Neutral Citation Number: [2024] EWHC 1714 (Ch)

Case No: BL-2021-BHM-000041

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street,
Birmingham

Date: 03/07/2024

Before:

HIS HONOUR JUDGE TINDAL
(Sitting as a Judge of the High Court)

- -

Between:

BALBER KAUR TAKHAR

Claimant

- and -

(1) GRACEFIELD DEVELOPMENTS LIMITED
(2) DR KEWAL SINGH KRISHAN
(3) MRS PRAKASH KAUR KRISHAN

Defendants

- -

Mr Graeme Halkerston (instructed by **Tanners Solicitors LLP**)
for the **Claimant**
Mr Thomas Graham and Mr Justin Perring (instructed by **N, D and P Solicitors**)
for the **Defendants**

Hearing dates: 12th, 13th, 14th 15th, 18th, 19th, 20th, 21st December 2023
8th, 9th January and 12th June 2024

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JUDGMENT

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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.

HIS HONOUR JUDGE TINDAL

HHJ TINDAL:

Introduction

1. This case is the sequel to *Takhar v Gracefield* [2020] AC 450, in which the Supreme Court held that where it was proved that a judgment had been obtained by fraud, a party seeking to set it aside did not have to show that they could not with reasonable diligence have uncovered and alleged that fraud before that judgment (which I shall refer to as 'the Supreme Court *Takhar* Judgment').

2. That decision opened the door to Mrs Balber Takhar (the Claimant as I shall call her) to seek to set aside for fraud the 2010 judgment of the late HHJ Purle QC sitting as a High Court Judge (*Takhar v Gracefield* [2010] EWHC 2872 (Ch): ('the Purle Judgment'). She alleged her signature on a key document HHJ Purle QC relied on had been forged by the Defendants – her cousin the Third Defendant ('Mrs Krishan') and the latter's husband the Second Defendant ('Dr Krishan'), directors and shareholders of the First Defendant company ('Gracefield'). In 2020 before Mr Gasztowicz QC sitting as a High Court Judge (*Takhar v Gracefield* [2020] EWHC 2791 (Ch), 'the Gasztowicz Judgment')) the Claimant did prove fraud and the Purle Judgment was set aside. (Mr Gasztowicz QC's costs judgment is reported at [2020] Costs LR 1851).

3. This case is the retrial of the original action, but with two new causes of action: deceit and conspiracy. The former effectively duplicates one of the original claims, undue influence. The latter alleges fraudulent conduct of the previous action, as found in the Gasztowicz Judgment. The Defendants deny all claims on the merits and raise limitation on the new claims. This case raises three legal issues of wider relevance *after* judgments are set aside for fraud - not covered by much direct authority according to my research ('the three wider questions'):

   3.1 First, what approach should be taken to *Res Judicata*, credibility, memory (given cases since *Gestmin v Credit Suisse* [2013] EWHC 3560) and findings of fact on a re-trial after a judgment is set aside for fraud ?

   3.2 Second, can fraudulent misrepresentation amount to undue influence and if so, does it require a pre-existing 'relationship of trust and confidence' ?

   3.3 Third, can fraud in procuring a judgment allow it to be set aside *and* amount to 'unlawful means' for the tort of conspiracy sounding in damages ?

4. The second and third questions also link to limitation. Deceit is no longer pursued as a tort due to limitation, but it founds the argument that fraudulent misrepresentation also amounts to undue influence, not argued before HHJ Purle QC. Conspiracy is new, but raises the point that (following the Supreme Court *Takhar* Judgment) whilst reasonable diligence in discovering fraud is *not* necessary to set a judgment aside, it *is* highly relevant to whether a new claim arising from or concealed by fraud is limitation-barred, since s.32(1) Limitation Act 1980 states where an action is based on fraud, time does not start to run until the claimant 'could with reasonable diligence have discovered it'.

5. In terms of the essential background to this case, initially, I very respectfully adopt the factual summary (albeit parts of it are in dispute before me) by Lord Kerr in the Supreme Court *Takhar* Judgment at [1]-[6]:

> "Balber Kaur Takhar, the claimant, is the cousin of the third defendant, Parkash Kaur Krishan. For many years before 2004, they had not seen each other. In that year they became reacquainted. At the time, Mrs Takhar was suffering personal and financial problems. She had separated from her husband some five years previously. As part of the arrangements made between Mrs Takhar and her husband, she had acquired a number of properties in Coventry. When Mrs Takhar and Mrs Krishan met again, according to Mrs Takhar, she confided in her cousin and grew increasingly to depend upon her. Mrs Takhar claims that Mrs Krishan exerted considerable influence over her. The financial problems of Mrs Takhar arose mainly from the condition of the properties which she had acquired from her husband. Some were in a dilapidated condition. Payment for rates were in arrears. Bankruptcy for Mrs Takhar was in prospect. The Krishans provided financial help to Mrs Takhar. Dr Krishan, the second defendant and the third defendant's husband, took on responsibility for negotiating with Coventry City Council over the rates arrears and the dilapidated state of some of the buildings. Then, in November 2005 it was agreed the legal title to the properties would be transferred to Gracefield Developments Ltd, a newly formed company, of which Mrs Takhar and the Krishans were to be the shareholders and directors [as happened in 2006]. Mrs Takhar claims that it had been agreed between her and the Krishans the properties would be renovated and then let. The rent would be used to defray the cost of the renovation, which, in the short term, would be met by the Krishans. Mrs Takhar would remain beneficial owner of the properties. The Krishans present a very different account. They claim that Gracefield was set up as a joint venture company. The properties were to be sold after they had been renovated. They were to be given an agreed value and this would be paid to Mrs Takhar after they had been sold. Any profit over would be divided equally between Mrs Takhar and the Krishans. They explain that Mrs Takhar agreed to these arrangements because planning permission for development had to be obtained in order to realise the value of the properties and this was an area in which Dr Krishan had experience, having already successfully developed his own medical centre."

6. Whilst I detail the full procedural history below, in short, in October 2008 the Claimant sued alleging on her version of the agreement was a trust or a contract, and on the Defendants' version, it was procured by undue influence or was an unconscionable bargain. However, the Defendants relied on a written 'Profit Share Agreement' ('PSA') consistent with their case the Claimant had apparently signed. Whilst she denied that, she did not claim forgery. HHJ Purle QC relied on that to dismiss the Claimants' claims in 2010. However, in 2013, she obtained expert evidence that her 'signature' was a forgery and applied to set aside the Purle Judgment. The Defendants sought to strike that out as an abuse of process, which failed in 2015. That result was confirmed by the Supreme Court in 2019, which held the Claimant could aside the judgment for fraud without proving she could not have discovered it beforehand. In October 2020, Mr Gasztowicz QC found her signature had indeed been forged – by the Defendants - and set aside the Purle Judgment. The proceedings before me were therefore a re-trial of those original allegations with the new cause of action of conspiracy (and deceit) added in March 2015. The two actions were consolidated by consent in 2021.

7. The case was (re-)listed for trial in December 2023 before me. Mr Halkerston was Counsel for the Claimant (showing total command of a bundle of 10,000 pages). Mr

Graham and Mr Perring were for the Defendants (only instructed two weeks before trial, with faultless preparation at lightning speed). Owing mainly to the Claimant's evidence, the 8-day trial did not prove enough and we re-listed 2 days of submissions in January 2024. The break enabled the Claimant to indicate that she only pursued claims in undue influence, resulting trust and conspiracy, the latter narrowed to forgery in the earlier case. This also gave me the chance to raise various authorities on the three wider legal questions and Counsel to prepare extremely helpful submissions - Mr Graham on the facts, Mr Perring on the law, Mr Halkerston on both (assisted by Mr Lee Jia Wei on remedies). So, I have considered about 150 authorities in this judgment – the vast majority ventilated with Counsel. However, as I have written, I have referred to others cited in texts I was referred to as 'worked examples' of points. I have also analysed others in more detail on conspiracy (on the wider implications of the issue which Counsel left to me), resulting trust (which has risen in prominence in this case) and remedies. Indeed, in preparing my draft judgment, it became apparent I needed more submissions on remedies. So rather than a straightforward hand-down hearing, I had a further day of submissions on remedies and consequentials. This ended up rather delayed as although I circulated my draft judgment in March 2024, the Defendants were unavailable for a period of time as they were out of the country, so that hearing was listed in June 2024. Having heard submissions, I gave brief oral reasons for my conclusions (along with costs etc) and then after inviting brief further submissions on interest, I finalised this judgment, handing it down with an order reflecting my decision. As the Claimant raised a narrow application for permission to appeal on remedies and interest, for convenience I have addressed those points in this judgment right at the end.

8. With the focussing of the Claimant's case after the evidence, re-ordering and simplifying the list of issues after trial, the issues I must still resolve are these:

   (i) Did the Krishans make any or all of the following misrepresentations to the Claimant from May/June 2005 before transfer of the Properties in 2006 ?

      (1) That any of the Properties were (or were 'likely' to be) subject to Compulsory Purchase Orders ? ('CPO's)

      (2) That the Properties were 'worthless' or only worth £100,000 in total because of the CPOs or the threat of them ?

      (3) That if the CPOs or the threat of them could be removed, the Properties would be worth £300,000 ?

      (4) That if the Claimant agreed to transfer the Properties to a company, they would take appropriate steps to ensure CPOs or threat of them were removed and refurbish and manage them for her benefit ?

      (5) That the proposed transfer was an 'act of charity' by the Krishans ?

   (ii) If so, were any or all representations made knowingly/recklessly untrue ?

   (iii) What were the terms of transfer of the Properties in March/April 2006 ?

   (iv) Did the Claimant sign an unforged copy of the Profit Share Agreement ?

   (v) Did the Claimant repose sufficient trust and confidence in the Defendants in respect of the Properties so as to give rise to potential undue influence ?

   (vi) Were the transfers from the Claimant procured by actual undue influence as a result of any or all of the alleged misrepresentations ?

(vii) If so, was their agreement in 2005/06 and/or the transfer of the Properties in 2006 procured by their presumed undue influence over her ?

(viii) Did Gracefield hold the Properties on resulting trust for the Claimant ?

(ix) Is the Claimant entitled to rescind the agreement and/or transfers ? If so, what remedy is appropriate given the Properties have now all been sold ?

(x) What was the true market value of the Properties (1) on transfer in April 2006 ?; (2) on actual sale in 2011/2014 ?; (iii) in November 2022 ?

(xi) Must the Claimant give credit for (1) any sums received from the Defendants; or (2) any expenditure incurred by them on the Properties ?

(xii) Is the conspiracy claim barred by limitation ?

(xiii) Did the Defendants conspire to injure the Claimant by unlawful means by means of deploying forged evidence in litigation between October 2008 and the eventual sale of all the Properties in 2011-2014 ?

(xiv) If so, what damages should be ordered ? Should rental income be ordered ?

(xv) If any damages are payable to the Claimant, what interest is payable ?

9. This is now effectively 'two cases in one': a retrial of the original action (albeit actual undue influence is now pursued through the claim of fraudulent misrepresentation) and a new conspiracy claim on the conduct of that action (which now must itself be the subject of detailed findings of fact as the Krishans still deny the forgery but on a different basis than before Mr Gasztowicz QC). Therefore, the fact-finding exercise is on multiple layers, based on a 10,000-page bundle over a 20-year period, with difficulties in the evidence of *all* the key witnesses. So, given the tortuous history of this litigation, whilst I have not read every page or dealt with every point, I have tried to deal with the case thoroughly. Following a review of the authorities on memory and fact-finding since *Gestmin*, I assess the evidence as a whole (including witness credibility) before making detailed findings of fact (not least because Mr Graham has helpfully provided 60 pages of submissions on the facts). But first I must decide the scope of the finding of fraud binding the parties by issue estoppel and given some pleading points, the procedural history must be detailed. Given all that, while HHJ Purle QC was elegantly concise in his judgment of only ten pages, despite my very best efforts but regrettably lacking HHJ Purle QC's gift for brevity, I eventually failed in my attempt to keep my own final judgment within thirty times that length.

10. So, it may assist the parties if I set out now the structure of my judgment. I will address the issues listed above, but in a different order in the following 'chapters' (for want of a less grandiose word):

(a) This Introduction: paragraphs 1-10

(b) Procedural History: paras.11-39

(c) *Res Judicata* after Setting Aside a Judgment: paras.40-60

(d) Principles of Fact-Finding After Fraud Findings: paras.61-90

(e) Assessment of the Evidence: paras.91-140

(f) Findings of Fact: paras.141-319

(g) Undue Influence: paras.320-415

(h) Resulting Trust: paras. 416-445

(i) Conspiracy – Pleading, Scope and Limitation: paras.446-504

(j) Conspiracy – Merits and 'Unlawful Means': paras.505-565

(k) Remedies: paras.566-619

(l) Summary: paragraph 620

Procedural History

11. I touched on the procedural history of this litigation at paragraph 6 above. In most cases such a brief summary would do. However, as this is a retrial following an earlier judgment being set aside for fraud, indeed one raising complex issues of limitation with new causes of action, more detail is needed, especially in the light of the Defendants maintaining the stance that they did not forge the PSA, despite the findings in the Gasztowicz Judgment. At this stage, I will consider the original pleaded claim, HHJ Purle QC's findings in dismissing it; the Claimant's subsequent litigation with her own solicitors; the new expert evidence proving forgery of her signature on the PSA; the 2013 claim against the Defendants to set the Purle Judgment for fraud and its journey to the Supreme Court, the new 2015 allegations of deceit and conspiracy against Dr and Mrs Krishan; and the Gastozwicz Judgment in 2020 and since. However, I reserve until later my findings on the alleged acts of conspiracy in this period.

12. As I shall explain later in my findings of fact, this case concerns five properties in Foleshill in Coventry that from 2000-2006 were in the name of the Claimant:

12.1 The former Ritz Cinema in Longford Road, Coventry ('the Cinema');

12.2 The former Co-Op Emporium, 376-386 Foleshill Road ('the Co-Op')

12.3 554 Foleshill Road, Coventry

12.4 556 Foleshill Road, Coventry

12.5 558 Foleshill Road, Coventry.

554-558 Foleshill Road are terraced properties (at one stage they were knocked through to form one property) formerly used as shops and collectively known in this litigation as 'the Shops'. I shall refer to all these properties collectively as 'the Properties' and will describe them further in my findings of fact.

13. Whilst I will obviously return to those underlying facts later, for the moment, it suffices to note that all the Properties were transferred from the Claimant into the name of Gracefield in March-April 2006 and were all mortgaged and made subject to a debenture in December 2006. Dispute between the parties broke out in Spring 2008, after Dr and Mrs Krishan briefly put the Properties onto the market. The Claimant sought advice from a property consultant Mr Matthews, who after a meeting with the Second and Third Defendants in June 2008 suspected fraud as did the Claimant who brought a claim in October 2008.

14. Since the Defendants continue to rely on it before me and it was so central to the history, it is convenient at this stage to set out the PSA almost in full:

"THIS PROFIT SHARE AGREEMENT is made on 1 April 2006 BETWEEN Balber Takhar….('Mrs Takhar') of one part and Gracefield Developments Limited….('the company') of the other part.

WHEREAS…

(b) Mrs Takhar has sold 3 lots of properties to the company. The value placed on these properties is £100,000 which represents the value of compulsory purchase orders.

NOW THIS DEED WITNESSETH:

1. The company covenants with Mrs Takhar the following:
   (a) The £100,000 purchase price of the properties shall be split… £30,000 – three residential properties [i.e. 'the Shops'];
   £30,000 Ritz Cinema Site
   £40,000 Former Co-Op Site.
   This sum shall be placed on a loan account within the company and shall be paid to Mrs Takhar on the completion and sale of each site.
   (b) Further sums shall be payable to Mrs Takhar which represent deferred consideration for an uplifted value of the properties at the time they were transferred to the company. Again these sums shall be payable on the completion and sale of each of the sites:
   £60,000 - three residential properties (£20,000 each)
   £60,000 - Ritz Cinema Site
   £80,000 - Former Co-Op Site.
   (c) Mrs Takhar shall also receive 50% of the profits on the sale of each site. The treatment of the payment of the profits will be discussed at the relevant time and take into account Mrs Takhar's personal taxation position.

B TAKHAR
FOR AND BEHALF OF GRACEFIELD DEVELOPMENTS LTD
DIRECTOR SECRETARY…"

(Curiously, the PSA did not mention what happened to the other 50% share).

15. The PSA was drafted by the Krishans' own accountant, whom I shall refer to as 'SB'. I make clear this is not because she did anything wrong, although she was accused by the Krishans before Mr Gasztowicz QC of the forgery (which he roundly rejected, finding it was the Krishans). In the Gasztowicz Judgment, he anonymised her and her firm with random letters, but to make this much longer judgment easier to follow, I have adopted her initials 'SB'. Whilst SB understandably did not participate in that trial before me in 2023 or him in 2020, she was a witness before HHJ Purle QC in 2010 and I will refer to her statement and evidence later, as an important part of the evidential material before me. Similarly, I will anonymise the Krishans' lawyers in 2008-2010, although again stress they did nothing wrong at all. Only the Krishans knew about their forgery.

16. On 24th July 2008, the Claimant's then-solicitors, Challinors (who later settled her claim for negligence, as I shall describe) sent a letter before claim to Dr and Mrs Krishan which initially denied the Claimant's awareness of the company, contended they held the properties for the Claimant on trust and stated:

"Ultimately, our client alleges that you have defrauded her so as to obtain legal ownership of the Properties."

The letter invited Dr and Mrs Krishan to undertake not to dispose of or deal with the Properties. On 8th August 2008, the Defendants' solicitors offered such an undertaking. However, on 10th October 2008, the Defendants' then solicitors gave 14 days' notice to withdraw it as they wished to press on with their plans and invited the Claimant to issue a claim. On 24th October 2008, the Claimant faxed the Defendants' solicitors setting out their case in detail and attaching a copy of the Claim Form. I will come back to that important letter later.

17. That Claim Form was issued on 24th October 2008 under claim number 8BM30468 (which I will refer to as 'the Original Proceedings'). The Claim Form sought a declaration that Gracefield held the Properties on trust for the Claimant absolutely; and pleaded that the transfer had been procured by 'misrepresentation and/or undue influence' from Dr and Mrs Krishan. However, neither fraud, deceit, nor conspiracy were pleaded in that Claim Form. The Particulars of Claim followed on 19th February 2009. However, the pleaded claim of misrepresentation was not pursued. Instead, the case was put alternatively in trust, contract, undue influence and unconscionable bargain. As the latter and contract are not pursued, undue influence is pursued on rather different bases and I return to the pleading of trust, I need not set that out.

18. The Defence and Counterclaim denied the Claimants' allegations and relied on the PSA in the following rather cryptic way at paragraph 29:

> "An agreement was drafted…which was signed. Whilst the draft contained some of the terms of the agreement set out above, it did not in any event comprehensively deal with all that had been agreed…This agreement is headed Profit Sharing Agreement and is purportedly dated 1st April 2006."

A counterclaim sought a declaration not quite in the same terms as the PSA, in that it sought a declaration that Gracefield was the legal and beneficial owner of the Properties and on their sale, after deduction of Gracefield's costs, the Claimant 'should be repaid her loan of £100,000', further £100,000 by way of deferred consideration (not £200,000) and that after those and Gracefield's expenses, both the Claimant and the Krishans between them should have 50% of the net proceeds of sale. Both Dr and Mrs Krishan signed a statement of truth.

19. The Reply and Defence to Counterclaim dated 9th April 2009 included pleas that the Claimant signed the transfers without understanding the nature and effect of what she was signing, as Mrs Krishan represented them as merely administrative documents and added at Paragraph 13.6 of the Reply:

> "The Claimant has received no consideration for the transfer of the Properties. In addition to the reasons set out in the Particulars of Claim, the First Defendant would hold the Properties on resulting trust for the Claimant by operation of law owing to this gratuitous transfer."

Curiously, the only reply to the cryptic comment in the Defence at paragraph 29 that the PSA 'was signed' was the equally cryptic response that 'The admission of an incomplete agreement is noted'. This is hardly a denial by the Claimant.

20. Following further interlocutory skirmishes, including an injunction restraining Gracefield and the Krishans from dealing with the Properties pending trial, three versions of the PSA were disclosed by the Defendants on 13th July 2009: an unsigned version, an undated version signed by the Krishans and the version ostensibly signed

by the Claimant which it was later found the Krishans forged. Well after the trial had been listed for July 2010, and indeed at least three months at the latest after she had received a copy of the PSA with her apparent signature, the Claimant made a belated application on 31st March 2010 for handwriting expert evidence. Unsurprisingly, so close to that trial before himself and bearing in mind the Claimant was saying she could not remember signing the PSA, rather than saying that she did not do so, HHJ Purle QC refused that application.

21. At the trial itself before HHJ Purle QC in July 2010, the parties maintained their positions. The Claimant essentially said she did not recall signing it and in closing submissions, her Counsel accepted she did not allege forgery. The Krishans maintained their stance that she had signed and returned the PSA. In HHJ Purle QC's extempore judgment on 28th July 2010 at [21]-[22], he accepted the Defendants' case and found that the Claimant signed the PSA:

> "Mrs Takhar's case is she didn't sign [the PSA] at all and she has never seen the agreement until this dispute arose. However, no case of forgery is advanced. In the absence of Mrs Takhar giving a coherent explanation as to how her signature came to be on the scanned copy, I conclude that the Krishans' evidence, which I believe anyway, should be accepted and that Mrs Takhar took the copy of the agreement that she was signed away, which was returned, probably by her in some way, duly executed to [SB's] firm, which then ended up misfiled. At all events, I am satisfied that that was the agreement that was made. The properties were transferred by Mrs Takhar in to Gracefield's name before the written joint venture agreement was prepared, and the only credible explanation that I have heard is that they were so transferred on the terms subsequently set out in the joint venture agreement, which were previously agreed orally."

Whilst it is fair to say that HHJ Purle QC did not accept other aspects of the evidence of the Claimant and her son Sukhjinder (known as and whom I shall call 'Bobby'), having found she did execute and return the PSA to SB, it is hardly surprising that HHJ Purle QC rejected the Claimant's factual case. He went on to reject all her causes of action and dismiss her claim.

22. I will frequently return to parts of the Purle Judgment below and to some passages in the cross-examination of all three parties. For now, I note that Judge Purle QC during the trial intervened to prevent the Claimant's then-Counsel from cross-examining Dr Krishan on the basis that the agreement to transfer the Properties to the Third Defendant company was procured by misrepresentation – whether fraudulent (i.e. deceit) or even innocent and the Claimant's then-counsel accepted neither deceit nor misrepresentation had been pursued. It is now pursued before me, albeit no longer through the newly-pleaded tort of deceit, but as a different way of putting the originally-pleaded undue influence.

23. After HHJ Purle QC in 2010 ordered the Claimant to pay 80% of the Defendants' costs, in 2011 they set off £560,653.80 against her entitlement to the sale proceeds under the profit share HHJ Purle QC found, cancelling it out. To make matters worse, the Claimant's own solicitors Challinors in March 2011 sought possession of her own home which she had charged as security for their fees. Around the same time, the Defendants sold the Co-Op at auction for £675,000 and in May 2011 at auction the Shops were sold for £175,000.

24. When the Claimant was sued by Challinors for their fees, in October 2011, her Defence and Counterclaim alleged professional negligence, including failing to apply earlier for handwriting expert evidence. Challinors denied that, but that action settled by Tomlin Order on 22nd January 2013 with a payment to be made from Challinors to the Claimant in the sum of £300,000 and she was excused from the outstanding costs of Challinors (who entered administration in August 2013). That £300,000 payment is important to the issue of remedies at the end.

25. In October 2013, the Claimant obtained a final handwriting report from expert Mr Radley (having obtained a preliminary one in October 2011 as part of her case with Challinors). As Newey J (as he was) explained in his decision later upheld in the Supreme Court: *Takhar v Gracefield* [2015] EWHC 1276 (Ch) ('the Newey Judgment') at [11], Mr Radley concluded that a letter signed by the Claimant on 24th March 2006 'bore an original 'pen on paper' signature superimposable with the signature on the copy PSA', which was 'conclusive evidence that a copy of the original signature on the letter has been transposed by one of several simple processes onto the PSA'. Mr Radley also concluded that a 2011 banking account enquiry form was not signed by the Claimant, but was transposed from a 2006 account enquiry form, for which there was 'strong evidence' that the Claimant did not sign that either. Finally, Mr Radley also concluded there was 'limited positive evidence' that the Claimant did not sign the first page of a stock transfer form in the Third Defendant, although he described that as 'far from conclusive' and it could be an 'abnormal signature'.

26. On 20th December 2013, the Claimant issued proceedings to set aside the Purle Judgment for fraud, relying on Mr Radley's report under claim number HC-2013-000172 ('the Set Aside Proceedings'). On 4th March 2014, the Defendants' Defence denied that claims and contended the proceedings should be struck out as an abuse of process as the alleged fraud – primarily the forgery of her signature on the PSA – had been discoverable by her in the Original Proceedings – hence her late application for handwriting evidence in March 2010. The Claimant then sought permission to amend those new proceedings to allege deceit and conspiracy against Dr and Mrs Krishan. I note the Defendants finally sold the Ritz Cinema by auction for £191,000 in August 2014.

27. The Defendants' strike-out and the Claimant's amendment applications were heard by Newey J in February 2015 and determined in the Newey Judgment. He decided that it was unnecessary for a party seeking to set aside a judgment for fraud to show that it could not have been discovered before the judgment with reasonable diligence. Newey J also refused permission to the Claimant to amend so as to add claims of deceit and conspiracy, essentially because he considered there was an arguable limitation defence and that those did not 'arise out of substantially the same facts' as the 2008 proceedings under CPR 17.4.

28. However, on 5th March 2015 the Claimant issued a fresh action against Dr and Mrs Krishan for Deceit and Conspiracy as case number HC-2015-000788 ('the Deceit/Conspiracy proceedings'). That date is crucial for the limitation issues on the remaining conspiracy claim. It is accepted that for it, the limitation period under s.2 Limitation Act 1980 is six years 'from the date on which the cause of action accrued'. That means conduct prior to 5th March 2009 is time-barred subject to the Claimant's

limitation arguments, including s.32 Limitation Act. The Defendant's Defence to this new action obviously raised this limitation point.

29. As the Claimant later amended her pleading of conspiracy and deceit and no longer pursues the latter, I need not detail pleading of either in 2015. But in short, the deceit was pleaded as knowingly false representations that (i) the Properties were subject or likely to be subject to Compulsory Purchase Orders ('CPO's) (when they were not); (ii) that as a result they were 'worthless' or only worth £100,000 in total (when a CPO entitles an owner to market value); (iii) that if without CPOs, they would be worth £300,000 in total (when in fact they were worth over £1 million collectively); and (iv) if the Claimant agreed to transfer the Properties to Gracefield, that the Krishans would ensure the CPOs or threat of them were removed and the Properties were refurbished and managed for the Claimant's benefit as an 'act of charity'. Conspiracy was summarised:

> "From the beginning of 2005, the First and Second Defendants wrongfully conspired, combined together and agreed that they would by unlawful means: (i) procure the transfer of the Properties to a new company (which in the first instance was to be jointly owned by the Claimant and Defendants and which was in the event incorporated under the name of Gracefield Developments Ltd ('Gracefield')); (ii) obtain control of Gracefield; (iii) extract all alternatively most of the equity in the Properties for their own benefit; (iv) hide the misconduct by exaggerating the costs of managing the Properties and by forging documents."

30. As summarised in the Supreme Court in *Takhar*, the Defendants appealed the dismissal of their abuse of process argument in the Newey Judgment. Permission was granted and the appeal heard by the Court of Appeal in December 2016. In their judgment of 21st March 2017, the Court allowed the appeal on the basis that a judgment could not be set aside for fraud which had been discoverable with reasonable diligence beforehand. On foot of that decision, the Defendants issued bankruptcy proceedings against the Claimant based on the balance of their costs.

31. However, in the meantime the Supreme Court heard the Claimant's appeal in October 2018 and on 20th March 2019, the Court handed down its unanimous decision. I will return to passages in it in more detail below, but for now I simply quote the headnote from the Appeal Cases report ([2020] AC 450) that:

> "[W]here it could be shown that a judgment had been obtained by fraud and no allegation of fraud had been raised at the trial which led to that judgment, a party seeking to set aside the judgment was not required to show that the fraud could not with reasonable diligence have been uncovered in advance of the obtaining of the judgment; therefore, absence of reasonable diligence was not of itself a reason for staying as an abuse of process a claim to set aside a judgment on the grounds of fraud; and accordingly, the claimant's claim to set aside the judgment was not an abuse of process and [the Newey Judgment] refusing the defendants' application would be restored ."

32. The Supreme Court's decision opened the door to the trial of the Set Aside Proceedings before Mr Gasztowicz QC from 9th-11th September 2020. On 23rd October 2020, he handed down the Gasztowicz Judgment. This is surprisingly unreported given that it resolves a tension in the precise test for setting aside and again, I will return to that point and other specific findings in this case below. However, for now

the kernel of his decision was three-fold. Firstly, at [74] following the handwriting experts' joint view that it was inconclusive whether the bank account form in 2006 and 2011 had been forged, he found that they had not been forged. Secondly, at [64]-[65] following the handwriting experts' joint view that the Claimant's signature on the copy PSA had been forged, that was no longer disputed. Thirdly, he rejected the Krishans' argument that SB or her firm had forged the PSA signature, concluding at [126]-[127]:

> "I am satisfied, on the balance of probabilities, that not only did the Defendants have strong motive, and opportunity, to forge the document by transposition of the Claimant's signature onto it from elsewhere (and that there is no evidence or sufficient reason to think that anyone at [SB's firm] did so), but that they did do so. Based on all the evidence I have heard, the Defendants were in my judgment, on the balance of probabilities, responsible for the forgery of the signed profit sharing agreement document by adding the Claimant's signature to a copy of it by transposition from [a] letter. This amounted, in the words of Aikens LJ in *RBS*, to "conscious and deliberate dishonesty"."

Mr Gasztowicz QC went on to find that this forgery was 'material' to the Purle Judgment (and accordingly that it should be set aside), stating at [137]:

> "In any trial, and in a fraud trial in particular, the court is of course looking for independent and contemporaneous indicators of where the truth lies on crucial issues, such as in this case, whether there was a profit sharing (or "joint venture") agreement. The forged document clearly evidenced this in the absence of forgery of Mrs Takhar's signature on it. Had the Judge known that her signature on the copy of that before him had been forged, for which the Defendants were responsible (causing him also to weigh their oral evidence in the light of that knowledge), that plainly would have (in the words of Aikens LJ in *RBS*) 'entirely changed the way in which the first court approached and came to its decision' and it was plainly an 'operative cause of the court's decision to give judgment in the way that it did'…."

As a result, in Mr Gasztowicz QC's costs judgment [2020] Costs LR 1851, he ordered the Krishans to pay (i) indemnity costs of the Set Aside Proceedings; (ii) the Claimant's costs of the Original Proceedings on the indemnity basis with interest; and (iii) the Krishans' costs in the Original Proceedings she paid, he ordered to be £363,975.60, even though she contended they were £560,653.60.

33. Following those decisions (neither appealed by the Defendants), on 21st July 2021, DJ Malek (as he then was) ordered by consent consolidation of the re-opened Original Proceedings with the Deceit/Conspiracy Proceedings. The Claimant in her Consolidated Reply dated 17th December 2021 argued at paragraph 22a that the limitation period for the deceit and conspiracy claims was 'rewound' to the start of the Original Proceedings on 24th October 2008 as 'relation back' under s.35 Limitation Act 1980. Mr Halkerston initially relied on the cases of *Arab Monetary Fund v Hashim (No.4)* [1992] 1 WLR 553 and *Freemont Insurance v Freemont Indemnity* [1997] CLC 1428. However, in a powerful riposte under time pressure before trial, Mr Graham and Mr Perring's Limitation Skeleton pointed out that both cases really concerned the pre-CPR 'use' of consolidation to engage the court's discretion to extend validity of a claim form to 'serve out' the jurisdiction. More relevant are *Chandra v Brooke North* [2013] EWCA Civ 1559 and *Burton v Bowdery* [2017]

EWHC 208 (Ch) which held that where a court refuses permission to amend (as Newey J did here in March 2015), a claimant's remedy is to issue fresh proceedings (as the Claimant here then did), where limitation could be determined at trial. I would have agreed that is the situation here. However, wisely, Mr Halkerston did not pursue 'relation back' in closing submissions and I will say no more about it. Indeed, as I shall describe, the Claimant made further concessions on limitation.

34. In accordance with DJ Malek's order, on 3rd September 2021, the Claimant filed and served her Consolidated Amended Particulars of Claim ('CAPOC'), which substituted for the Particulars of Claim in both the Original Proceedings and Deceit/Conspiracy Proceedings. Save on resulting trust and conspiracy, there were no substantial changes in the contours of the originally-pleaded claims and so I can summarise the pleaded allegations relatively briefly:

34.1 Firstly, it was pleaded in similar terms as in the Deceit/Conspiracy Proceedings that Dr and Mrs Krishan made knowingly or recklessly false representations to induce the transfer of the Properties to Gracefield, namely that they were subject to CPOs, were worthless or limited to £100,000, that without CPOs they were worth £300,000; and if transferred, they would ensure the CPOs or threat of them would be removed as an act of charity, when as experienced property developers they knew those were false. However, in paragraphs 45-47 CAPOC, the deceit claim was specifically limited to representations before transfer in March-April 2006.

34.2 Secondly, it was pleaded in similar terms to the Original Proceedings that the transfer of the Properties was procured by Undue Influence. Whilst there appears to be a typo in paragraph 48, on proper reading of paragraphs 10-14, 19-20 and 48-49 CAPOC this claim relies on two limbs. First, those allegedly false representations are allegations of 'actual undue influence'. Second, the alleged emotional and financial vulnerability of the Claimant and her reposing of trust and confidence in her cousin Mrs Krishan and husband Dr Krishan and that the transfers of the Properties at an alleged undervalue without independent legal advice is put as an allegation of 'presumed undue influence'. In any event, there is no need to plead them formally separately: *Annulment Funding v Cowey* [2010] EWCA Civ 711.

34.3 Thirdly, it is pleaded in similar terms to the Original Proceedings that the transfer of the Properties was an unconscionable bargain. However, following the evidence, Mr Halkerston confirmed that was not pursued. Given the rarity in success of that claim (which turns on the terms of the agreement itself, rather than any inducement for it), it is difficult to see how it could have succeeded if undue influence did not. Indeed, it appeared flatly contrary to the Claimant's main pleaded case in contract.

34.4 Fourthly, the pleaded case in contract, similarly to the Original Proceedings, is that the Claimant and Defendants expressly agreed to the transfer of the Properties to Gracefield on what might be called a 'custodial' basis to protect the Claimant from liability under a CPO. It was also alleged various express and implied terms of that agreement were breached by the Defendants. After the evidence, the Claimant abandoned that claim (which was unsupported by any

contemporary documents and flatly contradicted by many). However, I return to it in assessing the Claimant's credibility.

34.5 Fifthly, despite the clearly-pleaded claim in the Original Proceedings for express/constructive trust (in direct alternative to the pleaded contract) and resulting trust (on the basis of gratuitous transfer) in the Reply, the pleaded claim in trust in the CAPOC is somewhat Delphic, stating that Gracefield held all the Properties on trust for her absolutely on the basis at para.50:

> "Further or alternatively, and without prejudice to the relief sought in the foregoing, it is averred that by reason of the terms of the Agreement, Gracefield held the Properties pursuant to an express, alternatively, an implied trust for the benefit of the Claimant…."

This pleading (again, not Mr Halkerston's drafting) is not a model of clarity. The Defence denied the substance of that claim. However, in seeking to 'cover the bases', in their main Skeleton Argument, Mr Graham and Mr Perring denied express trust (as it was not in writing as required by s.53 Law of Property Act 1953) and common intention constructive trust (on the basis there was no common intention in the terms of the Claimant's pleaded 'Agreement' i.e. her claimed contract in trust form). After the evidence, Mr Halkerston confirmed that he did not pursue either of these points. However, he did pursue a resulting trust, which was pleaded in the Original Proceedings and which Mr Graham and Mr Perring had also discussed in their Skeleton, even though it was not mentioned in Mr Halkerston's own. Mr Graham and Mr Perring raised various objections to this, which I will address in more detail below in the 'chapter' of this judgment on resulting trusts. As I will explain, I am satisfied resulting trust is sufficiently pleaded.

34.6 Finally, the pleading of conspiracy is not entirely clear at para. 41 CAPOC:

> "It is averred that the Krishans' actions referred to at paragraphs 9-40 above constituted an unlawful means conspiracy, in that the Krishans conspired and combined by unlawful means to (a) procure the transfer of the Properties to Gracefield……(b) obtain control of Gracefield; (c) extract all, alternatively most of the equity in the Properties for their own benefit; and (d) disguise their misconduct and mislead the Court, by exaggerating the costs of managing the Properties and forging documents, and thereby procuring judgment in the Original Claim in their favour."

In the Defence at paragraph 41(b), it was pleaded that:

> "The composite reference to paragraphs to paragraphs 9 to 40 is inadequate to plead a claim in conspiracy. Many of these paragraphs do not refer to actions of Dr and Mrs Krishan at all and the plea that such of those paragraphs that do comprise allegations of 'actions' 'constituted' a conspiracy is legally nonsensical. If Mrs Takhar wishes to allege that unlawful acts were carried out by Dr and Mrs Krishan, they must be pleaded with specificity."

In response in the Claimant's Reply at paragraph 21, the 'unlawful means' relied on were specified by reference to particular paragraphs of CAPOC: (a) fraudulent misrepresentations intended to procure the transfers of the Properties at paragraphs 10-13, 21-22, 29-32 and 45 CAPOC; (b) undue influence at

paragraphs 13, 17-21 and 23 CAPOC; (c) breaches of the Agreement at paragraphs 21-32 and 52-53 CAPOC and also '(d) the fraudulent concealment of their dishonest and unlawful actions as aforesaid, as set out at paragraphs 34-37 CAPOC'. I will expand on that last point in the chapter dealing with the 'scope and limitation' of the conspiracy claim. In short, I will find that not only was conspiracy adequately pleaded (at least as it has been narrowed), it was also properly 'put' in cross-examination.

35. In their Amended Defence of 22nd October 2021, the Defendants denied all these claims. As their positive case remains in essence that which they originally pleaded and Judge Purle QC accepted, their position can be summarised briefly:

35.1 Firstly, that the Krishans made no false representations and were simply trying to help the Claimant. The Properties were only worth £300,000 in total as they were in poor condition. The Claimant requested them to help given her own beliefs about the 'worthlessness' of the properties, the risk of CPOs and of bankruptcy. Insofar as they may have agreed with her, they simply meant she would be unlikely to receive anything once her liabilities were discharged, as they proceeded on the assumption that CPOs would not be made. The Defendants averred that they told the Claimant they would help her to try and preserve, manage and develop the Properties and agreed with her suggestion that a new company should be formed to do so. They then agreed with her that the consideration for the transfer would be £300,000, with £100,000 initially and a further £200,000 when they were sold, along with 50% of the balance of sale proceeds (with 50% to the Krishans along with refund of funds they supplied to the company to pay costs of development). This agreement then led to the incorporation of Gracefield and was then discussed and formalised in the PSA.

35.2 Secondly, that there was no undue influence. They averred that it was the Claimant's belief that she would be rendered homeless and penniless due to her financial problems and the Claimant who pleaded with them to help, which they did, but that at all times she was acting under her own volition. Moreover, the Claimant was advised by the Defendants' solicitor Mr Whiston to seek independent legal advice and she decided not to do so.

35.3 Thirdly, that the agreement in the terms reflected in the PSA was primarily for the Claimant's benefit and not an unconscionable bargain.

35.4 Fourthly, that there was no agreement as pleaded by the Claimant for Gracefield to have 'custody' of the Properties on her behalf, nor any breach of any express or implied terms.

35.5 Fifthly, for similar reasons, there was no trust in favour of the Claimant.

35.6 Finally on conspiracy, all the limbs of that claim were denied. In particular, there were no false representations as alleged or at all either before or after the transfers and no forgery (save of the Claimant's signature on the PSA in respect of which the Defendants were bound by the Gasztowicz Judgment). It was also pleaded that save as to that Judgment, they are entitled to contend that the profit share agreement was oral and was beneficial to the Claimant. Accordingly, the conspiracy claim was denied.

35.7 Seventhly, the Amended Defence contended that the Claimant had suffered no loss. The Properties were sold at auction in 2011/2014 at market value and set off

> the Claimant's share against the costs order in their favour in the Purle Judgment. Without the agreement, the Claimant would have been in a worse financial position. It was averred she would not have been able to rent out the Properties, nor to restore them or to afford planning permission and would have sold them for the same or less.

35.8 Finally, limitation was re-iterated for the deceit and conspiracy claims.

36. On 17th December 2021, the Claimant filed and served a Reply. This denied the Defendants' asserted factual case, effectively maintaining her own case. It did not respond on the trusts point, but as quoted above, did 'unpack' the conspiracy claim and respond to the pleading points, including at paragraph 10 by specifically pleading that if the 'agreement' were that pleaded by the Defendants, it was procured by the false representations as pleaded in the CAPOC as summarised above. On limitation, other than the 'relation back' point, the Claimant relied on s.32 Limitation Act contending fraud/concealment could only have been discovered with the handwriting report in 2013.

37. In terms of further case management, on 27th April 2022 at CCMC, DDJ Caun made directions approving the Claimant's cost budget in the sum of £481,419 and the Defendant's cost budget in the sum of £533,534. DDJ Caun made standard directions (subsequently extended by consent) for disclosure and witness statements and granted permission for expert valuation evidence (which only the Claimant obtained). The original time estimate was 5 days.

38. However, on 30th January 2023 at a Pre-Trial Review before myself, the parties agreed 8 days were needed and I extended the trial window to the end of July 2023. However, in the event, limited party availability meant the trial was listed for December 2023. As I said, the Defendants changed legal teams and Counsel two weeks before. The 8 days set down for trial proved insufficient because the Claimant's evidence took 2½ days rather than 1 day, as I explain below. As a result, we agreed to go part-heard for two days for submissions in January 2024, which as I say meant the parties were able to reflect and research further.

39. On the Friday before submissions started on Monday 8th January, the Claimant narrowed the issues. In addition to concessions on various costs and expenses, the Claimant abandoned her claims in contract, unconscionable transaction and deceit. She maintained her claims in resulting trust, undue influence (including 'fraudulent misrepresentation' which is why deceit was not separately pursued). She also maintained her claim in conspiracy, but limited in the following way:

> "….based upon the Defendants' actions taken after the commencement of claim 8BM30468 [i.e. the Original Proceedings] to procure judgment in their favour and to mislead the Claimant and the Court …..[and] no arguments will be made as to the effect of section 32 of the Limitation Act other than to the extent relevant to the conspiracy claim as explained…"

In the course of my preparation for the resumed trial, I had also come across several authorities which seemed to me relevant and asked my clerk to inform the parties of them. Two of them – the November 2023 judgment of Foxton J in *Lakatamia v Lakatamia & Morimoto* [2023] EWHC 3023 (Comm) at [79] referring to *Willers v Joyce* [2016] UKSC 43 – went to the heart of whether the tort of unlawful means

conspiracy could encompass 'dishonest defence of civil proceedings' on which the Claimant seemed now to be focussing her conspiracy claim. I will come back to the scope of the conspiracy claim later, but in essence it now really turns on whether the Krishans' forgery of the PSA deployed in the Original Proceedings was 'unlawful means'. That likewise turns on the findings not just of myself, but in the Purle Judgment and Gasztowicz Judgment, which raises the question of *res judicata* and issue estoppel, to which I now turn.

Res Judicata After Setting Aside a Judgment for Fraud

Principles

40. There was some discussion at trial about the extent to which (if at all) I was bound by findings in the Purle Judgment and Gasztowicz Judgment, especially the finding the Krishans had forged the Claimant's signature on the PSA. Mr Graham and Mr Perring called it a 'juridical fact', but Mr Halkerston contended it gave rise to an issue estoppel on the now-narrowed conspiracy claim. Since it is now the centrepiece of that claim, I consider it now in some detail. There is an obvious interface between the two common law doctrines of setting aside a judgment for fraud and *Res Judicata*. However, fortunately, the leading case on that interface is the Supreme Court *Takhar* judgment and I will focus mainly on *Takhar* and *Virgin Atlantic v Zodiac Seats* [2014] AC 160, but also the Privy Council decision in *Finzi v Jamaican Redevelopment* [2024] 1 WLR 541. This 'chapter' addresses two follow-on consequences of those principles *after* a judgment has been set aside for fraud. First, to what extent, if at all, do findings in a judgment later set aside for fraud unaffected by it survive ? Second, to what extent, if at all, are the parties bound by any findings in the later 'set-aside judgment' – in other words does set-aside take the parties 'back to square one' ? These questions were not directly considered by the Supreme Court in *Takhar* or *Virgin*, nor in the only case I found which cites them both (itself an unsuccessful set-aside application): *Longe v Bank of Scotland* [2019] EWHC 3540 (Ch). Nevertheless, I consider the answers are clear from those authorities.

41. I turn first to Lord Sumption's summary in *Virgin* at [17] (also quoted in *Longe*) of the various strands of *res judicata,* although I limit it to the three relevant here: cause of action estoppel, issue estoppel and '*Henderson*' abuse of process by re-litigation (I need not deal with merger of a successful cause of action in judgment nor the related rule in *Conquer v Boot,* but I will return to the broader 'Principle of Finality' towards the end of this judgment at paragraphs 545-550):

> "*Res judicata* is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is 'cause of action estoppel'. It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings…..[Next], there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties…'Issue estoppel'….[Last], there is the principle first formulated by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100, 115,

> which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones…."

42. It is in the light of those definitions Lord Sumption had given a few paragraphs earlier at [17] of *Virgin* that his summary at [22] (quoted by Lord Kerr in *Takhar*) of the principles of cause of action estoppel and issue estoppel must be read:

> "*Arnold v National Westminster Bank plc* [1991] 2 AC 93 is accordingly authority for the following propositions. (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action. (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised. (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

43. However, this possibility of issue estoppel on a point not raised (without reasonable diligence) in earlier proceedings creates overlap to an extent with '*Henderson* abuse of process', since each can apply to a point not raised in earlier litigation. But that does not mean issue estoppel has now 'swallowed up' *Henderson* abuse of process. On the contrary, in *Virgin* at [23]-[26], Lord Sumption emphasised the two doctrines were different, as he explained at [26]:

> "Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive."

Issue estoppel bites where a point necessarily common to both proceedings either had been raised and decided in a valid judgment in earlier proceedings with a different cause of action between the same parties or their privies, or 'usually' where it was not raised and could with reasonable diligence and should have been raised. By contrast, *Henderson* abuse of process is rather more flexible and of wider application on a 'broad merits-based' approach explained by Lord Bingham in *Johnson v Gore Wood* [2002] 1 AC 1 at [31] (quoted in *Virgin* at [24]):

> "*Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been

raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive…

[T]here will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been…to render raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

44. Having pinned down the different concepts of cause of action estoppel, issue estoppel and *Henderson* abuse of process, I now turn to their interface with the doctrine of setting aside a judgment for fraud central to this whole litigation. In *Takhar*, Lord Sumption again explained how all those doctrines fitted together at [61]-[63] (my underline), having explained at [60] that setting aside for fraud is not a procedural application but itself a free-standing cause of action:

"…..[61] The cause of action to set aside a judgment in earlier proceedings for fraud is independent of the cause of action asserted in the earlier proceedings. It relates to the conduct of the earlier proceedings, and not to the underlying dispute. There can therefore be no question of cause of action estoppel. Nor can there be any question of issue estoppel, because the basis of the action is that the decision of the issue in the earlier proceedings is vitiated by the fraud and cannot bind the parties… <u>If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment.</u> It follows that res judicata cannot therefore arise in either of its classic forms.

[62] The rule…in *Henderson*…that a party is precluded from raising in subsequent proceedings matters which were not but could and should have been raised in the earlier ones, is commonly treated as a branch of the law of res judicata…….[W]here a question was not raised or decided in the earlier proceedings but could have been, the jurisdiction to restrain abusive re-litigation is subject to a degree of flexibility which reflects its procedural character. This allows the court to give effect to the wider interests of justice raised by the circumstances of each case.

[63] It is this flexibility which supplies the sole juridical basis on which the defendants can argue that the evidence of fraud must not only be new, but such as could not with reasonable diligence have been deployed in the earlier proceedings. It is also the basis on which Lord Briggs JSC, in his judgment on the present appeal, suggests a less absolute rule…I cannot accept either the defendants' argument, or Lord Briggs JSC's more moderate variant… [P]roceedings of this kind are abusive only where the point at issue and the evidence deployed in support of it not only could have been raised in the earlier proceedings but should have been: see *Johnson*…. Lord Bingham observed…it is

> 'wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive'. The 'should' in this formulation refers to something… the law would expect a reasonable person to do in his own interest and…the efficient conduct of litigation. However, the basis on which the law unmakes transactions, including judgments..procured by fraud is a reasonable person is entitled to assume honesty in those with whom he deals. He is not expected to conduct himself or his affairs on the footing that other persons are dishonest unless he knows that they are. That is why it is not a defence to…deceit to say that the victim of the deceit was foolish or negligent to allow himself to be taken in…It follows that unless on the earlier occasion the claimant deliberately decided not to investigate a suspected fraud or rely on a known one, it cannot be said that he 'should' have raised it."

However, in *Finzi* Lord Leggatt clarified that if the evidence of fraud had actually been *obtained* by the party who did not deploy it at the original trial, as opposed to obtainable, but not actually obtained by that party until after the judgment like *Takhar*, their claim to set aside the judgment for fraud may be an abuse of process.

45. The sentence I have underlined in [61] raises one of the consequential questions I must consider: the status of a set-aside judgment on a retrial. However, the answer in part turns on the test for setting aside approved *obiter,* by the Supreme Court in *Takhar* (Lord Sumption at [67] and Lord Kerr at [56]) of Aikens LJ in *Royal Bank of Scotland plc v Highland Financial* [2013] 1 CLC 596, para 106:

> "[F]irstly, there has to be a 'conscious and deliberate dishonesty' in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned. Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be 'material'. 'Material' means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. Put another way, it must be shown the fresh evidence would have entirely changed the way in which the first court approached and came to its decision. Thus, the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."

46. This was the test Mr Gasztowicz QC applied, in preference to the test of materiality in *Hamilton v Al-Fayed* [2001] EMLR 15 at [34], favoured but not adopted by Sir Terence Etherton MR in *Salekipour v Parmar* [2018] QB 833 (which was decided before the Supreme Court in *Takhar* endorsed *Highland*):

> "[If] clearly established by fresh evidence that the court was deliberately deceived in relation to the credibility of a witness, a fresh trial will be ordered where there is a real danger…this affected the outcome of the trial."

Sir Terence Etherton MR said in *Salekipour* at [93]:

> "I am inclined to agree…that the test was over-stated in the *Royal Bank of Scotland* case and that the proper approach is that laid down by the Court of Appeal in the *Hamilton* case."

That test of materiality is a substantially lower threshold than in *Highland*.

47. However, in the Gasztowicz Judgment at [33]-[61], Mr Gasztowicz QC showed how Aikens LJ's formulation in *Highland* had been endorsed by all the Justices in *Takhar* despite both *Hamilton* and *Salkeipour* being cited to them in argument. He also pointed out that contrary to the tentative view in *Salekipour*, the *Highland* test was indeed perfectly consistent with Lady Hale's analysis in *Sharland v Sharland* [2016] AC 871, which concerned an (approved but unsealed) consent order obtained by fraud. Just as Aikens LJ had in *Highland*, Lady Hale in *Sharland* had held fraud leading to a consent order would not be 'material' justifying the order being set aside if the court would not have made a significantly different order had it been aware of the fraud at the time of making it. Mr Gasztowicz QC also found *Highland* to be consistent with the Supreme Court's approach to materiality where a civil settlement not by order is obtained by fraud in *Zurich Insurance v Hayward* [2017] AC 142, as *Highland* only required fraud to be 'an' operative cause of judgment, not 'the' operative cause'.

48. I respectfully agree with Mr Gasztowicz QC's analysis favouring *Highland*, both for the reasons he gave and also because of the underlying policy reason why Lord Sumption in *Takhar* at [67] endorsed Aikens LJ's formulation in *Highland*:

> "I recognise the risk of frivolous or extravagant litigation to set aside judgments on the ground of fraud, but like other members of the court, I think that the stringent conditions set out by Aikens LJ in [*Highland*]…, combined with the professional duties of counsel, are enough keep it within acceptable limits. I do not think that the imposition of further conditions would be consistent with the long-standing policy of equity of reversing transactions procured by fraud."

So, whilst approval of *Highland* was technically *obiter* in *Takhar,* it was actually part of Lord Sumption's process of reasoning in rejecting the requirement that fraud would not have been discoverable with reasonable diligence. The 'stringent conditions' in *Highland,* including that the fraud must have been *causative* of the judgment result meant that such a 'further condition' would be unnecessary and inconsistent with equity's policy. So to water down materiality with the *Hamilton* test that fraud need not be proven to be causative of the result, provided there is a 'real danger' that it influenced the outcome (at least where that fraud had been discoverable with reasonable diligence at the time), would undermine the strict limits on the doctrine the Court in *Takhar* envisaged would apply. Moreover, following *Takhar,* in *Dale v Banga* [2021] EWCA Civ 240 the Court of Appeal also proceeded on the basis that the test for setting aside a judgment (as opposed to on appeal) was that in *Highland* whilst also mentioning *Salekipour* on a different point. The same conclusion was reached by the Privy Council in *Finzi*.

49. However, this causative test of materiality of fraud in *Highland* endorsed in *Takhar* then raises the first consequential question I must resolve. If a judgment is only liable to be set aside if the fraud was an operative cause of that judgment being in the terms it was, what about any terms of (and findings in) that judgment which were entirely unaffected by the fraud ? What if the original action raised several causes of action and the fraud was only fatal to some of them, but another cause of action failed for reasons wholly unrelated to the fraud - would that create any sort of *Res Judicata* at the retrial

following the judgment being set aside ? This raises the question of the status of some of the findings in the Purle Judgment

Does fraud always 'unravel all' ? The status of the Purle Judgment

50. I repeat the sentence I underlined above by Lord Sumption in *Takhar* at [61]:

> "If the claimant establishes his right to have the earlier judgment set aside, it will be of no further legal relevance qua judgment."

This strict approach to the effects of proven fraud is consistent with the underlying policy of the law that 'fraud unravels all', discussed by Lord Kerr in *Takhar* at [43]-[53], starting with a quote by Lord Bingham in *HIH Casualty Insurance Ltd v Chase Manhattan Bank* [2003] 1 All ER (Comm) 349 at [15]:

> "Fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all . . . Once fraud is proved, 'it vitiates judgments, contracts and all transactions whatsoever': Lazarus Estates Ltd v Beasley [1956] 1 QB 702, 712 per Denning LJ. Parties entering into a commercial contract will no doubt recognise and accept the risk of errors and omissions in the preceding negotiations, even negligent errors and omissions. But each party will assume the honesty and good faith of the other; absent such an assumption they would not deal."

This is also consistent with the stringent approach of Lord Buckmaster in *Jonesco v Beard* [1930] AC 298,300-301, part-quoted by Lord Kerr in *Takhar* at [47]:

> "The proper method of impeaching a completed judgment on the ground of fraud is by action in which, as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires….That, however, there is jurisdiction in special cases to set aside a judgment for fraud on [appeal with] a motion for a new trial may be accepted…[H]owever…the necessity for stating the particulars of the fraud and the burden of proof are no whit abated and all the strict rules of evidence apply….Fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the Court, it spreads to and infects the whole body of the judgment."

51. Notwithstanding that, there does appear to be jurisdiction for the Court to set aside *part* of a judgment for fraud, as Lord Brown said in the Privy Council case of *Boodoosingh v Ramnarace* [2005] 4 LRC 240 (albeit *Jonesco* was not cited). That was a case where the plaintiff had been shot by the defendant and won his claim for damages for assault. The unsuccessful defendant both appealed and brought a fresh action to set that judgment aside for fraud (namely alleged perjured evidence of his loss of earnings). The Court of Appeal of Trinidad and Tobago in separate decisions dismissed the appeal on the basis the new evidence was equivocal and then stayed the fresh action pending further appeal of its first decision to the Privy Council. Dismissing that further appeal, Lord Brown said at [18] and [27]:

> "[18] There is no doubt that a judgment obtained by fraud can be set aside either by order made in a fresh action brought in fraud to impeach it or on appeal to the Court of Appeal by adducing fresh evidence sufficient to establish the fraud….Certainly, an appeal rather than a fresh action in fraud is the appropriate course where part only of a judgment is being impugned. A fresh action, if well-

> founded, is apt to set aside a judgment. Their Lordships know of no case, however, in which it has served some lesser purpose, say a reduction in the damages award…[my underline]….
>
> [27] Even were the appellant on this appeal able to demonstrate to the necessary standard of proof that the respondent to some extent deliberately inflated his loss of earnings claim, their Lordships conclude that it would not be right to set aside the entire judgment. So far as the issue of liability was concerned, this was not, it must be observed, a close run case…."

52. This principle would appear to be unaffected by the advent in England and Wales of liability to lose the right to judgment for a proven personal injury claim if tainted with 'fundamental dishonesty' under s.57 Criminal Justice and Courts Act 2015: relating to the position where fraud is proven *before* judgment, not *after*. In my own judgment, *Boodoosingh* is also reconcilable with the reaffirmation of *Jonesco* in *Owens v Noble* [2010] 1 WLR 2491, where the Court of Appeal held a judgment could either be set aside for fraud by fresh action or by appeal, but only on appeal if either the Court of Appeal found fraud was admitted or incontrovertible, or ordered a separate remitted hearing of the fraud issue under CPR 52.10 (an '*Owens v Noble* hearing'). I note that in *Dale* at [42], Asplin LJ adopted a test closer to *Hamilton* rather than *Highland* test for when the Court of Appeal will order a '*Noble v Owens* hearing', but that is consistent because it is a 'filter' rather than a *finding* of fraud. Despite reference to Lord Sumption's comment in *Takhar* at [61] I set out, Asplin LJ in *Dale* at [54] left open the possibility of a 'conditional order' for only part of a judgment to be set aside for fraud. Given *Boodoosingh* (that was not cited), that course seems open on appeal either for admitted or incontrovertible fraud, or at an '*Owens v Noble* hearing'.

53. However, it is equally clear from *Boodoosingh* and Lord Sumption's comment at [61] of *Takhar* that where the judgment is set aside for fraud by fresh action, as here, the *whole* judgment 'will be of no further legal relevance qua judgment'. That applies here to the *whole* of the Purle Judgment. That plainly means neither cause of action nor issue estoppel can bite on it. In any event, even if it were theoretically possible for findings in a judgment set aside for fraud unaffected by fraud to survive (which I find it is not), the whole of the Purle Judgment is 'infected' by fraud (to use Lord Buckmaster's phrase in *Jonesco*). As HHJ Purle QC made clear in his judgment at [32], he saw the case as turning on the facts and in particular his acceptance of the Krishans' factual account and rejection of the Claimant's. Since, as Mr Gasztowicz QC found at [134]-[137] of his judgment that the forged PSA was a key part of Judge Purle QC's overall factual reasoning, it is clear no causes of action failed independently of the fraud. In those circumstances, the Claimant re-running the original causes of action cannot possibly amount to a *Henderson* abuse of process either (it hardly amounts to 'unjust harassment' of the Defendants in Lord Bingham's phrase in *Johnson)*. The bringing of *new* claims which could and should have been brought originally which are unaffected *by the fraud found* (e.g. the claim in deceit about the *earlier* alleged fraudulent misrepresentation which HHJ Purle QC made clear wa not before him) might amount to a *Henderson* abuse of process, but that is not argued by the Defendants who prefer to defend it on the merits and on limitation.

54. Nevertheless, whilst the Purle Judgment is 'of no further legal relevance *as a judgment*', it remains forensically relevant, if not quite in the same way as a valid

earlier judgment in a later trial in the same litigation involving another party, as Foxton J recently said in *Lakatamia v Tseng* [2023] EWHC 3023 (Comm) at [14]:

> "It was accepted before me that the findings of liability in the 2021 Judgment do not bind Ms Lakatamia (*Hollington v Hewthorn* [1943] KB 587). However, that does not mean that the contents of the judgment are without significance. The relevant principles were set out [by] Laurence Rabinowitz KC in *JSC BTA Bank v Ablyazov* [2016] EWHC 3071 (Comm), [24]…: "The application of the principle in *Hollington* has in recent years become substantially diluted. In particular:
> (l) Whilst a court cannot rely upon a bare finding of a prior court for example that a party has been negligent, it can rely upon the substance of the evidence which is referred to in the judgment of the prior court, including for example the contents of a document, the evidence given by a witness and the like: *Rogers v Hotle* [2015] QB 265, [40], [55];
> (2) Whilst….a subsequent court cannot rely upon [non-binding opinion in an earlier one as it] must make its own findings of fact, a reference in a judgment to the substance of evidence is itself evidence which the judge in a later case can take into account "in like manner as he would any other factual evidence, giving to it such weight as he thinks fit" : *Rogers (supra)*.
> (3) Moreover, if the judge in a later case concludes that the matters of primary fact recorded in an earlier judgment justify the conclusions reached in that judgment, he is entitled to reach the same conclusion: *Otkritie International v Gersamia* [2015] EWHC 821 (Comm), [25] (Eder J)".

In this case, the Purle Judgment is not only an important part of the procedural history (which is why I requested it when I saw it was not in the original bundle). It is itself *evidence* of the substance of the testimony given by the witnesses to HHJ Purle QC at trial in 2010 (which gives a navigable overview of the key parts of their evidence which the transcripts detail). I can take into account as I see fit; and indeed, I agree with particular conclusions of HHJ Purle QC on matters of primary fact in his judgment (e.g. the Properties were derelict). However, there also seems to me another forensic aspect that is of particular relevance on a retrial after setting aside for fraud (which *Lakatamia* and *Ablyazov* were not). That is the forensic significance of HHJ Purle QC 'highlighting' points the parties can be expected to be prepared to address before me. I will give examples both ways:

54.1 Firstly, in favour of the Defendants, at [14], HHJ Purle QC rejected the evidence of the Claimant and her son Bobby Takhar that they did not want the Properties to be sold. That point is entirely unaffected by the Krishans' fraud, as it relates to a document having nothing to do with them and before they were even involved. I will consider that point below.

54.2 Secondly, in favour of the Claimant, there is HHJ Purle QC's criticism at [29] of his judgment of the Defendants' 'Balber Takhar Account' and 'Options for Gracefield' documents discussed below, which he described as clearly and deliberately misstating the position, in an endeavour to put pressure on Mrs Takhar' and 'unworthy and wholly inappropriate steps to take'. Again, I will have to reach my own conclusion on those documents below, but the fact that HHJ Purle QC disapproved of them, even when dismissing the Claimant's claim, puts at least a little wind in her sails in inviting me to make a similar or even stronger finding about them. On that subject, also relevant are Mr Gasztowicz QC's

comments about those documents, which I now consider in the context of the second question.

Are the parties 'back to square one' ? The status of the Gasztowicz Judgment

55. This second question raises a quite different point: what (unappealed) findings made by the court *when setting a judgment aside* then bind the judge at re-trial ? (Obviously if the judgment is not set aside, this does not arise). Again, there is little direct authority on this point, to the extent that even in the excellent '*Civil Fraud*' (1st Ed, 1st Supp, 2022) by Thomas Grant KC and David Mumford KC, the learned editors can only offer fairly general guidance on the retrial at 38-032:

> "The court would also have to consider what consequential directions would be required for the hearing of the trial, and in particular, what directions are appropriate as regards the 'fraudulent' evidence. The deceiving party will, presumably, have to adduce a further witness statement to allow the new trial to proceed on honest evidence. Given that the procedure for setting aside the original judgment will have taken place in open court, it is inevitable that the tribunal on the new trial will be aware of the fraud perpetrated in respect of the original judgment, notwithstanding any prejudicial effect that may have."

Whilst no authorities are cited, I respectfully agree with this helpful summary. However, I would wish to build on it in *Res Judicata* terms as well. As explained by the Supreme Court in *Takhar* and cases cited in it such as *Jonesco*, the fresh action to set aside a judgment for fraud is a different cause of action than the original substantive claims. As Lord Sumption explained in *Takhar* at [61], cause of action estoppel cannot bite on the original judgment to defeat a set-aside action. However, the corollary is that the finding of fraud does not in itself create a cause of action estoppel in respect of any of the original or new causes of action (even deceit, at least where, as here, the allegation of deceit does not relate to *the proven fraud*). But insofar as the finding of fraud is relied on as *part* of any of the pleaded causes of action (here, conspiracy), then an issue estoppel *can* arise. In Lord Sumption's terms in *Virgin* at [17] and [22] quoted above, it arises if the issue of fraud has been determined and is 'necessarily common' to both the set-aside action and the conspiracy claim, unless there are no 'special circumstances'.

56. Indeed, to illustrate how issue estoppel works, before turning to the status of Gasztowicz Judgment, whilst I did not hear argument on it, there seems to me a clear issue estoppel in relation to the Supreme Court decision in *Takhar* itself. That is the question of *when* the Claimant 'could with reasonable diligence have discovered the fraud' for the purposes of s.32 Limitation Act 1980 quoted at the start of this judgment and considered later. It is clear from *Finzi* it was part of the *ratio* of the Supreme Court's decision in *Takhar* that the Claimant could have discovered the fraud with reasonable diligence before the Purle Judgment. That is not only clear from the Court's judgments, the contrary conclusion would render their whole decision *obiter* ! In fairness, there is no dispute about that and I need not articulate it as an issue estoppel (although technically I consider it gives rise to one). One issue on limitation for conspiracy is really *when* before the Purle Judgment the fraud took place and then *when* was it 'discoverable with reasonable dilligence'. Both were obviously *before* the Purle Judgment – but how long before ? That illustrates that an issue estoppel does not necessarily determine the outcome of the question where one 'issue' is 'estopped' by a

prior decision. In this case, that raises both the scope and effect of any issue estoppel in litigation.

57. As to the scope of an issue estoppel, it is important to be precise about what was actually *decided* in the particular set-aside judgment. Not everything said in it is a formal *decision* (rather than observation). This point can be illustrated with two different aspects of the Gasztowicz Judgment. Firstly, Mr Gasztowicz QC made similar observations as had Judge Purle QC on the deliberate falsehoods in the Balber Takhar Account and Options for Gracefield documents. It is worth setting out what he said on that topic in full, as I will return to it later in this judgment:

> "113. As shown both in this trial and in the trial before Judge Purle, what has been called the "Balber Takhar Account" put forward by the Defendants to the Claimant during the course of their dealings contained deliberate untruths. It was demonstrably untrue in referring to the Second and Third Defendants having spent £556,000 from their own accounts management, professional fees, planning applications and surveys, etc. This document was prepared and presented to the Claimant by the Defendants with these false figures in it in order, as the Second Defendant described it to Judge Purle, to "get her off the fence and do something with these properties"...
>
> 116. Similarly, in order to try to persuade the Claimant to agree to sell the properties, the Defendants presented her with the "Options for Gracefield" document to try to achieve what they wanted. This also contained demonstrable untruths – for example in stating that a £60,000 corporation tax bill that would shortly need to be paid….
>
> 119. These documents were created by the Defendants in an attempt to persuade the Claimant to act on the basis of the untruths in them. That is by no means the same, and is very far from, producing a forged document to a court to try to pervert the course of justice."

However, that last point shows Mr Gasztowicz QC clearly differentiating between (i) falsehoods in documents intended only for the other party; and (ii) forged documents tendered to the Court. The former went to the Krishans' credibility on the latter – the only question being decided – whether the Purle Judgment was procured by fraud on the *Highland* test. These observations were staging-posts on the way to that decision, not part of it such as to found issue estoppel. Nevertheless, these observations also 'highlight' this evidence (just as Judge Purle QC's observations do so). Indeed, Mr Halkerston invited me to reach the same conclusion for the same reasons even if those were not 'binding'. I will certainly take them into account, but I must reach my own conclusions.

58. Turning to what Mr Gasztowicz QC actually decided and so what does fall within the true 'scope' of the issue estoppel, as described when summarising his judgment in the procedural history, the three findings Mr Gasztowicz QC made were as follows. Firstly, at [74] he found the bank account forms in 2006 and 2011 had not been forged. Mr Halkerston accepts that finding now binds the Claimant and so her argument about that is not pursued before me and I will only touch on it in my findings of fact. Secondly, Mr Gasztowicz QC in his judgment at [64]-[65] following the handwriting experts' joint view that the Claimant's signature on the copy PSA had been forged, noted that was no longer disputed. Therefore, that is a binding decision too. Thirdly and most importantly, the Gasztowicz Judgment rejected the Krishans' argument that SB or her

firm had forged the PSA signature, concluding at [126]-[127] it was the Krishans together:

> "I am satisfied, on the balance of probabilities, that not only did the Defendants have strong motive, and opportunity, to forge the document by transposition of the Claimant's signature onto it from elsewhere (and that there is no evidence or sufficient reason to think that anyone at [SB's firm] did so), but that they did do so. Based on all the evidence I have heard, the Defendants were in my judgment, on the balance of probabilities, responsible for the forgery of the signed profit-sharing agreement document by adding the Claimant's signature to a copy of it by transposition from the …letter. This amounted, in the words of Aikens LJ in *RBS*, to "conscious and deliberate dishonesty"." (my underline)

Mr Gasztowicz QC went on to find that this forgery was 'material' to the Purle Judgment stating at [137] (as quoted more fully above):

> "Had the Judge known that [the Claimant's] signature on the copy..before him had been forged, for which the Defendants were responsible (causing him also to weigh their oral evidence in the light of that knowledge), that plainly would have (in the words of Aikens LJ in *RBS*) "entirely changed the way in which the first court approached and came to its decision"…"

59. Whilst the Krishans repeatedly asserted in evidence that Mr Gasztowicz QC 'only' decided they had forged the PSA 'on the balance of probability', that finding binds them. As confirmed in *Re B (Children)* [2009] AC 11 (HL), there is only one civil standard of proof - the balance of probabilities - and just because something is very serious (indeed a crime) that does not elevate that standard of proof into a criminal standard of proof, but is relevant to the inherent probabilities (as I discuss in a moment). As Lord Hoffmann pithily explained at [2]:

> "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not….If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

Here, 'a value of one was returned' on the Krishans *together* ('the Defendants' as I underlined) forging the Claimant's signature on the copy PSA before Judge Purle QC. So they are treated as having done so. If they disagreed with that finding, they should have appealed it. They did not do so. Now, the findings in the Gasztowicz Judgment both that (i) the Krishans together forged the Claimant's signature on the copy PSA; and (ii) this forgery 'entirely changed the way in which HHJ Purle QC came to his decision' (i.e. it was an operative cause of the Purle Judgment) are (as Lord Sumption put it in *Virgin* at [17] and [22]) 'necessarily common' to the Gasztowicz Judgment and the Claimant's conspiracy claim, indeed they are central to both. Moreover, no 'special circumstances' of the kind described in *Arnold* and *Virgin* are suggested, doubtless as there are not any in this case. Therefore, in my view, issue estoppel arises in respect of both of those findings, which was not really disputed in law by Mr Perring, even though Mr Graham preferred to call them 'juridical facts'.

60. Even if I am wrong and the Krishans' forgery of the Claimant's signature on the copy PSA and its causative impact on the Purle Judgment are simply 'juridical facts', those findings still bind the Krishans. Indeed, that was perfectly clear from Mr Graham and Mr Perring's pre-trial Skeleton Argument. Therefore, I was not expecting to hear much in evidence about the forgery itself, as it was *already proven*. However, as I shall explain below, following disclosure in 2022 by the Krishans' then-solicitors of emails from the Krishans in October-November 2008 not previously disclosed in the litigation, the Krishans have put forward a new factual case about the forgery they did not run before Mr Gasztowicz QC in 2020 (when they blamed their accountant, whom I am calling SB). Before me, the Krishans suggested those emails show that in October 2008, they had found a copy of the PSA they believed had been signed by the Claimant and sent it to SB (along with a second copy of the PSA they signed as SB had lost the first copy they had signed themselves in 2006). The Krishans accepted the copy PSA SB had later sent their solicitors and which was disclosed in the Original Proceedings was forged – which they still denied they had done – but believed the copy PSA they sent to SB in 2008 had been *genuinely signed* by the Claimant. My initial view was this argument was foreclosed by issue estoppel as it could and should have been presented to Mr Gasztowicz QC: see Lord Sumption's judgment in *Virgin* at [22]. However, Mr Halkerston did not take this point when I raised it, preferring to cross-examine the Krishans about it. Therefore, given its importance to the conspiracy claim, I will have to make detailed findings of fact about this issue, to an extent covering again the same ground as the Gasztowicz Judgment which I quote at length, albeit with new documents and evidence. I am afraid this will add significantly to the length of my own judgment. Indeed, it is also relevant to the Krishans' credibility, as I will discuss in my assessment of the evidence. However, before turning to that, I will first discuss fact-finding after fraud.

Principles of Fact-Finding After Fraud Findings

61. As explained in the Introduction, fact-finding in a re-trial after a judgment has been set aside for fraud may be very complex. There is a 'perfect storm' of challenges. Firstly, given the inevitable delay built-in by the initial litigation, its re-opening and the re-hearing of the original claims (and any new ones), many years may have passed since the events under dispute. (Here, trial was over 18 years after the Claimant and Krishans began their discussions in mid-2005). Moreover, witness' memories of what happened may have been distorted by the almost constant litigation and the finding of fraud. Indeed, some potential witnesses may no longer be able to give evidence or even have passed away. Secondly, after such a delay and inevitable impact on witness memory, a judge's instinct may be to rely heavily on contemporary documents. However, where there has been a forgery to procure a judgment by fraud as here, it may strike at the heart of the reliability of such documents. Thirdly, faced with such unreliable memory and wary of how much weight to place on certain key documents, a judge risks being buried under the morass of material available. Moreover, as is clear from the quote from *Civil Fraud* above, there seems to be no authority and little guidance on how to approach fact-finding at the re-trial. So, I hope I may be forgiven for considering the best approach in principle in some detail first. I will start by reviewing recent judicial observations on memory, then consider the role of contemporary documents and finally I will propose a 'holistic approach'.

The Persistence of Memory (Problems)

62. In my own experience, the single most-quoted authority in any skeleton argument across a range of fields of law is Leggatt J's (as he then was) analysis of the fallibility of memory in *Gestmin v Credit Suisse* [2013] EWHC 3560 at [16]-[22]. Sure enough, each Counsel here referred me to it. Despite its familiarity, because of its importance, I shall set it out once again in full:

> "16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness' memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
>
> 19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
>
> 20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often……when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does

> nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
>
> 21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
>
> 22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

63. *Gestmin* itself was a negligence claim by an investment company (the *alter ego* of a wealthy investor) against a bank which gave the company advice to invest in sub-prime mortgages prior to the 'credit crunch' starting in 2007/08. Leggatt J found unreliable the recollection of the investor that his company had specified low-risk investments, because it was not only unsupported by contemporary documents, the bank's investment instruction documents flatly contradicted it.

64. Yet that particular feature of plentiful documentation in *Gestmin* is sometimes overlooked when it has been cited in a wide range of fields. It has particularly proliferated in personal injury and clinical negligence case. I reviewed key cases in that field in *Freeman v Pennine NHST* [2021] EWHC 3378 (QB), they were summarised by HHJ Bird in *Jackman v Harold Firth* [2021] EWHC 1461 (QB) and again in *Powell v University Hospital Sussex NHST* [2023] EWHC 736 (KB) by Mr Dias KC. *Gestmin*

has even been cited in family cases, although that was questioned by Jackson LJ in *Re B-M* [2021] EWCA Civ 1371 cited in *Powell.*

65. Nevertheless, even within its original setting of commercial cases, it is necessary to put *Gestmin* in some judicial and scientific context – both before and since. The science of forensic memory has developed in the decade since *Gestmin*, in fairness, not least because of the debate it provoked. However, as the Court of Appeal emphasised in *Martin v Kogan* [2020] EMLR 4 at [88]:

> "*Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay '*The Judge as Juror: The Judicial Determination of Factual Issues*' (from '*The Business of Judging*', Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why…it cannot simply ignore the evidence."

66. Indeed, that 'line' of judicial observations on memory goes back at least 45 years before *Gestmin*. One quoted by Lord Bingham in that essay was Lord Pearce's dissent in *Onassis v Vergottis* [1968] 2 Lloyds Rep 403 (HL) at pg. 431:

> "'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person ? Secondly, is he, though a truthful person telling something less than the truth on this issue, or though an untruthful person, telling the truth on this issue ? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so has his memory correctly retained them ? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others ? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken ? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability…"

67. Indeed, Bingham J's (as he then was) luminous essay '*The Judge as Juror',* cited in *Martin,* itself anticipates much of Leggatt J's analysis in *Gestmin* by almost 30 years. Bingham J discussed the fallibility of memory and quoted psychological research showing memory did not just fade in a linear manner as Lord Pearce had assumed in

Onassis, but dropped off sharply then plateaued. He discussed how research also showed that memory could be distorted by external influences, including the process of litigation. In my view, [16]-[21] of *Gestmin* (I return to the more contentious [22]) are best seen as an invaluable updating of Lord Bingham's insights with more modern research, albeit Leggatt J did not cite any.

68. However, Leggatt J himself remedied that in another judgment (rather overlooked by comparison to *Gestmin*): *Blue v Ashley* [2017] EWHC 1928 (Comm), which involved a totally undocumented alleged promise of a bonus during an evening's drinking in a pub. Tellingly, despite being a 'commercial case', Leggatt J could not focus on key contemporary documents in the way he suggested at [22] of *Gestmin*, as there were not any. Instead, he focused intensely on witness evidence of the evening and its plausibility compared with detailed background findings of fact before and after, making allowances for fallibility of memory. He said at [68]:

> "….My observations [in *Gestmin*] have also been specifically endorsed by two academic psychologists in a published paper: see *Howe and Knott, "The fallibility of memory in judicial processes: Lessons from the past and their modern consequences" (2015) Memory, 23, 633* at 651-3. In the introduction to that paper the authors also summarised succinctly the scientific reasons why memory does not provide a veridical representation of events as experienced. They explained: "... what gets encoded into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state. This information is subsequently integrated (consolidated) with other information that has already been stored in a person's long- term, autobiographical memory. What gets retrieved later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event. Specifically, what gets retold about an experience depends on whom one is talking to and what the purpose is of remembering that particular event (e.g., a friend…a therapist...the police…). Moreover, what gets remembered is reconstructed from the remnants of what was originally stored; that is, what we remember is constructed from whatever remains in memory following any forgetting or interference from new experiences that may have occurred across the interval between storing and retrieving a particular experience. Because the contents of our memories for experiences involve the active manipulation (during encoding), integration with pre-existing information (during consolidation), and reconstruction (during retrieval) of that information, memory is, by definition, fallible at best and unreliable at worst.'……." (this underlining is my own, not Leggatt J's)

69. That three-stage analysis of memory as being 'encoded', 'stored' then 'retrieved' is now mainstream psychological opinion, as is differentiation into three types of memory: 'working memory' (short-term memory), 'semantic memory' (retained knowledge of the world) and 'episodic long-term memory' (memory of experienced events), explained in 2023 British Academy paper 'Legal Aspects of Memory' (https://www.thebritishacademy.ac.uk/documents/4750/JBA-11-p095-Baddeley-et-al.pdf). Its implications for civil litigation were very recently discussed by Popplewell LJ in his invaluable lecture *'Judging Truth from Memory: The Science'* (https://www.judiciary.uk/speech-by-lord-justice-popplewell-judging-truth-from-memory). Most importantly, as HHJ Bird noted in *Jackman*, a similar analysis is now accepted in CPR PD 57AC Appendix p.1.3:

> "Witnesses of fact and those assisting them to provide a trial witness statement should understand that when assessing witness evidence the approach of the court is that human memory: (1) is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time, but (2) is a fluid and malleable state of perception concerning an individual's past experiences, and therefore (3) is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration."

70. Whilst acutely conscious that I am not a psychologist and have no expert evidence in that field in this case, armed with those invaluable observations, I would tentatively suggest all three stages of memory pose risks to accuracy of witness memory, especially in a retrial after a judgment has been set aside for fraud:

70.1 '*Encoding'*. The risks of memory distortion on *encoding* are the same with any trial – retrial or not. However, since retrials happen later, there seems a greater premium on contemporary documents. Yet as Popplewell LJ said in his lecture at paras.33-39 and 43-54, even such *contemporary* encoding of memory itself can be distorted by semantic memory and our beliefs, 'confirmation bias' and lack of attention. Moreover, he said at para.55:

> "[Y]ou perhaps begin to understand why I expressed a little pushback on courts giving such primacy to contemporaneous documents. They may be produced near the time, but..[are]…after the memory has been encoded, and if there is an encoding fallibility, which there may be for these different reasons, it infects the so-called contemporaneous record every bit as much as other reasons for the fallibility of recollection which affect it at the storage and retrieval stage."

70.2 '*Storage*': As Popplewell LJ stressed at ps.56-63 of his lecture, the main problem with *storage* of memories of events in long-term episodic memory is *forgetting*. A retrial after fraud by definition comes with substantial delay meaning witnesses forget things. Yet as Lord Bingham recognised decades ago, forgetting is not as linear as Lord Pearce described in *Onassis:* 'with every day that passes the memory becomes fainter'. Research actually suggests memory loss is initially rapid and levels off over time. But it also again suggests what we 'store' depends on what matters to us, perspectives and wishful thinking. By reference to Leggatt J's observation in *Gestmin* at [19]-[20], I would add if there is a dispute, those factors may be entrenched by the litigation and so storage may be distorted by a 'litigation mindset'.

70.3 '*Retrieval*' – As Leggatt J said in *Gestmin*, that same litigation mindset also affects how *all* witnesses retrieve memories in preparing their statements and then giving evidence. As Popplewell LJ said at para.40 of his lecture:

> "The semantic memory can also corrupt a recollection by affecting it at the retrieval stage….That applies to some extent to recall of events, where… semantic memory can do some filling in of the gaps where details are forgotten. It is especially important to keep in mind when witnesses are giving evidence of what they thought or believed at the time….As Leggatt J said in *Gestmin* 'Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs'."

> Moreover, in a retrial after fraud, memories are being 're-retrieved' having been retrieved repeatedly earlier in the litigation – before and at the first trial, the set-aside trial and then the re-trial. With each 're-retrieval' a witness' 'story' risks being based to an increasing extent on their previous statements and transcripts of evidence at earlier trials, rather than what they actually can remember – or 'retrieve' – of the events under dispute – what Popplewell LJ in his lecture at para.84 called 'a single-handed Chinese Whispers'. Indeed, the finding of fraud itself may well distort memories, reinforcing wider suspicion or even paranoia in the 'innocent party' and overshadowing how the 'guilty party' then presents their later evidence.

Of course, such issues with memory generally are why the preparation of witness statements needs to be done with such care (Popplewell LJ at p.88 of his lecture pointed out oral evidence in chief used to be normal and still is in criminal cases). As Lady Rose in her recent lecture '*The Art and Science of Judicial Fact-Finding*' (https://www.supremecourt.uk/docs/speech-230714.pdf) explains, this is one reason why the changes to witness statements in the Business and Property Courts in PD57AC were made to ensure witnesses stuck to their personal knowledge, rather than simply comment on contemporary documents, to which I now turn.

The Strengths and Weaknesses of Contemporary Documents

71. Whilst Leggatt J's observations about memory itself in *Gestmin* at paragraphs [16]-[21] have been widely endorsed, his proposed solution to the problem at [22] has provoked more debate. For convenience, I repeat it (with my underlining):

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

72. Just as Leggatt J's observations at [16]-[21] form part of a line of judicial thinking on memory (c.f. *Martin* at [88]), so too does his focus of documents at [22]. This 'line' was helpfully summarised by Lord Kerr (albeit in his dissenting judgment) in *Bancoult v SSFCO (No.3)* [2018] 1 WLR 973 (SC). The case concerned the long-running litigation over the British Indian Ocean Territory in the Chagos Islands. In 2010, the British government declared a Marine Protection Area ('MPA'), but Wikileaks released a US Embassy cable of a meeting between US and UK diplomats in London which the claimants argued proved the real purpose of the UK government declaring the MPA was simply another way to stop locals returning. In the Administrative Court, because the cable was unlawfully leaked, the Judge ruled the British diplomats giving evidence could not be cross-examined on it further and held that there was no improper purpose. The Court of Appeal and majority of the Supreme Court held the cable was admissible

despite the unlawful leak once it came into the public domain, but held that further cross-examination of the British diplomats on it would have made no difference. Lord Kerr disagreed with the latter point and said this on contemporary documents:

> "100 Case law emphasises the importance of documentary evidence in assessing the credibility of oral witnesses. In *Onassis*…at 431, Lord Pearce, having reviewed the various reasons that a witness' oral testimony might not be credible, stated, "All these problems compendiously are entailed when a judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part." In *Armagas Ltd v Mundogas SA* ('*The Ocean Frost*') [1985] 1 Lloyd's Rep 1, 57 Robert Goff LJ made this observation: "It is frequently very difficult to tell whether a witness is telling the truth or not and where there is a conflict of evidence… reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth'.
>
> 101 That approach was approved by the Privy Council in *Grace Shipping Inc v C F Sharp & Co (Malaya) Pte Ltd* [1987] 1 Lloyd's Rep 207 and applied in a number of subsequent cases. For example, in *Goodman v Faber Prest Steel* [2013] EWCA Civ 153 the Court of Appeal held that the trial judge had erred in accepting a personal injury claimant's evidence of pain without dealing with contradictory documentary evidence and explaining why the claimant's evidence was to be preferred. Moore-Bick LJ applied the approach of Robert Goff LJ and stated that 'memory often plays tricks and even a confident witness who honestly believes in the accuracy of his recollection may be mistaken. That is why in such cases the court looks to other evidence to see to what extent it supports or undermines what the witness says and for that purpose contemporary documents often provide a valuable guide to the truth."…..
>
> 103 Although said in relation to commercial litigation, I consider that the observations of Leggatt J in *Gestmin*….at [15]—[22] have much to commend them. His statement at para 22 appears to me especially apt…"

73. To those endorsements of the value of contemporary documents can now also be added those of Males LJ in *Simetra v Ikon* [2019] 4 WLR 112 at [48]-[49]:

> "In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence. The classic statement of Robert Goff LJ in *Armagas*…is frequently, indeed routinely, cited…It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain

> why they are not to be taken at face value or are outweighed by other compelling considerations…."

74. Indeed, such is the importance of contemporary documents, especially in commercial cases, that as Lady Rose again explains in her lecture, the BPC disclosure process has been overhauled in CPR PD 57AD, so that there is greater oversight from the Court and that disclosure is focussed on the key issues of the case, by reference to the different 'disclosure models'. That will be important in a re-trial after a judgment is set aside for fraud, because of the sheer volume of documents (both contemporaneous with events under dispute and relating to the later litigation). Otherwise, the parties may lose sight of the wood for the trees.

75. Nevertheless, however important contemporary documents may be to the forensic process, they may not be a panacea. Just as Leggatt J himself found in *Blue* with the absence of contemporary documents concerning the crucial conversation about the bonus, it may not always be possible, even in commercial cases, to follow his suggestion in *Gestmin* at [22] to 'place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts'. This point was also emphasised in *Martin* at [89]:

> "[T]he observations in *Gestmin* were expressly addressed to commercial cases. For a paradigm example of such a case, in which a careful examination of the abundant documentation ought to have been at the heart of an inquiry into commercial fraud, see *Simetra*...and the apposite remarks of Males LJ at paras. 48-49. Here, by contrast, the two parties were private individuals living together for much of the relevant time. That fact made it inherently improbable that details of all their interactions over the creation of the screenplay would be fully recorded in documents…."

I suggest there may be three individual and cumulative challenges in a case where the court is not as 'blessed' with plentiful reliable documents as it was in *Gestmin* or *Simetra*: the potential paucity, ambivalence and deceptiveness of documents.

76. Firstly, as in *Blue* and indeed *Martin* itself – about contested authorship of a film - there may be a paucity of such documents because conversations are not recorded. As will appear, that is a particular issue in this case too with the many conversations prior to transfer between the Claimant and the Krishans. This point was developed further in *Natwest v Bilta* [2021] EWCA Civ 680, a claim about alleged dishonest assistance from bank employees in a VAT carousel fraud. As the Court (Asplin LJ, Andrews LJ and Birss LJ) explained at [49]-[50]:

> "In a case such as the present, where the events in question took place over 9 years before trial and occurred in a narrow period of around 3 weeks, the salutary warnings about the recollections of witnesses in *Gestmin* and *Blue* are pertinent. It was therefore of paramount importance for the Judge to test that evidence against the contemporaneous documents and known or probable facts if and to the extent that it was possible to do so. We say, 'if and to the extent that it was possible to do so', because it is important to bear in mind that there may be situations in which the approach advocated in *Gestmin* [at [22]] will not be open to a judge, or, even if it is, will be of limited assistance. There may simply be no - or no relevant - contemporaneous documents, and even if there are, the

> documents themselves may be ambivalent or otherwise insufficiently helpful. The case could be one about an oral promise which turns entirely on the word of one person against another's, and the uncontested facts may well not point towards A's version of events being any more plausible than B's. Even in a case which is fairly document-heavy (as this one was) there may be critical events or conversations which are completely undocumented…."

77. Secondly, as the Court in *Natwest* mentioned, such contemporary documents as there are, may be 'ambivalent or otherwise insufficiently helpful'. For example, in *Bancoult*, whilst Lord Kerr in dissent considered the leaked cable confirmed the real purpose of the MPA was to stop locals returning to the islands, the majority of the Supreme Court interpreted it as essentially ambivalent. As Lord Mance said at [40]-[41], as the US not UK Diplomats had prepared the note, it was more likely to record what the US was interested in and therefore was ambivalent in proving *the UK diplomats' purpose* in establishing the MPA. Moreover, as Popplewell LJ said in his lecture at para.55, 'contemporaneous documents…may be produced near the time, but…if there is an encoding fallibility… it infects the so-called contemporaneous record every bit as much'.

78. Thirdly, even worse, a document may simply be deceptive at face value, deliberately misleading, or even forged. As my former colleague in Birmingham BPC, HHJ Cooke, said in *Singh v Singh* [2016] EWHC 1432 (Ch) at [12]:

> "Such documentation as there is tends to favour the defendant, but that cannot be conclusive where the nature of the documents is said to be to assist in presentation of a false picture to the outside world and not to reflect the arrangements privately agreed."

That is a particular issue here, where the Krishans forged the Claimant's signature on the PSA. However, the accuracy of other documents they produced is also in issue, including the 'Balber Takhar Account' and 'Options for Gracefield' documents. Moreover, the Claimant contends many of the letters apparently in her name were in fact drafted by the Krishans which she signed.

A Holistic Approach

79. Given all these potential problems with witness memory and with the documents, fact-finding seems like a particularly difficult challenge in this case. Certainly, it cannot possibly be as straightforward as simply following the approach in *Gestmin* at [22] to 'place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts'. However, in my view, that is just one judicial approach to fact-finding which works best in a commercial case with plentiful and reliable documentation like *Gestmin* itself and *Simetra*. Yet as Leggatt J's own very different approach in *Blue* shows, it is far from the only approach, even in 'commercial cases'. *Gestmin* and *Blue* are at different ends of the spectrum on the availability and reliability of documents. Most cases are more likely to fall somewhere in between. In truth, all judicial fact-finding involves a mixture of the tools and techniques discussed in cases like *Onassis* and *Armagas:* reference to the objective facts and documents, to the witnesses' motives and recollections, and to the overall probabilities, the precise balance of which will depend on the circumstances of the particular case. In some, more like *Gestmin*, contemporary documents will be central, if

not paramount. In others, more like *Blue*, witness recollection will be central, but must be weighed alongside those other tools and yardsticks as Leggatt J himself did in *Blue* itself. As the Court of Appeal added in *Natwest* at [51]:

> "Faced with documentary lacunae…the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that…"

This suggests a 'holistic approach' in terms of the use of those various judicial tools and yardsticks for fact-finding. That sort of approach was applied by Joanna Smith J in *Bahia v Sidhu* [2022] EWHC 875 (Ch), in a case about events years before with few documents. Likewise, the findings of fact themselves must be determined holistically and not in a 'compartmentalised' way, as Vos C (as he then was) said in *St Petersburg Bank v Arkangelsky* [2020] 4 WLR 55 at [59]:

> "(T)he judge seems rather to have compartmentalised his treatment of the appellants' 16 points.…. Put another way, what is lacking in the judgment is an element of standing back and considering the effects and implications of the facts he had found taken in the round. Let me say at once that this approach would not necessarily be fatal to the findings he has made. It would, in my judgment, depend on whether it could properly be said that the somewhat piecemeal approach that he adopted unfairly affected the judge's evaluation of the facts…."

80. A 'holistic approach' also benefits from being open to fact-finding insights from other jurisdictions, including Family and Crime. That was the approach Mr Dias KC adopted in the clinical negligence case of *Powell* at [25] with his '13 axioms of fact-finding' (which I repeat with some citations and quotations excised):

> "(1) The burden of proof rests exclusively on the person making the claim (she or he who asserts must prove), who must prove the claim to the conventional civil standard of a balance of probabilities;
>
> (2) Findings of fact must be based on evidence, including inferences that can properly (fairly and safely) be drawn from the evidence, but not mere speculation (*Re A (A child) (Fact Finding Hearing: Speculation)* [2011] EWCA Civ 12, per Munby LJ);
>
> (3) The court must survey the "wide canvas" of the evidence (*Re U, Re B (Serious injuries: Standard of Proof)* [2004] EWCA Civ 567 at [26] per Dame Elizabeth Butler-Sloss P (as then was)); the factual determination "must be based on all available materials" (*A County Council v A Mother and others* [2005] EWHC Fam. 31 at [44], per Ryder J (as then was));
>
> (4) Evidence must not be evaluated "in separate compartments" (*Re T* [2004] EWCA Civ 558 at [33], per Dame Elizabeth Butler-Sloss P), but must "consider each piece of evidence in the context of all them other evidence" (*Devon County Council v EB & Ors.* [2013] EWHC Fam. 968 at [57], per Baker J (as then was));

such "context" includes an assessment of (a) inherent coherence, (b) internal consistency, (c) historical consistency, (d) external consistency/validity – testing it against "known and probable facts" (*Natwest*), since it is prudent "to test [witnesses'] veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case" (*The Ocean Frost)…*

(5) The process must be iterative, considering all the evidence recursively before reaching any final conclusion, but the court must start somewhere (*Re A (A Child)* [2022] EWCA Civ 1652 at [34], per Peter Jackson LJ…

(6) The court must decide whether the fact to be proved happened or not. Fence-sitting is not permitted (*Re B…* at [32], per Lady Hale);

(7) The law invokes a binary system of truth (*Re B* at [2], Lord Hoffmann):

(8) There are important and recognised limits on the reliability of human memory….(*Gestmin…*); and the court should be wary of "story-creep", as memory fades and accounts are repeated over steadily elapsing time (*Lancashire County Council v C, M and F (Children – Fact-finding)* [2014] EWFC 3 at [9], per Peter Jackson J);

(9) The court "takes account of any inherent probability or improbability of an event having occurred as part of the natural process of reasoning" (*Re BR* [2015] EWFC 41 at [7], per Peter Jackson J); "Common sense, not law, requires… regard should be had, to whatever extent appropriate, to inherent probabilities" (*In re B* at [15], per Lord Hoffmann); (10) Contemporary documents are "always of the utmost importance" (*Onassis…*per Lord Pearce), but in their absence, greater weight will be placed on inherent probability or improbability of witness's accounts… (*Natwest* at [50])…

(11) The judge can use findings or provisional findings affecting the credibility of a witness on one issue in respect of another (*Arkhangelsky);*

(12) However, the court must be vigilant to avoid the fallacy that adverse credibility conclusions/findings on one issue are determinative of another and/or render the witness's evidence worthless. They are simply relevant: "If a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything." (*R v Lucas* [1981] QB 720, per Lord Lane CJ); Similarly, Charles J: "a conclusion that a person is lying or telling the truth about point A does not mean that he is lying or telling the truth about point B..." (*A Local Authority v K, D and L* [2005] EWHC 144 at [28]). What is necessary is (a) a self-direction about possible "innocent" reasons/explanations for the lies (if that they be); and (b) a recognition that a witness may lie about some things and yet be truthful "on the essentials … the underlying realities" (*Re A (No.2)* [2011] EWCA Civ 12 at [104].

(13) Decisions should not be based 'solely' on demeanour (*Re M* [2013] EWCA Civ 1147 at [12], per Macur LJ); but demeanour, fairly assessed in context, retains a place in the overall evaluation of credibility: see *Re B-M*, at [23] and [25]: "a witness's demeanour may offer important information to the court about what sort of a person the witness truly is, and consequently whether an account of past events or future intentions is likely to be reliable"; so long as "due allowance [is] made for the pressures that may arise from the process of giving evidence". But ultimately, demeanour alone is rarely likely to be decisive. Atkin LJ said it almost 100 years ago ('*The Palitana')* (1924) 20 Ll. L. Rep. 140, 152): "… an

> ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour."

I respectfully agree with all of that, as I do with this summary by Thornton J in *Smith v SoS for Transport* [2020] EWHC 1954 (QB) at [40] of observations by Stuart-Smith J (as he then was) in *Arroyo v Equion* [2016] EWHC 1699 (TCC) (chiming with how Juries are routinely directed to fact-find in criminal trials)*:*

> "….c. The task of the Court is always to go on looking for a kernel of truth even if a witness is in some respects unreliable…..
>
> d. Exaggeration or even fabrication of parts of a witness' testimony does not exclude the possibility that there is a hard core of acceptable evidence within the body of the testimony….
>
> e. The mere fact that there are inconsistencies or unreliability in parts of a witness' evidence is normal in the Court's experience, which must be taken into account when assessing the evidence as a whole and whether some parts can be accepted as reliable…
>
> f. Wading through a mass of evidence, much of it usually uncorroborated and often coming from witnesses who, for whatever reasons, may be neither reliable nor even truthful, the difficulty of discerning where the truth actually lies, what findings he can properly make, is often one of almost excruciating difficulty yet it is a task which judges are paid to perform to the best of their ability…"

However, I would like to pull all this together and to elaborate on ten points about my own 'holistic approach' to fact-finding - in the particular context of a re-trial after a judgment is set-aside for fraud.

81. Firstly, the burden and standard of proving facts is firmly on the claimant on the balance of probabilities. Where, as here, the defendant has procured a previous judgment through fraud, I must be very careful to avoid reversing or diluting that burden and standard of proof. Whilst the finding of fraud is relevant to the inherent probabilities (as I discuss next), that does not change the burden's incidence or strength. One party's dishonesty does not prove the other's honesty. Whilst the Defendants have put forward a positive case about what happened with the transfer of the Properties, they did not have to do so and do not have to prove it. Moreover, it would also be wrong to choose the 'most likely' scenario unless I am satisfied it is more likely than not - as if I am not so satisfied then it follows the Claimant has failed to discharge her burden of proof, as Lord Brandon said in *'The Popi M'* [1985] 1 WLR 948 (HL). There is only one civil standard of proof that does not change with the allegation, as Lord Hoffmann said in *Re B* at [15]:

> "There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to the inherent probabilities…."

82. Secondly, on such inherent probabilities, I must be conscious of the limits of my understanding of what action is 'inherently probable' for an individual in a different social or cultural situation than myself. As Popplewell LJ said at para.14 of his lecture, quoting from Lord Bingham's essay '*The Judge as Juror'*:

> "Lord Bingham said: 'An English Judge may have a shrewd idea of how a Lloyd's broker, or a Bristol wholesaler or a Norfolk farmer might react in some

> situation, but he…should feel very much more uncertain about the reaction of a Nigerian merchant or an Indian ship's engineer or a Yugoslav banker'. Speaking for myself I'm not sure I would be confident even about the Lloyds broker, let alone the Bristol wholesaler or Norfolk farmer."

More generally, in *JSC Bank v Kekeman* [2018] EWHC 791, Bryan J pointed out that fraud and dishonesty are uncommon, so proof requires cogent evidence, as Andrew Smith J said in *Fiona Trust v Privalov* [2010] EWHC 3199 at [1438]:

> "It is well established that 'cogent evidence is required to justify a finding of fraud or other discreditable conduct' per Moore-Bick LJ in *Jafari-Fini v Skillglass* [2007] EWCA Civ 261 at para.73. This principle reflects the court's conventional perception that it is generally not likely that people will engage in such conduct: "where a claimant seeks to prove a case of dishonesty, its inherent improbability means that, even on the civil burden of proof, the evidence needed to prove it must be all the stronger", per Rix LJ in *Markel v Higgins*, [2009] EWCA 790 at para 50. The question remains one of the balance of probability, although typically…(as cited by Lord Nicholls in *In re H*, [1996] AC 563 at p.586H), "The more serious the allegation the more cogent the evidence required to overcome the unlikelihood of what is alleged and thus to prove it". Associated with the seriousness of the allegation is the seriousness of the consequences, or potential consequences, of the proof of the allegation because of the improbability that a person will risk such consequences."

Likewise, very recently in *Rea v Rea* [2024] EWCA Civ 169 at [32], Newey LJ said that undue influence (at least by coercion) is also inherently improbable. Having said that, where, as here, there has already been a finding of fraud, that is also relevant to the inherent probabilities of other dishonest or fraudulent conduct, as Eder J explained in *Otkritie v Urumov* [2014] EWHC 191 at [89]. Indeed, in *Arkangelsky*, in finding the judge wrongly leapt from inherent improbability of fraud into imposing too high a standard of proof, Males LJ observed at [120]:

> "Once other findings of dishonesty have been made against a party, or he is shown to have given dishonest evidence, the inherent improbability of his having acted dishonestly in the particular respect alleged may be much diminished and will need to be reassessed."

83. Thirdly, however, the corollary of that last point - that a prior finding of fraud may diminish the inherent improbability of other dishonest conduct - needs to be balanced against the point regularly stressed in criminal and family cases (most famously in *R v Lucas* [1981] QB 720) that: 'if a court concludes that a witness has lied about a matter, it does not follow that he has lied about everything'. I was referred to a suggested '*Lucas* direction' by another Birmingham BPC colleague, HHJ Williams in *Singh v Jhutti* [2021] EWHC 2272 (Ch) at [62] (another local case about informal property transactions within an extended family):

> "I remind myself that witnesses can often lie and for different reasons. Lies in themselves do not necessarily mean that the entirety of the evidence of a witness should be rejected. A witness may lie in a stupid attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie. A witness may lie because the case is a lie."

To similar effect is Roth J's comment in *Slocom v Tatik* [2012] EWHC 2464 (Ch) at [23] in respect of a particular witness who gave evidence in that case:

> "[S]ome of [the witness'] conduct was not only discreditable but dishonest. However, that does not necessarily mean that all his evidence in this case is to be rejected. The fact that an individual has acted dishonestly does not mean that he is therefore dishonest in all that he says or does."

Likewise, in *Martin v Kogan* [2021] EWHC 24 (Ch) (the retrial of the action relating to authorship of a film following the Court of Appeal allowing the appeal as quoted above), Meade J took a similar approach at [51]:

> "...There was agreement on the principles that: (i) Just because a witness is lying on one issue does not mean that the entirety of their evidence is to be rejected; (ii) It should be borne in mind that a witness may lie to bolster a true story, or to try to bolster a false one; (iii) A witness's evidence may be wholly wrong without his or her having lied—their recollection may be distorted by reinterpretation of what happened, or even delusion."

I remind myself of all those observations and bear them strongly in mind.

84. Fourthly, I remind myself of the distinction between finding 'primary facts' as to what actually happened on the balance of probabilities and drawing inferences on the same standard in the absence of direct evidence on issues such as an individual's state of mind, like their intention or beliefs (and indeed, 'fraud' and 'dishonesty'). This is a distinction well-recognised in appellate authorities, like Lord Hodge's judgment in *Beacon v Maharaj* [2014] UKPC 21 at [12] and [17], both quoted in *Enal v Singh* [2023] 2 P&CR 5 (PC)):

> "Where a judge draws inferences from his findings of primary fact …dependent on his assessment of the credibility or reliability of witnesses and of the weight to be attached to their [oral] evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole…Where findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum."

Indeed, as I shall discuss below, in *Enal*, Sir Nicholas Patten giving the Privy Council's judgment at [37]-[38] moved away from older more restrictive authorities on drawing inferences of a transferor's intention when transferring property to endorse this more modern approach based on all the evidence as articulated in *Lavelle v Lavelle* [2004] EWCA Civ 223 at [19] by Lord Phillips:

> "…[I]t is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. But words or conduct more proximate to the transaction itself should be given the significance they naturally bear as part of the overall picture."

On that 'overall picture', as there is rarely direct evidence (e.g. admissions) of fraud or dishonesty, inferences of them must be based on all the evidence and primary facts. As noted in *Kekhman*, Moore-Bick LJ said in *Jafari-Fine* at [76]:

> "Whenever an allegation of fraud or similar misconduct is made it is particularly important to consider the whole of the evidence before reaching a final conclusion, to test the oral evidence by reference to any contemporaneous documents and to consider the inherent probabilities…."

As Bryan J added in *Kekeman* at [78]-[79], such inferences are often based on 'circumstantial evidence' rather than direct evidence of eyewitnesses etc:

> "[78] As is often the case in cases involving allegations of civil fraud and questions of knowledge, much of the evidence in the present case is 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. In relation to circumstantial evidence and the drawing of inferences…… [Rix LJ said in *JSC v Ablyazov* [2012] EWCA Civ 1411 at [52]]: "….The essence of….successful circumstantial evidence is the whole is stronger than individual parts. It becomes a net from which there is no escape…..[A] jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately. '"
>
> [79] Of course, what Rix LJ stated in *Ablyazov*...was stated in the context of contempt where the standard of proof is to the criminal standard…where the 'net' metaphor is particularly apt. However, care needs to be taken in utilising [that] metaphor where the standard is th[e] balance of probabilities. Something can be proved on balance of probabilities even if all other possibilities have not been excluded, which is why Lord Millett in *Three Rivers* referred to *some* fact which tilts the balance and justifies an inference of dishonesty. Nevertheless, the points that are made that it is the essence of a successful circumstantial case that the whole is stronger than the individual parts, and that circumstantial evidence works cumulatively, are equally apt in the context of civil fraud."

That reference is to *Three Rivers DC v Bank of England* [2003] 2 AC 1 (HL) (quoted by Bryan J in *Kekhman* at [42]), where Lord Millett said at [186]:

> "It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

However, in *Arkhangelsky* at [42] Vos C clarified Lord Millett's observation:

> "[When he] said that it was not open to the court to infer dishonesty from facts which have been pleaded but are consistent with honesty, he was not laying down a general rule that can affect a case like this where there were multiple allegations founding an inference of dishonesty, many of which are themselves allegations of dishonesty that have been found proven."

Nevertheless, there is a need for caution, so I will make *all* my findings of fact before considering whether any misrepresentation I find proved was 'fraudulent'.

85. Fifthly, with a case with so much evidence as this one – a 10,000-page bundle over 20 years, including multiple witness statements and previous transcripts of witnesses - it would be easy to lose one's way or overlook potential important evidence. I have tried to address this risk by including the next chapter (albeit that it inevitably lengthens the judgment still further), which is a detailed initial review of the whole of the evidence. Again, learning about fact-finding from the criminal and family jurisdictions, I have

tried to take an 'iterative' and 'recursive' approach as Peter Jackson LJ suggested in *Re A* quoted in *Powell*. It seemed to me the most helpful evidential review would be to tease apart and review the different types of evidence. I will consider them in 'layers', laying one down upon another, cross-checking the accuracy and cogency of each against the previous layers of evidence to gradually work up a clearer picture of events, before 'standing back' as encouraged in *Arkhangelsky* to make my findings of fact on all the different 'layers' of evidence as a whole, all on the balance of probabilities.

86. Sixthly, as Peter Jackson LJ in *Re A* also accepted, even on an iterative and recursive approach, it is necessary to 'start somewhere'. I propose to start with the agreed or incontrovertible facts. As Lord Bingham said in *'The Judge as Juror'*, 'the normal first step is to add to what is common ground between the parties…facts…shown to be incontrovertible'. He gave examples of 'real evidence' like photographs. Moore-Bick LJ also observed in *Jafari* at [76]:

> "[S]ince the final conclusion must be capable of accommodating any facts which are admitted or which are established by evidence which is not capable of being seriously challenged, such facts provide a useful starting point for the assessment of the more controversial parts of the evidence."

87. Seventhly, the next 'layer' of evidence to be considered is contemporary documents. As I have discussed, there may be a paucity of them, or they may be ambivalent or downright deceptive, yet as Males LJ said in *Simetra* at [49]:

> … [I]n a case where there are contemporary documents <u>which appear on their face to provide cogent evidence</u> contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations…."

I underline that phrase, as in a retrial after a finding of fraud, it may be helpful to differentiate between contemporary documents apparently giving cogent evidence and those which require caution. The reasons for caution could include the document being created by the party found to have forged documents, or even if it was created by third parties, where the information recorded in the document came substantially from the forging party. Of course, on the other hand, there may be unrelated reasons for caution about documents produced by the other party too. It could be alleged to be forged itself, or to be affected by memory fallibility in the way Popplewell LJ described in his lecture as quoted above, or simply to have the sort of 'ambivalence' or unreliability discussed in *Bancoult*. The point is simply that in a retrial after a finding of fraud - especially forgery - I must be careful that the documents I rely on can bear the weight that I put upon them.

88. Eighthly in a retrial after a judgment is set-aside, it is quite possible the statements from the earlier trials may be available, but the witnesses not re-called. As such their statements are admissible as hearsay, provided there is a Hearsay Notice – see s.1 and 6 Civil Evidence Act 1995 ('CEA') and CPR 33. If not, the statement is still admissible, but the Court must take into account the failure to serve a Hearsay Notice on costs and indeed on the weight of the statement – s.2(4) CEA (see *Shagang v HNA* [2020] 1 WLR 3549 (SC)) which states:

> "Regard may be had, in particular, to the following— (a) whether it would have been reasonable and practicable for the party by whom the evidence was adduced to have produced the maker of the original statement as a witness; (b) whether the

> original statement was made contemporaneously with the occurrence or existence of the matters stated; (c) whether the evidence involves multiple hearsay; (d) whether any person involved had any motive to conceal or misrepresent matters; (e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose; (f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

Moreover, I note that Bryan J said in *Kekhman* at [86]:

> "Where the question is one of credibility of witnesses, and competing accounts of events (or the extent of a person's knowledge and involvement) I accept that evidence untested by cross-examination is to be given less weight, but it does not follow that it should be given no weight whatsoever having regard to the circumstances of the case, and any reasons given as to why a particular witness or witnesses were not called to give oral evidence."

However, if a witness is absent for no good reason, adverse inferences can be drawn, as explained by Roth J in *Slocom* at [40] (and HHJ Williams in *Jhutti*):

> "[I]n *Wiszniewski v Manchester HA* (1998) Lloyd's Rep Med 223. Brooke LJ set out the…principles (at 240)… "(1)…[A] court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the action. (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue. (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

89. Ninthly, I turn to oral witness evidence itself. Lord Bingham, in '*The Judge as Juror'* identified the following five factors to assist the task of assessing the honesty or reliability of witnesses: (i) the consistency of the witness' evidence with agreed or incontrovertible evidence; (ii) the internal consistency of their evidence; (iii) consistency with what they said on other occasions; (iv) the credit of the witness separate from the litigation, and (v) the demeanour of the witness. He considered the first three factors to be 'a useful pointer to the truth'. He placed less weight on the other two, especially demeanour, to which I will return in a moment. (I have already addressed (iv) in part on the question of past character being relevant - with suitable caution - to inherent probabilities). On a retrial after a judgment is set aside for fraud, there is far more evidential material than usual to assess 'consistency' - including transcripts of evidence at previous trials. However, it is well to remember the risk of what Popplewell LJ called 'single-handed Chinese Whispers'. However, as noted in *Arroyo*, *Smith* and *Slocom* (and as juries are frequently directed) simply because part of a witness' evidence is wrong – or even dishonest – does not stop other parts of their evidence being accepted. More generally, it is important to bear in mind the nature of memory (as discussed in *Gestmin* at [16]-[21] and elsewhere) to understand the likely

effect on a particular witness' memory when weighing their consistency. However, I also bear in mind (as I discuss below at paragraphs 471-3) that in fairness to a witness, they should have the chance to answer challenges to *their* evidence, which the other party must put to them as well as the other party's case: *Chen v Ng* [2017] UKPC 27 at [55]; *Griffiths v TUI* [2023] 3 WLR 1204 (SC) at [70(i)]. In *Rea* at [52], Newey LJ held that one basis for a judge's finding of undue influence by coercion had not been put to a witness. In writing my own judgment, my own note of cross-examination has been central to all of my findings of fact.

90. Finally, there is 'demeanour', which Lord Bingham in '*The Judge as Juror*' defined as 'a witness' conduct, manner, bearing, behaviour, delivery, inflexion: in short anything which characterises their mode of giving evidence but does not appear in a transcript of what they actually said'. Lord Bingham's essay is widely acknowledged as being pivotal to modern judges' wariness of deciding cases based *solely* on witness 'demeanour'. As Lord Bingham remarked:

> "The ability to tell a coherent, plausible and assured story, embellished with snippets of circumstantial detail and laced with occasional shots of life-like forgetfulness is very likely to impress any tribunal of fact. But it is also the hallmark of the confidence trickster down the ages."

Lord Leggatt (as he now is) in his October 2022 lecture: "*Would you believe it ? The relevance of demeanour in assessing the truthfulness of witness testimony*" (https://www.supremecourt.uk/docs/at-a-glance-keynote-address-lord-leggatt.pdf) argued that psychological research shows demeanour is unreliable. Lady Rose in her lecture pointed to the Equal Treatment Benchbook showing cultural differences may contribute to manner of answers / demeanour. By contrast, Peter Jackson LJ in *Re B-M* suggested demeanour could tell a court a lot about a witness, so long as 'due allowance [is] made for the pressures that may arise from the process of giving evidence', a phrase also used in *Natwest*. As Mr Dias KC observed, the real point is demeanour should not be used *by itself* to assess reliability. This is particularly true with a retrial after a judgment is set aside for fraud, because the 'litigation mindset' is so entrenched and emotions will be raised. It would be wrong to ignore traditional measures of unsatisfactory witness evidence listed by Joanna Smith J in *Bahia* and HHJ Williams in *Jhutti* derived from *Painter v Hutchinson* [2007] EWHC 758 (Ch) where Lewison J (as he then was) mentioned: a. evasive and argumentative answers; b. tangential speeches avoiding the questions; c. blaming legal advisers for the witness' statement; d. disclosure and evidence shortcomings; e. self-contradiction; f. internal inconsistency; g. a shifting case; h. brand new evidence; and i. selective disclosure. Lewison J decided the evidence of one witness should be *rejected unless corroborated* by indisputable and contemporaneous documents. That is a tried and tested approach which I consider apt for some witnesses here. The same is true of more reliable but still flawed witnesses whose evidence may be *accepted unless contradicted* by indisputable and contemporaneous documents.

Assessment of the Evidence

91. Consistent with the 'holistic', 'layered' and iterative approach to the evidence I have just set out, before turning to my findings of fact, I survey the various layers of evidence here: (i) agreed and incontrovertible evidence; (ii) contemporary documentation; (iii) valuation evidence; (iv) absent witnesses; (v) non-party witness

evidence; and (vi) party evidence (including covert recordings) before finally (vii) taking a brief summary stock-take of all the evidence as a whole.

Agreed and Incontrovertible Evidence

92. Given the animosity and all-out litigation warfare between the parties over the last 15 years, including the forgery, there is a surprising amount of evidence that is essentially agreed or at least incontrovertible. Counsel prepared a detailed chronology running over five pages and spanning over 20 years with all the key events in the case. At trial there was no real dispute about any of those dates, even if there were sharply different accounts of how the events had happened. Indeed, whilst prior to trial the Claimant had disputed the authenticity of documents, that are now no longer challenged, even if the reasons for them are still disputed. That effectively-agreed chronology is therefore the 'base layer' of evidence in my findings of fact, augmented by other agreed and incontrovertible evidence.

93. There is also plenty of incontrovertible 'real evidence': for example, agreed photographs of the Properties over time so that I can actually see the state of their outsides for myself, which assists resolution of the debate over what condition they were actually in. On a linked point, although not 'real evidence' as such, there are important contemporary valuations of at least some if not all the Properties at various points in time: 2002, 2007 and 2009, as well as confirmation of the prices fetched at auction for the Co-Op and Shops in March 2011 and the Cinema in August 2014. Whilst the Claimant relies on the different valuations by her expert surveyor Ms Dobson for transfer in April 2006, those dates of sale and Ms Dobson's inspection in November 2022, the 2002 and 2007 valuations are important, not least as Ms Dobson has not commented on those dates. I will consider the contemporary valuations alongside Ms Dobson's evidence as a separate 'layer' later. The Claimant also agreed the Krishans had paid rates and other arrears on the Properties of £5,672 (and had paid her maintenance totalling £13,800). There is also some agreement as to the level of expenditure on the development by the Defendants between 2006 and 2010, totalling £132,084.83 (although it is not agreed this falls to be offset from any remedy).

94. Moreover, before submissions, the Claimant abandoned her previous primary factual case of a 'custodial contract' – i.e. that their agreement was that Gracefield would simply have the paper title of her properties and manage them for her but also return them on demand as she remained beneficial owner. The last part of that case survives as the Claimant's resulting trust claim, but as Mr Halkerston accepts, that claim presupposes there was in fact no agreement to transfer the beneficial interest to Gracefield in return for a 'profit share'. This concession on the 'custodial contract' (and to a lesser extent the claim for unconscionable bargain) slightly reduced the volume of evidence in real dispute. (The same cannot be said of the dropping of the deceit claim, as the alleged misrepresentations are still part of the actual undue influence claim).

Contemporary Documentation

95. Whilst this is not a case like *Gestmin* where all the crucial issues are recorded in reliable contemporary documents, nor is it a case like *Blue* where none are. As I have already said of the chronology, there are abundant documents in relation to most parts of the claim. However, there are no contemporary records of the key conversations in 2005/06 between the parties. The whole trial bundle (not including authorities) runs to

28 bundles, including 10 bundles of documents from 2002 to 2023. Mr Halkerston (who in fairness knew the bundle better than anyone else) estimated it ran to 10,000 pages in all which seems about right. Of course, I was not referred to all those pages – and I explained to Counsel that I would not necessarily read documents that were not raised at trial in some way. However, my 'working bundle' of the documents actually raised in evidence or mentioned in the trial spanned two (extremely full) lever-arch files of well over 1000 pages and I actually read much further into the bundle than simply those documents. This judgment is already too long already without referring to every single document which was raised or that I have read, but I emphasise that I have taken them all into account in reaching my findings and will refer to key documents.

96. However, as I explained above, I consider it helpful to differentiate between contemporary documents which give appear to give cogent evidence and those which I should approach with caution. In the first category, there are numerous documents relating to the Properties prior to July 2005 when the Krishans became involved, when Bobby Takhar and the Claimant were managing the Properties. Those early documents are mostly from apparently independent sources - such as Coventry City Council and their agents such as valuers and property development companies - and I find them obviously reliable and cogent. Nevertheless, to go back to the Purle Judgment, because I have much more evidence of the whole history than HHJ Purle QC did, I have a wider context and so I reach some different conclusions than he did. But I also reach similar ones, such as that Bobby Takhar's plans to re-develop the Properties were considered by Coventry City Council and their agents as unrealistic, not least as the Properties were in a far worse condition than he suggested. It is also clear Coventry CC did tell him about compulsory purchase, but stressed to him that it was a 'last resort'.

97. Moving forward in time to the period *after* the transfer of the Properties in April 2006 (which no longer forms part of any of the maintained causes of action) there are further documents from independent bodies and professionals: not only Coventry City Council, but also from Mr Johnson whom the Krishans had instructed to develop the Properties and conduct the planning permission process (as well as the contemporary valuation evidence which I will discuss later). Again, I considered all the documentation produced by Mr Johnson and the few documents from Mr Matthews, whom the Claimant instructed in 2008, to be reliable, especially as they were convincing witnesses as I discuss below. Therefore, much of Gracefield's accounts, 'work in progress' logs and director's loan account ledgers prepared by the Krishan's accountant, SB, are also broadly accurate insofar as they are based on the expenditure now agreed. As I shall explain below, I consider that SB – who gave evidence in 2010 but not before me – is a broadly reliable and important witness, even though now a hearsay one.

98. However, that does not mean the accounting documents etc for Gracefield SB prepared in fact reflected reality, insofar as the information which she included came not from an independent professional or third party but from one of the parties. As I shall describe, that is particularly true of crucial documents running up to the transfer. However, picking a different example for the moment, in the 'work in progress' logs and accounts from 2006 onwards until at least 2018, SB included in Gracefields' accounts and records an entry for £225,000 variously described as a 'management fee or charge', 'purchase invoice reserve' and 'purchase reserve'. As I shall explain, this was a figure

Dr Krishan conjured out of thin air, which distorted Gracefield's accounts over the years of the litigation.

99. Moreover, documents produced by the parties themselves are still more problematic. The Claimant claimed typed letters purporting to have been written by her were in fact written on the Krishans' computer and indeed effectively written by, or dictated to the Claimant by, Mrs Krishan. Indeed, in some cases, the Claimant says that she simply signed letters put in front of her as she trusted the Krishans so implicitly. In other cases, that apparently self-serving assertion would be taken with a considerable pinch of salt. However, for five reasons quite separate from the Claimant's own evidence, I will find that it is broadly true.

    99.1 Firstly, Mrs Krishan accepted in evidence that the Claimant did not have a computer until 2008 and the typed letters in question were produced on the Krishans' computer using their standard letter templates, although she insisted the Claimant had written them, not herself (as was put to her).

    99.2 Secondly, this can be seen by comparison of two letters. One is a typed letter the Claimant signed which is to Mr Whiston confirming the transfer of the Properties to Gracefield dated 3rd March 2006, with her own address centrally at the top. The other is a letter from Mrs Krishan to Mr Whiston of the same date with the Krishans' address in the same place and font with the same rogue apostrophe in the name of SB's firm, suggesting the same person wrote both on the same computer – the Krishans'. Back in her 2009 statement, Mrs Krishan accepted she wrote her own letter that day, but now says the Claimant wrote both. I will find that Mrs Krishan wrote both.

    99.3 Thirdly, I will find later that a letter purporting to be from the Claimant dated 4th July 2005, was probably not drafted by her. She may have an English degree but her language even in the formal context of evidence was far from professional, but emotive and direct. Indeed, Mr Graham pointed to formal vocabulary and syntax in the Claimant's statement: *'I can recall this shift in the tenor and nature of her conversations quite distinctly because it was a marked change'* as being inconsistent with her own words and suggestive of having been drafted by someone else. I agree. But I would also make the same point about the wording of the 4th July 2005 letter e.g. *'I write to formally advise you that I am currently in negotiations to develop the above sites'*. This is not the Claimant's own language either. It is the same professional efficient language far more characteristic of Mrs Krishan (a Deputy Headteacher), whom I will find did indeed draft it.

    99.4 Fourthly, the 4th July letter also ends under the Claimant's signature with 'B.K. TAKHAR (MRS)'. This is very different to a handwritten letter dated 6th April 2006 to the Krishans' solicitor Mr Whiston. The Claimant simply ended her handwritten letter 'Yours Sincerely' and signed. She did not write her name in capitals and put ('MRS') after. Whilst the language is also formal, I will find the Claimant wrote it, but that Mrs Krishan dictated it.

    99.5 Fifthly, another letter purporting to be from the Claimant dated 24th March 2006 is the letter Mr Gasztowicz QC found was the source of the Claimant's signature which led to the forging of the PSA (called 'the Whiston Letter' as it was sent to the solicitor Mr Whiston). Whilst that does not mean it was originally drafted by Mrs Krishan, again the formal language is consistent. Moreover, the Krishans'

preparedness to forge a signature reduces the (far lower) inherent unlikelihood that they would draft a letter for the Claimant.

99.6 Fifthly, I will also find below that a letter in the Claimant's name signed by her dated 3rd April asking Mr Whiston to draft a will and naming the Krishans as executors and the Claimant's three sons as beneficiaries is also consistent with being drafted by Mrs Krishan. This is not just the style, but also the content – it does not mention the Claimant's daughter at all.

99.7 Finally, in his evidence, Dr Krishan did not really deny that the Claimant would sign anything put in front of her. I will find she did just that.

As I discuss below, this view is also consistent with other evidence in the case.

100. Furthermore, some of the documents admittedly produced by the Krishans themselves are downright deceptive. I will detail the five key instances:

100.1 Firstly of course, there is the finding in the Gasztowicz Judgment that they forged the Claimant's signature on the third copy of the PSA they disclosed in the Original Proceedings using the Claimant's handwritten letter to Mr Whiston I mentioned. I discuss below the Krishans' oral evidence about it.

100.2 Secondly, as 'highlighted' in both the Purle and Gasztowicz Judgments, there is the 'Original Balber Takhar Account' document which they each found misleading. I said I would reach my own view about it, but I agree with both my judicial predecessors. The first version was produced by the Krishans (in circumstances described later) for a meeting in March 2008 with the Claimant after she asked the Krishans to stop the proposed sale of the Properties. It listed payments made to and for the Claimant (including rates arrears) from December 2005 to May 2008 totalling £37,100. Whilst that is contested, the real point is that at the foot of the page, it lists a number of items of expenditure on the Properties, then states *"Currently out of Premier and Private accounts £556,000 plus two more current bills…"* That clearly implies the Krishans had spent £556,000 out of their own bank accounts on the Properties, when in fact the expenditure in Gracefield's own accounts totalled only £132,084.80. Moreover, Gracefield's Director's Loan Account ledger shows in March 2008, less than £20,000 was owing to the Krishans and the balance had never got anywhere near £556,000, not least as the Krishans arranged a debenture for Gracefield secured on the Properties for bank lending of £125,000 (£150,000 from March 2008). Dr and Mrs Krishan told me that he had made a typing error in failing to put the correct number then a full stop and then to continue 'From the company £556,000' meaning what they would receive from the profit share when the Properties were sold on their assumed value at the time (presumably, c.£1.4 million). However, that makes no sense, not least as there is no reference to any such valuation of the Properties in the document and that does not explain why after the £556,000 it actually continued on expenses *'plus two more current bills'*. Moreover, over the page, '*Total so far: £565,600*' (a different figure) was also sandwiched between discussions of expenses. This was no typing error – I will find on balance of probabilities it was a plain misstatement of the expenditure incurred. I agree with HHJ Purle QC this was done to 'get the Claimant off the fence' and to agree to the sale of the Properties and with Mr Gasztowicz QC that the document was 'demonstrably untrue'. I emphasise that I do not simply adopt their findings, I make my own finding to similar effect, fortified that it accords with theirs.

100.3 Thirdly, as pleaded as part of the conspiracy claim (although given HHJ Purle QC's rejection of it, not causative of loss), when the 'Balber Takhar Account' was disclosed in 2009, it had been altered so that the original reference to *'Total so far: £565,600'* had become *'Total estimated approx so far £565,600. Will check'*. It is plain that this must have been done by the Krishans – it was their document. It is true this is a small change, but it is important: showing the Krishans trying to soften the original document. It also demonstrates their story to me about an original typing error is wrong, since they amended the document without altering what they themselves said was a typo. I will call this the 'Altered Balber Takhar Account'.

100.4 Fourthly, there is the 'JS Invoice' (as I call it to anonymise the noise and air quality surveyor who carried out an assessment of the cinema in June 2007). An invoice handed to the Claimant in April 2008 dated 14th June 2007 showed the total cost was £39,045.25. Yet in June 2008, the Krishans handed the Claimant and her financial adviser an altered version of the same invoice now totalling £6,010.13, closer to the entry in Gracefield's accounts of £6,735.78. I have both versions in the bundle yet no explanation from 'JS' themselves. Someone must have altered this invoice. Mr Graham submitted the Krishans had no reason to do so, as it made no difference. But since it is obvious from the Original Balber Takhar account that in April-June 2008, the Krishans were exaggerating costs to pressure the Claimant into selling, I will find on the balance of probabilities that they had every reason to change it, as they later would with the forged PSA.

100.5 Finally, there is the 'Options for Gracefield' document produced by the Krishans for that same June 2008 meetings. Again, both Judge Purle QC and Mr Gasztowicz QC found this document to be deliberately misleading. Once again, on the evidence I have heard and reaching my own view, on the balance of probabilities I will make the same finding as both of them. Each concentrated on the point like the 'Balber Takhar Account' that the development had *'incurred huge costs. Most of these had been met by us personally'*. As I have explained, this was not correct as the Krishans had effectively if not entirely been repaid due to the debenture lending. Moreover, both judges criticised the document later added '*Shortly there will also be a £60,000 Corporation Tax Bill'*. Dr Krishan said that was a mistake and he meant Capital Gains Tax. As Mr Graham says, it is true that in other respects the document was broadly accurate, save for one point. However, that is the most important one and I quote it (bold in the original):

> "When the company was set up 3 years ago the aim was to stop Balber losing the properties in Coventry and to pull her out of debt and prevent bankruptcy. At that stage, the properties had no value and were a liability. The Council was considering Compulsory Purchase Orders and she would have received **nothing whatsoever in return**."

This is simply wrong, Dr Krishan accepted that he knew that a CPO must compensate the owner full market value. In any event, he also accepted he thought the Properties were worth £300,000 at the time of transfer and so it is impossible to understand how he or Mrs Krishan could have genuinely thought they had 'no value', especially as they believed at the time the Claimant's debt was modest. However, both statements closely resemble the misrepresentations the Claimant says the Krishans made. I will return later to other corroborative evidence from the same time: covert recordings.

Valuation Evidence

101. On the subject of valuation, whilst the expert valuation evidence of the Claimant's surveyor Ms Dobson is clearly relevant to remedies and I return to it in the course of the judgment, it is also useful to consider it now in the context of the documentary evidence of contemporary valuations. That is because the value of the Properties at the time of the transfer in April 2006 is highly relevant to the credibility of the parties as just discussed, as well as to liability and remedies. Before I turn to Ms Dobson's opinion, I will set out the preceding context of the contemporary valuations - and the Council and its agents' contemporary estimates of refurbishment costs. Those assessing costs at least actually saw inside the Properties, whilst Ms Dobson did not. She was only instructed in late 2022 and reported for the first time in January 2023, when the Properties had been sold many years earlier and she was not able to enter them. Therefore, I set out the contemporary valuations and costs estimates first, helpfully set out in the following tables by Mr Graham, which I have slightly altered.

Contemporaneous Valuations

Property	*Valuer*	*Date*	*Valuation £*
2002			
Cinema	PPM Valuation Panel Report	2002 (Query 2003?)	
Co-Op	PPM Valuation Panel Report	27.11.02	108,000 (existing condition)
2007			
Shops	Savills	31.07.07	210,000 (with PP)
Cinema	Savills	01 08 07	450,000 (with PP)
Co-Op	Savills	01 08 07	425,000 (with PP)
2009			
Shops	Chamberlains	31 03 09	120,000 (without PP)
Cinema	Chamberlains	31 03 09	165,000 (if demolished)
Co-Op	Chamberlains	31 03 09	215,000 (current condition, without PP)
2011			
Shops	Sale Price	21 03 11	175,000
Ritz	Sale Price	14 08 14	191,000
Co-Op	Sale Price	29 03 11	675,000

Refurbishment Costs

Property	*Source*	*Date*	*Est. cost £*
2002-03			

Co-Op	Panel Valuation	27.11.02	750,000
Co-Op	Barneveld Surveyors	04.03.03	£677,000 Or £400,000 for 'much lower' spec
2005			
Cinema	Donaldsons	12.07.05	1,035,000 as drama centre
Co-Op	Donaldsons	12.07.05	867,100
2006			
Cinema	Donaldsons	30.01.06	£606,000
Co-Op	Donaldsons	30.01.06	£925,000
2007			
Cinema	Mr Johnson Indicative Budget Cost Estimate	Jan 07	£1,434,484
Co-Op	Mr Johnson RJ's Indicative Budget Cost Estimate	Jan 07	£1,831,507

102. There is a striking disparity between the 2006 costs estimate by Coventry CC's agent Donaldsons and Mr Johnson's costs estimate only the following year which was twice as much. The reason is not entirely clear from Mr Johnson's 'indicative budget cost estimate', but I suspect his proposed works differed from Donaldsons proposal of 12 flats on the Cinema site and retail unit and 12 flats on the Co-Op site. Of course, there is no contemporary valuation of the Shops until 2007 and no refurbishment costs estimate of them at all. Moreover, we only have costs for developing the Cinema from 2005, so we do not have the costs of demolishing it in 2002, which may well have been factored into its valuation then of £160,000. However, the upshot of those contemporary documents we do have is as follows:

    102.1 In 2002-03, valuations suggested the Cinema land was worth £160,000 if demolished; and the Co-Op £108,000 as it was, but would cost £250,000 to refurbish and by 2003 that Co-Op cost estimate had risen to at least £400,000 (for 'lower spec') or up to £677,000. Therefore, the Properties were clearly in bad state and needed a lot of money spending on them. This is consistent with the Council's contemporary notes based on inspections. It is clearly inconsistent with the Claimant and Bobby Takhar's evidence.

    102.2 In 2005-06 when the Krishans became involved with the Properties up to the point of transfer, the last valuation was 3 years old, but they were not formally re-valued (whilst Mr Graham included the parties' agreed total valuation of £300,000, which I accept was agreed, it was the parties' estimate, not a professional valuer – a point I return to later). However, there had been a recent estimate of refurbishment costs by Donaldsons for Bobby Takhar's idea of re-developing into a literature and drama centre the Co-Op costing £867,100 or Cinema costing over £1 million. It is hardly surprising that the brief for Donaldsons from Coventry CC in May 2005 had in noting the old valuations for the Co-Op of £108,000 and the Cinema as £160,000 (where entry for a structural survey was refused) described the 'owner' as 'unrealistic' (I suspect by then a reference to Bobby Takhar then dealing with it, rather than his mother the

Claimant). The Donaldson's costs estimate in January 2006 was on the basis of what it called 'a more commercially viable alternative use of commercial use on ground floor and residential development above' – much closer to the Krishans' plans by then. In short, such development would cost much less than Bobby Takhar's worthy but unrealistic dreams of community projects and would obviously be worth more on future sale to a potential developer, like the Krishans.

102.3 By May 2007 when Savills valued the Properties on a loan security basis for Natwest Bank, they were still undeveloped, but did have planning permission (it was only anticipated for the Cinema, but granted later that year). The valuations for each of the Properties were much higher. The Shops (not previously valued) were valued at £210,000, the Co-Op's value had leapt from £108,000 in 2002 to £425,000 in 2007; and the Cinema's value had leapt from £160,000 in 2002 to £450,000 in 2007. The Properties in total were worth £1,085,000. That rise was more to do with the state of the market than planning permission – Savills commented 'Purchasers are paying a premium for properties that were derelict or in need of refurbishment, *with or without planning consent*'. Given that, it seems unlikely planning permission had more than trebled the value of the Properties in only a year since the transfers in March/April 2006. So, it seems likely that £300,000 was much too low, on valuations already 2 or 3 years old for the Co-Op and Cinema and no valuation of the Shops.

102.4 However by March 2009, the value of the Properties had supposedly *fallen*: on Chamberlains' valuations, the Properties collectively were worth £495,000 – less than half Savills' valuation two years earlier. But this assumed no planning permission, even though it would not lapse on the Shops until December 2009, on the Co-Op until March 2010 and the Cinema until December 2010. This seems like a surprisingly low valuation on an unrealistic basis, as the Properties *did* still have planning permission. But by 2009, litigation had begun, so their value was probably 'blighted' - certainly this valuation is out of kilter with the others and the later prices.

102.5 The 'valuations' of the Shops and Co-Op in March 2011 and Cinema in August 2014 are not valuations at all, but sale prices at auction, by which time planning permission had lapsed on them all. In that sense, those prices were what the market was prepared to pay for them in its purest form, but not necessarily comparable to the earlier professional valuations. In any event, the total gross 'yield' of the Properties to Gracefield was £1,041,000 – not much different from their valuation with planning permission in 2007.

103. Against that context, I will turn to Ms Dobson's reports, initially in January 2023 but amended (but without changing her valuations) in November 2023 following receipt of further documentation, including some of the historic costs documents from Coventry CC / Donaldsons and the 2009 Chamberlain valuations. Her valuation conclusions were helpfully set out by Mr Halkerston as follows:

April 2006	*Without ('Pre') Works*	*After ('Post') Works*
Co-Op	£450,000	N/A

Shops	£240,000	N/A
Cinema	£200,000	N/A
Total	£890,000	N/A
2011/2014		
Co-Op (March 2011)	£700,000	£800,000
Shops (March 2011	£300,000	£375,000
Cinema (August 2014)	£250,000	£300,000
Total	£1,250,000	£1,475,000
November 2022		
Co-Op	£950,000	£1,150,000
Shops	£380,000	£540,000
Cinema	£500,000	£550,000
Total	£1,830,000	£2,240,000

104. Mr Graham submitted that not only were Ms Dobson's valuations reached without entering any of the Properties; both of her reports contain errors; the valuations in each are the same even though the second report accepted the condition of the Properties was worse; and she calculated costs for refurbishment, despite that being outside her particular expertise (it required a quantity surveyor), by using generic tools in the first report, but (out of date) contemporary costs estimates in the second. Above all, she did not set out her methodology or calculations for either the 'pre-works' or 'post-works' valuations. I do accept her reports lost sight of the wood for the trees and left questions unanswered. However, they cannot be characterised, as Mr Graham did, as just '*bare ipse dixit*', as Lord Hodge said in *TUI v Griffiths* [2023] 3 WLR 1204 (SC) [37]:

> "Because an expert's task is to assist the judge in matters outside the judge's expertise, and it is the judge's role to decide the case, the quality of an expert's reasoning is of prime importance. This court gave guidance on the role of the expert in *Kennedy v Cordi*a [2016] 1 WLR 597…[at 48]:
>
> > "An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or *bare ipse dixit* carries little weight, as the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated *ipse dixit* carries little weight is understated; in our view such evidence is worthless…. Wessels JA stated the matter well in….South Africa in *Coopers…Ltd v Deutsche Gesellschaft* 1976 (3) SA 352, 371……Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning

> proceeds, are disclosed by the expert. As Lord Prosser pithily stated in *Dingley v Chief Constable* 1998 SC 548, 604: As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

As Lord Hodge said in *TUI* at [73], this is not just leaving questions unanswered.

105. Moreover, applying by analogy the criteria in *Kennedy* at [44] for expert evidence admissibility to its *weight*, there is no doubt about Ms Dobson's expertise (save on costings) and body of knowledge underpinning it; and I would add she was plainly impartial and trying to assist the Court, especially in her oral evidence:

105.1 For the 'pre-works' values in April 2006, Ms Dobson clarified in oral evidence that in her first report at paras.17.0.1-5, she had benchmarked her valuations against Savills' loan security valuations in 2007 with planning permission for the Co-Op of £425,000, the Cinema of £450,000 and Shops of £210,000. She noted Savills had said 'Purchasers are paying a premium for properties that were derelict or in need of refurbishment, *with or without planning consent*' and their loan security valuation for the bank would have been more conservative than open market value. So, Ms Dobson considered in the same 'hot market' of 2006-07 in April 2006, planning permission would make little difference, but on the open market, the Co-Op would have been worth more (£450,000) and the Shops more (£240,000). However, she valued the Cinema lower at £200,000. Properly explained, I accept as accurate on the balance of probabilities her total for April 2006 of *£890,000*.

105.2 For the pre-works values at sale in 2011 / 2014, Ms Dobson in her report at paras.18.10-26 and oral evidence also adopted a straightforward and reasonable method: whether sale prices could have been enhanced. I accept limiting the auction to cash buyers reduced the Cinema in August 2014 from its value of £250,000 to its actual price of £191,000; and the Co-Op in March-May 2011 from value of £700,000 to actual price of £675,000. I also accept the price of the Shops were depressed to £175,000 by cash auction as one 'job lot', especially as only one was structurally unsound. But Ms Dobson estimated an average value of £80,000 which comes not to £300,000 (where she assumed planning permission) but £240,000 – the same as April 2006 (like similar properties in the location). Therefore, I find on balance of probabilities the total value in 2011/14 was *£1,190,000.*

105.3 However, I accept that Ms Dobson's 'post-works' valuations for 2011/14 and rental income estimates were unreliable. There were too many hypotheses as the Properties were not in lettable condition. The same applies to a 2022 'post-works' valuation of the still-unrefurbished Cinema.

105.4 Yet, the 'post-works' valuations by Ms Dobson for November 2022 for the Co-Op (£1,150,000) and Shops (£540,000) *are* reliable as they were based on *reality*. As she noted at para.18.12 of her first report, the Co-Op had in fact been sold in 2016 for £1,320,000 in 2016; and at para 16.8.5, she corroborated her valuation of the Shops if sold separately of £540,000 was corroborated by sale of a neighbouring property in July 2021 for £202,000.

105.5 Likewise, the 'pre-works' valuations for 2022 by Ms Dobson are based on those reliable 'post-works' figures. As explained in her first report at paras.16.9.10-17 and oral evidence, she worked out the 'pre-works' value by taking the average value per square foot from comparables and deducting from the 'post works'

values average costs using industry-standard software in the first report, calibrated against the extra information in the second. This seems to me a perfectly reliable approach and I accept her 2022 'pre-works' valuations of the Co-Op at £950,000 and Shops at £380,000 and indeed £500,000 for the Cinema. The total is *£1,830,000.*

Absent Witness Evidence

106. I turn to the statements from absent witnesses. Statements from the trials in 2010 and 2020 of witnesses not called before me are hearsay. (Strictly speaking, the previous statements from current parties and witnesses are also hearsay, but I will consider some parts of those when considering their evidence to me).

107. Firstly, there are the Claimant's now-absent witnesses (except her solicitors):

107.1 Mr Duncan and Mr Todd were dealing with the Properties for Coventry City Council from 2004/2005 through to 2008. Whilst Mr Duncan and Mr Todd did not give evidence before me, their statements were not challenged and so they were not recalled. Each of them confirmed there were never any Compulsory Purchase Orders ('CPO's) in respect of the Properties. There was only an oblique reference to CPOs in a Cabinet report in 2006 and some discussion about CPOs with Bobby Takhar in 2005 (confirmed by an important note from June 2005 which I detail in my findings of fact). But they confirmed what he was told then – use of CPOs is always a last resort for the Council. There was never even a Cabinet report drawn up to consider CPOs – the first stage in what in law is a long process. Whilst Mr Duncan and Mr Todd did not detail it, Counsel and myself researched the CPO process using legislation and Government Guidance. In brief summary, a local authority resolves to make a CPO (what Mr Todd called a Cabinet report at Coventry CC), but if a CPO is made, there can then be effectively an appeal to the Secretary of State and even if a CPO is upheld, subject to Council debts, effectively full market value is paid in compensation.

107.2 Mrs Har Hari's (also known as Mrs Kaur) evidence was largely peripheral, although I touch on part of it later. However, given her absence, under s.4 CEA I can only attach very modest weight indeed to Mrs Har Hari's (and another absent witness, Mrs Meade's) multiple hearsay statements reporting what the Claimant said about her state of mind in 2005. Further, Mrs Clowe's statement is unsigned and undated, so I will ignore it totally.

108. Secondly, there are the Defendants' now-absent witnesses (except the solicitors). I need only touch on Mrs Beeston who witnessed the transfers, as is now agreed.

108.1 Mr Whiston's pre-PD 57AC statement now seems like a rather 'of its time' chronology of documents that adds relatively little to them, but is a helpful guide in its way. He summarised being instructed by a letter from the Claimant of 3rd March 2006 (which I have found above was drafted by Mrs Krishan) and that he did not meet the Claimant until after the transfers when she instructed him to prepare a will. His evidence is not challenged.

108.2 Mr Rodgers was Gracefield's banker at Natwest from early 2006. His evidence had two points of relevance. Firstly, that Dr Krishan told him then the Claimant had no business acumen, which Dr Krishan denies. Secondly, Mr Rodgers said that he advised him in late 2006 that one of the 'principals' of Gracefield - 25%+

shareholders – had adverse credit data (the Claimant had a CCJ) and this led to the Claimant transferring all 50% (i.e. not just all but 24%) of her Gracefield shares to the Krishans. As I will explain addressing Dr Krishan's evidence below, I prefer Mr Rodgers' recollection as painting an accurate picture of how Dr Krishan saw the Claimant.

109. Finally, I come to the evidence of SB, who is by far the most important of the now-absent witnesses. If the others' absence is understandable, SB's absence requires explanation. After all, she drafted the PSA on which the Krishans later forged the Claimant's signature, leading to the Purle Judgment being set aside. She gave evidence to HHJ Purle QC that he accepted at [18]. However, the reason SB is not giving evidence to me is simple – and the same as the reason why I have anonymised her name, as did Mr Gasztowicz QC in his judgment (calling SB 'Mrs A' and her firm 'X'). At the set aside trial before him in 2020, the Krishans did not call SB because at that stage they were alleging that either she or someone else at her firm had forged the Claimant's signature because they had lost the original copy the Claimant had signed. Mr Gasztowicz QC said this at [86]-[87]:

> "…. It seems to me most unlikely that Mrs A or anyone at X would have [forged the PSA]…It would elevate an act of negligence (…never...alleged) into a serious fraud and attempt to pervert the course of justice (which if discovered would have been added on top of such negligence). Furthermore, if they had lost a copy which had been returned signed and wanted to behave dishonestly… they could simply have continued with the line that they had no copy of it, and said that it must therefore never have been returned, there being no documentary or other independent evidence to the contrary….In contrast, the Defendants had every reason to forge [it]."

I have considered whether I should draw an adverse inference against the Defendants under the *Wiszniewski* principles from the absence of SB. However, Mr Halkerston did not invite me to do so and the reason for SB's absence now is clear and obvious, even if it reflects little credit on the Krishans' attempt to 'throw her under the bus'. Therefore, I draw no adverse inference against them from it, but must still consider the weight I can attach to it under s.4 CEA considering the contents of SBs' evidence. I apply the criteria under s.4(2) CEA: (a) given the Krishan's self-inflicted estrangement with SB, it would not have been practicable for them to call her; (b) her 2009 statement and 2010 evidence were not *contemporaneous* with her key involvement in 2006 but she produced documents and her evidence is more reliable at least insofar as it is consistent with them; (c) there is no multiple hearsay (since what SB reports as having been told is not relevant as evidence of the matter stated, but as evidence of *who told her*, as I explain); (d) SB in her evidence in 2009-2010 had no motive to conceal or misrepresent matters and her reliability was endorsed by HHJ Purle QC and her integrity by Mr Gasztowicz QC in 2020; and (e) I will find her original evidence was edited to some extent and I will bear that in mind; (f) the circumstances of the admission of SB's evidence now deny me seeing her cross-examined especially on what is now known to be the forged PSA, reducing the weight of her evidence, as Bryan J said in *Kekhman* at [86]. However, unlike there, I have a detailed transcript of SB's cross-examination on other topics in 2010 and know her evidence was accepted, so my disadvantage in not seeing her cross-examined myself on those topics is much less, especially as 'demeanour' is not determinative. So I attach significant weight to SB's evidence so far as it is supported by her contemporary notes, although given her 'editing' she would

have had other questions to answer. Moreover, SB's evidence cuts both ways and so is broadly fair. On one hand it undermines the Claimant's account that she was unaware of the terms of the transfers. On the other, as I will show, it also significantly undermines the Krishans' evidence on what the terms actually were.

110. SB's evidence in brief was that she was instructed by the Krishans to incorporate Gracefield in November 2005 on the basis of the Claimant having a 50% shareholding, with the Krishans 25% each. SB confirmed her initial meeting about Gracefield was with Dr Krishan at his home (when discussing other business) and he mentioned the Properties owned by the Claimant and the plan to transfer them to the company, develop and sell them and split the proceeds. SB first met the Claimant with the Krishans at their home on 20th January 2006 and SB took a contemporary note of that (which I will find to be accurate) where the market value of £300,000 for the Properties was confirmed as was deferred payment to the Claimant of it and a 50/50 profit share. Before a second meeting to discuss the tax efficiency of the different options, SB prepared another note summarised in her statement at [16]:

> "On 20th February 2006, I had a further meeting with the Krishans and the Claimant. In advance of that meeting, I made a note of the consequences of the properties being transferred at either £100,000 (being their value in the event that they were subject to a Compulsory Purchase Order) or £300,000 (being the estimated market value. Both of these values had been advised to me by Dr Krishan and, I believe, were what had been agreed by all concerned as representing fair and realistic values." (my underline)

SB was cross-examined on the second note and meeting and said that the decision between the options was not in the end 'based on tax but on the financing of the development'; and they went with the option 'with regards to using the value that was attributed to the compulsory purchase order of the properties' (i.e. £100,000) and she was advised of that figure 'by the directors', she could not remember who (although in her statement she said it was Dr Krishan). SB answered she was not aware that in law the CPO value was the market value and said 'I was advised that if the properties were subject to [CPO] they would be worth significantly less'. SB accepted her (in law incorrect) understanding led to the Claimant's initial deferred payment being £100,000 in Gracefield's director's loan account to be paid along with another £200,000 and 50% of the net proceeds when the Properties were sold. SB's statement went on to discuss that she had confirmed to Mr Whiston on 15th March 2006 that: the Properties would be transferred to Gracefield for a total of £100,000 'reflecting the value placed on them by the Council with regard to potential [CPO]s'. SB said she wrote to the Claimant on the same date to confirm the payment for the Properties was £100,000 but she was also preparing a profit share agreement for further sums when the Properties were sold as 'we are transferring the properties at the value of the [CPO] rather than…development value', which did not contain a copy of the PSA. SB then detailed how she prepared that and its terms (as I noted at the start, it did not mention the Krishans' 50% share). SB also said she did not discuss the PSA with the Claimant or post it to her – she passed a copy for her to Dr Krishan and the copy with the Claimant's (later proven to be forged) signature was misfiled and she had no idea where the original was. However, whilst SB's statement and evidence said she received a copy from the Claimant, that was 'edited' indeed inaccurate, as in a later-disclosed version, she actually said Mrs Krishan handed it to her in 2009 and that the Krishans signed the PSA after the event. Finally, SB's statement discussed the transfer of shares from the

Claimant to the Krishans (as Mr Rodgers discussed) and her eventual removal as a director of Gracefield; and she prepared its accounts. She said the £225k charge was Dr Krishan's idea.

Non-Party Live Witnesses

111. I can now deal with these witnesses in the usual way by briefly summarising my impression of their evidence. Following on from SB, for the Defendant, there was Sally Smith, Richard Johnson (who I have mentioned already), Dennis Webb, Suzanne Davies and Dr Sudhir Handa. For the Claimant, there was Peter Matthews (whom I have again mentioned already) and lastly, a 'semi-party' witness - the Claimant's son Sukhjinder ('Bobby') Singh Takhar.

112. Ms Smith was not called to give live evidence as her statement was agreed and so I accept her evidence is entirely reliable. In fairness, it also adds relatively little – Ms Smith was an auction manager responsible for the marketing of the Properties in 2008 and their eventual auction – the Co-Op and Shops in 2011 and Cinema in 2014. Whilst she gives useful evidence about the poor condition of the Properties, she cannot remember any details of the auction, even the sale prices.

113. Mr Johnson's evidence I have already indicated I found broadly reliable. He struggled at times with his memory (amusingly, even his own address as he had not long moved), especially how many times he had actually met the Claimant. Mr Johnson also gave evidence to HHJ Purle QC in 2010, but that did not necessary give him an advantage with memory. As if to illustrate the problems with its fallibility that I have discussed, in his 2009 statement he recalled meeting the Claimant twice: once in February 2006 after having been instructed by and met Dr Krishan in December 2005; and again, at the opening of Dr Krishan's new surgery in Wolverhampton in September 2007. Yet in his 2022 statement for this trial, Mr Johnson only recalled meeting the Claimant at the 2010 trial itself. Since the Claimant accepts meeting him in 2007, I accept they did then. However, I also find he may be muddled about the February 2006 meeting – and indeed a telephone call which he mentioned in neither statement. However, Mr Johnson clearly did work diligently on the project after transfer of the Properties in April 2006, liaising with the Council and its agents, as well as various other professionals (such as 'JS' whose invoice was amended). Mr Johnson confirmed the poor state of the Properties but arranged no repairs as applications for planning permission were pending. Mr Johnson was also taken through all the expenditure in Gracefield's 'work in progress logs' (except Dr Krishan's £225,000 'management charge') up to June 2010 totalling £132,084.83 and confirmed it had all had been spent, which is now agreed to have happened (if not that it should be credited as I said above).

114. Mrs Davies is the widow of John Davies who sadly died in March 2010, just before the first trial. As Dr Krishan was his doctor, it is understandable that she wishes to assist him. Mr Davies was in the business of office refurbishment and introduced him to Mr Johnson in 2006. He certainly made a note in November 2005 which refers to the Krishans and the Claimant and discusses the context and the agreement. I accept the note suggests the Claimant was present. Mrs Davies was not there – the person referred to was Mr Davies' secretary Joan. I do not accept that Mrs Davies would remember her husband telling her at the time in 2005 about such an inconsequential meeting where all he did was recommend an architect. However, I do accept he would have told her later about the dispute after it broke out in 2008, especially as she had by then met the

Claimant in 2007. However, given the forgery, I can attach no weight to Mrs Davies' multiple hearsay evidence about what another now-deceased witness, Linda Hunt, told her.

115. Indeed, this same Linda Hunt popped up in the evidence of Mr Webb, another patient of Dr Krishan, and Dr Handa, a fellow GP, also both evidently keen to support Dr Krishan. Mr Webb's other evidence was again hearsay conversations with Mr Davies who was negative about the Properties, but I find again this is most likely to have been after the dispute erupted in 2008. However, Mr Webb briefly mentioned Linda Hunt had emphasised the Claimant's clear animosity towards Dr Krishan to him. Like Mrs Davies, Dr Handa said he remembered Linda Hunt reporting that the Claimant had told her she was going to photocopy a signature onto a document rather than physically signing it because she did not want any comeback from HMRC or DWP (the Claimant was on benefits and later investigated about the Properties, but no action taken). This anecdote seems to have been deployed by the Krishans through Dr Handa to insinuate the Claimant herself forged her signature, which actually Dr Krishan openly alleged in evidence. Given the Gasztowicz Judgment, that is untenable. Overall, my impression of the mysterious Linda Hunt is that she was very close to the Krishans, but disliked the Claimant and was willing to make wild accusations about her to all and sundry, so I totally ignore what she said. Speaking of wild accusations, Dr Handa also accused the Claimant of trying to ruin Dr Krishan with complaints including a 2011 outcome letter saying she wrote vindictive letters. However, that was based on an interview with Dr Krishan who had a motive for implicating her, not the Claimant herself. One anonymous letter, which is the bundle, was in my judgement clearly written by the Claimant's estranged husband Parminder Singh Takhar (informally known as 'Bill'), who has mental health issues and is clearly also angry with the Krishans. Whilst I am no expert, the handwriting and content of the letter is similar to a letter signed and named Parminder Takhar which is also strongly critical of the Krishans. Therefore, the evidence of Mr Webb and Dr Handa did not really assist me at all.

116. Turning to the Claimant's witnesses, I found Mr Matthews to be an impressive witness. He runs a number of companies and is clearly an expert on properties. He was introduced to the Claimant by her friend Mrs Kaur in March 2008 after the Claimant was upset that the Properties had been marketed and she had objected to that to Mrs Krishan (which was the start of the deterioration of their relationship). He was concerned from his initial discussion with the Claimant, who mentioned that in 2005 she had been worried about the Properties being compulsory purchased and her getting nothing. Mr Matthews knew that could not happen. He also felt the Claimant lacked understanding in other practical ways. He also saw the outside of the Properties and felt mortgages could be raised on them (as the Krishans had done with the debenture on Gracefield). Yet even the best witnesses after 15 years have memory issues – I find Mr Matthews mixed-up in his evidence which 'JS Invoice' he saw first. He said in 2009 and I accept it was the forged one first, as makes more sense. In June 2008, he met the Krishans and the Claimant, where he agreed sale was reasonable plan (although not what the Claimant wanted to do), but the Krishans gave him the (lower) JS Invoice and 'Options for Gracefield' and gently challenged them, which is when he said 'the mood changed' and so he ended the meeting. He could see those documents were misleading (for similar reasons as I have already discussed about them) and told the Claimant that he suspected fraud by the Krishans. It was his involvement and strong suspicion of foul play which led to the Claimant covertly recording conversations with Mrs Krishan in May before and then after that June meeting.

117. However, before I turn to those recordings, the last 'non-party' witness is Bobby Takhar. Yet in reality, he is a party in all but name. In the courtroom, the person sat behind Mr Halkerston who seemed to be giving instructions was not the Claimant but Bobby Takhar. He was also apparently the person who first spotted the PSA had been forged and pressed for the Purle Judgment to be set aside. Bobby (as I shall call him) was evidently emotional when discussing the Properties, especially the Co-Op. It was a well-known property in the area which his father Parminder ('Bill') had bought at a time when he was in partnership with his now-estranged brother Inderjit (known informally as 'Ian') as the 'Takhar Trading Company' ('TTC'), having arrived in the UK with nothing and built up the business through hard work over many years. As I shall explain later, Bobby and his mother the Claimant plainly saw the Properties as 'family properties', formally owned by the Claimant but on behalf of Bill but not Ian. Whilst in the Original Proceedings, the Claimant's case was that she held the Properties on trust for TCC, I will find it was much simpler – Bill owned and gifted the Properties to the Claimant who owned them absolutely, as the Krishans originally pleaded. Therefore, it is not really an appropriate case to examine the interface between the ancient English concept of the trust and the complex cultural web of 'interests' in properties regarded as owned communally within more traditional British Asian families (the only analysis I am aware of is Sir William Blackburne's fascinating judgment in *Singh v Singh* [2014] EWHC 1060 (Ch)).

118. Like HHJ Purle QC, I find Bobby Takhar had a rather rose-tinted view of the Properties – at least the Co-Op and the Shops (again which had a lot of history within the family) and in evidence minimised the state of their disrepair evident from all the contemporary evidence. It is a classic example of what Popplewell LJ in his lecture described as an individual's deeply-held beliefs affecting the 'encoding', 'storage' and 'retrieval' of long-term memories. I also agree with HHJ Purle QC that Bobby Takhar's claim to have not 'picked up on' Coventry CC's warning of the possibility of CPOs as a 'last resort' at a meeting on 30th June 2005 is implausible. I will find Bobby wanted to get an informal 'power of attorney' (in essence written authorisation) to deal with the Properties and told his mother what Coventry CC had said and she told the Krishans, who then stepped in – what Bobby called their 'power grab'. I will find this 'not picking up on the CPOs' was his genuine memory – but not of *what happened*, but how he *remembered feeling* when the Krishans emphasised the seriousness of CPOs. Indeed, I will find he gave a clear and consistent account of what *they said*.

119. HHJ Purle QC inferred from Bobby' Takhar's rejection of offers that he was open to selling the Properties. In fairness, when seen in that wider family and cultural context, I find that evidence is more consistent with Bobby's evidence that the family did *not* want to sell the Properties to normal developers, as he was determined to develop them as community assets, especially the Co-Op. Indeed, he said in evidence whilst he accepted the family could not have developed both, the Cinema was an 'outlier' which Bill had bought, whereas the Co-Op was 'the jewel in their crown' and if necessary to develop it, the family would have sold the Cinema, which I will find below at paragraph 569 would have happened by April 2006 absent the Krishans. Overall, except insofar as it is contradicted by independent and reliable contemporary documents (as on the condition of the Properties), I accept the evidence of Bobby Takhar as honest and otherwise fair.

The Parties

120. I turn now finally to the evidence of the Claimant and the Krishans. It is a reflection of the complexity of the fact-finding in this case that it is the first case I recall hearing when no Counsel sought to persuade me their own client was a satisfactory witness. However, before their actual evidence, I should deal with the covert recordings the Claimant took of conversations with Mrs Krishan in May-June 2008. On 19th May, she covertly recorded two conversations. I do not accept the Claimant's suggestion that this was initially inadvertent on her mobile phone. After all, she was already concerned enough about the mounting costs of the project suggested by the 'Balber Takhar Account' to instruct Mr Matthews. I find that she was 'fishing for evidence'. I find that she lied about why she did this as she did not want to be criticised for doing it deliberately, although she freely accepted she recorded the second and third calls deliberately. In the light of that, giving myself a *Lucas* direction, I accept this minor lie does not undermine her other evidence, but I bear it in mind. That being the case, the observations of HHJ Cooke in *Singh* at [8]-[12] quoted in part above are useful:

> "8… The essence of the claimant's claim is as to matters he says were agreed in private between himself and the first defendant, the truth of which would only be known to the two of them and, perhaps, to anyone they had subsequently told about their arrangements. This is not an uncommon situation, and the court is frequently required to decide between the conflicting accounts given long after the fact of private and undocumented arrangements by reference to such documents and contemporary evidence as exists and to the actual behaviour of the parties, which may allow inferences to be drawn about their private agreements and so which of the accounts now presented is more reliable. The decision is ultimately as between the credibility of the oral evidence of the competing parties…..
>
> 11. In this case however I have the direct evidence of the recordings made by the claimant. It is true to say that these must be approached with some caution, as there is always a risk that where one party knows a conversation is being recorded but the other does not the content may be manipulated with a view to drawing the party who is unaware into some statement that can be taken out of context. But there can be great value in what is said in such circumstances, where the parties plainly know the truth of the matters they are discussing and are talking (at least on one side) freely about them.
>
> 12. Such documentation as there is tends to favour the defendant, but that cannot be conclusive where the nature of the documents is said to be to assist in presentation of a false picture to the outside world and not to reflect the arrangements privately agreed. Even on the basis of those documents however, there are serious doubts about the plausibility of the defendants' version of events. As will be seen, the transcripts of the recorded conversations in my view take the matter beyond doubt and show that the account given by the claimant, on the essential matters, is to be preferred."

(HHJ Cooke did not cite *Jones v Warwick University* [2003] 1 WLR 954, where the Court of Appeal held that covert recording even within the other party's home was admissible, but made the defendant pay the costs of the issue. However, in my judgment HHJ Cooke's analysis is entirely consistent with it. In any event, no objection was taken by the Defendants to the covert recordings' admissibility).

121. As HHJ Cooke said in *Singh*, it is always necessary to approach covert recordings with caution, especially on what the recording party said, but sometimes they can yield real

evidential insight and do so here. Mrs Krishan said that in the first two calls on 19th May 2008 (as I will explain, there was a third on 30th June after the Matthews meeting) she was at work, distracted and unwilling to go into detail on the call, so did not hear or correct some of things the Claimant said. However, the transcripts of the two calls on 19th May do not show Mrs Krishan suggesting talking another time when she was not busy. In fact, they had two long calls when she did most of the talking. The Claimant repeated her concerns about the costs (she already had been given the Balber Takhar Account saying £556,000 had been spent of the Krishans' own money). Yet Mrs Krishan made a number of statements consistent with the lies in the Options for Gracefield document and which are clearly phrased as her own opinion, not repeating back to the Claimant what the latter had said in 2005/06 as Mrs Krishan claimed in cross-examination:

121.1 Firstly, Mrs Krishan stressed she was helping the Claimant as family:

> First Call: "[Claimant]…[Y]ou are spending a really excessive amount. [Mrs Krishan] We are yes, we have to, we have got another six months at least of this, all right and then you know we should be able to sort of move forward, all right. These things just take time, you know, but I looked at them yesterday and I thought there is no way my sister [a reference to the Claimant, even though they were cousins] is actually going to get caught up in the hands of Inderjit [the Claimant's brother-in-law, known in the family as 'Ian'] because I know how you feel and I don't want anybody associated with him tackling it because you know what they'll do, they'll sub let it to him or they'll give it further on to him, and I am not having that. I think – I don't know why but it's a question of family honour, almost."
>
> Second Call: "[Mrs Krishan] I don't do anything without you, but I do protect your interests…[T]he only thing that really mattered to me was when you told me you didn't really want to lose it, and I thought well you've got to have something as well. What bothered me was – well I've got so much and you've got nothing really in that sense."

121.2 Secondly, Mrs Krishan said the Properties in 2005/06 were 'worthless':

> First Call: "[Claimant] I'm not sure what choice was there [to do with the Properties] to be quite honest. [Mrs Krishan] Well precisely, because by the time you paid everything back there was nothing there. When you look at the balance sheet, right, if you had paid everything back, everything owing to the Council, everything owing to everybody, right, I mean they were actually worthless on paper. There was nothing there. I know you like to think that, yes, you know, they are there, but they are actually worthless."

121.3 Thirdly, Mrs Krishan effectively said they <u>had</u> spent £500,000:

> First Call: "[Claimant] Suddenly you see you have spent £500,000, I mean that is a lot of money, that is a huge amount. [Mrs Krishan] I know it is. [Claimant] That is a humungous amount of money. [Mrs Krishan] Yes. But it was either that and making them viable or letting them go under completely."

121.4 Fourthly, Mrs Krishan told Claimant she risked being made bankrupt:

> Second Call: "[Claimant] I am just concerned with all the money that you are…you know…[Mrs Krishan] Well yes you have…to do things, you

> know to build up anything you have to do that…I mean how else could we have done it, right. The only other alternative open to us was that they go, and that they take them off [a reference from before to the Council] and you know, they pay some of the debts and they [sic – presumably she meant 'you'] are made bankrupt."

121.5 Fifthly, that the Krishans had no benefit themselves from the Properties:

> Second Call "[Claimant referring to estranged husband 'Bill' working hard] [Mrs Krishan] "But hang on a minute….Why do you think we have fought so hard for you not to have lost them and to get them to this stage where they are viable. It's not been any benefit to us…I have no vested interest in them, but I know you have because that's your life, all right and you think clearly some time why. I mean they were at a stage where you would have lost them, whether you know, how would you then look up to Bill, your children, everybody, right."

122. A fortnight after these calls, there was the meeting on 9th June 2008 between the Claimant, her son and Mr Matthews on one side and the Krishans on the other that I mentioned, after which he told the Claimant he suspected the Krishans of fraud. The Claimant's third covert recording weeks later on 30th June 2008 needs to be seen in that context. It also needs to be seen in the light of a letter on 25th June 2008 from Coventry CC giving formal notice under s.215 Town and Country Planning Act 1990 (a purely planning not compulsory purchase power) the Claimant had to either demolish or refurbish the Cinema within 28 days. Indeed, the tone of the call was different, Mrs Krishan said if the Claimant was not happy with what they had done, she could deal with them and also that:

> [Mrs Krishan] "I mean we did say it was going to be 50/50 on everything we did." [The Claimant] "Yes" [Mrs Krishan] Right, so whatever the values are now, you know I mean is you are willing to sort of pay us off then we are quite happy with that."

The Defendants point to the Claimant's acknowledgement of 50/50, which is important. Yet otherwise, Mrs Krishan repeated her themes from the earlier calls, talking about the letter from Coventry CC about the Cinema sent to the Claimant:

> "…[A]lthough we are handling it the property is yours."

Mrs Krishan linked back the Council's letter about planning to the (different) question of Compulsory Purchase Orders ('CPO's):

> "[Claimant] I have been very appreciative, I have been very, very appreciative, in fact you don't know how appreciative I am, okay. I don't think you realise that. [Mrs Krishan] Really, when the first lot of CPO orders came, maybe, you know, it would have been better had we not done anything and they had just been taken off, and it would have left you absolutely nothing." [At the end, just as the Claimant was saying goodbye, Mrs Krishan added the following]: "[W]e are still sort of going back to the stage where we are saddled with CPOs and everything else again."

123. Looking at these calls in the round, whilst the Claimant clearly was hoping to obtain evidence from Mrs Krishan's own mouth, this plainly succeeded. Mrs Krishan was not aware she was being recorded and so had her guard down, rather like the internal

emails Males LJ discussed in *Simetra*. She clearly wanted to take the opportunity to cajole and in the third call outright pressure the Claimant into agreeing with their plans for the Properties by 'reminding' her - not of what *the Claimant* had said in 2005/06 but what *Mrs Krishan* presented as 'home truths' about the situation back then (and by 30th June 2008, 'again'). The recordings give strong corroboration to the Claimant's evidence that Mrs Krishan said similar things in 2005/06. I will refer to this as Mrs Krishan's 'rescue narrative' to the Claimant – this is my term, not the Claimant's nor Counsel's and I simply use it as shorthand to avoid confusion in a very long judgment to refer to what the Claimant's solicitors in correspondence called the Krishans' 'campaign'. The calls also show (again my terms as shorthand) Mrs Krishan using both 'carrot' (e.g. *'I don't do anything without you, but I do protect your interests'*) and 'stick' (e.g. *'When the first lot of CPO orders came, maybe it would have been better had we not done anything and they had just been taken off, and…left you absolutely nothing'*). It is arguable whether those covert recordings are 'hearsay', they are tendered to show not the truth of the matter stated, but what Mrs Krishan was stating, said to be untrue. Yet if 'hearsay', but for the purposes of s.4 CEA 1995, I have already explained why I give them considerable weight, not least as they were first-hand hearsay from the period, if not contemporaneous with 2005/06; Mrs Krishan had no motive to conceal (just the opposite), Mrs Krishan's answers were freely her own and there is nothing preventing their evaluation.

124. Yet I must now turn to my impression of the Claimant's own evidence. As Mr Graham said on behalf of the Defendants, she is clearly an intelligent and articulate lady. She has a degree in English Literature and Cultural Studies from Warwick University, worked in the family business, was a trainee teacher at a school and then taught herself yoga and now teaches it. Yet her evidence planned to last a day (always optimistic) actually lasted 2½ days, because for the first 1½ days, she was an incredibly difficult witness, manifesting many of the poor habits criticised in *Painter*. She was argumentative, avoided answering questions, rambled long discursive answers with unimportant information and contradicted herself. She made speeches and snide or sarcastic remarks. She turned herself away melodramatically. Rather than politely disagreeing with Mr Graham's questions, she would 'perform' an irritatingly histrionic 'Please !'. At certain points, she gave absurd answers, like saying she thought 'drawings' in the context of a company were little pictures. Mr Graham's patience and determination was commendable. Time and again, I had to tell her to calm down and simply answer the question. He very fairly described my interventions as 'increasingly firm'.

125. However, on the third morning, after having been delayed on the motorway in the cold, a very different Claimant turned up for the last day of her evidence – and we made ten times the progress as we had the first 1½ days. She was quiet, thoughtful and aside from a couple of flashes of (more understandable) emotion, she mostly simply answered the questions calmly and clearly. It was as if a completely different witness was giving evidence. When I complimented the Claimant on the change in her demeanour (a word I use deliberately as I will explain), she said that she was now 'all out of emotion'. That, it seems to me, is the key to understanding both her original antics then her total *volte-face*.

126. I remind myself that I should not assess a witness based solely on demeanour, but it can be relevant, with allowances made for the pressures, as said in *Natwest*. While I was not taken to the transcripts of the Claimant's evidence in 2010 and 2020, I have read them.

Under long and detailed cross-examination then, at times the Claimant rambled and was emotional, but that was distress, not anger. For example, before Mr Gasztowicz QC, the Claimant was cross-examined at length by the Krishans' then Counsel about benefit fraud, said to go to her credit. She rambled about it, but the upshot was that the DWP investigated in 2009-10 but took no action. Despite the Krishans' insinuation of fraud by her in a trial about fraud by them, there was no explosion of emotion and histrionics. The Claimant then (and in 2010) was like she was with myself on the third day: reasonable.

127. In fact, it was telling that the Claimant was not taken in cross-examination before me, even on the last day when being reasonable, to her previous statements or transcripts of evidence at the 2010 and 2020 trials to reveal any inconsistencies, as Mr Halkerston later did with the Krishans. I was acutely conscious Mr Graham and Mr Perring had precious little time to prepare for trial, which is one reason that I read her transcripts myself. However, such was their professionalism, I am sure they will have read the Claimant's long previous statements, as I also did. Whilst I may have missed a few needles in the haystacks (and will make some references to the previous statements), there were few inconsistencies in the *content* of what she said, even if her *demeanour* in evidence was very different.

128. So, what am I to make of the Claimant's 'Jekyll and Hyde' evidence to me ? In my judgement, her broad consistency in *content* over the three trials and her latterly calm evidence – and even concessions - suggests that she genuinely believed what she was telling me. I find that she was an essentially *honest* witness. Especially given that abrupt change, it would be simplistic to attribute the Claimant's histrionics for the first 1½ days as her consciously 'lying'. That would be a reversion to simplistic reliance on 'demeanour' Lord Bingham deprecated. However, her demeanour does have an impact on her *reliability* as a witness. Ultimately, the Claimant is plainly a very *emotional* person. I remind myself of Lord Pearce's wise warning in *Onassis* that 'emotional witnesses who feel morally in the right easily and unconsciously conjure up legal rights that do not exist'. As Leggatt J said in *Gestmin* and Popplewell LJ elaborated in his lecture, the 'storage' and 'retrieval' of memory can be distorted by emotions, beliefs and a 'litigation mindset'. At paragraph 70, I suggested that would be a particular risk in a retrial after a finding of fraud. After 15 years of battling the Krishans over the Properties, the Claimant's litigation mindset is more entrenched than most. She is particularly indignant that she sees herself as having trusted the Krishans as family and them as having betrayed her trust, as she implied towards the end of her evidence. Moreover, her anger has been particularly stoked by the fraud in 2009-10 which lost her chance to recover her Properties. Her evident anger in the first 1½ days led her to do something she did not do in 2010 or 2020 – simply dismiss a question or evidence simply because it came from the Krishans – like meetings with or contemporary notes of SB or Mr Davies, even though I will find they partly *support* her case. In any event, insofar as the Claimant's evidence is contradicted by contemporary documentation from professionals neither prepared by or derived from the Krishans, I will prefer that documentary evidence.

129. However, insofar as the Claimant's evidence is only contradicted by the Krishans' evidence, in particular their discussions about the Properties in 2005/06, I prefer at least the core (if not all details) of the Claimant's recollection, for five reasons:

129.1 Firstly, I find it is the Claimant's emotional personality that is key to what she genuinely remembers. She was not interested in any intellectual challenge or financial gain in developing the Properties. As she said in evidence she is not a 'numbers person' and preferred for Bill, Bobby or the Krishans to manage the Properties than herself. I find what is solidly 'encoded' in, 'stored' and 'retrieved' from the Claimant's memory is not facts and figures but *emotions*. This is why she rambled so much – at times into reverie – each time she gave evidence. Over the years with repeated re-telling, whilst the Claimant soon forgot dry meetings with professionals like SB and Mr Davies, the memories that have stayed with her clearly are the strong emotions she experienced: most vividly the shock of discovering the auction in March 2008. However, I also accept the Claimant can also accurately recall *her own emotions* in 2005/06. As I explain in my findings of fact, at that time she was emotionally vulnerable and very worried about what to do with the Properties which were emotionally important to her and her family – especially after Bobby told her there was talk of CPOs in June 2005. She reached out to Mrs Krishan for help and reacted to their intervention with heightened relief and gratitude. Essentially, she felt they were helping her 'as an act of charity' - her perception then, even if she angrily rejects the phrase now. She believed they were protecting her from financial ruin and saving her family's properties. This is consistent with her implicitly trusting the Krishans and then deferring entirely to them, even to the point of simply signing letters they put in front of her. Yet, crucially I also accept the Claimant remembers that 'rescue narrative' broadly clearly as she also clearly recalls being 'fed' it repeatedly by Mrs Krishan.

129.2 Secondly, whilst the Claimant's anger led her to reject reliable evidence (even if it partly supported her case), her clear and consistent recollection under cross-examination time and again in 2010, 2020 and 2023 that she was repeatedly fed 'the rescue narrative' by Mrs Krishan is itself notable. As Lord Bingham said in '*the Judge as Juror*', a key tool in assessing the reliability of oral evidence is *consistency* – (i) internally in a witness' current evidence (which on discussions with the Krishans the Claimant's was, as just explained); (ii) with their evidence on previous occasions (again broadly consistent, as I said above); and (iii) with other evidence (why I prefer professionals' notes to the Claimant's recollection, but hers on the discussions with the Krishans where she is to an extent corroborated, as I will explain). Following *Arroyo* and *Smith*, the fact I have rejected her evidence if contradicted by contemporary documents, does not mean I must reject her evidence if not contradicted by them, still less supported. Nor does the Claimant's 'demeanour' for the first 1½ days of cross-examination lead me to reject all her evidence, especially as I have considered and accepted the reason for that demeanour and because it changed so markedly.

129.3 Thirdly, as I have just said, I find the Claimant's account of the discussions with the Krishans is corroborated by some contemporary documents – especially her recollection that the Krishans repeatedly said the Properties were likely to be subject to CPOs and that if so, they would be 'worthless'. That is consistent with what the Krishans told her in 2008 in the 'Options for Gracefield' document. It is also consistent with SB's recollection that she was asked to value the Properties not at 'market value' of £300,000, but at £100,000 (much closer to the Claimant's debt and so more 'worthless') as if subject to CPOs, that they were plainly not. I

will find SB was told by Dr Krishan as she said in her statement even if her oral evidence was vague.

129.4 Fourthly, as I discussed above, the covert recordings in 2008 strongly corroborate the Claimant's account of Mrs Krishan's 'rescue narrative' (as I call it) in 2005/06, not only on the alleged 'CPOs likely' and 'Properties worthless' misrepresentations, but on the Claimant's recollection of being 'fed the rescue narrative' (as I put it) more generally by Mrs Krishan. In the covert recordings, rather than repeating back what *the Claimant had said* in 2005/06, Mrs Krishan gave the impression that she was repeating what *she had told the Claimant* then. Certainly, in the covert recordings, it is Mrs Krishan, not the Claimant, who is repeating the various parts of the 'rescue narrative': that she was helping the Claimant as family, not for their own personal benefit; that the Properties in 2005/06 were 'worthless'; and if the Properties were subject to CPOs, the Claimant would have been 'bankrupt'. I have quoted the material passages just above and need not repeat them. Of course, it is true Mrs Krishan does not explicitly say that she told the Claimant the same thing in 2005/06, but her comment is entirely consistent with that. It is also true that I found the Claimant did not tell me the truth in evidence that her decision to record was deliberate not accident, but giving myself a *Lucas* warning, it is clear that was a lie out of concern that she may be criticised for doing something wrong in covertly recording, rather than a lie undermining the rest of her evidence, although I do bear it in mind.

129.5 Finally, as I said, one party's dishonesty does not itself make the other party honest. But I prefer the Claimant's rambling, emotional but broadly reliable memory of undocumented conversations with the Krishans to their accounts - smooth and polished, but I am driven to conclude, seriously unreliable.

130. Before I turn to my reasons for that conclusion, it is important to distinguish observations on a witness' reliability or even honesty on particular *parts* of their evidence from an inference of dishonesty on *a cause of action*, which must be on *all* the evidence – see *Three Rivers* and *Jafari-Fine.* Indeed, I remind myself that even if a witness lies about one aspect of their evidence, that does not mean they have lied about anything else, especially what they are alleged to have lied about at the time which forms the core of the cause of action. Indeed, as I have already said, I found the Claimant lied - in part - about how she came to make the covert recordings in 2008, but I found there was a clear explanation for that minor lie which does not undermine the rest of her evidence, although I bear it in mind. Moreover, just like the Claimant, the Krishans were giving evidence about events up to 18 years ago and it is only fair to make allowances for memory fallibility and 'forgetting' for them too. In fairness, much of their evidence as to timelines, meetings and work done on the Properties is supported by contemporary documents prepared by professionals I consider to be reliable. Nevertheless, I must focus on the reliability of their evidence as to their undocumented discussions with the Claimant from July 2005 to April 2006 about the transfer of the Properties; and on their conduct during the dispute and litigation in 2008-10.

131. It is particularly important that I remind myself the finding that the Krishans had lied and forged the Claimant's signature in the Gasztowicz Judgment does not mean they are not being honest in evidence to me. As said in so many contexts since *Lucas* 40 years ago, witnesses can often lie and for different reasons. Lies in themselves do not

necessarily mean the entirety of the evidence of a witness should be rejected. A witness may lie in a stupid attempt to bolster a case, but the actual case nevertheless remains good irrespective of the lie. A witness may lie because the case is a lie. Likewise, the fact that a witness has been dishonest about part of their evidence does not mean that the whole of their evidence is dishonest – and that a witness' evidence may be wrong in the absence of dishonesty through distorted recollection – as indeed is true of the Claimant as I have discussed.

132. But whilst a '*Lucas* Direction' reminds judges that witnesses may have lied in the past to bolster a true account, as Males LJ said in *Arkangelsky* at [120] - that:

> "Once other findings of dishonesty have been made against a party, or he is shown to have given dishonest evidence, the inherent improbability of his having acted dishonestly in the particular respect alleged may be much diminished and will need to be reassessed."

In this case, the Krishans have been found to have committed a serious fraud, as Lord Briggs said of the (then-alleged) forgery in the Supreme Court at [89]:

> "If proven it was a very serious, pre-meditated, carefully planned and executed fraud which was instrumental in the defeat of Mrs Takhar's claim, and plainly aimed from start to finish at deceiving the court about the central issue in the case."

Indeed, after Mr Gasztowicz QC found the forgery proved, when ordering them to pay indemnity costs, he said in his costs judgment at [9]:

> "[The Krishans] not only forged a key document in support of their case with a view to deceiving the court in the original action (which worked), but also went on oath in the present action to lie about what they had done and to seek to deflect blame for the forgery onto third party professionals, who were not before the court."

Of course, the Krishans were not obliged to accept the finding of forgery, but as Mr Perring put it, they are 'stuck with it'. (As I have said, in my judgment, it gives rise to an issue estoppel on the conspiracy claim). Again, they did not have to give any explanation for it, but as they maintained their innocence in the face of the finding and indeed the evidence on which it was based, they can hardly be surprised if they are accused of being untruthful about other things as well. The Krishans did not say (as they could easily have done were their case true), that they forged the Claimant's signature out of frustration to bolster their true case knowing the Claimant had agreed to the PSA and was now herself lying in denying doing so. Instead, they defiantly asserted their innocence and even tried to minimise Mr Gasztowicz QC's finding (that they did not appeal) by suggesting he only made the finding 'on the balance of probabilities'. That was his job and it is also my job to make findings on the balance of probabilities. His finding of forgery plainly reduces the inherent improbability of other dishonesty by the Krishans. This includes reducing the 'inherent improbability' of undue influence, which Newey LJ recently discussed at [32] of *Rea v Rea* [2024] EWCA Civ 169.

133. Especially in the light of the suggestion that Mr Halkerston did not 'put his case' on conspiracy as I discuss in more detail below, it may be helpful to discuss the evidence in cross-examination of the Krishans more generally. The trial was planned to last 8 days. In the end, because of the Claimant's behaviour in evidence, we finished her case

two days behind schedule. Whilst I initially wanted to see whether we could recover the timetable, I was persuaded by Counsel that we should go part-heard for two days of submissions. However, we all agreed that all the evidence had to be finished within the remaining days of the original trial. Therefore, I limited Mr Halkerston's cross-examination, even though he had more witnesses to cross-examine (and indeed two main witnesses, not one). So, we all agreed that he would divide up his cross-examination between Dr Krishan and Mrs Krishan, rather than having to put every topic to them both. As Lord Hodge said in *TUI*, at [70(vii)] such a 'guillotine' on cross-examination is relevant to the 'flexibility' of the rule that a party is required to challenge in cross-examination every material part of their evidence which he will submit the Court should reject; and indeed, what Newey LJ in *Rea* at [52] called 'the (overlapping) obligation on a party to put his case to a witness with relevant knowledge'.

134. In my view, Mr Halkerston fairly but clearly exposed Mrs Krishans's evidence across the whole scope of the case to be seriously unreliable. Working backwards:

134.1 As I noted above when dealing with issue estoppel, I was not expecting to hear detailed cross-examination on the forgery of the PSA, because the Gasztowicz Judgement had already determined that the Krishans had forged the Claimant's signature and deployed it in the Original Proceedings. However, Mrs Krishan's 2022 statement gave a new account not given to either HHJ Purle QC or Mr Gasztowicz QC about 2008 emails disclosed by her then-solicitors in 2022. She claimed in October 2008 she found a copy of the PSA she believed was signed by the Claimant and gave it to SB around that time; but also that the Krishans re-signed a new copy of the PSA they had originally signed in 2006 which SB's firm had earlier misplaced. However, Mrs Krishan said she had forgotten to mention any of this, even at the trial in 2020 about the forgery of the PSA and had left disclosure of her emails to her solicitors then. Whilst as I have explained, I felt this issue was foreclosed by issue estoppel, which would have meant that Mr Halkerston actually did not have to cross-examine about it, he actively chose to do so and to put the Claimant's case. Indeed, he put in detail to Mrs Krishan the emails and the findings in the Gasztowicz Judgment. It is true that he did not say the word 'conspiracy' to her, but she had plenty of opportunity in cross-examination to answer his clear charge that she and Dr Krishan had got together to forge the Claimant's signature on the PSA to use it to win the Original Proceedings and had deliberately not disclosed the emails revealing them doing so until her then-solicitors properly disclosed them for her in 2022. As I will detail later in my findings of fact, I reject the evidence of Mrs Krishan on this issue. If her story had been true, one would have expected it to have been front and centre of her evidence in 2020 at least, not prompted in 2022 by emails which she had 'forgotten about' despite being highly material to the set-aside trial. Moreover, it is telling that the 'discovery' of the PSA in the email she did not disclose to him was on 25th October 2008 – the day after the Claimant issued her claim. I will find that was the date of their forgery.

134.2 Mr Halkerston also put to Mrs Krishan that the documents the Krishans produced earlier in 2008 – especially the 'Balber Takhar Account' and 'Options for Gracefield' documents – were misleading, as HHJ Purle QC and Mr Gasztowicz QC had already found, with which I agree for the reasons detailed at paragraph 100 above. She suggested the Balber Takhar Account was typed badly by her

husband, but the revised version was also put to her which had not changed that. She suggested that 'Options for Gracefield' in saying the Claimant would have got 'nothing whatsoever in return' from CPOs was what she had told them, not their lie. Yet it was plainly wrong but tallies with what she said in the 2008 covert recordings.

134.3 Mr Halkerston also put to Mrs Krishan various passages from those covert recordings, which I have summarised at paragraphs 121-122 above. He put to her they showed she had told the Claimant back in 2005/06 there had been CPOs, she was at risk of bankruptcy and losing properties or that they were worthless. She denied that and said all that was what the Claimant had told them at that time. However, Mrs Krishan simply did not say that in any of those covert recordings, as she would surely have done in 2008 if that happened in 2005-06 ('But you told me…' etc was absent). Instead, as I have said, it was Mrs Krishan doing the talking, emphasising her 'rescue narrative'. As I have said, those recordings are more consistent with the Claimant's account that back in 2005/06, it was Mrs Krishan saying them.

134.4 Whilst Mr Halkerston indicated (without objection) that he would direct his cross-examination on the actual development of the Properties from 2006-2008 on Dr Krishan who was dealing with it, he did put key moments to her. In particular, on the abortive auction of the Co-Op in March/April 2008 he pointed out to her that her 2022 evidence that the Claimant had suggested the agent Loveitts contradicted her 2009 statement which said no such thing which she did not adequately explain. Similarly, Mr Halkerston also put to Mrs Krishan the inconsistency between her 2022 and 2009 statements on whose idea it had been in Summer 2006 for the Claimant to transfer one share in Gracefield to her so the Krishans had 51% to avoid deadlock – in 2009 Mrs Krishan said it was her idea but in 2022 the Claimant's idea. Again, Mrs Krishan did not explain this (or a later 49% share transfer).

134.5 However, of course perhaps the longest topic in Mr Halkerston's cross-examination of Mrs Krishan was what their discussions had been in 2005/06 leading up to the transfers. Because of its importance to the undue influence and resulting trust claims, I will deal with the evidence on this below in a separate section of my findings of fact. However, Mr Halkerston took Mrs Krishan in detail through the documents, to her previous statements and transcripts of her evidence. Yet again I will find Mrs Krishan's evidence as between 2009/2010 and 2022/2023 was internally contradictory; and externally contradictory not only with what she said herself in those 2008 covert recordings, but also with some of the same contemporary documents in 2005-06 which the Krishans relied on to challenge the Claimant's evidence about this whole period. Indeed, on that point, those documents clearly show it took four months from the Claimant authorising Dr Krishan on 4th July 2005 to his instruction of professionals in November. I will find that does not fit Mrs Krishan's account that the Claimant was desperate for help. It is more consistent with the latter's that Mrs Krishan persuaded her.

135. Turning to Dr Krishan, again I am satisfied Mr Halkerston fairly but clearly exposed his evidence across the whole case to be seriously unreliable:

135.1 Mr Halkerston again cross-examined Dr Krishan in detail about the forging of the PSA, going through the contemporary documents methodically and clearly

putting his case that they showed the Krishans were both involved in the forgery and how it was distributed to professionals and in the litigation, including March 2009 emails showing Dr Krishan insisting it be referred to in their Defence. Albeit again Mr Halkerston did not actually use the word 'conspiracy', that was obvious. Dr Krishan adopted the same brand-new account as Mrs Krishan about her finding a signed copy of the PSA and them signing two copies – one in relation to the forgery of the PSA and her new story about finding another copy. Indeed, Dr Krishan went even further in cross-examination, at one point in denying that they forged the PSA, he even briefly suggested the Claimant may have done so herself. It is one thing for a judge to remind themselves that a witness' dishonesty on a previous occasion does not mean they are lying now. It is quite another thing if that witness makes wild accusations which fly in the face of the previous finding of dishonesty by them. Indeed, I note the Krishans have made other wild accusations about the Claimant by proxy by calling Dr Handa, Mr Webb and Mrs Davies to talk about the mysterious Linda Hunt.

135.2 In the light of Mrs Krishan's evidence that Dr Krishan typed the 'Balber Takhar Account', prepared 'Options for Gracefield' and dealt with costs of the development such as the JS Invoice, Mr Halkerston took Dr Krishan through them and squarely put to him they were deliberately misleading, as HHJ Purle QC and Mr Gasztowicz QC had concluded. Again, Dr Krishan went even further, admitting the JS Invoice had been forged but accusing the Claimant of doing it: not put to her. On 'Options for Gracefield' saying with a CPO she 'would have received nothing whatsoever in return', he actually accepted he knew that a CPO entitles the owner to full market value (less any debts to the council), but that 'had not come up' with the Claimant. Yet in 2010, he admitted he told her in 2005/06 she could lose the Properties through CPOs, but denied knowing how they worked, so he has completely changed his story. Moreover, when challenged about his evidence that it was the Claimant's idea to transfer the Properties to a company, Dr Krishan said it was due to her benefits, Council Tax arrears and a requirement to demolish the Cinema. When pointed out he had not mentioned CPOs, he said 'it had not occurred to him' to mention it. I will find she did not mention them, he did and indeed the transfer to Gracefield was his idea. As I said, I will come back to the key four month period in July-November 2005 later.

135.3 Mr Halkerston also put to Dr Krishan that SB in her 2009 statement (if not her more vague evidence) said he had told her of the market value of the Properties of £300,000 - or £100,000 if subject to a CPO (as she noted for the February 2006 meeting). However, Dr Krishan claimed his (then) witness SB was wrong and indeed that the Claimant had come up with that difference in value, which he accepted was incorrect. However, Dr Krishan made much in 2005 of his own business experience. His suggestion that he had absolutely no idea of the value of the Properties and just took the Claimant's word and outdated valuations beggars belief. I will find later he (rightly) believed them to be worth much more than £300,000.

135.4 This is reinforced by a related point about 'business acumen'. As I mentioned earlier when discussing Mr Rodgers' hearsay evidence, he recalled Dr Krishan telling him when arranging Gracefield's banking that the Claimant had 'no business acumen', yet when Mr Halkerston put that to Dr Krishan, he denied it and asserted she did have business acumen. He could offer no good reason why Mr Rodgers would have got that wrong. Moreover, Mr Halkerston put to Dr

Krishan that he had deliberately tricked the Claimant into transferring all her remaining 49% shareholding in Gracefield in late 2006, again pointing to Mr Rodgers' statement which said he had told Dr Krishan that only 'principals' with 25% of the shares needed to pass the credit check, as Dr Krishan admitted in his 2009 statement. However, in his evidence to me, Dr Krishan said he did not know that at the time, which is why he did not explain to the Claimant that she did not need to transfer *all* her shares to Mrs Krishan due to the bank. I will find the omission deliberate. But in any event his evidence is internally inconsistent.

135.5 Dr Krishan's current evidence was in places inconsistent even with itself. Mr Halkerston challenged the 'management fee' of £225,000 which he asked SB to include in Gracefield's accounts. Dr Krishan said it was consistent with the 15-20% uplift that professional developers charge and was an alternative to the profit share if the Claimant backed out of the deal. Therefore, he said he asked SB to remove it after the 2010 trial, as the profit share had been upheld in the Purle Judgment (on the counterclaim). However, as Mr Halkerston took Dr Krishan through year after year of accounts after 2010, the management fee still stubbornly appeared, prompting different and more tenuous explanations from Dr Krishan each time. Moreover, as Mr Halkerston says, there is no evidence whatsoever that 15-20% is the going rate, I would add especially where a 'developer' arranges practically no refurbishment work on a project at all in over 5 years As I said above, in my view Dr Krishan plucked £225,000 out of thin air as his 'insurance policy' that he could charge if the profit share agreement (which as I will describe was never properly 'formalised') was not effective. Even Dr Krishan did not claim he had ever agreed it with the Claimant.

136. For all these reasons, individually and cumulatively in relation to both Dr Krishan and Mrs Krishan, I find that substantial parts of their evidence were seriously unreliable. This is not the *Lucas* error of 'they lied before, **so** they must be lying again'. It is rather 'they lied before **and** they are seriously unreliable again'. I reach that view on the evidence they gave me in 2023, quite separately from the finding of dishonesty in 2020. As a result, similar to *Painter*, I consider that I can place no reliance on their evidence unless corroborated by indisputable and contemporaneous documents, such as the records of meetings with professionals.

Holistically Taking Stock

137. As I discussed in detail in the previous section, I have set out in great detail those various 'layers' of evidence in endeavouring to take a 'holistic' approach to the evidence to my findings of fact. I have not simply focussed on contemporaneous documents as in *Gestmin*, although they are very important as stressed in *Simetra*. I consider this approach to be consistent with guidance in cases such as *Natwest, Arkangelsky, Powell* (and *Kekhman* on 'circumstantial evidence').

138. I now propose to 'stand back' (as suggested in *Arkangelsky*) and look at all those 'layers' of evidence together, iteratively and in the round, to illustrate my fact-finding process. In doing so, I find I can summarise ten key points drawn from the whole of the evidence, which then form the 'skeleton' of my findings of fact which then follow. Whilst I will need to make particularly detailed findings of fact on the period between July 2005 and the transfers in April 2006 and the run-up to litigation in 2008, I can take the intervening period from 2006 to 2008 much more swiftly, as it is no longer the focus of the remaining causes of action.

139. Those ten key points drawn from all the layers of evidence are as follows:

139.1 Firstly, the Claimant is an intelligent but also a very emotional person, disinterested in business (even if she grew up in a family business) and with scant recollection of what she clearly sees as dry details related to business. As she put it, she is 'not a numbers person'. In other words, as Dr Krishan told Mr Rodgers, the Claimant has 'no business acumen' and that is how he and his wife saw her. By comparison, he is an experienced businessman.

139.2 Secondly, the Claimant had ownership of the Properties but was not really interested in them, preferring to leave management to others like her husband or son (indeed, early on she tried to distance herself from them). In 2003, Bobby Takhar had taken on responsibility for them, but like his mother, he too 'was not a numbers person' and his plans for the Properties were obviously thought by Coventry CC to be wholly unrealistic.

139.3 Thirdly, this was in part because Bobby and his mother the Claimant were strongly emotionally-attached to the Properties which Bill and Ian acquired. They also had a rose-tinted view of their condition, which was in fact poor, as confirmed by voluminous independent contemporary documentation.

139.4 Fourthly, by June 2005, Coventry CC were losing patience and warned Bobby that CPOs could be obtained, but as I shall explain, they consistently stressed it was a 'last resort'. The evidence from the Council, both contemporary documents and statements in the Original Proceedings from Mr Duncan and Mr Todd show there was never any real risk of CPOs being made; and even if they had been the Claimant would have been entitled to full market value, less (relatively modest) debts to the Council.

139.5 Fifthly, Dr Krishan not Bobby was authorised by the Claimant to deal with the Properties on her behalf from July 2005. Whilst their condition was poor, they had development opportunity and their true value in 2006 was almost three times the £300,000 extrapolated from valuations in 2002/2003. The Claimant had no interest in the market value of the Properties since she did not want to sell them, as she saw them as 'family properties'.

139.6 Sixthly, there is little reliable contemporary documentation recording the conversations between the Claimant and the Krishans about the Properties from July 2005 until around the time of the incorporation of Gracefield in November 2005. It is clear that by the end of this period, the Claimant started being financially supported by the Krishans. She was paid £5,000 by Mrs Krishan in July 2005 and £400 a month from December 2005 (until September 2007). As a result, in the next 'chapter', after some background findings, but before making findings of fact about that period, I will undertake a further assessment of the evidence focussed on that period.

139.7 Seventhly, once Gracefield was incorporated in November 2005 with the parties as directors and shareholders (50% to the Claimant, 25% each to Dr and Mrs Krishan), professionals became involved, including Mr Davies, SB, Mr Whiston and Mr Johnson. Their documents substantially improve the contemporary evidential record. Mr Davies recommended Mr Johnson as an architect who planned the development; whilst SB as accountant and Mr Whiston as a solicitor arranged the transfers in March/April 2006.

139.8 Eighthly, SB was told the market value of the Properties was £300,000 and their value subject to CPOs was £100,000. It is agreed that was wrong. I need to make detailed findings of fact about who told SB that and why. The Krishans say those came from the Claimant, she says they came from them.

139.9 Ninthly, once the Properties were transferred to Gracefield in April 2006, the Claimant had very few dealings with them and by the end of 2006, was persuaded by the Krishans to give up her shareholding (and directorship). I will find they also tried to auction the Co-Op in March 2008, which led to the dispute and to the Krishans' production of the 2008 false documents.

139.10 Finally however, rather than this pressure succeeding in getting the Claimant to acquiesce in the Krishans' plan to sell the Properties, she instructed Mr Matthews. He met them, considered the documents and told the Claimant he suspected fraud in June 2008. By late July 2008, she had instructed solicitors and by late October 2008, she had issued proceedings. I will make findings about the date and circumstances in which during those proceedings the Krishans forged the Claimant's signature on the copy PSA.

140. Against that context, I can finally turn now to my findings of fact. As I have just illustrated, I will make each of them 'iteratively' by considering all the layers of evidence that I have analysed in detail, sometimes referring to my general assessment of the evidence in giving reasons for my findings. However, given the lack of documents for 2005, I will review the evidence on that before making detailed findings on 2005-06, before briefly on 2006-07, then more detail on 2008 and the litigation up to 2010.

Findings of Fact

141. This long chapter of my judgment is in five sections: (i) the parties and properties up to June 2005; (ii) my assessment of the evidence on the key period from July to November 2005 when the Krishans became involved and Gracefield was incorporated; (iii) my findings of fact from July 2005 to the transfers in April 2006; (iv) developing the Properties from 2006-2007; and (v) the dispute and litigation from 2008-2014, although I focus on particular aspects of the litigation, as I have already set out the full procedural history.

The Parties and Properties up to June 2005

142. The Claimant was born in 1952 and her younger cousin the Third Defendant, Parkash Krishan was born in 1954. Her father was one of five brothers, of whom the Claimant's father was the youngest. Their families had moved to England from India in the 1950s and they were very close as children. Mrs Krishan in her 2009 statement strikingly described the Claimant as 'like a sister to me'. The Claimant in her 2022 statement said that she 'regarded Parkash as the sister I never had'. Likewise, Mrs Krishan's 2009 statement recalled that she had grown up in Wolverhampton and the Claimant in neighbouring Wednesfield, but she remembered the families saw each other almost every weekend. They would play together all the time. Mrs Krishan said she looked up to her slightly older cousin, whilst the Claimant said that she saw herself as 'the big sister'.

143. However, they began to grow apart in the 1970s. Mrs Krishan's father died in 1970 and whilst the Claimant supported her, including paying for her school trip to Wales, it appeared a family argument broke out over his land in India. Moreover, in 1972, the Claimant married Parminder Singh Takhar (known as 'Bill') and whilst Mrs Krishan attended the wedding, they fell out of contact afterwards. Bill's family was very traditional and felt that as the Claimant was entering their family in Coventry, she had to reduce ties to the Black Country.

144. Mrs Krishan went on to marry Dr Krishan in 1975, but the Claimant did not come to their wedding. Mrs Krishan took two degrees, became a teacher and since 1990 has been a Deputy Headteacher in Wolverhampton and sometimes an Acting Headteacher. Dr Krishan became a successful GP in Wolverhampton. Moreover, he also developed related businesses. SB and her firm began acting for him in 2002 and she later reported that another company he ran was developing a new Health Centre in Wolverhampton with a £2.1 million build cost (this was opened in September 2007 where the Claimant met Mr Johnson). Moreover, in an August 2005 letter to Coventry PCT, Dr Krishan said he had 'experience with health centre developments and currently have one in Wolverhampton' so I infer that he had undertaken such projects before. Therefore, Dr and Mrs Krishan were (and are) both successful professionals.

145. Life took a very different path for the Claimant. From Bobby's first statement, I note that Bill and his father had started a grocery shop in Foleshill in Coventry in the 1960s, which steadily grew into the Takhar Trading Company ('TTC'), which despite its title was actually a family partnership. Bill's younger brother Inderjit (known as 'Ian') joined in the late 1970s. Bill worked more or less every day in the business, whilst the Claimant helped out on practical tasks and spoke to customers in (rather than running) TTC's electronics store. That store was at 554-556 Foleshill Road – i.e. 'the Shops', which in those days was knocked through to one property. Ms Dobson described it and enclosed this picture:

> "[It] comprises three, two storey properties, two of which were formerly dwellings. Number 558 is an end-terrace and 556 and 554 are mid-terrace properties. The buildings are of a traditional masonry construction."

146. Over time, Bill went on to acquire all three of the Properties, including the prestigious if dilapidated old Art Deco 'Co-Operative Emporium' at the heart of Foleshill High Street. Ms Dobson described it and enclosed this picture

> "[It] is a locally-listed landmark building described as an iconic Art Deco building. It is a three-storey building of traditional masonry construction… around 1931..[by] the Co-Operative Wholesale Society."

However, the curiosity of the group was the old Ritz Cinema, further up Foleshill Road, which Ms Dobson again described and enclosed this picture:

> "[It] is a three-storey, irregular building that was formerly the Ritz Cinema [and] has been described as an iconic Art Deco building. The building is of a traditional masonry construction and is faced with corrugated steel elevations with [painted] mock-dressed corner stones."

From SB's January 2006 note, the Claimant remembered it had been bought in 1986. I have not found purchase dates for the other two of the Properties.

147. The Properties were all considered 'family properties' as I have already mentioned. All of them were acquired by dint of Bill and Ian's hard-work over many years and they were both very emotionally-attached to them (as evidenced by Bill's later angry letters about the Krishans, to which I have referred). As I shall explain, this led to a dilemma for the Claimant later about dealing with them because they were so important to Bill. However, the three Properties were in Bill's name and he later transferred them to the Claimant in 2000. It is true she said in 2002 to Coventry CC that the Shops were owned by Bill, Ian 'and family' when denying responsibility for rates. That was clearly Ian's perspective, who continued to include the Properties in TTC's accounts after Bill stopped work. However, since TTC was a partnership, there is no evidence that the Properties' beneficial ownership was different than their legal ownership – in Bill's name, even if practically seen as part of TTC's 'empire'.

148. The Claimant and Bill went on to have four children: the eldest was Bobby, then Nina, Sukhjeet and finally Arun. Bobby as a youth worked in the family business but went on to University and eventually became a BBC Producer. I will touch on some of the life experiences of the younger three in a moment. However, the Claimant, as an intelligent woman, found her domestic-centred life increasingly stifling and frustrating. Indeed, later, she enrolled at Warwick University and obtained a Degree in English Literature and Cultural Studies. Over the years, the Claimant's marriage to Bill also became increasingly difficult. Bill began to suffer from serious mental health issues in the 1990s. He became abusive to the Claimant, physically and verbally. By 1999, she had decided to move out. Whilst Bobby, Nina and Sukhjeet were adults by then, Arun was still a child. The Claimant moved out with him to her parents but really wanted her own place. So, with Bobby's help, she rented a property in Shropshire, the other side of the Midlands - and told Bill she wanted a divorce.

149. However, even in 1999-2000, divorce was still a taboo subject in Bill's traditional family. Bill (who owing to his illness had effectively retired from TTC) accepted they would live apart for the moment but promised to transfer the three Properties into her name if she did not divorce him. This was the point on which the Claimant was cross-

examined in 2020, as she had said in evidence in 2010 that Bill put them in her name due to the dispute with Ian. However, as the Claimant pointed out, these were linked – she mentioned both points to the Council in that conversation about rates for the Shops in 2002. If anything, the dispute with Ian in conjunction with stopping the divorce is all the more reason for Bill to want to gift the Claimant the Properties, which were no longer in use. Mr Graham makes a fair point that the Claimant has expressed herself differently about this – initially that she held them on trust for TTC, now as 'family properties'. Yet that is how she saw them, which her then-lawyers (wrongly) interpreted as 'TTC' being a beneficiary. But far from *accepting* Ian's claim on the Properties, she *wanted to avoid* Ian having any claim, as I will find Mrs Krishan knew and exploited. I return to this on resulting trust, but I find the Claimant was beneficially gifted the Properties by Bill, but despite the legal (and formal equitable) position, she informally considered that they remained 'family properties' in which Bill had a 'stake', or even that they 'really belonged' to herself and Bill. However, Bill's mental illness continued and the Claimant and Arun made a new life in Telford, but regularly seeing her other children. Bill accepted this, as he paid £180,000 for her to buy her own home in Telford outright. With that and the Properties, she was asset-rich but cash poor, studying her degree on benefits (lawfully as the DWP accepted in 2009-10).

150. However, by 2002, the Claimant was beginning to struggle financially. She certainly had no money to maintain the Properties and pay for their expenses. Presumably from a search of the Land Registry, she was contacted by Coventry City Council ('Coventry CC' or 'the Council') about the business rates for the Shops in May 2002. That led to the Coventry CC's note of its discussion with her I have mentioned. It records that the Claimant told them that whilst the Shops were 'given' to her by Bill, they were 'owned' by him and Ian (along with other property on the Foleshill Road) but she was separated from Bill. That may be the way she saw the situation (especially as it would avoid her liability) but the Council did not see the legal/equitable position that way and nor do I.

151. All the Properties had been empty for a long time and were in poor condition. In November 2002, Coventry CC's rates valuation report described the Co-Op as 'in very poor condition and requiring a substantial amount of work to bring it to a tenantable standard'. This included repairs to the roof, brickwork, guttering, stairs, walls gates to the yard, replastering of the internal walls, rewiring, installation of a fire alarm and lighting, replacement of the toilets, installation of running water and central heating, repair of the lift, pumping out of the flooded basement, external redecoration and general tidying. The report estimated the total cost of the works would be around £750,000. As it stood, the report estimated the value of the Co-Op as only £108,000. The same impression is confirmed by a later full survey of the Co-Op in 2003 by Barneveld surveyors, who estimated repair costs as £677,000 at full specification or around £400,000 'if much lower spec'. (Ms Dobson found this was a helpful report on costs).

152. By March 2003, the 'owner' of the Co-Op was described in that report as 'Mr Takhar': which I suspect was a reference to Bobby who took on management of the Properties around this time. He had actually worked in the Co-Op building when it was still TTC's shop when younger and recalled it holding a lot of stock on the upper floors. In his statement, he described the Co-Op as having been empty for 2-3 years

and 'needing some work done'. He suggested Bill's contacts could do the work for £200,000. However, that may be because they were all rather in denial about the amount of work needed. Bobby clearly saw the Co-Op through rather rose-tinted spectacles as 'the Jewel in the TCC Crown' as he put it. It certainly had a faded glamour of a bygone age of Art Deco and was a well-known and prestigious building in Foleshill, but the evidence and 2005 photographs show that it was simply in very bad condition.

153. Similarly, Bobby described the Shops in his statement as 'needing some touching up'. This was another understatement. There is no contemporaneous evidence about the Shops. However, the Savills report in May 2007 noted that Number 558 had 'suffered significant structural damage evident from the severe cracking at first floor level', although they could not gain entry to the premises or even see the garden because it was so overgrown, confirmed by 2005 photographs. By then, the old TTC electronic store had been re-converted back into the three Shops, but were still seen (as Ms Dobson noted) as one 'job lot'.

154. In fairness, Bobby was rather more clear-eyed about the Cinema, which he described as 'his father's dream' not theirs and 'an outlier'. He said he would have been prepared to sell it to fund development of the Co-Op (to which I will return on remedies at the end of this judgment). Bobby said in his statement the Cinema 'had been vacant for 20 years and was in significant disrepair'. Indeed, the Claimant later commissioned a survey in December 2004 through the Shropshire Chamber of Commerce which said that it was:

> "…basically in reasonable structural condition and has the potential for renovation/conversion…[but] the costs will be relatively high and…it may be more cost-effective to demolish the structure and to redevelop the site. [It is] in a fairly prime location and has the potential for either a community facility as intended or alternative uses such as mixed retail and rental."

The report estimated the immediate costs as £6,000 and some roofing work of £10,000. But the full renovation costs were assessed in 2006 as c.£600,000.

155. Whilst the Shops were certainly subject to Council Tax and Business Rates, there is no evidence the Co-Op and Cinema were, possibly owing to their condition. Coventry CC certainly wanted something done with the dilapidated and disused Cinema, under some local pressure. A March 2003 note records that three Councillors had presented a petition (and as will be seen, they did not give up). The report proposed that the Cinema be valued (why I suspect that Coventry's valuation of £160,000 if demolished came from mid-2003 not late 2002) and Coventry CC work with the owner to develop it, possibly with a grant.

156. Notably, in June 2003 to discuss this Coventry CC wrote not to the Claimant, but to Bobby (who had also been the contact for the Barneveld Report). By then, he had largely taken over from the Claimant in dealing with the Properties, but not entirely (e.g. she commissioned the December 2004 survey on the Cinema). In July 2003, Coventry CC did write to the Claimant once it confirmed she was formally the owner. However, from other documents such as a February 2004 internal email within the Council, it appears they were generally dealing with Bobby. His status came up again in mid-2005, as I will describe. However, that February 2004 email noted he had said the Properties were owned by his mother but that he was dealing with them and

envisaged a 'community use open to all' rather than some faith groups or purely commercial developers.

157. As I said earlier, whilst HHJ Purle QC concluded that Bobby wanted to sell, I conclude he was prepared to sell the Cinema, but had declined offers for the Properties because he wanted to pursue a 'community use' for them. In evidence to me, Bobby explained that he had initially left management of the Properties to his father, but Bill was struggling with his mental health and whilst he kept saying he would sort out with Ian what was happening with the Properties, he never did. Bobby and his mother got tired of waiting and – I find in 2003, he decided as the eldest son, it was his responsibility to try to develop the Properties as community assets. As Bobby explained, Foleshill was a busy and close-knit Asian community with many local businesses, including TTC. One jeweller had approached Bill and Ian but they could not agree about what to do. Others approached Bobby about the Properties. However, Bobby wanted to try and get funding to develop them for community use or rental rather than sell them. This was not least because Bobby still saw Bill as having a stake in the Properties and he wanted his father's 'green light'. Bobby said he was even prepared to dip into his own savings which were at that time around £80,000, or as I noted, to sell the Cinema to fund developing the Co-Op and Shops.

158. However, in that February 2004 internal email Coventry CC officers were blunt:

> "It was clear that neither he nor his mother possess the funds to develop the sites themselves and are unlikely in my view to be able to cover any future building maintenance costs or premises costs for such large sites in such poor condition. Given his desire to lease the properties this means he needs to bring in significant long-term streams of income or sell the sites on."

I suspect this was also what was meant in an internal brief from Coventry CC to its development agents Donaldsons in May 2005 by 'owner unrealistic'. Indeed, in July 2005 they concluded that Bobby's plan for a drama and literature centre at the Cinema would cost over £1 million even though its 2003 value was £160,000 on demolition. 'Unrealistic' would seem to be a fair description.

159. Another reason Bobby had taken on responsibility for dealing with the Properties from around 2003, other than his father's inertia, was his mother's other problems. The first aspect was her financial worries. In July 2002, the rates bill for the Shops was £2,044.75, which led to a Magistrates' Court summons for £2,119.75 in October 2002. This led to the involvement of the bailiffs. Whilst she managed to pay that off, by April 2003, the rates arrears were back up to £1,529. The Claimant managed to find work as a teacher on a graduate training scheme at a high school in Wolverhampton in 2003 and her net salary was c.£12,000. Doubtless this helped a little, but it was not enough to cover her mounting costs. The Claimant approached Bill, but he told her to speak to Ian, but when she did, he simply told her to speak to Bill again. She became desperate. Indeed, in December 2003, she finally decided to tell Bobby how bad things were financially and he paid off a bailiff demand of £1,539.

160. However, the Claimant's problems were only really beginning in 2003. Her second oldest son Sukhjeet was at university and began experiencing mental health problems. The Claimant called Bobby and they went to Kent to pick Sukhjeet up, but he did not really recover until 2006-2007. So, during the critical period in this case, she was

caring for him, as well as for Arun. Indeed, I accept all this stress began to take its toll on the Claimant as well. She has not disclosed her medical notes from the period, but there is a 2009 GP letter which says:

> "As the medical practitioner involved in [her] care…I can confirm that during the period of late 2003 to 2005, she was suffering significant stress in relation to a family member. This was her son Sukhjeet, who I saw at the end of 2003, suffering from psychosis…"

There was rather a debate about whether the Claimant was 'clinically depressed' and 'like a zombie'. That may have been a little bit of melodrama by the Claimant and there is no medical evidence confirming clinical depression. However, I entirely accept that for those reasons and her financial worries, she was under 'significant stress' and this had a huge impact on her resilience.

161. Moreover, things then got even worse for the Claimant. She was briefly signed off sick from work in March 2004 for minor physical conditions, which would not have helped. Meanwhile, her debts were building up. These included her substantial credit card debts, which at one stage were £5,500 on her RBS card, £3,800 on her Barclaycard and £550 on her Natwest card. Moreover, in 2004, her other child Nina was getting married and the Claimant felt the responsibility to pay for the wedding. She got into further debt to the sum of £22,000, which ended up in a County Court Judgment in 2006 that Bobby paid in 2008. To make matters worse, a week before the wedding in 2004, she and Arun were in a car crash. She sustained soft tissue injuries to her shoulder and hip and whilst she attended the wedding, she eventually gave up work and went onto benefits. But I suspect that was more the mounting stress than her own injuries, as Arun was injured and started having headaches, as also confirmed by the 2009 GP letter:

> "At the time, she was also experiencing difficulties with her younger son, Arun, for severe headaches and he was requiring cranial osteopathy…."

By late 2004, she had a Legal Aid bill of £4,124, bailiffs were chasing Council Tax bills of £1,732.91 and there were further bills for the Shops for £4,192.

162. Whilst I am conscious that the Claimant is over-dramatic and has a distorted or poor memory at times, it is fair to describe all these problems coming together in the course of 2004 as a 'perfect storm'. The financial pressures were made worse by Nina's marriage, in turn made worse by caring for Sukhjeet's mental health problems, in turn made worse by a car accident causing significant injuries to Arun; eventually leading to her giving up work (although that happened later), in turn making her financial problems even worse still. I therefore accept that even before she gave up work, as the Claimant put it in her statement:

> "[M]y life was slowly unravelling from 2000 onwards. By 2004, my marriage had fallen apart in all but name. I was in debt, but didn't really want to ask my eldest son for help. My two younger sons were both ill and required constant care. My daughter had gotten married to someone whom I thought would be bad for her and which ultimately ended up in divorce...."

163. It was under this mounting pressure that in mid-2004, the Claimant remembered her cousin Parkash and reached out to her by calling her to invite her to Nina's wedding. I

do not accept this was some sort of devious plan to get the Krishans to give her financial support. I accept that in mid-2004, the Claimant felt she needed *emotional* support and thought of her cousin with whom she had once been so close. She was no longer with Bill and so got in touch with Mrs Krishan to invite her to Nina's wedding. They did not attend it because they never received the actual invitation – it seems that the Claimant got Mrs Krishan's address wrong. This suggests the Claimant is right in her recollection that she called Mrs Krishan and was invited round to the right address rather than turning up out of the blue to an address she had got wrong, as Mrs Krishan suggested. Either way, they both reconnected and the Claimant became a regular visitor, not always invited but always made welcome, as one would expect from reacquainted cousins. They initially reminisced about childhood, but eventually the Claimant felt comfortable enough to confide her problems in her cousin and at this stage, in fairness to Mrs Krishan, it sounds like she gave a lot of emotional support and in turn rightly gained the Claimant's trust, as the latter put it in her statement:

> "[A] we grew closer and closer, I started to confide in Parkash about my personal problems. I told her about my struggles with Bill, my worries about my children (particularly Arun), my health issues and my money problems. I felt really comfortable sharing these things with her. I had never shared so much with anyone before and it felt really good opening up about these very private aspects of my life."

Given what follows, it is important to acknowledge that *at this point*, I accept Mrs Krishan was motivated only by family-feeling for her rediscovered cousin. She was not 'grooming' the Claimant, but nor was she being 'groomed' by her. The Claimant was simply opening up to her about her deepest worries and concerns. However, I also accept that during 2004, the question of the Properties did not really come up between Mrs Krishan and the Claimant. As I have discussed, the Claimant had an awful lot on her plate besides the Properties, which by this stage, she was mainly leaving to Bobby. However, as I noted, the Claimant did arrange the survey on the cinema herself in December 2004, which as I quoted, suggested it had development potential but needed a lot of work.

164. Given that, it was inevitable that in early 2005 the Claimant would mention the Properties at some point to her re-found confidante, Mrs Krishan. I accept the Claimant's recollection that what prompted her to mention it was Mrs Krishan asking her about divorce. The Claimant explained she had not got divorced from Bill, but he had transferred her the Properties. Mrs Krishan said it was unfair she had been lumbered with them as they were probably mortgaged to the hilt (doubtless thinking of her financial problems which they had often discussed). However, when the Claimant told Mrs Krishan the Properties were not mortgaged, I find that Mrs Krishan realised these Properties could be valuable. Mrs Krishan claimed the Claimant first told her the Properties were derelict, so she could not sell them and even if she could, it would not pay off her debts. However, given the Claimant and Bobby's rose-tinted view of them – and indeed the then-recent survey suggesting the Cinema had development potential - I find the Claimant probably told her about their development potential. Doubtless, Mrs Krishan then mentioned this to her husband, who was undertaking his own health centre development in Wolverhampton at the time. I find like most successful business-people, he was always on the lookout for a development opportunity.

165. I also accept the Claimant's perspective that this first conversation in early 2005 about the Properties being mortgage-free and capable of development was a turning point in their relationship. I accept Mrs Krishan started talking about money a lot more and how experienced they were in property development. As noted, the Claimant's statement stated 'I can recall this shift in the tenor and nature of our conversations quite distinctly, because it was a marked change', which Mr Graham suggests is obviously in the Claimant's lawyers' language, not hers. I accept that, but it does not mean the Claimant did not notice a change in tone from Mrs Krishan. I accept that she did – as she went on to say in simpler language: 'we had never really talked about *her* wealth much before'. I find that it was Mrs Krishan, doubtless encouraged by Dr Krishan, who was angling to help with the Properties, not the Claimant angling for help with the Properties. Indeed, I find the Claimant repeatedly declined it, since she did not want to 'burden' the Krishans with it and she trusted her son Bobby to deal with them.

166. However, by early 2005, Coventry CC were starting to lose patience with Bobby and his unrealistic plans for the Properties. On 8th February 2005, faced with ongoing councillor pressure about the dilapidated Cinema, Cabinet agreed in principle that the compulsory purchase process could be followed 'as a last resort' for the Cinema and Co-Op (not the Shops despite the arrears) among other unrelated properties. An email a year later in March 2006 states the strategy was 'to give authority to use the CPO process, inform owners of this, then encourage progress by negotiation and this fails, to use CPO'. However, given Mr Todd and Mr Duncan's evidence and their brief to the agent Donaldson's in May 2005, this was not the formal start of the CPO process, which was a formal report to Cabinet to make a CPO - that never happened. It was simply authority to use a *potential* CPO process as *leverage* to get progress on the Properties. As it was put in a May 2005 brief, the plan was for the Council to take preliminary steps for CPO in August 2005, recruit a developer by November 2005, complete negotiations by April 2006 and 'start the CPO process, *if necessary*' in May 2006. Even if that were to happen, as I explained, the owner could appeal it to the Secretary of State and was compensated at full market value, subject to outstanding Council debts.

167. It was in that context that Coventry CC briefed Donaldsons in May 2005 that the value of the Co-Op was £108,000 (that was from 2002), but there was a full structural survey (by Barneveld in 2003) and it was located in a district centre – and 'retail, community, offices or residential were all possible' but 'the owner was unrealistic'. Whilst the owner was named as Mrs Takhar, her representative had been Bobby and it was his plans being described as 'unrealistic', although the plans for a drama and literature centre at either the Co-Op or the Cinema doubtless were endorsed by his mother with her degree in English Literature. The Cinema was described as valued at £160,000 assuming demolition (as I said, probably from early 2003). It noted that the owner had refused a structural survey, but in fairness this may be because the Claimant had a structural survey in December 2004 as I said. However, again the brief stated: 'owner unrealistic'. Accordingly, Donaldsons took the steer from their client, the Council. In their report circulated to the Claimant in July 2005, Donaldsons noted and fully costed the Takhar family's plans for a drama and literature centre at either the Co-Op or the Cinema, which for the former would cost nearly £1 million and the latter over £1 million. However, Donaldsons also 'appraised more commercially viable alternative use'. They described the Co-Op as 'derelict with substantial refurbishment required', which even on a commercial mixed retail/residential basis would be £867,000. They

proposed demolition and a residential development for the Cinema, not least as the proposal for a community project may be hampered by the lack of parking.

168. Whilst the Donaldsons report was not sent to the Claimant until 12th July 2005, Donaldsons had plainly reached their view prior to a crucial meeting between Coventry CC officials including Mr Duncan and Bobby Takhar on 30th June about the Co-Op and the Cinema (again, the Shops were not mentioned). The notes of the meeting record the Takhar family had requested a meeting as they were considering commercial offers from developers (I find of the kind Bobby described from local businesses) but preferred them to have a community use. It was noted that Donaldsons felt whilst the Cinema if demolished for housing 'would offer a commercially attractive proposition to a developer, the same could not be said of the Co-Op' and recommended the two were treated as one project. The meeting noted the Co-Op was valued at £100,000 (strictly, £108,000 in 2002 as there was no updated valuation) and needed £900,000 of work - £700,000 structural and £200,000 refitting. Bobby said his own costing from (a contractor of) McAlpine was £200,000, but as I said, that was an unduly optimistic estimate. Mr Duncan said that grant funding was unlikely through the Council. But, more positively, another official suggested it may be available for the Co-Op to be converted into a local health centre that Foleshill needed as 'there had been a long and fruitless search' for one as with other parts of Coventry and an official from the Primary Care Trust said it could be investigated. The notes continued:

> "Andy Duncan said that he would be seeking authority from the City Council's Cabinet during September to appoint Donaldsons as a consultant. At the same time he would start the process leading to compulsory purchase powers being made available to the Council. He stressed that it was nobody's interests that these powers were actually used other than as an absolute last resort and a mutually agreed solution was in everyone's interests. Once appointed, assuming this is agreed, Donaldsons will contact the family to explore their objectives and interests." (my underline).

169. I make five comments about the notes, including the 'action points' that followed:

169.1 Firstly, Mr Duncan did 'put CPOs on the table' but also strongly stressed they were an 'absolute last resort'. As I have said, this was neither the announcing of compulsory purchase orders themselves, but rather the 'start of the process' – a long process as he knew and as I have explained. Moreover, Mr Duncan did not even say CPOs were 'likely': on the contrary, he actually went out of his way to stress to Bobby Takhar that it was 'in no-one's interests that the powers were actually used' and 'a mutually agreed solution was in everyone's interests'. Indeed, the 'start of the process' was not even one of the action points at the end of the meeting. However, it does not seem to have been mentioned that a CPO would in any event mean compensation at full market value, less outstanding debts to the Council etc.

169.2 Secondly, in those circumstances, I do not accept that Bobby Takhar 'did not pick up on CPOs being mentioned' as he told HHJ Purle QC and myself, which is simply unrealistic given the contemporary notes. As I said, the process of saying that in 2009-10 has become his memory – the 'retrieval' in the Original Proceedings and Bobby's 'litigation mindset' throughout has distorted the memory 'stored' as Leggatt J described in *Gestmin* and Popplewell LJ in his lecture. In short, Bobby has effectively convinced himself CPOs were not

mentioned when the notes show they plainly were. However, I entirely can and do accept that Bobby was not unduly *worried* by the risk of CPOs, given Mr Duncan's reassurances about it. However, Bobby was conscious that he was his mother's representative (as I discuss in a moment) and I find on the balance of probabilities after the meeting he would have told her about the eventual possibility of CPOs being made as an 'absolute last resort' as Mr Duncan put it. I also accept that neither Bobby nor the Claimant knew that if CPOs were eventually made, full market value less debts etc would be paid, as that had *not* been mentioned.

169.3 Thirdly, it is clear that Bobby saw himself as his mother's representative because, importantly, one of the action points states that his task was to:

> "Obtain a solicitor's letter granting him Power of Attorney to negotiate on behalf of his mother, the registered legal owner, and forward this to Andy Duncan by September."

In evidence, Bobby explained this did not mean a formal Power of Attorney, just a solicitor's letter confirming that he had the Claimant's authority to act on her behalf, as he had informally been doing and it was her idea. This demonstrates that they were both fully intending for Bobby to carry this on.

169.4 Fourthly, Bobby's plans for a community use were not finished. One action point was for a Council official to consider local planning documents to see whether the Cinema could have a community use (albeit perhaps not as the rather Quixotic dream of a 'drama and literature centre' for Foleshill). As the last line of the quote shows, plans included the family's objectives.

169.5 Finally, the meeting had raised an entirely new and possible 'community use' – indeed one which may have unlocked public funding – namely using the Co-Op as the badly-needed health centre for Foleshill. Something that would benefit the whole community, as Bobby and the Claimant had always wanted. As it happened, that was also Dr Krishan's own expertise.

170. So, before moving on to what happened next, it is convenient to consider and comment on Mr Graham's submissions of the Claimant's position in mid-2005, which I can roll together in three points flowing from my findings above.

170.1 I agree that she was struggling to pay her debts as they fell due (and indeed would end up with a County Court Judgement on the wedding debt of £22,000, although the Krishans were not aware of that until after the transfers in late 2006). I accept that in principle, those debts could have led to bankruptcy proceedings. She was 'asset rich' (owning not only the Properties but her own mortgage-free home worth £180,000 as she later told Mr Whiston) but she was 'cash poor'. However, bankruptcy for the Claimant was only a theoretical possibility, since she could in fact sell or mortgage one of her assets – especially the Cinema as Bobby actually contemplated - or even just pay off her debts of c.£30,000 from his savings of £80,000, as he did in 2008 with the CCJ. Bluntly, I find it simply would never have come to her being made bankrupt and debates about bankruptcy net estate and whether she would have disavowed the Properties are academic.

170.2 However, I accept that Bobby's savings were not enough to fund any refurbishment, obviously the Claimant could not; and Bill and Ian would or could not help. Coventry CC would also not provide a grant. Yet the PCT might do so for the new 'health centre' idea, which I accept would have been just the sort of 'community project' the Claimant and Bobby would have welcomed if that were possible. Moreover, I accept they would have been prepared to sell the Cinema if necessary to keep and develop the Co-Op (and the Shops). Therefore, whilst their 'Plan A' of a drama and literature centre was unrealistic, there was clearly a 'Plan B' including selling the Cinema, before getting to the 'Plan C' of selling the Co-Op and the Shops too.

170.3 Whilst of course the Properties would have been lost had Coventry CC obtained and implemented CPOs, that would have been a long and drawn-out process, which under their own timetable (that they were following) would not even have formally started with a Cabinet report until May 2006. I will find at paragraph 569 below but for the Krishans' intervention, the Takhars would have accepted reality and sold the Cinema in or about April 2006 to remove the Council's main concern. In any event, had CPOs ever been made, the Claimant would have got full market value for any of the Properties taken by CPO, subject to her relatively modest debts which Bobby could have paid.

After all, in fairness, this is one of the reasons for the Claimant's anger in her evidence – in part at herself – as actually in hindsight, her financial situation was easily resolved. She was indeed 'cash poor' - but Bobby was not, if she had got over her pride about asking him - and she was certainly 'asset-rich'. Indeed, as Mr Matthews said in evidence, there were options with these viable Properties, even if (as I would add) it would have required rather more realism from the Claimant and Bobby than they had shown in 2003-05. It was that sort of realism that Coventry CC's plan was intended to achieve – not the rush to compulsorily purchase the Properties, which as Mr Duncan said at the meeting on 30th June, would have been 'in nobody's interests' – including the Council's.

Assessment of the Evidence: July to November 2005

171. Yet within five days of Bobby's meeting, on 4th July 2005 the Claimant had signed a letter authorising not him to deal with the Properties on her behalf with the Council, but Dr Krishan. But it took until 20th November 2005 for Gracefield to be incorporated. What happened over this four-month period is critical, yet none of the discussions the Claimant and the Krishans say occurred are recorded. Moreover, they give irreconcilable accounts. The Krishans say that transferring the Properties to Gracefield was the Claimant's idea because of her financial desperation, as a joint venture company to renovate the Properties then sell them, dividing the profits equally after the Claimant first had £300,000 – the market value at the time of the transfers in March/April 2006. The Claimant says that in this period the Krishans told her the Properties were subject to CPOs (or at the least 'likely' to be), that they were 'worthless' or only worth £100,000 because of the CPOs, that if the CPOs were removed they would be worth £300,000 (instead of their real value of almost three times that); that if the Properties were transferred into Gracefield's name, they would be renovated and let (not sold) and managed for her benefit but would still belong to

her; and this was an 'act of charity'. The Claimant now contends that all of these were fraudulent, misrepresentations. As I explained by reference to *Three Rivers* and *Jafari-Fine*, the inference of fraud must be assessed on *all* my findings of primary fact and so I will determine that later in my conclusions on undue influence. But I can now decide on the balance of probabilities who said what to whom and whether or not it was factually true. Yet while not quite the totally-undocumented pub conversation in *Blue*, this period was very far from the document-heavy dealings in *Gestmin*. So, as I said when assessing the evidence of the parties, given the importance of this four-month period, before making findings of fact about it (and indeed on to the more-documented period from December 2005 to April 2006), I find it helpful to assess all the evidence on it: a few contemporary documents and the evidence of the parties (and Bobby).

172. I start with the incontrovertible evidence and contemporaneous documents:

172.1 Firstly, there is a note of a booking which appears to have been printed off on 2nd July 2005 for flights for two adults. It is cut off on the right-hand side but seems to be flights from London to Delhi in July 2005, returning in August, although neither party mentioned that. I also note Mrs Krishan's diary for 2nd July (I do not have it for 4th July) noted 'Bero came' (Mrs Krishan's name for the Claimant).

172.2 Secondly, the wording of the 4th July 2005 letter was as follows:

> "Dear Sir/Madam,
> Re: Former Co-Op Emporium…and Ritz Cinema
> Following your meeting last week with my son on the 30th June I write to formally advise you that I am currently in negotiations to develop the above sites and would be grateful if we could arrange a meeting to sort the matter out. I have authorised Dr Krishan to contact you on [my ?] behalf to arrange a mutually convenient time for this meeting as soon as possible.
> Yours Sincerely [her signature] B.K. Takhar (MRS). "
>
> This is the start of the Krishans' involvement with the Properties

172.3 Thirdly, photographs show Mrs Krishan wrote cheques for £5,000.15 (£3,881.15 for the Barclaycard bill and £1,119 to top up) on *22nd* July 2005: over two weeks *after* the Claimant's letter of authorisation for Dr Krishan. Indeed, the cheques also came *after* the sending at Mr Duncan's request of the Donaldson's report to Bobby and Dr Krishan – on 12th July, that the Krishans could have read before 22nd July.

172.4 Fourthly, about a fortnight after Mrs Krishan wrote the Claimant the cheques on 5th August 2005, Dr Krishan wrote to Coventry Primary Care Trust referring to a conversation that day and setting out his own experience of health centre development asking about public funding for a health centre on the Co-Op site (the meeting on 30th June).

172.5 Fifthly, in August-September 2005, Coventry CC wrote to the Claimant chasing Council Tax on the Shops for 2001/02, 2002/03, 2003/04, 2004/05 and 2005/06 with a total balance in a 'Final Notice' of 13th September of £2,135.27. However, on 30th September, £250 was paid on the Claimant's Council Tax account and again on 14th October (albeit not noted in a 2014

letter). Yet the 'Original Balber Takhar Account' in 2008 records the Krishans first paid in *November*.

172.6 Sixthly, on 17th October 2005, a Coventry CC Cabinet report faced with more Councillor petitions about the 'eyesore' Cinema proposed 'investigating' notices under s.215 Town and Country Planning Act 1990 ('s.215 notices'). These are not the same as compulsory purchase orders ('CPOs'): they require repair works or demolition.

172.7 Seventhly, on 28th October 2005, Donaldsons wrote to Dr Krishan to suggest a meeting with them and the Council about the Cinema and the Ritz (consistent with the timescale in the Council's brief back in May 2005), which from a letter of 1st November seems to have been organised for 16th November. There is no note of that meeting, but neither is there any letter suggesting it was moved. However, Donaldsons also refers to an earlier conversation with Dr Krishan. On 5th November, someone took external photos of the Properties.

172.8 Eighthly, on 15th November 2005, a fax from one of SB's colleagues ('SR') instructed the incorporation of a new company – i.e. Gracefield - on Dr Krishan's instructions. SR also emailed him and he on 16th November 2005 confirmed the details and shareholdings in it as 50% for the Claimant, 25% for himself and 25% for Mrs Krishan.

172.9 Ninthly, on 16th November – the same date as Dr Krishan's Council meeting - there is a handwritten note by or on behalf of John Davies:

> "JD, Dr K, Mrs K, Mrs Takhar relative. Mrs Balber Takhar not seen for 33 years. Needing help with bankruptcy and eviction. Properties in Coventry – CPOs losing them. Has no family or no help – CCJs, no family support, violent marriage, divorce. Demanding help handed deeds and was very insistent. Verbal discussion agreed with 50/50 share and further written agreement sorted. Deal was in her favour as Dr K to do finance. Need an architect. JD to be contacted. Jean to remind JD."

It is not clear from the note who gave Mr Davies that account.

172.10 On 18th November, SR emailed SB plainly a note of a conversation with Dr Krishan. His plan was for the Co-Op (oddly called the County Court) for 3 units on the ground and flats on the upper floor to be rented or sold; and the Cinema to be demolished and a block of flats to be built and rented or sold. Nothing was said about the Shops. It added that the Claimant had outstanding debts *'so Dr K will be paying them off and this will be his way of buying into the properties'*.

173. The most contentious document is Mr Davies' note. It is not suggested this has been concocted and I find it is a contemporary note of a real meeting on 16th November 2005. However, the Claimant denies being present. Yet, if she was not there, her personal circumstances would not have been discussed in such detail if Dr Krishan was just asking Mr Davies to recommend an architect. In fact, the listing of names suggests the Krishans and the Claimant were all there. Mrs Krishan says the Claimant told Mr Davies what she had told them. However, I do not accept she would have said she was 'demanding help and very insistent' and had 'no family support' given

Bobby, or mentioned 'divorce' when still married to Bill. Indeed, Dr Krishan's statement does not mention the Claimant even being there and neither of the Krishans mentioned that in their 2009-10 evidence. They told me they did not want to involve Mr Davies in 2010 as he was dying. But they could have mentioned the meeting but explained that. Therefore, *all* the parties' evidence on this meeting is unreliable and I have found Mrs Davies' hearsay evidence unreliable too. Conscious of *Chen, TUI* and *Rea*, whilst the note was put to all parties and their evidence was challenged, the 'cases being put' to each of them are wrong. I therefore do not make findings about exactly what was said and by who to Mr Davies at that meeting. However, as I find that it is a genuine note of a meeting I find they all attended, I can take it into account, in weighing the parties' wider evidence on July-November 2005.

174. On that approach, whoever was doing the talking and whatever precisely was said, Mr Davies was told either by or in front of the Claimant that she was *'needing help with bankruptcy and eviction. Properties in Coventry – CPOs losing them'*. The Krishans say that is what *the Claimant had been telling them*. However, by November 2005 Dr Krishan had been dealing with the Council for four months and I find on the balance of probabilities would have known that the Council still saw CPOs as a 'last resort' and even if made, paid full market value less Council debts. It is difficult to understand why Dr Krishan would have let the Claimant repeat (or repeated himself) things he must have known by November were wrong like 'CPOs losing them'. Therefore, the note is more consistent with Mr Davies being told what the Claimant says the Krishans *had been telling her* for the previous four months - 'CPOs losing them' i.e. the Properties would be lost to CPOs, (not 'CPOs mentioned', or 'threatened', or even 'likely') and bankruptcy and eviction. This also fits more Dr Krishan talking – consistent with his statement *he* met Mr Davies. Even the reference to *'50/50 share with further written agreement sorted'* is ambivalent, as a day earlier Gracefield was incorporated and the Claimant had 50% of the shares and the Krishans 25% each. It is unclear what the 'further written agreement sorted' was - to *rent* the Properties and split that 50/50 as the Claimant says, or to rent *or sell* them to split 50/50 that as the Krishans say. Whilst that is clear in SR's note of what Dr Krishan told her days later, it is not clear in Mr Davies' note.

175. I turn to the parties' accounts. The gist of Mrs Krishan's 2009-10 statement was the Claimant started pressuring her and Dr Krishan to help her with the Properties in early 2005, that increased after Bobby's meeting with the Council on 30th June 2005, after which the Claimant visited and telephoned several times a week saying if the Properties were compulsorily purchased she would only receive £100,000 but she thought they were worth £300,000 on the open market. While the Krishans initially refused to help because of their own development in Wolverhampton, they eventually agreed in principle to develop the Properties and if sold over £300,000, to split the profit 50/50 and Mrs Krishan then wrote the cheques. There was no reference to 2nd July 2005, despite the diary entry, nor to 4th July despite the letter, nor to any meeting with Mr Davies (only his recommendation of Mr Johnson). But Mrs Krishan's account in evidence in 2010 specifically focussed in on 2nd July 2005:

> "[I]n fact, on July 2nd – I will never forget that because we sat down and that 50-50 agreement [sic] and how it would help her. She was adamant we had to try and do something and in fact she sat on the computer and a letter was written and she wanted my husband to actually sort things out…."

176. However, it appears that Mrs Krishan did forget again about the 2nd July 2005 after all. In her 2022 statement, unless I have missed it, there does not appear to be any reference to it, despite the diary entry. Instead, her account in her 2022 statement was essentially that after the Claimant pressing for financial help, 'in the end' Mrs Krishan gave in and paid cheques to the Claimant and agreed to pay her £400 a month cash to 'help her get back on her feet'. The statement only then goes on to say the Claimant asked for help with the Properties, which she told them were 'derelict' so she could not sell them and they would not pay off her debts anyway. The Claimant said to Dr Krishan 'Oh brother, you must help me' and suggested they could make the Properties viable, sell them and go 50/50 on the profits and that the Properties should be transferred to a company as she was worried about benefit fraud. Mrs Krishan's statement suggests that they 'eventually' said they would help and they then had a meeting with John Davies. Therefore, this account is different again: it put the money before 'help' with Properties not afterwards, it did not mention Bobby's meeting or the importance of 2nd July, but did mention the Davies meeting not mentioned in 2009-10.

177. Unsurprisingly, Mr Halkerston cross-examined Mrs Krishan in detail about these inconsistencies and put to her the alleged fraudulent misrepresentations. She went back to her account that the key discussion was on 2nd July 2005. The Claimant had been in quite a state, broke down and said she felt there was a real chance she might lose the Properties. It was the Claimant who had mentioned the CPOs and that the Properties were 'worthless' as a result and Mrs Krishan herself only later found out they were actually worth £300,000 and the extent of the debts (she did not know about the £22,000 wedding debt at the time). When referred to the 2008 covert recordings, Mrs Krishan insisted she herself was only repeating back to the Claimant what he latter had said herself back in 2005. Mrs Krishan said it was on 2nd July 2005 that she wrote the cheques for the Claimant's debts and agreed to help. She said the Claimant not her had drafted the letter on 4th July. She insisted it was the Claimant's idea to transfer the Properties to a company to be refurbished, sold and the profits split 50/50 and she kept pressing them to progress it, but the Krishans were dragging their feet.

178. However, there are a number of serious problems with Mrs Krishan's account:

176.1Firstly, it is inconsistent with her 2022 witness statement which suggests financial help was provided first, then 'eventually' help with the Properties. In cross-examination, Mrs Krishan said it was the same time.

176.2 Secondly, whilst that was more similar to her evidence in 2010, there are still real differences. For example, Mrs Krishan did not say the Claimant drafted a letter there and then – as it was dated 4th not 2nd July.

176.3 Thirdly, in that way and others, Mrs Krishan's latest account (her fourth) is inconsistent with contemporary documents – not just the 4th July letter (which is more consistent with drafting by Mrs Krishan as I said at paragraph 99.3 above), but clearly the cheques dated 22nd July.

176.4 Fourthly, this account is inconsistent with the 2008 covert recordings, where for example Mrs Krishan herself seems to be saying that by the time the Claimant paid her debts the Properties would be 'worthless' and she could be 'bankrupt', rather than saying *the Claimant* said that back in 2005.

176.5 Finally, this new account does not explain the delay between July and November 2005. Mrs Krishan previously said it took a while for the Claimant to *persuade* them to help. Her current account appears to be that they *agreed to help* in early July - whether 2nd or 4th - but then dragged their feet until November 2005. However, Dr Krishan had written to the NHS in August 2005 and was in discussions with Donaldsons by October 2005.

For all these reasons, even aside from the finding of fraud in the Gasztowicz Judgment (on which I remind myself that just because they lied in evidence before, it does not mean they are now), Mrs Krishan's evidence is unreliable. Indeed, it has gone through four different versions, changing at each stage.

179. Dr Krishan's accounts were different yet again – from Mrs Krishan's and his own:

179.1 In his 2009 statement, Dr Krishan said the key meeting was 2nd July – the Claimant was 'desperate' as the Council was threatening to compulsorily purchase the Co-Op and Cinema and asked for the Krishans to develop them along with her. It was the Claimant who proposed a company and a 50/50 profit share, which they agreed would be split after the Claimant received the value of the Properties. He said they agreed the values of £100,000 for the Co-Op as it was valued at £108,000 in 2002 but deteriorated due to water ingress; and £100,000 each for the Cinema and the Shops. Then the Claimant wrote to the Council on their computer on 4th July 2005. In his evidence in 2010, Dr Krishan added the Claimant was already aware of the risk of CPOs from the Council and whilst he was not familiar with it, he did tell her she could lose the Properties through the process.

179.2 However, in Dr Krishan's 2022 statement, like Mrs Krishan, he did not mention 2nd July at all. He said the Claimant first mentioned the Properties in May 2005 as the Council were pressuring her as they were 'derelict' and 'she had no money to spend on them and was at risk of losing them'. He said he did not approve of helping the Claimant but later, Mrs Krishan helped with the credit card bills and that following settlement of that, under lots of pressure to help from the Claimant, they decided to help her. As I have said, he did not mention the Claimant meeting Mr Davies.

179.3 Understandably again, Mr Halkerston cross-examined Dr Krishan in detail and put to him the alleged fraudulent misrepresentations. Dr Krishan maintained that it had been the Claimant who approached and pressured them to help, not the other way around. However, he thought her debts were more like £15,000 – she did not mention the £22,000 wedding debt. She had said the bailiffs were after her and she could be homeless. Importantly, Dr Krishan said they discussed her selling the Properties, but she was adamant that she did not want to sell them. However, she was worried about CPOs and he did not need to make threats about that. He also knew this would entitle her to full market value if it happened, but he never discussed that with her – he said it never came up. Dr Krishan said it had been the Claimant's idea to transfer the Properties because she was worried about benefits and wanted to get the Council 'off her back' in relation to Council Tax and 's.215 notices' to do works on the Cinema (different from CPOs). But he accepted he did not say she did so due to CPOs and he said 'it had not occurred to him to mention it', even though CPOs 'had put the fear of God into Bobby'. The Claimant suggested a company and he agreed to that.

180. There are also a number of serious problems with Dr Krishan's account:

180.1Firstly, again the meeting on 2nd July 2005 comes and goes through Dr Krishan's accounts. Moreover, his account Mrs Krishan's help with finances came first is inconsistent with the cheques dated 22nd July.

180.2 Secondly, Dr Krishan accepted the Claimant 'was adamant she did not want to sell', yet he told SR in November the plan was to 'rent or sell'. That is inconsistent with his evidence it was the Claimant's idea.

180.3 Thirdly, Dr Krishan's case that he took a lot of persuasion is inconsistent with his letter (which he failed to mention) as early as 5th August to the NHS to enquire about PCT funding and describing his own experience in health centre development. He was plainly very keen on this idea. By then, he also would have seen Donaldsons' report sent to him on 12th July 2005 and could see that the Cinema in particular was a commercially-attractive site.

180.4 Fourthly, Dr Krishan's awareness of the health centre idea and insistence that Bobby was scared due to the CPOs suggests Dr Krishan was well-aware of the meeting on 30th June. By four months later, I find Dr Krishan knew full well that for the Council, CPOs were still a 'last resort', yet Mr Davies was told 'CPOs losing them', which is not consistent with that position. Even if the Claimant said it, why did not Dr Krishan correct it ?

180.4 Fifthly, whilst Dr Krishan said in 2010 he told the Claimant she could lose her Properties to CPOs but was unfamiliar with the process, he said neither to me. He readily accepted he was aware that the owner of property compulsorily purchased is paid full market value (he says £300,000 but did not get valuations) less debts to the Council (he thought her total debts were c.£15,000). Dr Krishan accepted the Properties were not 'worthless' or even only worth £100,000. Yet he accepted never explaining how CPO payment worked to the Claimant when she he says she said they were 'worthless'.

Again, like Mrs Krishan, I find Dr Krishan's account of this period is unreliable, even aside from the finding of fraud (and give myself the same *Lucas* direction).

181. Of course, the Claimant's reliability is also weakened by her forgetting about that Davies meeting. But as I said, the Krishans did not mention it at all in 2009 or 2010 and Dr Krishan did not mention her being present in his 2022 statement, so this point only goes so far. Moreover, unlike the Krishans, the Claimant's account of this time has remained broadly consistent in her statements and evidence (why she was not really cross-examined much on 'internal' inconsistency with them). She said she accepted Mrs Krishan's help with the money first and then accepted her persistent offer to help with the Properties (which I accept is also inconsistent with the dates of the 4th July letter and 22nd July cheques). She insisted Mrs Krishan persuaded her to let Dr Krishan help and drafted the letter on 4th July 2005. She said that after he started speaking to the Council, they met and the Krishans told her that CPOs had been applied against the Properties by the Council, which could be taken off her, leaving her with only liabilities, she could be left 'bankrupt', 'penniless' and 'homeless' or could go to prison and that Ian could take the Properties off her which 'terrified her'. However, she said the Krishans said they wanted to help as it was 'payback time' for the help she had given Mrs Krishan in childhood. They said they had experience with development and CPOs and that she should trust them with the Properties. She said she resisted their help for some time because she wanted to stand on her own two feet. However, over the

autumn of 2005, the Krishans supported her and took her on holiday to Spain. They suggested they would fight the CPOs with lawyers, get the Properties up and running and rented out; and whilst they would be put in a company for administrative reasons, this was only a formality as they would still belong to her. The Claimant said she eventually gave in to the Krishans' persistent suggestions (I quote from her 2022 statement below). In short, her account has always been they used what I am again calling as shorthand both 'stick' and 'carrot' combined in further shorthand 'the rescue narrative'.

182. As I have said, during the difficult first 1½ days of cross-examination before me, the Claimant was emotional, histrionic and dismissive of questions. But she did answer some of the questions clearly, especially on this key topic. At one point she even said she was 'remembering detail as they were going through it' (but I am cautious of that). She said she planned to authorise Bobby to deal with the Properties, but Mrs Krishan said the Claimant should not be burdening him with them and they should deal with it for her. She said Mrs Krishan typed the letter of authorisation for Dr Krishan for her to sign. The Claimant said they got her to sign that letter and once they had done that, the other times they put a letter in front of her to sign, it was easier. As she had in her 2009 statement and 2010 evidence, she described how the Krishans told her CPOs had been made. They said the Properties were 'worthless' (only worth £100,000 and not enough to cover her debts, including the mounting arrears in rates and Council Tax). They said she risked bankruptcy, legal proceedings and even prison. They also kept on about her ending up bankrupt and homeless. She added when she and Mrs Krishan returned from Spain, the Krishans met Bill who handed over some keys. The Claimant said eventually she gave in and agreed. She said once she accepted financial support, first the cheques and then the monthly maintenance, she got used to it and whilst she initially she insisted she could have managed without it, in re-examination she admitted she found it useful and came to depend on it.

183. On the CPO issue, the Claimant's solicitor's letter of 24th October 2008 (to which I return) said she had been told 'a compulsory purchase order procedure had been initiated by the Council'. It was later in November 2008 that the Council's Mr Todd confirmed the Properties were never 'threatened to become subject to a CPO' which was always a 'last resort'. Whilst it was vague in the initial letters, throughout the Claimant's *evidence* – her 2009 statement, 2010 oral evidence, 2022 statement and 2023 oral evidence, she has consistently insisted the Krishans said CPOs *had been made*. The irony is there is some contemporaneous corroboration in the note of the meeting with Mr Davies in November 2005 she denied she attended, where he noted *'Properties in Coventry – CPOs losing them'* (not 'CPOs but last resort', 'CPOs threatened' or even 'CPOs likely'). As I said, I cannot find precisely what was said in that meeting and by whom. However, Mr Davies was told something like 'CPOs losing them' and I find that is consistent with what the Claimant says the Krishans told her. In her statements, the Claimant said the Krishans told her in 2005 words to the effect that *'CPOs had been applied against all the Properties'* (2009 statement) or '*CPOs had been applied on the Properties'* and *'the Properties were worthless and it was essential to remove the CPOs to protect their value'* (2022 statement) – in other words that CPOs *had been made*. This is also corroborated by Mrs Krishan saying in the 19th May 2008 recording the Properties were 'worthless' and the 30th June 2008 one: 'When the first lot of *CPO orders came*' (not 'were threatened') and 'back to [being] saddled with CPOs and everything else *again*'.

184. Whilst the Claimant's lawyers in 2021 pleaded that the misrepresentations were in Spring 2005, she had already said it was later in her 2009 statement. As I said at paragraph 99 above, the letter of 4th July 2005 is more consistent with being drafted by Mrs Krishan than the Claimant, just as Mr Graham pointed out similarly-complex language in her statement was not consistent with her own. Four months between July and November 2005 is also *inconsistent* with the Krishans' case: far from them dragging their feet (Dr Krishan was authorised on 4th July, sent Donaldson's report 12th July, Mrs Krishan wrote cheques on 22nd July, Dr Krishan wrote to the PCT 5th August etc), I find the Claimant did so. The Krishans did not pay rates arrears on the Shops in September-October 2005 (which was missed from a Council letter in 2014) - I find it was the Claimant, Bobby or Bill. She says in November the Krishans met Bill and went round the Properties (hence their photographs of 5th November) and he handed them keys. The Krishans said in 2009 they met Bill around that time, as the Claimant saw them as 'family properties', I find that she would not have agreed to the Krishans' plan until Bill had also agreed. The last barrier to her agreement was overcome. That explains why Dr Krishan in November suddenly started to instruct all the professionals. That it is consistent with her case that until then, *they pressed her*.

185. As to how the Krishans 'pressed' the Claimant, her account is also supported - and theirs undermined – by what Mrs Krishan said in the 2008 recordings:

> "….[B]y the time you paid everything back…everything owing to the Council, everything owing to everybody, right, I mean they *were* actually worthless on paper…..I know you like to think that, yes, you know, they are there, but they are actually worthless……(my underline and italics)
> "…. The only other alternative open to us *was* that they go, and that they take them off and you know, they pay some of the debts and they [you ?] are made bankrupt."
> "[W]hen *the first lot of CPO orders came*, maybe, you know, it would have been better had we not done anything and they had just been taken off, and it would have left you absolutely nothing." (my underline)

So, Mrs Krishan was saying: (i) there had been CPOs; (ii) that if the Properties had been taken, after all the Claimant's debts, she would have been left with nothing and been made bankrupt; (iii) so the Properties were 'worthless' to her. Mrs Krishan was not saying the Claimant had told them this back in 2005.

186. Moreover, on this key point, the Claimant is also corroborated by her son Bobby, who in his statement recalled visiting the Krishans with her and them saying this:

> "[T]he buildings had become a liability and if the Council was not properly dealt with, my mother would be left with huge debts and legal costs. [Dr Krishan] in particular weighed in with what appeared to be quite detailed knowledge of the CPO procedure and warned that my mother could be left bankrupt and homeless. Prison was even mentioned. The Krishans then said they had experience in fighting CPOs, having done so in relation to some land on which they were building their new Mayfield Medical Centre. They told us about how they knew inside out the tricks the Council would use… I remember how passionate Parkash in particular was, and how she said that they would not allow the Council to take away her 'children's birthright' and they would fight my mother's corner with all the experience that they had built in property development. They told my

> mother that it was 'payback time' for all that she had done for Parkash in her childhood."

That account is consistent both with the Claimant's account and indeed with what Mrs Krishan said in the 2008 covert recordings. Indeed, it is also consistent with Dr Krishan's own observation 'the CPOs put the fear of God into Bobby' in a way in which the Council's references to CPOs as 'an absolute last resort' would not be – I find it was the Krishans' account of the CPOs that did that. This explains why Bobby believed he 'did not pick up on the CPO issue' on 30th June. He was saying he had not realised the CPO issue was so bad. But that is because it was *not* so bad: Coventry CC still saw (and always would see) CPOs as an 'last resort'.

187. In the light of all that, in my judgement the underlined content of Mr Davies' note *corroborates* the Claimant and Bobby's accounts of what the Krishans told them:

> "16/11/05 JD, Dr K, Mrs K, Mrs Takhar relative. Mrs Balber Takhar not seen for 33 years. Needing help with bankruptcy and eviction. Properties in Coventry – CPOs losing them. Has no family or no help – CCJs, no family support, violent marriage, divorce. Demanding help handed deeds and was very insistent. Verbal discussion agreed with 50/50 share and further written agreement sorted. Deal was in her favour as Dr K was to do finance.

I do not accept this was the Claimant or the Krishan telling Mr Davies what *she* had said in July 2005. As I said, after four months, the Krishans must have known CPOs were a 'last resort' and such risks were far-fetched. Whilst the Claimant accepted in the covert recordings in 2008 that *'it was going to be 50/50 on everything we did'*, that begs the question of what they agreed to *do*.

188. I find the '50/50 share' mentioned in November 2005 is consistent with a 50% *shareholding* in Gracefield, organised that same week. The 'further written agreement to be sorted' is consistent with what the Claimant says was their agreement - for the Properties to be renovated and *rented*, with a 50/50 split of the proceeds (and indeed the Krishans' expenditure repaid from her share), but there is no mention in Mr Davies' note about later *selling* their Properties or their *sale value*. This is consistent with the Claimant's evidence that at least at this stage, there was no discussion in front of her of onward sale of the Properties or a profit share as such. Certainly, a profit share was not mentioned by Dr Krishan to SB's firm two days later on 18th November when SB's colleague SR had recorded Dr Krishan telling her that he would be buying into the Properties by paying off the Claimant's debts. Moreover, as I will describe, there is also no mention of a true 'profit share' on sale of the Properties in SB's 2006 notes.

189. I remind myself that I have rejected parts of the Claimant's evidence, not least as she forgot this meeting; she lied about why she started making the covert recordings in 2008; and at least for 1½ days of her evidence was an incredibly difficult witness. I also remind myself of the important evidential principles at paragraphs 81-89 above. The burden of proof is squarely on the Claimant and it is not enough to for her to persuade me that her account is 'the most likely', as that would be her failure to discharge the burden of proof (*'The Popi M'*), which is to persuade me that it is *more likely than not* that the Krishans told her what she alleges (*Re B*). Since the Claimant alleges fraud and undue influence, I will decide those allegations later, on all my primary findings of fact which shed light on conduct and intentions at the time and must be clearly proved (*Enal, Three Rivers, Jafari-Fini, Kekhman*). However, whilst for now making findings

of fact on this period, I remind myself that the conduct the Claimant alleges is inherently improbable requiring cogent evidence (*Rea, Jafari-Fini, Kekhman, Privalov*). In particular, I remind myself that the fact the Krishans were found to have committed fraud procuring the Purle Judgment and to have lied in their evidence in the Gasztowicz Judgment, does not mean they are now giving dishonest evidence to me – they may have lied earlier to bolster a true case they now pursue before me that there was no undue influence (*Lucas, Jhutti, Slocom, Martin*). Yet even bearing all that in mind, I strongly prefer the core of the Claimant's account, which I find to be true on the balance of probabilities, on three alternative bases:

189.1 Firstly, as I have just detailed at paragraphs 171-188 given paragraphs 120-136, I find the core of the Claimant's account of 2005 reliable (despite her demeanour) and corroborated; but the Krishans' accounts unreliable and inconsistent: internally with each other; and externally with documents.

189.2 Secondly, I find the core of the Claimant's account more consistent with my assessment of all the evidence at paragraphs 91-140 (summarised at para.139); and my background findings of fact at paras.141-170:

(i) The Claimant was emotionally-attached to the Properties and did not want to sell them but could not afford to develop them. Yet in July 2005, after a Council meeting where Bobby had been told that CPOs were a possibility but an 'absolute last resort' and there were (different) development possibilities for the Properties, the Claimant suddenly replaced her son with Dr Krishan, whom she had only met the previous year – the husband of her recently-reacquainted cousin.

(ii) The Properties, whilst derelict, were potentially very valuable, yet Dr Krishan did not arrange proper valuations. Outdated valuation and guesswork were used to pick £300,000. Moreover, despite the fact that CPOs were a 'last resort' for the Council, four months after Dr Krishan had started dealing regularly and would have known that Mr Davies was told 'CPOs losing them', that was inconsistent with it.

(iii) Moreover, within another four months in March/April 2006, the Claimant transferred the Properties on the basis their value subject to CPOs was only £100,000 even though it is agreed: (i) they were not subject to CPOs; and (ii) even if they were, they were not worth £100,000 but market value (at least £300,000) less Council debts.

(iv) Moreover, by the end of 2006, the Claimant was no longer a director or shareholder of Gracefield - I will find tricked by the Krishans.

(v) In early 2008, a dispute erupted when (I will find) the Claimant discovered the Krishans had put the Properties up for auction without consulting her. They then produced a number of false documents to try and persuade the Claimant to sell, which led to this litigation.

If the Krishans are to be believed, the Claimant had convinced herself (and they never corrected her) the Properties were at risk when they were not; and she would be left penniless and homeless when she would not; then also had to *convince* them to share in her valuable assets and a chance of huge profit in return for modest financial support (an imbalance I return to on presumed undue influence). On the evidence I have – very different than that HHJ Purle QC had - the Krishans' case is implausible. By contrast, the Claimant's case makes sense –

if they were trying to take control of the Properties: as the weight of evidence from 2005-2010 shows they did.

189.3 Thirdly, I therefore find the core of the Claimant's account proved on the balance of probabilities, despite the inherent improbability of such alleged serious conduct – and even without the finding of fraud in the Gasztowicz Judgment. However, that would reduce it significantly too (*Arkhangelsky*).

Whilst I have focussed here on July-November 2005, given reliable documents are then more abundant up until the transfers, I turn to my findings of fact from July 2005 to April 2006, on all the evidence on the balance of probabilities.

The Krishans Take Control: July 2005 – April 2006

190. I will start my findings of fact for this period by picking up where I left off with my findings at paragraph 168-170, about Bobby Takhar's meeting on 30th June:

190.1 It is true Bobby's dream of a community drama and literature centre was clearly 'unrealistic' and the Council did 'put CPOs on the table', but they also stressed they were an 'absolute last resort'. Accordingly, I find he did indeed 'pick up' on the CPOs, but that he was not unduly *concerned* by them – he still planned to get an authorisation letter from the Claimant. The Council's main problem was the Cinema, but it was commercially attractive and I find the family would have been prepared to sell it to develop the Co-Op, which now had the exciting possibility of funding to become a health centre – precisely the sort of community use the family wanted.

190.2 In the light of that, I find on the balance of probabilities that Bobby gave the Claimant that more balanced view of the meeting with the Council, she plainly knew about it, as it was referred to in the letter she signed of 4th July. Specifically, I find he told her the Council had mentioned CPOs, but *only as a 'last resort'*: what he had been told. Moreover, from later evidence in 2005/06, it is clear that in 2005/06, CPOs were never made and never even 'likely'. Far from it – they were and I find that they stayed a 'last resort'.

190.3 However, at the start of July 2005, the Claimant would have been worried even by that. So, I also find on the balance of probabilities, that on 2nd July, she mentioned this reference to CPOs as a 'last resort' to Mrs Krishan, but also Bobby's meeting generally, including the plan to authorise him and for the Co-Op to be a health centre. That was too good an opportunity to miss for Dr Krishan when Mrs Krishan told him. SB later told Donaldsons (presumably on his instructions) that Dr Krishan was completing his own health centre and was interested in similar projects. Here, one had fallen right in his lap. I find that at his behest, over the next couple of days, Mrs Krishan cajoled the Claimant to authorise *him* to deal with the Council by pointing out his expertise, but also to save 'burdening' Bobby (not the way Bobby saw it). Worried by that, the Claimant finally agreed on 4th July to authorise Dr Krishan to deal with Coventry CC. Mrs Krishan drafted the letter of authorisation and the Claimant signed it. However, in doing so, she was not yet fully handing over practical control of and responsibility for management to the Properties to the Krishans. That took those ongoing discussions over the space of four months from July to November 2005. Until the Krishans got involved, I find the Claimant would have continued to

leave them to Bobby. Instead, in replacing her own son with him to deal with the Council, she was placing substantial trust in Dr Krishan.

191. Indeed, standing back to review all my findings so far, one can see the Claimant's trust (in the lay sense – I come to the legal issue of 'a relationship of trust and confidence' later) in the Krishans growing and developing over time:

191.1 Firstly, the origin of the Claimant's trust in the Krishans lay in her historical relationship with her cousin Parkash, to whom she had been like a 'big sister'. They had been out of contact for over 30 years due to her stifling marriage to Bill and his conservative family. However, I accept it was the Claimant's strong emotion (always crucial to her) that her beloved Parkash had come back into her life just when she needed her in a 'perfect storm' of personal and financial problems in 2004. So, the Claimant took her into her confidence with her problems to an extent she did not even do with Bobby.

191.2 Secondly, once Mrs Krishan had found out about the Properties in early 2005 and shared that with her husband, she tried to persuade the Claimant to let them manage them. However, the Claimant was still content for Bobby to do so. But after the meeting on 30th June, she told Mrs Krishan about CPOs as a last resort; and the idea of a health centre. The Krishans wanted to be involved and Mrs Krishan used the Claimant's re-established trust and confidence in herself and the Claimant's guilt about 'burdening Bobby' with the Properties to persuade her to trust Dr Krishan to be her representative for them with Coventry CC instead of Bobby.

191.3 Thirdly, once the Claimant had been persuaded to trust Dr Krishan with dealing with the Council, I will find below that he and Mrs Krishan deliberately developed her trust in them by what I am calling their 'rescue narrative'. This was partly what I am calling the 'stick' of dire warnings about the CPOs – indeed that they had been made; and partly what I am calling the 'carrot' of financial support becoming financial dependency of the Claimant on them; with reassurance they would help – as 'payback' for her previous help for Mrs Krishan. I find Dr Krishan specifically told the Claimant to leave communication with the Council to him (as her solicitors' letter of 24th October 2008 states, albeit I find this was before not after the transfers). In any event, whether or not told, that is what the Claimant did.

192. Shortly after the Claimant had signed that first letter of authorisation in July 2005 and the Krishans had sent it, they received a copy of the Donaldsons report sent on 12th July 2005, which suggested the Cinema 'offered a commercially attractive proposition to a developer'. Yet whilst Donaldsons was less positive about the Co-Op, the idea of a health centre must have attracted Dr Krishan. Indeed, within a month of being authorised by the Claimant, on 5th August, he had written to the PCT, although he said he *'was not interested in selling the building or site'*. He told the PCT *'he had spoken to the planners'* who had suggested it – just as it had been suggested in the meeting. I find that Dr Krishan must have either had a copy of the note of the meeting on 30th June, or already been told the gist of it by the 'planners' at the Council, including that the process had started leading to CPO powers being made available, but as an 'absolute last resort' – just as Bobby had been told at that meeting. Indeed, CPOs would have been the obvious first question to ask the Council about. I find on the balance of

probabilities Dr Krishan - and through him Mrs Krishan - knew full well CPOs were a 'last resort' and indeed the Council's position did not change.

193. Dr Krishan in his 2022 statement recalled thinking, 'there should be a corporate vehicle to protect them all', 'any borrowing would be in the company name so they would not be liable' and 'transferring the Properties into a company meant they would not all be in one name and would prevent anyone being able to walk away with them'. As I said, Dr Krishan suggested it was the Claimant's idea, because of her benefits, rates and Council Tax bills and the Council's 's.215 notices' on the Cinema – as he admitted, different from CPOs (which it 'had not occurred to him to mention', even though he said she worried about CPOs leading to 'bankruptcy' and 'homelessness'). This does not fit his description of her to Mr Rodgers as having 'no business acumen'. I find it was Dr Krishan's idea, for the reasons he gave. Indeed, the Claimant's suggested motive makes little sense. Maintenance from the Krishans might also be thought to affect her benefits. In any event, she would not have needed either if she had simply sold the Cinema – even for £160,000, let alone £200,000. It would have got the Council 'off her back', avoided any 's.215 notice', paid the rates and Council Tax arrears on the Shops and left a 'development pot' for the Co-Op (I will find that but for the Krishans' intervention, it would have been a 'no brainer' by April 2006 for her and Bobby). The Claimant's family were still paying arrears on the Shops in October 2005, not pushing the Krishans to pay. There was no 's.215 notice' on the Cinema until 25th June 2008: before the covert recording on 30th June when Mrs Krishan said 'when the first lot of CPO orders came'.

194. Mrs Krishan did not claim she had mixed up s.215 notices with CPOs – indeed there were neither before 2008 (and never a CPO). But her comment then supports the Claimant's account that the Krishans had told her there were actually CPOs (not just 'likely' ones) before. In her 2022 statement, the Claimant said they told her in 2005 that *'CPOs had been applied on the Properties'* which *'meant they could be snatched away from her leaving only liabilities'* and 'she could be left *'penniless'* and *'homeless'* and *'it was essential to remove them to protect their value'*. This is similar to the core of her account in her 2009 statement that *'CPOs had been applied against all the Properties'* and the Council could *'snatch'* the Properties, leaving her *'penniless'* and *'homeless'*. Her solicitors put it differently in late 2008, but at that time whether there had been CPOs or not was still being clarified with the Council. Given the Claimant's patchy memory, in fairness to the Krishans, I have also considered whether she may have misremembered them telling her CPOs 'had been applied for' on the Properties – as a misunderstanding of 'the start of the process' as stated on 30th June, or indeed 'investigation' of a s.215 notice on the Cinema in October 2005. However, neither was put to her - the Krishans say *she mentioned* both, not that she misunderstood *them mentioning* either. Moreover, the Claimant and Bobby already knew what the Council had said on 30th June about CPOs and Dr Krishan said he did not need to mention it. As I noted, whilst he said the Claimant mentioned 's.215 notices', there were no such s.215 notices until 2008 and it was only 'investigated' in October 2005. Indeed, I find that the Claimant's clear and consistent recollection of being told about CPOs by the Krishans – rather like her clear and consistent recollection of the proposed auction in 2008, was a strong shock clearly lodged in her memory.

195. Therefore, on all the evidence, I find on the balance of probabilities that over the Summer of 2005, after Dr Krishan had been authorised by the Claimant to deal with the

Council, he and Mrs Krishan arranged to meet the Claimant (I accept the little detail in her 2022 statement that it was in Debenhams). I find on the balance of probabilities that the Krishans between them told the Claimant that *'CPOs had been applied on the Properties'* which *'meant they could be snatched away from her leaving only liabilities'* and 'she could be left *'penniless'* and *'homeless'*. However, I accept the Claimant had been told by Bobby that CPOs were a last resort, but she had not understood them to have such dire consequences and she was very worried. However, I also find on the balance of probabilities that the Krishans reassured her they were professionals, with experience in property development and that she should leave this to them, as it was *'payback time'* for the help the Claimant had given to Mrs Krishan in her childhood. This was the start of what I am calling the 'stick' and 'carrot' of the Krishans' 'rescue narrative'. I find the Claimant told Bobby, who was also shocked and they visited the Krishans. I have quoted his account above at paragraph 186 and I explained his shock at this meeting explains his evidence about 'not picking up on the CPOs'. I find on the balance of probabilities that as Bobby says, the Krishans told them: *'the buildings had become a liability and if the Council was not properly dealt with, the Claimant would be left with huge debts and legal costs'*. Dr Krishan mentioned she would be left *'bankrupt and homeless'* and mentioned prison. He also said they had *'experience in fighting CPOs'* and *'knew inside out the tricks the Council would use'*. Mrs Krishan said they would not allow the Council to take away the *'children's birthright'*, would *'fight her corner'* and that it was *'payback time for all that she had done for Parkash in her childhood'*.

196. Indeed, on the first alleged false representation, I find on balance of probabilities the Krishans *did* say to the Claimant words to the effect that the Properties were subject to CPOs (or even if I am wrong about this, that they were 'likely' to be):

196.1 I find on the balance of probabilities that in addition to these initial conversations, between July and November 2005, the Krishans incorrectly (whether fraudulently I decide later) repeatedly told the Claimant words to the effect that 'CPOs '*had been applied on the Properties'* that could leave her *'penniless'* and '*homeless'*; and also *'it was essential to remove them to protect their value'*, for five reasons, individually and cumulatively. Firstly, this was a 'stick' to induce the Claimant to transfer the Properties – to 'get her off the fence', as Dr Krishan said to HHJ Purle QC of what he found to be the false documents in 2008 (see Gasztowicz Judgment at [113]). Indeed, such wider evidence (summarised at paragraph 189 above) also supports that finding, including my findings below about January 2006. Secondly, the Claimant's account in 2009-2010 was broadly consistent with her 2022-2023 account. Thirdly, that account is corroborated by Mr Davies' note on 16th November saying: *'needing help with bankruptcy and eviction'* and *'CPOs losing them'* (not 'threatened' or 'likely' – whatever exactly was said and whoever said it to Mr Davies in the circumstances). Fourthly, it is also corroborated by Mrs Krishan's comments in June 2008: '*When the first lot of CPO orders came'* (not 'were threatened') and '*back to [being] saddled with CPOs….again*'. As I say, I do not accept the Claimant mixed up (non-existent) s.215 notices with (non-existent) CPOs – nor do I consider did the Krishans – who unlike her were in contact with the Council. Fifthly, that point answers Mr Graham's submission that 'everyone knew there were no CPOs' and Bobby had been told the position in June. However, since July, Bobby and the Claimant had relied on Dr Krishan to communicate with the Council, so for all they knew, the

position may have changed. Yet the Krishans were careful not to say CPOs *had been made* to Bobby.

196.2 Even if I am wrong about that, all the same factors support my alternative finding on the balance of probabilities that the Krishans effectively told the Claimant (and indeed Bobby on the occasion quoted above) that CPOs were 'likely' i.e. 'if the Council were not properly dealt with', as Bobby put it. Mr Graham's point here was different - that if they did say this, CPOs were indeed 'likely'. However, as shown by Bobby's account which I accept, the Krishans *exaggerated* the likelihood and the consequences of CPOs – with 'bankruptcy', 'homelessness' and even 'prison'. The opposite was in fact true – for the Council - whilst starting to discuss s.215 notices for the Cinema in October 2005 - CPOs still were (and remained) a 'last resort'. Indeed, even if the Claimant had convinced herself of all that in July, by November, Dr Krishan was in a position to correct and reassure her. Even if it was her talking to Mr Davies, he did not do so. I find deliberately.

197. I deal next with the third alleged false representation i.e. but for the CPOs, the Properties would be worth £300,000 on the open market. Mr Graham submits that the Claimant and Bobby were in a better position to know the Properties' value – the Krishans were not expert valuers and relied on the earlier valuations consistent with a total value of £300,000. However, I find Dr Krishan came up with this value, which was incorrect (whether fraudulent I will decide below):

197.1 Since Dr Krishan thought the Claimant had 'no business acumen', it is implausible that he simply took her word on valuation. By mid-July, he had the July Donaldsons report which included undated valuations for the Co-Op of £108,000 and Cinema £160,000 and I find on the balance of probabilities he not her 'rounded up' for the Shops to £300,000. Indeed, in cross-examination, Dr Krishan accepted he had said in his 2010 evidence 'We came up with residual values and Mrs Takhar was perfectly happy'.

197.2 In fairness, I accept the Krishans would not have realised the Properties in late 2005 were worth something like £890,000 as Ms Dobson assessed and I find for April 2006. Nevertheless, even extrapolating back a few months in what Ms Dobson called the 'hot market', I find Dr Krishan's £300,000 valuation was far too low, yet he did not get new valuations, despite presenting himself to the PCT in August as an experienced developer.

198. This leads to the second alleged representation: that with a CPO, the Properties were 'worthless' or only worth £100,000. Dr Krishan accepted even if there had been a CPO, the Properties were still worth £300,000, not £100,000. Mr Graham therefore accepts if the Krishans had said that due to the CPOs or threat of them the Properties were only worth £100,000, that would be a clear misrepresentation. But he submits the Krishans never said that they were, still less that they were 'worthless'. However, I find on the balance of probabilities that they did both:

198.1 Firstly, I found above the Krishans told the Claimant the Properties 'were worthless and it was essential to remove the CPOs to protect their value'. This ties in with what Mrs Krishan said in 2008 covert recordings:

> "….[B]y the time you paid everything back…they <u>were</u> actually <u>worthless on paper</u>…..I know you like to think that, yes, you know, they are there, but they <u>are actually worthless</u>.." (my underline). Mrs Krishan was there saying

that the Properties had been worthless due to her debts in 2005 (whether or not saying they were still such in 2008).

198.2 Secondly the Krishans were therefore not telling the Claimant the Properties had *no intrinsic value* – they plainly did of *at least* £300,000. Instead, they said they were 'worthless *to her*' after her debts, as Mr Graham argued was true. But as he also said, they all agreed they were worth £300,000, yet her modest debts were c. £35,000, so they plainly were not 'worthless to her'.

198.3 Thirdly, that leads to what SB was later told – and later said to the Claimant in a letter – that '£100,000 was the value of the Properties subject to a CPO'. I will find below that SB had been told that by Dr Krishan.

198.4 Fourthly, it is totally implausible that the Claimant came up with a valuation of £100,000 (flatly contracting the valuations for the Co-Op and Shops Bobby was given by the Council on 30th June) which the Krishans simply accepted. The Claimant had also entrusted Dr Krishan with dealing with the Council on her behalf and relied on what he told her. Therefore, I find it more likely than not that he came up with the £100,000 value himself.

198.5 Fifthly, this was bound up with the dire threats of 'bankruptcy' and 'homelessness', yet given she not only owned her own mortgage-free home but could have solved all her financial problems and created a 'development pot' for the Co-Op just by selling the Cinema, that was extremely *unlikely*.

199. However, the Krishans always balanced their 'stick' with their 'carrots'. On 22nd July 2005, Mrs Krishan paid the two cheques totalling £5,000 to the Claimant. In October, she also took her to Spain for a break the Claimant clearly needed, still struggling financially and caring for Arun and Sukhjeet. Moreover, I also accept the Claimant's evidence that Mrs Krishan also presented transfers as positive – a way to deal with the CPOs (never properly explained) and to avoid any claim by Ian. Moreover, I find the Krishans reassured the Claimant the transfers to a company was to fight the CPOs and renovate the Properties to *rent* them out. I find she never agreed for the Properties to be refurbished and *sold*. They were her 'family properties' and Dr Krishan himself accepted she was reluctant to sell (as shown by her dismay in 2008 when the Co-Op was up for auction). I find proved on the balance of probabilities the Claimant's pleaded fourth false representation: that if she transferred the Properties to Gracefield, they would ensure the threat of CPOs was removed and refurbish and manage them for her benefit. (Again, I come back to the issue of fraud). However, the fifth is *not* proved: whilst the Krishans *called* it an 'act of charity', the Claimant *knew* they would *also* benefit.

200. I also find on the balance of probabilities that the Krishans reassured the Claimant that, whilst the Properties would be transferred to the company to undertake the developments and she had a 50% shareholding, this was only a formality and beneficially the Properties still belonged to her which she believed. As she said:

> "I recall asking [the Krishans] what would happen to the Properties when they were transferred to the company. The[y] had been in the family for many years and I was anxious to make sure they stayed that way. So I needed to know..whatever the Krishans did with the[m], they would remain in my ownership. [They b]oth repeatedly assured me that the transfer of the Properties was only a formality and that of course they would still be mine."

Whilst that forms part of her abandoned contract claim, it is also part of the fourth false representation – that Gracefield would manage the Properties 'on her behalf and for her benefit' – and also key to her resulting trust claim. I accept it because:

200.1 The Claimant has been consistent throughout she believed the Properties would still belong to her after transfer to the company, which Mrs Krishan said was only for 'administrative convenience' so 'legal and above board'.

200.2 It fits very clearly what Mrs Krishan said in the June 2008 covert recording: *'Although we are handling it the property is yours'*. She said this shortly before saying *'We did say it was going to be 50/50 on everything we did'* and the Claimant saying *'Yes'*, which needs to be seen in that context. It was not 50/50 *ownership* but 50/50 on the *development,* albeit the Krishans' expenditure repaid from the Claimant's share of *rent*, not sale proceeds.

200.3 It also fits what Mrs Krishan said in a May 2008 covert recording: "*I have no vested interest in them, but I know you have because that's your life'*."

200.4 That strong attachment of the Claimant to her 'family properties' and her fear of Ian taking them is consistent with Mrs Krishan also saying in 2008: *'There is no way my sister is going to get caught up in the hands of [Ian]'* and persuading the Claimant the company would protect them from him.

200.5 It also fits the Claimant seeing the Properties as belonging to herself and Bill, as I said at paragraph 149: and so not agreeing to transfer until he did.

201. Therefore, on 5th November 2005, after the Claimant and Mrs Krishan got back from Spain, the Claimant and the Krishans went to see the Properties with Bill. The Claimant said she travelled with Mrs Krishan, whilst Dr Krishan drove Bill and spent the day talking to him and asked him for the keys, which Bill gave to him. So, the Claimant knew Bill also agreed, which I find then enabled her to agree in principle to the transfers. She gave the reasons in her statement:

> "Ultimately, however, I felt trapped. I was too afraid that I would lose the Properties to the Council and end up, as the Krishans described it, penniless and homeless. I was too tired to face this problem on my own, but Parkash's warnings, echoing my own concerns, that I should not be burdening Bobby with my problems were ringing in my head. Moreover, what the Krishans were offering was exactly what I needed help with – they seemed to be offering a perfect solution to my problems, because I could both ensure that the Properties were put back into good condition, but also keep them in the ownership of me and my family. So I eventually agreed to accept their help"

I accept that and underline it to stress both carrot and stick: 'the rescue narrative'.

202. Once the Claimant had agreed in early November 2005 to transfer the Properties to a new company, Dr Krishan acted quickly. Mrs Krishan chose the name 'Gracefield' and once the Claimant handed over the deeds on 14th November, Dr Krishan instructed SR at his accountants to incorporate it and on 16th November confirmed to SR its shareholdings: 50% to the Claimant, with 25% each to the Krishans. But as I said, the Claimant was told the Properties still belonged to her, so transfer was just a formality. I find on the balance of probabilities their agreement was for a '50/50 share' of Gracefield and the benefits from *renting*, albeit the Krishan's expenditure would be repaid from the Claimant's share. From the letters from Donaldsons to Dr Krishan (of

1st November and 23rd November 2005), I find that he met them and an officer from the Council on 16th November – the same day as Mr Davies – it is unclear which was first. I have seen no note of that meeting, but I assume pending the PCT's response on the health centre, he proposed a similar plan as SR told SB on 18th November he had told her: that paying off the Claimant's debts would be 'his way of buying into the properties' and he planned to demolish the Cinema and build flats; and at the Co-Op to build 3 units and upper floor flats; and in each case to rent out the flats or to *sell* them.

203. However, when on the same day Dr Krishan – now with Mrs Krishan and the Claimant – met Mr Davies, Mr Davies' note mentions nothing about any plan to sell the Properties. As I said at paragraphs 173-174 above, given all the parties' unsatisfactory evidence about this meeting, I am wary of making findings about exactly what was said and who said it, but I do find Mr Davies' note to be a reliable and contemporaneous record of the gist of the meeting. I find on the balance of probabilities that gist is more consistent with the Claimant's account of what she had been told by the Krishans since July – what I am calling their 'rescue narrative' – than it is with the Krishans' account of what the Claimant told them. This is why Mr Davies was told at the meeting – either by the Claimant or the Krishans – that she 'needed help with bankruptcy and eviction' as due to 'CPOs' she was 'losing' the Properties. If necessary to make a finding on who was relaying this to Mr Davies, I would find on the balance of probabilities it was Dr Krishan – whose statement did not even mention the Claimant being there.

204. Dr Krishan speaking (at the very least towards the end) would also be consistent with the comment that the *'deal was in her favour as Dr K was to do finance'*. That is the context for the description of a *'verbal discussion agreed 50/50 share with a further written agreement sorted'*. As Mrs Krishan later put it: *'we did say it would be 50/50 on what we did'* as the Claimant acknowledged. However, as I said at paragraph 174 above, that same week, Dr Krishan had arranged the incorporation of Gracefield with the Claimant to have 50% of the shares and the Krishans 25% each. Despite what Dr Krishan told SR in the Claimant's absence on 18th November, there is no clear reference in Mr Davies' note to 'sale'. I find 'sale' was not mentioned in front of the Claimant, which is one reason why she was quite so shocked by the auction in March 2008. For that and the other reasons at paragraphs 171-189 above, I accept on the balance of probabilities the Claimant's evidence that she never agreed to refurbish and *sell* the Properties, but only to *rent* them. Mr Davies' note is not inconsistent with that. However, as I say, that agreement is also inconsistent with a pure 'act of charity': which reflects their refrain of 'payback for the Claimant's help', but clearly by November 2005 she knew the Krishans stood to benefit. Then Dr Krishan got to his point: he needed an architect and Mr Davies suggested Mr Johnson.

205. On 28th November, Dr Krishan instructed his regular solicitor, Mr Whiston of Pitt & Cooksey Solicitors, enclosing the deeds explaining that Gracefield had been incorporated (with the three of them as directors and shareholders) for the Properties to be transferred from the Claimant and instructed him to implement that. On 14th December 2005, Mr Whiston confirmed all were mortgage-free and asked Dr Krishan to confirm whether there would be consideration for the transfer or whether they would be a gift. He added the Claimant should take tax advice. Of course, Dr Krishan had already instructed SB, but he was her client, not the Claimant. Then on 7th December, Dr Krishan first met Richard Johnson, the architect, introduced by Mr Davies. The Claimant was not present. They visited the Properties and Mr Johnson later said in his

letter of 12th December 2005, he felt the Shops required a structural engineer but could be refurbished. He felt the Cinema was derelict and they agreed to knock it down for a residential development to be built. The Co-Op was empty and the building was in poor repair, with broken windows and brambles. They agreed to keep the ground floor as retail with the upper floors as flats. The same day, Dr Krishan wrote back to Donaldsons to confirm that both Mr Johnson and SB were involved. They acknowledged that on 16th December.

206. As 2006 began, Coventry CC were still receiving requests for updates from councillors about the Cinema – pressing for demolition. It was decided to review whether a CPO could force development of the site which was to be considered. However, it is confirmed by Mr Duncan and Mr Todd's uncontested evidence that it never even got to the first stage for a CPO of a Cabinet report. As Mr McGuigan later replied on 27th March 2006, whilst there was a decision to use the CPO process as a 'last resort', there was now a development company and things were 'moving in the right direction'. I find Dr Krishan would have known this all along. Doubtless it would have been confirmed to him in his frequent dealings with the Council and their agents Donaldsons in Autumn 2005, not only by his discussions with the planners referred to in his letter to the PCT in August, but in his November meeting with Donaldsons and the Council on 16th November.

207. On 30th January 2006, Ms Hayward wrote to SB to say they were 'encouraged that Dr Krishan has now become involved', but wanted to know more about his track record. The plans were for 12 residential apartments at the Cinema site, with 'rough estimate costs' of £606,000 to build; and at the Co-Op, a retail unit on ground floor and 12 apartments above costing £925,000. Ms Hayward added that *'no allowance has been made for land value as the land [will be] owned by the company'* (she noted above it was still owned by Dr Krishan's 'family'). On 21st February 2006, SB replied to Ms Hayward to explain about Dr Krishan's health centre project in Wolverhampton with a build cost of £2.1 million and she added that Dr Krishan 'had secured funding for the development'. However, by that stage, Dr Krishan had done no more than set up Gracefield's bank account.

208. SB's letter brings me to her involvement following SR's email on 18th November. As I said earlier, in brief SB's evidence was that her initial meeting about Gracefield was with Dr Krishan at his home (when discussing other business) and he mentioned the Properties owned by the Claimant and the plan to transfer them to the company, develop and sell them to split the proceeds. However, I do not accept the latter was discussed in front of the Claimant. SB met her with the Krishans at their home on 20th January 2006 and SB took a contemporary note. The 'client' at this stage is noted to be Dr Krishan and I find that it was him doing most of the talking. The Claimant was largely a 'passenger'. She accepts she briefly met SB but became emotional about Bill and left them talking and left the room, which explains why she cannot remember the discussion well. Certainly, there would have been nothing in it to change her understanding that the Properties would still belong to her and the transfer was for 'administrative convenience'. This may also explain her lack of interest in the mechanics of that. SB remembered the Claimant's gratitude to the Krishans and said in evidence that she also made 'the odd point'. That was probably the Properties being owned jointly for approximately 10-11 years with the Cinema bought in 1986, with 1999/2000 'sale range' when she acquired the Properties from Bill – who is later

referred to as 'still being a partner in the business but being ill in the mid-1990s' and also confirming her benefits position (Income Support and Child Tax Credit).

209. Speaking of the Claimant's finances, it is undisputed that from November 2005, the Krishans started paying the Claimant a monthly maintenance of £400 and also discharged the bills on the Properties which she had been struggling to do. Therefore, whilst the Claimant said she could have managed without it, it is clear at the time that she was not managing without it and that maintenance was vital to her and also made her feel financially *dependent* on the Krishans. Turning back to the SB meeting, I find Dr Krishan told SB they would fund the development, which would have benefits for the Claimant, such as them paying the arrears (said to be £7,500) and an allowance to her of £400 a month starting two months earlier following the £5,000 (on the credit cards in July). The Claimant now accepts that in total from December 2005 to September 2007, she was paid £13,800 for her maintenance, which less the £5,000 would equate to 22 monthly payments. That is effectively the same as on the Original Balber Takhar Account. However, whilst she also accepts the Krishans paid £5,672 in rates and other arrears, that is much lower than in the Balber Takhar Account and I return to it. In any event, this financial support from the Krishans from late 2005 was invaluable for the Claimant in financially managing, but also crucial in cementing her trust in them.

210. I find that after the Claimant left the room, Dr Krishan relayed to SB in January their actual plans for the Properties in much more detail than before Mr Davies in November. The Co-Op was said to have a £1 million cost to convert to shops and flats; whilst the Shops were to be converted back into residential accommodation. Though there was subsidence, a grant was available and the Krishans were also paying the rates at that time. It was noted the earliest date for the build would be Summer 2007. Yet tellingly, whether or not the Claimant was present, as SB accepted in evidence in 2010: the notes simply do not mention the possibility of *sale*. The closest they come is a reference to developing the Cinema '15 flats x £150k £55-60k'. SB in her evidence did not explain what that meant. However, especially given the reference in the next line to 'Co-Op £1m spend to convert', I find the reference to the Cinema was development costs not sale prices.

211. Unlike the Davies meeting two months earlier, there was discussion of the values. The total market value of all the Properties was said to be £300,000. In her 2010 evidence, SB said she understood that had been agreed before the meeting. SB accepted that she had seen no formal valuation of that. It was broken down into the Co-Op as £120,000, the Cinema £90,000 and the Shops £90,000 ('3 x £30k'). SB noted she needed to check the position on VAT with the Co-Op. SB's note mentioned 'Post April 2006' (perhaps the plan to stagger the transfers). However, just as with Mr Davies in November, there was no reference in SB's 20th January meeting notes to any payment (beyond arrears and maintenance) to the Claimant, still less to any 50% profit share: consistent with the Claimant's recollection that it was not discussed in front of her. In fact, SB's 2009 statement and 2010 evidence was that the profit share was mentioned by Dr Krishan in discussion in late 2005, not at the 2006 meeting. I find that even if the Claimant was present, she would have 'tuned' out from the detailed business discussion. In any event, I find there would have been nothing in it to change her fundamental understanding that the Properties would still belong to her (and Bill) after the 'formal' transfers.

212. Indeed, SB added in her statement after that meeting, she considered there were actually two tax options: either the parties' plan for the Claimant to transfer the Properties to Gracefield legally, or for her to retain them and for Gracefield to act as the developer. The Claimant does not mention that, but had she heard it, it would have *confirmed* her view that the transfer was just a formality for tax reasons and the Properties would still belong to her (and Bill). Dr Krishan accepts SB said this to him, so it cannot have been finally decided by the 20th January. However, he wanted the Properties transferred to a company he could control, not the burden of managing them without the benefit of ownership. There is a clue to how he responded to this unexpected threat in an important note from SB dated 20th February 2006. She said she prepared part of the note in advance of the meeting of 20th February (I find the first page) and part at the meeting itself (I find the second page). The Claimant did not recall this meeting, but I find that as the topic was tax planning (even though it was her potential tax), she 'tuned out' and has since forgotten about it. However, the contents of the first page of SB's note – written *before* the second meeting - are very revealing. SB set out two options, although neither appear to involve the Claimant retaining them. 'Option 1' was based on a sale value 'Per CPO' of £100,000 which following tax calculations would end her up with a tax bill of £24,600. 'Option 2' was based on a sale value 'Est value £300,000' which would end up with a tax bill of £88,600.

213. At this stage, I repeat paragraph 16 of SB's 2009 statement (with my underline):

> "On 20th February 2006, I had a further meeting with the Krishans and the Claimant. In advance of that meeting, I made a note of the consequences of the properties being transferred at either £100,000 (being their value in the event that they were subject to a Compulsory Purchase Order) or £300,000 (being the estimated market value. Both of these values had been advised to me by Dr Krishan and, I believe, were what had been agreed by all concerned as representing fair and realistic values."

As I said, in her 2010 evidence, SB equivocated about which director said this. Perhaps by then she realised the significance of what she had said. Certainly, she added that she had been advised by the directors that if the Properties were subject to CPOs, they would be worth significantly less than market value. In fact, it was put to her (correctly), that this was wrong: a CPO entitles owners to full market value less debts, of which she accepted she was unaware. Certainly, Dr Krishan in evidence to me accepted these distinctions between 'CPO values' and 'market values' were wrong. He said he never told SB that - it was the Claimant. If so, it is strange he did not correct her. In fact, I find on the balance of probabilities that Dr Krishan *did* tell SB - and the Claimant - about the £100,000 'CPO Value':

213.1 Firstly, whilst Mr Graham argued these were in fact *SB's* values in her tax or accounting exercise, that is not what SB said then, or Dr Krishan says now. Moreover, in her 2010 evidence, SB said the decision had not been based on tax, but on financing the development. She also said that the note should have said £100,000 was the *directors'* value should CPOs be made.

213.2 Secondly, whilst SB equivocated in evidence about which director gave her the £100,000 'CPO Value', she was clear she only spoke to the Claimant twice; but prepared that part of the note *before* the second meeting – and there was no reference to the £100,000 'CPO Value' in the first meeting. The only plausible

explanation was that Dr Krishan told her that separately, *between* the two meetings and she then included it in her pre-meeting note.

213.3 Thirdly, that would be consistent with what SB said in her own statement that Dr Krishan told her the values, including the £100,000 'CPO Value'. (Moreover, it is also consistent with my findings at paragraph 198.3 above).

This is why SB prepared the pre-meeting note with those alternative valuations.

214. Moreover, as I noted above at paragraphs 193-198 above, I found on the balance of probabilities the Krishans told the Claimant in 2005 not only that *'the Properties were worthless'* but also that *'it was essential to remove the CPOs to protect their value'*. In any event, I also find on balance of probabilities that the Krishans told the Claimant (and I find SB – despite her saying 'in the event that') there *were* CPOs in 2006 before the transfers, shown by documents from March:

214.1 As I will detail below, SB wrote letters to the Claimant and Mr Whiston on 15th March and the draft PSA in April as if a CPO had actually been made and £100,000 was the Council's valuation. She told Mr Whiston the total sum of £100,000 was *'the value placed on the properties by the council with regards to the compulsory purchase order'* and told the Claimant the same day: '*we are transferring the properties in at the value of the compulsory purchase order rather than the true redevelopment value'*.

214.2 The Claimant recalls after seeing (I will find, both) those letters, she spoke to Mrs Krishan, who said *'They were just paper figures, set because that was the price the Council had fixed. She again said I had to do this to save the Properties'*, entirely consistent with SB's two letters and indeed also I find Mrs Krishan *reminding* the Claimant in 2008: *"When the first lot of CPO orders came'* and *'[We are] going back to the stage where we are saddled with CPOs… again*": implying there had previously been CPOs.

214.3 Moreover, the Krishans had a motive to 'return to the rescue narrative' in February 2006: namely both (i) to 'head off' SB's idea for the Claimant to still own the Properties – which is why SB recalled the decision was not on tax grounds - and (ii) obviously it was in their interests to reduce the up-front transfer cost from so-called 'market value' of £300,000.

I accept SB's recollection in her 2009 statement (as opposed to her equivocation in evidence) that 'both of these values were relayed to me by Dr Krishan'. He denied that when it was put to him in cross-examination by Mr Halkerston, but I find on the balance of probabilities that he spoke to SB between the two meetings to rule out the option of the Claimant retaining the Properties (which is why SB remembered that decision had not been made on tax grounds) and to tell her that the Council *had* made CPOs and fixed the values at £100,000. SB accepted all this because she did not understand CPOs paid market value less debts, as she admitted in evidence. This is why she discussed 'CPO value' ('Per CPO') and wrote those letters. If she had known there were no CPOs (indeed, a 'last resort'), I find she would not have said this. Whilst the Claimant does not recall the 20th February meeting, she is clear the Krishans regularly told her CPOs had been made. Therefore, even if I am wrong to have found above that the Krishans told the Claimant in 2005 that the Properties were subject to CPOs, I find in any event on the balance of probabilities that one of the occasions they told the Claimant that was before the 20th February meeting. Since I have found (at paragraph 198 above) the Krishans had also told her that due to the CPOs, the Properties were

only worth £100,000, she would have had no reason to challenge – or indeed remember – SB saying at the meeting that the Council had placed CPOs on the Properties valued at £100,000. In any event, I find the Claimant was again a 'passenger' at it. Nevertheless, since unlike the meeting with Mr Davies, I have SB's note and her evidence too, I am in a position to make more detailed findings.

215. At the 20th February meeting, I find SB discussed the two tax options for the transfer 'price': the £100,000 'CPO Value' and £300,000 'market value'. I find £100,000 was agreed as the 'price'. The £200,000 'deferred consideration' was the balance of the agreed 'market value' of £300,000 (as SB later adjusted in the accounts). I accept Dr Krishan's characterisation to Mr Rodgers that the Claimant (then) had 'no business acumen'. She did not understand the CPO process (how they were made, challenged etc) and specifically that CPOs paid full market value less debts. She also did not expect to be actually *paid* (or indeed to be treated as *loaned*) a penny because as far as she was concerned, all these detailed mechanics of transfer were just formalities and tax planning, as the Properties would still really belong to her (and Bill) after transfer into Gracefield's name. So, whilst this was *not in fact* purely an accounting exercise by SB as Mr Graham suggested, that *was how the Claimant understood it*: she thought all these were just 'paper figures', as Mrs Krishan would soon call them. However, what was *not* discussed at the 20th February meeting was any *onward sale* of the refurbished Properties.

216. Indeed, SB's note does not refer to any '50% profit share' on *sale*, as she accepted in evidence. Indeed, her statement itself stated the action point was to 'draft an agreement regarding the £200,000 split over properties', not a 50% profit share. That is also clear from SB's letters to Mr Whiston and the Claimant noted above. I return to both, but quote and underline part of the letter to the Claimant, which again would have reinforced the Krishans' incorrect statement there *were* CPOs:

> "With regards to the payment for the properties, the sum of £100,000 will be transferred to a loan account in your name and the purchase price of the property will be paid out to you once the redevelopment of each plot is completed and the new properties have been sold. In addition, I am also preparing a profit share agreement which will show that additional sums are paid out to you in the first instance as soon as each development is <u>sold</u>. This is due to the fact that <u>we are transferring the properties in at the value of the compulsory purchase order rather than the true redevelopment value</u>. The profit shares allocated to you first will be as follows: 3 houses - £20,000 each; Ritz Cinema - £60,000. Co-Op £80,000. I would hope that the agreement will be sent to you within the week."

217. Going back to late February 2006, as noted above, on 21st February, SB did write to Donaldsons to confirm Dr Krishan's development experience including on a health centre. But on 23rd February, Mrs Hayward told Dr Krishan that would go no further, inviting his proposals on use for the Co-Op. (Dr Krishan therefore changed to his back-up plan of mixed retail/residential use discussed with SB). But Mrs Hayward was more positive about the development of the Cinema, enclosing a residential development brief for Mr Johnson. In essence, this was for demolition of the Cinema and construction of a 3-4 storey block of flats (with parking). After another meeting with Dr Krishan, Mr Cocks and herself on 3rd March to consider Mr Johnson's draft plans, Mrs Hayward noted good progress. The Cinema would have 14 flats in total. The Co-Op

would be retail development on the ground floor and 12 flats above – six one-bed and six two-bed flats.

218. Also on 3rd March 2006, with Donaldsons' blessing to proceed, Dr Krishan set up Gracefield's bank account (as Mr Rodgers confirmed) and Mrs Krishan wrote to Mr Whiston to request him to prepare transfer documentation for the Shops to be transferred to Gracefield in March and the Cinema and Co-Op after 5th April (as also discussed on 20th February). On 3rd March, Mrs Krishan also prepared a letter in the Claimant's name confirming she instructed Mr Whiston to transfer the Properties to Gracefield. As noted above at paragraph 99, the format and mis-spelling of SB's firm's name was identical, showing she drafted both. The Claimant signed it, not only as she implicitly trusted her, but also because I find she had recently been in two meetings with SB to discuss it. As I say, in the first, she became emotional and left the room. The second, I found she 'tuned out' of discussions of further mechanics and tax implications. But by the end of that meeting at the very latest (in fact I find months before), the Claimant had been told by the Krishans (or at the very least, had been told by them through SB) that CPOs had been made and the Properties were only worth £100,000. Yet as I have also found on the balance of probabilities, nothing had been discussed at either meeting to change the Claimant's established understanding that after formally 'putting the Properties in Gracefield's name' to protect them from the CPOs (and Ian) the Properties would really still belong to her (and as she saw it, Bill too).

219. Ironically, on 14th March (see paragraph 223 below) the Council discussed their response to Councillors about the Cinema, saying their plan of warning of CPOs as a last resort then negotiating had seen progress. In stark contrast, as SB had been told by Dr Krishan CPOs had been made valued at £100,000, on 15th March, SB wrote her letter to the Claimant (quoted again below); and this to Mr Whiston:

> "Further to a meeting with the above-named clients [Gracefield and Mrs Takhar – now also a client] it has been agreed between the parties that the properties currently owned by Mrs Takhar will be sold to the… company… Pre 31 March 2006: The [Shops] for a value of £10,000 each. The sum of £30,000 is the value placed on the properties by the council with regards to the compulsory purchase order. Post 6 April 2006 (but before 30 April): The [Cinema and Co-Op], at a value of £30,000 and £40,000 respectively. Again, these values are the amounts placed on the properties by the council with regards to the compulsory purchase order…" (my underline)

Notably, SB did not mention to Mr Whiston anything about any '£200,000 split' or deferred consideration for the 'sale', still less any 50% profit share.

220. The Claimant has always accepted seeing a copy of SB's letter to Mr Whiston which he sent to her on 15th March asking her to confirm the values. She recalls reflecting on and querying '*sale'* to Gracefield and the low valuations (I find the Krishans had told her the £100,000 'CPO value' before and she had 'tuned out' of SB's meeting, but she was now being asked to *confirm* it by a professional). Whilst she earlier denied seeing SB's letter to her, both in her 2009 statement and her 'calm' cross-examination she accepted she did. It stated as follows:

> "Please find enclosed a copy of the letter I have today sent to the solicitor advising him of the sale of the properties into Gracefield. He will no doubt be

> contacting you shortly to confirm you are happy with the instructions. With regards to the payment for the properties, the sum of £100,000 will be transferred to a loan account in your name and the purchase price of the property will be paid out to you once the redevelopment of each plot is completed and the new properties have been sold. In addition, I am also preparing a profit share agreement which will show that additional sums are paid out to you in the first instance as soon as each development is sold. This is due to the fact that we are transferring the properties in at the value of the compulsory purchase order rather than the true redevelopment value. The profit shares allocated to you first will be as follows: 3 houses - £20,000 each; Ritz Cinema - £60,000. Co-Op £80,000. I would hope that the agreement will be sent to you within the week. I trust this is all clear however, should you have any further queries, please do not hesitate to contact me. Kind Regards….." (my underline).

This not only referred to 'sale' as opposed to 'transfer' at £100,000, but also its payment to a loan account. It also explicitly told her (I find for the first time) of the prospect of *later sale* of the Properties after refurbishment – the opposite of what she (let alone Bill) wanted. However, rather than ask SB about this, such was her implicit trust in Mrs Krishan, the Claimant asked her instead. She visited Mrs Krishan on 24th March 2006 to query it, yet then signed this letter to Mr Whiston, again in terse professional language I accept (see paragraph 99) was drafted by Mrs Krishan (who was copied into SB's letter to the Claimant):

> "I have met and discussed the best way forward for redevelopment of my properties with [SB] and you will have received a letter dated the 15th March [from her]. I confirm that the [Shops] are to be sold to the company at a value of £10,000 each pre-31st March 2006. I also confirm that the former Ritz Cinema and the Co-Op site are to be sold to the company for £30,000 and £40,000 respectively, post 6th April 2006 but before the 30th April…."

221. Given the Claimant's signature in this letter was found to be the source of the forged PSA in the Gasztowicz Judgment, it has been explored in detail in evidence. I note the Claimant addressed it in her 2009 statement much closer to the time – before repeated 're-retrieval'. Although confusingly dealt with in two different places (paragraphs 303-304 and 319-321), she appears to be discussing one conversation about Mr Whiston's letter and SB's letters and the draft response. The Claimant said she *'plucked up the courage to question her'* but Mrs Krishan said they were just *'paper figures'* and *'the price set by Coventry CC for them'* (as the Claimant had been told in February by the Krishans and – unwittingly, also SB) and '*They had to do this to save the Properties'* and pressed her *'Do you not want to save them ?'* stressing *'family honour'* and explaining the transfers were split as it was more *'tax efficient'*. The Claimant said she was also reassured by Mrs Krishan's explanation of SB's letter to herself as *'just the hoops they had to go through to allow them to deal with the Properties on her behalf'* and such was her trust in Mrs Krishan, she accepted it. The Claimant's 2022 statement covers some of the same ground and in evidence, she added Mrs Krishan had called the letters *'legalese'* that the Claimant accepted as she *'was not a numbers person'*. She therefore also accepted Mrs Krishan's word the transfers had to be done to save the Properties from the CPOs, so she signed Mrs Krishan's draft. Whilst Mrs Krishan denied it, on the balance of probabilities I accept this was the gist of what she told the Claimant on 24th March 2006. Indeed, it is pretty similar to what Mrs Krishan told the Claimant in the 2008 covert recordings. The 'stick' were the CPOs which reduced the

Properties' value and meant 'she had to do this to save the Properties'. The 'carrot' was Mrs Krishan's reassurance of the Claimant that this was a question of 'family honour' and these were just 'paper figures' or 'legalese': presented as SB's tax/accounting exercise, even though it was not, as I discussed at paragraph 215. Therefore, I find on balance of probabilities despite SB's letters of 15th March, the Claimant was still reassured that even after transfer the Properties would really still belong to her (and Bill) and indeed, despite references to 'sale', the plan in reality was still to rent, not sell.

222. On 29th March 2006, Mr Whiston sent Dr Krishan (not the Claimant) the three TR1 transfer forms on the Shops and explained the Claimant needed to sign them in the presence of an independent witness (who was Mrs Beeston, Dr Krishan's receptionist). On 31st March, Mr Whiston sent on another two TR1s for two of the three Shops, with consideration for each as £10,000 each (and later for the Cinema £40,000 and Co-Op £30,000 – totalling £100,000 for all the Properties). The Claimant now accepts that she signed and Mrs Beeston witnessed the three transfers for the Shops (with no reference to trusts) on 31st March, but I accept her recollection: only after Mrs Krishan said she needed to sign them to save the Properties as 'the Council had become more aggressive'. This was really a continuation of Mrs Krishan's 'rescue narrative' throughout.

223. I should add here that on 22nd March, Mr McGuigan at Coventry CC emailed Mr Duncan asking him to draft a reply to the councillors' January letter pressing for action on the Cinema, following an email discussion about it earlier in March. Somewhat ironically given Mrs Krishan drafting letters for the Claimant to sign, Mr Duncan did so for Mr McGuigan which was sent out on 27th March. As I noted above, it said in February 2005, the CPO process had been approved in principle as a last resort. The letter set out the progress suggesting it was 'moving in the right direction' but 'if progress stalls, the option of compulsory purchase remains provided it can be justified and financed'. So, internally within the Council, the officers were even telling Councillors that CPOs were only 'an option'. The Krishans knew this, but it was totally different from what they had incorrectly told the Claimant: that CPOs had now been made, they meant the Properties were only worth £100,000 and with her debts 'worthless'.

224. However, unaware of that, such was the trust that the Claimant now placed in the Krishans that on 3rd April 2006, a letter in her name (which again I find was drafted by Mrs Krishan) asked him to prepare her a new will to benefit in equal shares Bobby, Sukhjeet and Arun – Nina was not mentioned – and tellingly, to have the Krishans as the executors. Optimistically, he was asked to draw this up before her holiday to India (in fact with Mrs Krishan) that week and also to draft up a formal Power of Attorney for Bill who was mentally ill. I do accept that the will is what the Claimant wanted to do – in May 2006, she confirmed as much to Mr Whiston in a meeting without the Krishans. However, by this stage, the Claimant was not only trusting them with the Properties through their company (albeit she was a director and 50% shareholder at that stage), but also trusting them with the execution of her will. Nevertheless, on 5th April, Mr Whiston wrote back to the Claimant and rightly explained he could not prepare a will for her without meeting her and confirming her identity. He again rightly added that he could only draw up a Power of Attorney on Bill's own instructions, but questioned whether he would have mental capacity for it.

225. The same day, 5th April, Mr Whiston also wrote to the Claimant a letter. As well as confirming receipt of the signed TR1s for the Shops, he asked whether the £30,000 consideration for them would be paid to her on completion of the transfers or whether she had already been paid and if so, when. He added:

> "You will appreciate that as I have acted for Doctor and Mrs Krishan (albeit in a personal capacity) in the past, there may well arise a conflict of interest if I act for you in connection with the transfers of the properties to the company. Accordingly, I need to advise you to take independent advice from another solicitor in respect of the proposed transactions. If you do not wish to take such advice, I would be grateful if you would telephone my office immediately upon receipt of this letter to confirm that you wish me to proceed with the transactions and then confirm the same in writing."

Therefore, because *Mr Whiston* had a potential conflict of interest, he (again, rightly) advised the Claimant to seek independent legal advice or to confirm by telephone and in writing that she wished him to proceed with the transactions. However, the transaction Mr Whiston mentioned was simply the *transfers* he had prepared. He did not refer to any 'profit share', because he was not told about it. He did not even know £100,000 was to be 'paid' to her loan account.

226. The Claimant responded in the one letter from her in her handwriting of 6th April. But she says she was just writing down what Mrs Krishan told her over phone to write. I accept that, especially given the again rather formal language and the rush to get this done as Thursday 6th April 2006 was only two days before she and Mrs Krishan were due to head to India on the Saturday. It said:

> "Thank you for your letter received this morning. I wish to confirm that there is no conflict of interest regarding the transfer of the properties to the above-named company. As requested, I have spoken to your secretary of the same and am forwarding this letter accordingly."

227. Mr Whiston wrote back on 10th April, although by that time the Claimant and Mrs Krishan were in India. His letter replied:

> "Thank you for your letter of 6th April. I think that you have misunderstood the situation, as I was not implying that there was a conflict of interest between yourself and Doctor and Mrs Krishan. What I was suggesting was that there may be a conflict of interest for me in acting on your behalf and protecting your interest and acting for Doctor and Mrs Krishan in protecting their interest. I have taken your letter as approval to continue with the transfers and that in this respect you will act on your own behalf. I will let you have further transfers for signature in respect of the remaining properties in due course."

228. On 12th April, whilst the Claimant and Mrs Krishan were in India, Dr Krishan met SB who handed him a draft of the profit share agreement (as she annotated 'passed to client 12 April 2006') – the 'PSA' on one copy of which the Krishans later forged the Claimant's signature. I have quoted that at the start of this judgment, but will do so again. I set it out almost in full (again noting SB's language at the first (b) is consistent with thinking there actually *was* a CPO):

> "THIS PROFIT SHARE AGREEMENT is made on 1 April 2006 BETWEEN Balber Takhar….('Mrs Takhar') of one part and Gracefield Developments

Limited….('the company') of the other part….WHEREAS

(b) Mrs Takhar has sold 3 lots of properties to the company. The value placed on these properties is £100,000 which represents the value of compulsory purchase orders.

NOW THIS DEED WITNESSETH:

2. The company covenants with Mrs Takhar the following:

(a) The £100,000 purchase price of the properties shall be split… £30,000 – three residential properties [i.e. 'the Shops'];
£30,000 Ritz Cinema Site
£40,000 Former Co-Op Site.
This sum shall be placed on a loan account within the company and shall be paid to Mrs Takhar on the completion and sale of each site.

(b) Further sums shall be payable to Mrs Takhar which represent deferred consideration for an uplifted value of the properties at the time they were transferred to the company. Again these sums shall be payable on the completion and sale of each of the sites:
£60,000 - three residential properties (£20,000 each)
£60,000 - Ritz Cinema Site…..£80,000 - Former Co-Op Site.
Mrs Takhar shall also receive 50% of the profits on the sale of each site. The treatment of the payment of the profits will be discussed at the relevant time and take into account Mrs Takhar's personal taxation position…….. B TAKHAR……
.FOR AND BEHALF OF GRACEFIELD DEVELOPMENTS LTD …. DIRECTOR….SECRETARY…."

229. The PSA needs to be seen in the context of my earlier findings at paragraphs 203-204, 210-212, 215-216 and 219-221 above. The PSA is the first appearance of the '50% profit share' in the documentary record. I found it was not mentioned in Mr Davies' note of 16th November 2005, where I found '50/50 share' was consistent with the agreement between the Claimant and the Krishans to split 50% shareholdings in Gracefield and split 50/50 the profits of renting the Properties (after payment of Gracefield's / the Krishans' costs). This is borne out by the absence of reference to a '50/50 profit share on sale of the Properties' in either SR's note of what Dr Krishan told her on 18th November - or the 2006 notes of SB on 20th January or even 20th February. This is also consistent with SB's letter to the Claimant of 15th March, splitting the £100,000 'purchase price' of £100,000 on the director's loan account; with a 'profit share' totalling £200,000 – with no reference to 50%. On the balance of probabilities, I accept the Claimant's evidence that it was never discussed with her. Indeed, it is unclear how this 50% profit share for the Claimant came to be inserted by SB. SB said she understood the Claimant and the Krishans would each have 50%. Yet, that is not mentioned in SB's note, nor in her 15th March letters; she did not specify the Krishans had 50% in the PSA either. In evidence, SB accepted the draft was incomplete and could be interpreted as leaving it to Gracefield, so further split between the Claimant and Krishans. There is no way in 2006 the Krishans would have signed it in those circumstances. As I elaborate later, I reject their entirely new account before me that they signed two copies of (they say, the incomplete) PSA – in April 2006 and in October 2008. It is also inconsistent with the newly-disclosed emails showing SB in October 2008 had no signed copies. I will find the Krishans signed the PSA for the first time in November 2008 after the litigation started. Since I find the Krishans did not

sign the incomplete PSA themselves in 2006, they were hardly likely to give it to the Claimant to sign. I find this is why she never saw it, let alone signed it. I reject the vague hearsay accusation of Linda Hunt to the contrary.

230. Finally in this section, in the Claimant and Mrs Krishans' absence, the development progressed. Mr Johnson emailed Dr Krishan on 18th April to set out the proposed works. On 21st April, Mr Whiston sent Dr Krishan the transfers for the Cinema and the Co-Op for the Claimant to sign and be witnessed. Meanwhile, SR wrote to Dr Krishan on 24th April asking about the Properties' proposed use. He answered on 26th April confirming they expected to sell the flats on the Cinema site (I find not discussed with the Claimant), whereas the Co-Op retail and residential units would be rented. Finally, on 28th April 2006, again witnessed by Mrs Beeston, the Claimant signed the Cinema and Co-Op transfers (again with no reference to trusts), but again I accept only after Mrs Krishan had told her she was in a fix and needed to get on trying to deal with the Council – one more use of the 'rescue narrative' to carry the Krishans' plan safely through. Finally, they now had control of the Properties.

Development of the Properties: 2006-2007

231. In the context of a judgment which is already so long, fortunately I can deal with the findings of fact in this section very briefly, since as the Claimant's case has been narrowed down, no cause of action arises out of them. I will need to return to more detail in the last section of my findings of fact on 2008, but not as much as in the most crucial section I have just dealt with on 2005-2006.

232. As I mentioned above, on 4th May 2006, the Claimant met Mr Whiston - for the only time - when she gave instructions for her will. Mr Whiston's 2009 statement confirms that Mrs Krishan brought the Claimant to his office, but did not sit with her. As I mentioned above, the Claimant told Mr Whiston she owned her own home, mortgage-free, valued at £180,000. She confirmed she wanted the Krishans to be his executors and his three sons to have her property equally. However, the Claimant added that she wanted her jewellery to her daughter Nina (formally Satwinder): a family tradition as she explained in evidence. However, that had not been mentioned in the letter the Claimant had signed to Mr Whiston about the will on 3rd April – again suggesting she did not draft it, but Mrs Krishan did. This is supported by another letter in formal language about the will which did not mention Nina the Claimant signed dated 26th July 2006. I find if she had written those letters herself, she would have mentioned Nina's jewellery each time, if only so that she mentioned all four of her children in the letters. The Claimant signed her will in these terms in August 2006 – as I say, again illustrating the trust and confidence she still had in the Krishans.

233. Around that time – late April-early May 2006 - Bobby attended the Shops and helped to tidy them up, assisted by Sukhjeet and to an extent, by Bill. They cleared the undergrowth and hired several skips in which to put the rubbish, which all took about two weeks. The Krishans were not present. It seems from Gracefield's accounts (which are no longer challenged on general expenditure) at some point, there was also some scaffolding at the Shops and a skip hired. Other than that, there was no maintenance work carried out on any of the Properties at any point before 2008. They were never renovated by Gracefield.

234. This work Bobby undertook to the Shops may have prompted Dr Krishan on 11th May 2006 to write to Coventry CC to confirm they were purchased by Gracefield on 31st March and that they were unoccupied and unfurnished and requested that the business rates would be zero. A 2014 letter from Coventry CC to the Claimant – after the Purle Judgment, the sale of the Shops and Co-Op and the Set-Aside Proceedings had been issued – appears to have overlooked the payments in 2005 (paragraph 172.5 above) but confirmed that Council Tax and Business Rates on the Shops were received in December 2006 and then not again until mid-2007 – and a bill from July 2006 shows that over £800 of Council Tax on one of the Shops had been refunded. I return to that letter below.

235. On 8th May 2006, the Claimant and the Krishans signed forms setting up Gracefield's bank account with Natwest (as Mr Gasztowicz QC found in rejecting the Claimant's argument that her signature on the forms was forged). However, as confirmed in Mr Rodgers' 2009 statement, it was Dr Krishan who set up the account on 3rd March 2006 and told him that the Claimant had 'no business acumen of her own' – I have rejected Dr Krishan's denial of that.

236. On 14th July, Mr Johnson wrote to Mr Rodgers with the plans for the Properties. I do not doubt he was working hard to progress Dr Krishan's instructions and the development and he produced detailed drawings. However, as I said at paragraph 113 above, I found Mr Johnson's evidence on when he met the Claimant before 2010 to be muddled and I do not find he met her until 2007. I find she had very little involvement from May 2006 until March 2008. When Gracefield was incorporated in November 2005, she was a director and a 50% shareholder. By January 2007, she was neither. How this happened from July 2006 is no longer part of a claim, but again proves the Krishans' influence over the Claimant.

237. The first stage was that on 26th July 2006, the Claimant (as she effectively accepted in evidence – and there is no evidence of forgery here) signed a stock transfer form, transferring one share from herself to Mrs Krishan, so that she was now only a 49% shareholder – losing control over Gracefield. However, because of her lack of business acumen, she would not have appreciated this at the time – indeed I find it was how Mrs Krishan cajoled her into doing it. The latter's plan was clear: to give the Krishans control if there was a deadlock. Mrs Krishan in her 2009 statement said it had 'occurred to *her* that there was no casting vote in Gracefield', so 'the Claimant *agreed* that one of her shares should be transferred to me' and she emailed SR on 26th July and asked her to draw up the stock transfer form and then emailed it back to her the same day. That is consistent with the contemporary emails and I accept it. What I cannot accept is Mrs Krishan's total *volte-face* on this topic in her 2022 statement when she says it was *the Claimant* who was worried about a deadlock and wanted to transfer. This meant that the Claimant with 49% could no longer stop a sale.

238. The second stage was in November 2006 when the Claimant transferred all her remaining 49 shares to Mrs Krishan. Mr Rodgers explained that in the course of deciding whether to grant Gracefield a large overdraft, he undertook a credit check in accordance with bank policy on Gracefield's 'principals' – i.e. those with at least 25% of the shares. That revealed the Claimant's poor credit history – and indeed the fact she now had a CCJ on the wedding debt of £22,000 (which until then the Krishans had not been aware of at all). Mr Rodgers told Dr Krishan 'one of the principals' had poor credit history, but it would have been obvious that it was the Claimant. The practical

effect of this – as I find Mr Rodgers explained to Dr Krishan at the time - was that whoever that was would have to reduce to a less than 25% shareholding. So, to secure the funding, it was only necessary for the Claimant to transfer 25 of her remaining 49 shares. Indeed, I note that Dr Krishan admitted he was told this '25% rule' at the time in his 2009 statement, although he said in evidence to me he only found out later 'principal' meant 25%, which I reject. The Claimant did not know the '25% rule' and I find Dr Krishan tricked her by asking her to transfer all of her shares, which she did, again demonstrating the extent of trust she had in them. Within two months, in January 2007, Dr Krishan also got the Claimant to agree to resign as a director. For the reasons at paragraph 220 and 229 above, as she never saw let alone signed the PSA, SB's 15th March letter only entitled her to the first £300,000 on sale of the Properties and left everything else to Gracefield under control of its directors. However, by the start of 2007, the Krishans had not only taken over the Properties, they had successfully ousted the Claimant from Gracefield itself.

239. Shortly before the Claimant's resignation, this was recorded in the director's loan account in December 2006 crediting the Claimant another £200,000 for the Properties. It would have come as little use once she was no longer a director. Her ouster had also made it easier for the Krishans to execute a debenture over Gracefield in favour of the bank on 21st December 2006 (although for a few more days a director, she was not told) for a £20,000 overdraft from Natwest, secured by a debenture over Gracefield and a personal guarantee from Dr Krishan. This enabled the Krishans from January 2007 to begin taking drawings from Gracefield. As I said at paragraph 100.2 above, a plain reading of the Balber Takhar Account in 2008 would suggest the Krishans had spent £556,000 out of their own bank accounts. However, it is telling that in the directors' loan account, their balance as at 30th November 2006 was only £23,950. The vast majority of that was financial maintenance to the Claimant and arrears payments (though not including the £7,500 lump sum they would claim in the Balber Takhar Account). Gracefield's work in progress logs up to 30th November 2006 prepared by SB show no expenditure at all on the Properties save the 'purchase price' of £100,000 and in December 2006, the extra £200,000 credited. Moreover, after the overdraft rose to £100,000 in June 2007, the Krishans drew £51,000 from the director's loan account in July 2007 and a further £41,000 from it in September 2007. So, by 30th November, their director's loan account balance was only £733. By then they had ceased to pay the Claimant monthly maintenance of £400 in September 2007 (when rates on the Shops re-started). From the work in progress logs, the only expenditure on the Properties in the year up to November 2007 was £9,109 – most of which professionals' fees: no longer disputed as actually spent.

240. In fairness, that £9,109 paid to Mr Johnson and to other professionals such as Nolans (structural engineers), M Lathwood (Quantity Surveyor) and (with a caveat about the invoice), 'JS' the air quality and noise surveyor on the Cinema for example, was clearly money well-spent. Their work had enabled effective planning permission applications to be made on the Shops (for change of use to three residential properties), which had been granted on 19th December 2006. The same date, Mr Johnson submitted planning permission applications for the Co-Op and the Cinema. The Co-Op was granted quickly on 21st March 2007: for various works leading to a retail unit on the ground floor and residential accommodation on three floors. Nevertheless, I note despite that success, he still had to chase the Krishans for his fees in June 2007. Despite the Council's desire to see a resolution to the Cinema issue, it took them another six months until December

2007 to grant (assisted by JS' report) planning permission for demolition and the erection of three-storey residential accommodation.

241. At paragraph 105.1 above, I summarised why despite the difficulties in the clarity of Ms Dobsons' expert reports, that in the light of her helpful oral evidence, I accepted her 'pre-works valuations' for April 2006, of £890,000 in total (£450,000 for the Co-Op, £240,000 for the Shops and £200,000 for the Cinema). In short, they were corroborated by the Savills valuations in May 2007, instructed by Natwest due to the debenture lending, which said: 'Purchasers are paying a premium for derelict properties or properties in need of refurbishment, with or without planning consent'. However, I should elaborate on why I reached that conclusion on each of the Properties:

241.1 For the Cinema, whilst it was 'derelict', as the 2004 Survey obtained by the Claimant showed, it was structurally-sound. But it was an eyesore, which is why local people and councillors kept demanding that something be done about it. Even in 2003 (as I find), the valuation of £160,000 had assumed demolition and development. The value of the land lay in its location, size and potential, not the actual building itself. In June 2005, at the Bobby Takhar meeting, it was suggested the Cinema would 'offer a commercially-attractive proposition to a developer'. Leaving to one side the 2005 costings of Bobby's 'pipe dream' of a drama and literature centre, by January 2006, Donaldsons had estimated the costs of residential development as £606,000. Of course, it anticipated it would rise once fully-calculated (if not more than double as Mr Johnson's 2007 calculation did). The point is that in April 2006, the Cinema may have been an unattractive building, but it was an attractive development opportunity. If anything, Ms Dobson's valuation of £200,000 in April 2006 is surprisingly low given what she described herself about the market in 2006-07. £200,000 is certainly not over-inflated as a year later, with no maintenance so having deteriorated, Savills valued it at £450,000, anticipating planning permission later granted. As I noted at paragraph 119 above, I accept Bobby and the Claimant would have been prepared to sell the Cinema to keep the other Properties it and I will find later at paragraph 569 that it would have been sold by April 2006.

241.2 For the Co-Op, as Ms Dobson noted in her second report at para 31.3, the Barneveld Survey in 2003 had concluded that it was 'severely dilapidated' but the load-bearing and structural elements were in 'adequate condition' and once dried-out would be 'satisfactory', advising that the Co-Op would need 'stripping back' to its structural elements and starting afresh', estimating costs as £677,000 (or £400,000 for a 'much lower spec'). The same concerns had fed in the previous year to Coventry CC's valuation for rates of the Co-Op as £108,000 in its condition. In June 2005 Donaldsons concluded the Co-Op was not attractive to developers by itself, but might be as part of a 'package' with the Cinema. (The health centre route was also worth exploring, but that came to nothing in February 2006). In early 2006, Donaldsons had estimated development costs as £925,000, (again doubling in Mr Johnson's calculation in 2007 of £1,831,507). But, as Ms Dobson said in her first report at para.18.16, as a 'local landmark building', the most immediate return in April 2006 would have been commercial retail, as it always had been. Whilst that would have been contrary to the Claimant and Bobby's 'community use' ideas, notably the Co-Op's buyers in 2011 refurbished it as a shop and let it out. That was the 'commercial' option with the Co-Op – indeed even Mr Johnson's expensive 2007 costings for flats above envisaged a

shop on the ground floor. In any event, in May 2007, Savills' valued the Co-Op at £425,000 with planning permission, but also noted developers were paying a premium even for derelict properties without planning permission and this value was on a loan security basis which Ms Dobson observes decreases a valuation. Therefore, I accept her expert opinion that on an open market valuation in April 2006, even without planning permission, those same enthusiastic developers would have been prepared to pay £450,000. In any event, even if that is slightly on the high side, given Ms Dobson's Cinema valuation was surprisingly low, on the balance of probabilities their combined value was at least £650,000.

241.3 There was less said and to be said on the Shops. Ms Dobson's basic point in her first report at paras.18.24-25 was that they were three separate properties but as they had once been joined (even though they were not anymore), they were treated by everyone as one property, which depressed the prices which could have been fetched individually. In short, everyone always treated the Shops as a 'job lot' even though they did not have to be, so their valuation was lower than they needed to be. That was particularly true as it was only 558 that was structurally-unsound. I accept Ms Dobson's opinion that 'lumping in' 554 and 556 with it reduced Savills' valuation substantially (especially on a loan-security basis) to £210,000 even with planning permission. By comparison, in Ms Dobson's report she noted that (doubtless better-condition) four different terraced properties between 505 and 655 Foleshill Road sold in 2005-06, fetching an average of £127,000. I accept in the buoyant market of April 2006, if the three Shops had been valued individually, their total value would have been at least £240,000.

So, even if Ms Dobson's valuation for the Cinema was on the low side and for the Co-Op was on the high side, I accept her total for April 2006 of £890,000.

242. Whilst I accept Ms Dobson's expert (and Savills' contemporaneous) opinion that in the 'hot market' of 2006-07, actually getting planning permission added relatively little to the 'pre-works' value of development opportunity properties even if derelict or in poor repair, it is clear from Savills' assumed 'post works' valuations of the land once developed as 'unlocked' by planning permission were much higher. Whilst this did not really apply to the Shops (which were to be re-converted to homes, not 'developed'), it certainly did to the Cinema, where Savills 'pre-works' valuation of £450,000 rose to its 'post-works valuation' of £1,905,000; and on the Co-Op where Savills' 'pre-works' valuation of £425,000 rose to its 'post-works' valuation of £1,572,000. In both cases, on the 2006 Donaldsons refurbishment estimates of £606,000 for the Cinema and £925,000 for the Co-Op, the potential profit on the Cinema alone could approach £1.3 million, with the Co-Op adding up to £650,000 potential profit. So, in June 2005, it was the Cinema which Donaldsons considered the best opportunity, not the Co-Op, for all its local history. I find those potential 'post works values' in 2007, while not calculated for 2006, buttress Ms Dobson's April 2006 pre-works valuations of £890,000. On the Savills 2007 valuations and the Donaldsons' 2006 costings, the profits one could expect from development and sale of the Properties (assuming the Shops were broadly cost-neutral) would approach £2 million.

243. However, by the time of the Savills' valuations in May 2007, Mr Johnson in his January 2007 'Indicative Budget Cost Estimate' had actually fully assessed the refurbishment costs of the development (which appears to have changed in specification and so doubled in cost from what Donaldsons estimated). That meant, on

Savills' post-works valuations of the Co-Op as £1,572,000 but Mr Johnson's much higher costs of £1,831,507, developing the Co-Op would actually make a *loss* of c. £260,000. On Savills' post-works valuation of the Cinema of £1,905,000 but Mr Johnson's costs of £1,434,484, its profit would only be c.£470,500, not much different from their 'pre-works' valuation of £450,000 which would not require them to spend anything. Again assuming the Shops were broadly cost-neutral, the Krishans would make much better profits if they simply sold the Properties as they were at Savills' pre-works valuations of c.£1,085,000.

244. Therefore, by mid-2007, the Krishans would have realised that a quick sale of the Properties as they then were would generate an extremely good financial return for them. They had spent effectively no money on the Properties themselves (and what little money they had spent on those and maintaining the Claimant was largely refunded by the overdraft by November 2007). They not had undertaken any maintenance – Bobby had done that done for free at the Shops in April 2006 and again in late 2007 on the Co-Op. Moreover, it now suited them that there was no signed PSA for the Claimant to receive 50% of the profit share, as they knew she had last been told by SB on 15th March 2006 that she would receive (only) £300,000 in total on a sale. So, the Krishans might make c.£700,000 at little cost.

245. No wonder the Krishans felt they had many reasons to celebrate in September 2007 at the opening of their new health centre. From photographs, the Claimant attended and briefly met various people, including Mr Johnson and Mrs Davies, I accept her evidence at this stage the Claimant was 'gushing' about the Krishans' help whom she still trusted implicitly. But I do not accept she mentioned a 50% profit share. I have found as a fact it was never mentioned to the Claimant. Mrs Davies may have got that information from her husband who had been told by the Krishans when the dispute arose in 2008. I accept and find as a fact on balance of probabilities the Claimant never even saw, let alone signed, the draft PSA.

The Dispute, Litigation and Sale of the Properties: 2008-2014

246. As 2007 turned into 2008, whilst the Krishans' plans of developing the Properties seemed to have ended, they looked forward to high returns from sale. As noted, on 7th December 2007, planning permission was granted on the Cinema. Whilst Dr Krishan says Natwest were pressing for repayment of the overdraft, from the chronology, the bank increased it to £125,000 in January 2008 and to £150,000 in March 2008. By then, I will find the Krishans had decided to sell the Properties through auction with Loveitts, precipitating a dispute with the Claimant in March and eventually litigation by October 2008. This then concluded in July 2010, with the Co-Op and Shops sold in March 2011 for £675,000 and £175,000 respectively and the Cinema sold in August 2014 for £191,000.

247. I have already covered in my assessment of the evidence earlier many key points about 2008 - indeed finding in several respects the Krishans' evidence about it was seriously unreliable. Moreover, at the start of this judgment, I also detailed a full procedural history. However, given the findings of fact from 2008 to 2014 relate to the conspiracy claim as it has now narrowed, I will need to focus in on a little detail (although not as much as for 2005/06) on five particular aspects of the period from 2008-2014: (i) how the dispute developed in 2008, (ii) its progress to litigation in October 2008; (iii) how and when the Krishans forged the PSA (which I can take in significant part from the

binding findings in the Gasztowicz Judgment with a little supplementation given the new disclosure); (iv) how the Krishans deployed the PSA and other false evidence in the litigation and its mixed fate in the Purle Judgment in 2010 (again, which I can largely but not entirely take from the Gasztowicz Judgment); and (v) the sale of the Properties in 2011/14.

248. Gracefield's bank account from 2006 to 2010 eventually incurred an overdraft of £181,661.98. As discussed at paragraph 239, whilst the Krishans had incurred expenditure themselves, by November 2007 they had paid themselves back using the overdraft so they were only owed £733 in their directors' loan accounts with Gracefield and they had ceased to pay the Claimant maintenance. Whilst they did still use their own funds, so that by February 2008 they were owed £19,583 but in April 2008, £20,000 was paid to Dr Krishan, again using that overdraft. Given its size, it is not surprising that between 2006 and June 2010, Gracefield incurred bank interest and charges of £49,116.68 and that total was not challenged when Dr Krishan was cross-examined. However, he appears to have double-counted in that schedule the £19,582.35 in bank charges which forms part of the £132,084.83 in expenditure which Mr Johnson showed was incurred from 2006 to June 2010.

249. At the start of 2008, by then it had become apparent to the Krishans that they would get better returns selling the Properties as they were than by developing them, as most of the 'development uplift' as assessed by Savills in May 2007 would be swallowed up by the very high development costs, at least as Mr Johnson had assessed them in 2007. Therefore, once the Cinema obtained planning permission in December 2007, it was wise to sell the Properties. Indeed, Ms Dobson's report at paras.16.1-2 details how the market turned from boom in 2007 to bust in 2008. As she said (and frankly I can clearly remember) the fact that by the end of 2007, the 'Northern Rock Crisis' had first publicly revealed in the UK the emerging 'Credit Crunch' which had started in the US. The Krishans were astute enough to know that they should sell the Properties and sell quickly. Indeed, at other points of her report Ms Dobson herself says that the best time to sell was 2007. Certainly, by the time the Krishans met Mr Matthews in June 2008 (as I detail below), he agreed with them the Properties should be sold then - if they were to be sold (although he knew the Claimant did not want to sell – showing her attachment to them). Therefore, with the New Year, the Krishans pressed forward with their new plans to sell the Properties. On 27th February 2008, nine months after their previous valuation, Savills re-affirmed their valuations of the Cinema (which had already factored-in planning permission which was now actually granted) as £450,000 and slightly increased its valuation of the Co-Op to £430,000 (from £425,000). This was done in the context of a 'Marketing Report' for the sale of the Properties. I note that Savills tendered services on the basis of marketed sale, not auction.

250. However, in fact, Loveitts were instructed to auction the Co-Op, then the Cinema. Mrs Krishan says it was the Claimant's suggestion. Dr Krishan does not mention that – he said that the Claimant agreed the Properties should be sold and then he had the Properties valued by Loveitts. Mrs Smith from Loveitts remembers him. The Claimant for her part is adamant that she knew nothing about the sales until 17th March 2008, when she happened to be in Coventry going to the Register Office for a copy of Arun's birth certificate, drove past the Co-Op and saw an 'For Sale' sign outside it for an auction on 14th May. She vividly described in evidence her shock. After going to the Register Office, she drove past the other Properties and saw the same sign outside the

Shops but not outside the Cinema. She was upset and called Bobby, who also remembered that same day clearly. I accept the Claimant's account on the balance of probabilities for three reasons:

250.1 Firstly, as I found in my assessment of the evidence when discussing the parties' respective credibility, it beggars belief (especially in the light of the findings I have made since) that Dr Krishan would defer to the Claimant (whom Mr Rodgers recalls him describing to him as having 'no business acumen'), as Mrs Krishan claimed. Dr Krishan does not mention it. Indeed, Ms Smith from Loveitts does not even refer to the Claimant at all.

250.2 Secondly, whilst it was suggested Mrs Krishan's account was supported and the Claimant's account undermined by contemporary documentation, the contrary is true. It was suggested the Claimant and Bobby's evidence that she saw the 'For Sale' sign on 17th March must be wrong, as Loveitts' auction agreement was dated 25th March. However, that agreement relates to the Cinema only. Moreover, a Loveitts compliments slip sending that agreement to Dr Krishan (presumably on or around 25th March 2008) refers to 'another offer on the Co-Op', showing it had already been advertised for long enough to have at least two offers – consistent with the Claimant's case that the Co-Op was advertised earlier (before 25th March) than the Cinema, *corroborating* her account. So too does Mr Matthews' note of 31st March recording her discussing her discovery (that I discuss in a moment).

250.3 Thirdly, as also said above, the Claimant's vivid and detailed recollection of discovering the auction when she drove past and saw the sign stands in total contrast to her dismissive answers about practical matters she did not care about, like meetings with professionals. Of course, I have found that in late March after SB's letter, due to Mrs Krishan's reiteration of the 'rescue narrative', the Claimant acquiesced to the plan to sell the Properties. However, she never agreed to be 'cut out the loop'. Her shock is also corroborated by Bobby's own vivid memories and those of Mrs Har Hari.

251. Indeed, on discussing what had happened with the Claimant, Mrs Har Hari recommended that she take advice from Mrs Har Hari's own financial adviser, Mr Matthews, whom I found an impressive witness, corroborated by his contemporary notes. The Claimant contacted him after she tried and failed to get hold of Mrs Krishan. Mr Matthews recalled that having been introduced by Mrs Har Hari, he met the Claimant for the first time on 31st March 2008 and took a note of that. It recorded the Claimant describing being gifted the properties about 9 years before (i.e. 1999/2000), that they were empty and in need of repair and had rates and costs to be paid as she was on benefits. She explained (still not realising at that stage what had in fact happened) that in 2005 her cousins offered to help for family reasons not profit by transferring Properties into a company to 'cover overheads, renovate and let'. The note does not record mention of compulsory purchase, but Mr Matthews was clear in evidence that he recalled it was mentioned as the Claimant thought the Properties could be subject to CPO without fair compensation, which he knew was wrong. However, the note did not record it as it was just an overview, not investigation of fraud at that stage. I accept Mr Matthews' evidence which also fits my findings. The Claimant went on to tell Mr Matthews (as I noted above) that she had found out the Properties were due to be

auctioned in May 2008 which she had not been consulted about and sale was not what they had agreed. He told her to tell the Krishans to stop the sale.

252. It is not disputed that this is what the Claimant did – she and Bobby invited the Krishans, once they had returned from holiday, to her home on 5th April 2008. The Claimant said (and I accept) that during the meal she had cooked them, she told them she had found out about the auction, had spoken with Mr Matthews and suggested they and she meet him to get advice. Mrs Krishan apologised for not communicating, but tried to persuade the Claimant that selling the Properties was a good idea. However, the Claimant made clear that she did not want the Properties sold and it was agreed that the Co-Op would be removed from the auctions. The next day, the Krishans instructed Loveitts on 6th April to stop the auctions. I consider this point - April 2008 – the crucial turning-point in the dealings between the Claimant and the Krishans. She had previously trusted them implicitly – initially Mrs Krishan for emotional support and then her and Dr Krishan for support financially and practically with the Properties. Indeed, she had been very grateful for their help – as she told people like Mrs Davies in 2007 and even Mr Matthews at the first meeting in March 2008. However, given what had happened, now the Claimant was angry with the Krishans, not simply for failing to consult her, but in deliberately planning to sell the Properties when she had never agreed that. For their part, whilst the Krishans pulled the auction, they knew that they needed to sell and sell quickly.

253. Therefore, the Krishans decided to try and persuade the Claimant to agree to selling the Properties. Strictly speaking of course, Gracefield legally owned the Properties and they owned Gracefield, so they could have ploughed ahead regardless. However, in 2005/06, they had told the Claimant the Properties would really still belong to her and they must have known that ploughing ahead might open a can of worms about the transfers. They had cajoled and pressured the Claimant then and I find that is just what they decided to do again. Therefore, they invited the Claimant and Bobby to their home to discuss the Properties on 30th April. In turn the Claimant says that she asked them to have the invoices for their spending on the Properties ready. However, beforehand, they decided to put their case to sell to the Claimant as strongly as they could and once again, to exaggerate to do it. So, they prepared the 'Balber Takhar Account'.

254. As I noted at paragraph 100 above (and as both HHJ Purle QC and Mr Gasztowicz QC found before me), the Original Balber Takhar Account is a misleading document. It starts reasonably enough, with an accurate list of the initial £5000 cheque for the Claimant's credit cards and monthly payments of £400 from December 2005 to August 2007 (with £200 in September 2007). There is no dispute the Krishans paid the Claimant £13,800, which is essentially the same as the list of payments *to her* on the Balber Takhar Account. That is not surprising: the Claimant would know full well how much they paid *her*. However, as I noted earlier, when it came to paying *others*, the Original Balber Takhar Account started radically diverging from reality. It suggested the Krishans had paid Coventry CC from 2005 to May 2008 a total of Council Tax and Rates of £28,500. Whilst the Balber Takhar Account says 'outstanding rates on Ritz and Co-Op also cleared', given there is no evidence of rates being charged on these, I do not accept that. On the Shops, the letter from Coventry CC from 2014 confirms the position for rates and Council Tax from 2006 (it missed a couple of payments in Autumn 2005) to 2010. No rates were levied on 554-556 Foleshill Road in the period and no Council Tax was charged at all from June 2009, when Bobby Takhar started

paying. The total paid on both on the Shops from 2006 to 2010 was £2,190.18 on 554 Foleshill Road and £2,191.25 on each of 556 and 558 Foleshill Road, a grand total by my calculation of £6,572.68 (rather than the £5,672 the Claimant accepts, but I am prepared to accept the higher figure). Therefore, the Original Balber Takhar Account over-estimated the amount spent on Council Tax and Rates on the Properties by over four times. So, their future estimate of annual rates on all the Properties of £42,000 was a massive over-estimate too.

255. However, all that simply pales in comparison with what was said at the bottom of the first page and top of the second about other costs, which given its significance (and how it later changed) I set out in full (my italics):

> "In addition, all bills and liabilities paid for management, authorisation, architects, quantity surveyors, structural engineers, planning applications, designs, air and noise surveys etc. *Currently out of Premier and Private accounts £556,000 plus two more current bills outstanding* to Structural Engineers for further work of approx. £2,000 and £7,600 to Loveitts for marketing purposes. *Total so far: £565,600*. Further work being done by Architects, Quantitty Surveyors, Engineers and Planners being done to ascertain feasibility and current costs as of today of developing sites."

The clear implication made by this document was that (i) total costs expended so far were £565,600; and (ii) that £556,000 of that had come 'out of Premier and Private accounts' – namely the Krishans' own bank accounts. That was miles from the truth. As I found, on Gracefield's own work-in-progress logs prepared as part of their accounts by SB: up to November 2006, nothing was incurred other than £100,000 nominally in the directors loan account to the Claimant for the Properties; whilst in the year to November 2007, £9,109 was incurred (mostly on Mr Johnson). If one goes to the same log up to November 2008 (prepared once the litigation had started), excluding Dr Krishan's spurious 'management fee' I discuss below and the £300,000 in the accounts for the 'cost' of the Properties, the costs in total from 2006 to 2008 were £91,808.18, less than a fifth of what was represented. Moreover, as found above, from the Krishans' own directors loan accounts based on information they supplied SB themselves as Gracefield's directors, as at November 2006, they were owed by it £23,950 and as at November 2007 (after they arranged the overdraft a year earlier and extended it), they were owed by Gracefield £733. In April 2008, the date they prepared the Original Balber Takhar Account, the director's loan account suggests they transferred themselves £20,000 and effectively were owed nothing (indeed by November 2008, their loan account was in the red).

256. After the findings in the Purle and Gasztowicz Judgments had 'highlighted' this issue, the Krishans before me desperately tried to explain this all away as a typo by Dr Krishan, as '*Currently out of Premier and Private accounts' [full stop] £556,000 plus two more current bills outstanding."* This is plainly nonsense. To start with, 'Currently out of Premier and Private Accounts' alone would make no sense – and they put it on a different line than the previous expenditure (which is not counted up) and the costs were never anywhere near £556,000. Alternatively, they suggested that they meant but did not clearly state that £556,000 was the amount they expected to realise from the sale (what they had told Mr Gasztowicz QC). But, as he found (and I agree) there is no reference to that (or any valuation of the Properties which would explain it) anywhere in this document, which is all about 'costs'. It would make no sense to 'sandwich' an

unexplained profit between a list of costs. I find on the balance of probabilities the Krishans concocted this document. I agree with Mr Gasztowicz QC that the document was 'demonstrably untrue' and with HHJ Purle QC this was done to 'get the Claimant off the fence' and to agree to the sale of the Properties.

257. Unsurprisingly, when the Original Balber Takhar Account (with some invoices I will come to in a moment) was handed to the Claimant and Bobby by the Krishans when they visited on 30th April they were in shock at the levels of cost. The Krishan' plan was to persuade the Claimant that the costs were so high that it would be better to sell or at least continue development. I find their underlying plan had not changed – as the financial crisis snowballed in Spring 2008, they must have known property prices would fall. Certainly, despite all the talk of costs (and future costs), I find the Krishans knew it would be much better to sell than develop, but they had seen on 5th April that the Claimant did not want to sell. The critical thing was to 'keep her on board', rather than 'opening up the can of worms' of 2005/06 (if I may be permitted the mixed metaphors). The Balber Takhar Account was intended to inflate the costs to achieve just that. This is why they presented it to the Claimant and Bobby when they visited.

258. However, the Krishans' plan backfired. On 30th April, the Claimant was horrified at how much had been spent and told them not to spend any more on the Properties, as she could not afford to pay them back what they had spent already. (This suggests she considered herself still their 'owner'). Immediately, the Claimant sent Mr Matthews the Balber Takhar account and a collection of invoices she and Bobby were given, including I find the 'JS Invoice' of 14th June 2007 (reference JS/1/2007/RGA1). As I will explain, that differed from another copy of the same invoice with the same reference only totalling £6,010.13. This first invoice totalled £39,045.25, by someone adding a '2' to the start of £3,505 for the Air Quality Assessment of 11th June so it was now £23,505 and adding a '1' to the start of the next three items, inflating them by £1,000 each. The Krishans accepted this higher invoice was forged but both denied it was them. Dr Krishan even suggested the Claimant had forged it to implicate them, but again, this is nonsense. The Claimant sent it to Mr Matthews who considered it 'amateurish' without a proper heading. However, the inherent improbability of forgery is reduced by the Krishans' later forgery of the PSA copy: *Arkhangelsky*. I find on the balance of probabilities the Krishans forged the JS Invoice to pretend it was a revised invoice with substantially inflated costs, chiming with their approach in the Original Balber Takhar Account.

259. By May 2008, the Claimant was starting actively to suspect the Krishans of underhand tactics. Therefore, she decided to try and get evidence to prove her suspicions and for Mr Matthews. That is why when the Claimant called Mrs Krishan on 19th May 2008 – twice – she recorded it both times. This was not accidental at first on her mobile phone as she drove as she suggested. I found she lied about why she did this as she did not want to be criticised for doing it deliberately, although she freely accepted that she recorded the second and third calls deliberately. Giving myself a *Lucas* direction, I accept this minor lie does not undermine her other evidence, though I bear it in mind. However, as I said I have found the actual transcripts very revealing and useful. I have set out the material passages above in my assessment of the evidence. But it is helpful to summarise them briefly in their proper place in the timeline of events. In the calls on 19th May 2008, when Mrs Krishan was at work, she still did most of the talking, in

response to the Claimant's repeated concerns (stemming from the Balber Takhar Account) they were spending far too much on the Properties.

260. As quoted at paragraph 121 above, Mrs Krishan responded that the Properties in 2005/06 had been 'worthless', the Claimant had at that time risked bankruptcy, that the Krishans had and were helping her as family to save the Properties from Ian, that they derived no benefit themselves, but had spent £500,000 in developing them. Now placed in the context of what was actually happening when those calls were made, it is clear that Mrs Krishan was returning to – and reminding the Claimant of – 'the rescue narrative' she and Dr Krishan had fed her in 2005/06: e.g. the 'worthlessness' of the Properties, the risk of bankruptcy and how they were trying to help her not helping themselves. I have found these were wrong in 2005-06 (but not yet made findings on their fraudulence) and they were certainly wrong – and I find deliberately misleading - in 2008. It is clear that this was part of the Krishans' plan to 'keep the Claimant 'on board'.

261. The key passage of the 19th May calls at the time was Mrs Krishan saying:

> "[W]e have got another six months at least of this, all right and then you know we should be able to sort of move forward, all right. These things just take time, you know, but I looked at them yesterday and I thought there is no way my sister is actually going to get caught up in the hands of Inderjit ['Ian'] because I know how you feel and I don't want anybody associated with him tackling it because you know what they'll do, they'll sub let it to him or they'll give it further on to him, and I am not having that. I think – I don't know why but it's a question of family honour, almost."

262. However, this time, the Claimant was not taken in, even by the 'emotional button-pressing' by invoking family honour and the risk of Ian 'getting his hands on' the Properties. The Claimant insisted on a meeting with Mr Matthews on 9th June and the Krishans reluctantly agreed. They knew that they would not be able to cajole the Claimant so easily with an independent professional there. They also knew that they should not continue to rely on the forged JS Invoice and decided to hand over the original totalling £6,010.13 in case he wanted to go through the records. However, otherwise they decided to throw everything at their attempts to keep the Claimant 'on board', or even agree to a sale. Persuasion and cajoling was not working as it worked in 2005/06. Therefore, they went back to their computer – always an integral part of their schemes and produced 'Options for Gracefield'.

263. That document, as discussed above at paragraph 100, was found by both HHJ Purle QC and Mr Gasztowicz QC to be misleading. Once again, on the evidence I have heard and reaching my own view, on the balance of probabilities I agree and indeed find that 'Options for Gracefield' was intentionally misleading. As I noted earlier, like the 'Balber Takhar Account' it incorrectly stated the development had *'incurred huge costs. Most of these had been met by us personally'*. As I have explained, this was misleading as by November 2007, the Krishans had effectively if not entirely been repaid. Moreover, it added '*Shortly there will also be a £60,000 Corporation Tax Bill'* which is wrong and I reject Dr Krishan's excuse he meant Capital Gains Tax. As Mr Graham says, it is true that in other respects the document could be said to be factually accurate, save for one

> "When the company was set up 3 years ago the aim was to stop Balber losing the properties in Coventry and to pull her out of debt and prevent bankruptcy. At that stage, the properties had no value and were a liability. The Council was considering Compulsory Purchase Orders and she would have received **nothing whatsoever in return**." (bold in the original).

Dr Krishan accepted that was wrong. Notably, with Mr Matthews there, it was not suggested CPOs had been made, as that could be easily checked. However, it was suggested 'she would have received nothing whatsoever in return' – a reiteration of what they had told the Claimant back in 2005-06. However, it was now part of their new plan to convince the Claimant to sell the Properties.

264. In order to do that, the 'Options for Gracefield' document set out four supposed 'options' which in fact were clearly a 'steer towards sale':

264.1 The fourth was not an 'option': it was the Krishans saying they no longer wanted to develop the Properties due to 'interference'. In fact, they no longer wanted to develop the Properties as it was not cost-effective.

264.2 The third and second 'options' were really two sides of the same coin, especially as the document had stressed that 'time was ticking' as the planning permissions would lapse after three years (not specified but in fact December 2009 on the Shops, April 2010 on the Co-Op, December 2010 on the Cinema). The 'options' were that the Claimant pay all their costs and expenses to date (hence the inflated Balber Takhar Account) and the Krishans withdraw their management and the next 'option' - really being the next step in that same option – that the Claimant find a partner to develop the sites. The Krishans knew full well – not least as the Claimant had already told them on 5th April – that she could not afford to pay them the inflated costs in the Balber Takhar Account. The Krishans also knew that the Claimant would have no interest in developing the Properties – and although Bobby might, they doubted it and at least they got £500,000.

264.3 However, the Krishans' real objective was 'option 1':

> "The properties be sold through auction as originally planned but will now yield a lower return."

Indeed, when they presented 'Options for Gracefield' to Mr Matthews at the meeting on 9th June, he agreed with the Krishans' preferred option of sale. In his own note, Mr Matthews accepted he that 'in the current financial climate a developer would sell fast before the market collapses and probably sell at an auction' as the Krishans had planned. In evidence he accepted that was true if the Properties were to be sold, but the Claimant did not want to sell and it was fair to keep them until the market recovered.

265. In any event, Mr Matthews' purpose for the meeting was not a general discussion. He already had concerning information and it was now exacerbated by another copy of what appeared to be the same 'amateurish' invoice but now with completely different figures on it. Moreover, he could immediately tell 'Options for Gracefield' included inaccuracies and possible lies – like under compulsory purchase the Claimant would have got 'nothing whatsoever in return', which the Krishans also reiterated to him at the meeting. He did not challenge that or the documents, as his purpose was to investigate the Krishans, not to challenge them. Indeed, when he gently probed about the initial transfer and tax implications they did not answer the questions. Moreover, when he

queried the £500,000 costs in the Balber Takhar Account by suggesting they had 'inadvertently placed additional costs in the spreadsheet', they denied it, 'the mood changed' and he 'decided to wind up the meeting without pressing any further'.

266. After that meeting, it was clear to Mr Matthews and he told the Claimant that it was likely the Krishans had defrauded her and that she should get some legal and accountancy advice. Whilst he had become involved to see if he could assist the Claimant to develop the Properties, which having seen them from the outside he considered still viable, given the suspected fraud, clearly there was no longer any role for him (except as perhaps the only entirely reliable witness I had) in what would clearly become a 'legal wrangle'. It is striking that Mr Matthews' initial intuition even at that stage that 'something did not seem right' – and his perceptive analysis of the problems with the various documents from the Krishans from April-June – Mr Matthews was proved right about the legal wrangle too. However, before getting to that, there were a few last issues.

267. On 25th June 2008, a few weeks after the difficult meeting with Mr Matthews, doubtless still under pressure from councillors, Coventry CC finally ran out of patience with the Cinema. They wrote to the Claimant warning her under s.215 Town and Country Planning Act 1990 (as discussed above, a planning power, not compulsory purchase one) that she must either demolish or come up with 'a substantial package of proposals to tidy up the building' within 28 days, otherwise the Council could issue a formal notice requiring her to do so, breach of which could result in prosecution – notably, not 'prison' as the Krishans had said back in 2005/06) and/or undertake the work itself and charge her for it. This was also sent to Mr Johnson, who emailed Dr Krishan on 28th June. He said given the local pressure, he felt the Council's threat was real and could lead to 'compulsory purchase of the site'. That is true, but not the same as saying CPOs were even 'likely'. Nevertheless, in mid-2008, the situation was getting serious.

268. This is the context for the last call the Claimant covertly recorded on 30th June. As I observed in my assessment of the evidence earlier, the tone of the call was different from those on 19th May (before the Matthews meeting as well as the Council's letter). Consistently with 'Options for Gracefield', Mrs Krishan said if the Claimant was not happy with what they had done, she could deal with it:

> [Mrs Krishan] "I mean we did say it was going to be 50/50 on everything we did." [The Claimant] "Yes] [Mrs Krishan] Right, so whatever the values are now, you know I mean is you are willing to sort of pay us off then we are quite happy with that."

I have dealt with that already, but add that whilst the Claimant acknowledged 50/50, by this stage, Mr Matthews had told her he suspected fraud and she should get lawyers and the Claimant was 'gathering more evidence'. Yet it is a testament to the importance she even now placed on her relationship with Mrs Krishan that the Claimant had not yet sued. Otherwise Mrs Krishan repeated her themes from the earlier calls, talking about the letter from Coventry CC about the Cinema sent to the Claimant not to Gracefield as 'although we are handling it the property is yours'. However, Mrs Krishan linked back the Council's letter about planning to the (different) question of Compulsory Purchase Orders ('CPO's):

> "[Claimant] I have been very appreciative…[Mrs Krishan] Really, when the first lot of CPO orders came, maybe, you know, it would have been better had we not

> done anything and they had just been taken off, and it would have left you absolutely nothing." [At the end, just as the Claimant was saying goodbye, Mrs Krishan added]: "[W]e are still sort of going back to the stage where we are saddled with CPOs and everything else again."

269. A few days later (in fairness, not a month as the Claimant says in her statement), on 4th July 2008, the Claimant visited the Krishans uninvited (as she may well have done before, but in a very different context). In short, it was a difficult meeting where the Claimant and the Krishans argued – perhaps for the first time. As a result, the Claimant tried one last time with a handwritten letter on 7th July. It was a concillatory letter which went back to the re-kindling of their relationship 'at a low ebb in her life', how she confided in Mrs Krishan and how they supported her financially and the Properties, but how she could not expect the Krishans to carry on supporting her, so if they let her know the cash incurred to date, she would reimburse them. Mrs Krishan herself did not respond.

270. Instead, on 14th July, Dr Krishan tried one last time too, albeit in a very different way. He wrote to the Claimant to say that she had not given them a decision (in fact she had done in her letter). He added that Coventry CC's concerns could lead to prosecutions and CPOs. This was either a little slip forgetting that in 2005 /06 they had told the Claimant there were CPOs, or simply part of their ongoing narrative that they would and now had 'saved' the Properties from CPOs in some way. Indeed, I accept after transfer the Krishans had briefly suggested to the Claimant they had instructed solicitors to do so. Dr Krishan repeated what they had said in 'Options for Gracefield': that they were no longer prepared to develop the Properties. He suggested she could, but she would have to buy them at their current market value (a slightly different tack than repaying their costs which by then they knew Mr Matthews suspected, but obviously equally deliberately unrealistic). Dr Krishan ended by saying that if the Claimant did not buy the Properties on that basis within 28 days, the Krishans would have no option but to sell them. In fact, that had been their plan since they realised development was uneconomic in late 2007. But they thought it was worth one last application of pressure to see if the Claimant would agree so they could achieve their goal.

271. This letter from Dr Krishan on 14th July was the last straw for the Claimant and she finally instructed solicitors – as I said Challinors. I have already explained their first pre-action letter of 24th July 2008 on her behalf to the Krishans does not set out the 'stick' part of their 'rescue narrative' in 2005/06. I have taken that into account finding the Claimant was mistaken in saying the Krishans told her CPOs had actually been made in 2005 rather than 2006 given SB's notes. However, at this stage Challinors were still investigating the CPO position with Coventry CC and this point was addressed one they had heard back in their letter of 24th October. However, the 'carrot' side of 'the rescue narrative' is set out in detail in the 24th July letter and described as a 'campaign'. On my findings, especially when taken with the 'stick' side, that is a reasonably fair description. Tellingly (as the Claimant later pleaded in her professional negligence counterclaim against them), in this very first letter, Challinors on her behalf alleged fraud. They set out a case principally based on Gracefield holding the Properties on trust for the Claimant but also effectively of undue influence, but it is not explicitly mentioned. What is mentioned – and I return to at the very end of this judgment – is the Claimant's proposal to 'provide recompense for reasonable

expenditure on the Properties'. Lastly, the Krishans were invited to undertake not to deal with the Properties, to avoid the need for an application for an injunction.

272. The Krishans promptly instructed a firm of solicitors. Although they did nothing wrong whatsoever, in the circumstances I simply will refer to them as 'H' and the solicitor with conduct as 'J'. It appears that SB was also involved as she met the Krishans on 4th August and on 7th August emailed J and her assistant a PDF of various documents the Krishans had given her. This included not only Challinors' letter before claim, but also a statement prepared by Mrs Krishan setting out her account of the transfers, including an agreement to pay the Claimant £300,000 and 50% of the profits on sale, but without any reference to either her or them signing a PSA. It also included an unsigned copy of the 'Whiston letter' of 24th March 2006 which I found Mrs Krishan had drafted (and the 4th July 2005 letter), 'Options for Gracefield' and an edited version of the 'Balber Takhar Account'.

273. Having first met the Krishans on 26th August 2008, the next day J contacted SB's colleague SR. From J's file note, SR had SB's letters of 15th March *2006* (not 2008 as recorded) to the Claimant and to Mr Whiston. Despite the headings of those letters, SR also confirmed they had not acted for the Claimant (Mr Whiston later told Challinors he had not acted for her either and declined their request for a copy of his file). SR also referred to a copy of a profit share agreement dated 1st April 2006 which had been 'handed to the client'. Given they did not act for the Claimant, that would have been a reference to Dr Krishan, as he accepted. Importantly, SR confirmed at as of 27th August 2008, there was no signed copy of the PSA on their file. SR emailed those documents, including the unsigned PSA noting that SR/SB had no record of it being signed and returned. Again, from disclosure from H's file, it appears that J emailed the Krishans that day to ask them what happened to the PSA. Mrs Krishan responded briefly:

> "The profit agreement is as in the agreement [i.e. a reference to what she had told J as recorded in the earlier note]. <u>As to what happened to it, I am not sure</u> but it was in the 2005 and 2006 that it was agreed." (my underline)

J responded by asking whether the PSA had been signed, Mrs Krishan replied:

> "As far as we know the agreement was signed. Not sure where it is or who has copies."

Therefore, as at 27th August 2008, the Krishans suggested 'as far as they know the agreement was signed': not that they had signed and returned it in 2006 and had heard from Linda Hunt or anyone else that the Claimant had done so. Indeed, I find J's email prompted them to recall the written PSA that they had almost forgotten about and to dig out their (unsigned) copy to consider it. I will return to that. The next step was that on 28th August 2008, J received a fax from Mr Whiston enclosing a copy of various correspondence including the 'Whiston letter' signed by the Claimant and dated 24th March 2006 found in the Gasztowicz Judgment to have been used in forging the Claimant's signature on the PSA.

274. On 28th August, J responded in detail to Challinors. That set out much of the chronology in dealings with professionals that I have detailed, including the meetings with SB. It also enclosed a copy of the 24th March 2006 signed 'Whiston letter'. J's letter also said that in 2005, it was the Claimant who said Coventry CC were threatening CPOs (the first mention in the legal correspondence, in fact). The basis of the Krishans' agreement was set out in accordance with the Krishans' instructions,

although interestingly, it suggests the agreement was the Claimant would receive the first £60,000 of any sale proceeds from the Cinema, £80,000 from the Co-Op and £20,000 each in respect of the three Shops. Those figures, totalling £200,000, are taken from SB's letter to the Claimant of 15th March 2006 which J had been sent by SR, although it did not specify a further split and did not actually mention the payment of the £100,000 'purchase price'. J offered the Krishans' undertaking not to deal with the Properties. As one might expect of an initial response, I find on balance of probabilities J sent the Krishans a copy of this letter and its enclosures, including the signed copy of the Whiston letter.

275. Following the warning in June 2008, on 19th September 2008, Coventry CC issued a formal notice under s.215 of the Town and Country Planning Act 1990 (the planning, not compulsory purchase power) requiring Gracefield either to demolish or undertake maintenance and cleaning to the Cinema by 27th October. Coventry CC's letter of 22nd September to Gracefield urged compliance with it. Indeed, in October, Coventry CC also warned s.215 improvement notices on the Shops on 17th October 2008 and issued a formal notice on the Co-Op on 20th October. This was the first formal action on the Properties, for which Gracefield had been responsible for over 2½ years yet undertaken no improvements (save Bobby's efforts in tidying them up). But these were planning notices, not CPOs.

276. At the same time, Coventry CC were also corresponding with Challinors. On 30th October 2008 they confirmed the planning notices on the Properties. However, before that on 3rd October 2008 Coventry CC confirmed the Co-Op was taken out of business rates in 1998 and there were no outstanding arrears on it. They would later on 28th November confirm the same for the Cinema and the rates for the Shops on an 'empty' basis for 2005/06, 2006/07, 2007/08 and 2008/09. Back on 10th October 2008, Coventry CC also confirmed there were no CPOs on any of the Properties and on 23rd October, Mr Todd confirmed that there had never been any. Challinors pressed and eventually on 11th November 2008, Mr Duncan at Coventry CC confirmed that over the last 16 years, he could say for certain the Properties had never even been 'threatened' with CPOs.

277. Pre-action correspondence continued back and forth and both parties contacted the Land Registry to make entries. Meanwhile, the Krishans may have been considering the now full-blown financial crisis and been desperate to sell. On 10th October, J wrote to Challinors warning that they would sell the Properties after 14 days unless proceedings were issued. On 13th October, Challinors invited them to extend the period, or they would seek an injunction. On 21st October, J replied saying there was no basis for an injunction and stated after 24th October the Krishans would deal with the Properties as they saw fit. The same day, J emailed the Krishans chasing them for documentation to disclose, including the PSA. On 22nd October, J spoke to Dr Krishan where he appeared to be resistant to disclosure, but J advised him if helpful it would pressure the Claimant. Notably, even then, Dr Krishan did not tell J they had any signed copy of the PSA.

278. On Friday 24th October 2008, Challinors issued a Claim Form under claim number 8BM30468, what I detailed above in my procedural history as 'the Original Proceedings. The Claim Form sought a declaration that Gracefield held the Properties on trust for the Claimant absolutely; and pleaded the transfer had been procured by 'misrepresentation and/or undue influence' from the Krishans. However, neither fraud, deceit, nor conspiracy were pleaded. Moreover, as I also explained, misrepresentation

was not pleaded in the February 2009 Particulars of Claim, as HHJ Purle QC pointed out to the Claimant's then-Counsel at trial.

279. The same day, Challinors sent a long letter (and fax) to H responding to its long letter of 28th August. Again, the broad thrust was the 'carrot' side of the Krishans' 'campaign' for her to transfer the Properties in 2005/06, setting out the Claimant's understanding and reassurance from the Krishans that the Properties would remain hers, at least beneficially. This was the stated basis for her trust claim and would be the basis for her later-pleaded contract claim. As I have said, it would have been better characterised (and in due course was), as a false representation of the position after transfer to induce the Claimant to do so. Challinors' letter again stressed and detailed the 'implicit trust' the Claimant had in the Krishans. But as I noted, the letter also mentioned the CPOs and said the Claimant:

> "...was advised [from context, by the Krishans] not to contact Coventry City Council as she would be seen as influencing a compulsory purchase order procedure initiated by the Council. She was told on numerous occasions that there was an ongoing legal battle with the Council regarding CPOs."

As I said, this was the first articulation of the Claimant's case on CPOs. However, at this point, the Claimant (and Challinors) had been told by Coventry there had been no CPOs, but not yet had it confirmed as Mr Duncan later did that they had not even been 'threatened'. Therefore, this issue was put quite carefully, but mentioned that Coventry CC would be 'providing a history as regards threats of CPOs'. However, most importantly, Challinors concluded by confirming they had issued a Claim Form and enclosing a copy of it (not by way of service). Challinors said if the Krishans did not agree to extend the undertaking during proceedings by 4pm on 30th October, the Claimant would apply for an injunction.

280. Since the Challinors letter was also a fax, I find on the balance of probabilities it would have arrived with H that day – Friday 24th October 2008. In the light of what follows, I find that J or a colleague at H told the Krishans that day that the Claimant had issued a claim (if not necessarily sent them a copy of the letter and Claim Form). After all, J had been emphasising to Dr Krishan the importance of providing the PSA and other documents and now the Claimant had issued a claim – but not yet served it. It was now becoming urgent for those documents to be sent to Challinors – provided they supported the Krishans' case.

281. That explains the significance of the next day, Saturday 25th October 2008. This crucial date has been revealed by the very proper disclosure of emails by Gowlings solicitors, acting for the Krishans in 2022 (but no longer doing so) as part of the disclosure exercise for the current proceedings. In his statement, the Krishans' then-solicitor explained that as part of an electronic review of the Krishans' emails, they had discovered emails between the Krishans, J and her firm H and SB in October and November 2008, which they confirmed had neither been disclosed to the Claimant earlier in the litigation, nor provided to Gowlings by the Krishans. They are clearly extremely important and should have been disclosed earlier. However, before reviewing the findings in the Gasztowicz Judgment and making my own about the forgery (which is not disputed even if the Krishans still deny responsibility for it), I will consider in detail the contemporaneous documents relevant to that issue in 2008-09.

282. The late-disclosed emails show that at 12.43 on Saturday 25th October 2008, the lunch-time after Challinors confirmed to the Krishans' then-solicitors that proceedings had been issued, Mrs Krishan emailed SB, saying:

> "Subject: Gracefield: Dear [SB], I have been going through some of the papers that I had before the dispute with Mrs Takhar. I found a second sheet copy of the profit agreement signed by Mrs Takhar but not by ourselves. I don't have the first sheet. Do you have the original signed copy ? We will send it with the change of name for the Pharmacy. [That last reference is to another business venture]. Speak to you soon. Parkash and Kewel."

SB replied on Monday 27th October 2008 at 09.05:

> "Morning Parkash, I have the original document, but it is not signed by either party. Can you please arrange to sign and send over. Regards…"

283. On Thursday 30th October 2008, the deadline for replying to Challinors, at 11.44 am, J emailed (through her secretary) the Krishans a copy of a draft letter explaining that she had not been able to get hold of Mrs Krishan, but felt the letter should go (implicitly, that day). Given that the Krishans later replied to that email on 7th November, I infer they did not confirm H's draft letter at the time, so she sent it. This confirmed that they would stand by their undertaking not to deal with the Properties without giving 7 days' notice and indicated that they had 'no intention of litigating by correspondence'. Indeed, since proceedings had now been issued, the substantive statements of the parties' respective cases in correspondence naturally ended too. The letter enclosed a Form 288b relating to the Claimant's resignation as director of Gracefield, a Stock Transfer Form for the one share in it to Mrs Krishan, a summary of work in progress of works done and Gracefield's Accounts for year ending 30th November 2007 showing the Claimant as a creditor. I will return to the other enclosure in a moment.

284. However, in those 2007 accounts (I note sent by SB's colleague to Dr Krishan on 7th August 2008) is the first reference to a £225,000 'Purchase Reserve – Management Fee', said to be a 15% charge on the 'uplift in value' of the Properties: the Shops from £100,000 to £225,000, the Cinema from £100,000 to £600,000 and the Co-Op from £100,000 to £975,000. These values for the Cinema and Co-Op were significantly in excess of Savills' valuations for the current value of the land and there appears to be no basis for them. Nor was there any basis for such a 'charge' – Dr Krishan admits the Claimant never agreed it. In evidence to HHJ Purle QC in 2010, he accepted he would not be entitled to both. Yet before me, having initially suggested it was removed from Gracefield's balance sheets after the Purle Judgment, he was taken to the 2011 and later accounts up to 2018 showing it was still there. Indeed, in 2014 after the Cinema was sold (but after the Claimant had issued the Set Aside Proceedings), Dr Krishan asked SB to calculate the returns from the sale with and without this 'fee', suggesting he was not treating it as an alternative at all. I find on all the evidence that Dr Krishan in early August asked SB to include this spurious 'management fee' as an 'insurance policy' to try to offset from any litigation the Claimant brought, having just received Challinors' first letter before claim in July 2008.

285. Going back to H's letter of 30th October 2008 when that management fee first appeared, the last enclosure was the blank copy of the incomplete PSA and stated:

> "Draft Profit Sharing Agreement prepared by [SB's firm], which reflects the contents of [its] letter to your client of 15 March 2006. We are instructed that

there is a signed copy of the agreement which will follow."

I underline that to stress the obvious point that since 22nd October when J last spoke to Dr Krishan, who at that time did not mention having a signed copy of the PSA and indeed was resistant to disclosing the PSA at all, his instructions had changed. As I have noted, on Saturday 25th October 2008, the Krishans told SB they had 'found' a copy of the second page of the PSA that the Claimant had signed; and I find between then and Thursday 30th October, the Krishans (probably Dr Krishan) had 'instructed' J that they had a signed copy. Certainly, SB's firm did not have one – as they had told H on 27th August and they told the Krishans on 27th October. As far as I can tell, this is the first reference to the PSA being signed between Challinors and H, and J said 'it would follow'.

286. However, it appears that having sent the Krishans a draft of her 30th October letter, J understandably did not send them another copy of it (which was identical). As I noted, the Krishans only responded to J's 30th October email a week later at 7.27am on Friday 7th November, when Mrs Krishan emailed J (through her secretary) and said this (among comments about cheques and unrelated matters):

> "Dear [J], Was this letter sent to Challinors ? Did you get the signed copy of the agreement of[f] [SB] or was it sent without the signed copy ?...

The urgency of Mrs Krishan's request is telling. J's letter had been sent announcing to Challinors that a signed copy of the PSA existed and would follow. That meant that sooner or later, it would have to be provided. Yet it is clear from the late-disclosed emails of 25th October that the 'Claimant-signed' copy PSA had come from the Krishans. So, it is striking that rather than send it directly to J or even tell her about it, the Krishans did not send J directly 'the signed copy'.

287. The Krishans also emailed SB the same day - 7th November – again only disclosed by the Krishans' later (but not current) solicitor in 2022 and so they are not mentioned in the chronology at [83] of the Gasztowicz Judgment. At 07.29am, two minutes after Mrs Krishan sent her email to J, Dr Krishan emailed SB:

> "Dear [SB], We have not as yet had the draft profit agreement to sign. Please email and we will sign and return."

Later that morning, at 10.15 on Friday 7th November, SB said that she had got this to bring to their meeting on Monday evening (i.e. 10th November). Therefore, at that time the Krishans themselves had not signed. There is no suggestion in the emails to SB about what they told me – that they originally signed one in 2006 which had been lost. There are no notes of the meeting between the Krishans and SB on 10th November 2008. However, given there is an undated copy of the PSA signed by the Krishans, I infer this is when they signed it for SB. If they had not already sent SB the 'Claimant-signed copy' (that I will find was their forgery) as suggested by their 7th November email to J, I find they also gave it then to SB.

288. This flurry of emails on 7th November about the PSA may have been prompted by Challinors' letter to H on 4th November, which as well as queries about the other documentation disclosed by H on 30th October asked:

> "Do your clients have any evidence of the value of the compulsory purchase orders as alleged within the [PSA] to form the basis of valuation of £100,000 for all of the Properties ?"

Notably though, for whatever reason, Challinors did not chase the signed copy of the PSA J's letter had mentioned on 30th October. Nor indeed did Challinors' letter of 21st November, even when they wrote to H querying the documents recording the Claimant's resignation as a director from Gracefield and pointing out the stock transfer form disclosed only shows her transferring 1 share, but Companies House documentation showed that she transferred all 50 of her shares in 2006. There was no reference to the PSA or chasing up the signed copy of it. There was also no further correspondence about the PSA in 2008 or early 2009. I return to what the documentation shows about later in 2009. However, this may explain why the copy of the PSA which the Krishans had 'found' with the Claimant's signature lay dormant for a few months, since their own solicitors H still did not have it and the Claimant's solicitors did not chase it.

289. In the meantime, in November-December 2008, there was correspondence between Coventry CC and Gracefield or Mr Johnson about the improvement notices to the Properties, but little had been done. On 12th January 2009, the Council finally ran out of patience with the Shops too and issued a s.215 improvement notice on those as well. On 7th February, the Krishans instructed an agent to develop the Properties. Indeed, in February 2009 – long after the deadline for the improvement notices on the Cinema and Co-Op had expired, further emails suggest that Dr Krishan was liaising with professionals about demolishing the Cinema, which he authorised on 13th February 2009, but it never occurred.

290. That is because days afterwards, on 18th February 2009, Challinors served the Claim Form and Particulars of Claim I detailed above in my procedural history I need not repeat. In short, it was pleaded the Claimant and Krishans had made an agreement that she would transfer the Properties to Gracefield which would develop and rent them and pay her rent; that this agreement was procured by undue influence and/or unconscionable bargain (not misrepresentation) and that Gracefield held the Properties on trust for the Claimant and/or TTC. Doubtless, the proceedings were served on H on behalf of Gracefield and the Krishans just within the 4-month time-limit from issue of the Claim on 24th October 2008.

291. In March 2009, Dr Krishan got quotes for remedial works to the Co-Op and Shops to comply with the planning improvement notices. The total was about £35,000 (just for compliance, not to develop them). Plans also appeared to be proceeding to demolish the Cinema after an asbestos survey. On 23rd March, Challinors wrote to H indicating they were aware of the plans to demolish the Properties and asking for confirmation that it would not proceed otherwise they would apply for an injunction. On 24th March, H told Challinors that demolition was required under the notice and it would proceed. Moreover, on Wednesday 25th March 2009, J emailed the Krishans a draft letter inviting Challinors to apply for injunction.

292. It appears that as at 25th March 2009, the Krishans' Defence had been drafted but not yet served, as Dr Krishan authorised that letter be sent by email, but added:

> "The letter is fine to send. We will look at the Defence and Counterclaim and get back to you. <u>There is a signed profit sharing agreement in place that SR says she has forwarded you in the file so this needs to be confirmed and changed in the defence as it says there is not one that is signed</u>. Will look at the rest and get back to you." (my underline)

Indeed, the next day, Thursday 26th March 2009, it appears from a file note that J's assistant at H had conversations with both Dr Krishan and SR, who mentioned a copy of the second page of the PSA signed by the Claimant but not by the Krishans. At 14.50, SR emailed J's assistant enclosing other documents. Further, at 17.05, SR emailed Mrs Krishan (with the subject 'agreement') enclosing 'signed agreement as requested'. That must be the backsheet supposedly 'signed' by the Claimant, as lastly at 18.16 that evening, SB emailed J directly saying:

> "Further to our telephone conversation please find attached the copy of the profit-sharing agreement signed by Parkash and Kewal [i.e. the Krishans]. Apologies my colleague didn't send this over earlier with the copy of Mrs Takhar's signature – I was holding it in a separate file. As discussed, I will hold the original signature copy until further notice.".

Therefore, on 26th March 2009, SB passed J copies of the PSA apparently signed by the Krishans (herself in her later email) and by the Claimant (via SR's earlier email). It is not disputed the latter was the 'copy PSA' later disclosed which had the Claimant's signature forged on it. The 'original' was never disclosed.

293. The Defendant's Defence is undated, but it must have been served between 26th March and 9th April when the Claimant's Reply to it was served. I detailed the Defence above at paragraph 17 and need not repeat it, save to say all allegations were denied, but also that it had obviously been slightly but importantly amended in the light of Dr Krishan's comment about the signed PSA, as paragraph 29 said:

> "An agreement was drafted by [the Defendants' accountants] <u>which was signed</u>. Whilst the draft contained some of the terms of the agreement set out above, it did not in any event comprehensively deal with all that had been agreed as set out. This agreement is headed Profit Sharing Agreement and is purportedly dated 1st April 2006." (my underline)

A counterclaim sought a declaration in accordance with the Defence's pleaded terms, seeking legal confirmation that Gracefield was the legal and beneficial owner of the Properties and the following declaration:

> "A declaration that the first defendant is contractually bound (and the claimant to accept) that at the time the Properties are sold to distribute the net proceeds after all the proper costs of the first defendant have been paid such that (a) the claimant is repaid her loan of £100,000; (b) the claimant is thereafter entitled to a further £100,000 by way of deferred consideration; and (c) thereafter the net proceeds….are shared equally between the claimant… and the second and third defendants."

As I mentioned above at paragraph 17.4 above, this was not in exactly the same terms as the PSA itself, which 'entitled' the Claimant to £300,000 out of the Properties before a 50% profit split to the Claimant only. Nevertheless, the 'signed PSA' was squarely part of their pleaded case – specifically included at Dr Krishan's request and both he and Mrs Krishan signed a statement of truth in it.

294. It is possible that the service of this Defence prompted Challinors on 31st March 2009 to apply for an injunction to restrain any demolition of the Cinema and in his own first involvement, HHJ Purle QC granted it on a without notice basis until the return date on 16th April 2009. Whilst I do not have a copy of that, my understanding is that the injunction was continued to trial. I understand from other documents that the Claimant

took responsibility for undertaking the works to the Co-Op and Shops under the planning improvement notices. Frankly, from rather confusing emails at this time from the Council, it is unclear what the position was on the Cinema, but it was not demolished. In March 2009, the Claimant had also got the valuations from Chamberlains of the Co-Op for £215,000, Cinema for £165,000 if demolished and Shops for £120,000 I noted above as plainly affected by 'litigation blight'. Moreover, Challinors also instructed the Claimant's then-Counsel to draft a Reply and Defence to Counterclaim, which as I noted was dated 9th April 2009. Again, I have summarised the effect of this at paragraph 18 above and it included a specific plea of resulting trust on the basis of gratuitous transfer. The response to paragraph 29 of the Defence and the 'signed PSA' was simply to note the admission of an incomplete agreement, not to say the Claimant did not sign the PSA (although in fairness the Defence had not said that in terms).

295. It also appears that another order was made at a hearing on 12th May 2009 before HHJ Brown QC, which I do not have either. H's letter to Challinors dated 7th July 2009 accuses them of not complying with it, in that no works had been undertaken on the Co-Op or the Shops and Council Tax had not been paid on it, threatening an Unless Order. From Coventry CC's 2014 letter to the Claimant referred to earlier, it appears this was the point when Bobby Takhar started paying Council Tax and Rates on the Shops. H proceeded to apply for an Unless Order for those works to be done as Gracefield and the Krishans were under threat of prosecution. On 24th July, Coventry CC indicated they would extend time for compliance but hold fire on action until after a visit in October 2009. That was how the Properties were left. It was around this time the Claimant faced investigation into benefit fraud (given the timing, I suspect prompted by the Krishans or Linda Hunt), which went nowhere. Whilst her benefit position until 2006 was complicated by the Properties, the DWP accepted there was no 'fraud' and that is clear to me.

296. However, H's letter of 7th July also proposed disclosure in the proceedings took place by 4pm on 13th July 2009. It appears to have occurred around this time, as there is a flurry of correspondence in late July between H and Challinors about partial disclosure on each side (for example the lack of emails from the Claimant, although it is accepted she did not have a computer until 2008). But Challinors did not complain about lack of disclosure of the PSA and other key documents. Therefore, I infer that around this time, the Defendants disclosed the altered JS Invoice which the Krishans gave the Claimant in April 2008 (not the original version Mr Matthews also saw in June 2008). It is unclear whether the first page of the 'Balber Takhar Account' was disclosed but the second page they did disclose had been altered, as I mentioned above in assessing the evidence. It was altered so the original reference to *'Total so far: £565,600'* had become *'Total estimated approx so far £565,600. Will check'*. It is true that this is a small change, but it is important: showing the Krishans trying to soften their huge exaggeration. It also demonstrates their story to me about an original typing error is nonsense, since they amended the document without altering what they said was a typo on the first page. When talking of the document with the original first page and altered second page, I am calling this the 'Altered Balber Takhar Account'.

297. Crucially, whilst I do not have the disclosure statement, I note on the chronology and accept that on 13th July 2009, H disclosed to the Claimant and sent to Challinors the copy PSA with the Claimant's signature on it, later admitted to be forged. Indeed, it is

not disputed that the first date on which the Claimant could have seen the PSA with her forged signature was on 13th July 2009. As I said at paragraph 19, but repeat now in context, three PSAs were disclosed then:

297.1 The first was a full unsigned version, in the same terms as I have quoted.

297.2 The second version of the PSA was undated copy signed by the Defendants.

297.3 The third version of the PSA disclosed was a copy (not the original) of the second page of the PSA 'signed' by the Claimant. It is unclear when Challinors requested inspection, but some documents were requested on 14th August and the PSA with the Claimant's 'signature' was specifically queried by Challinors on 1st October 2009 so they certainly had it by then. That is confirmed by the statement in the Set Aside Proceedings from the solicitor at Wragge & Co whom the Krishans had instructed in September.

298. Dr Krishan annexed this to his statement of 15th December and said at para. 42:

> "On 12th April 2006, I saw [SB]. She handed me a copy of a Profit Sharing Agreement that she had drafted. My wife was in India, but when she returned, we signed this on behalf of Gracefield and my wife gave a copy to the Claimant for signature. We wanted [her] to have time to consider this, so she took it away before signing it. I understand she then forwarded a signed version to SB, as she had been requested.."

Mrs Krishan said this in her December 2009 statement at para. 36:

> "While [the Claimant and I] were away [in India], Sue Bowdler had prepared a Profit Sharing Agreement. When we returned, my husband and I signed it. We also gave a copy to the Claimant. We suggested that she should take it away and if she was happy with it, sign it and return it direct to SB. I understand that she did that and SB retained copies of the Profit Sharing Agreement signed by all parties."

The Claimant said in her December 2009 statement at paragraph 323:

> "…I do not know if Hamiltons drafted the profit share agreement … I had not seen it before the proceedings. I do not recollect signing it or being asked to. I do not have a copy nor have I ever. In summary there was never any such agreement discussed or agreed with me. It was not mentioned to me by the Second or Third Defendant on any occasion we were together or by any other form of communication."

Mrs Krishan responded in a February 2010 statement at paras 12 and 13:

> "…[T]he Claimant states that she had no knowledge of any Profit Sharing Agreement. This is not correct….[SB] provided a draft Profit Sharing Agreement to my husband in April 2006. I gave a copy to the Claimant for her to take home and consider and she then apparently signed the Agreement and returned it to [SB]. There is no copy of the Profit Sharing Agreement with both the Claimant and mine and my husband's signatures on it because we did not all sign the Profit Sharing Agreement together."

That remained the parties' respective cases in cross-examination at trial in July 2010 before HHJ Purle QC. As I noted at paragraph 20 above, in April 2010, he had refused the Claimant's last-minute application on 31st March 2010 for handwriting expert

evidence. Therefore, in cross-examination of Mrs Krishan, all the Claimant's Counsel was constrained to do was point her to some curiosities in the appearance of the copy PSA with the likes of dots and creases and suggest that if the Claimant had agreed and signed the PSA, she would have done so when handed it in April 2006. Mrs Krishan could only respond to that point with this:

> "All I know is that [the Claimant] took it away and she signed it and sent it back and we did the same with our copy."

The following exchange in cross-examination of Mrs Krishan is also relevant:

> "Q. How did you know she had returned it to the accountants ?
> A. I didn't actually until much later. I assumed she'd returned it..
> Q. Did she tell you she had signed it?
> A. Yes, she did somewhere along the line but I can't precisely…"

299. SB also gave evidence on this issue. Her December 2009 statement said at para.27

> "Although I passed the draft [PSA] to Dr Krishan on 12 April 2006, he did not sign it there and then. I did, however, receive a signed copy from the Claimant some time afterwards."

However, from the Wragge solicitor's evidence in the Set-Aside Proceedings, it appears that in response to the handwriting expert application, in April 2010, he exchanged emails with SB about the provenance of the copy PSA and she said:

> "I do not have the original signature of Mrs Takhar – only a copy – we have never had sight of the original. The signed document was passed from Mrs Takhar to Parkash although I am not sure if Parkash had sight of the original or was simply supplied with a copy by Mrs Takhar".

That solicitor subsequently spoke to SB on 24th May 2010 and noted this:

> "Check with PK. [SB] says PK handed it to her in 2009. PK dug it out once in litigation. SB thinks she might have received PK/KK signed PSA after the event. Did anyone ever sign the PSA at the time" (PK is Mrs Krishan)

Therefore, insofar as SB's statement had said that 'she received a signed copy from the Claimant some time afterwards', it is incorrect on SB's own instructions. In fact, SB was telling Wragges after her statement had been exchanged that she received the copy PSA with the Claimant's signature on it from Mrs Krishan in 2009 and that Mrs Krishan had 'dug it out once in litigation'. In fact, from the emails only disclosed in 2022 it appears probable that the Krishans either emailed it to her in late October 2008 or handed it to SB at their meeting on 10th November 2008 after she had emailed SB on 25th October 2008 to say that she had found it amongst some papers. I found that was also the time SB received the Krishans' signed PSA as well. However, it may have been misfiled, as she said:

> "Q You did not post a copy of this [PSA] to Mrs Takhar, did you ?
> A No, I passed a copy, I believe to Dr Krishan on 12th April
> Q In fact, you did not see Mrs Takhar sign this agreement, presumably ?
> A No
> Q You see you received a copy back with Mrs Takhar's name on it but that did not come back direct from Mrs Takhar, did it ?
> A I do not know where that came from, I'm sorry. I don't deal with the post so do not know where it came from.

> Q. You have not tried to ascertain where it came from?
> A. No. I do know for some reason when that was received it was actually misfiled on another client file, so it wasn't on the Gracefield file. It was on a separate client file…..
> THE JUDGE: Did you see it at the time ?
> A I don't think I did see it at the time, no…..

Indeed, it is concerning that even though SB was asked at length about how she knew the copy PSA had returned and was able to confirm that she had never seen one with an original signature and that it was misfiled, she denied that it was handed over at a meeting with the Krishans, just as she had originally handed it over in April 2006. Yet SB did not mention in answer there what she had told the solicitors in April-May 2010 about being handed back the copy PSA with the Claimant's signature by Mrs Krishan once the litigation had started, in 2009. Whilst I accept this was inadvertent, it meant HHJ Purle QC got a wrong picture.

300. Sure enough, as later found in the Gasztowicz Judgment, to which I will now turn, the 'signed copy PSA' was pivotal to the Purle Judgment, which HHJ Purle QC gave orally on 28th July 2010, observing at [21]-[22]:

> "…Mrs Takhar's case is she didn't sign [the PSA] at all and she has never seen the agreement until this dispute arose. However, no case of forgery is advanced…. In the absence of Mrs Takhar giving a coherent explanation as to how her signature came to be on the scanned copy, I conclude that the Krishans' evidence, which I believe anyway, should be accepted and that Mrs Takhar took the copy of the agreement that she was signed away, which was returned, probably by her in some way, duly executed to [SB's] firm, which then ended up misfiled. At all events, I am satisfied that that was the agreement that was made. The properties were transferred by Mrs Takhar in to Gracefield's name before the written joint venture agreement was prepared, and the only credible explanation that I have heard is that they were so transferred on the terms subsequently set out in the joint venture agreement, which were previously agreed orally."

Whilst it is fair to say HHJ Purle QC did not accept other parts of evidence of the Claimant and her son Bobby, he also did not accept the Krishans' on the Balber Takhar Account and Options for Gracefield, observing:

> "29….There were two documents, one called the Balber Takhar account, the other the Gracefield Options, which clearly misstated the position, in my judgment deliberately so, in an endeavour to put pressure on Mrs Takhar. These were unworthy and wholly inappropriate steps to take and [the Claimant's Counsel] pertinently asks: Why tell these lies ? The only, or at least most compelling answer, he says, is because everything that Mrs Takhar previously has said is true. The Krishans were concealing from Mrs Takhar the true purpose of the transfers. She never regarded the properties as anything other than hers. Nor did the Krishans, and they were put in to Gracefield merely as a shell not because of any joint venture agreement…
> 30 However, I regard the other evidence to be too compelling. I regard the contemporaneous evidence to point unerringly in the one direction of a beneficial transfer to Gracefield in return for a joint venture agreement, which cannot be castigated as unfair or inappropriate. I regard the responses given in April and May 2008, to Mrs Takhar's volte-face (which is what it was) to have been an

> exercise in frustration which, however understandable were in truth inexcusable but did not alter the facts of the past."

Therefore, it seems HHJ Purle QC's concerns over 'the Balber Takhar Account' and 'Options for Gracefield' were assuaged by the 'contemporaneous evidence' which was 'too compelling'. It seems clear this was a reference to the PSA. Moreover, at [32]-[33] of his Judgment, HHJ Purle QC noted that he had been referred to the authorities, but essentially rejected resulting trust, unconscionable bargain and undue influence on the facts, saying on the latter:

> "Whilst there was undoubtedly a relationship of trust and confidence, it was not a relationship in which Mrs Takhar put her decision-making powers at the disposal of the Krishans. She retained her own decision-making powers and the transactions were not those which on their face called for an explanation. In any event, such explanations as I have heard persuade me that there has been no abuse of trust and confidence in this case."

301. I pause there in the timeline at the Purle Judgment in July 2010 to turn to the Gasztowicz Judgment in 2020. I have detailed the procedural history in the intervening decade (including the Supreme Court decision in 2019) which I need not repeat. However, it is worth emphasising one observation I made there that in paragraphs 9 and 10 of her 2020 statement in the Set Aside Proceedings, Mrs Krishan specifically denied the suggestion the Krishans' solicitor in 2009-2010 recorded from SB (whom by that stage they were blaming for the forgery) that Mrs Krishan had passed SB the copy 'signed' by the Claimant. That was not mentioned in Mrs Krishan's 2010 evidence, nor in SB's own evidence as I noted. Nor did Mrs Krishan mention in 2010 or 2020 what she said in the later-disclosed emails from 2008 that she had 'found' a backsheet of the PSA signed by the Claimant and sending it to SB and J. This was only prompted by the emails of 25-27th October 2008 I have discussed disclosed by her new solicitors in 2022 which had not been previously disclosed in the whole of this litigation.

302. Therefore, the following findings in the Gasztowicz Judgment need to be read with the fact he had not seen those 25-27th October 2008 emails firmly in mind. Mr Gasztowicz QC's key findings were as follows as I set out in detail:

> "64. In relation to the Profit Sharing Agreement document, the Claimant's handwriting expert, Mr Radley in his report of 4th October 2013 concluded that there was conclusive evidence of the copy of the Claimant's signature on the Whiston letter having been transposed onto the document. It matched exactly - even though no individual [would] sign…a complex signature of the sort involved here in exactly the same way on more than one occasion. The Defendants' own expert, Mr Michael Handy, in his report dated 2nd July 2020 agreed there was conclusive evidence of this transposition. At trial, no doubt was cast on these conclusions; indeed, the Defendants through their counsel accepted the document had been forged in this way.
>
> 65. I accordingly find the Claimant's signature on the profit sharing agreement document to have been forged by her genuine signature on the Whiston letter having been transposed onto the document prior to it being photocopied/scanned…..
>
> 86. It seems to me most unlikely that [SB] or anyone at [her firm] would have done this, however. It would elevate an act of negligence (which had never been

alleged) into a serious fraud and attempt to pervert the course of justice (which if discovered would have been added on top of such negligence). Furthermore, if they had lost a copy which had been returned signed and wanted to behave dishonestly (rather than just saying so and supporting the Defendants' case in that honest way), they could simply have continued with the line that they had no copy of it, and said that it must therefore never have been returned, there being no documentary or other independent evidence to the contrary.

87. In contrast, the Defendants had every reason to forge the document. Although the Defendants have at this trial sought to minimise its importance on the basis that the agreement relied on was merely oral anyway, and that this document did not contain reference to the agreement that the 50% of the net profits remaining in Gracefield after sale of the properties, and due payments, being theirs, it was a document which, if signed, [Dr Krishan's] own witness statement describes as being seen as critical to the defence…..

88. And it was, of course, of great value to the Defendants to be able to produce a copy of the draft signed by the Claimant. Such a document signed by her was likely to show the Claimant's case that there was no agreement for profit-sharing to be fundamentally wrong, and the Defendants' case that there was such an arrangement to be fundamentally right.

89. The point is made by…the Defendants that at the time the document was drafted, the Claimant owned half the shares in Gracefield and that a term stating they were to get the 50% of the net proceeds remaining in the company after the Claimant was paid her 50% could have been inserted in a forged document if the Defendants were going to forge her signature. However, the profit-sharing agreement document had been drawn up by [SB] in the terms that it was, for whatever reason, and had been referred to in the Defence from the start, with no reference to any other document having been produced or signed. Forging the Claimant's signature on a copy of it would simply involve one addition and be entirely consistent with what the Defendants had said about the documentation there was. This would considerably assist the[m] on the fundamental point that profit sharing had been agreed, leaving the Claimant's evidence discredited and the Defendants free to convince the court… the 50% net profit left in Gracefield was to be theirs - as in fact they subsequently did at trial. As mentioned above, they also in fact held all the share capital in their names by then.

90. In terms of opportunity for the Defendants to forge of the Claimant's signature by transposing her genuine signature on the Whiston letter onto a copy of the Profit-Sharing Agreement document, this would only have been there if the Defendants had access to a copy of that letter.

91. A copy of the signed Whiston letter may well have been sent by Mr Whiston to the Defendants, when received by him. Aside from this, the evidence shows that a copy of the signed Whiston letter was certainly sent to the Defendants' new solicitors by [Mr Whiston's firm] in August 2008. The Defendants' solicitor, [J], then wrote to Challinors…on 28th August 2008 a detailed letter setting out how the [Krishans] had helped the Claimant and refuting allegations of fraud made by the Claimant in relation to their dealings with her, and attached a copy of the Whiston letter to it.

92. [Dr Krishan] went…before me from saying that he 'would' have been sent a copy of this letter by his solicitors to saying he positively remembered there had not been any attachments to it. He was obviously closely involved in the litigation

and it would seem surprising if he did not want to see relevant documents as referred to in that letter. Whether or not he read them in detail then, he would have been likely to have got and kept copies of them…[that] would have been available to him later, giving the opportunity of transposition of the signature from the attached Whiston letter onto the profit sharing agreement document. Taken with all the other evidence in the case which suggests transposition of the Claimant's signature from it by them, I am satisfied the Defendants did have access to the Whiston letter…

99. It is not clear how the Second Defendant was able to instruct his solicitors to write to the Claimant's solicitors on 30th October 2008 that a 'signed copy of the letter would follow'…when there is no evidence of [SB] changing [her] position as expressed on 27th August that they had no record of the return of a signed copy of the Profit Sharing Agreement document. ….On the evidence, only on 26th March 2009 did [SB's firm] say they had a copy of it. Had the Defendants themselves provided, or been intending to provide, a purportedly signed copy of the letter to [SB's firm] (which could then be produced by them to the Defendants' solicitors) they would obviously have been able to give such instructions, however.

100. It seems to me likely that that is what happened. It is borne out by the statements of [SB] nearer to the time…..

109. [Yet her answers in cross-examination] suggests that when [SB] said in her witness statement that she "received a signed copy from the Claimant some time afterwards", she meant she "received a copy signed by the Claimant sometime afterwards". However, that she did not know where it had come from was at odds with her previous statements, both written and verbal that it had come from the [Mrs Krishan], whether then put on the wrong file or not.

110. I consider it likely the Defendants provided the document to the firm after the litigation had commenced, by one means or another in order for it then to be produced as important documentary evidence apparently signed by the Claimant, of a type that would otherwise have been lacking.

111. The Defendants had the motive, and the probable opportunity, to do this, and it explains how [Dr Krishan] was able to assert to his solicitors on 30th October 2008 that a copy signed by the Claimant would be able to be produced subsequently, even though [SB] had said at that time that they did not have any such copy…..

[The Gasztowicz Judgment at [113]-[121] then went on to find the Balber Takhar Account and Options for Gracefield were 'demonstrably untrue' for similar reasons as in the Purle Judgment. It then continued:

122. The Defendants' evidence before me was also unsatisfactory in other respects. When asked directly about how the signed Profit Sharing Agreement document was returned, the evidence of both Defendants before me was that [Mrs Krishan] had been told by the Claimant in front of independent witnesses that she had returned a signed copy to [SB's firm].

123. Although the return to [SB's firm] of a signed copy of the Profit Sharing Agreement document was enquired into at the original trial… no mention was made by either of the Defendants of the Claimant having stated this in front of witnesses (who might potentially have been identified to prove or disprove that) then. Furthermore, although the question of whether a Profit Sharing Agreement

document had ever been signed by the Claimant (which might for example have been lost by SB's firm who…panicked into forging another copy, as the "alternative theory" went) was brought into sharp focus in the present trial by the Defendants themselves in their witness statements, no mention was of her having said this in front of witnesses.

125. There was no mention in the Defendants' witness statements for the current trial to them having been told by the Claimant that she had signed and returned the Profit Sharing Agreement document before witnesses. Nor in the Defendants' correspondence, such as their solicitors' letter responding to the letter before action, was there any reference to the Claimant having said she had signed the document, let alone that she had done so before witnesses, showing her agreement thereto…

The conclusion I am drawn to is that these details are a recent fabrication designed to support their case in relation to the signing and return by the Claimant of a copy of the Profit Sharing Agreement document.

126. All this affects the view I have formed of the matter. I am satisfied, on the balance of probabilities, that not only did the Defendants have strong motive, and opportunity, to forge the document by transposition of the Claimant's signature onto it from elsewhere (and there is no evidence or sufficient reason to think that anyone at [SB's firm] did so), but that they did do so.

127. Based on all the evidence I have heard, the Defendants were in my judgment, on the balance of probabilities, responsible for the forgery of the signed profit sharing agreement document by adding the Claimant's signature to a copy of it by transposition from the Whiston letter. This amounted, in the words of Aikens LJ in *RBS*, to 'conscious and deliberate dishonesty'.

128. I should add that the point was made by [the Defendants' Counsel] in submissions that the Defendants as professional people would not have forged the document, and also 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. On the second point, their non-objection to the application may have been an act of bravado, designed to avert suspicion, in a belief also that as the true signature of the Claimant had been transposed and only a photocopy document was available it would, if the application was allowed despite its proximity to the trial date, have gone undetected…..

136. No doubt Judge Purle as the trial judge came to the conclusion he did – that there was a transfer of beneficial ownership on the basis of a profit sharing agreement as the Defendants contended, not a wholly different arrangement as the Claimant contended - for a variety of reasons, as will often be the case in a trial. I have of course carefully considered the judgment as a whole. However, the signing of the Profit Sharing Agreement document by the Claimant as he believed it to be was undoubtedly one….

137. In any trial, and in a fraud trial in particular, the court is of course looking for independent and contemporaneous indicators of where the truth lies on crucial issues, such as in this case, whether there was a profit sharing (or "joint venture") agreement. The forged document clearly evidenced this in the absence of forgery of Mrs Takhar's signature on it. Had the Judge known that her signature on the copy of that before him had been forged, for which the Defendants were

> responsible (causing him also to weigh their oral evidence in the light of that knowledge), that plainly would have (in the words of Aikens LJ in *RBS*) "entirely changed the way in which the first court approached and came to its decision" and it was plainly an "operative cause of the court's decision to give judgment in the way that it did".
>
> 138. Applying in full the test laid down by Aikens LJ and approved by the Supreme Court in *Takhar* itself - which in my judgment represents the law, as set out above – it was plainly material to the judgment given at trial…."

Mr Gasztowicz QC at [140] finally rejected a submission that a second trial would make no difference to the outcome, as inconsistent with the *RBS* case.

303. Those findings are binding on the Krishans, whether as an issue estoppel arising in the conspiracy claim largely based on that forgery, as Mr Halkerston submitted and I accept, or as a 'juridical fact' as Mr Graham accepted. Either way, the Krishans are, as Mr Perring engagingly put it (in a very different register of language from his erudite submissions on the law), 'stuck with it'. However, as I observed when considering issue estoppel, whilst Mr Halkerston did not argue the Krishans were prevented from doing so, the Krishans firstly gave evidence that they did not forge the Claimant's signature on the disclosed PSA (stressing the finding in the Gasztowicz Judgment that they did so was only 'on the balance of probabilities'). Secondly, they also said that both they and the Claimant had originally signed copies of the PSA back in 2006: themselves based on their own evidence and the Claimant based on Linda Hunt's account given through Mrs Davies and Dr Handa. Mr Graham knew he could not - and so did not - argue the first point, but fearlessly submitted on the second strand of his clients' evidence:

> "The signature on the copy of the signature page purportedly signed by C has been found to be a forgery for which the Krishans were responsible. That is a juridical fact. This does not affect the Krishan's belief that C did sign a version of the written Agreement and did post it back to [SB's firm] …The forging of C's signature on one version of the written PSA is an established juridical fact and is clearly not justifiable or excusable. However, at most its effect was to strengthen what was already a good and strong case, that the parties entered the Agreement contended for by Ds."

I deal with the two different positions in the Krishans' evidence in reverse order.

304. I have absolutely no hesitation in rejecting the suggestion that the Krishans and the Claimant signed the PSA in 2006 and they signed it then and again in October-November 2008. On the issue of the Krishans' signing, at no stage in the contemporary documents, or in any of their earlier evidence over the last almost 15 years, have they ever suggested that happened. It would also be inconsistent with SB's 2008 emails suggesting she had no signed copy of the PSA. The assertion of 'another misfiling' is just that – an assertion: all the easier to make because it cannot be gainsaid, not least because SB is no longer a witness as the Krishans dishonestly accused her of forgery. Whilst in cross-examination at the Set Aside Trial in 2020 they certainly did suggest that the Claimant originally signed the PSA, Mr Gasztowicz QC rejected that at [122]-[125] of his judgment I quoted above, not least because, yet again, they had never said it before, not even in their own statements for the trial before him. Therefore, the Krishans are seeking to run a factual case he rejected, which again to my mind seems to give rise to an issue estoppel in the conspiracy claim. However, even if I am wrong

about that, I unhesitatingly reject this attempt to exploit the sadly-deceased Linda Hunt's wild accusations about the Claimant, whether directed at Mrs Davies or Dr Handa (neither of whose evidence was particularly helpful to me in any event). Whatever the difficulties with other parts of the Claimant's evidence, I have and do entirely accept her consistent and clear evidence that she never saw at the time or signed *any* version of the PSA. Indeed, this new account by the Krishans was so late in the litigation and so threadbare that it says less about the Claimant's credibility than the Krishans' own credibility, especially in proferring it through others (by multiple hearsay from a dead 'witness'). Moreover, their preparedness simply to brush aside the findings in the Gasztowicz Judgment weakens it further.

305. Having dealt with the case Mr Graham argued, I return to what he did not – whether the Krishans forged the Claimant's signature on the PSA disclosed in July 2009. I have treated the Krishans as having done so throughout this judgment so far, because their own lawyers rightly accept it is at least a juridical fact and I find it is an issue estoppel on the conspiracy claim. However, as I said, the Krishans in their evidence did not appear to accept even that juridical fact – pointing to the Gasztowicz Judgment being 'on the balance of probabilities'. Therefore, whilst I make my findings on that same – and correct - correct civil standard of proof, I will then - even though it is unnecessary to do so, go on to test it by applying the criminal standard. After all, as I explain later, the forgery of the Claimant's signature and its deployment in the Original Proceedings was a crime, albeit one that would never realistically be prosecuted as it was also a contempt of court. However, I start by saying I am satisfied on the balance of probabilities that the Krishans together combined to forge the Claimant's signature on the PSA in October 2008 then deploy it in evidence from July 2009.

    305.1 Firstly, whether or not it is binding on me, I wholeheartedly agree with and adopt the reasoning in the Gasztowicz Judgment quoted above. Those findings apply to both Mrs Krishan and Dr Krishan acting together.

    305.2 Secondly, even though Mr Gasztowicz QC did not have the benefit of the Krishans' and SB's email exchanges on 25-27th October and 7th November 2008, they actually demonstrate the correctness of his perceptive finding even without them at [99]-[100] of his judgment. He found the Krishans 'instructed' J before her letter of 30th October 2008 that a signed copy of the PSA would follow which they then provided, as the emails to and from SB prove. Yet rather than sending it directly to J as she requested, the Krishans' emails of 7th November as a whole show they wanted to send it to her *via SB*, which would have the effect of concealing their 'discovery' of it on 25th October. There is no good reason for such concealment *from their own solicitors* if this was genuine. This concealment was redoubled by their failure to disclose these emails to their successor solicitors later in the proceedings, plainly forcing the latter to do so very properly themselves. However, when one adds into this suspicious scenario the 'coincidence' that on 25th October 2008 Mrs Krishan supposedly 'discovered' the PSA signed by the Claimant, happening to be the day after she had issued proceedings, as I find they were told, this becomes utterly untenable. The overwhelming inference is that the Krishans did not 'discover' this PSA, they forged it on 25th October 2008 - together. As the 7th November emails show, this was most likely passed to SB by the 10th November 2008, when the Krishans also signed the PSA for the first time. This left both 'signed' PSAs – their genuine one and the one they had forged with the Claimant's signature – in SB's files. This is

consistent with SB's account to the Krishans' solicitors in 2010 that Mrs Krishan passed her the 'Claimant-signed' copy PSA after the litigation had begun, even though I find it was more likely to be 2008 than 2009. Either way, the admittedly forged PSA which was disclosed in July 2009 was the same document the Krishans handed to SB in 2008, since they were the ones who forged it: on 25th October 2008, in response to the issue of the claim. I emphasise I am satisfied of that conclusion even without reliance on the Gasztowicz Judgment, but simply on the basis of the contemporary documents, including those deliberately concealed.

305.3 Thirdly, my conclusion is reinforced by the Krishans' wholly unreliable – indeed I find dishonest - evidence to me, trying to 'explain away' these undisclosed emails. Mrs Krishan in her 2022 statement said:

> "I have been shown [the recently-disclosed emails] for the purposes of making this statement. Until I saw these emails again, I did not recall them at all – it clearly went out of my mind. However, I now recall that sometime in 2008, when I was going through some old SAT [exam] papers that I was due to throw out, I found some papers that I presumed Mrs Takhar had left, and that amongst them was a copy of what I thought may have been the original agreement, because it only had Mrs Takhar's signature on it. I knew the original had been sent to the accountants in 2006, so I was not sure whether this was a copy or what it was, but I sent it on to [SB] and [J] …in any event. Nobody replied to say what it was, copy or original, which I would have expected them to do, and so I forgot about it."

Mrs Krishan stuck to this story at trial, but when pushed about why she did not disclose these emails earlier, she insisted that despite her solicitor saying in 2022 that his firm had not seen them, they had access to her emails. She said that the fact she found the PSA the day after proceedings were issued was just a coincidence. Yet she also appeared to accept that this document was the forged PSA. However, she could not then explain how she came to have it if the Krishans did not forge it. Nor could she give any remotely plausible explanation of why she did not disclose emails under her control in her own email account which explained the provenance of a document prior to a trial about the provenance of that same document. She said she 'did not realise its significance'. This frankly absurd 'explanation' of these emails is in fact flatly contradictory of them. They prove that that SB did ask for the signed copy of the PSA and indeed J was pressing the Krishans for it (yet only a week earlier Dr Krishan seemed reluctant to disclose it). However, the Krishans did not send this 'discovery' straight to J, but asked her if she had received it from SB, which is to whom they gave it. This is totally inconsistent with the evidence of Mrs Krishan. Dr Krishan effectively simply followed her evidence on this point. Indeed, he also had to accept before me that at the Set-Aside Trial, he had accepted the signed PSAs were not produced until after the litigation had started; and he had not suggested that he and Mrs Krishan had signed an earlier PSA either.

305.4 Fourthly, on that latter point, I have rejected above the Krishans' entirely new story that they signed two copies of the PSA: one in 2006 and one in 2008. As I also explained, that weakens their credibility – on this issue too.

305.5 Finally, speaking of other issues, in my assessment of the evidence above which I need not repeat, I found the Krishans' evidence to me seriously unreliable on

various other points that were not before Mr Gasztowicz QC.

Indeed, I have a far wider canvas of evidence before me than he did in 2020 and in my judgment, it is not just 'more likely than not' that the Krishans combined to forge the Claimant's signature on the PSA in October 2008 and to deploy it in evidence in 2009. The evidence to support that is so overwhelming that I am satisfied on the criminal standard so that I am *sure* of it (or to put it another way, I am satisfied beyond reasonable doubt of that forgery and deployment).

306. As Mr Gasztowicz QC found, the Krishans forged the Claimant's signature on the copy PSA, using her signature on the letter from her to Mr Whiston on 24th March 2006 confirming her instructions that the Properties be transferred to Gracefield for £100,000. I found above that Mrs Krishan drafted that letter for the Claimant to sign. Whilst it may be too much of a stretch to say the Krishans kept a copy of the signed letter to use it forgery over two years later, I certainly find they were familiar with this letter and as Mr Gasztowicz QC found, a signed copy had been sent by J to Challinors on 28th August 2008. I found, as is common for such a detailed 'first substantive reply', that a copy of that letter – and its enclosures including a copy of the Whiston letter with the Claimant's signature on it - was sent to the Krishans as well. I also note that is at almost exactly the same time – 27th August 2008 – as J was corresponding with SB and SR and asking about the PSA – including asking the Krishans whether they had a signed copy. As I noted above but repeat here to assist, that day Mrs Krishan said:

> "The profit agreement is as in the agreement [i.e. a reference to what she had told J as recorded in the earlier note]. <u>As to what happened to it, I am not sure</u> but it was in the 2005 and 2006 that it was agreed." (my underline)

J responded by asking whether the PSA had been signed, Mrs Krishan replied:

> "As far as we know [it] was signed. Not sure where it is or who has copies."

Therefore, on or around 28th August 2008, the Krishans had been reminded by J of the PSA which was increasingly apparent as central to their case – and asked if there was a signed copy, which they said there was not. I find they recalled they still had the blank PSA SB originally gave them in 2006, which is the reason that at that time, there was no copy signed by anyone on her file. The seed of forgery was planted. Within days of being reminded about the PSA and finding their blank copy, they were also sent J's letter of 28th August, including the Whiston letter. However, they did not yet act. That only came once they were told on 24th October that the Claimant had issued – but not yet served – her claim. They knew litigation had arrived and there was a risk their conduct to the Claimant would be exposed, as Mr Matthews had already probed with the costs in the Balber Takhar Account earlier in the year. If they also were sent Challinors' letter of 24th October, as I find, they would have then read about the CPOs and realised they needed to buttress their position. In any event, on Saturday 25th October 2008, they returned to their own unsigned copy of the PSA from 2006 and took up the Whiston letter from 24th March 2006 – almost exactly the same time as the date in the PSA – 1st April 2006 – to add plausibility to the 'Claimant's signature'. As Mr Gasztowicz QC said at [64] of his judgment, the Defendant's own handwriting expert agreed in his July 2020 report that there was conclusive evidence the Whiston letter had been transposed onto a copy of the PSA. I suspect it was by photocopying one onto the other, which may account for the dots and lines the Claimant's Counsel noticed and put to Mrs Krishan in 2010. However, it does not matter precisely how they did it. I am satisfied (indeed, sure) that they did so. Having done so that morning of 25th October

2008, they then put their plan into action by emailing SB to say that they had 'found a second sheet copy of the profit agreement signed by Mrs Takhar but not by ourselves' amongst some old papers. As I said, they then did not send this to J, but gave it to SB, by email before or at the latest at the meeting on 10th November, when they signed another copy. Finally, this was provided to H in March 2009 and disclosed on 13th July 2009.

307. I turn, with some relief, to the last topic in my findings of fact: the sale of the Properties in 2011-2014, which I can take very shortly indeed. The only issue which is factually disputed is the Properties' value at the time (returning me to Ms Dobson's evidence). However, I will pick up the narrative again on 28th July 2010, at the very point at which HHJ Purle QC dismissed the Claimant's claims. Entirely unsurprisingly, the first to speak was the Defendant's Counsel, who asked for and was given a declaration in terms of the PSA plus the Krishans' 50% share rather than strictly of the counterclaim as such – that Gracefield was the legal and beneficial owner and that it and the Claimant was contractually bound that upon the sale of the Properties, she would receive £200,000 then for the net proceeds to be split 50% to her and 50% to the Krishans.

308. This can now be seen in context of my findings. As I explained above, the Krishans' attempts to cajole and pressure the Claimant into agreeing to sell the Properties in 2008 after she had objected to the auction simply ended in her suing them on 24th October 2008. In the light of my finding that the Krishans forged the Claimant's signature on the copy PSA the very next day – 25th October 2008, it is clear their plan had changed. Whereas in 2005/06 they had cajoled the Claimant into transferring the Properties to their company and shortly afterwards into their full control, I find that from 25th October 2008, they decided to use forgery in the coming proceedings to maintain and secure their control of the Properties, so that they could sell them as soon as they could and finally release the returns.

309. This conclusion is supported by the Krishans' remarkable determination in 2009 – relying on the improvement notices which Coventry CC had issued but showed little interest in enforcing – to demolish the Cinema. As H said to Challinors at the time, the Krishans considered this would enhance the land value. However, with an injunction from March 2009, they handed over responsibility for compliance on the Co-Op and Shops to the Claimant. At the same time, now that proceedings had been served, the Krishans decided to rely on the signed PSA in their Defence, as Dr Krishan insisted in his email of 25th March 2009 to J that it be amended to refer to the signed PSA. The next day, 26th March, Dr Krishan spoke to J, who then spoke to SR and SB, who sent J for the first time the 'signed' copies of the PSA. This included both the copy with their forgery of the Claimant's signature and the copy the Krishans signed for the first time at the meeting with SB on 10th November 2008, by which time SB had the forged copy.

310. Consistently with the Gasztowicz Judgment and the emails they both sent at the time, I am sure the decision to forge the Claimant's signature was a joint decision which the Krishans executed together, as they had executed their plans together back in 2005/06: Mrs Krishan had cajoled and persuaded the Claimant and produced letters for her to sign; and Dr Krishan (once he had the Claimant's authority to deal with the Council from 4th July 2005), had told (along with Mrs Krishan) the Claimant there were CPOs, or at least deliberately exaggerated their likelihood and consequences. The Krishans have been a team throughout and they supported each other's lies in the Original Proceedings as they supported each other's (what I find on this to be) lies in their

evidence before me. Once the forged PSA was disclosed in July 2009, they not only contended the Claimant had signed it, they dragged in SB to give evidence to that effect, yet that did not reflect what she told their solicitors, or the October 2008 emails the Krishans concealed.

311. However, having succeeded in the Purle Judgment, the Krishans immediately obtained their declaration, albeit not in the terms originally sought, but in the terms of the PSA upheld in the Purle Judgment: with the Claimant on the sale of the Properties entitled to £100,000 'repayment of her loan' and a further £200,000 'by way of deferred consideration', with the net balance after expenses etc being shared equally between her and the Krishans. Moreover, having sought and inevitably been granted their costs (although reduced to 80% by HHJ Purle QC because of their misleading Balber Takhar Account and Options for Gracefield documents), the Claimant was ordered to pay £100,000 of the Defendant's costs on account and total costs were sent for detailed assessment.

312. From Mr Gasztowicz QC's costs judgment in 2020, when he ordered the Krishans to repay their costs the Claimant had paid in 2010, it appears that the total costs the Krishans had originally sought in July 2010 was £560,653.80. However, the Krishans contended that only £363,975.60 had been 'paid' by the Claimant, which he ordered the Krishans to 'repay'. Mr Halkerston accepted in his Skeleton Argument the Claimant had actually been paid this, so would have to give credit for £363,975.60 from any damages I awarded. This is because she was 'repaid' something she had never truly 'paid' to the Krishans anyway. It is not disputed and is clear from contemporary documents this was not so much 'paid' by her, as deducted by the Krishans from the Claimant's supposed 'share' under the PSA when the Co-Op and Shops were sold a few months later in March 2011.

313. Indeed, the Krishans acted quickly after the Purle Judgment on 28th July 2010. Fewer than 6 weeks later by 6th September 2010, Dr Krishan had reinstructed Ms Smith from Loveitts to proceed to auction. It appears from their letter that it was planned to market the Co-Op for £800,000. However, on 22nd October 2010, a report showed there was asbestos in the Co-Op and it appears from other emails there was a dispute over the Shops, with neighbours disputing the rear garden and parking at the front. One wonders whether Bill Takhar - who was extremely angry with the Krishans - had pulled local strings to make life more difficult for them. I find it was then that Bill made anonymous NHS complaints about Dr Krishan. Certainly, despite the Purle Judgment, it appears that the Claimant sought to frustrate the proposed sales with notices on the Land Registry and even complained to Gracefield's new bank RBS. Bill even applied for an injunction on 8th November 2010 to Telford County Court to restrain Gracefield and the Krishans from dealing with or securing monies on the Properties (or the Claimant's home) with a pending auction on 17th November. However, on 12th November, HHJ Purle QC in Birmingham granted the Krishans' application and not only directed Bill's application be transferred and dismissed it as totally without merit, but also injuncted both Bill and the Claimant from seeking to register cautions and restrictions at the Land Registry to frustrate the pending sale. This use of Court proceedings enabled auctions to proceed on the 17th November 2010. Therefore, it is important to note that the Krishans did not just deploy forgery in evidence in their plan to procure the Purle Judgment to confirm Gracefield's ownership of the Properties, they then used the Purle Judgment itself to get an injunction in order to implement their plan to sell the

Properties. As shown by the counterclaim declaration then enforced by injunction, for the Krishans, the litigation was not an end in itself, but entwined with their plans.

314. At the November 2010 auctions, the Shops were successfully auctioned for £175,000, with a completion date set initially for January 2011. However, the reserve on the Co-Op of £700,000 was not met. Nevertheless, negotiations continued and on 13th December 2010 a sale contract on the Co-Op for £675,000 was initially agreed with January completion. However, due to conveyancing complications, the completion date for the Shops was 21st March 2011 and for the Co-Op was 29th March 2011, by which time planning permission granted. Accordingly, those sales of the Co-Op and Shops realised a total of £850,000 from which, subject to sale costs, under HHJ Purle QC's declaration, the Claimant would be entitled to £575,000 (£300,000 plus 50% of the net balance). However, from the director's loan account, it appears that £563,650.80 was paid to Wragges from the Claimant's entitlement (in fairness, the same sum as the Claimant later argued – I find correctly - to Mr Gasztowicz QC had been 'paid' by her in costs, although he cautiously adopted the Krishans' figure of £363,975.60). Therefore, the Krishans had not only succeeded in their plan to keep and sell the Co-Op (the property most precious to the Claimant and her family) and Shops, they also managed to retain *all* the proceeds and also pay their lawyers *in full* not just 80% from *her* share. This effectively avoided the 'hit' from the 20% costs reduction – a further entwining of the litigation with their sales of the Properties.

315. Pausing there, I note the sale price for the Co-Op of £675,000 (by which time planning permission had lapsed) is very similar to the March 2011 'pre-works' valuation Ms Dobson came to of £700,000. As I explained at paragraph 105.4 above, unlike her 2011 'post-works' and rental values, for her 'pre-works' valuations, she more simply analysed whether a different approach to the sales could have fetched a higher price. The question is whether with reasonable effort, an extra £25,000 making a total of £700,000 could have been achieved. Certainly, the Chamberlains valuation in March 2009 during the litigation of £215,000 was far too low. As Ms Dobson explained at para 18.17 of her first report, the Co-Op's actual sale price of £675,000 was less than it could have been because it was limited to auction with cash buyers. After the reserve price was not met, it seems that negotiations simply continued with one of the bidders, rather than even going to open auction again, still less marketing the Property openly. I recognise that there had recently been an asbestos report and the auction happened just after the Claimant and Bill had tried to stop it but had been injuncted. But I accept Ms Dobson's opinion that with more effort and less haste, a sale price of £700,000 (only an extra £25,000) could have been achieved very easily. Therefore, I accept Ms Dobson's 'pre-works' valuation for the Co-Op in March 2011 of £700,000.

316. The Shops have a much wider differential between their total sale price of £175,000 in March 2011 and Ms Dobson's valuation of them then of £300,000. However, as she explained in her first report at paras.18.24-18.26 and in evidence as noted at paragraph 241.3 above, the problem was that the Shops had always been seen and were being marketed as a 'job lot' and would have fetched more if sold separately and not limited to cash buyers. By reference to comparable commercial properties, Ms Dobson identified an average value of £80,000, but that totals not her £300,000 (which appears to have taken into account planning permission) but rather £240,000. Whilst this is the same as in April 2006, other terraced properties on the Foleshill Road also had similar values in 2011 as 2006.

317. However, the Cinema was not sold in 2010/11, even though the original planning permission granted on 7th December 2007 did not lapse until 7th December 2010. The application to extend planning permission was only made days before it lapsed and the permission was not extended. As a result, there had to be a fresh application, which due to local opposition took another three years and had to change from the originally-granted 18 flats to only 10 flats. As Ms Dobson explained, this reduction in flats also reduced the Cinema's value. So, I accept her view the sale price in August 2014 of £191,000 was not as high as it could have been. Yet, there is no valuation for the Cinema with renewed planning permission in late 2010. However, Ms Dobson showed the 2009 Chamberlains valuation of £165,000 is based on an incorrect estimate of the square-footage, as Ms Dobson showed, so that does not help either. Ultimately, I cannot value the Cinema in late 2010 and I have to proceed on the basis of the value in August 2014. However, the difference between Ms Dobson's valuation of £250,000 then and the actual sale price of £191,000 is explicable because it was auctioned to cash buyers only, not marketed more widely. I accept Ms Dobson's opinion at para 18.22 of her first report that since the Cinema would inevitably have been demolished (as Coventry CC had said back in 2003), a marketed sale would have been open to a wider range of potential buyers with different purchase options, such as an offer conditional on planning permission, or once granted, by mortgage with a proposed lease. Limiting it to cash buyers limited the price substantially. I accept Ms Dobson's opinion that had the Cinema been sold unrestricted in 2014, it would have fetched the price of £250,000 at the least (only £50,000 more than its value in 2006 and only £90,000 more than its value over a decade earlier). However, yet again the Claimant in 2014 received nothing from the Cinema's sale because any 'share' she may have had under the declaration in the Purle Judgment was offset again by Dr Krishan's spurious 'management fee' discussed at paragraph 284 above, as by 2014 the Set Aside Proceedings had begun. In any event, together with £240,000 on the Shops and £700,000 on the Co-Op, the true value of £250,000 for the Cinema in August 2014 means the total value at the times of sale was £1,190,000, not the actual total sale price of £1,041,000.

318. After the draft judgment was circulated, Dr Krishan provided another schedule which after deduction of a slightly higher overdraft figure purports to suggest that from June 2010 to 2019, £44,802.39 of further expenditure was incurred. £16,490.06 of this appears to relate to the sale of the Co-Op and Shops in March 2011; and £16,148.15 clearly relates to the renewed planning application and sale of the Cinema in 2014. So, whilst that total of £32,638.21 clearly relates to the sale of the Properties, the balance of £12,164.18 does not. Instead, it seems to relate to Gracefield's accountancy and tax expenses (suggested by several payments to SB's firm) and given that most of that £12,164.18 relates to the period after the Cinema sale, it may possibly even be linked to the litigation.

319. Finally in my findings of fact, I address Ms Dobsons' valuations of the Properties in November 2022. As I said at paragraph 105 above, those were based on her actual inspection (albeit not inside) of the actual Properties. The Co-Op ground floor (only) had been refurbished and was in use as a shop with an annual rent of £144,000 and had been sold in 2016 for £1,320,000. The Shops had been tidied up and two of them were being used as shops with flats above and no.558 had its subsidence repaired and was a dwelling. Ms Dobson also noted recent comparable sale prices – for example the next-door property to the Shops sold in July 2021 for £202,000. These together with her own inspection in November 2022 support Ms Dobson's 'post-works' valuations in 2022 of

£1,150,000 for the Co-Op and £540,000 for the Shops. I explained at paragraph 105.3 above Ms Dobson's 2022 'pre-works' valuations worked backwards from that post-works value by deducting average costs and profit, using industry-standard software in the first report, calibrated against the extra information about the Properties in the second. I accept this is a reliable approach and I accept Ms Dobson's 2022 'pre-works' valuations of the Co-Op at £950,000 and Shops at £380,000. The Cinema is more simple, since in November 2022, it was still 'pre-works' albeit in informal use as a church. Ms Dobson saw it and I accept her valuation of £500,000.

Undue Influence

320. Undue Influence focuses on the transfer of the Properties by the Claimant to Gracefield in March/April 2006 and spans the period from July 2005 until then. In this 'chapter', I first determine the linked and mainly factual questions of the actual terms of transfer and whether fraudulent misrepresentations by the Krishans induced it. Second, I consider whether they can in principle amount to undue influence. Third, I examine whether there must be (and was) a pre-existing relationship of trust and confidence. Fourth, I resolve the Claimant's 'actual undue influence' argument; and fifthly her 'presumed undue influence' argument.

321. The second key question at the start of this judgment was whether fraudulent misrepresentations can amount to undue influence; and if so, whether there needs to be a pre-existing relationship of trust and confidence. In other retrials after a judgment is set aside, *the same fraud* may have *also* been central to *the transaction previously litigated*, leading to a new or re-opened claim for undue influence, although that does not arise here. Yet, there is still a parallel between setting aside a transaction for undue influence (by fraud) and setting aside a judgment for fraud. If 'fraud unravels all', surely fraud inducing a transaction also amounts to 'undue influence' ? Certainly, there are *dicta* which link misrepresentation with undue influence, including *RBS v Etridge (No.2)* [2002] 2 AC 773 (HL). However, as Lord Nicholls said there, over centuries Equity developed the doctrine of undue influence in parallel with the common law tort of duress: they did not merge. Likewise, the tort of deceit and the equitable remedy of rescission for fraudulent misrepresentation have not merged, though have stayed in harmony (for example by the latter applying by analogy the statutory time-limit for the former: *HMRC v IGE* [2021] Ch 423 (CA)). Those careful 'checks and balances' within and between Equity and common law would be disturbed by simplistically 'treating fraud as actual undue influence' (itself contested after *Etridge*). Unlike the forgery of the PSA in 2008, the alleged 'fraudulent misrepresentations' in 2005-2006 are as yet unproven. So, in this judgment, I take a rigorous approach to (i) the standard of proof on fraudulent misrepresentations; (ii) whether they are proved (to the deceit requirements); if so, (iii) how they fit into 'undue influence' and what 'actual undue influence' *means* after *Etridge*; (iv) whether proving undue influence with fraudulent misrepresentations requires a prior relationship of 'trust and confidence'; before (v) my overall conclusions on 'undue influence'.

What were the terms of the agreement to transfer the Properties in March/April 2006 and did the Defendants make fraudulent representations to the Claimant inducing it ?

322. In 2010, undue influence was the main claim before HHJ Purle QC, who insisted misrepresentation was not run, as it was not pleaded in the Particulars. On his findings of fact in the Purle Judgment, including that the Claimant signed the PSA, HHJ Purle

QC rejected undue influence and also unconscionable bargain. The latter is no longer pursued before me either as Mr Halkerston accepted that it added nothing to undue influence and in this case I agree. However, I will come back to the role of 'unconscionability' within 'undue influence' itself.

323. However, my own findings of fact are very different from those in the Purle Judgment. So, I must revisit undue influence completely, especially as now (unlike then), 'false representations' *are* pleaded, but not pursued as torts of misrepresentation or deceit, instead as 'actual undue influence' (with presumed undue influence in the alternative). However, before turning to the key principles, I address the issues of the terms of the agreement to transfer in March/April 2006 and whether it was induced by any fraudulent misrepresentations. That enquiry can encompass later evidence shedding light on parties' intentions at the time: *Enal v Singh* [2023] 2 P&CR 5 (PC) at [37]. That is different from treating events *after* a transaction as proof of undue influence, which is impermissible as Lewison J (as he was) said in *Thompson v Foy* [2010] 1 P&CR 16 at [101]:

> "[W]hat I must look at is whether [the claimant] was caused to enter into the transaction by undue influence; and this necessarily means looking at the situation at the time the impugned transaction was entered into, rather than at subsequent events, save in so far as subsequent events cast light on what was happening before and at the time of the impugned transaction. A transaction into which someone enters of their own free will does not retrospectively become tainted by undue influence merely because the counter-party fails to perform his or her side of the bargain."

However, one initial problem I must grapple with is to decide what the 'bargain', or 'transaction' actually was. Clearly, it was the transfer of the Properties from the Claimant to Gracefield in March/April 2006, but what were the terms of it ?

324. The Claimant's primary pleaded case (Consolidated Particulars of Claim ('CAPOC') para 15) had been there was an oral contract between her and the Krishans that: (i) they would set a new company to which the Properties would be transferred; (ii) it would hold them on trust for the Claimant; (iii) it would re-transfer them to her on her demand; and (iv) the transfer was to address the threat of CPOs and make it administratively convenient for the Krishans to manage and refurbish the Properties on her behalf. Indeed, I have found on the balance of probabilities at paragraph 200 above the Krishans did tell the Claimant that whilst the Properties would be transferred to the company to undertake the developments and she had a 50% shareholding, this was only a formality and beneficially the Properties would still belong to her. Moreover, I went on to find at paragraphs 219-221 above, when the Claimant queried SB's letters of 15th March 2006 which said something different on 24th March, Mrs Krishan said those letters were just *'hoops to go through to allow them to deal with the Properties'* and the £100,000 total price was a *'paper figure'*: presenting them to the Claimant as a tax/accounting exercise. This reaffirmed her belief that the transfers were only a formality. So, I accept she saw them as what might in lay terms be called 'putting the Properties into Gracefield's name' but that they would 'really still belonged to her' - hardly an unusual arrangement within families. However, she now accepts this 'formality transfer' was not the true contractual nature of the transaction. She also accepts she cannot at the same time argue the Krishans objectively agreed merely 'to be putting the Properties in Gracefield's name', but also that they fraudulently misrepresented that was the true nature of the transaction, which I will consider below

as part of the fourth fraudulent misrepresentation claim. The Claimant's belief that the transfers were just a 'formality' is also key to the resulting trust claim. But neither are *contractual*.

325. Therefore, as Mr Graham fairly said, there was always an inconsistency between the Claimant's pleaded contractual 'agreement' between her and the Krishans and her undue influence case that she was pressurised and/or tricked into the transfers by them. Yet there has also been an inconsistency in the Krishans' case as well. The original pleaded case on behalf of them and Gracefield in the Original Proceedings (Original Defence para.1) was that the true nature of the transaction was in the terms of the PSA, save that 'deferred consideration' was £100,000 (not £200,000 as in the PSA) then 50% to the Krishans and Claimant (less maintenance from her 50%, also not in the PSA). However, HHJ Purle QC did not make a declaration that those were the contractual terms, but instead that the terms were those in the PSA (quoted at para.228) but with the Krishans having the other 50% profit share. In other words, he found the 'terms of the transaction' were the Claimant would transfer the Properties in return for (i) £100,000 on her Gracefield director's loan account, (split between £30,000 for the Shops, £30,000 for the Cinema and £40,000 for the Co-Op), to be paid on the completion and sale of each site; (ii) £200,000 'deferred consideration' payable on the completion and sale of each site (split £60,000 for the Shops at £20,000 each, £60,000 for the Cinema and £80,000 for the Co-Op); (iii) 50% of the profits of sale to the Claimant; with (iv) the other 50% of profit share was for the Krishans. Since that last element is not actually part of the PSA, I will call these the 'PSA Plus' terms. Those are what the Krishans still maintain were the true terms of the transaction.

326. However, I have found (at paragraph 229) that the Claimant never agreed the PSA or a 50% profit share as it was never discussed with her. Therefore, what was found in the Purle Judgment to have been the nature of the transaction has been undermined first by the Gasztowicz Judgment finding the Purle Judgment was procured by fraud and secondly now by my own findings that the Claimant did not agree the PSA (or indeed, the 'PSA Plus' terms). I found (as summarised at paragraph 229 by reference to earlier findings) that in Mr Davies' note of 16th November 2005, the '50/50 share' was consistent with the Claimant and Krishans' agreement to have a 50% shareholding in Gracefield and to split 50/50 the profits of renting the Properties (after payment of Gracefield's / the Krishans' costs). This is borne out by the absence of reference to a '50/50 profit share on sale of the Properties' in SR's note of what Dr Krishan said on 18th November 2005, or the 2006 notes of SB on 20th January or even 20th February. This is also consistent with SB's letter to the Claimant of 15th March (quoted above at paragraph 220). That letter only mentions the £100,000 'purchase price' (described there and in the PSA as the value of the CPOs) credited to the Claimant's loan account and the £200,000 which SB's letter describes as a 'profit share'. However, as £200,000 was the balance of the agreed (supposed) market value of £300,000, it is better described as 'deferred consideration', as it was in the draft PSA. Nor was any 'profit share' (or indeed even any 'deferred consideration') mentioned in the transfers. The first appearance of the '50% profit share' was in the draft PSA itself that as noted at paragraph 229 above included a 50% share for the Claimant but not the Krishans. As a result, I also found that they neither signed it themselves, nor gave a copy to the Claimant to sign. So, I found the 'PSA Plus' terms were never actually *agreed* with the Claimant even if they reflected SB's own (mis)understanding of the deal.

327. Indeed, if one just focusses on the contemporary documentation seen by all parties, one might think the true terms were 'the transfer terms' set out in the transfers themselves (i.e. sale of the Properties for £100,000); or the terms of SB's 15th March letter to the Claimant, also copied to Mrs Krishan (and doubtless seen by Dr Krishan). What I will call these '15th March letter' terms were that the £100,000 'purchase price' would be paid to the Claimant's director's loan account in Gracefield and the £200,000 (albeit as 'deferred consideration' rather than 'profit share'), *with no explicit 50% profit share*. Since on this basis Gracefield owned the Properties, that would mean that if the Properties were sold for at least £300,000 in total, the Claimant would get that and Gracefield the 'profit', to be distributed as its *then* directors and shareholders saw fit. I emphasise 'then', not as the Claimant was in fact ousted by the end of 2006 - as later events are not relevant: *Thompson*. The point is that directorships and shareholdings can always change and so on this basis, any 'profit share' for anyone was *non-contractual*.

328. So, if it were open to me, I would find either the '15th March letter terms' were the true objective terms of the transaction. Certainly, for presumed undue influence, whether the terms of the transaction 'call for explanation' so as to raise the presumption is assessed *objectively* as Mr Perring submitted, relying on p.11-010 of Professor Enonchong's excellent work *'Duress, Undue Influence and Unconscionable Dealing'* (2023) 4th Edition (to which I return repeatedly below). That is not the same as assessing objectively what the terms of the 'transaction' *actually were,* but it would be analytically inconsistent if that was not done. Indeed, that would also be consistent with the contractual principle that the terms of a contract are determined objectively, not subjectively (*Chitty on Contracts* (2023) 35th Ed paras.4-002-3). Undue influence is also a part of contract law.

329. However, I do not believe this conclusion is fairly open to me as the '15th March transfer terms' were not 'put' in cross-examination either to the Krishans or to the Claimant: see *Rea v Rea* [2024] EWCA Civ 169 at [52]. Since the Claimant now only pursues the 'formality transfer' terms as a fraudulent misrepresentation not the true terms of the agreement, that leaves me with the 'PSA Plus' terms which I have found she was not aware of, let alone agreed. Nevertheless, in fairness to the Krishans and Mr Graham who addressed me on the 'PSA Plus' terms, I focus on these for both 'presumed undue influence' and 'actual undue influence', although 'cross-check' my conclusions with the 'the 15th March letter terms' and 'transfer terms'. If the result is the same, the issue is academic. Moreover, as Mr Halkerston said, 'actual undue influence' turns on alleged 'fraudulent misrepresentations', so I consider those before wading into the more complex legal question as to whether they can amount to 'actual undue influence'.

330. The five alleged fraudulent misrepresentations are effectively pleaded as such, as paragraph 10 'CAPOC' states they 'untrue and known to be so by the Krishans' at paragraph 11. I will summarise them and the pleaded facts at paragraph 12:

    (i) The Properties were subject to or likely to be subject to CPOs;

    (ii) The Properties were worthless, or alternatively worth £100,000, because of the CPOs or the threat of them;

    (iii) If the CPOs, or the threat of them, could be removed, their value would increase to £300,000.

(iv) If the Claimant agreed to transfer the Properties to a company, the Krishans would take steps to ensure that the CPOs or threat of them were removed; and refurbish and manage the Properties on her behalf and for her benefit;

(v) The proposed transfer was intended to be an 'act of charity' for the Claimant who was Mrs Krishan's cousin and in financial difficulties.

The pleaded facts said to support fraud were that the Krishans were experienced developers who knew or would have investigated and discovered the following facts: (1) the Properties were not subject to CPOs and the risk of them was remote; (2) even if CPOs were made, the Claimant would be entitled to their market value; (3) the Properties were in fact worth much more than £300,000 (whilst the pleaded values are more than Ms Dobson's valuation of £890,000, that is 'much more than £300,000' in any event); and (4) in any event, the proposed transfer was intended to benefit the Krishans not the Claimant, as shown by later events.

331. I made findings of fact above at paragraphs 190-200 above as to what the Krishans told the Claimant in Summer-Autumn 2005 and at paragraphs 208-230 above as to what they told her in January-April 2006. However, at that stage I did not decide whether they were fraudulent misrepresentations because as I said at paragraph 84 above, a conclusion of fraud is usually a matter of *inference* from the primary facts, as Lord Millett said in *Three Rivers* at [186] (quoted above and in *Kekhman* at [42]). As I said there, Lord Millett continued by saying:

> "It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

The facts pleaded I have just summarised above are certainly clear enough to amount to fraud if proved. As also noted, in *Arkhangelsky* at [42] Vos C said:

> "[When Lord Millett] said it was not open to the court to infer dishonesty from facts which have been pleaded but are consistent with honesty, he was not laying down a general rule that can affect a case like this where there were multiple allegations founding an inference of dishonesty, many of which are themselves allegations of dishonesty that have been proven."

Any inferences of fraud also require assessment of *all* primary facts, given Vos C's encouragement in *Arkhangelsky* at [59] (quoted at paragraph 79) to 'stand back and consider the effects and implications of facts found taken in the round'.

332. As Males LJ added in *Arkhangelsky* at [117] and [120] (the latter quoted above at paragraph 83), while the starting-point is that fraud or dishonesty are inherently improbable, once other such findings have been made against a party, the inherent improbability of his having acted fraudulently or dishonestly in the respect alleged may be much diminished. Yet, as discussed at paragraph 84, the '*Lucas* direction' is that if someone has committed fraud in another respect, that does not prove they have committed fraud in a different respect alleged. As stressed in *Kekhman, Privalov* and *Otkritie* (also quoted at paragraph 83 above), even if there are other findings of dishonesty, there is still a need for cogent evidence of fraud to be satisfied on the balance of probabilities it occurred. Here, the Krishans were found in the Gasztowicz

Judgment to have been dishonest in relation to the PSA forgery, reducing the 'inherent improbability' of further dishonest conduct. Moreover, I have found the Krishans' evidence seriously unreliable on other aspects like the Balber Takhar Account, the forged JS Invoice and Options for Gracefield. Nevertheless, it does not mean the finding of dishonesty is evidence of fraudulent misrepresentations, still less does it prove them as stressed in *Lucas*.

333. Moreover, there is no alternative case of negligent or innocent misrepresentation, which is not pleaded. So, it would be just as unfair on the Krishans, having faced an allegation of fraud, to be found to have misrepresented negligently (still more innocently), as it would be to find dishonesty when not alleged, as Lord Millett said in *Three Rivers*. This is particularly true given the now-dropped deceit claim was bound to fail on limitation. It was only ever pleaded in relation to the transfers in March/April 2006, so under s.2 Limitation Act 1980 ('LA'), limitation expired in April 2012. However, the deceit claim was only issued in March 2015. The Claimant has dropped her 'relation back' argument, rightly as I said at paragraph 33 above. The Claimant's only other argument was s.32 LA, but that only stops limitation running on an action based on fraud of the defendant *until the fraud could have been discovered with reasonable diligence*. Unlike on the conspiracy claim below, the relevant 'fraud' in the deceit claim was the alleged fraudulent misrepresentations up to 2006. As Mr Perring said, the Claimant alleged those were fraudulent back in 2008 but chose not to plead it. Limitation expired in 2014.

334. For those reasons, I consider I should hold the Claimant to her factual pleading of fraudulent misrepresentation, assessed at the legal standard of what she pleaded it as: deceit. Indeed, there is a close analogy between the elements of common law deceit and for equitable rescission for fraudulent misrepresentation: *IGE*, which is in turn analogous to equitable rescission for undue influence. I gratefully take the elements of deceit from Mr Graham and Mr Perring's original skeleton: (1) the Krishans made a false representation by words or conduct to the Claimant; (2) they did so 'fraudulently' (which I explain below); (3) they intended the Claimant to act on it; and that (4) she was induced to do so and so suffered loss: *Bradford Third Equitable Benefit BS v Borders* [1941] 2 All ER 205 (HL) at 211. If a representee acts as the fraudulent representor intended them to act, they cannot deny 'materiality': *Versloot v HDI* [2017] AC 1 (SC) [31] (indeed they need not even *believe* in its truth: *Zurich v Hayward* [2017] AC 142 (SC) at [18]), although lack of materiality or belief is relevant to inducement in fact: *Barings v Coopers & Lybrand* [2002] BCLC 410 at [117]. On the third element of 'fraud', Lord Herschell explained in *Derry v Peek* (1889) 14 AC 337 (HL) 374:

> "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive

of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

335. However, since deceit cannot be pursued, that begs the legal question whether fraudulent misrepresentation with those same elements as the tort of deceit can itself amount to 'actual undue influence', which I consider below. However, despite the fact that this was not pleaded, this is not suggested to give rise to any limitation issue. In *Anullment Funding v Cowey* [2010] EWCA Civ 711 at [54] it is made clear even if undue influence is originally pleaded as 'presumed', it is open to the Court to find proven 'actual undue influence' on the evidence.

336. For context, I first very briefly summarise my findings of fact relating to Summer 2005 at paragraphs 167-170 and 190-191. At Bobby's meeting with Coventry CC on 30th June 2005, he was told the Council and Donaldsons did not consider his proposed 'community uses' for the Properties realistic but would look into using the Co-Op as a health centre and did consider the Cinema a viable development opportunity. Coventry CC said they would 'start the process leading to CPOs being made available' but they were an 'absolute last resort'. Bobby told the Claimant what happened and he needed her written authorisation. The Claimant told Mrs Krishan this on 2nd July 2005. Mrs Krishans persuaded her to authorise Dr Krishan rather than Bobby and sign a letter Mrs Krishan wrote on 4th July.

337. The first pleaded false representation made by the Krishans to the Claimant is that they told her that the Properties either were subject to CPOs or were 'likely' to be. On that issue, I have found the Krishans said different things at different times:

337.1 Firstly, for July and October 2005, at paragraphs 194-196.1 above, I found on the balance of probabilities the Krishans told the Claimant that *'CPOs had been applied on the Properties'* which *'meant they could be snatched away from her leaving only liabilities'* and 'she could be left *'penniless'* and *'homeless'* and also that '*it was essential to remove the CPOs to protect their value'* which as underlined is an unequivocal statement there *were in fact* CPOs. So, I found the Krishans stated as a *fact* that there *were* CPOs on the Properties (in effect, that they were 'subject to them' in the pleaded expression at para.10(a) CAPOC). I also found at paragraph 192 that Dr Krishan and through him Mrs Krishan knew full well that CPOs were still a 'last resort' for the Council. On all the evidence, I am satisfied on the balance of probabilities that the Krishans deliberately told the Claimant there were in fact CPOs on the Properties when they knew there were not, in order to get the Claimant 'off the fence' and to agree to transfer them.

337.2 However, I added at paragraph 196.2 above that, even if I was wrong about that and the Krishans did not say the Properties were actually subject to CPOs, I found they also exaggerated both the *likelihood* and consequences of them. They worried the Claimant by suggesting that CPOs could result in her being made 'bankrupt', 'homeless' and even being in 'prison', as with the occasion when Bobby was present, quoted at paragraph 186 above. I find on the balance of probabilities the Krishans both knew (through Dr Krishan) that was wrong, as a CPO entitles an owner to full market value less debts and for the Council, aside from starting to 'investigate' s.215 notices on the Cinema, CPOs still were a 'last resort'. Accordingly, I also find on the balance of probabilities that the Krishans knew that CPOs were *very unlikely,* yet I find they deliberately exaggerated their likelihood.

338. Pausing there, conscious of the cogent evidence required for a finding of fraud, even with a previous finding of fraud in a different respect, I find on the balance of probabilities that either way, the Krishans made fraudulent misrepresentations. Whilst Dr Krishan's knowledge is not to be *imputed* to Mrs Krishan or vice versa, on my all my findings of fact, they always 'worked as a team' and I find shared all relevant information with each other, but did not do so with the Claimant:

338.1 On the basis of my finding at paragraphs 196.1 and 337.1 above that the Krishans told the Claimant (not Bobby) that 'CPOs had been applied on the Properties' in the sense that they were subject to CPOs, knowing that in fact there were not, this was a straightforward fraudulent misrepresentation. By reference to the principles summarised at paragraph 334 above, the Krishans made a false statement of fact ('that CPOs had been applied on the Properties'), which they knew to be false (*Derry*), intending the Claimant to believe and act on it by transferring the Properties, which she later did. So, they cannot deny materiality (*Versloot*), or inducement as the fraudulent misrepresentation was one operative cause of the Claimant's agreement (*Zurich*), since I accept her reasons for agreeing to transfer in November 2005 (that I will accept remained in April 2006) in her statement:

> "I felt trapped. I was too afraid I would lose the Properties to the Council and end up, as the Krishans described it, 'penniless and homeless'….[W]hat the[y] were offering was exactly what I needed help with – they seemed to be offering a perfect solution to my problems, [as] I could both ensure the Properties were put back into good condition, but also keep them in the ownership of me and my family. So, I eventually agreed to accept their help." (my underline).

338.2 Even if I am wrong about that, on the basis of my finding at paragraphs 196.2 and 337.2 above, the Krishans deliberately exaggerated the likelihood and consequences of CPOs being made, rather than reassuring the Claimant with the truth that CPOs were a 'last resort' and anyway would entitle her to full market value less debts. There is a difference in misrepresentation between exaggeration and outright falsehood and Mr Graham questioned whether an opinion as to whether CPOs were 'likely' was *representation* as opposed to *forecast*. Whilst he did not refer to it, this point is supported by the case of *RBS v Chandra* [2011] EWCA Civ 192 which held a wrong but genuine forecast of the future was not 'misrepresentation'. However, at [26] and [39] of *Chandra*, Patten LJ contrasted that with conscious deception or misleading explanations. I find there was a stark gulf between what the Krishans knew to be true about CPOs being a 'last resort' and the apocalyptic scenario Bobby recalls them giving him and the Claimant. So, I find on the balance of probabilities these were knowingly misleading misrepresentations by the Krishans as to the current or future likelihood of CPOs (or they were at least reckless) and so fraudulent: *Derry*, which were intended to and did induce the transfers in the same way as I have said.

339. In any event, irrespective of my findings for 2005, in respect of January-April 2006, I went on at paragraphs 211-230 above to find on the balance of probabilities the Krishans deliberately told the Claimant there were in fact CPOs on the Properties knowing there were not, in three different (and cumulative) ways, which *in addition* I find all amounted to fraudulent misrepresentations:

339.1 Firstly, I found at paragraph 213 that Dr Krishan told SB that the Council had made CPOs on the Properties and placed the value on them of £100,000. That was plainly a fraudulent misrepresentation because it was a false statement of fact made knowing it was false with the intention to induce reliance on it – in short, a lie. Moreover, I went on to find at paragraph 214 above the Krishans told the Claimant that CPOs had been made prior to the meeting on 20th February. Whilst she could not recall that meeting and does not specifically mention being told that, it is entirely consistent with her evidence that the Krishans maintained their lie that there were in fact CPOs on the Properties meaning they were only worth £100,000 and I find on the balance of probabilities the Krishans repeated the same lie to the Claimant directly as Dr Krishan told SB. They knew it was false, intended her to rely on it to transfer the Properties and she did.

339.2 Secondly, whether or not the Krishans told the Claimant that, I have found at paragraphs 214-215 and 220 they told SB that and she told the Claimant, both in the meeting of 20th February (which the Claimant could not recall) and SB's letter of 15th March, that she eventually accepted she had received. That letter said: '*we are transferring the properties in at the value of the compulsory purchase order rather than the true redevelopment value'*. This was an innocently false representation by SB, based on a fraudulent misrepresentation by the Krishans. As explained by Prof. Cartwright in 'Misrepresentation, Mistake and Non-Disclosure' (2022, 6th Ed) para.5-07 (by reference to authorities including *Borders*, referred to in Mr Graham's and Mr Perring's original skeleton) a defendant may be liable for misrepresentation made on their behalf if they have the requisite knowledge e which I find the Krishans plainly did and intended the Claimant to be told.

339.3 Thirdly, even if I am wrong about that, at paragraph 221 above I found on the balance of probabilities that on 24th March 2006, when the Claimant asked Mrs Krishan about SB's letters of 15th March (which as I say referred to the CPOs as having been made), Mrs Krishan said words to the effect of the transfers had to be done *'to save the Properties'*. That way, Mrs Krishan reaffirmed SB's statement that *there were CPOs* by saying transfer was necessary to 'save the Properties' from them. Mrs Krishan knew full well there were no CPOs (indeed they were not even 'likely') and that transfer was certainly not necessary to 'save the Properties'. This was a lie – indeed a fraudulent misrepresentation which induced the Claimant to transfer the Shops the following week and the Co-Op and Cinema the following month.

On any and all these various bases, I uphold the first fraudulent misrepresentation.

340. I turn to the closely-linked second pleaded false representation, namely that the Krishans told the Claimant that due to the threat or making of the CPOs, that the Properties were 'worthless' or alternatively worth only £100,000. At paragraph 198 above, I noted Mr Graham accepted that if the Krishans had told the Claimant that the Properties were worth £100,000 because of the CPO, that would be a misrepresentation, even if innocent. Whilst he submitted against that finding, I found on the balance of probabilities that between July and November 2005, the Krishans told the Claimant due to the threat of CPOs, the Properties were only worth £100,000 and told her given her debts were 'worthless' to her because;

340.1 Firstly, this is just what Mrs Krishan said in the 2008 covert recordings:

> "….[B]y the time you paid everything back…they were actually worthless on paper…..I know you like to think that, yes, you know, they are there, but they are actually worthless.." (my underline)

Mrs Krishan was there saying that the Properties had been worthless due to her debts in 2005 (whether or not saying they were still such in 2008).

340.2 Secondly the Krishans were therefore not telling the Claimant the Properties had *no intrinsic value* – they plainly did of *at least* £300,000. Instead, they said they were 'worthless *to her*' after her debts, as Mr Graham argued was true. But as he also said, they all agreed they were worth £300,000, yet her modest debts were c. £35,000, so they plainly were not 'worthless to her'.

340.3 Thirdly, as just discussed, I found at paragraphs 213-214 above that Dr Krishan told SB that '£100,000 was the value of the Properties subject to a CPO': consistent with what they told the Claimant in 2005.

340.4 Fourthly, it is totally implausible that the Claimant came up with a valuation of £100,000 under a CPO which the Krishans simply accepted and relayed to SB. The Claimant knew that flatly contradicted the valuations Bobby was given on 30th June and she had also entrusted Dr Krishan with dealing with the Council on her behalf and relied on what he told her. Therefore, I find it more likely than not that he came up with the £100,000 value himself.

340.5 Fifthly, this discussion of the Properties being 'worthless' to the Claimant was bound up with the dire threats of 'bankruptcy' and 'homelessness', yet given she not only owned her own home mortgage-free but could have easily solved all her financial problems and created a 'development pot' for the Co-Op just by selling the Cinema, all that was extremely *unlikely*.

341. Therefore, having made that finding, as Mr Graham concedes, that is a misrepresentation. Moreover, I find it was plainly fraudulent, as Dr Krishan accepted he knew that a CPO entitled the owner to full market value (which he considered to be £300,000) less debts (which he thought at the time were only c.£15,000). He did not suggest he did not know about that rule at the time, as SB said. Indeed, he said SB got it wrong about the '£100,000 CPO Value'. So, when telling the Claimant that, he must have known it was wrong (or at least been reckless about it - *Derry*). Again, I find Mrs Krishan is in the same position, as they shared all relevant information and 'worked as a team'. In short, they both lied to the Claimant and that was one operative cause of her transferring the Properties. So, I also uphold the second fraudulent misrepresentation.

342. The position is even clearer in January-April 2006, for similar reasons as for the linked first fraudulent representation. By February 2006, I found the Krishans were not just telling the Claimant that due to the threat of CPOs the Properties were only worth £100,000 so 'worthless to her', they were also telling her directly and through SB that £100,000 'was the value of the CPO'. I find on balance of probabilities the Krishans expanded their earlier lie to the Claimant into a bigger lie that the Council had not just made CPOs but fixed the price at £100,000 and indeed as Mrs Krishan said to the Claimant on 24th March, transfer was needed to save them. That is an entirely separate reason for finding the second fraudulent misrepresentation proved (like for the first fraudulent misrepresentation, whether the terms of the transaction were 'PSA Plus' or '15 March letter' is irrelevant).

343. The issue with the third pleaded false representation – that if the CPOs or their threat could be removed, the value of the Properties would increase to £300,000 – is again linked. There is a shorter and a longer answer:

343.1 The shorter answer is that I have found on the balance of probabilities at paragraphs 196.1 and 198 above the Krishans together told the Claimant that the Properties were *'worthless'* and *'it was essential to remove the CPOs to protect their value'* and I have also found at paragraph 197.1 that Dr Krishan told the Claimant the £300,000 value. In any event, I also found at paragraphs 213-214 above that the Claimant was told by the Krishans, directly and indirectly by SB that the 'market value' of the Properties was £300,000, but their 'CPO Value' was only £100,000. That is essentially saying without the CPOs, the value of the Properties would increase from £100,000 to £300,000. But the Krishans knew their value was not £100,000 in the first place. So, saying that was a fraudulent misrepresentation of fact.

343.2 However, the Krishans may object this avoids the real issue: which is whether they fraudulently misrepresented the value of the Properties in April 2006 as £300,000 knowing they had a higher actual market value. As Prof. Cartwright explains in '*Misrepresentation'* at para.3.18, expressing an opinion without honest belief in its truth is a misrepresentation of fact that opinion is genuinely held. The starting point is that at paragraph 197.1 above, I found on the balance of probabilities that Dr Krishan not the Claimant came up with the 'market value' of the Properties of £300,000. It is true I accepted at paragraph 197.2 above that the Krishans would not have realised the Properties in late 2005 were worth something like £890,000 as Ms Dobson assessed and I find for April 2006, (although I found in late 2005 extrapolating back, the Properties' true market value was much higher than £300,000). However, as I found at paragraphs 213-214 above, Dr Krishan told SB and through her the Claimant in late February 2006 that the actual market value was still £300,000. I find on the balance of probabilities that just as in April 2006, in late February 2006 the Properties' actual market value was £890,000. However, the real question is whether by the time Krishans were telling the Claimant directly and through SB that the market value of the Properties was (still) £300,000, they knew that opinion was false, had no honest belief in its truth or were reckless as to that, including 'blind-eye knowledge' (*Derry*). Despite presenting himself in August 2005 to the PCT as an experienced developer, Dr Krishan continued to fail to get valuations by Spring 2006. I find on the balance of probabilities that by late February 2006, Dr Krishan knew either actually or on a 'blind-eye' basis that the Properties were worth a lot more than £300,000 (even if he did not know they were worth as much as £890,000) which is why he *deliberately* did not get valuations. I would also find that Mrs Krishan either knew that through her husband or was reckless as to its truth when she commented on SB's letter of 15th March to the Claimant that £100,000 was a 'paper figures' (see paragraph 221). These fraudulent misrepresentations were intended to be believed by the Claimant and also induced the transfers soon afterwards so were material (*Versloot*).

Either way, I uphold the third fraudulent misrepresentation as well. Again the 50% profit share is irrelevant and so my conclusion would be the same whether the terms were the 'PSA Plus' or '15th March letter' terms.

344. I turn to the fourth pleaded false representation: that if the Claimant agreed to transfer the Properties to a company, they would take appropriate steps to ensure CPOs or threat of them were removed; and refurbish and manage them on her behalf for her benefit. This differs than the first three fraudulent misstatements of *current fact* (including on the third, as I have found a fraudulent misrepresentation of the *fact* of the Krishans' opinion). By contrast, the fourth does relate to the terms of the transaction itself – or at least their *future intention*. This differs from *Chandra* on forecast of *future events*. Prof. Cartwright says in *Misrepresentation* at paras.3-44-45, an *honest* statement of current intention about future conduct is a prediction or a promise, but not a *misrepresentation* as you cannot *know* in fact what you *will* do. But a *lie* about your *current* intention about your own *future* conduct is a fraudulent misrepresentation as to your own *current* state of mind. As Bowen LJ famously said in *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459:

> "[T]he state of a man's mind is as much a fact as the state of his digestion. …A misrepresentation as to the state of his mind is a misstatement of fact."

It is helpful to tease apart intention to remove the CPOs or their threat on one hand; and to manage the Properties for the Claimant's benefit on the other.

344.1 The first strand is that the Krishans told the Claimant they would take appropriate steps to ensure the CPOs or the threat of them were removed. I accept that although CPOs were a 'last resort', there was a very minor risk, revisited by Coventry CC regularly in 2005 through to 2007. It is also clear that CPOs were never made. However, the point is not whether Dr Krishan successfully avoided CPOs from April 2006 onwards. It is that for the reasons discussed under the proven first fraudulent misrepresentation, in 2005, both Krishans lied to the Claimant that there were in fact CPOs that required 'removal' and in February-April 2006 that the Council had made CPOs fixing the value at £100,000. So, this strand of the fourth fraudulent misrepresentation is proved, but it adds little to the first misrepresentation.

344.2 The second strand – the intention to refurbish and manage the Properties on the Claimant's behalf and for her benefit – as Mr Graham says, is vague. He submitted it must mean the Claimant alleges she was told the Properties would be refurbished and then *let*; whereas the Krishans' real plan was *sale*. It is certainly clear that sale was always the Krishans' plan, as Dr Krishan told SR as early as 18th November 2005. Yet I have also found that there was no reference to onward sale of the Properties in front of the Claimant (with which they knew she disagreed) with Mr Davies in November 2005 (paragraphs 203-4), in SB's January meeting (paragraph 208) or in her February meeting (paragraph 215). This is one reason (as I found at paragraphs 220-1) when the Claimant received SB's 15th March letters, she questioned it with Mrs Krishan, who said it had to be done to save the Properties. Standing back from these findings, I may well have drawn the inference that this was not just an omission by the Krishans to mention their plans to sell the Properties in front of the Claimant, but the deliberate concealment of their plan from her. However, I do not recall this factual point being put to the Krishans in cross-examination, so again it would be unfair to the Krishans make this finding: see *Rea* at [52]. In any event, concealment is not fraudulent *misrepresentation*: *Bradford* at 211.

344.3 In any event, the pleaded second strand of the fourth alleged fraudulent misrepresentation is that the Krishans told the Claimant that if she transferred the

Properties to a company, they would refurbish the Properties and manage them on her behalf and for her benefit. As I found at paragraphs 199-200 above, the Krishans repeatedly *told* the Claimant all that. However, the Krishans *did* have a genuine intention to refurbish and manage the Properties; and indeed, 'on behalf of' the Claimant, in the sense of 'instead of' her. The real issue is whether in telling the Claimant they *intended* to manage the Properties *'on her behalf and for her benefit,* the Krishans fraudulently misrepresented at the time their current intentions as to the future, as in *Edgington*. (Prof Cartwright in *Misrepresentation* at para.3.44 gives the useful example of *East v Maurer* [1991] 1 WLR 461 (CA), where the vendor of a hairdressing salon deliberately misrepresented his intention not to work full-time at his nearby competing salon). I remind myself very often genuine intentions go astray, so I do not place weight on what the Krishans later did in ousting the Claimant from Gracefield later in 2006, let alone in 2008. However, aside from the modest financial support of maintenance of £400pcm and payment of bills on the Properties the Krishans started giving the Claimant when she agreed in principle to transfer in November 2005, on all my findings of fact on the period from July 2005 to April 2006 at paragraphs 190-230, I would find on the balance of probabilities that the Krishans did not genuinely intend to benefit the Claimant, but rather to benefit themselves at *her expense*. (I will develop that below in my conclusions on undue influence). Indeed, this conclusion is affirmed by the response of Mrs Krishan on 24th March 2006 to the Claimant querying SB's letters, as I found at paragraph 221 above. I found on the balance of probabilities that Mrs Krishan told the Claimant that SBs' letters contained *'paper figures'* and the formalities she described were '*just the hoops they had to go through to allow them to deal with the Properties on her behalf'* etc. In short, I also found at paragraph 221 above that Mrs Krishan was presenting the transfers as a tax/accounting exercise, even though in reality – and for SB - it was not as I found at paragraph 215. I also find on the balance of probabilities that Mrs Krishan knew this was false – she was using the Claimant's implicit trust in her to mislead her about the Krishans' real intentions to manage the Properties for their own benefit not the Claimant's (with similar fake intention as *Edgington* and *East*) and the real nature of the transfers. This was knowingly false on the *Derry* test, let alone recklessly. Both were material, operative causes and/or 'induced' the Claimant into the transfers, of the Shops about a week later and the Co-Op and Cinema about a month later, which the Claimant was 'steered' through by Mrs Krishan with further lies about the 'necessity' of the transfers to save the Properties found at paragraphs 222 and 230 above.

Therefore, I also uphold all of the fourth pleaded fraudulent representation.

345. However, I reject briefly the pleaded fifth false representation – that the Krishans said the transaction would be 'an act of charity'. I accept the Krishans had *said* from July to November 2005 - as I said at paragraph 204 above, it went hand in hand with their suggestion their help was 'payback' for the support the Claimant had given Mrs Krishan. However, by November 2005, the Claimant knew the Krishans would also benefit from the transfers, so they were not 'acts of charity'.

346. However, for the avoidance of doubt, my rejection of the fifth fraudulent misrepresentation does not affect the following important conclusions:

346.1 Firstly that as just explained, I have upheld the first four pleaded fraudulent misrepresentations (the fifth was always rather a 'makeweight'). I make clear that those were individual findings. Even if I am wrong about one or more, I would maintain the other conclusions were right on the evidence.

346.2 Secondly, for the reasons I explained in my earlier findings of fact (including paragraphs 149, 157, 170, 188, 199-204, 210, 215 and 221), I find on the balance of probabilities that the Claimant did not want to sell the Properties, even though that was the logical thing to do. She saw then as 'family properties' which really belonged to her and Bill (albeit not Ian, with whom Bill was in dispute about them) and which she was responsible for. This explains her dismay (which I have found at paragraph 250 above) in March 2008 when she discovered the Krishans were auctioning the Co-Op – indeed, behind her back. Indeed, the Co-Op for the Takhar family was the 'jewel in the crown', as Bobby put it (see paragraph 119), but he and the Claimant were more pragmatic about the derelict Cinema: 'Bill's dream'. The Krishans knew the Claimant did not want to sell, which is why Mrs Krishan said in the covert recordings 2008 (paragraph 121 above) that she knew the Claimant really did not want to lose them and whilst they 'had no vested interest in the Properties, she knew she did as it was her life'.

346.3 The same applies even more clearly to the Claimant's belief and intention (which I found as a fact (at paragraphs 200-203, 208, 211-215, 218 and 221) that after the formal transfers of the Properties 'into Gracefield's name', she intended they would really still belong to her (and Bill). That is why she repeatedly sought assurance about it and did not agree until she had Bill's blessing; what she believed was being discussed with Mr Davies and SB; and why she was concerned about SB's letters but reassured by Mrs Krishan on 24th March 2006 that those letters were just 'paper figures' and 'hoops': effectively a tax or accounting exercise which she accepted as 'not a numbers person'. Even if I am wrong about that, the disclosure of 'profit share' on sale in SB's letter was not inconsistent with the Properties staying in the Claimant's beneficial ownership if in Gracefield's name until that sale, especially as the Claimant would get up to £300,000 of the proceeds *first*, the destination of the balance of the proceeds was not clear and on the face of it would go to Gracefield (see paragraph 229 above).I will return to that in a moment on the actual undue influence claim. However, the Claimant's intentions for the beneficial ownership of the Properties following transfer to Gracefield is also key to the resulting trust claim.

347. Turning back to the first four fraudulent misrepresentations I have found proved, I would make three general points. The first is that, as I have said, they reflect the combination of Dr and Mrs Krishan working together as a team; and the combination of both 'carrot' and 'stick'. Dr Krishan was more responsible for the 'stick' and used his position as the Claimant's representative with the Council to misrepresent the Council's position e.g. CPOs had been made or were 'likely', the Properties being 'worthless', or only worth £100,000 rather than £300,000 on the open market. He was also responsible for the 'carrot' of the first strand of the fourth fraudulent misrepresentation: that he could save the Properties from that. Broadly, Mrs Krishan was more responsible for the 'carrot': exploiting the Claimant's implicit trust in her to reassure her they would manage the Properties for her benefit and the transfer was just a formality. But she could occasionally wield the 'stick' as well as the 'carrot' e.g. by her own references to the CPOs.

348. The second point is that this overall 'rescue narrative' not only lasted for nine months between July 2005 and April 2006, it also subtly developed over that time. I have found that the Krishans' 'stick' of both the first and second false representations took different forms in Autumn 2005 and Spring 2006, the latter using the involvement of SB. However, the Krishans also developed their 'carrot'. In Autumn 2005, Mrs Krishan took the Claimant away to Spain and reassured her doubts about the transfers with the fourth fraudulent misrepresentation that they would manage the Properties for her benefit. Yet, when SB in March 2006 talked in terms of 'sale' of the Properties, Mrs Krishan used the Claimant's implicit trust in her to soothe her concerns about SB's March letters as 'paper figures' and 'hoops'; and to steer her through the transfers over the next month.

349. The third point is the Krishans' 'rescue narrative' took as long as it did because it had to wear down the Claimant's reluctance to accept help and to transfer the Properties from July to November 2005, after which, as she said in her statement:

> "I felt trapped. I was too afraid I would lose the Properties to the Council and end up, as the Krishans described it, 'penniless and homeless'…[And] they seemed to be offering a perfect solution to my problems, [as] I could both ensure the Properties were put back into good condition, but also keep them in the ownership of me and my family. So, I eventually agreed…."

Nevertheless, it still took another five months to complete the transfers. Yet I find on the balance of probabilities but for the Krishans' fraudulent misrepresentations to the Claimant I have upheld, she would not have transferred the Properties:

349.1 Firstly, the Krishans' fraudulent misrepresentations need to be seen as working synergistically in the way the Claimant explains in that quote. Together, they wore down her resistance to the Krishans' plan until in November 2005, the Claimant agreed in principle. Dr Krishan then instructed the professionals but also fed them the same 'rescue narrative' the Claimant had been fed so that she was carried like a passenger through the meetings (rather than shut out which may have prompted her objection – as the Krishans forgot in the auction in early 2008). Mrs Krishan 'shepherded' the Claimant through the process by drafting letters for her to sign; and reminders of fraudulent misrepresentations to keep the Claimant 'on track' on 24th March 2006; and on the signing of the transfers.

349.2 Secondly, even if I am wrong about that, even ignoring the fraudulent misrepresentations I have found in 2005, the re-iteration of all four fraudulent misrepresentations in 2006, especially from February to April alone, were sufficient to induce (and cause) the Claimant to transfer the Properties, which was precisely the Krishans' intention in making them.

349.3 Thirdly, even if I am wrong about that, since fraudulent misrepresentation here operates through the equitable doctrine of undue influence, the Claimant does not have to prove that but for those misrepresentations she would not have transferred: *UCB v Williams* [2003] 1 P&CR 12 (CA).

'Presumed' and 'Actual' Undue Influence and Fraudulent Misrepresentations

350. As noted at the start of this judgment and 'chapter', this case raises the question – whether fraudulent misrepresentation can constitute 'undue influence' and if so, whether that requires a pre-existing relationship of trust and confidence. In this section

of this 'chapter', I examine the first limb of that question, in the next, the second limb. On the first, one might think a conclusion of fraudulent misrepresentations inducing the Claimant to transfer the Properties would inexorably lead to a conclusion of undue influence. However, as discussed at paragraph 321 above, fraudulent misrepresentations cannot be simply 'treated' as 'actual undue influence', especially as the old distinction between that and 'presumed undue influence' was itself questioned in *Etridge*. Moreover, the latter requiring a relationship of trust and confidence but the former not doing so, has been questioned in the context of misrepresentations by Professor Enonchong in Chapter 8 of *'Undue Influence'*. There are some relevant judicial *dicta*, including of Jonathan Parker LJ in *UCB* at [84]-[91] (quoted later) who concluded 'undue influence may include fraudulent misrepresentation'. However, in *UCB*, a relationship of trust and confidence was accepted, whereas here it is contested.

351. So, as Lord Nicholls put it in *RBS v Etridge (No.2)* [2002] 2 AC 773 (HL) at [6], 'it is necessary to go back to first principles' in living transactions (the principles are different with wills: see *Rea* at [20]-[32]):

> "6…Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.
>
> 7 Here, as elsewhere in the law, equity…extended the reach of the law to other unacceptable forms of persuasion [to] investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft-repeated words of Lord Eldon LC, from as long ago as 1807 *(Huguenin v Baseley* 14 Ves 273, 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.
>
> 8 Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with…duress as [it]...has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage…
>
> 9 In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically, this occurs when one person places trust in another to look after his affairs and interests, and the latter

betrays this trust by preferring his own interests. He abuses the influence he has acquired….In *Allcard v Skinner* (1887) 36 ChD 145…Lindley LJ, at p 181, described this class of cases as those in which it was the duty of one party to advise the other or to manage his property for him. In *Zamet v Hyman* [1961] 1 WLR 1442, 1444-1445 Lord Evershed MR referred to relationships where one party owed the other an obligation of candour and protection.

10 The law has long recognised the need to prevent abuse of influence in these 'relationship' cases despite the absence of evidence of overt acts of persuasive conduct. The types of relationship, such as parent and child, in which this principle falls to be applied cannot be listed exhaustively. Relationships are infinitely various. [T]he question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship between the parties belongs to a particular type: see *Treitel, The Law of Contract,* 10th ed (1999), pp 380-381. For example, the relation of banker and customer will not normally meet this criterion, but exceptionally it may: see *Natwest Bank v Morgan* [1985] AC 686, 707-709.

11 Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

12 In *CIBC Mortgages pic v Pitt* [1994] 1 AC 200 your Lordships' House decided that in cases of undue influence disadvantage is not a necessary ingredient of the cause of action. It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out.

13 Whether a transaction was brought about by the exercise of undue influence is a question of fact. Here, as elsewhere, the general principle is that he who asserts a wrong has been committed must prove it. The burden of proving an allegation of undue influence rests upon the person who claims to have been wronged….The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case.

14 Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters the stage is set for the court to infer that, in the absence of a

> satisfactory explanation, the transaction can only have been procured by undue influence. In other words, proof of these two facts is prima facie evidence that the defendant abused the influence he acquired in the parties' relationship. He preferred his own interests. He did not behave fairly to the other. So the evidential burden then shifts to him. It is for him to produce evidence to counter the inference which otherwise should be drawn….
>
> 15….[I]n *Natwest Bank v Morgan* [1985] AC 686, 707, Lord Scarman noted that a relationship of banker and customer may become one in which a banker acquires a dominating influence. If he does, and a manifestly disadvantageous transaction is proved, 'there would then be room' for a court to presume that it resulted from the exercise of undue influence.
>
> 16 Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term 'presumption' is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of *res ipsa loquitur* is invoked. There is a rebuttable evidential presumption of undue influence.
>
> 17 The availability of this forensic tool in cases founded on abuse of influence arising from the parties' relationship has led to this type of case sometimes being labelled 'presumed undue influence'. This is by way of contrast with cases involving actual pressure or the like, which are labelled 'actual undue influence': see *BCCI v Aboody* [1990] 1 QB 923, 953, and *Royal Bank of Scotland pic v Etridge (No 2)* [1998] 4 All ER 705, 711-712, paras 5-7. This usage can be a little confusing. In many cases where a plaintiff has claimed that the defendant abused the influence he acquired in a relationship of trust and confidence the plaintiff has succeeded by recourse to the rebuttable evidential presumption. But this need not be so. Such a plaintiff may succeed even where this presumption is not available to him; for instance, where the impugned transaction was not one which called for an explanation….."

352. This last point made by Lord Nicholls in *Etridge* is of real importance in this case, since notwithstanding his warning that the usage can be a little confusing, Counsel before me divided their submissions on undue influence into 'actual undue influence' and 'presumed undue influence'. In this case, I actually found that helpful, although it does require careful consideration. In *Etridge*, Lord Clyde expressed himself more strongly than Lord Nicholls on this point at [92]:

> "I question the wisdom of the practice which has grown up, particularly since… *Aboody* ....of attempting to make classifications of cases of undue influence.. [which is] not easy to define… It is something which can be more easily recognised when found than exhaustively analysed in the abstract. Correspondingly the attempt to build up classes or categories may lead to confusion. The confusion is aggravated if the names used to identify the classes

> do not bear their actual meaning. Thus, on the face of it, division into cases of 'actual' and 'presumed' undue influence appears illogical. It appears to confuse definition and proof. There is also room for uncertainty whether the presumption is of the existence of an influence or of its quality as being undue. I would also dispute the utility of the further sophistication of subdividing 'presumed undue influence' into further categories. All these classifications to my mind add mystery rather than illumination."

By contrast, Lord Scott in *Etridge* appeared rather more sympathetic to the previous classification of cases of undue influence the Court of Appeal had undertaken in *Aboody*, which he explained and clarified at [151], [157] and [219]:

> "151.…The nature of the two classes was described by Slade LJ in *Aboody…at* 953: "[Class (1)] is those cases in which the court will uphold a plea of undue influence only if it is satisfied that such influence has been affirmatively proved on the evidence (commonly referred to as cases of 'actual undue influence'). . .; and [Class (2) is] those cases (commonly referred to as cases of 'presumed undue influence')…in which the relationship between the parties will lead the court to presume that undue influence has been exerted unless evidence is adduced proving the contrary, e g by showing that the complaining party has had independent advice."
>
> 157 In…. *Aboody*…. Slade LJ split the Class 2 cases into two subdivisions. He categorised at p 953, the 'well established categories of relationships, such as a religious superior and inferior and doctor and patient where the relationship as such will give rise to the presumption' as Class 2A cases, and confirmed that neither a husband / wife relationship nor a banker / customer relationship would normally give rise to the presumption….He continued, at p 953: 'Nevertheless, on particular facts (frequently referred to in argument as 'Class 2B' cases) relationships not falling within the 'Class 2A' category may be shown to have become such as to justify the court in applying the same presumption'.
>
> 219 The presumption of undue influence, whether in a category 2A case, or in a category 2B case, is a rebuttable evidential presumption. It is a presumption which arises if the nature of the relationship between two parties coupled with the nature of the transaction between them is such as justifies, in the absence of any other evidence, an inference that the transaction was procured by the undue influence of one party over the other. This evidential presumption shifts the onus to the dominant party and requires the dominant party, if he is to avoid a finding of undue influence, to adduce some sufficient additional evidence to rebut the presumption. In a case where there has been a full trial, however, the judge must decide on the totality of the evidence before the court whether or not the allegation of undue influence has been proved. In an appropriate case the presumption may carry the complainant home…..
>
> But it makes no sense to find, on the one hand, that there was no undue influence but, on the other hand, that the presumption applies. If the presumption does, after all the evidence has been heard, still apply, then a finding of undue influence is justified. If…..the judge, having heard the evidence, concludes that there was no undue influence, the presumption stands rebutted. A finding of actual undue influence and a finding that there is a presumption of undue influence are not alternatives to one another."

Certainly, in *Barclays Bank v O'Brien* [1994] 1 AC 180 (HL) at 189-190, Lord Browne-Wilkinson had also previously endorsed the *Aboody* classification.

353. Even since *Etridge*, the subdivision of cases of undue influence *evidentially as opposed to doctrinally* into 'actual' and 'presumed' has persisted and even been endorsed. In *Drew v Daniel* [2005] EWCA Civ 507, Ward LJ said at [31]:

> "In the broadest possible way, the difference between the two classes is that in the case of actual undue influence something has to be done to twist the mind of a donor whereas in cases of presumed undue influence it is more a case of what has not been done namely ensuring that independent advice is available to the donor."

Likewise, in *Annulment Funding v Cowey* [2010] EWCA Civ 711, Morgan J held it was open to a judge to find 'actual undue influence' when the Defence had effectively pleaded 'presumed undue influence'. Referring to paragraphs [13]-[17] of Lord Nicholls' speech in *Etridge*, Morgan J said in *Cowey* at [50]:

> "What that passage establishes is that an issue as to whether there was undue influence involves an issue of fact. The party asserting that there has been undue influence can call direct evidence which supports such a finding. Alternatively, that party can call evidence of other matters which justify the inference that undue influence was used. Either way, the party is attempting to prove the fact of undue influence."

Referring to Lord Scott in *Etridge* at [219] in *Cowey* at [54], Morgan J added that:

> "In the words of Lord Scott, the judge had to decide on the totality of the evidence whether undue influence had been proved..There was nothing procedurally unfair in the judge determining whether all of the evidence led him to find that actual undue influence had been established."

Moreover, as Morgan J further added in *Cowey* at [70], if actual undue influence is found, it is not wrong for the court to express a view on presumed undue influence in the alternative, as they were just two different ways of proving it.

354. Therefore, I accept Mr Perring's submission that after *Etridge*, undue influence is a 'unitary doctrine' where 'actual undue influence' and 'presumed undue influence' are not two different things, just two different methods of proving the same thing. (As Lord Nicholls said in *Etridge* at [16], the rebuttable evidential presumption of undue influence is the equitable counterpart of common law *res ipsa loquitur* - 'the thing speaks for itself'). That 'thing' – i.e. undue influence - can either be affirmatively proved without resort to any evidential presumption (i.e. a *finding* not a *claim* of 'actual undue influence'), or established without such affirmative proof by presumption from the nature of the transaction which is not rebutted (i.e. a *finding* not a *claim* of 'presumed undue influence').

355. Ultimately, as Mr Perring also submitted, relying on Lord Nicholls' observation in *Etridge* at [6] and Lord Lindey's in *Allcard* at 182-183, the objective of the law is not to save an individual from their folly, but to ensure that the influence of one person over another is not abused. But what counts as 'abusing' such influence ? Professor Enonchong in *'Duress'* sets out this analysis at para. 8-001:

> "Thus, for a claim to succeed on the ground of actual undue influence, it must be established that (a) the complainant's free will was impaired, (b) there was

> impropriety in the defendant's conduct and, in terms of causation, (c) the improper conduct constituted by (a) and (b) were part of the process by which the complainant's consent to the transaction was obtained."

Professor Enonchong at p.8-0024 equated 'impropriety' to 'unconscionability'. This is the same concept as in the cause of action of 'unconscionable bargain'. The Privy Council in *Boustany v Pigott* (1995) 69 P & C R 298 at 303 considered that an 'unconscionable bargain' was not just one which was hard, unreasonable or foolish, but where one party has imposed its terms in a 'morally reprehensible or culpable manner' and taken advantage of the vulnerability of the other party. Based on in part on Prof. Enonchong's analysis, Mr Perring submitted that 'actual undue influence' requires not only the impairment of the complainant's free will, but also some improper or unconscionable conduct by the defendant. (Whilst he suggested unconscionability could start *after* the transaction, that is not easy to square with *Thompson v Foy* [2010] 1 P&CR 16 at [101] quoted above). By reference to Prof. Enonchong's analysis at paras.8-20 to 8-32, Mr Perring's examples of 'unconscionability' were improper threats, bullying or importunity, domination or exploitation of vulnerability. Mr Perring contrasted situations where there is lack of knowledge of another party's vulnerability, or a genuine intention to benefit them, or simply ordinary family or commercial pressure.

356. However, if 'actual' and 'presumed' undue influence are two different ways of proving the same thing, if 'unconscionability' is a requirement, it is one for both. Moreover, any suggested test of 'unconscionability' must be seen in the light of Lord Scarman's view in *Natwest Bank v Morgan* [1985] AC 686 (HL) at pg.709:

> "There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting-point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case."

Indeed, as Lord Briggs said in relation to constructive trusts in his 2018 lecture *'Equity in Business' (https://www.supremecourt.uk/docs/speech-181108.pdf) :*

> 'Unconscionable conduct may be a minimum condition, but never a sufficient condition, for the intervention of Equity'.

So, I am not convinced 'unconscionability' is a test for a party's actual *conduct*.

357. Whilst as Lord Clyde observed in *Etridge* at [92], undue influence is easier to recognise than define in the abstract, it is unnecessary to fall back on any sort of 'elephant test'. In my own very respectful judgment, Lord Nicholls in *Etridge* at [7] put his finger on the touchstone of living transaction 'undue influence':

> "The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion."

Lord Nicholls' approach focusses on the effect of one party's conduct on the other's *free will*, rather than whether that conduct is of a particular *type*. If 'consent' is procured by means such that it ought not fairly to be treated as the expression of their free will, it would be 'unconscionable' – but that is the cart, not the horse. *In RBS v Chandra* [2011] EWCA Civ 192 at [26], Patten LJ said:

> "[I]t is impossible adequately to classify every type of situation in which improper or undue influence can be said to have been used to persuade a person to enter into the transaction…. But for a person's conduct to fall into this category it must…. make it unconscionable for that person…to seek to rely on the effect of what has been done."

As I have underlined, it is *the reliance on the effect* of the conduct, as opposed to the *specific nature* of the conduct, which must be 'unconscionable'.

358. As Lord Nicholls said in *Etridge* at [13], in determining that question of fact, the court must take into account all of the circumstances including: the nature of the alleged undue influence, the personality of the parties (including their age, health and 'vulnerability': *Etridge* at [11]), their relationship, and extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship. Ward LJ proposed a yardstick in *Drew* at [36]:

> "[I]n all cases of undue influence the critical question is whether or not the persuasion or the advice, in other words the influence, has invaded the free volition of the donor to accept or reject the persuasion or advice or withstand the influence. The donor may be led but she must not be driven and her will must be the offspring of her own volition, not a record of someone else's. There is no undue influence unless the donor if she were free and informed could say 'This is not my wish, but I must do it'."

359. It is true that some of the phrases Ward LJ used in *Drew* were drawn from cases on undue influence in the context of wills, which is narrower than for living transactions: limited to 'coercion' (see *Rea* [20]-[32]). Certainly, if a party to a living transaction were 'coerced' into it, that would also plainly be 'undue influence'. Such 'coercion' would include the cases Lord Nicholls described in *Etridge* at [8] of 'overt acts of improper pressure or coercion such as unlawful threats'. A clear example of that is a wife being bullied by a husband into agreeing loans until she eventually signed anything put in front of her as in *Aboody*. In that context, as Lord Nicholls said in *Etridge* at [8] there is considerable overlap with modern common law duress (which was also Lord Hodge's view in the duress case of *Pakistan Airways v Times Travel* [2021] 3 WLR 727 (SC)).

360. Indeed, modern Family Law has belatedly caught up with Equity in recognising 'coercion and control' as the touchstone of 'domestic abuse', as the husband's conduct

in *Aboody* would now doubtless be seen. I respectfully agree with Prof. Enonchong at paras.8-006-7 and 8-014-8-18 that such cases do not require a pre-existing relationship at least *of trust and confidence*: it would be a contradiction in terms and indeed an abuse of language for the law to do so. As Lewison J said in *Thompson* at [101]: 'people do not usually trust those who coerce them'. However, it is fair to characterise such cases as a 'relationship of influence' - but not of 'trust and confidence', rather of 'ascendancy', 'control' or 'domination', as Lord Nicholls put it in *Etridge* at [11]. I come back to that point below.

361. However, 'undue influence' is not limited to such 'barn-door undue influence'. Equity is more subtle than that. As Ward LJ also observed in *Drew* at [30]:

> "It is true that Lord Nicholls defined actual undue influence in terms of 'overt acts of improper pressure or coercion such as unlawful threats'. It is, of course only one way of describing [it]…Lindley L.J. in *Allcard* [at 181 described it as] '…cases in which there has been some unfair and improper conduct, coercion from outside, over−reaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor'."

As Briggs J (as he was) said in *Hewitt v First Plus* [2010] 2 P&CR 22 (CA) [25]:

> "[A] finding of undue influence does not depend, as a necessary pre-requisite, upon a conclusion that the victim made no decision of her own, or that her will and intention was completely overborne. No doubt there are many examples where that is shown, but a conscious exercise of will may nonetheless be vitiated by undue influence."

As Lord Nicholls himself noted in *Etridge* at [12], whilst undue influence is only likely to arise 'when, in some respect, the transaction was disadvantageous to the complainant from the outset or as matters turned out', in *Pitt* the Lords over-ruled the requirement stated in *Aboody* of 'manifest disadvantage' in *Morgan* for 'actual undue influence'. Lord Browne-Wilkinson said in *Pitt* at pgs.20/29:

> "…..[I]n my judgment there is no logic in imposing such a requirement where actual undue influence has been exercised and proved. Actual undue influence is a species of fraud… Like any other victim of fraud, a person who has been induced by undue influence to carry out a transaction which he did not freely and knowingly enter into is entitled to have that transaction set aside as of right. A man guilty of fraud is no more entitled to argue that the transaction was beneficial to the person defrauded than is a man who has procured a transaction by misrepresentation. The effect of the wrongdoer's conduct is to prevent the wronged party from bringing a free will and properly informed mind to bear on the proposed transaction which accordingly must be set aside in equity as a matter of justice."

362. This brings me to the first part of the second question I asked at start of this judgment, which in the light of *Etridge* and the cases since already discussed, I re-phrase as: 'Does proof that fraudulent misrepresentation induced a transaction affirmatively prove undue influence ? The answer to that first part of the question is that it plainly *can*. Indeed, in *Etridge*, Lord Hobhouse observed firmly at [103]:

> "Actual undue influence…is an equitable wrong committed by the dominant party against the other which makes it unconscionable for the[m] to enforce his legal rights against the other. It is typically some express conduct overbearing the other party's will. It is capable of including conduct…at law, for example, duress and misrepresentation. Indeed, many of the cases relating to wives… guarantee[ing] and charg[ing] a husband's debts involve allegations of misrepresentation (e.g. *O'Brien)*. Actual undue influence does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such a relationship. He who alleges actual undue influence must prove it."

On that point, Lord Nicholls drew this dividing line in *Etridge* at [32]-[33]:

> "Undue influence has a connotation of impropriety. In the eye of the law, undue influence means that influence has been misused. Statements or conduct by a husband which do not pass beyond the bounds of what may be expected of a reasonable husband in the circumstances should not, without more, be castigated as undue influence. Similarly, when a husband is forecasting the future of his business, and expressing his hopes or fears, a degree of hyperbole may be only natural. Courts should not too readily treat such exaggerations as misstatements…..Inaccurate explanations of a proposed transaction are a different matter….."

363. Lord Nicholls' dividing line was explored further in *Chandra*, where a husband's genuine forecast of costs in persuading a wife to guarantee a business loan was held not misrepresentation even though it turned out to be wrong. Patten LJ at [94] endorsed David Richards J's (as he then was) differentiation at first instance between 'deliberate concealment' which can amount to 'unacceptable means' and 'inadvertent non-disclosure' which could not. Whilst Patten LJ in *Chandra* at [32] differentiated between misrepresentation and undue influence, he was expressing the view that *innocent* misrepresentation could not produce 'undue influence'. However, Patten LJ in *Chandra* did not say *fraudulent* misrepresentation could not do so – on the contrary, at [26], he gave 'conscious deception' as an *example* of undue influence. In any event, that position is put beyond doubt by two other Court of Appeal decisions which it is not clear were cited to the Court in *Chandra*:

363.1 In *Cowey,* a man had mistakenly misled his partner about the fundamental nature of the loan he was securing on their house, which the Court held the judge was entitled to find to be 'actual undue influence' and the Court of Appeal agreed. Giving the only judgment, Morgan J said at [62] and [64]:

> "The judge did not refer to misrepresentation as distinct from other forms of undue influence. In *Etridge*, some of the members of the House of Lords discussed undue influence and misrepresentation interchangeably, on the basis that undue influence can take different forms and misrepresentation is one of those forms."

363.2 Moreover, as noted above at paragraph 350, in *UCB*, Jonathan Parker LJ held where a husband had fraudulently misrepresented the status of a new charge on their home to his wife, there was undue influence:

> "[U]ndue influence may include fraudulent misrepresentation…. Both constitute improper and unacceptable methods of persuasion [a]s Lord Nicholls says in paras 32 and 33 in *Etridge*…" (at [87]).

364. As Prof Enonchong says at para.8-103 of his work, discussing *Cowey* and *Chandra, innocent* misrepresentation or non-disclosure is more difficult to analyse as proving 'undue influence'. However, *fraudulent* misrepresentation plainly *can* amount to undue influence, but that is not the same as saying it automatically *will.* For example, in *Zurich v Hayward* [2017] AC 142 (SC), where defendant insurers in a personal injury case settled a claim which they suspected to be exaggerated and it turned out it had been fraudulently so, it was held they could rescind the settlement agreement for fraudulent misrepresentation - there was no suggestion they could have done so for undue influence. Indeed, it follows from what I have said the real issue is not whether fraudulent misrepresentation can *amount* to undue influence, but whether if there has been fraudulent misrepresentation, in the words of Lord Nicholls in *Etridge* at [7], 'ought the consent thus procured not fairly to be treated as the expression of a person's free will ?' In *Etridge* at [36] Lord Nicholls said a husband misleading a wife could be undue influence, but did not suggest that was different from his test at [7]. In short, the ultimate issue remains whether there was *undue influence* not (just) deceit. But that therefore leads to the second part of the second question I phrased at the start of the judgment I clarify this way: whilst fraudulent misrepresentation clearly can amount to 'unacceptable means' for the purposes of undue influence, does it also require there was a pre-existing relationship of trust and confidence ?

A Relationship of Trust and Confidence ?

365. For cases of what used to be called 'presumed undue influence', as Lord Nicholls said in *Etridge* at [18]-[19], unless there is a special class of relationship such as a parent over child (the old *Aboody* 'Class 2A'), in other relationships (the old 'Class 2B'), as Lord Nicholls said in *Etridge* at [10] 'the question is whether one party has reposed sufficient trust and confidence in the other, rather than whether the relationship belongs to a particular type'. Lewison J said in *Thompson* at [100]

> "First, although in *Etridge* Lord Nicholls described the paradigm case of a relationship where influence is presumed as being one in which the complainant reposed trust and confidence in the other party in relation to the management of the complainant's *financial* affairs ([14]), I do not consider that this description was intended to be exhaustive. To restrict the type of trust and confidence in this way would not be consistent with the authoritative exposition by Lindley L.J. in *Allcard* ....in which he referred to 'cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him'. This very sentence was paraphrased by Lord Nicholls at [9]. In addition, when describing the circumstances in which the burden of proof would shift at [21]…[he] used much more general language. Secondly, the requisite trust and confidence can arise in the course of the impugned transaction itself: *Turkey v Awadh* [2005] 2 P. & C.R. 29 ([11])."

Buxton LJ said in *Turkey* at [9]-[11] whilst a relationship of trust and confidence usually pre-dates a transaction, it can arise 'because of its actual circumstances' as there where a father bought his Saudi daughter's English property which he arranged. Buxton LJ also noted in *Macklin v Dowsett* [2004] EWCA Civ 904 one arose where an owner sold his land to occupy it as life tenant to build a bungalow but if it was not completed in three years, he agreed to surrender it for only £5,000.

366. However, *Thompson* itself was the other side of the line. A daughter promised to buy out her mother's property and the mother gifted it, but the daughter did not pay.

Lewison J held their relationship was one of trust, but no different from the mother's with her other daughter. The mother did not entrust financial affairs to the key daughter, made her own decisions and knew she took a risk with the gift, not least as she had first been warned about that by an independent solicitor.

367. Before *Etridge*, in *Goldsworthy v Brickell* [1987] Ch 378 at 401, Nourse LJ said:

> "In all of these relationships, whether of [Class 2A or Class 2B], the principle is the same. It is that the degree of trust and confidence is such that the party in whom it is reposed, either because he is or has become an adviser of the other or because he has been entrusted with the management of his affairs or everyday needs or for some other reason, is in a position to influence him into effecting the transaction of which complaint is later made….[In] cases where functions of this sort constitute the substratum of the relationship, there is no need for any identity of subject matter between the advice which is given or the affairs which are managed on the one hand and the transaction of which complaint is made on the other. Nor….is it necessary for the party in whom the trust and confidence is reposed to dominate the other…in any sense in which that… is generally understood."

Nourse LJ's analysis in *Goldsworthy* was recently re-affirmed by Sir Nicholas Patten giving judgment for the Privy Council in *Enal v Singh* [2023] 2 P&CR 5 at [55]. In holding that a grandson's power of attorney over his grandfather's property gave rise to a relationship of trust and confidence, he said at [59]:

> "The power of a court of equity to intervene in these cases is designed to prevent a relationship of influence from being abused. The object of its inquiry is to determine how the intention to enter into the transaction was produced. In *Etridge* Lord Nicholls at [7] observed 'the circumstances in which one person acquires influence over another, and the manner in which that influence may be exercised, vary too widely to permit of any more specific criterion'. The earlier authorities are full of examples of cases where even in the absence of some overt form of improper pressure or coercion gifts or transfers of property have been set aside….[In] *Allcard* where an over generous gift of property to a religious order was held to be the product of motives of beneficence created by the relationship between Miss Allcard and the order which she had joined… raising an inference that it was induced by th[at] relationship of dependence that had grown up…."

368. In *Enal* at [50] Sir Nicholas Patten noted the overlap between relationships of trust and confidence and fiduciary duties, also discussed in *Snell's Equity* (2022) 34th Ed at paras.7-065-9. It also explains at paras.7-003-6 that outside settled categories of fiduciary such as trustee (including resulting trustee as I return to), fiduciary duties can also arise in 'relationships of trust and confidence'. That phrase in the fiduciary context was equated with the 'duty of loyalty' Henry J for the Privy Council described in *Arklow v Maclean* [2000] 1 WLR 594 (PC) at 598-600: 'where one person is in a relationship with another which gives rise to a legitimate expectation that Equity will recognise…the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal'.

369. Having said all that, as Prof. Enonchong explained at para.10-044 of his work:

> "As Lord Nicholls made clear in *Etridge* [at 11] a relationship of influence is not confined to cases where one party reposes trust and confidence in another. It

> extends to other cases where one party has ascendancy, domination or control over the other party due to reliance, dependence or vulnerability of the other party. Therefore, in determining whether there was a relationship of influence, it would be wrong for the court to confine itself to the question whether there was evidence of trust and confidence in financial matters thereby ignoring evidence of the complainant's vulnerability. However, it is not enough simply to show that one party was under some disability such as chronic intoxication. What is required is affirmative proof one party had influence over the other in the relationship."

370. That leads me to cases of 'actual undue influence' – in other words, 'affirmative proof' of undue influence. Classically, as Lord Hobhouse said in *Etridge* at [103], that 'does not depend upon some pre-existing relationship between the two parties though it is most commonly associated with and derives from such a relationship'. That is because the classic territory of 'actual undue influence' entails conduct like improper pressure or coercion, such as unlawful threats' or indeed 'domination' which as discussed above at paragraph 360, do not require a pre-existing relationship *of trust and confidence*. However, one analysis of the 'coercion' cases (i.e. indisputably 'Class 1 cases' of 'actual undue influence') is that whilst there is no need for a relationship of *trust and confidence*, the 'coercion' itself creates a 'relationship of *influence*', albeit of a twisted kind. After all, even with so-called 'presumed undue influence' cases, a 'relationship' can arise due to the circumstances of the transaction itself' as Buxton LJ put it in *Turkey* at [11] if in a very different context. However, this is not a 'coercion' case.

371. As Lord Nicholls observed in *Etridge* at [9], older cases to which the label 'presumed undue influence' could apply have articulated the nature of the required 'relationship' in different ways, such as one party 'owing a duty to advise the other or manage his property' in *Allcard*; or 'relationships where one party owed the other an obligation of candour and protection' in *Zamet*. Against that context, Lord Nicholls himself in *Etridge* at [33] gave the example where a husband whose wife has reposed trust and confidence in him prefers his own interests to hers, describing him as *'failing to discharge the obligation of candour and fairness he owes her looking to him to make the major financial decisions'*. Building on this, Prof. Enonchong at paras. 8-009-13 of his work argues that deliberate misrepresentation or concealment cannot be actual undue influence without a pre-existing 'duty of candour and fairness' he summarised at para.8-10:

> "For actual undue influence to be established on the basis of a breach of the duty of candour and fairness it is necessary to show that there existed between the parties a particular kind of relationship prior to the impugned transaction…..Lord Nicholls…[referred] to cases where the complainant reposed trust and confidence in the other party in management of [their] financial affairs. It therefore appears that for a relationship to be regarded as a protected relationship in this context one party must at least have reposed trust and confidence on the other in the management of the affairs of the former. This will depend on the facts of each case." (my underline)

372. One reading of this analysis is effectively to equate 'the duty of candour and fairness' with 'a relationship of trust and confidence'. Certainly, that appears to have been the approach of Briggs J (as he then was) in *Hewitt* where, having considered *Chandra* and *Thompson*, he held a husband's deliberate non-disclosure of his affair to his wife when

asking her to agree to a new bank charge meant her consent had been procured by undue influence. He said at [29]-[30]:

> "The first question is whether Mrs Hewett reposed a sufficient degree of trust and confidence in her husband to give rise to what Lord Nicholls described as an obligation of candour and fairness owed to her. I consider that she did, for two reasons. The first is that…she regarded Mr Hewett as being in charge of the family finances, albeit not to an extent that excluded her from any participation in important decisions…. It would….be wrong to confine a husband's obligation of candour and fairness when proposing a risky financial transaction to his wife as confined to cases where the wife meekly follows her husband's directions without question. The purpose of an obligation of candour is that the wife should be able to make an informed decision (with or without the benefit of independent advice) properly and fairly appraised of the relevant circumstances. The second reason is that the specific transaction which Mr Hewett put to his wife required her to take on trust his promise to make the instalment payments due to First Plus arising from the re-mortgage. As the Judge put it….that is what Mr Hewett swore to do on their children's lives. There was therefore both a pre-existing relationship of trust and confidence, and an intensification of it derived from the very basis of the proposed transaction." (my underline)

373. As with most 'labels', in my own very respectful judgement, it is important to distinguish between the label and the contents. The 'label' of a 'duty of candour and fairness' taken from Lord Nicholls' specific example in *Etridge* at [33] of a *husband* who 'fails to discharge the obligation of candour and fairness he owes to his *wife* looking to him to make the major financial decisions' must be seen in the light of his description of the wife as first 'reposing trust and confidence in him'. Likewise, Lord Nicholls appears to have derived that expression 'obligation of candour and fairness' from Lord Evershed MR's description in *Zamet* of 'an obligation of candour and protection', which Lord Nicholls quoted in *Etridge* at [9]. Yet as he immediately went on to say at [10]-[11], the modern formulation of that is the 'relationship of trust and confidence', although a relationship of influence or ascendancy can arise where a vulnerable person has been exploited. Therefore, given that Lord Nicholls and other Lords in *Etridge* like Lord Clyde discouraged a proliferation of confusing terminology and classification in the law of undue influence, I prefer to focus on the contents of a 'relationship of trust and confidence' rather than the label of 'an obligation of candour and fairness'.

374. After all, Lord Nicholls, Lord Scott and the other Lords in *Etridge* stressed that 'actual' and 'presumed' undue influence were different methods of proving the same underlying concept – or 'unitary doctrine' – as Mr Perring put it. Therefore, at least in cases which do not involve 'direct pressure' or 'domination' where a relationship of 'trust and confidence' (at least) is inapt, it is logical to require the claimant to prove the same relationship, whether they then seek to prove undue influence affirmatively by 'unacceptable means' like deliberate misrepresentation or concealment; or by invoking the 'evidential presumption' discussed in *Etridge*.

375. Therefore, I accept that for both what Mr Halkerston called the Claimant's 'actual undue influence' and 'presumed undue influence' arguments, I agree with Mr Perring that the burden is on her first to prove she had a 'sufficient relationship of trust and confidence' with the Krishans. But since on 'presumed undue influence' I am leaving

aside my findings on fraudulent misrepresentation, I will leave them aside on 'trust and confidence' as well, even as applied to 'actual undue influence' (though they come back in at a later stage). Notably it is relevant to both that even on his very different factual findings, HHJ Purle QC said at [32]:

> "Whilst there was undoubtedly a relationship of trust and confidence, it was not a relationship in which Mrs Takhar put her decision-making powers at the disposal of the Krishans. She retained [them]."

376. In his submissions applying the law Mr Perring set out to the facts, Mr Graham made seven different points, which I can conveniently group into three themes:

376.1 Firstly, I agree with Mr Graham the relationship between the Krishans was not one of 'domination' not requiring a relationship of trust and confidence itself proving the requisite 'influence'. Such a finding would be inconsistent with my finding that it took the Krishans four months from July to November 2005 to agree to their plan. I agree with Mr Graham that the Claimant's relationship with the Krishans was not a 'special class of relationship' to use Lord Nicholls' expression in *Etridge* at [18] (called in *Aboody*, *O'Brien* and *Pitt* a 'Class 2A relationship'), in which the law irrebuttably presumes influence, including parent over child (but not child over parent – *Enal* at [51]), guardian over ward, trustee over beneficiary, solicitor over client and medical adviser over patient, but not as between husband and wife, as Lord Nicholls clarified in *Etridge* at [19]. The Claimant's relationship with Mrs Krishan was that of cousins, whether or not 'like sisters', as I discuss below. However, I disagree that the Claimant and Dr Krishan had no relationship beyond the husband of her cousin. As I shall explain, from July 2005 to April 2006, he was akin to the Claimant's informal agent with Coventry CC in respect of the Properties, which I will find was effectively a fiduciary one, but I agree here not a 'Class 2A' one in any event. In any event, that is not the Claimant's case. She simply argues that she developed with both the Krishans what used to be called a 'Class 2B' 'relationships of mutual trust and confidence'. That is what I analyse.

376.2 Secondly, I also agree with Mr Graham in principle that 'mutual trust' or 'inequality of bargaining power' are not enough by themselves to prove a 'Class 2B' 'relationship of trust and confidence' in the sense explained by Lord Nicholls in *Etridge* at [10]-[11]. This is illustrated by *Thompson* at [103], where the mother's relationship with the daughter in dispute was no different to her relationship with another daughter. However, Mr Graham's submissions that this was all the Claimant's relationship with the Krishans was, that they had no relationship of influence over her and/or were not in a position to influence her into the transaction, beg questions I must answer.

376.3 Thirdly, the real focus of Mr Graham's submission here is that the Claimant and Krishans' relationship was not one of 'trust and confidence' in the sense of 'management of her financial affairs'. I must consider this at more length.

377. I agree with Mr Graham that the relationship between the Claimant and the Krishans was not one in which she placed her trust and confidence in them in respect of management of her financial affairs *generally* and that *other than for the Properties*, she remained entirely free and able to make her own decisions. Therefore, the case is different from *Enal* where a grandfather had decades earlier been granted an effectively unused power of attorney by his son over the latter's properties which the grandfather

had bought in his son's name. The grandfather used the power of attorney to sell one of the properties for a tenth of its real value without consulting his son, to his daughter (the son's estranged sister) with whom he lived and his grandson (her son), to whom the grandfather had recently granted his own power of attorney. Sir Nicholas Patten for the Privy Council said at [57]:

> "The existence of the [grandson's] power of attorney is not of itself sufficient to raise a presumption of undue influence but it is probative of a relationship of trust and confidence which coupled with the highly unusual aspects of the sale ….lay[s] the ground for an inference of undue influence."

378. However, as I noted, in *Enal* at [55], Sir Nicholas Patten had endorsed the analysis in *Goldsworthy* quoted above of Nourse LJ I partially repeat and underline:

> "[T]he degree of trust and confidence is such that the party in whom it is reposed, either because he is or has <u>become an adviser of the other</u> or because he has been entrusted with the management of his affairs <u>or everyday needs or for some other reason, is in a position to influence him into effecting the transaction of which complaint is later made</u>….

Therefore, relationships of trust and confidence are not limited to those entailing 'the management of financial affairs generally' and also include 'advisers'. After all, Lord Nicholls in *Etridge* at [18] described a solicitor and client as a 'Class 2A relationship' where influence is irrebuttably presumed, yet except in the unusual case of a Court of Protection Deputy, is a solicitor is very rarely entrusted with general management of their client's financial affairs. Moreover, Nourse LJ in *Goldsworthy* also spoke of 'management of everyday needs or for some other reason' and added there was no need for identity between such a relationship and the impugned transaction. That is inconsistent with a *requirement* of management of financial affairs generally. Furthermore, whilst Lord Nicholls in *Etridge* at [14] spoke of a complainant 'placing trust and confidence in the other party in relation to the management of the complainant's financial affairs', as Lewison J said in *Thompson* at [100] 'that description was not intended to be exhaustive' and to restrict it in that way would be inconsistent with *Allcard,* which Lord Nicholls paraphrased in *Etrdige* at [9]; and the broader way Lord Nicholls himself put it at [21] (quoted later). Ultimately, as Nourse LJ said in *Goldsworthy*, what matters is the 'degree of trust and confidence' in the relationship was such that one party was in 'a position to influence' the other into the impugned transaction.

379. In my judgment, the relationship between the Claimant on one hand and each of the Krishans on the other, had a degree of trust and confidence, such that the Krishans individually and jointly were in a position to influence the Claimant into the transaction of transferring the Properties to Gracefield on the '15th March letter terms', let alone the 'PSA Plus' terms. As I said at paragraph 191 above but repeat for ease with further elaboration, one can see the Claimant's trust in the Krishans growing and developing over time:

379.1 Firstly, the origin of the Claimant's trust in the Krishans lay in her historical relationship with her cousin Parkash, to whom she had been like a 'big sister'. They had been out of contact for over 30 years due to her stifling marriage to Bill and his conservative family. However, I accept it was the Claimant's strong emotion (always crucial to her) that her beloved Parkash had come back into her life just when she needed her in 2004. So, the Claimant took her into her

confidence with her problems to an extent she did not even do with Bobby. That was the foundation for what followed.

379.2 Secondly, once Mrs Krishan had found out about the Properties in early 2005 and shared that with her husband, she tried to persuade the Claimant to let them manage them. However, the Claimant was still content for Bobby to do so. But after the 30th June meeting, she told Mrs Krishan about CPOs as a last resort; and the idea of a health centre. The Krishans wanted to be involved and Mrs Krishan used the re-established trust and confidence in herself from the Claimant (who was feeling guilty about 'burdening Bobby') to persuade her to trust Dr Krishan to be her representative for the Properties instead. That was an intensely personal relationship and built upon their family ties - apt for what the Claimant saw as 'family properties' – and her established trust in Mrs Krishan. By extension from her cousin, she also trusted her husband. Whilst Dr Krishan did not become the Claimant's 'power of attorney' in the formal sense in *Enal* on 4th July 2005, the use of that phrase by the Council in their note of 30th June 2005 is telling. I find Dr Krishan essentially became the Claimant's agent with the Council for negotiations about the Properties and indeed the communication channel between it and the Claimant, giving him the means and opportunity to abuse his role. In my judgment, at least in Dr Krishan's case, I would find he then took on the fiduciary duty of loyalty under the principles stated in paragraph 368 above, including *Arklow*, especially once he told the Claimant not to contact the Council, as it would be seen as influencing the CPO process (as her solicitors' letter of 24th October 2008 states), which I find was probably *before* not *after* the transfers. However, as I heard no submissions on that, I stress my conclusion on the relationship of trust and confidence would be the same without that conclusion (but I will return to it on remedies). In any event, due to the strength of the Claimant's trust and confidence in Mrs Krishan born of their past and rediscovered present, the Claimant trusted her husband Dr Krishan to take over from her own son. This intertwining of family relationships and informal agency is redolent of *Turkey*, where the father arranged the sale to himself of the English house he lived in (with no valuation) from his financially-struggling Saudi daughter and husband.

379.3 Thirdly, once the Claimant had been persuaded to trust Dr Krishan with dealing with the Council about the Properties, I will find below that Dr Krishan, but also Mrs Krishan, deliberately developed the Claimant's trust in them by what I am calling their 'rescue narrative'. This was partly what I am calling the 'stick' of dire warnings about the CPOs – indeed that they had been made; and partly what I am calling the 'carrot' of financial support becoming financial dependency of the Claimant on them; with reassurance they would help – as 'payback' for her previous help for Mrs Krishan. Such was the Claimant's trust in them – first her beloved cousin Mrs Krishan, now her husband Dr Krishan, she agreed to this. I turn now to elaborate this.

380. Since I have now travelled this ground frequently, I simply give the key points:

380.1 From July to November 2005, even ignoring for now my findings about the fraudulent misrepresentations by the Krishans to the Claimant, their relationship of trust and confidence expanded further into financial support. This cemented the strength of that relationship because the Claimant had been in financial difficulties for a long time, especially from 2004-05. Indeed, the Claimant's

impecuniosity, if not 'serious disadvantage' for the purposes of 'unconscionable bargain', did make her relatively vulnerable and financially dependent on the Krishans. This is analogous to *Macklin*, where at [28], Auld LJ said whilst inequality of bargaining power was in itself insufficient for a relationship of trust and confidence, it was relevant. However, again family was entwined too because the Claimant only agreed to proceed with the Krishans' plan when they had gained not only Bobby's but Bill's trust and confidence too with his symbolic handing over of keys.

380.2 By SB's meetings in January-February 2006, the Claimant's trust and confidence in both Krishans in respect of the Properties and their development was now so strong that she effectively handed over control and decision-making to them, was simply a 'passenger' at meetings, where she showed her gratitude to them to SB. Whilst well short of 'domination', the relationship between the Claimant and the Krishans was of implicit trust, informal advice, property management and financial dependency, like the old farmer with his tenant and business partner in *Goldsworthy*.

380.3 Finally, from February to April 2006, again leaving aside my findings of fraudulent misrepresentation, the Krishans again drew on their relationship of trust and confidence with the Claimant – e.g. on 24th March when she questioned SB's 15th March letters, Mrs Krishan did so (even if she did not do so fraudulently). Moreover, in this period, the Claimant not only signed letters Mrs Krishan drafted for her to sign, but also the transfers, at a clear undervalue of £100,000 from the market value she was told, with both that and the further £200,000 only to be paid on future sale (even if there were an additional 50% profit share). On 3rd April, Mrs Krishan even drafted a letter for the Claimant to instruct Mr Whiston to draft a will naming the Krishans as executors. Of course, this case is not quite as clear as *Enal* with its chain of powers of attorney and an elderly man living with his daughter whose son had his power of attorney. But nor is it like *Thompson*, where the mother *knowingly* took a risk. I find there was 'trust and confidence'.

381. This is confirmed when one stands back and distinguishes the different roles the Krishans played in their individual relationships with the Claimant:

381.1 Mrs Krishan was the foundation of the relationships: the Claimant's beloved cousin - as Mrs Krishan admitted in 2010 even if she rowed back from it before me – they were 'cousin-sisters' – more like a sister than a cousin. The Claimant rediscovered her 'cousin-sister' in 2004 at a low ebb and Mrs Krishan (in fairness, genuinely) supported her emotionally. However, once she knew about the Properties in 2005, she then worked to extend that relationship of 'emotional trust and confidence' with the Claimant to encompass her 'family properties' and succeeded in July 2005 to widen it not only to the Properties, but also to her husband as well.

381.2 Once the Claimant became worried about the Properties in July 2005, for her Dr Krishan was the ideal man for the job, even better than her son Bobby. Not only was he married to her beloved 'cousin-sister', he had just the experience to fight the CPOs that concerned her. From the Claimant's perspective at the time (and leaving aside what she now knows about his fraudulent misrepresentations), Dr Krishan took charge, managed the situation with the Council, took on the bills for

the Properties and arranged all the professionals required the Claimant had no interest in. So, whether or not a fiduciary, Dr Krishan plainly enjoyed her trust and confidence.

381.3 However, tellingly, when the Claimant saw SB's letters in March 2006, it was Mrs Krishan again, drawing on their history, steering her by the elbow (even if not fraudulently) into signing the Properties over to Gracefield. Only years later did the Claimant realised what had really happened, which may well be one reason why she was so angry in her evidence.

382. In my judgment, this was undoubtedly a relationship of sufficient trust and confidence. It had grown. It had kept the Claimant on an even financial keel. It had led to her effectively handing over all control to the Krishans from November 2005, which enabled them to steer the Claimant through the transfer process in March/April 2006. By the same repeated (even if not fraudulent) encouragement, entangling and gradually binding her into greater and greater trust and confidence in the Krishans, until she dutifully signed anything in front of her, including her family properties away for very modest financial support 'up front'. When all is seen holistically, it shows the huge trust the Claimant put in the Krishans.

383. Indeed, even if I am wrong (and more importantly, so would be Lewison J in *Thompson*) and 'trust and confidence' requires management of financial affairs *generally*, on my findings, for the same reasons, this was even more clearly a 'relationship of influence' based on the Claimant's relative vulnerability and the Krishans' increasing ascendancy (which I have found they deliberately brought about). Indeed, contrary to HHJ Purle QC's findings, I find the Claimant absolutely *did* put her decision-making powers for the Properties at the disposal of the Krishans. For example, when the Claimant queried SB's letters in March, she then meekly accepted Mrs Krishan's explanation (even if not fraudulent) and dutifully signed the letter (which the Krishans much later used for their forgery).

384. But let me assume I am wrong on the *facts* and agreed with the Purle Judgment. Let us say, as HHJ Purle QC did at [6], [11] and [12] of it, the Claimant was stressed and in financial difficulty and Bobby's negotiations had failed, so she who persuaded the Krishans to help her, rather than the other way around as I have found. Let us also say, as found by HHJ Purle QC at [14]-[16], that she was happy to transfer the Properties to Gracefield and knew full well the plan was to sell them. Further, let us say, as HHJ Purle QC found at [19]-[23], that the oral agreement was in the terms he declared. Then finally, as HHJ Purle QC found at [19]-[24], that the Claimant was entirely happy to transfer the Properties and had the chance of independent advice from Mr Whiston before she did. Yet despite all that, HHJ Purle QC still found at [32] of the Purle Judgment: *'there was undoubtedly a relationship of trust and confidence'*. I entirely agree. However, of course my own findings of fact are very different. It is with my own findings in mind that I must now turn to my conclusions on 'actual undue influence'.

The 'Actual Undue Influence' Argument

385. Whilst as I have explained, 'actual undue influence' is simply a different method of proof than 'presumed undue influence', it is convenient to label the Claimant's argument of 'affirmative proof' as her 'actual undue influence argument'. As I summarised above at paragraph 364, whilst fraudulent misrepresentation *can* produce

undue influence, the ultimate test for what is really 'affirmative proof' of it was set out by Lord Nicholls in *Etridge* at [7]: whether a complainant's 'intention to enter into the transaction' was 'produced by unacceptable means' so that the transaction 'ought not fairly be treated as the expression of their free will'.

386. The short answer is that, for the reasons given at paragraphs 171-230 and 321-349 above, I am satisfied undue influence is affirmatively proved on the balance of probabilities. The Krishans from July 2005 to April 2006, by means of the fraudulent misrepresentations I found proved, unconscionably produced the Claimant's intention to transfer the Properties to Gracefield by unacceptable means so they ought not fairly to be treated as the expression of her free will. Contrary to HHJ Purle QC's finding quoted at paragraph 375 above, I find on the balance of probabilities the Claimant *did* 'put her decision-making powers at the disposal of the Krishans'; and they *did* abuse her trust and confidence:

386.1 I have found that from July to November 2005, the Krishans used their relationship of trust and confidence and fraudulent misrepresentations to wear down the Claimant's resistance to transferring the Properties to a company they could control. They deliberately misrepresented there were CPOs (or if I am wrong, that they were 'likely') and exaggerated the consequences – that they would leave her 'penniless' and 'homeless'. But they also 'reassured' her if she transferred the Properties they would fight the CPOs. In short, they invented a Bogeyman, then said they would fight it. They built on this by saying the Properties were only worth £100,000, so were worthless to her given her debts and underplayed the true market value of the Properties as £300,000, when they correctly suspected it was higher, so deliberately did not get valuations. The last was their reassurance to the Claimant if she transferred the Properties, they intended to manage them for her benefit, when their true intention was to manage them for their own.

386.2 Having secured the Claimant's agreement in principle in November 2005, from then until April 2006, the Krishans carried her like a passenger through meetings and letters they produced for her to sign as they drove her towards the transfers. They dealt with any impediments to their plans to transfer them to Gracefield with further fraudulent misrepresentations, such as to SB and the Claimant about the '£100,000 CPO Value' and indeed, Mrs Krishans' lies on 24th March when the Claimant queried SBs' letters, then her shepherding of the Claimant through the transfers soon afterwards.

In my judgement, it does not really matter how the 'terms of the transaction' are analysed. On the 'PSA Plus terms', whilst the Claimant was promised a payment of £300,000 and then 50% of the profit of sale of the Properties, the Krishans misled her about both aspects. On the '15th March letter terms', she did not even get a contractual 'profit share' illustrating the force of the undue influence exerted on her by the Krishans. Indeed, she signed 'transfer terms' loaning Gracefield the £100,000 'price' it was supposedly paying her for her own Properties.

387. However, in deference to the high quality of Mr Graham and Mr Perrings' submissions, let me answer them. Mr Graham's over-arching submission was that there was no nor unconscionable conduct by the Krishans, or even if there was, no impairment of the Claimant's will in her agreement to transfer. As he put it: the Claimant was not led to do anything, never mind driven: it was not in her nature to be led; and it was not in the

Krishans' nature to drive her'. I will address Mr Graham's individual points in three broad groupings of them to start with:

387.1 Some of Mr Graham's points are not disputed, like the absence of threats, or coercion. Some I have already rejected for reasons I need not repeat, like there being no relationship of trust and confidence and so no duty of candour and fairness (another label for it) and no misrepresentations.

387.2 Some of Mr Graham's points cannot stand with my findings of fact and indeed those conclusions on the fraudulent misrepresentations, such as the Claimant being an equal partner in a straightforward commercial venture and being fully involved in the process and in all decision-making by the Krishans. I have borne those submissions well in mind, but have rejected them for the reasons I have summarised above.

387.3 But the main thrust of Mr Graham's submissions were on the Claimant's independent – indeed dominant - will. I will consider this point in more detail under three sub-headings: independence, involvement and advice.

388. In relation to independence, Mr Graham submitted positively and correctly that the Claimant was an intelligent, independent and resourceful woman. She is a graduate and trainee teacher, owning her own property and caring for her family. In 2002-2004, the Claimant had handled the Properties alongside Bobby, getting a survey of the Cinema and a valuation and even in July 2005, she received the Donaldsons' valuations. I accept all that. Indeed, since it is rare for an advocate to 'endure' cross-examination more than the witness, Mr Graham has earned the right to point to the Claimant's histrionic evidence to say she was '*strong and robust, not a woman who could be cowed from exercising her free will'*. Quite.

389. However, when determining whether the Claimant was subject to actual undue influence in 2005-06, I have to look at evidence of the Claimant's independence at that time, not years before and certainly not years later in the shadow of the litigation which has consumed her life. As I have found at paragraphs 150-165, the contemporaneous evidence shows that in 2004-05 the Claimant's ordinarily redoubtable independence and intelligence was rather overwhelmed and she was under 'significant stress' as her GP put it (I accept, not 'clinical depression'). There was a 'perfect storm' of personal problems, including a financial crisis. On that subject, Mr Graham skilfully sought to present her payment of bills and dealings with bailiffs as a reflection of independence. It was not – rather it was a reflection of her financially struggling and fire-fighting. Therefore, I find in 2004-2005, by comparison to her previous determined individualism, exemplified by separation from Bill and university studies, the Claimant was *relatively* 'vulnerable'. However, I doubt that would have reached the high threshold of 'serious disadvantage through poverty, ignorance, lack of advice or otherwise' as required to claim 'unconscionable bargain' (*Pakistan Airways* at [24]). However, that does not mean that claim was 'bogus' as Mr Graham submitted, it simply means that on the evidence the Claimant would have failed to prove it.

390. I also accept Mr Graham's point that in mid-2005, the Claimant knew she had to do something about her financial situation and the Properties (although given they could have been sold – especially the Cinema – CPOs, bankruptcy or other loss of the Properties were a very small risk). The Claimant had largely (but not entirely) left them to Bobby and I find were it not for the Krishans ousting him in July 2005, she would

have authorised him to continue, not dealt with it herself. When Mrs Krishan did persuade the Claimant to authorise Dr Krishan rather than Bobby, the Claimant was happy to hand over liaison with the Council - as she had previously done. She did not really want to be involved and had enough on her plate. As I said, she trusted Dr Krishan as an extension of her trust in Mrs Krishan. Whilst it was not the Krishans' case, I accept the four months between July and November 2005 it took for them to persuade her to agree to the transfer in principle illustrates perhaps best her independence and the fact this was certainly not a 'relationship of domination'. However, it is also clear that the Claimant was worn down by the 'stick' and 'carrot' of the Krishan's rescue narrative, including the four fraudulent misrepresentations I have accepted above, as she said:

> "I felt trapped. I was too afraid I would lose the Properties to the Council and end up, as the Krishans described it, 'penniless and homeless'….[W]hat the[y] were offering was exactly what I needed help with….a perfect solution to my problems…. So, I eventually agreed to accept their help."

Therefore, the fraudulent misrepresentations *eroded* the Claimant's independence.

391. I turn to the Claimant's 'involvement' with the Properties from July 2005 to April 2006. In fairness to Mr Graham, much of the rug from under his submissions has been pulled by my findings of fact (but I do stress in making them, I considered those submissions). I have found the Claimant accepted help from the Krishans in July 2005, not begged them for it. I have found that Dr Krishan came up with the idea of a development company and the transfers of the Properties to it, not the Claimant. As I say, I have found that she took some persuasion to agree in principle to transfer the Properties to a company over the four months between July and November, not proposed the idea and pestered the Krishans about it.

392. Nevertheless, I accept between November 2005 and April 2006, the Claimant attended more meetings than she accepted (including both with Mr Davies in November 2005 and SB twice in January *and* February 2006). Moreover, I accept she signed the transfers and later the stock transfer forms she earlier denied and has not pursued other allegations of forgery. Furthermore, I accept she also sent and received more correspondence about the development than she had accepted (including to Mr Whiston on 3rd March authorising the transfers, his and SB's letters of 15th March about the terms of transfer, her confirmation of the values to Mr Whiston on 24th March and letters to and from him about the will).

393. However, at the end of the day, whilst I am wary of what findings I can make of the Davies meeting in November 2005, for those with SB in January and February 2006, the Claimant was essentially a 'passenger'. She contributed 'the odd point' as SB put it in evidence in 2010. The person driving the process was not the Claimant but Dr Krishan. Likewise, I have found that Mrs Krishan drafted for the Claimant to simply sign the 2006 letters in her name to Mr Whiston of 3rd March, 24th March on the transfers and 3rd April on the will (although I accept the Claimant gave her own instructions on the will when she met him on 4th May).

394. Turning to advice, whilst Mr Graham also relies on the Claimant's involvement with professionals to show she could get independent advice, in fact that was a problem. As the Claimant was a mere 'passenger' with SB who was actually involved in the transaction, she was hardly likely to seek independent advice from third parties like the

Shropshire Chamber of Commerce (through whom she had instructed the surveyor of the Cinema in 2004) or advisers like Mr Matthews whom she instructed in 2008. Whilst she was supported throughout by Bobby, he had also been taken in by the Krishans' 'rescue narrative', just as she had. Therefore, understandably, on his advice argument, Mr Graham places most emphasis (both on actual influence and on rebutting any presumption of undue influence) on the exchange between the Claimant and Mr Whiston in April 2006. On receipt of the Claimant's signed transfers for the Shops, Mr Whiston then on 5th April wrote to the Claimant to advise her that as he had previously acted for the Krishans and there may be a conflict of interest and she should seek independent legal advice about the transfer. The Claimant wrote back in her own handwriting on 6th April confirming in terms that there was no conflict of interest in relation to the transfer from her to Gracefield. As Mr Whiston pointed out in his reply on 10th April, that was not his point, but he took it as confirmation the Claimant was declining to get independent advice. Mr Graham points out that the Claimant's incorrect answer actually shows she felt there was no conflict of interest in the transfer itself, he submitted showing there was no undue influence.

395. In the presumed undue influence case of *Smith v Cooper* [2010] 2 FLR 1521 (CA) a woman transferred her home from her own name to that of herself and her partner for no consideration, then used that property to get a mortgage to buy another property, again in joint names. A solicitor involved throughout did not advise the woman at any point to get independent legal advice because he considered she did not need it, even though her instructions vacillated and she suffered from depression and panic attacks. In upholding her claim to set both transactions aside for undue influence, Lloyd LJ observed at [56]:

> "So far as I can see, [the solicitor] acted and advised properly and with reasonable competence in his position as the solicitor instructed by, advising, and representing the two clients jointly. What he did not do, or purport to do, was to give any advice to Miss Cooper from her own separate point view and for her own separate benefit. This is, therefore, not a case in which Miss Cooper had any independent advice. The judge's comment that Mr Grimes did not know one client better than another 'and to that extent was independent' is not really to the point. What is meant, in this context, by independent advice is advice to and for the benefit the one party alone given by an adviser whose duty it is to consider the position that party and to advise her so she can give thought, free from any influence or dependence on the other party, as to whether she really does want to enter into the transaction, bearing in mind its full implications from her point view. The adviser, advising the party in question alone, must explain the nature and the consequences the transaction to that party with full knowledge of the relevant circumstances: see, for example, *Snell's Equity*... para 8–31. Mr Grimes was not in that position. It did not occur to him that Miss Cooper needed any such protection. He did not know the relevant underlying circumstances. He did not, and did not profess to, give Miss Cooper any advice as to her position separately."

396. It is true that Mr Whiston did not fall into the same trap as the solicitor in *Smith*. Whilst he did not purport to give the Claimant independent legal advice (indeed he explained why he could not do so due to the potential conflict of interest), he did advise her to get some. However, the difficulty with this point is that there were clear misunderstandings between Mr Whiston and the Claimant. As I have explained at paragraphs 219-227

above, Mr Whiston was not aware of any discussions about 'deferred consideration' of £200,000 or indeed a 50% profit share, even assuming that was agreed by the Claimant and Krishans, which I have found it was not. So far as Mr Whiston was concerned, the transaction was simply the transfers (split over the tax year) of the Properties for a total of £100,000, being *'the amounts placed on the properties by the council with regards to the compulsory purchase order'*. So, just as the Claimant was misled by the Krishans' fraudulent misrepresentations, so too were SB *and Mr Whiston*. As a 'one-man band' high street solicitor, doubtless Mr Whiston could have researched CPOs, but it is very unlikely he would know about them off the top of his head. In any event, he had asked the Claimant to confirm the values, which she had ostensibly done on 24th March 2006. Yet Mr Whiston perfectly reasonably misunderstood that too because I have found Mrs Krishan drafted that letter for the Claimant to sign (the same signature she and her husband later used in forgery). Mr Whiston did not know he was to all intents and purposes corresponding with Mrs Krishan.

397. Indeed, there was a further innocent misunderstanding by Mr Whiston. I have found at paragraph 226 that whilst the Claimant did hand-write the letter of 6th April, it was dictated by Mrs Krishan. She did not have time to write a letter in the Claimant's name as usual, as they were in a rush before they went to India, as another Mrs-Krishan-drafted letter said dated 3rd April 2006 for the Claimant to sign to instruct Mr Whiston on the will. Yet even if I am wrong, whoever composed the 6th April letter, did not answer Mr Whiston's question and so failed to address whether the Claimant wanted independent legal advice. Certainly, the Claimant did not realise that and if she did, she even let the other party to the transaction dictate her response. Therefore, whilst I agree with Mr Graham that the Claimant's handwritten letter of 6th April is 'particularly significant', it shows the opposite of what he claims. Far from showing the Claimant clearly not under influence of another person, it demonstrates her writing a letter at Mrs Krishan's dictation. This suggests that, in Ward LJ's words in *Drew,* that far from her response that there was no conflict of interest in the transfer being 'the offspring of her own volition', it was *literally* 'the record of someone else's'.

398. Indeed, this last point is demonstrated throughout by revisiting the development of the relationship of trust and confidence between the Claimant and the Krishans discussed in the last section, but now including how the fraudulent misrepresentations I have upheld fitted in. I deliberately left those to one side when summarising the development of the relationship of trust and confidence. Yet they were deployed by the Krishans as part of their 'rescue narrative', which in turn strengthened the relationship – they are entangled. Therefore, it may be helpful to look again at that development as the growing *abuse* of trust and confidence, before once again applying Lord Nicholls' test in *Etridge* at [7]: whether the Claimant's 'intention to enter into the transfers' was 'produced by unacceptable means' so that they 'ought not fairly be treated as the expression of her free will' (and indeed it would be 'unconscionable' to so regard them):

    398.1 The Claimant initially in 2004 reposed emotional 'trust and confidence' in Mrs Krishan at a difficult time in her own life when she was emotionally vulnerable and under 'significant stress' and found Mrs Krishan supportive, This in turn reinforced the Claimant's trust and confidence in her. Whilst I accept that at this stage Mrs Krishan was quite genuine and Dr Krishan not involved, the implicit trust the Claimant had in Mrs Krishan from 2004-2005 was the solid basis for her belief in the Krishans' later lies in 2005-06

398.2 In July 2005, having politely declined Mrs Krishan angling to help with the Properties earlier that year, the Claimant told her about the Council's meeting with Bobby on 30th June. Mrs Krishan drew on their pre-existing relationship of emotional trust and confidence to 'guilt-trip' the Claimant about Bobby and persuade her into authorising Dr Krishan instead. Bobby described this as a 'power grab', which in hindsight I can well understand. This was the start of the Krishans' 'rescue narrative' of 'carrot' and 'stick'.

398.3 From July to November 2005, as I discussed at paragraphs 192-200 and 337-344 above, the Krishans' 'stick' was the first three fraudulent misrepresentations (and the related carrot of the first strand of the fourth). The Krishans lied about the existence of CPOs (or at least deliberately exaggerated their likelihood), underplayed the Properties' value, intentionally worried the Claimant by suggesting the Properties were only worth £100,000 due to the threat of CPOs so 'worthless to her' and warning of bankruptcy and even eviction. Yet on the other hand, they promised if she transferred the Properties to their company, they would deal with the Council and the CPOs. These closely-related fraudulent misrepresentations worked synergistically on the Claimant to influence her into agreeing to the transfer. First and foremost, they 'softened her up' with anxiety about the Properties so that her independence and reluctance to accept help was worn down. Secondly, by scaring the Claimant with dire warnings, the Krishans encouraged her to have more and more trust and confidence in themselves. Thirdly, the 'carrot' of the Krishans offering to take on these problems and fight the Council on CPOs drew the Claimant into agreeing to the transfer.

398.4 From July to November 2005, the immediate 'carrot' from the Krishans to the Claimant was their financial support, starting with Mrs Krishans' cheques for £5,000 on 22nd July (albeit only after the Krishans saw the Donaldsons' report and knew they wanted to proceed). However, there was no more support until the Claimant had agreed in principle to the transfers to what would become Gracefield in November 2005. The Claimant was 'rewarded' for this from December 2005 with 'maintenance' of £400 pcm and payments of Council Tax and Rates on the Shops. Whilst the Claimant said in evidence she could have managed without it, I have found that at the time it meant she came to feel financially dependent on the Krishans.

398.5 Another 'carrot' that the Krishans dangled in front of the Claimant from July to November 2005 was the fourth fraudulent misrepresentation that if she transferred the Properties, they would 'manage them for her benefit'. However, I have found that in 2005-06, beyond modest (and separate) financial support, the Krishans had absolutely no intention of managing the Properties for her benefit. However, as I develop below under 'resulting trust', though the Claimant was misled, her actual belief is highly relevant.

398.6 In 2006, after the wearing down of the Claimant's earlier hesitation, she became essentially a 'passenger' in the transfers. She 'tuned out' of meetings and even forgot about them, as with the Mr Davies meeting in November 2005 and SB's second meeting in February 2005. Indeed, in the SB's first meeting, she became emotional and left the room. Moreover, repeatedly, she signed letters Mrs Krishan typed for her.

398.7 This made it easier for the Krishans from November 2005 to April 2006, to steer the Claimant through the process of transferring the Properties. She signed multiple letters that Mrs Krishan put in front of her.

398.8 Indeed, Dr Krishan stopped SB exploring alternatives to transfer with the Claimant. He lied to SB between the January and February meetings to say the Council had made CPOs and set a value of £100,000 by comparison to the supposed market value of £300,000. Dr Krishan used SB unwittingly to reinforce and strengthen this message on CPOs to the Claimant.

398.9 When the Claimant queried SB's 15th March letters with Mrs Krishan, she smoothed over SB's letters by referring to them as no more than 'paper figures'. They actually were but not in the sense Mrs Krishan meant the Claimant to understand (i.e. mere formalities not affecting beneficial ownership). But Mrs Krishan also returned to the 'stick' of the fraudulent misrepresentations – transfers were necessary to 'save the Properties' etc.

398.10 With the Claimant in line, Mrs Krishan guided her by the elbow through the transfers: confirming the valuations on 24th March; dictating literally and figuratively the Claimant's response to Mr Whiston on 6th April; cajoling her with the need to 'save the Properties' into signing the transfers on the Shops on 31st March; and then the Cinema and Co-Op on 28th April.

399. Therefore, irrespective of whether the terms of the transaction were the 'PSA Plus terms', '15th March letter terms' or 'transfer terms', I find the Claimant has affirmatively proved her actual undue influence claim. Moreover, even though it is strictly unnecessary – *UCB*, as I said at paragraph 349, I find on the balance of probabilities, but for the 2005 fraudulent misrepresentations (irrespective of the 2006 ones), the Claimant would not have transferred the Properties to Gracefield in April 2006. I repeat this passage in the Claimant's statement once more:

> "I felt trapped. I was too afraid I would lose the Properties to the Council and end up, as the Krishans described it, 'penniless and homeless'….[W]hat the[y] were offering was ….a perfect solution to my problems…."

Whilst this related to November 2005, in fact the Claimant was merely a passenger by January 2006, save her brief doubts in March 2006 soon quelled by Mrs Krishans' further lies. (Given those doubts, I would find the Claimant did indeed feel about the transfers, as Ward LJ put it in *Drew*, 'This is not my wish, but I must do it'). For all those reasons, I find the Claimant's intention to enter the transfers in March/April 2006 was procured by the Krishans by unacceptable means, so it ought not fairly to be treated as the expression of the Claimant's free will. Nevertheless, by then, her free will had been worn down and overborne. Even without what happened in 2006, but for the earlier (actual) undue influence, she would not have transferred the Properties. By 2006, albeit with one brief 'bump in the road' in March, the Claimant was essentially just a passenger on the journey towards the transfers, with the Krishans very much in the driving seat.

Presumed Undue Influence

400. In case I am wrong on actual undue influence, I turn to consider the Claimants' 'presumed undue influence' argument, now leaving entirely aside my finding on fraudulent misrepresentation. Here, the terms of the transaction do matter and I will

focus on the 'PSA Plus terms'. I have found the Claimant and the Krishans had a relationship of trust and confidence (even on HHJ Purle QC's findings). I turn to the second and third stages: whether the transaction 'calls for explanation' so the evidential burden shifts to the defendants and if so, whether they rebut it.

401. Whilst Counsel used the familiar (if question-begging expression) 'whether the transaction calls for an explanation' Lord Nicholls used in *Etridge* at [14], I will underline and use his more precise formulation at [21] he explained at [22]-[29]:

> "21 As already noted, there are two prerequisites to the evidential shift in the burden of proof from the complainant to the other party. First, that the complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant. Second, that the transaction is not readily explicable by the relationship of the parties.
>
> 22 Lindley LJ summarised this second prerequisite in the leading authority of *Allcard v Skinner (1887)* 36 ChD 145, where the donor parted with almost all her property. Lindley LJ pointed out that where a gift of a small amount is made to a person standing in a confidential relationship to the donor, some proof of the exercise of the influence of the donee must be given. The mere existence of the influence is not enough. He continued, at p 185 'But if the gift is so large as not to be reasonably accounted for on the ground of friendship, relationship, charity, or other ordinary motives on which ordinary men act, the burden is upon the donee to support the gift."…
>
> 23 The need for this second prerequisite has recently been questioned: see Nourse LJ in *Barclays Bank pic v Coleman* [2001] QB, 20, 30-32, one of the cases under appeal before your Lordships' House. Mr Sher invited your Lordships to depart from the decision of the House on this point in *National Westminster Bank pic v Morgan* [1985] AC 686.
>
> 24 My Lords, this is not an invitation I would accept. The second prerequisite, as expressed by Lindley LJ, is good sense. It is a necessary limitation upon the width of the first prerequisite. It would be absurd for the law to presume that every gift by a child to a parent, or every transaction between a client and his solicitor or between a patient and his doctor, was brought about by undue influence unless the contrary is affirmatively proved. Such a presumption would be too far-reaching. Something more is needed before the law reverses the burden of proof, something which calls for an explanation. When that something more is present, the greater the disadvantage to the vulnerable person, the more cogent must be the explanation before the presumption will be…rebutted.
>
> 25 This was the approach adopted by Lord Scarman in *Morgan*….[at] 703-707. He cited Lindley LJ's observations in *Allcard*…above. He noted that whatever the legal character of the transaction, it must constitute a disadvantage sufficiently serious to require evidence to rebut the presumption that in the circumstances of the parties' relationship, it was procured by exercise of undue influence. Lord Scarman concluded, at p 704
>
> > 'The Court of Appeal erred in law in holding that the presumption of undue influence can arise from the evidence of the relationship of the parties without also evidence that the transaction itself was wrongful in that it constituted an advantage taken of the person subjected to the influence

> which, failing proof to the contrary, was explicable only on the basis that undue influence had been exercised to procure it'.
>
> 26 Lord Scarman attached the label 'manifest disadvantage' to this second ingredient necessary to raise the presumption. This label has been causing difficulty. It may be apt enough if applied to straightforward transactions such as a substantial gift or a sale at an undervalue. But experience has now shown that this expression can give rise to misunderstanding. The label is being understood and applied in a way which does not accord with the meaning intended by Lord Scarman, its originator.
>
> 27 The problem has arisen in the context of wives guaranteeing payment of their husband's business debts….
>
> 28 In a narrow sense, such a transaction plainly ("manifestly") is disadvantageous to the wife. She undertakes a serious financial obligation, and in return she personally receives nothing. But that would be to take an unrealistically blinkered view of such a transaction. Unlike the relationship of solicitor and client or medical adviser and patient, in the case of husband and wife there are inherent reasons why such a transaction may well be for her benefit. Ordinarily, the fortunes of husband and wife are bound up together….A wife's affection and self-interest run hand-in-hand in inclining her to join with her husband in charging the matrimonial home, usually a jointly-owned asset, to obtain financial facilities needed by the business….
>
> 29 Which, then, is the correct approach to adopt in deciding whether a transaction is disadvantageous to the wife: the narrow approach, or the wider approach? The answer is neither. The answer lies in discarding a label which gives rise to this sort of ambiguity. The better approach is to adhere more directly to the test outlined by Lindley LJ in *Allcard*...and adopted by Lord Scarman *Morgan*....in the passages I have cited."

This 'transaction is not readily explicable by the relationship of the parties' test is linked more closely to the particular relationship of influence itself, unlike the rather unmoored 'the transaction calls for an explanation', although I note the latter is favoured by Prof. Enonchong in his work at Chapter 11. It may simply be a question of semantics – it appears that the two expressions were used interchangeably (if briefly) by Sir Nicholas Patten in *Enel* at [52] and [58]-[60].

402. With that point, Lord Nicholls' important guidance in *Etridge* and Prof. Enonchong's helpful analysis in his work at Chapter 10 all in mind, I can gratefully adopt the following points of Mr Perring on 'the second prerequisite':

402.1 A presumption of undue influence will only arise if, that specific transaction is 'not readily explicable by the relationship of the parties', or in other words, there is 'something which calls for an explanation.' Indeed, it has been described in other ways eg. 'the nature of the transaction is sufficiently unusual or suspicious that, failing proof to the contrary, [it] was explicable only on the basis that undue influence ha[s] been exercised to procure it'; or 'cannot be reasonably accounted on grounds of friendship, relationship, charity or other ordinary motives on which ordinary people act'.

402.2 As I have said, the test whether the *transaction* is one 'not readily explicable by the relationship of the parties' or 'calls for explanation', is *objective* and assessed

at the time of it. But *disadvantage* between the parties is assessed *subjectively*: if it is considered fair as between the parties, it will not be regarded as disadvantageous even if *objectively* it is commercially unwise.

402.3 In many cases that will depend on the disadvantages falling on the claimant and the benefits to the defendant: The larger the difference between the two the more likely the transaction will call for an explanation. Where any disadvantage is not substantial or there is no disadvantage, it is unlikely that the transaction will call for an explanation.

402.4 However, the conclusion that the transaction calls for explanation can only be reached once the specific facts have been considered, and a conclusion is reached that no explanation can be found as to why B should have chosen to enter into the transaction, other than that B's intention was procured by undue influence by A. The nature of the transaction is part of the central factual inquiry into the presence of undue influence.

402.5 Where a transaction is one that calls for an explanation, any available explanation is considered before the presumption arises. The presumption arises only where the transaction is one that calls for an explanation and a satisfactory explanation is not forthcoming. In other words, the mere fact that a transaction is one that calls for explanation is not in itself enough to establish the second prerequisite. Where the nature of a transaction is one that calls for an explanation, the explanation required is one that goes to remove the suspicion of possible exercise of undue influence. In other words, before the court concludes the second prerequisite is established, it must be satisfied that the transaction is of such a nature that a person in the position of the complainant, acting in the way that such a person might ordinarily be expected to act, would not have entered into it unless he was induced by undue influence. The court often does not interfere with family arrangements if they are reasonable with full and fair communication.

403. That fifth point was summarised by Mr Perring from Prof Enonchong's work at ps.11-018-19. It is illustrated best by *Turkey*, which was not in the authorities bundle but which Prof Enonchong mentioned at para.11-018. In any event, it confirms Mr Perring's point and indeed the significance of the precise formulation one adopts of the transaction. As noted above, in *Turkey*, there was a relationship of trust and confidence between a Saudi husband and wife who owned an English property rented to but managed by her father. As the owners were in financial trouble, the father bought them out for a sum in Saudi currency without a valuation at an undervalue. The Court held the transfer did not 'call for an explanation' as it was a family transaction in response to financial problems, rather than an 'arm's length transaction' where the absence of valuation etc would have done. Buxton LJ gave a detailed analysis of the 'call for an explanation' test:

> "13. The second element is most clearly set out in the speech of Lord Nicholls in *Etridge* at [14] [which I have quoted above and need not repeat]
>
> 14. A similar explanation was given by Lord Scott in [220] of his judgment. Referring to the label of 'manifest disadvantage' that other cases have suggested might not be entirely helpful, Lord Scott said:'[T]he expression is no more than shorthand for the proposition that the nature and ingredients of the impugned transaction are essential factors in deciding whether the evidential presumption has arisen and in determining the strength of that presumption. It is not a

> divining-rod by means of which the presence of undue influence in the procuring of a transaction can be identified. It is merely a description of a transaction which cannot be explained by reference to the ordinary motives by which people are accustomed to act."
>
> 15. If on the evidence the transaction cannot so be explained—that is to say, the transaction calls for an explanation and that explanation is not forthcoming—the burden then shifts to the claimant to show that in fact, and despite the terms and nature of the agreement, he did not in truth abuse the position that he held. He would normally discharge that burden—as, for instance, now at least occurs in husband and wife cases—by showing that the defendant entered into the matter with his will fully unconstrained, usually with the benefit of independent legal advice…
>
> 20….[C]ounsel for the appellant argued that merely because, in the words of Lord Nicholls, the transaction 'called for an explanation'…then that in itself was enough to shift the burden of denying misuse of the admitted existence of trust and confidence on to [the father]. That… cannot be right in view of the totality of the formulation adopted by Lord Nicholls. The first issue, at least in a case such as the present, is whether the transaction, looked at as a whole, can be explained in terms other than those of undue influence.
>
> …21. Only if that exercise cannot be successfully discharged does the question arise of whether the claimant actually exercised undue influence. ….Lord Scarman in *Natwest v Morgan* [1985] A.C. 686…[said]:
>
> > 'An advantage taken of the person subjected to the influence which failing proof to the contrary was explicable only on the basis that undue influence had been exercised to procure it'
>
> The judge, having drawn attention to that test, continued:
>
> > "[I]t seems to me that what a trial judge ought to be doing is trying to exercise his common sense and assuming the necessary relationship to consider whether, given the circumstances and the nature of the transaction, it says to the unbiased observer that absent explanation it must represent the beneficiary taking advantage of his position."
>
> I would respectfully endorse that approach."

Chadwick LJ in *Turkey* then added this helpful coda at [39]:

> "[F]acts must be established which persuade the court the transaction in question is of such a nature that a person in the [claimant's] position, acting in the way that such a person might ordinarily be expected to act, would not have entered into the transaction unless his or her will was overborne…."

404. Another example applying *Turkey* but going the other way (also noted by Prof. Enonchong in p.11-018) is *Hart v Burbidge* [2014] EWCA Civ 992. In *Hart*, a daughter persuaded her mother to sell properties left in her will to other family and to cash in investments to purchase a new property for her to live with her daughter and her husband in their names not hers. The Court held that transaction should not be separated into cash and properties but considered as a whole and held that it called for explanation as it was clearly disadvantageous to the mother.

405. I turn to my conclusions on 'presumed undue influence'. For the avoidance of doubt, I emphasise again I leave to one side all my conclusions on the fraudulent

misrepresentations (although not the underlying findings of fact about what was said). As I said at p 329 above, I will focus on the 'PSA Plus terms', but then also cross-check my conclusion against the '15th March letter terms' and 'transfer terms'. If I find 'presumed undue influence' proven on any basis, this issue is academic. Indeed, it is anyway given my conclusions on 'actual undue influence'.

406. On that footing, Mr Graham's overarching submission was that the 'PSA-Plus' terms did not 'call for an explanation'. Again, I group his submissions into three:

406.1 Mr Graham argued that from mid-2005 to April 2006, the Claimant was in 'dire circumstances' financially at least and it was 'highly likely she would have been able to do anything with the Properties'. They were dilapidated, and refurbishment costs were high (in January 2006, Donaldsons estimated £606,000 for the Cinema and £925,000 for the Co-Op, let alone the Shops). The Claimant could not realistically afford to refurbish them (as later proved by Natwest's refusal to lend to Gracefield if she were a 'principal') and Bill and Ian either could not or would not do so. Bobby's community use idea was a non-starter and there was no grant funding. In 2005-06, the Properties were not an asset but a liability, or certainly accruing liabilities with no realistic prospect of producing income without refurbishment. Overall, I broadly agree with all of that. 'The status quo was not an option'.

406.2 Where I begin to part company with Mr Graham was his submission that 'There was no Plan B'. As he said himself, a joint venture partner could have provided all the labour, expertise and funding, although I accept there is no evidence they would have contracted on better terms than the PSA. More importantly, as I noted at paragraph 119 above and raised before the submissions, Bobby had said that if he had needed to sell the Cinema to develop the Co-Op, he would have done. I have also accepted at paragraphs 105 and 241.1 above Ms Dobson's evidence that in April 2006, the Cinema was worth £200,000, which with Bobby's £80,000 savings would have covered all the Claimant's liabilities, paid for a planning permission application on the Co-Op and to make some improvements to it and some work on the Shops. Therefore, I will find below at paragraph 569 below that in that 'counterfactual' situation but for the Krishans' intervention, after the 30th June meeting and Donaldson's report in mid-2005, once the health centre idea for the Co-Op had ended in February 2006, selling the Cinema would have been a 'no brainer'. Had the Claimant done so, it is very clear she would have been much better off at the time. However, that would not have generated even the £400,000 the 'lower spec' costs estimate in the 2003 Barneveld report to redevelop the Co-Op, let alone the much higher estimate from Donaldsons in January 2006. Whilst commercial sense might have suggested the Claimant sell the Co-Op, such was her family's attachment to and pride in the Co-Op, which might be thought to defy commercial sense, I will find for reasons elaborated at paragraph 569 that the Claimant would have kept and would still own both the Co-Op and the Shops. (I will elaborate on this below, since it has a significant bearing on remedies (which as I am upholding the 'actual undue influence argument' I will need to address and indeed will need further submissions on them).

406.3 Moreover, even leaving aside that 'counterfactual' and focussing on the 'PSA-plus' terms themselves, I cannot agree with Mr Graham they were 'not disadvantageous to the Claimant', still less 'skewed in her favour' since she got

£300,000 plus 50% of the balance on sale and the Krishans 'only' got 50% of the balance. On the contrary, it was not in her favour and not even subjectively fair as between the parties. As Mr Graham himself emphasised, in 2005-06, the Claimant was in dire financial straits – she was asset-rich, but cash-poor. Yet she handed over the lion's share of those assets – worth at least £300,000 – for what ? True, she got financial maintenance from the Krishans of £400 pcm plus the initial £5000 and they also took on the (relatively modest) Council Tax and Rates bills on the Shops. However, once the Claimant had got over her pride, all of that could easily have been provided by Bobby without losing the Properties, indeed he did later pay off her biggest debt – the £22,000 CCJ on Nina's wedding. If the Claimant had been promised the 'PSA Plus' terms of the market value of £300,000 plus a 50% profit share of the balance when the Properties were sold, when would she get it ? To generate any 'profit' and so any advantage there would need to be at least planning permission and refurbishment. All of that would take time. SB was told in January 2006 the earliest date for the build to even start was Summer 2007. Meanwhile, the Claimant would 'tread water' financially reliant on benefits and the Krishans' maintenance. So, the 'magnetic factor' - what made even the 'PSA-plus' terms 'manifestly disadvantageous' (to use the discredited 'label') - was the fact the Claimant would not see any money *up front* from the Properties themselves, only the 'maintenance'. By contrast, for those relatively modest costs (and much more substantial costs of development which were in their own control), the Krishans would get a 50% profit share of the proceeds, less a 'market value' they correctly suspected was a significant undervalue, if not around a third of the real value. Here, the 50% profit share giving 'apparent equality' was emphatically not 'equity'.

407. Of course, the parties did not have a crystal ball at the time, but this point about how disadvantageous to the Claimant even the 'PSA Plus terms' truly were can be illustrated by another counterfactual – what if the Properties had simply been sold for their true market value later in 2006 ? I assess this firstly on Ms Dobson's valuation of £890,000 and secondly assuming the value was actually £300,000:

    407.1 If the parties had agreed the 'PSA-Plus terms' in April 2006, but a few months later in the year given the 'hot market' then decided simply to sell, assuming no mortgage, negligible development and sale costs, I find they would have had proceeds of at least £890,000. The Krishans would have received £295,000 (£890,000 less £300,000 divided by 2) in return for the £5000 cheques and £400 pcm maintenance and a modest sum on bills for the Properties in the intervening months – a huge *profit*. True, with her extra £300,000, the Claimant would have received more - £595,000. However, that would been a *loss* of a third of the value of the Properties she would have fully owned a few months before, in return for a few months' maintenance of £400 pcm, £5,000 and those modest bills. That was never the plan, but the 'PSA-plus terms' (especially once the Claimant went down to 49% shares in July) put that 'low hanging fruit' in the Krishans' hands.

    407.2 It may be objected that the question whether there was disadvantage and the transaction was 'fair between the parties' is subjective and should be judged on what they subjectively thought the market value was. So, I leave aside my finding that was a fraudulent misrepresentation and I will use £300,000 in 2006 instead. Of course, that would mean the Claimant got all the proceeds in a sale later in 2006, but she had gained nothing and the Krishans lost nothing. However, had

they hung on in the 2006/07 'hot market', any market value would have risen, then yielding them a profit.

In short, whilst the Claimant agreed in principle to transfer the Properties in November 2005 because she thought the Krishans were offering 'the perfect solution to her problems', objectively, the arrangement was nothing of the kind.

408. In any event, following *Etridge*, the legal test is no longer 'manifest disadvantage', but whether the 'transaction calls for an explanation' in the sense that it is 'not readily explicable by the relationship of the parties' to use Lord Nicholls' formulation in *Etridge* at [21] which I prefer. I have detailed my findings on that relationship of trust and confidence at paragraphs 375-383 (and can now leave aside my 'counterfactual' at 384). In short, from July to November 2005, it had grown from a relationship of emotional trust and confidence between the Claimant and Mrs Krishan to one of trust for Dr Krishan over the Properties, to her handing over total control to them and becoming a 'passenger'.

409. I have first taken fully into account, as *Turkey* requires me to do, any explanation put forward which would explain the transaction and remove suspicion of possible exercise of undue influence, including Mr Graham's submissions that it was advantageous to the Claimant and indeed 'skewed in her favour' (which I have rejected); and that in any event, is readily explicable as a commercial arrangement albeit in a family context. I remind myself the Court does not often interfere with family arrangements if they are reasonable with full and fair communication. However, I find the transaction is not readily explicable by the relationship of the parties, even bearing in mind their close family relationship:

409.1 Firstly, even if I cannot rely on my findings of fraudulent misrepresentation (since that would be to confuse the 'actual' and 'presumed' methods of proof of undue influence), I can say the Claimant has proved that there was not full and fair communication, not least in relation to the actual value.

409.2 Secondly, even ignoring that, I consider the transaction was plainly not readily explicable by the actual relationship of trust and confidence of the parties, which had strengthened to a point where the Claimant effectively handed over decision-making to the Krishans. Yet despite her level of trust, as I have found, the transaction assessed overall was more advantageous to the Krishans than the Claimant and was *manifestly disadvantageous* to her. Particularly, the Claimant was in financial difficulties, but in exchange for *modest* maintenance, gave away for *no other money up front* her control over substantial assets. Had they had stayed in Bobby's control, it probably would have soon led to the sale of the Cinema, end of the Claimant's money worries and of pressure from the Council over the petition. The Claimant and Bobby would have had time and money to consider the Co-Op. That is not applying a test of 'manifest disadvantage', but it is a conclusion of it relevant to the test of 'not readily explicable by the relationship'.

409.3 Thirdly, even if I am wrong about that as well, following Mr Perring's analysis (which derives from *Etridge* and *Turkey* via Prof Enonchong's work), I ask instead whether I am satisfied the transfers were of such a nature that a person in the Claimant's position, acting in the way that such a person might ordinarily be expected to act, would not have entered into it unless he was induced by undue influence. In my judgment, even leaving aside my findings about what the

Krishans actually said to the Claimant and just focusing on the Claimant's predicament and the 'PSA-Plus' terms, I find such a hypothetical person acting normally would not have agreed to them without undue influence. That hypothetical person would have first have considered the option of selling the Cinema to which the family were much less attached that the Co-Op, indeed which could have funded a planning permission application for it (and quite possibly releasing enough funds for the Shops, it is unclear). However, if that same hypothetical person wanted to keep all five Properties, they would have obtained an updated valuation of them all, not relied on valuations of two of them from 3 years earlier. This would have revealed the value of the Properties was much higher than supposed. Indeed, that hypothetical person may well have wanted their own independent development advice (not legal advice) e.g. from someone like Mr Matthews. The Claimant did none of that. Instead, having been persuaded (and leaving aside my findings as to how), she simply handed over control of the transaction to the Krishans and even when presented with SB's letters revealing the plans were quite different than she supposed, she was quickly persuaded to carry on. This was not 'folly' as with Mrs Thompson refusing to listen to independent warnings, this behaviour by the Claimant is close to compelling evidence there must have been undue influence, let alone evidence that a hypothetical person in her position acting normally would not have agreed to the PSA.

Therefore, I find that the PSA Plus terms were not 'readily explicable by the relationship of the parties', 'called for explanation' and indeed were 'manifestly disadvantageous'. In any event, the presumption of undue influence arises.

410. It follows that 'terms of the transaction' issue is indeed doubly academic. On the '15th March letter terms', if the Claimant knew that on sale of the Properties she would get up to 'agreed' market value £300,000 but any 'profit' would have to come via Gracefield and would depend on her position then (even ignoring what happened next: *Thompson*), that conclusion would be even clearer:

410.1 To use pre-*Etridge* language applying the test in *Morgan* (which *Pitt* limited to presumed undue influence such as this analysis), that transaction would be even more clearly to the Claimant's manifest disadvantage. The Claimant would only be *entitled* to the supposed market price in the first place, but it would be deferred to a sale she could not control even with a 50% shareholding and one seat on the board (the Krishans having two). That same factor would render a right to any profit at all entirely fragile.

410.2 To use the *Etridge* test I actually prefer, that transaction is even less readily explicable by the relationship between the parties. Given the strength of the trust and confidence she reposed in them by the time of transfer and the extent of (even if not 'manifest') disadvantage to her, it was positively crying out for an explanation, indeed clear *evidence* of undue influence.

410.3 Moreover, a person in the Claimant's position, acting as one would ordinarily expect them to act, would have recognised they were giving away control over very valuable assets, sale of any one of which would have solved their financial worries, in return for modest maintenance and a risky chance at a profit, which would ultimately be controlled by someone else. They would not have agreed to this transaction without undue influence.

(This conclusion is clearer still under the 'transfer terms' for the reasons stated).

411. In any event, whichever way the transaction is analysed, it shifted the burden of proof to the Krishans. The principles were discussed in *Smith* by Lloyd LJ at [61]:

> "If…the presumption of undue influence applies…it is then up to the one party to prove that the transaction was not procured by an abuse of his position of influence but was rather the free exercise of the will of the other party as a result of full, free and informed thought. Lord Nicholls' phrase 'in the absence of satisfactory explanation' in paragraph 14 of *Etridge* refers to the dominant party satisfying this burden of showing that the transaction was not procured by undue influence. Full understanding of the transaction is of course necessary but by no means sufficient, because the problem is lack of independence, not lack of understanding. As was said by Buxton LJ in *Turkey* at paragraph 15: 'He would normally discharge that burden - as, for instance, now at least occurs in husband and wife cases - by showing that the Defendant entered into the matter with his will fully unconstrained, usually with the benefit of independent legal advice'.

Again, I can gratefully adopt Mr Perring's summary largely taken from *Etridge*, *Zamet v Hyman* [1961] 1 WLR 1442 and Prof Enonchong at Ch.12 of his work, which seem to me entirely consistent with *Smith*. If the court finds a 'relationship of influence' (such as trust and confidence, as I have) and (2) that the transaction calls for explanation (as I have), a finding of undue influence by A over B follows unless B can show A's entry into that transaction was not procured by undue influence. It is not sufficient for B to show A understood what he or she was doing and intended it: undue influence concerns the lack of sufficient independence in relation to the transaction. B must prove A was sufficiently independent of B and was able to, and did, consent to the transaction, free from any undue influence: a result of 'full, free and informed thought about it'. It is not enough to rebut the presumption to show that A's conduct is unimpeachable. The question of rebuttal is a question of fact to be determined on the evidence, with appropriate weight of the evidence required to rebut the presumption depending on the weight of the presumption in the case. For advice to assist in rebutting the presumption, it should be independent advice, but it is not a prerequisite to rebut the presumption that independent advice is received. A wide range of circumstances may show such informed and free thought about the transaction, including, for example, the education of the complainant, his general sophistication, his business experience or commercial knowledge, or any previous dealings in the type of transaction.

412. In turning to the factual scenario, once again I deal with the 'PSA-Plus' terms first. Mr Graham's submissions on rebutting the presumption on the facts were brief: that is would be 'easily rebutted' as he argued on the facts 'the Claimant was sufficiently independent and able to and did consent to the transaction free from undue influence and a result of free, full and informed thought about it'. However, I have found the Krishans' evidence unreliable, unless supported by contemporary documents, but here I have found they support the Claimant's case. In any event, on my findings, the Claimant was not at all 'independent' of the Krishans. Indeed, by the time of the transfers she was financially and practically *dependent* on them and they had exploited that to the full. Even leaving aside my findings of fraudulent misrepresentation, she had 'misunderstood' the *need* for the transaction, if not its *nature* as well. Mr Graham also placed weight here on Mr Whiston's role. However, as I said at paragraphs 394-397 on dealing with the issue of Mr Whsiton's 'advice' in relation to 'actual undue influence',

whilst he did not fall into the trap of not advising the Claimant to get independent legal advice as in *Smith*, he could not constitute that independent legal advice and in fact the Claimant did not get that independent legal advice, I found because Mrs Krishan literally and figuratively 'dictated' the Claimant's response. Whilst I note from the summary in *Smith* and its reference to *Turkey* that independent legal advice is not a minimum requirement, given Mr Whiston's misunderstanding of the nature of the transactions, it seems to me the absence of independent legal advice is on the particular facts of this case fatal to rebutting the presumption. Even leaving aside my findings on the 'actual undue influence' argument, I would also uphold the 'presumed undue influence' argument on the PSA terms.

413. Therefore, yet again the '15th March letter' and 'transfer terms' point is academic, but again the same result is even more clear. It cried out for an explanation in the sense that the Claimant was signing away valuable assets for no money up front (save modest maintenance) and only a guarantee of the value on sale (if sold for more than £300,000) with the chance of profit not in one's own control. The evidence to rebut that extremely strong presumption of undue influence would need to be compelling (of course still on the balance of probabilities). In this case on my findings of fact even leaving aside the fraudulent misrepresentations and the conclusions on actual undue influence, the evidence gets nowhere near that.

414. I turn finally to causation. Whilst Mr Perring suggests that for actual undue influence a lower 'one factor' (or 'an operative cause') is enough, there I applied the stricter 'but for' test. That clearly does apply to 'presumed undue influence'. On my findings of fact, it is clear that even in the absence of the fraudulent misrepresentations and my conclusions on actual undue influence, given the extent to which this transaction (even on the PSA-Plus terms) called out for an explanation and indeed I find were manifestly disadvantageous to the Claimant, it follows that but for the undue influence, she would not have transferred the Properties to Gracefield – I will find below Bobby would have stayed in control.

415. So, the Krishans are responsible for procuring the transfers of the Properties by undue influence. It was not suggested Gracefield were in a different position. As Lord Millett said in *Agnew v Lansforsakringsbolagens* [2001] 1 AC 223 (HL) at pg.265, undue influence is not a liability on a particular party, it simply gives the party whose consent was procured by it the right to set the transaction aside. In any event, the Krishans were Gracefield's directors and agents and it is attributed with their conduct. Alternatively, it was enriched at the Claimant's expense and that enrichment was unjust, whether strictly pleaded in those terms: see [41]-[44] of *Hart* cited above. I address remedies later, but there will be issues concerning:

    415.1 The appropriate date for valuation of the Properties: 2006, 2011/14 or 2022;

    415.2 What credits and expenses incurred by the Krishans can be 'offset';

    415.3 How the award for undue influence relates to the other claims.

Resulting Trust

416. Speaking of other claims, I turn to resulting trust. *If* such a trust arose when the Claimant transferred the Properties to Gracefield in March/April 2006, as I discuss below at paras. 586-589, it may give a remedy against Gracefield and indirectly against the Krishans. It was as a remedy that resulting trust was argued in

Westdeutschebank v Islington LBC [1996] AC 669 (HL). Indeed, despite the extensive authorities cited on every other topic, *Westdeutschebank*, Chapter 8 of *Lewin on Trusts* (2020) (20th Ed), together with another case I raised *Enal v Singh* [2023] 2 P&CR 5 (PC), were the only authorities on resulting trust canvassed in submissions. This is because the Krishans argue that it is not pleaded. However, to deal with that issue and whether there was a resulting trust, I will need to refer other authorities to explain my analysis. So, I first address the principles, then the pleading point, then my conclusion. Yet, my conclusion on resulting trust turns on a very simple finding of fact which I have already made (primarily at paragraph 200) that due to what the Krishans told her, the Claimant believed the transfer to Gracefield was only a formality and intended that beneficially the Properties would still belong to her.

Principles of Resulting (and 'Implied') Trusts

417. As I noted at paragraph 34.5 above, the 2021 Consolidated Particulars of Claim ('CAPOC') briefly pleads (not drafted by Mr Halkerston) for the Claimant:

> "[B]y reason of the…Agreement, Gracefield held the Properties pursuant to an express, alternatively, an implied trust for [her or TTC's] benefit …."

Since the pleading of resulting trust depends on the meaning of 'implied trust', I must go back to first principles, by citation from *Lewin* at para.8-002:

> "A general distinction might be drawn between express, resulting and constructive trusts on the basis that express trusts…are founded on the *express or inferred intention* of the settlor, resulting trusts are founded on the *presumed (but rebuttable) intention* of the transferor or purchaser of property, and constructive trusts are imposed on a person who holds the title to property *against his intention*. But the proposition that a resulting trust is founded on a presumed intention does not mean that where a trust is expressly intended to take effect it can do so only as an express trust. A resulting trust can arise in circumstances where an express trust for a settlor founded on his express intention would have been created but for a failure to comply with the formal requirements of section 53(1) of the Law of Property Act 1925. But the resulting trust is still founded on the presumed intention of the settlor. It is created, not because it was intended by the settlor, but by operation of law because the settlor is presumed to have intended not to make a gift, his actual intention being consistent with that..."

The expression 'implied trust' is statutory e.g. in s.117(1)(xii) Settled Land Act 1925 'trust' includes an implied or constructive trust. *Lewin* states at para.8-004:

> "The Court [in *Re Llanover Estates* [1926] 1 Ch 626] held that the expression covers resulting trusts, rejecting the argument in this context an 'implied trust' is merely an inferred or precatory ['future'] trust."

418. The centuries-old distinction in the three main types of trust appears elsewhere in the 1925 property legislation including s.53 Law of Property Act 1925 (LPA):

> "(1)…(a) no interest in land can be created or disposed of except by writing …; (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will; (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same...

> (2) This section does not affect the creation or operation of resulting, implied or constructive trusts." (my underline)

419. Therefore, whilst an express declaration of trust in land must be in writing, there is no such requirement for 'resulting, implied or constructive trusts'. However, since s.53 LPA should be construed *in pari materia* with the rest of the 1925 legislation, despite the differentiation in s.53(2) LPA, 'implied trusts' also include resulting trusts, if not necessarily constructive trusts. In *Westdeutschebank* at pg.705C-D, Lord Browne-Wilkinson also differentiated 'constructive trusts' imposed by law for unconscionable conduct from 'express or implied trusts' based on 'purposes for which the property was vested in the trustee', including within the latter at 705E-G 'resulting trusts' (my underline):

> "Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience… There are cases where property has been put into the name of X without X's knowledge but in circumstances where no gift to X was intended. It has been held that such property is recoverable under a resulting trust… These cases are explicable on the ground that, by the time action was brought, X or his successors in title have become aware of the facts which gave rise to a resulting trust; his conscience was affected as from the time of such discovery and thereafter he held on a resulting trust..."

420. Resulting trusts have rather fallen out of fashion since *Westdeutschebank,* especially as soon after common intention constructive trusts were overhauled in *Stack v Dowden* [2007] 2 AC 432 (HL). In *Gany v Khan* [2018] UKPC 21 at [17], Lord Briggs even said presumed resulting trusts were now 'a last resort'. Nevertheless, as Lord Kerr said in *Marr v Collie* [2017] 3 WLR 1507 (PC) at [54]

> "[Where joint owners] have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the answer."

Indeed, *Enal* is a contemporary instance of such a resulting trust analysis, though it was held on the facts it did not arise. In particular, at [35], Sir Nicholas Patten observed the modern extension of the common intention constructive trust after *Stack* did not affect the older principles and presumptions of resulting trusts, at least outside the context of domestic property as in *Stack* itself.

421. At this point, I return to the full (but Delphic) wording of para.50 CAPOC:

> "….[I]t is averred that by reason of the terms of the Agreement, Gracefield held the Properties pursuant to an express, alternatively, an implied trust for the benefit of the Claimant, alternatively TTC…."

Therefore, whilst Mr Graham and Mr Perring's initial trial skeleton, referring to *Lewin* para 8-004, suggested that 'implied trust' could either mean a 'precatory' (i.e. future) express trust, a constructive trust or a resulting trust, for the reasons discussed,

whilst 'implied trusts' include 'resulting trusts' as well as precatory express trusts (*Re Llanover*), it is more questionable whether 'implied trusts' include constructive trusts. In any event, neither express trust (precatory or not) nor constructive trust are pursued by the Claimant. There cannot be an express trust because it was not in writing – s.53(1) LPA. The problem with 'common intention constructive trust' is similar to the problem with the contract argument (which unlike constructive trust also faced the difficulty that it was not in writing – s.2 Law of Property (Miscellaneous Provisions) Act 1989). On the Claimant's own case - and now my findings of fact - there was no such 'common intention' between her and the Krishans that Gracefield would hold the Properties for her benefit (still less TTC). On the contrary, I have now found at paragraph 344 above their statements to that effect were (part of) a fraudulent misrepresentation by the Krishans to the Claimant. Even if I am wrong about that conclusion, I found as a fact at paragraph 200 (re-quoted later in this 'chapter') that the Krishans reassured the Claimant that the Properties would be transferred to Gracefield to undertake the developments and she had a 50% shareholding, but this was only a formality and beneficially the Properties would still belong to her, *that she believed*. In short, even though the Krishans intended Gracefield to have beneficial ownership, the Claimant intended to retain it. That 'mismatch' is fatal to a contract or common intention constructive trust, but consistent with a resulting trust, which primarily focusses on the intention of transferor (and need not be in writing: s.53(2) LPA). This is clear from the principles of resulting trusts specifically which I now analyse.

422. Whilst a resulting trust arises by operation of law like a constructive trust, it focusses on the prior owner's (here, transferor's) *intention* like an express trust. A resulting trust operates through a presumption in two types of case, both discussed by Lord Browne-Wilkinson in *Westdeutschebank* at pg.708A-D:

> *"*Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption,* which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer…*Vandervell v. Inland Revenue Commissioners* [1967] 2 A.C. 291, 312 et seq.; *In re Vandervell's Trusts (No. 2)* [1974] Ch. 269, 288 et seq. (B) Where A transfers property to B *on express trusts,* but the trusts declared do not exhaust the whole beneficial interest: ibid, and *Quistclose Investments Ltd. v. Rolls Razor Ltd (in liquid.)* [1970] A.C. 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. Megarry J. in *In re Vandervell's Trusts (No. 2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as bona vacantia: see *In re West Sussex*

> *Constabulary's Widows, Children and Benevolent (1930) Fund Trusts* [1971] Ch. 1."

Lord Browne-Wilkinson in *Westdeutschebank* went on to reject the extension of those two types of presumed resulting trust to a third - 'failure of consideration'.

423. I will turn in a moment to 'Type A' which is said to be the relevant category here, but first consider 'Type B' as it was mentioned in the Purle Judgment itself. As Lord Browne-Wilkinson explained in *Westdeutschebank,* 'Type B' resulting trusts are express trusts which do not declare and exhaust the whole beneficial interest. However, as resulting trusts, they need not be in writing under s.53(2) LPA. In *Quistclose Investments Ltd. v. Rolls Razor Ltd* [1970] A.C. 567 (HL), a company was loaned money on the strict condition it was not at its free disposal, but had to be used for a particular purpose (to pay a dividend). However, the company went into liquidation and the dividend could not be paid. At least as later explained by Lord Millett in *Twinsectra v Yardley* [2002] 2 AC 164 (HL), the Lords in *Quistclose* treated the limitation on use of the money as an express trust, but it did not provide for where that purpose failed, so did not exhaust the beneficial interest, so it gave rise to a resulting trust for the loan. However, this could not avail the bank in *Westdeutschebank* itself, since Lord Browne-Wilkinson held at pg.608E that by contrast with *Quistclose*, that transaction did not create such an express trust of purpose in the first place. Another example of a 'Type B' resulting trust is *Ali v Dinc* [2022] EWCA Civ 34, where the voluntary transfer of two houses from X to Y so that Y could raise funds to pay back X gave rise to a Type B '*Quistclose*' resulting trust of them when Y dissipated the funds.

424. That leads me to 'Type A' resulting trusts, which as *Ali v Dinc* shows, do not arise in every voluntary transfer (also clear from *Gany*, to which I return). As Lord Browne-Wilkinson said in *Westdeutschebank*, 'Type A' resulting trusts arise either when someone either purchases property in another's name or makes a 'voluntary payment or transfer' of it. In *Westdeutschebank* itself, a bank argued as a 'swap loan' to a council was void in public law, it was a voluntary payment so a resulting trust arose. Lord Browne-Wilkinson rejected this too at pg.708F:

> "As to type (A), any presumption of resulting trust is rebutted since [the] payment [was made] with the intention the moneys....should become the absolute property of the...authority. [They]…. were under misapprehension that the payment was made in pursuance of a valid contract. But that does not alter the actual intentions of the parties at the date the payment was made or the moneys were mixed in the bank account….[T]the presumption of resulting trust is rebutted by evidence of any intention inconsistent with such a trust, not only by evidence of an intention to make a gift."

425. This inter-relationship between what is a 'gift' and what is a 'voluntary transfer' raises the status of a transfer declaring there is a 'price' where the parties do not intend money to change hands. This arose in *Chen v Ng* [2017] UKPC 27, where Mr Ng transferred shares to his (intimate and business) partner Ms Chen under a transfer which declared they had been 'sold' for $40,000, where they both did not intend any payment for various reasons. The trial judge held that Mr Ng had transferred the shares for valuable consideration consistent with the documents, rejecting his explanation of them for two reasons, neither canvassed in cross-examination. One involved a document to which Mr Ng had not been taken and the other rejected part of Mr Ng's statement which had not been challenged. Unsurprisingly, the Court of Appeal allowed the appeal, but then it

found a 'voluntary transfer' resulting trust. Reversing that Court and ordering a retrial, the Privy Council at [36] rejected the argument that the terms of the documents foreclosed a resulting trust (since estoppel by deed which could potentially do so was not applicable) and said the real issue that needed to be decided – at a retrial - was whether the transaction was (i) a genuine sale where the money was outstanding, as the judge had found (albeit unfairly); (ii) a resulting trust as the Court of Appeal had found (albeit wrongly as they failed to consider); (iii) a gift.

426. A good example of a 'Type A' 'purchase in another's name' case is *Enal*. As noted above, a (grand)father bought properties in his son's name, but the son also granted him a power of attorney over it, which having not used it for years the (grand)father then invoked to sell one at an undervalue to his daughter and grandson (who in turn had a power of attorney over his grandfather's property). As discussed, the Privy Council confirmed that transfer was procured by undue influence given the 'relationship of trust and confidence' with the grandson with his power of attorney. However, the Privy Council only got to that point by first confirming the son beneficially owned the property, with no resulting trust from the (grand)father purchasing it in the son's name. Despite the *(grand)father*'s power of attorney over the *son*'s property, the presumption of resulting trust was rebutted by what Lord Browne-Wilkinson in *Westdeutschebank* called the 'counter-presumption of advancement' of a parent to even an adult child. Sir Nicholas Patten discussed the roles of these different presumptions at [34]-[35]:

> "34 Where a property has been purchased and conveyed into the name of someone other than the person who has paid the purchase price the traditional starting point in equity has been to presume that the property is held on trust by the named transferee in favour of the person who has paid for it. Equity is said to lean against a gift unless there is evidence of surrounding and other circumstances which indicates that this was what the payer intended. In the absence of evidence of an agreement or declaration to that effect at the time of the transfer the ascertainment of the payer's true intentions will be largely a matter of drawing inferences from the objective facts relevant to the transaction.
>
> 35 [Where] the property has been transferred into the name of a child of the payer….there is a presumption of advancement in favour of the child which, unless rebutted, will displace the presumption of a resulting trust. Although much criticised as based on outdated assumptions…the presumption of advancement continues to form a relevant part of the court's inquiry as to the intended legal consequences of the transaction….."

427. In *Enal* (as noted above at paragraphs 84 and 322), Sir Nicholas Patten at [37] said that later evidence could be relevant to intention, endorsing this guidance:

> "In these cases equity searches for the subjective intention of the transferor. It…is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. But words or conduct more proximate to the transaction itself should be given the significance that they naturally bear as part of the overall picture. Where the transferee is an adult, the words or conduct of the transferor will carry more weight if the transferee is aware of them and makes no protest or challenge to them."

428. A good example of a 'voluntary transfer' Type A resulting trust referred to in *Westdeutschebank* and linked to the point in *Enal* about inferences is the Lords' decision in *Vandervell v IRC* [1967] 2 AC 291. The Lords found a resulting trust where a shareholder voluntarily transferred his shares to a third party but with an option (in his company) to buy back the shares. Lord Upjohn said at pg.312:

> "Where A transfers, or directs a trustee for him to transfer, the legal estate in property to B otherwise than for valuable consideration it is a question of the intention of A in making the transfer whether B was to take beneficially or on trust and, if the latter, on what trusts. If, as a matter of construction of the document transferring the legal estate, it is possible to discern A's intentions, that is an end of the matter... But…if the document is silent, then there is said to arise a resulting trust in favour of A. But this is only a presumption and is easily rebutted. All the relevant facts and circumstances can be considered in order to ascertain A's intentions with a view to rebutting this presumption."

So, in *Vandervell*, Lord Upjohn stressed deciding 'intention' was first a question of evidence, only then of presumption. Indeed, Lord Wilberforce added at pg.329:

> "There is no need, or room, as I see it, to invoke a presumption. The conclusion, on the facts found, is simply that the option was vested in the trustee company as a trustee on trusts, not defined at the time, possibly to be defined later. But the equitable, or beneficial interest, cannot remain in the air: the consequence in law must be that it remains in the settlor….. There is no need to consider some of the more refined intellectualities of the doctrine of resulting trust….."

Again, in *Gany*, Lord Briggs for the Privy Council referring to *Vandervell*, held when a settlor gratuitously transferred shares to a trust company which he ran, he could plainly be inferred to intend the shares to form part of the trust fund, without needing to rely on a presumption (not technically of resulting trust).

429. In *Ali v Khan* [2002] EWCA Civ 974, whilst *Vandervell* was not cited, in my judgment, essentially the same approach was taken – and in a case where there was a sale at an undervalue from father to adult child, not a gift. The judge found any 'Type A' or 'Type B' presumption of resulting trust was rebutted by the presumption of advancement and s.60(3) LPA, which provided that *'in a voluntary conveyance a resulting trust was not to be implied merely because the property is not expressed to be conveyed for the use or benefit of the grantee'*. (That provision was later held at first instance in *Ali v Dinc,* upheld on appeal, 'merely' to be a 1925 abolition of an old conveyancing technicality). However, despite proceeding on the basis there was no presumption of resulting trust, the Vice-Chancellor in *Ali v Khan* held at [28] there was direct evidence of intention to retain the beneficial interest which meant the father still owned it beneficially:

> "The judge's error…was to conclude the beneficial interest was transferred to [the daughters] in the absence of any common intention as to when and to whom they should dispose of it in the future. He should have concluded, in the light of all the other evidence he accepted, that the absence of any such common intention as to the future supported the evidence of the Father he did not intend to transfer the beneficial interest with the consequential inference that it remained with him. In that event the Father was and is entitled to direct [them] when and to whom to transfer the legal interest."

430. Whilst *Gany* concerned a slightly different point, there was no presumption of resulting trust in *Vandervell* (where Lord Upjohn doubted it applied to options and Lord Wilberforce proceeded without it), albeit that it was a 'voluntary transfer' case. Nor did a presumption of resulting trust arise in *Khan* when the transaction was simply at an undervalue rather than truly voluntary. Yet in these cases, a resulting trust was found to arise not by presumption, but by a positive finding on the evidence of no intention to transfer any beneficial interest.

(How) Is Resulting Trust Pleaded ?

431. As I set out in the procedural history at the start of this judgment (paragraphs 17), in the Original Proceedings, paragraphs 2-8 on the Particulars of Claim pleaded a claim in trust on the basis that the Claimant held the Properties on trust for TTC and managed the Properties on its behalf in the sense that she was responsible for maintaining them and paying all relevant outgoings. Then it was pleaded that the Claimant agreed with the Krishans the following trust:

> "2. At all material times, the Claimant held the Properties on trust for TTC… and managed the properties on behalf of TTC.
>
> 3. The Claimant was responsible for maintaining the Properties and paying all relevant outgoings relating to them,…
>
> 4. In or around May 2005, the [Krishans] offered to take over the management of the Properties to help the Claimant:
>
> 4.1 [The Krishans incorporated Gracefield] for the purposes of holding the Properties on trust for the Claimant or alternatively TTC; and managing the Properties.
>
> 4.2 It was agreed between the parties that legal title to the Properties would be transferred to [Gracefield] for administrative convenience and the management of the Properties only.
>
> 4.3 It was agreed between the parties legal title to the Properties would be transferred back…to the Claimant on her demand.
>
> 7. The Properties were transferred to [Gracefield – Shops on 31st March 2006 and Cinema and Co-Op on 28th April 2006]:
>
> 7.1 By the Claimant with the intention that equitable estates in the Properties be held on trust for her, further or alternatively TTC.
>
> 7.2 For the particular purpose known to and intended by the parties.
>
> 7.3 In accordance with the agreement set out in paragraph 4 above;
>
> 7.4 For no consideration;
>
> 7.5. Further or alternatively for consideration that has wholly failed.
>
> 8. In the premises [Gracefield] holds the Properties on trust for the Claimant absolutely."
>
> A declaration was sought in the same effect.

432. The Defence (paragraphs 3-9) essentially denied the trust claim set out in the Particulars and pleaded the Claimant not TTC had legal and beneficial ownership of the Properties but then transferred both to Gracefield. Therefore, the Claimant's pleaded 'trust agreement' was denied and to the contrary, the Defendant pleaded (paragraph 28) a very different agreement for transfer. It was pleaded the Claimant would transfer the

Properties for £100,000 with a deferred consideration on sale of £100,000 (not £200,000 as in the PSA) and further profits split equally, part-evidenced by the PSA, which it was pleaded each party signed.

433. I obviously will return later to what is said about signature of the PSA when addressing conspiracy. However, for the moment, the terms of transaction in paragraph 28 of the Defence were answered in the Claimant's Reply in the following terms which unambiguously pleaded a resulting trust:

> "The Claimant has received no consideration for the transfer of the Properties. In addition to the reasons set out in the Particulars of Claim, the First Defendant would hold the Properties on resulting trust for the Claimant by operation of law owing to this gratuitous transfer."

Mr Perring accepted this clearly pleaded a Type A resulting trust, but argued it was impermissible to raise it in the Reply as opposed to by amending the Particulars of Claim giving the Defendants a chance to respond. However, *Bullen, Leake and Jacobs' Precedents and Pleading*s (2022) 19th Ed Supp para.1-38 indicates whilst that is true for new *causes of actio*n, a Reply can allege new facts or points in answer to the Defence and indeed should do so if it may cause difficulty if not mentioned. In my judgment, all the Reply did here was to put an 'equitable label' on the relevant pleaded fact in the Particulars at para.7.4 that: *"The Properties were transferred to [Gracefield] for no consideration"*.

434. Indeed, even if I am wrong and a Type A resulting trust was not pleaded in the Original Particulars, a Type B resulting trust was clearly pleaded at paras.7.1-7.2

> "7. The Properties were transferred to [Gracefield]…7.1 By the Claimant with the intention that equitable estates in the Properties be held on trust for her, further or alternatively TTC….7.2 For the particular purpose known to and intended by the parties."

The precedent pleadings for resulting trust in *Bullen, Leake and Jacob* at paras. 91-Z3 and 91-Z5 do not plead the expression 'resulting trust', but simply plead the facts necessary to establish it. So did in this case the Original Particulars plead a Type B resulting trust – as well as a Type A one. But these are simply two forms of the same cause of action, not a new cause of action, by analogy to actual and presumed undue influence, held not to require separate pleading in *Cowey*.

435. In any event, in the Purle Judgment itself, HHJ Purle QC at [2] clearly dealt with a Type B resulting trust argument, reciting that the Claimant 'suggests there has been a failure of purpose giving rise to a resulting trust' and concluded at [33]:

> "It also seems to me to follow from my findings [of fact] that there was a beneficial transfer and that Gracefield was not intended to be other than beneficial owner, albeit subject to an obligation to dispose of the proceeds and profits in a particular way. Nor is this a case where there has been any failure of purpose so as to give rise to a constructive or resulting trust…."

In my judgment, it was entirely clear that resulting trust was clearly and openly raised in the Original Proceedings, but clearly dismissed in the Purle Judgment at least in relation to 'Type B', albeit HHJ Purle QC did not deal with 'Type A'.

436. However, the Gasztowicz Judgment's finding that the Purle Judgment was produced by fraud meant that it was set aside and 'of no further relevance [as a] judgment', as Lord Sumption said in the Supreme Court in *Takhar* at [61], analysed above at paragraphs 50-53. The consequence of setting-aside a judgment was discussed by Grant and Mumford in *Civil Fraud* at paras. 38-029-30:

> '[T]he setting aside of the judgment (and consequential orders)…will in turn pave the way for a new trial on the true facts. There will be no need to issue a new claim form: the new trial will be within the old proceedings which will be automatically revived by the setting aside of the previous judgment and all orders flowing from it…'

Indeed, that was essentially the approach to the costs order made in the Original Proceedings in favour of the Defendants Mr Gasztowicz QC at [16]:

> "The costs order has been set aside and what follows from that is that the parties fall to be restored to the position they were in had this order not been made. That includes the defendants repaying the monies they were paid…"

Therefore, following the Gasztowicz Judgment, the Claimant's claims in the Original Proceedings, including for resulting trust as I have said, revived. If they had proceeded to trial as they were, there would have been no pleading point with the resulting trust claim, in relation to Type B or indeed Type A resulting trust.

437. The re-opened Original Proceedings were then consolidated with the new proceedings alleging deceit and conspiracy which had been issued on 5th March 2015. As I discussed at paragraph 33 above, that consolidation order was made by DJ Malek on 3rd September 2021 but its effect was not to 'relate back' the limitation periods on the deceit and conspiracy claim to the Original Proceedings. Therefore, on his order for consolidation, the present proceedings included the revived 'Original Proceedings' which in turn included pleadings of 'Type A' and 'Type B' resulting trust, as I have said. Therefore, the real pleading point here is the 'Delphic' way in which para.50 CAPOC *then* set out the trust claims:

> "Further or alternatively, and without prejudice to the relief sought in the foregoing, it is averred that by reason of the terms of the Agreement, Gracefield held the Properties pursuant to an express, alternatively, an implied trust for the benefit of the Claimant, alternatively TTC."

The terms of the Agreement' are pleaded at para.15 CAPOC:

> "The material terms of the parties' oral agreement ('the Agreement') were:
>
> a. That the Krishans would procure the incorporation of a new company to which the Properties would be transferred;
> b. The new company would hold the Properties on trust for Mrs Takhar, alternatively for Gracefield;
> c. That such transfer was to facilitate the Krishans assisting Mrs Takhar in dealing with the threat of a compulsory purchase order and to render it administratively convenient for the Krishans to manage and refurbish the Properties on Mrs Takhar's behalf;
> d. That, upon demand by Mrs Talkhar, the Properties would be transferred back into her name."

438. Para.50 CAPOC would win no pleading prizes. However, resulting trust is pleaded as an 'implied trust' (as explained in *Lewin* and *Westdeutschebank*) that entails a resulting trust, if not a constructive trust. That being the case, by analogy to *Cowey*, either Type A or Type B resulting trust is open and certainly there was nothing that *abandoned* the previous clear pleading in the Original Proceedings of either Type A or Type B resulting trust. Therefore, resulting trust was in the scope of the pleadings, even if as an alternative case (see *Ali v Dinc)*. Even if I am wrong about that, the pleading of 'by reason of the terms of the Agreement, Gracefield held the Properties pursuant to an… implied trust for the benefit of the Claimant' links resulting trust to (what the Claimant believed was) 'agreement' the transfers were for the Krishans to manage and refurbish the Properties on her behalf, similar to the fraudulent misrepresentation I have upheld at paragraph 344 above. Even if I was wrong about that, irrespective of the Krishans' intention, given what the Claimant thought the agreement was, she intended to retain her beneficial ownership and as transferor, *her* intention matters – *Westdeutschebank*.

439. Moreover, whilst Mr Perring and Mr Graham point to the absence of reference in Mr Halkerston's trial skeleton argument to resulting trust, he points to the fact theirs addressed it, albeit in legitimately complaining that the meaning of 'implied trust' was not entirely clear. Moreover, I specifically raised it right at the start of the trial and made it clear I was proceeding on that basis. Therefore, Gracefield and the Krishans knew the case they had to meet: see *Ali v Dinc* at [34]. I do not recall it being suggested then an amendment was required, but had it been I would have granted it. Given the history of the litigation it could not have come as a surprise to the Defendants and was essentially a formal amendment, not a new point of substance: *Ahmed v Ahmed* [2016] EWCA Civ 686. Indeed, it was dealt with in evidence and if I am wrong and an amendment is still required, I grant it – as it can be done in the judgment: *Charlesworth v Relay* [2000] 1 WLR 230. However, as Mr Graham pointed out in response to my draft judgment, resulting trust is only pleaded against Gracefield in respect of the sale proceeds (that are not disputed to have totalled £1,041,000). In the draft judgment, I posed the question whether since the proceeds of sale obtained by Gracefield were passed on to the Krishans, if Gracefield held the Properties and their proceeds on resulting trust, there may be a proprietary remedy against the Krishans. However, as Mr Graham pointed out, there is no such pleaded claim against the Krishans and so it cannot be deployed as a proprietary remedy against them. However, he did accept in argument at the remedies hearing that the proceeds could be followed through the giving of an equitable account, which I mention later.

Did Gracefield hold the Properties on resulting trust for the Claimant and/or TTC ?

440. I put the question this way because it was pleaded in the 2009 Particulars and indeed at para.50 CAPOC that Gracefield held the Properties on trust for the Claimant *or alternatively TTC*. HHJ Purle QC dismissed the latter at [10] of the Purle Judgment, describing it as a 'story emerging late in the day'. In fairness, it was clearly pleaded in the original Particulars at paragraph 2 that the Claimant held the Properties on trust for TTC, but *not that Gracefield did*. In any event, as I found as a fact at paragraphs 146-149 above, the Properties were all owned beneficially by Bill and TTC was a partnership from which he retired by 2000.

441. I reject the suggestion that the Claimant held it on trust for TTC (and in particular for Ian, whom the Claimant saw as a threat to the Properties, not their joint beneficial owner). It is true that as Bill transferred the Properties to the Claimant for no

consideration, she would hold them on resulting trust for Bill unless he intended them to be a gift. However, I find Bill did indeed intend them to be a gift to the Claimant to dissuade her from divorce (and to avoid any claim by Ian), so I find the Claimant held the Properties absolutely in law and equity. Indeed, that was also the conclusion in the Purle Judgment, which was an acceptance of the Defendants' own pleaded case. Whilst the Claimant may have *seen* the Properties as belonging to her and Bill as 'family properties', in law and equity, I find they belonged to her absolutely. What matters here is *Bill's intention* when transferring, which I find was an absolute gift, if not how the Claimant saw it.

442. Likewise, what really matters on resulting trust when *the Claimant* transferred the Properties to Gracefield is *her intention*. Just like in *Vandervell* and *Khan*, I can determine it without reference to 'presumption' on my finding of fact at paragraph 200 I reiterate. I found on the balance of probabilities the Krishans reassured the Claimant that, whilst the Properties would be transferred to Gracefield to undertake the developments and she had a 50% shareholding, this was only a formality and beneficially the Properties still belonged to her: *which she believed*:

> "I recall asking [the Krishans] what would happen to the Properties when they were transferred to the company. The[y] had been in the family for many years and I was anxious to make sure they stayed that way. So I needed to know..whatever the Krishans did with the[m], they would remain in my ownership. [They b]oth repeatedly assured me that the transfer of the Properties was only a formality and that of course they would still be mine."

I accepted the Claimant's evidence – that she intended 'Gracefield would manage the Properties 'on her behalf and for her benefit' – and its relevance to the fourth misrepresentation and to resulting trust, so it is open on the pleadings (*Dinc*):

442.1 The Claimant has been consistent throughout she believed the Properties would still belong to her after transfer to the company, which Mrs Krishan said was only for 'administrative convenience' so 'legal and above board'.

442.2 It fits very clearly what Mrs Krishan said in the June 2008 covert recording: *'Although we are handling it the property is yours'*. She said this shortly before saying *'We did say it was going to be 50/50 on everything we did'* and the Claimant saying *'Yes'*, which needs to be seen in that context. It was not 50/50 *ownership* but 50/50 on the *development,* albeit the Krishans' expenditure repaid from the Claimant's share of *rent*, not sale proceeds.

442.3 It also fits what Mrs Krishan said in a May 2008 covert recording: "*I have no vested interest in them, but I know you have because that's your life'*."

442.4 That strong attachment of the Claimant to her 'family properties' and her fear of Ian taking them is consistent with Mrs Krishan also saying in 2008: *'There is no way my sister is going to get caught up in the hands of [Ian]'* and persuading the Claimant the company would protect them from him.

442.5 It also fits the Claimant seeing the Properties as belonging to herself and Bill, as I said at paragraph 149: and so not agreeing to transfer until he did.

Indeed, as I went on to find at paragraph 346.3 above, which again I reiterate:

> "I found as a fact (at paragraphs 200-203, 208, 211-215, 218 and 221) that after the formal transfers of the Properties 'into Gracefield's name', the Claimant

> intended they would really still belong to her (and Bill). That is why she repeatedly sought assurance about it and did not agree until she had Bill's blessing; what she believed was being discussed with Mr Davies and SB; and why she was concerned about SB's letters but reassured by Mrs Krishan on 24th March 2006 that those letters were just 'paper figures' and 'hoops': effectively a tax or accounting exercise which she accepted as 'not a numbers person'. Even if I am wrong about that, the disclosure of 'profit share' on sale in SB's letter was not inconsistent with the Properties staying in the Claimant's beneficial ownership if in Gracefield's name until that sale, especially as the Claimant would get up to £300,000 of the proceeds *first*, the destination of the balance of the proceeds was not clear and on the face of it would go to Gracefield (see paragraph 229 above)."

Further, looking at later evidence of contemporary intention in 2006 (*Enal*), as I found at paragraphs 250-253, when the Claimant demanded the Krishans stop the sales in April 2008, they did; and at paragraph 122, in the last covert recording in June 2008, Mrs Krishan said *'although we are handling it, the property is yours'*.

443. My findings of fact establish that even if the Krishans did not genuinely 'agree' the transfers were for 'administrative convenience' to manage the Properties 'on her behalf and for her benefit' (whether or not fraudulently as I found at paragraph 344), the Claimant did genuinely believe it and on transfer of the Properties, she did not *intend* to transfer her beneficial interest. Therefore, a resulting trust arose. That is not based on a presumption, but a positive finding of fact, as in *Vandervell* and *Khan*. Unlike in *Chen*, it is based on the Claimant's evidence tested in cross-examination and like *Dinc*, open to me on the pleadings. I apologise none of those *cases* were raised in argument, but they simply underline that the conclusion is one of *fact*. So, it is unnecessary to fit it precisely within 'Type A' or 'Type B'.

444. However, if I am wrong about that, on my findings of fact, I conclude there was a 'Type A' resulting trust. The transfers were effectively gratuitous because no money changed hands (*Chen*). Even though the Claimant had a 'paper balance' on the director's loan account, the Claimant believed the transfer was a 'formality' with 'paper figures' and the Properties would still beneficially belong to her, which rebutted a gift. Far from arguing (as discussed in *Chen*) that the deed estopped the parties from denying there was 'payment', Mr Graham argued:

> "The transfer was subject to an agreement, the effect of which *obliged the parties to act as though the Claimant retained beneficial ownership*, in the sense that she would be entitled to the value of the Properties when they were sold, and then a 50% share of the profit." (my italics)

I disagree, but it shows even on the Defendants' case, there was no sale or gift. (Even if right, a resulting trust arose on the value at transfer and 50% of profits).

445. Even if I am wrong about that and only Type B resulting trust is pleaded, on my own findings of fact (or if they are wrong, on my analysis of that submission by Mr Graham), I would conclude there was a 'purpose resulting trust' as in *Quistclose* – indeed the claim HHJ Purle QC rejected on his own findings of fact, which unbeknownst to him were 'infected' by the forgery, to which I now turn.

Conspiracy: Pleading, Scope and Limitation

446. I turn now to my conclusions on the second 'case' of these 'two cases in one': the conspiracy claim. Whilst the law is complex, factually this claim is more straightforward than on undue influence and resulting trust on and I have already made all my findings of fact (but will summarise them for convenience and to save navigating this long judgment). Nevertheless, in the light of that legal complexity, I have split this claim into two 'chapters' of my judgment. The next – possibly of wider interest - is the merits of the claim and in particular the third key question I identified at the start: can the same fraud in procuring a judgment enable it to be set aside *and* amount to the tort of 'unlawful means conspiracy' ?

447. In the present 'chapter', I really prepare the ground for that question by dealing reasonably briefly with the factual and practical aspects of this particular unlawful means conspiracy claim: (i) whether it is sufficiently pleaded and its 'scope' in the sense of what period and conduct it encompasses; (ii) whether it was sufficiently 'put' to the Krishans in cross-examination; (iii) a summary of the key findings of fact I have made relevant to the conspiracy claim; (iv) when primary limitation for that conspiracy claim started running under s.2 Limitation Act 1980 ('LA'); and finally (v) whether (if needs be) that time was deferred under s.32 LA. Whilst the latter two questions originally occupied a separate skeleton on limitation by Mr Perring and Mr Graham prior to the trial, Mr Halkerston's confirmation the conspiracy claim has narrowed in scope has removed much of the complexity on limitation and so I can deal with those (relatively) briefly.

448. Nevertheless, before turning to those five issues in this 'chapter', whilst I deal with the law of conspiracy in much more detail in the next, it may help to start with the definition of the two different types of conspiracy from the Court of Appeal in *Kuwait Oil Tanker v Bader* [2000] 2 All ER (Comm) 271 [107]-[108], which they termed 'lawful means conspiracy' and 'unlawful means conspiracy':

> "It is common ground that there are two types of actionable conspiracy, conspiracy to injure by lawful means and conspiracy to injure by unlawful means. The first is sometimes described simply as a conspiracy to injure and the second as a conspiracy to use unlawful means (see eg *Clerk and Lindsell on Torts* (17th edn, 1995) pp 1267–1268, paras 23–76). In our view they are both conspiracies to injure and their ingredients are the same, with one crucial difference. In both cases there must be conspiracy to injure the claimant, but in the first case (in which the means employed would otherwise be lawful) the predominant purpose of the conspiracy must be to injure the claimant, whereas in the second case, although the defendant must intend to injure the claimant, injury to the claimant need not be his predominant purpose. We shall treat them as different torts, although, as it seems to us, they are better regarded as species of the same tort. It matters not. For present purposes we would define them as follows:
>
> (1) A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant.
>
> (2) A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another

person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so.

In this case, only the latter 'unlawful means conspiracy' is pursued.

449. Whilst Mr Perring made legal submissions on limitation and merits of conspiracy which I consider later, Mr Graham focussed his factual submissions on the various factual points comprising the conspiracy (which I have already addressed in making the relevant findings of fact I summarise below), but also the extent to which conspiracy was properly pleaded and properly 'put', which I address first. Indeed, I address pleading in detail as the pleaded 'scope' of the conspiracy in my judgment affects what had to be 'put', relevant factual findings and limitation.

Has unlawful means conspiracy been adequately pleaded ?

450. Just like the rules on pleading and proving fraud which I summarised above at paragraphs 82-84 and 331, conspiracy must be clearly proved and clearly pleaded: *Jarman v Barget* [1977] FSR 260 at 267-8. Mr Perring referred me to the excellent chapter on conspiracy in '*Civil Fraud*' (1st Ed, 1st Supp, 2022) by Thomas Grant KC and David Mumford KC, that states on pleading at paras. 2-138-141:

> "The claimant bears the burden of pleading and proving all elements of the cause of action in conspiracy. An allegation of conspiracy is a serious one. Accordingly, the standard of proof (though it remains the balance of probability) is a high one, commensurate with the seriousness of the allegation. A conspiracy claim must be clearly pleaded and clearly proved with convincing evidence. Dishonesty is not, strictly speaking, an element of the cause of action in conspiracy….However, for practical purposes most conspiracy claims involve an allegation of dishonesty, even if no fraud as such is alleged… It is accordingly clear…that, for practical purposes, an allegation of conspiracy engages the same professional issues as to what allegations can properly be made and how they must be pleaded as any other claim in which dishonesty is an element of the cause of action."

This was reaffirmed in *Lakatamia Shipping v Su* [2021] EWHC 1907 (Comm) by Bryan J at [40]-[41] (with the citations in his own quote omitted):

> "Although most of the authorities address the applicable principles in the context of pleading and proving fraud and associated dishonesty, aspects of the applicable principles will be of relevance when allegations of serious wrongdoing are made more generally, even if there is no requirement to plead or prove fraud or dishonesty, as such, as an element of the cause of action (such as in unlawful means conspiracy), and even though the strictures applicable to a plea of fraud or dishonesty are not automatically triggered. In this regard I was referred to *Ivy Technology v Mr Barry Martin & Others* [2019] EWHC 2510 (Comm)…..at [12] by Henshaw J:
>
> > "Conspiracy must be pleaded to a high standard, particularly where allegations include dishonesty: i) Allegations of conspiracy to injure 'must be clearly pleaded and clearly proved by convincing evidence' ii) The more serious the allegations made, the more important it is for the case to be set out clearly and with adequate particulars…….. iii) Unlawful means conspiracy is a grave allegation, which ought not to be lightly made, and like fraud must be clearly pleaded and requires a high standard of proof…

> iv) Where a conspiracy claim alleges dishonesty, 'all the strictures that apply to pleading fraud" are directly engaged': it is necessary to plead all specific facts and circumstances supporting the inference of dishonesty by the defendants."

451. This last point on pleading and proving fraud reflects Bryan J's own approach in *Kekhman*, where at [42] he quoted Lord Millett's analysis at [185]-[186] of *Three Rivers*, partly quoted at paragraph 331 above, but which I now quote in full:

> "185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal….
>
> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

But as also quoted at paragraph 331 above, Vos C said in *Arkhangelsky* at [42]:

> "[When Lord Millett] said it was not open to the court to infer dishonesty from facts which have been pleaded but are consistent with honesty, he was not laying down a general rule that can affect a case like this where there were multiple allegations founding an inference of dishonesty, many of which are themselves allegations of dishonesty that have been proven."

Moreover, in *Su*, Bryan J added this observation on pleading at [47]:

> "[A]n important aspect of the role of statements of case is to enable the other party to know what case it has to meet….[W]hether particulars of claim do so can often be tested by examining what a defendant pleads back to the particulars of claim and what that reveals as to the defendant's understanding of the case being advanced against it…."

452. One issue that Mr Perring and Mr Graham raised on the pleading of conspiracy in this case was the important distinction between the pleading of single conspiracies and multiple conspiracies within a single case explained by the learned editors of *Civil Fraud* at para 2-035-037:

> "A series of acts may be carried out pursuant to a single conspiracy. [Or] those acts may be carried out pursuant to separate conspiracies. There may be an overarching conspiracy and sub-conspiracies, with varying parties to each….In some cases, the issue will be a dry analytical one with no practical consequences

> (for example, if the same group of defendants had the same involvement in all the same acts carried out over a period). In other cases, though, a finding that there were separate conspiracies may allow some defendants to escape or limit their liability if they are not held to have been party to a single over-arching conspiracy……The point is also capable of having practical importance in the context of how the….claim is pleaded. In *AG of Zambia* [*v Meer Care* [2007] EWHC 902 (Ch)], only one overarching conspiracy had been pleaded. This was not held to preclude a lesser finding of liability based on sub-conspiracies, but it appears the defendants did not contend that it should have done. And there are examples going the other way eg *Colliers CRE Plc v Pandya* [2009] EWHC 211 (QB) in which HHJ Seymour QC held that the claimant's decision to limit its pleading to a single conspiracy precluded a finding that a particular corporate defendant was party to it, since it was not party to the initial agreement. A claimant who wishes to preserve the possibility of presenting its claim according to these alternative analyses would be well advised to ensure the alternatives are each pleaded."

453. In *Pandaya*, HHJ Seymour QC found the first defendant employee of the claimant company, at the behest of her partner the third defendant, had dishonestly created false invoices on the claimant's accounting system to enable payments to themselves via the fourth defendant, fifth defendant and the second defendant company set up between the first and third defendants. The third defendant was liable for inducement of breach of contract and unlawful means conspiracy with the first defendant; while the second, fourth and fifth defendants were liable in unjust enrichment, but not for unlawful means conspiracy. The fourth and fifth defendants were conduits for dishonest payments but not parties to the original conspiracy. Of the second defendant company, HHJ Seymour QC said at [108]:

> "The position of [the second defendant company] was somewhat more complicated. As it was, on the evidence, the creature of [the first and third defendants], it knew what they knew. However, they only became respectively the company secretary and director of [it] on April 2006 and the earliest cheque drawn payable to [the second defendant company] was [in] September 2006 in the sum of £2,169.19. The chronology thus demonstrated that [the second defendant company] could not have been a party to the [pre-April 2006] initial agreement between [the first and third defendants]. It may well be appropriate to conclude that [the first, second and third defendants] made an agreement to cause harm to [the claimant] by unlawful means at a date after the initial conspiracy – probably at about the time cheques ceased to be drawn payable to [the fifth defendant] and started to be drawn payable to [the second defendant], so in the autumn of 2006. However, no such second conspiracy was pleaded on behalf of [the claimant] and, even if it had been, it does not appear that, in practical terms, there would have been any benefit to [the claimant], for the sums for which [it] would have been liable would almost certainly have been those for which I have found [it] was liable as money had and received."

454. Quite aside from the point that conspiracy was academic in *Pandaya*, as the learned editors of *Civil Fraud* point out when citing it at paragraph 2-037, the suggestion that a party cannot join an existing conspiracy is not correct in law, the real principle is that they cannot be *liable* for damage caused *before they join*, as they observe at paragraph 2-127 of *Civil Fraud*:

> "It is not necessary for all parties to a conspiracy to have joined the conspiracy at the same time in order for them to be liable. However…a defendant will have no liability for specific losses incurred or caused before he became a party to the conspiracy, or (it would logically follow) for acts which have already occurred and which may give rise to loss in the future."

That is clear from the authority cited for that proposition, which was in fact *Kuwait Oil* itself. As the Court explained at [11]-[43] and [134]-[136], it was a case of a pleaded single conspiracy over several years, sub-divided into four different 'schemes' in different periods with different unlawful means. The Court said at [136] that the judge had been correct to consider the agreement at the outset, then to consider whether each of the four schemes was carried out pursuant to the conspiracy and to conclude all defendants were parties to a single actionable conspiracy. However, the Judge was wrong to consider whether one of the defendants had 'left the conspiracy' when he *retired* as in fact the scope of the conspiracy for all the defendants was only ever to participate *whilst working*. However, they did not consider that undermined the pleading, adding that:

> "We do not consider there was any unfairness in the way that the judge approached the case or, indeed, in the way in which it was advanced at trial. The defendants had no doubt at each stage what case they had to meet."

455. In this case, as I have explained at paragraph 29 above, the original pleading of conspiracy in the Particulars of Claim for the Deceit/Conspiracy Proceedings in 2015 summarised the conspiracy at paragraph 4:

> "From the beginning of 2005, the First and Second Defendants wrongfully conspired, combined together and agreed that they would by unlawful means: (i) procure the transfer of the Properties to a new company (which in the first instance was to be jointly owned by the Claimant and Defendants and which was in the event incorporated under the name of Gracefield…; (ii) obtain control of Gracefield; (iii) extract all [or] most of the equity in the Properties for their own benefit; (iv) hide the misconduct by exaggerating costs of managing the Properties and by forging documents."

The Particulars then developed each of those four 'limbs' as I summarised at paragraph 29 (or 'schemes' as I might now call them). I need only discuss the fourth. It alleged following the Claimant issuing the Original Proceedings in October 2008, Dr and Mrs Krishan made further false representations and relied on forged documents in proceedings. Most importantly, the Krishans relied on a copy of the PSA having forged the Claimant's signature on it. However, it was also alleged the Defendants deliberately amended the 'Balber Takhar Account' and finally gave false evidence at the trial before HHJ Purle QC. To that extent the pleading resembled *Kuwait Oil*: one conspiracy, four different 'schemes'. However, the fourth 'scheme' was rather vague as it appeared to cover both conduct before and during the Original Proceedings, but that was not totally clear. Nevertheless, that gives some context to the later 2021 pleading of conspiracy.

456. As I noted above at paragraph 34.6, after the Gasztowicz Judgment set aside the Purle Judgment in 2020 and consolidation in 2021 of the re-opened Original Proceedings with the Deceit/Conspiracy Proceedings, the 2021 Consolidated Amended Particulars of Claim ('CAPOC') pleaded it this way at paras.41-42:

> "41. It is averred that the Krishans' actions referred to in paragraphs 9 to 40 above constituted an unlawful means conspiracy, in that the Krishans conspired and combined by unlawful means to: (a) procure the transfer of the Properties to Gracefield…(b) obtain control of Gracefield; (c) extract all, alternatively most, of the equity in the Properties for their own benefit; and (d) disguise their misconduct and mislead the Court by exaggerating the costs of managing the Properties by forging documents and thereby procuring judgment in the Original Claim in their favour.
>
> 42. The overt acts which amount to an unlawful means conspiracy were carried out by the Krishans with the intention of procuring, for their own benefit, [the Claimant's] interest in the Properties, thereby causing her loss, in that but for the Krishans' conspiracy, [she] would have: (a) retained ownership of the Properties; (b) further or alternatively, sold the Properties; (c) further, until…. the Properties were sold, received rental income…"

457. At paragraph 34.6 of this judgment, I described paragraph 41 CAPOC as 'not entirely clear' and noted the Defence had made the same point at paragraph 41(b):

> "The composite reference to paragraphs to paragraphs 9 to 40 is inadequate to plead a claim in conspiracy. Many of these paragraphs do not refer to actions of [the] Krishan[s] at all and the plea that such of those paragraphs that do comprise allegations of 'actions' 'constituted' a conspiracy is legally nonsensical. If Mrs Takhar wishes to allege that unlawful acts were carried out by Dr and Mrs Krishan, they must be pleaded with specificity."

Notwithstanding that, the Defence also pleaded as follows at paragraph 41:

> "(a) It is denied that Dr and Mrs Krishan entered into the alleged or any combination…(c) Dr and Mrs Krishan did not procure the transfer of the Properties to Gracefield. The transfer was effected pursuant to the agreement of the parties. (d) Dr and Mrs Krishan took ownership of Gracefield solely to satisfy the bank's requirements in order to obtain and overdraft for the company. (e) Dr and Mrs Krishan did not extract all or most of the equity in the Properties for their own benefit and did not seek to do so. (f) Dr and Mrs Krishan did not seek to mislead the Court save to the extent that they are bound by the findings of Deputy Judge Gasztowicz QC (g) The conspiracy claim is out of time."

Whilst I deal with (g) – limitation - later in this chapter, as I also noted at paragraph 34.6, in the Claimant's Reply at paragraph 21, the 'unlawful means' relied on were then specified by reference to particular paragraphs of CAPOC: (a) fraudulent misrepresentations intended to procure the transfers of the Properties at paragraphs 10-13, 21-22, 29-32 and 45 CAPOC; (b) undue influence at paragraphs 13, 17-21 and 23 CAPOC; (c) breaches of the Agreement at paragraphs 21-32 and 52-53 CAPOC and also '(d) the fraudulent concealment of their dishonest and unlawful actions as aforesaid, as set out at paragraphs 34-37 CAPOC'. I said I would expand on that and will in a moment.

458. Whilst I described at paragraphs 437-438 above the pleading of trust at para.50 CAPOC as 'Delphic', in fairness, conspiracy in para.41 CAPOC is not; and even to the extent that it is ambiguous, it was comprehensively clarified by the Reply, especially against the context of the earlier pleading of conspiracy in 2015 (just as with the far vaguer leading of trust, as discussed in the previous chapter). It must of course be seen in the

light of the summary of the elements of unlawful conspiracy in *Kuwait Oil* at [108[(2)] which I separate out into those elements:

> "A conspiracy to injure by unlawful means is actionable where *[i]* the claimant proves that he has suffered loss or damage *[ii]* as a result of *[iii]* unlawful action *[iv]* taken pursuant to a combination or agreement between the defendant and another person or persons *[v]* to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do."

459. Paragraph 42 (and indeed 43) CAPOC are clear enough on [i], [ii] and [v]: the losses caused to the Claimant (of the Properties, the ability to sell them and rent them in the meantime); and the intention of the Krishans in causing that loss to benefit themselves by procuring the benefit of her interests in the Properties. Indeed, as explained in *Kuwait Oil* at [118] and *Lonrho v Fayed* [1992] 1 AC 448 (and accepted by Mr Perring before me in his Legal Closing Submissions), it is unnecessary to prove a predominant purpose to injure with *unlawful* means conspiracy, therefore it suffices the intention to injure the claimant is the means by which the defendants seek to benefit themselves. Moreover, para.41 CAPOC is clear on [iii]: the Krishans' 'combination'. The issue is [iv]: 'unlawful means'.

460. Whilst paragraph 41 CAPOC in isolation asserts without specifying the 'unlawful means' in (a), (b) and (c) (I return to (d) below), that failing is remedied in the Reply, which as I noted in paragraph 433 in relation to resulting trust (according to *Bullen, Leake and Jacobs' Precedents and Pleading*s (2022) 19th Ed Supp para.1-38) 'may allege new facts or points in answer to the Defence and indeed should do so if it may cause difficulty if not mentioned'. The Reply does not allege new facts, it simply 'unpacks' the 'composite reference to paragraphs 9-40' at para.41 CAPOC by clarifying four distinct 'unlawful means' by reference to particular paragraphs, grouped into (a), (b), (c) and (d) by reference to para.41 CAPOC (see paragraph 457 above). The first three are clearly 'unlawful' and indeed individually actionable (consistent with them being 'unlawful means': *Kuwait Oil* at [122]-[133]): fraudulent misrepresentation, undue influence and breach of contract. Applying Bryan J's 'how did the defendant plead back ?' approach in *Su* at [47], this ambiguity did not prevent the Krishans in para.41 of the Defence addressing the relevant elements of unlawful means conspiracy in *Kuwait Oil* at [108(2)]. Any doubt in relation to the 'composite pleading' would have been dispelled by the Reply and there has been no CPR 18 request since.

461. On para.41(d) CAPOC, I do not accept it was vague in the first place on 'unlawful means': the Krishans' combination was to use unlawful means 'to (d) disguise their misconduct and mislead the Court by exaggerating the costs of managing the Properties by forging documents and thereby procuring judgment in the Original Claim in their favour' (my underline). This shows that the 'intention' of the unlawful means in (d) was to 'procure judgment in their favour' by the 'unlawful means' of 'disguising their misconduct and misleading the Court' 'by exaggerating the costs of managing the Properties' and 'by forging documents'.

462. A pedantic reading of para.41(d) CAPOC in isolation might suggest ambiguity as to whether it included (1) 'disguising their conduct' *before litigation* began in October 2008 by 'exaggerating the costs of managing the Properties and forging documents' (i.e. by 'the Balber Takhar Account', 'JS Invoice' and 'Options for Gracefield' all pleaded at paras.29-31 CAPOC); as well as (2) 'disguising their conduct and

misleading the Court' *during litigation* by 'exaggerating the costs of managing the Properties and forging documents' 'thereby procuring judgment in their favour' However, again that was made clear in the Reply at para.21(d): 'the fraudulent concealment of their dishonest and unlawful actions as aforesaid as set out in paragraphs 34-37 CAPOC'. Again, that is a clear pleading of unlawful means ('fraudulent concealment'), but it is limited to paragraphs 34-37: i.e. the conduct of the Original Claim itself. That had to be read in the context of the Gasztowicz Judgment as pleaded at para.40 CAPOC. In summary, para.34 CAPOC contended that the Krishans' claim in their letter of 30th October 2008 and Defence in 2009 that the Claimant had entered the PSA and signed it was false; and para.35(a) CAPOC explicitly pleaded the Krishans had forged her signature on the PSA to claim that. Paras. 35(b) and (c) CAPOC also referred to the 'Altered Balber Takher Account' (not the Original) disclosed in the Original Claim; and the 'forged' JS Invoice as 'false documents' produced in the Original Claim. Moreover, paras.36-37 CAPOC encapsulated this limb of the conspiracy:

> "The Defendants presented false evidence at the trial of the Original Claim …to hide their dishonesty, procure judgment in their favour and continue to maintain control of the Properties and [their] proceeds of sale. On 28th July 2010, HHJ Purle QC gave judgment dismissing the Original Claim."

Whilst it is not referred to in the Reply, I would add that the point about 'proceeds of sale' at para.36 CAPOC was developed at para.38 CAPOC which pleaded that:

> "After the Purle Judgment was handed down, the Krishans procured the sale of the Properties by Gracefield [noting the sales of the Co-Op in March 2011, sale of the Shops at an undervalue in May 2011; and sale of the Cinema at undervalue in August 2014]. The[y] kept the entirety of the proceeds of sale and did not account or pay to Mrs Takhar any part of them."

Whatever criticisms may be levelled at para.41(a)-(c) CAPOC before clarification in the Reply, para.41(d) CAPOC, especially as clarified, more than met all the strictures on pleading both conspiracy and fraud above.

463. The pleading complication arises because, as I noted at paragraphs 39-40 above, after the evidence and just before the part-heard two days of submissions, in a letter dated 5th January 2024, as well as dropping other claims like contract as discussed, the Claimant limited her claim in conspiracy to conduct which was:

> "….based upon the Defendants' actions taken after the commencement of claim 8BM30468 [i.e. the Original Proceedings] to procure judgment in their favour and to mislead the Claimant and the Court…."

As I explained, in submissions, Mr Halkerston confirmed that conspiracy was indeed now restricted to the Krishan's defence of the Original Proceedings. Whilst I suggested he was 'filleting' paragraph 41 CAPOC to delete (a), (b) and (c) of it, leaving only (d), he submitted (and I accept) that it is simpler and clearer to see this as the conspiracy claim only pursuing para.41 CAPOC in respect of paragraphs 33-44 CAPOC as encapsulated at para.36 (I quote below)

464. I have already dealt with many of Mr Graham's 'pleading points' about conspiracy. He also submitted there were insufficient pleadings of causation and loss, applying Bryan J's approach in *Su*, those were not arguments made in the Krishans' Defence. Indeed, the answer to causation and loss as a pleading point (as opposed to actual proof of it,

considered later) is that each are addressed in paragraphs 42 (and 43) CAPOC and indeed paragraph 38 CAPOC, which is best seen not as a part of the conspiracy, but as the pleaded result of the successful culmination of the conspiracy in procuring of the Purle Judgment. In turn this caused the Claimant the particular losses pleaded at paragraphs 42 and 43 CAPOC: the loss of ownership of the Properties and their value on rental/sale.

465. Mr Graham's real point was not that conspiracy was not pleaded, but that its narrowing was a *departure* from the pleaded case of a single wider conspiracy, which was impermissible (see the authorities discussed in *Ali v Dinc* [19]-[25]). Whilst the originally-pleaded claim was of a single conspiracy with different aspects, what the Claimant was doing after the evidence was to (i) run only part of that pleaded claim; (ii) as a separate conspiracy not pleaded (he did not, but might have referred to *Pandaya*). Mr Graham submitted that Mr Halkerston only articulated this argument when I pressed him in closing submissions. Mr Graham added the original pleading was 'unambiguously a single conspiracy', whereas what the Claimant now ran was 'fundamentally different' to both the pleaded case and the case advanced in opening and there had been no application to amend the pleading. This was a fairness issue: the pre-trial skeletons and cross-examination of the Claimant and her witnesses was all predicated on that single conspiracy.

466. Whilst I recognise that the Claimant is now only pursuing part of her previously-pleaded claim, that does not mean she is now running it as a separately-pleaded conspiracy, still less does any fairness issue arise. Her originally-pleaded conspiracy claim in the initial Particulars in 2015 and CAPOC in 2021 was indeed of a single conspiracy with different 'schemes' in different periods and different unlawful means, rather like *Kuwait Oil*. However, by closing submissions, the Claimant was only pursuing one 'scheme': that after October 2008. I pressed Mr Halkerston whether that had always in truth been a separate conspiracy, but he was clear (and I accept) that the Claimant was not 'severing' what always should have been a separate conspiracy, but only pursuing *part of a single overarching conspiracy*. The 'false evidence' was as pleaded in para.35 CAPOC: the forged PSA, the forged JS Invoice and the Altered Balber Takhar Account, albeit he accepted the latter two were not causative of loss to the Claimant. Mr Halkerston submitted that there was no need to amend to pursue *part* of the pleaded case, as in effect this was no more than the commonplace forensic tactic of only pursuing in closing submissions one out of several different pleaded allegations in a cause of action having taken stock of the evidence about them all.

467. I accept Mr Halkerston's submissions. I accept that the 'scope' of the conspiracy claim which is still pursued is in effect paragraph 41(d) CAPOC as (for the avoidance of doubt) clarified in para.21(d) Reply to include paras.34-37 CAPOC. That 'narrowed' conspiracy claim is encapsulated by paragraph 36 CAPOC:

> "The Defendants presented false evidence at the trial of the Original Claim …to hide their dishonesty, procure judgment in their favour and continue to maintain control of the Properties and the proceeds of sale."

That is to say, it is clearly pleaded that the procuring of the Purle Judgment in the Krishans' favour on 28th July 2010 was by their disguising of their earlier misconduct and misleading of the Court by the exaggeration of costs of managing the Properties and forged documents (through the Altered Balber Takhar Account, forged JS Invoice

and above all, the forgery of the Claimant's signature on the PSA). For convenience, I shall refer to this as the (alleged) 'conspiracy litigation fraud'. Only conduct from the start of litigation in October 2008 is still pursued, including the forgery of the PSA (which I have found took place on 25th October 2008). Moreover, in my judgement, the Claimant was perfectly sensible after the evidence to take stock of her (frankly unwieldy) conspiracy claim, since para.41(a) CAPOC added nothing to her undue influence and resulting trust claims and paras.41(b) and (c) did not cause her any distinct loss. Taking stock and narrowing the issues is to be encouraged, not discouraged by over-zealous pleading points.

468. Even if I am wrong about that, a more analytical answer to Mr Graham's pleading point is that the Claimant's conspiracy claim had always been pleaded as a single conspiracy – with different 'schemes' involving different unlawful means in different periods with different specific objectives - but all part of an overarching conspiracy to benefit by injury to the Claimant, just like in *Kuwait Oil* itself. Therefore, by analogy with *Kuwait Oil*, the correct approach here is not to say the 'conspiracy litigation fraud' was not pleaded – which it was as part of a wider single conspiracy – but rather whether if it occurred it was carried out pursuant to that single conspiracy agreed at the outset between the Krishans, even if they had and continued to undertake different acts at different times. That is very different than *Pandaya*, where there was one conspiracy, but particular defendants were never part of it. For convenience, I refer to this as 'the single conspiracy check'.

469. Even if I am wrong about that too and there should have been an application to amend the Claimant's pleadings in respect of the 'conspiracy litigation fraud', I would give permission to amend even now (see *Charlesworth v Relay*) as a formal clarification of a clearly-pursued case. In effect, it would be a 'filleting' of para.41(d) CAPOC as I suggested in argument (but Mr Halkerston persuaded me was unnecessary). That would be similar to *Ahmed v Ahmed* where amendment was granted at trial to argue that a will was forged, which was not pleaded but had been squarely raised – as in effect the Claimant had always done here. There is no unfairness in that even after evidence. While Mr Graham submitted his cross-examination was predicated on a single conspiracy, as I have said, it still is a single conspiracy, but only part of it is still pursued. He cross-examined the Claimant about all parts of 'the conspiracy litigation fraud' 'putting the case' (see below) for the Krishans that I have rejected - that she signed another copy of the PSA and agreed to the transfers, indeed initiated them, the 'Balber Takhar Account', 'JS Invoice' and indeed 'Options for Gracefield'. Mr Graham also cross-examined Bobby Takhar and Mr Matthews insofar as relevant on these issues. Indeed, there is no doubt Mr Graham cross-examined the Claimant and her witnesses on <u>all</u> the constituent aspects of her conspiracy claim, including the part she now pursues - indeed very effectively, which is in part why she narrowed it. There is no prejudice to allowing an amendment even in judgment as the point was argued. The only other objection Mr Graham raised relates instead rather to Mr Halkerston's cross-examination of the Krishans and whether 'conspiracy' was fairly 'put to them'. But that was also misplaced for reasons I now give.

Was the conspiracy claim fairly 'put' to the Krishans in cross-examination ?

470. The requirement to 'put a case' is also dealt with in '*Civil Fraud*' at paras 34-057 - 34-060 (pre-dating the key case of *Griffiths v TUI* [2023] 3 WLR 1204 (SC))

> "It is a principle of long-standing [as said in *Browne v Dunn* (1893) 6 R 67, by Lord Herschell LC at 71] that:
>
> > "It will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation, by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."
>
> Where, however, it is made clear to the witness by the other party in cross-examination that his evidence on a particular matter is not to be believed, but certain particular reasons for disbelieving his evidence are not put, then the question of whether the court's subsequent rejection of his evidence for those reasons should stand is more nuanced. In *Chen v Ng* [[2017] UKPC 27 at [55]], the Privy Council stated the principles applicable
>
> > "At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds."

471. I discussed *Chen* on resulting trust above at paragraph 425. As Lords Neuberger and Mance explained at [48]-[61], the trial judge rejected a party's explanation of a transfer made to appear like it was not gratuitous when it was for two reasons, neither of which had been put to him. One rejected a paragraph in the party's statement the other party did not challenge at all. The other was based on a document the party was not taken to in evidence at all – noted at [11] 'not opened, let alone read'. Similarly, in *Rea v Rea* [2024] EWCA Civ 169, the Court of Appeal overturned a strong finding of undue influence by 'coercion' in the context of a will. It had replaced one 30 years earlier in favour of a daughter who had become the live-in carer of the testator who had fallen out with the other beneficiaries. The will had also been prepared by a solicitor who was satisfied it reflected the testator's free will and a GP had confirmed her mental capacity. As part of wider reasons for concluding the judge's conclusion was wrong on the particular evidence in the case, Newey LJ identified that the judge had made a finding that a clause in the will had been the 'daughter speaking through the testator', when the solicitor in evidence had said that had been drafted by her on the testator's instructions, including at a meeting where the daughter was absent. Newey LJ noted at [52] the daughter had also not been cross-examined about that point so that her evidence on it as not challenged, nor was that point 'put to her':

> "…notwithstanding the "general rule in civil cases … that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted" (see *Griffiths*…at paragraph 70(i), per Lord Hodge) and the

(overlapping) obligation on a party to put his case to a witness with relevant knowledge."

472. Whilst *Rea* came after submissions, Mr Graham and Mr Perring did refer me to *Griffiths* which itself referred to *Chen*. In *Griffiths*, a judge (in fairness, based on previous authority which Lord Hodge doubted at [79]) rejected the evidence of an expert witness who had not been called to be cross-examined. Lord Hodge rejected the Court of Appeal's analysis based on a Court deciding 'the ultimate issue' in expert evidence, looking at it instead through the lens of *Browne* at [70]:

> "In conclusion, the status and application of the rule in *Browne v Dunn* and the other cases which I have discussed can be summarised in the following propositions: (i) The general rule in civil cases….is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses. (ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair. (iii) The rationale of the rule, i e preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness. (iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy…(v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself…. (vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty. (vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule…. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in *Chen v Ng*, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule. [Lord Hodge at [59]-[60] also referred to the example of *Edwards v Boston* [2018] FSR 29 (CA)]. (viii) There are also circumstances in which the rule may not apply…"

Whilst most of those examples where the rule does not apply relate to experts (why I was referred to it on Ms Dobson – see paragraph 105), [61] suggests that there is no need to challenge 'collateral or insignificant' evidence and [62] states:

> "[T]he evidence of fact may be manifestly incredible, and an opportunity to explain on cross-examination would make no difference. For example, there may be no need for trial and cross-examination of a witness in bankruptcy applications where the contemporaneous documents properly understood render the evidence asserted in the affidavits simply incredible."

473. It seems to me important to unpack two different aspects to 'putting' points to a witness in cross-examination, identified by Newey LJ in *Rea* at [52]. The first – and the issue in *Griffiths*, *Chen* and *Rea* – is the opposing party's duty to challenge in cross-examination any point of *the opposing party's evidence* which they wish to submit

should be *rejected*. The second is for a party in cross-examination to *put its own case* to a relevant witness. As Newey LJ said, the *duty* overlaps, however the actual 'challenging' and 'putting' may not – it is a question of advocacy style. Provided an advocate on all material points challenges the contested evidence of an opposing witness and puts their own case on evidence, I see nothing in *Griffiths, Chen*, *Rea* or the cases they cite requiring an advocate to say to a witness words to the effect of 'I put it to you that you committed such and such a tort'. That is close to asking a witness to comment on the law - often leading to objection from the other advocate. In short, fairness requires the cross-examining advocate to challenge the *substance* of the witness' evidence and put their own case on the *substance* on all material points, not to *confront them with legal labels* for alleged misconduct. I do not accept Mr Halkerston not using the legal label of 'conspiracy' in cross-examination is itself 'failing to put his case'.

474. Of course, it would be different if Mr Halkerston had failed to challenge the *substance* of the Krishans' evidence on conspiracy, or indeed failed to put the *substance* of the Claimant's case on it. However, I am entirely satisfied he did not make that error (fortified by the fact there was no objection at the time). In my judgment, Mr Halkerston's cross-examination of the Krishans – different in style but just as skilful as Mr Graham's - challenged all relevant aspects of their evidence on the conspiracy and 'put the Claimant's case to them', even if he did not use the label 'conspiracy'. Indeed, I consider he 'put' not only the 'conspiracy litigation fraud' still pursued, but the *wider* original conspiracy claim, including all the pleaded factual allegations from 2005 to mid-2008, not least as the 'causation of loss', 'unlawfulness', 'intention to cause harm'; and on the facts, 'combination' of the Krishans on the transfers of the Properties in 2006 and their sales in 2011/2014 were all factually relevant to the claims of undue influence (including fraudulent misrepresentation) and resulting trust not disputed to have been 'put'. It is true Mr Halkerston divided topics between the Krishans, but that was agreed in advance due to the time lost on the Claimant's evidence (see paragraph 134 above), just as in *Edwards* and *Chen*. Even aside from that, the Krishans had a full opportunity in cross-examination to answer every 'challenge' and the Claimants' case on all parts of the conspiracy was 'put'. Speaking of *Chen* (and as *Rea* appeared on *Bailii* as I was writing this judgment), I have been acutely aware of the importance that every one of my own findings must be solidly based in cross-examination and cross-checked them all against my note of it. This is why, for example, I was wary at paragraph 173 above of what findings I could make about Mr Davies' November 2005 note; at paragraph 329 that I should analyse undue influence on the 'PSA Plus terms' despite rejecting them and preferring the '15th March letter terms'; and why I made no finding of deliberate concealment of sale at paragraph 344.2. I have certainly tried to avoid the errors in *Chen* and *Rea*. I do not believe I have rejected evidence of either of the Krishans on any significant ground not put to them, even if I have articulated in my judgment some in a slightly different way than Mr Halkerston did in cross-examination. (But even if I did, I have also reached all my key conclusions on alternative bases, so the position is very different than it was in *Chen* and *Rea*).

475. Indeed, even if (contrary to my view) Mr Halkerston did not challenge or put all material points on the originally-pleaded wide conspiracy, he certainly did so on the 'conspiracy litigation fraud' issue which is still pursued. For the reasons explained above, the pleaded elements of that issue were: (i) the Krishans caused the Claimant damage in procuring the Purle Judgment in their favour (and then selling the Properties

in 2011/14, the Shops and Cinema at an undervalue and not accounting any proceeds to her and so depriving her of the Properties and benefits from their rental or sale) (paras.37-38 and 42-43 CAPOC); (ii) as a result of (iii) unlawful action (namely the 'conspiracy litigation fraud'); (iv) taken pursuant to their combination; (v) in order to benefit themselves by injuring the Claimant by those unlawful means (paras 34-36 and 41(d) CAPOC as clarified in the Reply). All those topics were explored in cross-examination by Mr Halkerston of the Krishans, especially their 'combination in unlawful means' in 'litigation fraud' with the forgery of the PSA and JS Invoice and the false Balber Takhar Account. Indeed, even if I am wrong about that too, all of the factual findings underpinning those conclusions were the subject of binding judicial decision (indeed issue estoppel) from the Gasztowicz Judgment, so in fact Mr Halkerston could actually not troubled to cross-examine about the 'conspiracy litigation fraud' issue at all. Certainly, Mr Halkerston spent more time in cross-examination on it than I was anticipating. This was because he chose to address the Krishans' new case that they and the Claimant had signed other copies of the PSA in 2006 and the recently-disclosed emails Mr Gasztowicz QC was not shown; rather than arguing issue estoppel on that new case as he could have done. If anything, this decision gave *more* of an opportunity to the Krishans to put forward their evidence (and indeed as Mr Halkerston plainly hoped, 'more rope to hang themselves with'). That is also one reason why my findings of fact had to be so much more detailed; and so I fear this judgment to be much longer than intended.

Findings of Fact Relevant to the Narrowed 'Scope' of the Conspiracy Claim

476. Therefore, my findings of fact on the period from 24th October 2008 to 28th July 2010 cover some 20 pages from paragraphs 278 to 312 above and also must be seen in the context of my earlier findings of fact, especially for 2008 at paragraphs 246 to 277 and later findings on the sales at paragraphs 313-319. So, it may assist if I summarise the key points of my findings relevant to the 'conspiracy litigation fraud', albeit my conclusions are obviously based on my findings of fact, not this summary. I will address three broad topics: the context, the execution and the outcome of the 'conspiracy litigation fraud' from October 2008 to July 2010. However, as to the 'context' of the 'conspiracy litigation fraud', whilst it began in October 2008, it is necessary to consider events earlier, not least for my 'single conspiracy check' from *Kuwait Oil*. Even events prior to October 2008 are no longer pursued as *par*t of the conspiracy claim, it is open to me to infer purely *factually* whether the Krishans had an 'ongoing plan' from all my findings of fact at paragraphs 141 to 319 in the round rather than in a 'compartmentalised' way (*Arkhangelsky* at [59] – an unlawful means conspiracy claim quoted at paragraph 79 and see also paragraph 84 above). This is not making findings on matters not 'put' (on the contrary, as I said). Indeed Mr Graham dedicated several pages of his written submissions to 'events after the agreement was entered' as relevant in various ways, including 'to the extent that they are relevant to the narrow claim in conspiracy'. I have taken into account (and indeed accepted in some places) those submissions when making all my findings of fact on all the evidence.

477. In short, I found at paragraphs 190-230 and at 347 above that from early July 2005 to the end of April 2006, Dr and Mrs Krishan combined to work together as a team; and indeed combined 'carrot' and 'stick' (which I found were fraudulent misrepresentations) to procure the transfer of the Properties to Gracefield. Whilst Dr Krishan mainly 'wielded the stick' of dire warnings about the likelihood and consequences of CPOs, broadly Mrs Krishan 'dangled the carrot': exploiting the Claimant's implicit trust in her to reassure her they would manage the Properties for her benefit and the transfer was just a formality. But she could wield the 'stick' too - and indeed 'saw the Claimant through' the transfers in March-April 2006.

478. However, procuring the transfer of the Properties to Gracefield where the Claimant had a 50% shareholding and was a director alongside them and their 25% shareholdings each was not the limit of the Krishans' ongoing plan. At paragraph 229 above, I have rejected their evidence that they gave the incomplete PSA to the Claimant in 2006 or indeed signed it themselves at that point in 2006. Moreover, at paragraphs 237 to 238 above I found that by the end of 2006, the Krishans combined again effectively trick to the Claimant out of her shareholding and directorship of Gracefield. Firstly, in July 2006, Mrs Krishan cajoled her to transfer one share, so the Krishans gained a 51% stake. Secondly, in November 2006, Dr Krishan tricked the Claimant into transferring all her remaining 49 shares, rather than just 25 as the bank needed. Thirdly, by 2007, Dr Krishan had also persuaded the Claimant to resign as a director. I do not accept that it was a coincidence, I infer it was simply the second stage of the Krishans' ongoing plan.

479. However, that simply opened the way to the third stage of the Krishans' plan: to extract the equity in the Properties for their own benefit. Whilst this is no longer pursued as part of the conspiracy claim, it is pleaded at paragraph 41(c) CAPOC as a different 'scheme', or stage, in the same one single conspiracy, like in *Kuwait Oil*. As detailed at paragraphs 231-250 above, from mid-2006 to early 2008, the Krishans, through Mr Johnson who instructed the other professionals, pursued the development the Properties. But I find this was part of the Krishans' ongoing plan to benefit from them (indeed at the Claimant's expense). After all, in late 2007 when Mr Johnsons' costings and the financial crisis made clear they would make less profit from continuing the development than from immediate sale, they decided to auction the Properties without even consulting the Claimant, though they pulled the auction when she discovered it and objected in April 2008

480. However, it would be wrong to characterise this third stage of the Krishans' ongoing plan as to extract <u>all</u> the equity of the Properties because even on the '15th March letter terms', the Claimant would receive up to £300,000 (supposed 'market value') from sale (if not a 'profit share'). Nevertheless, their decision not to sign the PSA terms until late 2008 in the light of SB's 15th March 2006 letter (see paragraphs 228-229 and 285-288 above) shows they planned to keep <u>most</u> of the profits from any sale themselves. I find that such was the Krishans' influence over the Claimant (see paragraphs 382-384 above) that I find they clearly did not anticipate there would be litigation or a huge costs order to offset against any 'share' the Claimant would have of proceeds of sale, otherwise they would not have uncharacteristically and high-handedly blundered into the auction in March 2008 without returning to 'the rescue narrative' with the Claimant first.

481. As I explained at paragraphs 100 and 253-7 above, the Claimant's objection to the sale prompted the Krishans to try to persuade her to sell the Properties by giving her and

Bobby on 30th April 2008 the 'Original Balbir Takhar Account'. This exaggerated the rates and Council Tax paid four-fold and the costs of the development spent over five-fold. Rather than £91,808.18, they represented them as £565,600, of which £556,000 had come from their personal funds. Like HHJ Purle QC (and Mr Gasztowicz QC), I found this a deliberately misleading document. I also found at paragraphs 100 and 258 above that the Krishans also forged the JS Invoice on Air Quality and Noise Survey at the Cinema by adding numbers so it totalled £39,045.25, rather than the original invoice of £6010.13. As discussed at paragraph 296 the altered JS Invoice and 'Altered Balber Takhar Account' were later disclosed in the litigation, which is the subject of pleaded complaint at para.35(c) CAPOC. However, HHJ Purle QC ignored the first and implicitly rejected the second (as he explicitly rejected the original). Therefore, as Mr Graham and Mr Halkerston accepted neither can be causative of the Purle Judgment. Nevertheless, the Krishans' creation of false documents in April 2008 reveals at that stage their ongoing plan to deliberately inflate the costs to try to pressure the Claimant into agreeing a sale. Yet, as I went on to find at paragraphs 257-261, this plan backfired as it caused her to suspect the Krishans (if not yet of fraud) and prompted her to make the covert recordings on 19th May 2008, when Mrs Krishan returned to the 'rescue narrative' which had worked in 2005-06.

482. Yet this idea did not work either, so as I found at paragraphs 100 and 262-266 above, on 9th June 2008, at the meeting the Claimant insisted on having with the Krishans and Mr Matthews, I found the Krishans presented the original JS Invoice but also a new false document, 'Options for Gracefield' document which HHJ Purle QC again specifically rejected, as did Mr Gasztowicz QC and now myself. As a result of these false documents and the Krishans' stance, as I noted at paragraphs 266-270, Mr Matthews advised the Claimant that he suspected the Krishans of fraud; the s.215 notice on the Cinema (the first formal action by the Council after several years – and nothing to do with CPOs) prompted one more covert recording where Mrs Krishan again laid on her 'rescue narrative' one last time and the Claimant acknowledged they had agreed it would be 50/50 on everything they did (although as explained repeatedly, that was not the same as a 50% profit share). The Claimant tried to bring the arrangement to an end amicably in her letter of 7th July, to be met with Dr Krishan's aggressive 14th July letter.

483. As I explained at paragraphs 271-277 above, this prompted the Claimant to instruct Challinors Solicitors who sent her letter before claim on 24th July 2008 which alleged fraud. This prompted the Krishans to instruct H, who was provided on 27th August by SB and on 28th August by Mr Whiston with a number of documents, including SB's letters of 15th March 2006 and the 'Whiston Letter' of 24th March 2006, which I earlier found had been drafted by Mrs Krishan in the Claimant's name and which the latter had signed. I also found at paragraph 274 that J then drafted a letter to Challinors enclosing these documents of which the Krishans were sent a copy (including the Whiston letter). However, whilst J had an unsigned copy of the PSA, she did not send that to Challinors that stage, but asked the Krishans about it, who said they were not sure what had happened to it. Indeed, as late as 22nd October, Dr Krishan was reluctant to disclose that unsigned copy of the PSA. That led to the fourth 'scheme' or stage of the Krishans' plan.

484. That fourth and final stage (or scheme) of the Krishans' ongoing plan is the 'execution' of the 'conspiracy litigation fraud'. As I discussed at paragraphs 278-280, on 24th

October 2008, Challinors issued the Claim Form in the Original Proceedings, as they informed H in their long letter that same day, which for the first time mentioned CPOs and that Coventry CC would be providing a history about them. I found this letter had been sent to the Krishans who therefore knew that litigation had been initiated and their attempts (even through H's letters to Challinors in October) to force a sale of the Properties had failed. In terms of the pleading, their plan at para.41(c) CAPOC to 'extract most or all of the equity in the Properties for their own benefit' and para.36 CAPOC 'to continue to maintain control of the Properties and their proceeds of sale' would no longer work through persuasion or even pressure on the Claimant. It would require them to win in the litigation. In my judgement, the 'conspiracy litigation fraud' – the last pleaded 'scheme' is indisputably part of the same pleaded single conspiracy – so the 'single conspiracy check' I have derived from *Kuwait Oil* – if needed – is met.

485. At paragraphs 281-288 I went through the contemporaneous documentation in late October to early November 2008, including the recently-disclosed emails. At paragraphs 301 to 303 I detailed the findings in the Gasztowicz Judgment which did not have the benefit of those documents. I simply reiterate my finding at paragraph 304 incorporating them rejecting the Krishans' new case that they and the Claimant signed the PSA in 2006 before they signed it again in 2008; and at paragraph 305 giving my own reasons for agreeing with the Gasztowicz Judgment that the Krishans forged the Claimant's signature on the PSA, indeed not only on the civil but to the criminal standard of proof. In that context, it may assist to recapitulate my finding of fact at paragraph 306 as to when and how.

486. I found, like Mr Gasztowicz QC, the Krishans forged the Claimant's signature on the copy PSA, using her signature on the letter from her to Mr Whiston on 24th March 2006 confirming her instructions that the Properties be transferred to Gracefield for £100,000. I found that Mrs Krishan drafted that letter for the Claimant to sign. I found they were familiar with this letter and as Mr Gasztowicz QC found, a signed copy had been sent by J to Challinors on 28th August 2008. I found that letter and its enclosures including a copy of the Whiston letter with the Claimant's signature on it - was sent to the Krishans as well. That was at almost exactly the same time – 27th August 2008 – as J was corresponding with SB and SR and asking about the PSA – including asking the Krishans whether they had a signed copy, which the Krishans said they recalled but said 'as far as they knew it was signed. Not sure who has copies'. They had been reminded by J of the PSA which was increasingly apparent as crucial. I found the Krishans recalled they still had the one SB originally gave them in 2006, why there was no copy signed by anyone on SB's file. Within days, they found their blank copy and also had J's letter of 28th August, including the Whiston letter. The seed of forgery began to grow. However, it did not yet 'flower'. That only came once they were told on 24th October that the Claimant had issued – but not yet served – her claim. They knew litigation had arrived and there was a risk their conduct to the Claimant would be exposed, as Mr Matthews had already probed with costs in the Balber Takhar Account in 2008. Indeed, if they were sent a copy of Challinors' letter of 24th October, they would have then read not only that the Claimant had issued proceedings, but about the CPOs and realised they needed to buttress the position.

487. On Saturday 25th October 2008, the Krishans returned to their unsigned copy of the PSA from 2006 and the Whiston letter from 24th March 2006 – around the same time as the date of the PSA to add plausibility to the 'Claimant's signature'. As found in the

Gasztowicz Judgment at [64], the Defendant's own handwriting expert agreed in his July 2020 report that there was conclusive evidence the Whiston letter had been transposed onto a copy of the PSA. I suspected it was by photocopying one onto the other, which may account for the dots and lines the Claimant's Counsel noticed and put to Mrs Krishan in 2010. However, it does not matter precisely how they did it. I am satisfied - indeed sure - that they did so. Having done so that morning of 25th October 2008, they then put their plan into action by Mrs Krishan emailing SB to say that they had 'found a second sheet copy of the profit agreement signed by Mrs Takhar but not by ourselves' amongst some old papers. As I said, they then did not send this to J, but did tell her by 30th October 2008 there was a signed copy, which she told Challinors in her letter that day and that it would follow. From the 7th November emails, I found they then gave it to SB, by email before, or at the latest at the meeting on 10th November, when they signed another copy. This meant that SB now had both 'signed copies'.

488. Furthermore, at paragraphs 308-310 above, I contextualised my conclusions as follows. The Krishans' attempts to cajole and pressure the Claimant into agreeing to sell the Properties in 2008 after she had objected to the auction simply ended in her suing them on 24th October 2008. In the light of my finding that the Krishans forged the Claimant's signature on the copy PSA the very next day – 25th October 2008, it is clear their scheme (in *Kuwait Oil* terms, or as I would say, 'stage' or 'phase' of their conspiracy) had changed. Whereas in 2005/06 they had cajoled the Claimant into transferring the Properties to their company and shortly afterwards into their full control, I find that from 25th October 2008, they decided to use forgery in the coming litigation to win it and so maintain and secure their control of the Properties, so they could sell them as soon as possible and finally release the returns they had wanted all along. So, in February 2009, despite initially planning to demolish the Cinema, once proceedings had been served, the Krishans then decided to rely on the signed PSA in their Defence, as Dr Krishan insisted in his email of 25th March 2009, the next day initiating the provision of the forged PSA and their own 2008 signed version from SB to J. Consistently with the Gasztowicz Judgment and the emails the Krishans both sent back in October-November 2008, I am sure the decision to forge the Claimant's signature was a joint decision which the Krishans executed together, as they had executed their plans together back in 2005/06: Mrs Krishan had cajoled and persuaded the Claimant and produced letters for her to sign; and Dr Krishan (once he had the Claimant's authority to deal with the Council from 4th July 2005), had told (along with Mrs Krishan) the Claimant there were CPOs, or at least deliberately exaggerated their likelihood and consequences. The Krishans have been a team throughout and they supported each other's lies in the Original Proceedings as they supported each other's (what I find on this to be) lies in their evidence before me. Once the forged PSA was disclosed in July 2009, they not only contended the Claimant had signed it, they dragged in SB to give evidence to that effect, yet that did not reflect what she told their solicitors, or the October 2008 emails the Krishans concealed. Both Dr Krishan and Mrs Krishan combined in that joint effort litigation from 2009-2010 as I detailed in my findings of fact at paragraphs 290 to 299, but can now simply summarise, starting with paragraphs 290-293.

489. After 18th February 2009, when Challinors served the Particulars of Claim in the Original Proceedings, J and the Krishans' Counsel had still not even by mid-March seen any signed copy of the PSA – by the Krishans or the copy with their forgery of the Claimant's signature that was still on SB's file. That is why the initial draft of the

Defence stated there was no signed copy of the PSA. However, on 25th March 2009, Dr Krishan insisted that be changed so the Defence referred to a signed copy of the PSA. The next day, 26th March, he spoke to J, who then spoke to SR and SB, who sent J for the first time the 'signed' copies of the PSA. This included the copy with the Krishans' forgery of the Claimant's signature and the copy they signed for the first time at the meeting with SB on 10th November 2008. In the event, the Defence was served around the end of March 2009 and not only referred to the PSA being signed, it also included a counterclaim seeking a declaration that Gracefield was the legal and beneficial owner of the Properties and it and the Claimant were bound by the oral agreement for a profit share agreement partly proved by the (signed) copy of the PSA, albeit in different terms.

490. From paragraphs 294 to 297 above, I detailed the progress of the litigation and most relevantly, the disclosure on 13th July 2009 of the Altered Balber Takhar Account, the forged JS Invoice and three copies of the PSA – the unsigned copy, the copy signed by the Krishans and the copy with the forged signature that they forged, which it appears that Challinors had seen by October 2009. At paragraph 298 above, I noted Dr Krishan annexed the forged PSA to his statement in December 2009 saying that he had given a copy to the Claimant and 'understood that she then forwarded a signed copy to SB'. Likewise, in two statements from December 2009 and February 2010 (after sight of the Claimant's statement denying seeing or signing it), Mrs Krishan too twice stated she understood the Claimant was given a copy to sign and signed and returned it to SB. Both Krishans re-iterated that in their oral evidence at trial in July 2010. Likewise, at paragraph 299, I noted that SB's evidence did not reveal what she had told the Krishans' solicitors – that Mrs Krishan gave the (actually forged) copy PSA back to SB.

491. Against that context, at paragraph 300 above I noted that in the Purle Judgment, HHJ Purle QC dismissed the Claimant's claim, concluding at [22] and [32] that:

> "…. In the absence of Mrs Takhar giving a coherent explanation as to how her signature came to be on the scanned copy, I conclude that the Krishans' evidence, which I believe anyway, should be accepted and that Mrs Takhar took the copy of the agreement that she was signed away, which was returned, probably by her in some way, duly executed to [SB's] firm, which then ended up misfiled. At all events, I am satisfied that that was the agreement that was made. The properties were transferred by Mrs Takhar into Gracefield's name before the written joint venture agreement was prepared, and the only credible explanation that I have heard is that they were so transferred on the terms subsequently set out in the joint venture agreement, which were previously agreed orally….Whilst there was undoubtedly a relationship of trust and confidence, it was not a relationship in which Mrs Takhar put her decision-making powers at the disposal of the Krishans. She retained her own decision-making powers and the transactions were not those which on their face called for an explanation. In any event, such explanations as I have heard persuade me that there has been no abuse of trust and confidence in this case."

492. As the Gasztowicz Judgment found, the Krishans not only forged the PSA, but that was causative of why HHJ Purle QC reached that conclusion, finding that:

> "136. No doubt Judge Purle as the trial judge came to the conclusion he did – that there was a transfer of beneficial ownership on the basis of a profit sharing

> agreement as the Defendants contended, not a wholly different arrangement as the Claimant contended - for a variety of reasons, as will often be the case in a trial. I have of course carefully considered the judgment as a whole. However, the signing of the Profit Sharing Agreement document by the Claimant as he believed it to be was undoubtedly one….
>
> 137. In any trial, and in a fraud trial in particular, the court is of course looking for independent and contemporaneous indicators of where the truth lies on crucial issues, such as in this case, whether there was a profit sharing (or "joint venture") agreement. The forged document clearly evidenced this in the absence of forgery of Mrs Takhar's signature on it. Had the Judge known that her signature on the copy of that before him had been forged, for which the Defendants were responsible (causing him also to weigh their oral evidence in the light of that knowledge), that plainly would have (in the words of Aikens LJ in *RBS*) "entirely changed the way in which the first court approached and came to its decision" and it was plainly an "operative cause of the court's decision to give judgment in the way that it did".

493. As I stated at paragraphs 307, 311-312 and 315 above, no sooner had HHJ Purle QC given judgment on 28th July 2010, the Krishans' Counsel immediately asked for the declaration on the counterclaim, which HHJ Purle QC gave not in the terms pleaded but consistent with the 'PSA Plus terms' which he accepted. That illustrates the forged PSA's centrality to his conclusion. He also ordered the Claimant to pay 80% of the Krishans' costs subject to detailed assessment (reduced due to his rejection of the Balbir Takhar Account and Options for Gracefield) and £100,000 on account. However, it is clear from the costs judgment of Mr Gasztowicz QC's and the director's loan account that notwithstanding HHJ Purle QC's declaration, the Claimant never received any proceeds from the subsequent sales of the Properties, still less her 'entitled share' of £575,000 from the Co-Op and Shops alone. The Krishans offset her 'share' against their whole costs to their then-solicitors owing it appears of £563,650.80, not just 80% of assessed costs as HHJ Purle QC had ordered the Claimant to pay. I repeat that the 'conspiracy litigation fraud' is indeed the final 'scheme' in the *the same pleaded single conspiracy* with different schemes from 2005 onwards.

494. I return on remedies to my findings of fact at paragraphs 313 to 319 above, but make three short observations for now. Firstly, on causation, the Purle Judgment declaration enabled the Krishans not only to proceed to auction, but also to obtain – indeed from HHJ Purle QC himself – an injunction on 12th November 2010 to prevent the Claimant and Bill stopping the auctions. Secondly, on loss, as I have explained, paras.38 and 42-43 CAPOC pleaded the Claimant received no benefit from these sales (as I have just explained) despite the PSA terms and also lost the right to ownership (which given I have upheld her undue influence and resulting trust claims she should have had) with the right to sell or rental income. Thirdly, also on loss, para.38 CAPOC also pleaded that the Shops and Cinema were sales at an undervalue. I have actually found as a fact that all three sale prices were undervalues, modestly with the Co-Op but markedly with the Shops and Cinema.

When did Primary Limitation start to run on the Conspiracy Claim ?

495. Given my findings as to the scope of the conspiracy claim as pursued from 24th October to 28th July 2010 (with the loss of the Properties in 2011 and 2014), I can deal with this

issue much more briefly than originally may have been anticipated with Counsel's very helpful skeletons dealing in detail with limitation. In my view, the result (if not the precise date) has become factually and legally clear.

496. Legally, primary limitation for the claim in conspiracy turns on when it 'accrued' for the purposes of s.2 Limitation Act 1980 ('LA'), which provides that:

> "An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

As the learned editors of '*Civil Fraud*' observe at paras.25-004-005:

> "[The] common law causes of action, including deceit [and] conspiracy …are all…claims in tort. Accordingly, s.2 [LA] is *prima facie* applicable to all of them…In almost all claims in tort damage is the "gist" of the action: the tort is only complete, and so the cause of action only accrues, when legally recognised damage has been sustained by the claimant."

That is certainly true of conspiracy. In *Crofter Tweed Co v Veitch* [1942] AC 435, the House of Lords held that a trade union and mill owners on the Scottish island of Stornaway had conspired to frustrate the import and export of tweed cloth by the appellant rival company, but since they did not use unlawful means and the predominant purpose of the conspiracy was not to injure but to profit, there was no actionable conspiracy, whether (in modern terms) 'unlawful means conspiracy' or a 'lawful means conspiracy'. As Lord Wright observed at pg.461:

> "The conspiracy is the gist of the wrong, though damage is necessary to complete the cause of action."

As discussed further in relation to remedies, in conspiracy, only actual pecuniary loss is actionable 'damage': *Lonrho v Fayed (No.5)* [1993] 1 WLR 1489 (CA).

497. A claimant cannot avoid a limitation defence by 'limiting' their own claim (either on or after pleading) to damage within a limitation period 'if they have suffered actual damage from *the same wrongful acts* outside that period' (my emphasis and paraphrase of [23] in *Khan v Falvey* [2002] PNLR 28 (CA)). However, if the same wrongful act generates different *causes of action*, time can run on each cause of action individually – *Seedo v Gamal* [2023] 3 WLR 505 (CA) at [66]. Indeed, in *Seedo* (which is also relevant to s.32 LA below), a claimant argued that two different lies by a defendant inducing the claimant to buy a house (one discovered more than and one less than six years before the claim) were two different causes of action of deceit. However, that was rejected as on the facts they were part of the same deceit. The complication with unlawful means conspiracy is that it can not only encompass multiple 'wrongful acts', some being separately actionable, but also multiple 'damage'. Indeed, *Kuwait Oil* was just such a case, yet there does not appear to have been a limitation problem with a claim in 1994 pleading one overarching conspiracy running through its different 'schemes' from 1985 to 1992, causing losses to the plaintiff throughout. Nevertheless, the point does not seem to have been argued there, but it is argued here. However, in his original skeleton argument, Mr Halkerston offered three potential solutions on limitation:

497.1 Mr Halkerston's first solution was the complex 'relation back' argument based on consolidation, which he abandoned but I explained at paragraph 33 above I would have rejected anyway. As I also explained at paragraph 333 above, this meant the

Claimant's claim of deceit in tort (on the fraudulent misrepresentations I upheld for undue influence at paragraphs 334-349) accrued at the point of the transfers in March/April 2006. Therefore, whether or not part of the same deceit and damage (*Seedo*) the 2015 deceit claim was out of time (and s.32 LA did not assist - see below).

497.2 Mr Halkerston's second solution was that 'conspiracy was a continuing tort', like nuisance as discussed in *Jalla v Shell* [2023] 2 WLR 1085 (SC). However, as Mr Perring argued, that concept applies to tortious conduct continuing day-to-day like noxious fumes from a factory over a neighbour's land, as opposed to a one-off act with continuing consequences (like the oil spill in *Jalla*). Here, the pleaded conspiracy had various instances, but was not continuing day-to-day. Therefore, it cannot have been a continuing tort.

497.3 Mr Halkerston's third solution was linked to his 'continuing tort' argument in his Skeleton, but is actually conceptually distinct: that limitation is no defence to a conspiracy based on steps taken after 6th March 2009. I would add, as subsequently narrowed to acts after 25th October 2008, conspiracy is now not only based on different 'damage', but also different 'wrongful acts' than earlier parts of the pleaded case (which makes it different from *Khan* and *Seedo,* but similar to *Kuwait Oil*). There is little authority on this, as noted in *Kieran Corrigan v Onee Group* [2024] FSR 1 (reported after submissions in this case), where Mr Hilliard KC said at [338]:

> "…[T]he unlawful means conspiracy claim is time-barred in respect of the acts before 5th October 2014 [as it was issued on 5th October 2020]. However, in my judgment [it] is not barred in respect of the unlawful acts after [that date]….I was not referred to any authority, but this accords with principle. Those acts are capable of having caused a separate loss, and they are not to be regarded as one combined act or course of conduct for the purpose of limitation. Take the example of an unlawful means conspiracy where the unlawful means was tortious and therefore were a number of successive breaches of duty, some generating losses within the six-year limitation period. One would not expect the unlawful means conspiracy claim to be barred for all those acts, some of which might have caused loss shortly before the claim form was issued if a freestanding tort claim….would be in time." (my underline)

Whilst I am not bound by this analysis and prefer the word 'damage' in s.2 LA to the conceptually distinct word 'loss', I respectfully agree. It is consistent with *Khan* (it is not different 'damage' from the same 'wrongful act'); and *Seedo* (where the two lies were held part of the same 'wrongful act' - and indeed the same 'damage' – i.e. the house purchase). By contrast, in *Corrigan* there were different unlawful 'acts' *and* different 'damage', as part of the same overarching conspiracy, just as in this case. So, where 'wrongful acts' and 'damage' in this case are *both* on or after 6th March 2009 (six years before the claim) they are in time under s.2 LA. Indeed, this proposition in principle (without the analysis) was not disputed before me.

498. This conclusion obviously means the parts of the conspiracy claim which are no longer pursued were rightly dropped, as they were out of time (and s.32 LA did not assist them, as noted below), including any arguable 'wrongful acts' in 2006-2008 before

litigation was issued on 24th October 2008. This would include the forgery of the JS Invoice and preparation of the Original Balber Takhar Account in April 2008, but not their deployment by disclosure on 13th July 2009 (see paragraph 296 above) although since neither caused 'damage' anyway, it is academic. However, the PSA was forged before 5th March 2009 but not disclosed until 13th July 2009, so when was the 'wrongful act' and when was the 'damage' - on 25th October 2008 (out of time) or on 13th July 2009 (in time) ?

499. The Krishans' forgery of the PSA was not capable of causing 'damage' to the Claimant until deployed in the litigation, so at least for limitation purposes, the relevant 'wrongful act' was not the forgery itself on 25th October 2008, but (at least) the reference to a signed PSA in the Original Defence in late March 2009 or (as I prefer) the disclosure of the forged PSA itself on 13th July 2009 (in time). However, I do not consider it caused 'damage' immediately. There is an analogy with the well-trodden ground of 'damage' under s.2 LA in lawyers' negligence cases. In *Khan* itself, it was held that clients suffered 'damage' under s.2 LA not when their claims were struck out due to their solicitors' negligence, but when those claims suffered 'measurable damage' because they became *liable* to be struck out. Similarly, in *Holt v Holley* [2020] 1 WLR 4638, the Court of Appeal held that a client's claim suffered 'measurable damage' from solicitors' negligent failure to get expert evidence when it should have been applied for (at the latest, trial) not on the judgment months later. So, for the Claimant's negligence claim against Challinors, 'damage' was caused when HHJ Purle QC refused permission for handwriting evidence in April 2010. Likewise, for the Claimant's conspiracy claim against the Krishans, their forgery did not cause 'measurable damage' until then for the same reason, which was within time. Indeed, unlike the claim for Challinors' negligence, the Krishan's intentional conspiracy was really only 'complete' when they succeeded in the Purle Judgment itself on 28th July 2010 – until then, unlike the very different facts in *Holt*, the 'damage' was truly only 'contingent': *Law Society v Sephton & Co* [2006] 2 AC 543 (HL). Whether damage was April or July 2010, the conspiracy claim (as narrowed) is in time.

Was the limitation period postponed by s.32 LA ?

500. In the light of my conclusions on primary limitation, this is an alternative finding, which I can deal with briefly, even though prior to trial I anticipated it would be one of the most complex aspects of the claim. s.32 LA materially states:

> "(1)…. where in the case of any action for which a period of limitation is prescribed by this Act, either— (a) the action is based upon the fraud of the defendant; or (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant …the period of limitation shall not begin to run until the plaintiff has discovered the fraud [or] concealment…..or could with reasonable diligence have discovered it….
>
> (2) [In]..(1) above deliberate commission of breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

501. There is a mass of authority on s.32 LA in the context of fraud claims, as helpfully analysed by the learned editors of *Civil Fraud* at paras. 25-034 – 25-054. This includes that: s.32(1)(a) LA is only engaged if fraud is an essential element of the claim, which it is in the case of a dishonest conspiracy: *AG Zambia*. If limitation is determined at

trial, the Judge should focus on the 'fraud' found, rather than the 'fraud' pleaded: *Seedo*. However, all the cases on s.32(1)(b) and s.32(2) LA must now be read in the light of the recent analysis by the Supreme Court in *Canada Square v Potter* [2023] 3 WLR 963, which concerned a claim under s.140A Consumer Credit Act 1974 (as amended) for a 'unfair relationship' – a statutory descendent of 'unconscionable bargain'. Lord Reed clarified s.32 LA:

> "96 What section 32(1)(b) requires is that the defendant has 'deliberately concealed' 'a fact relevant to the plaintiff's right of action ….[It covers]…a fact without which the cause of action is incomplete: *Arcadia v Visa Inc* [2015] Bus LR 1362…if the claimant can plead a claim without needing to know the fact in question, there would appear to be no good reason why the limitation period should not run.
>
> 109… What is required is (1) a fact relevant to the claimant's right of action, (2) the concealment of that fact from her by the defendant, either by a positive act of concealment or by a withholding of the relevant information, and (3) an intention on the part of the defendant to conceal the fact or facts...
>
> 153….'Deliberate', in section 32(2), does not include 'reckless'. Nor does it include awareness that the defendant is exposed to a claim. As Lord Scott said in *Cave* at para 58, the words 'deliberate commission of a breach of duty' are clear words of English. They mean, as he added at para 61, that the defendant 'knows he is committing a breach of duty'…."

502. 'Reasonable dilligence' in discovering fraud is ironically the requirement in s.32(1)(a) LA which the Supreme Court in *Takhar* held was not a requirement to set aside a judgment for fraud. But I gratefully adopt Mr Perring's analysis:

> "The difference is explained, at least in part, by the need for the Court to protect its own process where it has been proved that it and the claimant were deceived by matters discovered after the trial, and because it is contrary to justice for a fraudulent individual to profit from a failure of reasonable diligence. In contrast, a failure to bring an action based on fraud in time is not concerned with seeking to unravel something that has been obtained by fraud, but seeking to prevent proceedings being brought too long after the cause of action accrued when it was reasonable for it to be brought for reasons that must include avoiding claims that are stale. Absent a standstill agreement, or protective proceedings, limitation arises when the cause of action accrues, subject to s. 32 Limitation Act 1980."

Indeed, in my own judgement, the situations are very different. The law is simply drawing a distinction between setting aside a judgment procured by fraud *reviving original claims brought in time* (if dismissed for limitation unrelated to fraud, the issue would not arise); and *bringing new claims out of time (*since if in time, s.32 LA would not arise). I also gratefully adopt these points made by Mr Perring:

502.1 On reasonable diligence a claimant is not required to do everything possible but only what an ordinary prudent person would do having regard to all the circumstances: *Peco Arts v Hazlitt* [1983] 1 WLR 1315 at 1323-1326.

502.2 The question is not whether the claimant should have discovered the fraud or concealment sooner; but whether they could with reasonable diligence have done so. The burden of proving that is on the claimant on balance of probabilities: *Law Society v Sephton* [2005] QB 1013 (CA) at [110];

502.3 The claimant must establish that they could not have discovered the fraud or concealment without exceptional measures which they could not reasonably have been expected to take: *Sephton* (CA) also at [110];

502.3 There must be an assumption that the claimant desires to discover whether or not there has been a fraud: *Sephton* (CA) at [116];

502.4 Naiveté and inexperience of the claimant are not factors which can properly go to whether he could with reasonable diligence have discovered the relevant facts: *Hussain v Mukhtar* [2016] EWHC 424 (QB) [43].

503. In this case, Mr Perring submits that insofar as the conspiracy claim is out of time (which I have held is the case for the acts and damage in the conspiracy prior to March 2009), the 'fraud' of the Krishans was 'discovered' (or could have been discovered with reasonable diligence) in 2008 when Mr Matthews alleged fraud. Indeed, fraud was even alleged by Challinors in their letter before claim in July 2008, even if for whatever reason it was not pleaded on issue on 24th October 2008. The same is true for conduct part of the originally-pleaded conspiracy before 24th October 2008 – including fraudulent misrepresentations in 2005/06, the Krishans' conduct in ousting the Claimant from Gracefield in 2006/07 and their use of false documents to pressure her in April-October 2008 such as the Original Balber Takhar Account, forged JS Invoice and Options for Gracefield. Therefore, it follows from my conclusions on primary limitation and s.32 LA that those earlier phases of the conspiracy before October 2008 were limitation-barred, that may explain why the Claimant has not pursued them (although it is academic on the 2006 transfers given my conclusions on undue influence / trust).

504. However, even if I am wrong on primary limitation and the Claimant suffered 'damage' when the Krishans forged the PSA on 25th October 2008 even before *deploying* it in the Original Proceedings from late March 2009, along with the Altered Balber Takhar Account and the forged JS Invoice, s.32 LA is engaged. They are all pleaded aspects of the 'conspiracy litigation fraud', they are now all 'facts without which the cause of action was incomplete': and so fall within s.32(1)(b) LA: *Arcadia*. It follows that in respect of the conduct forming part of the 'conspiracy litigation fraud', s.32(1)(a) LA itself is engaged, since the unlawful acts pleaded (including forging the JS Invoice) are fraud. Moreover, s.32(1)(b) is also engaged – there was 'deliberate concealment' of these facts by the Krishans, even if there was no 'duty to disclose' (*Potter*), certainly in relation to the forged PSA and the Altered Balber Takhar Account, if not the forged JS Invoice, which was not 'concealed' as the Claimant already had it. In my judgement, even if those allegedly 'unlawful means' forming part of the alleged conspiracy did cause 'damage' so that the cause of action was complete and accrued under s.2 LA 1980 before disclosure on 13th July 2009, in my judgment, they were not 'discovered' or 'discoverable with reasonable diligence' until then under s.32(1) LA. Therefore, subject to the point about the JS Invoice, even if I am wrong on primary limitation and the Claimant suffered 'damage' on 25th October 2008, the 'conspiracy litigation fraud' is within time. I turn to its merits.

Conspiracy: Merits and 'Unlawful Means'

505. This is perhaps the most legally-complex aspect of the entire claim and involves the third key question I described at the start of this judgment, which as far as Counsel or I are aware is not covered by binding authority: can fraud in procuring a judgment both

enable it to be set aside *and* amount to the tort of 'unlawful means conspiracy' sounding in damages ? I have put it in those terms since whilst the pleaded 'conspiracy litigation fraud' here also relies on the forged JS invoice and false Altered Balber Takhar Account, as I said, Mr Halkerston accepts they were not causative. He submitted that the Claimant's case on conspiracy stands or falls on whether the Krishans' now-proven forgery of the Claimant's signature on the PSA amounted to 'unlawful means' for the tort of 'unlawful means conspiracy'.

506. This issue arises acutely in this case not only on the facts, but also because of this observation in *Lakatamia v Tseng & Morimoto [2023] EWHC 3023 (Comm) ('Lakatamia')*, only a few months before this judgment, by Foxton J at [79]:

> "I have real doubts as to whether English law recognises a tort of unlawful means conspiracy dishonestly to defend a claim through the production of forged documents in those proceedings. The extension of the tort of malicious prosecution to the initiation of civil proceedings is not without controversy (see the differing views in *Willers v Joyce* [2016] UKSC 43), and there is no tort of maliciously defending proceedings. Even if it is possible to overcome those difficulties through the tort of unlawful means conspiracy, further issues would arise as to whether the deployment of forged evidence at trial can provide the basis for a private law cause of action, or is a matter to be dealt with under the court's jurisdiction (through strike-out or committal) or under the criminal law (cf. *Marrinan v Vibart* [1963] 1 QB 234)." (*Marrinan* was a case about 'witness immunity').

This was not part of the *ratio* of Foxton J's decision on that part of the action before him. He was concerned with the quantification of a default judgment and quantified part of the judgment in relation to the sale of a property, but not the damages for 'unlawful means conspiracy'. Quite apart from his doubts on the principle, as he explained at [80]-[81], the Particulars of Claim did not properly quantify those losses. Nevertheless, the *obiter dicta* of the Judge in Charge of the Commercial Court are entitled to the very highest respect. So, I raised *Lakatamia* and various other authorities and invited submissions. Counsel understandably focussed on applying unlawful means to false statements and witness immunity directly linked to this case, but largely left to me other issues Foxton J raised. I will attempt to explore those as carefully as I can.

507. The issue arises even more acutely because Mr Graham and Mr Perring did not really dispute that the findings on the Krishans' forgery of the Claimant's signature on the PSA in the Gasztowicz Judgment alone (let alone now my findings of fact) themselves proved the other elements of unlawful means conspiracy, save causation of loss, which they submitted was not proved. Indeed, as I shall explain, since my conclusions on undue influence and resulting trust are against them and differ from those in the Purle Judgment, their submissions on loss go more towards the *damages* payable than whether the conspiracy cause of action was completed by *damage*. I will therefore deal with some of those submissions on causation and loss in the next chapter when addressing remedies.

508. However, in this chapter, I will largely focus on 'unlawful means': considering: (i) whether forging then relying on those forged documents in litigation can in principle be 'unlawful means'; (ii) whether recognising that forgery of and reliance on forged documents in litigation could be 'unlawful means' for conspiracy would be inconsistent with the absence of a tort of maliciously defending proceedings given *Withers*; or (iii)

whether it would be inconsistent with the principles of finality in litigation and witness immunity; and (iv) finally if not, whether the Krishans' forgery here amounted to 'unlawful means' here.

509. However, it would be self-indulgent speculation lengthening what is already an extremely long judgment to embark on this complex legal question if it does not need to be addressed in this case. (Indeed, it would be frankly presumptuous for the likes of me given the recent view of the Judge in Charge of the Commercial Court). Therefore, before addressing those questions, I will consider first whether the other elements of unlawful means conspiracy are proved, relatively briefly because they all turn upon the detailed findings of fact that I have already made.

Has the Claimant proved the essential elements of unlawful means conspiracy ?

510. I can start by repeating the helpful summary of unlawful means conspiracy in *Kuwait Oil* at [108[(2)] which I have separated out into its essential elements:

> "A conspiracy to injure by unlawful means is actionable where *[i]* the claimant proves that he has suffered loss or damage *[ii]* as a result of *[iii]* unlawful action *[iv]* taken pursuant to a combination or agreement between the defendant and another person or persons *[v]* to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do."

I will take those in order (on law and my conclusions), even though those elements are sometimes ordered differently. This ordering brings into sharper focus Mr Perring's and Mr Graham's submissions on loss and causation. For the legal principles on each element, I will not only briefly draw on the helpful observations by Mr Perring which I can gratefully adopt, but also on the analysis in *Kuwait Oil*, the recent summary by Foxton J in *Lakatamia*, and indeed in places on the views of the learned editors of *Civil Fraud* in Chapter 2 on Conspiracy. As made clear there at paras 2-138-2-145 and as Mr Perring submits, the Claimant bears the burden of pleading and proving all elements of the cause of action, an allegation of conspiracy is a serious one where standard or proof remains the balance of probabilities, but the inherent probabilities must be taken into account when deciding where the truth lies, as well as the cogency of the evidence; and as discussed, a conspiracy claim must be clearly pleaded as well as clearly proved.

511. It is convenient to deal with (i), (ii) and (iii) in *Kuwait Oil* together: whether the Claimant has proved that she has (i) suffered loss or damage (ii) as a result of (iii) unlawful action. These elements collectively relate to causation of damage by unlawful action and are difficult to tease apart on the law and facts. Whilst I will consider below whether the Krishans' forgery of the PSA qualifies as 'unlawful means', it was plainly 'unlawful' in the sense that it justified the setting aside of the Purle Judgment by the Gasztowicz Judgment. That held not only that the Krishans had forged the Claimant's signature on the disclosed PSA, but also that this was an operative cause of the result in the Purle Judgment. In turn, in my view, that largely proves that elements (i), (ii) and (iii) of conspiracy are proved.

512. On the law, as I noted above on limitation, in *Veitch*, Lord Wright observed that damage was the gist of the cause of action in conspiracy, which was required to complete it. On liability for conspiracy, that only requires a claimant to prove 'damage' itself, not what damages should be awarded, which is a matter for remedies. I will discuss that in the next chapter, but as already noted, *Lonrho (No.5)* confirmed

'damage' must be actual pecuniary loss (rather than injury to reputation or 'general damages'). As the learned editors of *Civil Fraud* observe at 2-088, a claimant must also prove such 'damage' by pecuniary loss was not just 'caused' by the unlawful action carried out pursuant to the conspiracy but also that it was 'indeed the means' of causing that damage, as Lord Walker put it at [93]-[95] of *Total Network v HMRC* [2008] 1 AC 1174 (my underline):

> "….'Unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it)….. [C]riminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort …. provided that it is indeed the means (what Lord Nicholls…in *OBG Ltd v Allen* [2008] AC 1, para 159 called 'instrumentality') of intentionally inflicting harm."

This passage was endorsed in *JSC BTA Bank v Khrapunov* [2020] AC 727 (SC) at [14], where Lords Sumption and Lloyd-Jones also observed that this was:

> "….to be contrasted with a situation in which the harm to the claimant was purely incidental because the unlawful means were not the means by which the defendant intended the harm to the claimant. As an example of the latter situation, Lord Walker cited *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. The defendants in that case were alleged to have acted in breach of the statutory order imposing sanctions on Southern Rhodesia, but the order 'was not the instrument for the intentional infliction of harm'. Lord Mance in *Total Network* (para 119) was, we think, making the same point, by reference to the example of a pizza delivery business which obtains more custom, to the detriment of its competitors, by instructing its drivers to ignore speed limits and jump red lights."

(I will return to both *Total Network* and *Khrapunov* below on 'unlawful means').

513. In the present case, the Claimant has indeed proved to the requisite strict standard of proof and clarity on the balance of probabilities that she suffered 'damage as a result of unlawful action' (provided the Krishans' forgery of the PSA was 'unlawful means' discussed below). I consider those issues are largely covered by issue estoppel from the Gasztowicz Judgment. That held the forgery of the PSA was by the Krishans and was (at least) an operative cause of the dismissal of the Claimant's claims in the Purle Judgment. As discussed below, this was clearly the Krishans' intention for their reliance on their forgery in the litigation which was 'indeed the means' by which they inflicted on the Claimant their intended harm to her. Her losing and them winning meant they not she kept control of the Properties and the ability to sell them and to make a large profit for themselves. The Claimant has proved she 'suffered damage as a result of unlawful action'.

514. As found at paragraph 499 above, even if HHJ Purle QC refusing expert evidence in April 2010 caused 'measurable damage', the real (and certainly additional) 'pecuniary damage' in the conspiracy was the Purle Judgment itself. It resulted from and was intentionally inflicted by the Krishans by means of their forgery:

514.1 Firstly, the Purle Judgment was itself pecuniary damage to the Claimant because her claims – including recovery of her properties – failed when they should have succeeded on the balance of probabilities, as I have found (on the *original* bases of presumed undue influence and resulting trust). So, as stated at paragraphs 313-319 and 494 above, by means of their forgery procuring the Purle Judgment, the Krishans were able to sell the Claimant's beneficial Properties against her will. This is why Mr Halkerston said she needed to succeed on those 2006 claims to succeed on conspiracy in 2010.

514.2 Secondly, analytically, I actually disagree with Mr Halkerston about that. Even if the Claimant had failed in her undue influence and resulting trust claims before me, as held in the Gasztowicz Judgment, the causation test for setting aside a judgment in *Highland,* approved by the Supreme Court in *Takhar,* is not whether a claimant would succeed on honest evidence at a retrial, but whether the fraud was material to their losing first time round. Even if the Krishans should have won now, they should not have won then. As Mr Gasztowicz QC said at [26] of his Costs Judgment (my underline):

> "Even if the claimant loses at trial, it will not mean she is responsible for the costs incurred in there having been an earlier trial of no effect."

So, even if the Claimant had lost on undue influence and resulting trust before me, the Purle Judgment still caused her pecuniary damage in the form of costs liability both to the Krishans and to her own solicitors. The Claimant cannot claim as a loss her own unrecovered *costs* paid to her own lawyers: *Lonhro (No.5)*. But she was still wrongly exposed to liability for the Krishans' costs in the first place, so suffered 'damage', even if any 'loss' *in costs liability* has been removed by Mr Gasztowicz QC's costs order.

514.3 Thirdly, this leads to a another point: whilst the Claimant cannot recover *costs*, she still suffers from a different loss and damage caused by the Purle Judgment (so in turn the conspiracy), *even if* as held in it she was only ever entitled on sale of the Properties to £300,000 and 50% of the balance. The declaration in the Purle Judgment meant she lost the right to prevent the sales by injunction pending a valid judgment (as Bill found in November 2010). As I said at paragraphs 312, 315 and 318 above, this enabled the Krishans not only to sell the Properties in 2011 and 2014, but to cause her 'damage' by offsetting all her 'share' – in 2011 of the Co-Op and Shops of £575,000 against their liability to their lawyers of £563,650.80 (not just the £363,975.60 later ordered by Mr Gasztowicz QC); and in 2014 of the Cinema against Dr Krishan's spurious £225,000 'management fee'. This does not mean the Claimant can claim that 'share' in contract or costs, just that the Krishans' fraud in procuring the Purle Judgement caused 'damage'.

Even if, by further analogy to the lawyers' negligence cases of *Khan* and *Holt* at paragraph 499 above, this is strictly a loss of a chance rather than balance of probabilities analysis on *loss* (discussed on remedies below), the Purle Judgment was *damage* caused on the balance of probabilities by the Krishans' forgery.

515. I turn to the fourth element of unlawful means conspiracy: whether the 'damage' 'caused' to the claimant 'as a result' of the 'unlawful action' was: 'taken pursuant to a combination or agreement between the defendant and another person(s)', as it was put in *Kuwait Oil* at [108(2)]. As that formulation makes clear, it does not matter that Gracefield is not a defendant in the conspiracy claim - and a director or shareholder

(and here there were two of them anyway) can conspire with their own company: *Civil Fraud* at ps.2-017-2-024. It added at ps.2-011-2.016 that the leading case on 'combination' remains *Kuwait Oil,* where the Court said:

> "110…The essence of the unlawful means conspiracy is injury to the claimant as a result of an unlawful act or acts where two or more people have combined to cause the injury. It is not necessary that every overt act is done by every conspirator, but the act must be done pursuant to the conspiracy or combination.
>
> 111. A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that….it is not necessary to show there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end…..[I]t is not necessary for the conspirators all to join the conspiracy at the same time, but… the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts…
>
> 112. In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself."

As Mr Perring helpfully summarised, the combination: (i) does not have to be an express agreement: it is sufficient that two or more persons combine with a common intention, or, in other words, they deliberately combine, albeit tacitly, to achieve a common end; (ii) such a combination can and often will be inferred; and (iii) Knowledge of all acts carried out pursuant to the conspiracy is not necessary, but sufficient knowledge that unlawful acts are being carried out is necessary (whether or not the defendant knows the acts are unlawful: as held in *Racing Partnership v Done Bros* [2021] Ch 233 (CA) discussed below). I need only add (although it is not controversial), that unlike criminal conspiracies, in the tort of conspiracy (in either form) the 'combination' can be a married couple: *Clerk & Lindsell on Torts* (2023) 24th Ed at p.23-104 (citing one of the last ever decisions of Lord Denning in *Midland Bank v Green (No.3)* [1982] 2 WLR 1).

516. It is absolutely clear Dr and Mrs Krishan 'combined' to commit and deploy their forgery of the PSA in the Original Proceedings, which is consistent with my findings of their 'combination' throughout this litigation:

516.1 As I summarised at paragraph 477 above, referring to my findings of fact at paragraphs 190-230 and 347, in procuring the transfer of the Properties from the Claimant in 2005-06, the Krishans combined in their 'rescue narrative' of 'carrot and 'stick', typically Dr Krishan 'wielding the stick' of the exaggerated threat of CPOs and Mrs Krishan 'dangling the carrot' of support, but occasionally 'wielding the stick' too.

516.2 As I summarised at paragraph 478 above, referring to my findings of fact at paragraphs 229-237, the Krishans combined again later in 2006 to obtain control of Gracefield from the Claimant. Mrs Krishan cajoled the Claimant to transfer one share in July 2006 so the Krishans could obtain control; then Dr Krishan from November 2006 to January 2007 tricked the Claimant into transferring all of her

remaining 49 shares, despite the bank only requiring her to have less than a 25% shareholding; and into resigning as director.

516.3 As I summarised at paragraphs 479-482 above, referring to my findings of fact at paragraphs 231-270, from 2007 to July 2008, whilst Dr Krishan ran the development of the Properties in 2006-07, when it became apparent in late 2007 that the Krishans would make more money from an immediate sale, in order to fulfil their plan to extract most of the equity in the Properties for their own benefit, they agreed to auction the Properties. However, when the Claimant objected, from April to July 2008, they combined again to try to get her to change her mind. On 5th April 2008, Mrs Krishan tried to cajole the Claimant into keeping the Properties in the auction. When that failed, they withdrew the Properties (to avoid opening their can of worms from 2005/06) and Dr Krishan prepared the 'Original Balbir Takhar Account' which they jointly presented to the Claimant and Bobby Takhar on 30th April to exaggerate the costs of the development to try and force the sales. When that also failed, on 19th May 2008 in the first two covert recordings, Mrs Krishan returned to her 2005/06 'rescue narrative' to try and 'keep the Claimant on board'. When that failed again and the Claimant insisted on a meeting with Mr Matthews on 9th June, the Krishans handed over the documents they (most likely mainly Dr Krishan) had produced – the false 'Options for Gracefield' and the forged JS Invoice. When that then failed, Mrs Krishan tried the rescue narrative one more time on 30th June 2008. When that failed too - and after the argument on 4th July and the Claimant's conciliatory letter on 7th July to Mrs Krishan - it was instead Dr Krishan who responded on 14th July in anything but conciliatory terms.

516.4 Indeed, turning now to the 'conspiracy litigation fraud' at para.36 and 41(d) CAPOC which is still pursued, as summarised above at paragraphs 483-487, referring to my findings of fact at paragraphs 271-306, once the Claimant had issued proceedings on 24th October 2008, this prompted the Krishans *together* (as found in the Gasztowicz Judgment and as I found) on 25th October 2008 to forge the Claimant's signature from the Whiston letter onto their blank and incomplete PSA from 2006 which they had never signed. That day Mrs Krishan told SB about it, setting in train their delivery of it to her before or at their meeting on 10th November 2008, when they also finally signed the incomplete PSA. Dr Krishan instructed J that there was a signed PSA, as she told Challinors in her letter of 30th October 2008.

516.5 Finally, as I summarised at paragraphs 489-492, referring to my findings of fact at paragraphs 290-300, once the Claimant's Particulars of Claim were served in February 2009, it was Dr Krishan in March 2009 who insisted on the Defence mentioning the signed PSA, which was then disclosed with the forged JS Invoice and Altered Balber Takhar Account in July 2009. Again, Dr Krishan annexed the forged PSA to his statement in December 2009, but it was Mrs Krishan who in her 2010 statement contradicted the Claimant's denial of having signed it. They both gave evidence relying on it at trial.

517. I will repeat my summary at paragraph 488 in terms of 'combination' following *Kuwait Oil*. The Krishans 'combined' together throughout the events in this case. Whereas in 2005/06 they had cajoled and pressured the Claimant into transferring the Properties to their company and shortly afterwards into their full control, I find that from 25th October 2008, they decided to use forgery in the coming litigation to win it and so

maintain and secure their control of the Properties, so they could sell them as soon as possible and finally release the returns they had wanted all along. So, in February 2009, despite initially planning to demolish the Cinema, once proceedings had been served, the Krishans then decided to rely on the signed PSA in their Defence, as Dr Krishan insisted in his email of 25th March 2009, the next day initiating the provision of the forged PSA and their own 2008 signed version from SB to J. Consistently with the Gasztowicz Judgment and the emails the Krishans both sent back in October-November 2008, I am sure the decision to forge the Claimant's signature was a joint decision which the Krishans executed together, as they had executed their plans together back in 2005/06. Once the forged PSA was disclosed in July 2009, both Dr Krishan and Mrs Krishan combined in that joint effort to use it to win the Original Proceedings and stay in control of the Properties. The fact I refer to my findings from 2005-2008 does not mean I am ignoring the Claimant's narrowing of her conspiracy claim to October 2008 onwards and finding a series of 'schemes' throughout as in *Kuwait Oil*, the way the claim was originally pleaded. It just means I am looking at all my findings of fact (rather than 'compartmentalising' them: *Arkhangelsky*) to conclude that – just as the Krishans had already done before, in the 'conspiracy litigation fraud', *they 'combined' again*. As said in *Kuwait Oil* at [111], in shorthand not substitute for detailed analysis, they were *still* 'in it together'.

518. This brings me to the final basic element of 'unlawful means conspiracy', namely intention. As made clear in *Lonrho v Al Fayed* [1992] 1 AC 448 (HL), *Kuwait Oil*, *OBG* and *Civil Fraud* at para.2-041, to put it in the terms of Mr Perring's legal summary, the defendants must intend to injure the claimant, even if that is not the main or predominant purpose, provided that it is 'the means to their end', rather than just a 'foreseeable consequence' of it. As Foxton J noted in *Lakatamia* at [18]-[19] from summaries in other cases (citations omitted for brevity):

518.1 Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests. The intention to injure need not be the defendant's predominant intention. Nor need they act maliciously in the sense that harm to the claimant need not be the end sought.

518.2 It is enough that harm to the claimant was the means by which the defendant sought to achieve his or her end, *i.e.*, that the defendant knew (or turned a blind eye to the fact) that injury to the claimant would ensue. 'If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry… then he is to be regarded as knowing the truth'.

518.3 In some cases, there may be no specific intent but intention to injure results from the inevitability of loss, where: 'The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the…tort.'

518.4 However, a conspirator's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention:

518.5 Subject to that last point, the necessary intent to harm the claimant by benefitting oneself can be and often will need to be inferred, from the facts: '[i]f an act is done deliberately and with knowledge of the consequences, the actor cannot say

he did not 'intend' those consequences or that the act was not 'aimed' at the person who, it is known, will suffer them'.

519. Again, standing back and looking at all my findings of fact in the round rather than in a compartmentalised way and drawing inferences on all the evidence (*Arkhangelsky* and other authorities discussed at paragraphs 79-90 above) from 2005 (and earlier) to 2014 (and beyond), I can reach my conclusion. I am satisfied on the balance of probabilities that the Krishans combined in this way throughout – and certainly for the purposes of conspiracy more particularly in the 'conspiracy litigation fraud' from October 2008 through to the Purle Judgment in 2010. They shared the joint intention of procuring for their own benefit at the Claimant's expense at least most of her interests in the Properties and their proceeds of sale. By the time the Original Proceedings began in October 2008, they intended to achieve that objective by 'means' (subject to it being 'unlawful means' discussed below) of deploying false documents in the litigation – the forged PSA, the forged JS Invoice and the Altered Balber Takhar Account, even only the first one resulted in the Purle Judgment. That inference is clear if I simply focus on the events of the 'conspiracy litigation fraud' in isolation. It becomes utterly overwhelming if I stand back and look at all my findings of fact in the round. Again, it does not mean I am 're-widening the conspiracy', it simply means my conclusion on the Krishans' intention in the 'conspiracy litigation fraud' is supported not only by specific findings of fact, but consistent with them all.

520. For those same reasons, once again making my 'single conspiracy check' derived from *Kuwait Oil*, it is plainly satisfied (even assuming that is necessary for me to make it see paragraphs 467-469 above). In other words, I am satisfied on the balance of probabilities that the 'conspiracy litigation fraud' from 25th October 2008 up to the Purle Judgment on 28th July 2010 was part of the same 'joint intention' and 'combination' of the Krishans since 2005 to procure for their own benefit at the Claimant's expense at least most of her interests in the Properties and their proceeds of sale. It does not matter if this same 'conspiracy' was not actionable until 2008-2010, either because of the absence of causation of damage or even absence of unlawful means – and so irrespective of whether the Claimant was entitled (as I found) to succeed on undue influence and resulting trust. In short, the 'conspiracy litigation fraud' was part of the same 'plan' and part of the same alleged 'single conspiracy' the Claimant pleaded even though she has not pursued as 'conspiracy' conduct prior to 24th October 2008. So, the Claimant's conspiracy claim will succeed, *if* the Krishans' forgery of her signature and deployment of it in the Original Proceedings amounted to 'unlawful means'. This in turn means I have must consider the concerns of Foxton J in *Lakatamia* - to see if I very respectfully agree or very respectfully disagree with them. Either way, whilst only the Claimant was represented before Foxton J, I comfort myself with the benefit of the highest quality of legal argument from Counsel for all parties before me. Given Foxton J's concerns and the potential ramifications of this issue, I hope I will be forgiven for considering it in considerable detail.

Was the Krishans' forgery of the PSA 'unlawful means' in principle ?

521. I turn to the issue whether forgery of a document and its deployment in litigation is 'unlawful means' for the purposes of the tort of conspiracy. Whilst an officious interloper from another part of the common law may declaim 'of course !', in the light of Foxton J's doubts in *Lakatamia*, there is no such simplistic answer. I have found it helpful to go back to first principles of 'unlawful means' in conspiracy. As Mr Perring

submits, each of the words in the phrase 'unlawful means' encapsulates a separate concept. 'Means' is a question of whether an unlawful act is 'indeed the means' by which injury is intentionally inflicted pursuant to the conspiracy as opposed to incidental to it: as made clear in *Total Network* and *Khrapunov* and discussed above. As I said, I am satisfied that is proved in this case. The real issue is the meaning of 'unlawful' for the purposes of *conspiracy*.

522. As Mr Perring also submits, referring to *Total Network* and *Khrapunov*, 'unlawfulness' here concerns the unlawfulness of the act or means, and requires consideration of whether the unlawful acts are capable of founding liability. It includes civil and criminal wrongs if they are the means of intentionally inflicting the harm. However, the unlawfulness of the means does not depend on their actionability at the suit of the claimant: unlawful means conspiracy may render actionable acts which would not be apart from the element of combination. The test for determining what constitutes unlawful means is whether there is a just cause or excuse for combining the use unlawful means. This depends on the nature of unlawfulness and its relationship to the resultant damage to the claimant.

523. Indeed, those principles are clear from the judgment of Lords Sumption and Lloyd-Jones in *Khrapunov*, where the Supreme Court held that a contempt of court in conspiring to breach a freezing injunction was 'unlawful means' by both the first defendant subject to it and second defendant assisting him to breach it:

> "11 Conspiracy being a tort of primary liability, the question what constitute unlawful means cannot depend on whether their use would give rise to a different cause of action independent of conspiracy. The real test is whether there is a just cause or excuse for combining to use unlawful means. That depends on (i) the nature of the unlawfulness, and (ii) its relationship with the resultant damage to the claimant. This was the position reached by the House of Lords in *Total Network*.....[in holding] that a criminal offence could be a sufficient unlawful means for the purpose of the law of conspiracy, provided that it was objectively directed against the claimant, even if the predominant purpose was not to injure him.
>
> 12 The facts of *Total Network* were that the commissioners had sued Total for participating in…VAT frauds. They alleged unlawful means conspiracy … consisting of the commission by…other conspirators of the common law offence of cheating the revenue. [It was assumed this]… gave rise to no cause of action at the suit of the commissioners independently of the alleged conspiracy….[T]he House declined to apply to unlawful means conspiracy the condition which it had held in *OBG*… to apply to the tort of intentionally harming the claimant by unlawful acts against third parties, namely that those acts should be actionable at the suit of the third party. They held that the means were unlawful for the purpose of founding an action in conspiracy, whether they were actionable or not……
>
> 14…..[In *Total Network*]…addressing the character of the unlawfulness required, Lord Walker derived from the authorities the proposition that 'unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it)': para 93…He concluded [at 94]:

> 'From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort..
>
> Lord Hope arrived at the same conclusion, at paras 43-44, where addressing the facts of the case before him, he observed that although there was no predominant intention to injure the commissioners, 'the means used by the conspirators were directed at the claimants themselves': 'a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious'.
>
> 15 The reasoning in *Total Network* leaves open the question how far the same considerations apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so readily to the formulation of a general rule. Breaches of civil statutory duties give rise to yet other difficulties. Their relevance may depend on the purpose of the relevant statutory provision, which may or may not be consistent with its deployment as an element in the tort of conspiracy. For present purposes it is unnecessary to say anything more about unlawful means of these kinds.
>
> 16 The unlawful means relied upon in this case are criminal contempt of court albeit that the offence is punishable in civil proceedings… The freezing order and the receivership order had been made on the application of the bank for the purpose of protecting its right of recovery in the event of the [underlying] claims succeeding. The object of the conspiracy and the overt acts done pursuant to it was to prevent the bank from enforcing its judgments against [the first defendant] and the benefit to him was exactly concomitant with the detriment to the bank as both defendants must have appreciated. In principle, therefore, we conclude the cause of action in conspiracy to injure the bank by unlawful means is made out. We say 'in principle', because there remains an issue as to whether an action for conspiracy to commit a contempt of court is consistent with public policy.."

Lords Sumption and Lloyd-Jones went on *Khrapunov* went on to reject the submission that public policy, including witness immunity, precluded a contempt of court, as in that case, from being 'unlawful means' in the tort of conspiracy.

524. Indeed, how the Court in *Khrapunov* dealt with the 'public policy' argument is instructive in relation to part of Foxton J's second concern in *Lakatamia* at [79]:

> "I have real doubts as to whether English law recognises a tort of unlawful means conspiracy dishonestly to defend a claim through the production of forged documents in those proceedings…. [and] whether the deployment of forged evidence at trial can provide the basis for a private law cause of action, or is a matter to be dealt with under the court's jurisdiction (through strike-out or committal) or under the criminal law (cf. *Marrinan*…)"

Marrinan concerned witness immunity, which I address separately below (including the observations on it in *Khrapunov*). However, Foxton J's doubts whether the deployment of forged evidence at trial should sound in damages raise a similar concern to that raised and addressed by the Court in *Khrapunov*:

> "18….Mr Samek for Mr Khrapunov, submitted that not only is there no right of action for contempt of court as such, but the absence of such a cause of action reflects a principle of public policy that persons in contempt of court should not be exposed to anything other than criminal penalties at the discretion of the court. He called this the 'preclusionary rule'. It follows, he says, that even if a non-actionable crime can in principle constitute unlawful means for the purpose of the law of conspiracy, a claim for civil damages founded on a contempt of court is contrary to public policy, however the cause of action may be framed…..
>
> 22 [W]e consider that the case against a right of action for breach of a court order cannot be based on any 'preclusionary rule' of public policy. When judges [in authorities they had considered at [17]-[21]] say that the 'sole remedy' for contempt is criminal penalty, they are not stating a principle of public policy, let alone a 'preclusionary rule'. They are simply asserting that no private law right is engaged by a contempt. There is a world of difference between the mere absence of a relevant right and a rule of law precluding such a right even if the elements to support it otherwise exist.
>
> 23…Mr Samek's submission, in summary, was that the principles on which the law of contempt was founded required the court to have control over the consequences of a contempt, which it would not have if a right of action existed. That was because a right of action would make damages for contempt a matter of right….We are unmoved by these concerns. It is a commonplace of the law that the same act may give rise to criminal and civil liability. It necessarily follows that in such cases the sentence for the crime will be discretionary, but the civil consequences will not. Thus a person may be given immunity in a criminal trial for burglary, for example because he agrees to give evidence against others involved, but that will not protect him against civil liability to the owner of the goods stolen… [B]reach of an order of the court is actionable where it gives effect to an underlying private law obligation which is itself actionable, although the result is to produce exactly the result that Mr Samek finds objectionable…"

In *Khrapunov*, contempt of court was held to be 'unlawful means' despite the Court's committal jurisdiction and indeed combined civil and criminal liability (and likewise crime was in *Total Network*). 'Strike out' will not assist if forgery is only discovered later, as in this case. In my very respectful judgment, this addresses Foxton J's 'public policy' concern, but I return to witness immunity.

525. *Khrapunov* was concerned, as Lords Sumption and Lloyd-Jones said at [16], with a criminal contempt of court, even though in civil proceedings. This curiosity was recently explained in *ADM v Grain House* [2024] EWCA Civ 33 at [51]-[52]:

> "A person to whom a court order is addressed is guilty of a contempt of court if they breach the court order…. Third parties who have notice of a court order may also be guilty of contempt if they do something which is a wilful interference with the administration of justice….*Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 218-9. The former is often described as a civil contempt and the latter a criminal contempt. Although these labels are controversial and in some

> circumstances misleading, it is convenient to adopt them…[T]he principal difference between civil and criminal contempt in the present context is the mental element involved in establishing the contempt, as Lord Oliver explained in…*Times Newspapers* at pp. 217-218. For a civil contempt…the mental element required of a contemnor is not that he either intends to breach or knows that he is breaching the court order or undertaking, but only that he intended the act or omission in question, and knew the facts which made it a breach of the order. By contrast, for a criminal contempt by a third party what is required is a wilful interference in the administration of justice, which in the case of a court order requires an intention that it be breached."

In *Khrapunov*, the first defendant bound by the court order committed a civil contempt, whereas the second defendant who was not but assisted him wilfully interfered with administration of justice and so committed a criminal contempt.

526. Unsurprisingly, forgery of documents in litigation with the intention of wilfully interfering in the administration of justice by misleading the Court (rather than breaching a court order binding on that person) is a criminal contempt of court, as Zacaroli J held in *Neil v Henderson* [2018] EWHC 90 (Ch), in relation to the forgery of signatures on both documents and statements, but not service of them:

> "70. There is no doubt (and no dispute in this case) that misleading the court by the use of forged documents or by presenting a false case is capable of amounting to an act of contempt…
>
> 73. In relation to….the deployment of forged documents, the Defendant contends that it is necessary, in order to establish an act of contempt, to demonstrate that the deployment of forged documents had a significant impact on the court itself, for example, by causing the court to rely upon the forged document in some way. I do not accept this proposition…….Sir Richard Scott V-C, in *Malgar Ltd v RE Leach (Engineering) Ltd*, having noted that CPR 32.14 had not introduced a new category of contempt [said]: "The general law of contempt is that actions done by an individual which interfere with the course of justice or which attempt to interfere with the course of justice are capable of constituting contempt of court".
>
> 75….[I]n my judgment…it is not necessary to show that either the court or another party was actually misled by the deployment of false or forged evidence. Nor is it necessary to show that either the court or another party took action in reliance on the false or forged evidence. It is sufficient to show that the deployment of the false or forged evidence was likely to have one, other or both of these effects….
>
> 80. In relation to [forgery of documents]….it is agreed that, in order to establish a contempt of court in the ways alleged by the Claimants, the test is that set out in *Att-Gen v Sport Newspapers Ltd* [1991] 1 WLR 1194, per Bingham LJ at 1208F-H, in a case concerned with whether a publication amounted to contempt:- "the applicant must show that the respondents' publication was specifically intended to impede or prejudice the due administration of justice. Such an intent need not be expressly avowed or admitted but can be inferred from all the circumstances, including the foreseeability of the consequences of the conduct, although the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent. But this need

> not be the sole intention of the contemnor, and intention is to be distinguished from motive or desire….
>
> 83. It was common ground between the parties that all the allegations have to be proved to the criminal standard, namely beyond reasonable doubt, as is made clear in CPR PD81, para 9: "In all cases, the Convention rights of those involved should be particularly borne in mind. It should be noted that the standard of proof, having regard to the possibility that a person may be sent to prison, is that the allegation be proved beyond reasonable doubt…"

Here, I have found the Krishans forged the Claimant's signature on the PSA not just on the balance of probabilities as found in the Gasztowicz Judgment as the Krishans in evidence before me emphasised, but in the light of the far wider evidential canvas before me, to the criminal standard so I am sure (in other words, beyond reasonable doubt). Moreover, the Gasztowicz Judgment found the forgery was an operative cause of the Purle Judgment and it inexorably follows that HHJ Purle QC *was* misled, although as Zacaroli J held in *Neil*, that is not a requirement for contempt of court. Indeed, since I have found the Krishans intended the forgery to help win the Original Proceedings and it succeeded in doing so, I am sure the mental element of contempt is also established, since they intended to interfere with the administration of justice by misleading the Court.

527. For similar reasons, it also seems to me obvious that the deployment of forged documents in litigation also amounts to an abuse of process of the Court. If authority is needed for that, in *Surzur v Koros* [1999] 2 Lloyds Rep 611 at 616, Waller LJ considered that the deliberate production and deployment of sham documentation to secure a variation in a freezing injunction was both a contempt of court and an abuse of process. Indeed, he went on to hold at 617 (before it had been confirmed in *Total Network*) that the fact those were not actionable at the suit of the plaintiff did not prevent them being arguably 'unlawful means' for conspiracy Therefore, it does not matter that it would not amount to the *actionable tort* of abuse of process, which requires initiation or conduct of civil proceedings for purposes other than for that which they were designed and not reasonably connected with relief sought - *Crawford v Sagicor* [2014] AC 366 (PC). Instead, the forgery of documents in litigation through reliance on them in a statement of case - as Dr Krishan insisted here for the Defence in late March 2009 - is the sort of conduct rendering that statement of case liable to be struck out for abuse of process under CPR 3.4(2)(b). Certainly, that was the view in relation to forged and false documentation in *Masood v Zahoor* [2010] 1 WLR 746 (CA), later endorsed in *Summers v Fairclough* [2012] 1 WLR 2004 (SC).

528. In any event, as Mr Halkerston also submitted, forgery is a crime, which also can amount in principle to 'unlawful means' for the tort of conspiracy, as in *Total Network* with the crime 'cheating the revenue'. The prospect of a crime which is also a contempt of court being prosecuted is low, but the question is whether it is a crime, not whether the CPS would prosecute it (see by analogy ss.1-3 Protection from Harassment Act 1997 and *Veakins v Kier Islington* [2009] EWCA Civ 1288). Here, I find the Krishans' forgery (of which I am sure to the criminal standard of proof) also was a crime. As Mr Halkerston submitted, it amounted to the criminal offence of fraud by false representation under s.2 Fraud Act 2006:

> "(1)A person is in breach of this section if he— (a) dishonestly makes a false representation, and (b) intends, by making the representation— (i) to make a gain

> for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss.
> (2)A representation is false if— (a) it is untrue or misleading, and (b) the person making it knows that it is, or might be, untrue or misleading.
> (3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of— (a) the person making the representation, or (b) any other person.
> (4) A representation may be express or implied.
> (5) For the purposes of this section a representation may be regarded as made if it (or anything implying it) is submitted in any form to any system or device designed to receive, convey or respond to communications…"

For the reasons already given, I am satisfied so that I am sure that each of the Krishans dishonestly made a false representation in their evidence that the Claimant had signed the PSA, intending to make a gain for themselves or to cause loss to the Claimant. Moreover, I find that the deployment of the forged PSA in the Original Proceedings amounted to an implied representation that it was genuine by its submission into the 'system' (c.f. s.2(4) and (5)) of disclosure. There is a loose analogy with the presentation to a shop of a cheque with the implied representation that it is valid and will be honoured: see *Archibold Criminal Pleading, Evidence and Practice* (2024) para.21-329-335.

529. However, there seem to me two simpler analyses of criminal offences committed by the Krishans in committing and then disclosing their forgery of the PSA:

529.1 Firstly, the common law offence of conspiracy to defraud, as explained by the Court of Appeal in *R v Barton* [2020] 3 WLR 1333 at [119]-[121]:

> "The elements of the offence of conspiracy to defraud were described in *R v Scott* [1975] AC 819, 840 by Viscount Dilhorne: "it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence'
> …[T]here must be a dishonest agreement which includes unlawfulness, either as to the object of the agreement or the means by which it will be carried out…[E]ither a proprietary right or interest of the potential victim must be injured (or potentially injured)….[T]he defendant must act with an intention to prejudice another's rights."

For similar reasons I am sure those requirements are proved on my findings.

529.2 Secondly and most simply, the Krishans plainly committed the criminal offence of forgery of an 'instrument' (which includes a document under s.8) under s.1 Forgery and Counterfeiting Act 1981, which states:

> "A person is guilty of forgery if he makes a false instrument, with the intention that he or another shall use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other person's prejudice."

This offence requires a 'double intention': (i) that the false instrument shall be used to induce somebody to accept it as genuine, and (ii) to induce that somebody, by reason of so accepting it, to do or not to do some act to his own or

another's prejudice: see *Archbold* pars.22-5-22-21. Nevertheless, on my findings of fact, I am satisfied so that I am sure the Krishans did have that 'double intention' to induce HHJ Purle QC to accept the forged PSA as genuine and by reason of doing so, to dismiss the Claimant's claim (and accept their counterclaim). That was effectively found in the Gasztowicz Judgment which binds the Krishans; and in any event is also my finding.

530. The Krishans' forgery of the PSA and their deployment of it in the Original Proceedings was therefore a contempt of court and/or an abuse of process and/or a crime (if not crimes). That makes it very different from an innocently or even negligently incorrect statement, held not to amount to 'unlawful means' in conspiracy in *Stocznia Gdanska v Latvian Shipping* [2001] 1 Lloyd's Rep. 537 at [304]. It is also very different from the creation of false documentation to conceal previous actions which were not in themselves unlawful, as Andrew Smith J discussed in *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm) at [69]:

> "I accept that…['creating 'false and fictitious documentation' to conceal the transactions under the schemes']…might constitute unlawful means so as to give rise to the tort of conspiracy, provided that the 'false and fictitious documentation' was created in order to enable the schemes to be put into effect. I cannot accept that deceptive documents that were not contemplated at the time of a transaction and were drawn up subsequently in order to conceal what had been done would constitute unlawful means whereby a combination to bring about the transaction would be tortious."

By contrast, in this case the Krishans' forgery of the PSA (i) disguised a previously *wrongful* act (as I have found the transfers were procured by undue influence, quite aside from resulting trust) – and wrongfulness being in equity rather than tort makes no difference; and in any event (ii) the forgery purported to *prove* the Claimant's agreement, not *conceal* anything; and any event (iii) it was a 'false and fictitious document created to enable a new scheme to be put into effect': namely the 'conspiracy litigation fraud'. So, I am sure that the Krishans' forgery of the Claimant's signature on the PSA deployed in the Original Proceedings was a (criminal) contempt of court as in *Khrapunov* and/or an abuse of process as in *Surzur* and/or a criminal offence as in *Total Network*. It follows that it can certainly in principle be 'unlawful means' for the tort of conspiracy, irrespective whether it would otherwise be actionable at the suit of the Claimant. However, in any event, it was so actionable - as a claim to set aside a judgment for fraud, as held in *Takhar* itself. I will call forgery of documents in litigation amounting to a crime, contempt of court or abuse of process: 'litigation forgery'.

Would recognising 'litigation forgery' to be unlawful means for the tort of conspiracy be inconsistent with the absence of a tort for maliciously defending proceedings ?

531. In recent years, tort law has expanded into claims about litigation itself, most obviously the expansion of the tort of malicious prosecution from criminal proceedings into civil proceedings, first recognised by the Privy Council in *Crawford* and then the Supreme Court in *Willers v Joyce* [2018] AC 779. In *Lakatamia* at [20], Foxton J noted the new tort of knowing inducement of breach of rights under a judgment, which he called 'the *Marex* tort' after the case first recognising its existence: *Marex v Sevilleja* [2017] EWHC 918 (Comm). Indeed, in *Lakatamia* itself, he held one absent new defendant liable for both the *Marex* tort and unlawful means conspiracy for assisting in the

dissipation of assets of a pre-existing defendant bound by a Freezing Injunction (as in *Surzur*) and another with a default judgment for the *Marex* tort only. However, Foxton J did not award unquantified 'additional legal costs' arising from a conspiracy to deploy forged documents in the litigation against the existing defendant. As noted above, whilst the comment at [79] was *obiter*, Foxton J's first concern about this claim was:

> "I have real doubts as to whether English law recognises a tort of unlawful means conspiracy dishonestly to defend a claim through the production of forged documents in those proceedings. The extension of the tort of malicious prosecution to the initiation of civil proceedings is not without controversy (see the differing views in *Willers*...), and there is no tort of maliciously defending proceedings…."

532. In *Willers*, the majority of Supreme Court held that malicious prosecution could apply to civil proceedings, provided that the ordinary elements of that tort were made out, as summarised in *Clerk & Lindsell on Torts* (2023) at para.15-13:

> "In an action for malicious prosecution, the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him by the defendant on a criminal charge or, now, via civil proceedings; secondly, that the proceedings were determined in his favour; thirdly, that the defendant acted without reasonable and probable cause; and fourthly, that the defendant was malicious. The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort."

533. Recently, in *Roopnarine v A-G Trinidad & Tobago* [2024] 1 WLR 563, Lord Hamblen for the Privy Council summarised the third and fourth requirements, albeit in the traditional context of an alleged malicious criminal prosecution:

> "20 [R]easonable and probable cause means an honest belief based on reasonable grounds that there is a proper case to lay before the court….
>
> 21 Malice means an improper motive. The proper motive for a prosecution is a desire to secure the ends of justice. Malice will be established if it is shown that this was not the motive of the defendant or that something else was. Malice may be inferred from lack of reasonable and probable cause, but this will depend on the facts of the individual case."

In *Willers*, Lord Toulson, giving the judgment of the majority, also addressed some of the concerns of the minority, including about 'malice' at [52]-[56]:

> "55 Malice is an additional requirement….. As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation… But the authorities show that there may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a *bona fide* use of the court's process [as in *Crawford*].

> 56 The combination of requirements that the claimant must prove not only the absence of reasonable and probable cause, but also that the defendant did not have a *bona fide* reason to bring the proceedings, means that the claimant has a heavy burden to discharge."

534. Moreover, in *Willers* at [51], Lord Toulson disagreed with the minority's concern that to recognise malicious prosecution of a civil claim would open the door to recognising a tort of malicious defence of a civil claim:

> "*Reciprocity*. It is suggested that the logical corollary of allowing a claim for malicious prosecution of civil proceedings should be a right to sue for the malicious defence of a civil claim without reasonable or probable cause. The same argument might logically be advanced in relation to the malicious prosecution of criminal proceedings. That aside, the question whether there should be civil liability for bad faith denial of claims raises other and wider considerations. For an English court to adopt the approach of Supreme Court of New Hampshire in *Aranson v Schroeder* (1995) 671 A 2d 1023 and recognise the existence of [that] cause of action….would be bold, to say the least, but I do not see that recognition of civil liability for malicious prosecution of civil proceedings carries with it as a necessary counterpart that there should be liability for bad faith denial of a claim. There is an obvious distinction between the initiation of the legal process itself and later steps which may involve bad faith (for which the court is able to impose sanctions) but do not go to the root of the institution of legal process."

However, in the majority in *Crawford*, Lord Kerr had played down the implications of liability for a tort of malicious defence, as he said at [113]:

> "Whatever view one takes about recognition of a tort of malicious defence, it is possible, I believe, to remain sanguine about its likely prevalence. Again it must be proved that the defendant knew or had notice of the lack of merit of the basis on which the claim was resisted and persisted in it for a reason unrelated to its legitimate defence. These are not insubstantial requirements of proof. They represent significant evidential hurdles."

535. Nevertheless, in my very respectful judgement, to recognise a tort of malicious defence of civil proceedings would not just be to extend the tort of malicious prosecution, it would create a mirror image of it. While 'malice' and 'absence of reasonable and proper cause' would indeed be similar, such a tort would require the claimant *to have sued* the defendant earlier rather than *being sued by them*. That is not the same, as the learned editors of *Clerk & Lindsell* say at para.15-01:

> "A claimant who has been subjected to legal proceedings improperly instituted against him will naturally be aggrieved by the institution of those proceedings, be they criminal or civil. Where the charge or claims against the claimant are unfounded, they may ultimately fail, but nonetheless cause injury to him. He is put to the expense of defending himself; damaging publicity may harm his reputation and cause him further financial loss; the trauma of litigation may injure his health…"

In *Crawford*, the Privy Council recognised that malicious prosecution can cause economic loss (which was recoverable) to successful defendants unwillingly dragged into litigation. This does not apply to claimants who choose to litigate.

536. The second requirement of malicious prosecution is that the earlier case determined in the now-claimant's favour. As said in *Clerk & Lindsell* at p.15-33:

> "The reason why a claimant cannot as a rule succeed if a prosecution…. terminates adversely to himself is that otherwise there might be a conflict between civil and criminal justice, and all the issues, the conclusive determination of which properly belongs to the criminal court, might be tried over again by a sort of informal appeal. Extended to malicious civil proceedings, there remains a need to avoid collateral attack on decisions."

For the same reason, if a tort of malicious defence of civil proceedings were recognised, if it also required the previous case to have terminated in the then-and now claimant's favour, one would have to question its value, as the claimant would have already by definition sued and won – and presumably got a costs order. It may even start to resemble *Henderson* abuse of process by re-litigation.

537. To add any real value, a tort of malicious defence of civil proceedings would need to be available to a claimant who had *lost* first time around – like the Claimant did here. But that would turn malicious prosecution inside out and create precisely the risk of 'collateral attack' that the second requirement of malicious prosecution is designed to avoid. It is true the third and fourth requirements of absence of reasonable and proper cause and malice would be 'significant evidential hurdles', as Lord Kerr said in *Crawford*. An unsuccessful claimant would have to prove that a successful defendant in truth had no 'reasonable and proper cause' to defend the proceedings and was 'malicious' in the sense of 'not having a *bona fide* reason to defend'. Few claims would succeed – and many would be struck out as an abuse of process (or even give rise to damages for it: *Crawford* [62]-[66]). But that would not dissuade claims from disgruntled losing claimants, including those refused permission to appeal, challenging a decision by the back door. As Lord Leggatt said in *Finzi* at [69] and [76], a claim to set aside a judgment for fraud:

> "It is by no means unknown for disappointed litigants, looking back at proceedings which resulted in an adverse judgment…to come to believe that…..their opponent must have engaged in deceit. Conduct and intentions not originally seen as fraudulent may now be perceived in a malign light….There are sayings, mentioned in *Takhar*, that… fraud 'unravels all'. But allegations of fraud are not to be regarded as some kind of open sesame which have only to be uttered to enable a party to engage in a new round of litigation of disputes that have been compromised or decided."

I return to the 'finality' point, but in my judgment, recognising a tort of 'malicious defence' would risk more litigation than justice.

538. Nevertheless, the question here is not whether the law should recognise a tort of malicious defence of civil proceedings, but rather given the absence of such a tort, whether it would be inconsistent or incoherent to recognise that forgery of documents in litigation *constituting contempt of court and/or abuse of process and/or a crime* can amount to 'unlawful means' for conspiracy. I go back to the purpose of the tort(s) of conspiracy the Supreme Court gave in *Khrapunov*:

> "6 ….[T]he economic torts are a major exception to the general rule that there is no duty in tort to avoid causing a purely economic loss unless it is parasitic upon some injury to person or property. The reason for the general rule is that, contract apart, common law duties to avoid causing pure economic loss tend to cut across

> the ordinary incidents of competitive business, one of which is that one man's gain may be another man's loss. ….Identifying the point at which it transgresses legitimate bounds is therefore a task of exceptional delicacy. The elements of the…established economic torts are carefully defined so as to avoid trespassing on legitimate business activities or imposing any wider liability than can be justified in principle.…[O]f all the economic torts [conspiracy] is the one whose boundaries are perhaps the hardest to define in principled terms….
>
> 10 What is it that makes the conspiracy actionable as such ? To say that a predominant purpose of injuring the claimant in the one case and the use of unlawful means in the other supply the element of unlawfulness required to make a conspiracy tortious simply restates the proposition in other words. A more useful concept is the absence of just cause or excuse…A person has a right to advance his own interests by lawful means even if the foreseeable consequence is to damage the interests of others. The existence of that right affords a just cause or excuse. Where, on the other hand, he seeks to advance his interests by unlawful means he has no such right. The position is the same where the means used are lawful but the predominant intention of the defendant was to injure the claimant rather than to further some legitimate interest of his own. This is because in that case it cannot be an answer to say that he was simply exercising a legal right. He had no interest recognised by the law in exercising his legal right for the predominant purpose not of advancing his own interests but of injuring the claimant. In either case, there is no just cause or excuse for the combination."

539. Two or more people combining to commit forgery and deploy it in litigation is almost a paradigmatic example of the absence of just cause and it would also pose no threat to legitimate business activities – or indeed legitimate litigation. Therefore, to recognise 'litigation forgery' as 'unlawful means' would be consistent with the modern rationale of conspiracy and not inconsistent with its caution within the sphere of economic relations. Moreover, there would be no incoherence in the law recognising as 'unlawful means' in conspiracy 'litigation forgery' amounting to a contempt of court and/or abuse of process and/or a crime whilst not recognising any tort of 'malicious defence of civil proceedings', given 'absence of reasonable and proper cause' and 'malice' are significantly lower thresholds and are factual, so not apt for strike-out. By contrast, the requirement of a contempt of court, abuse of process or a crime are not only much higher hurdles, but clear legal thresholds more susceptible to policing by strike-out or indeed abuse of process for collateral attack (discussed further below).

540. Moreover, *not* to recognise forgery in litigation as 'unlawful means' in conspiracy actually *creates* incoherence in the law. The elements of malicious prosecution discussed in *Withers* and *Roopnarine* mean that a meritorious *defendant* exposed to loss by litigation beyond recovered costs has a remedy in tort against a misguided *claimant* bringing a claim without reasonable grounds, from which may in turn be inferred 'malice' by knowledge of that or even 'improper motive' without knowledge – as many misguided, often self-represented, claimants do. By contrast, a meritorious *claimant* deprived of a remedy to which he was entitled by a *fraudulent defendant* would not have a remedy in tort *at all*. Whilst the 'reciprocity' point against a tort of simply *malicious* defence is understandable, disparity between (simply) *malicious* prosecution sounding in damages but not (even) *fraudulent* defence, is not easy to understand. The victim claimant's only recourse would be an action to set aside the judgment for fraud and to go back, if not to 'square one', then in some cases back to near the beginning of

the board. That is not a 'remedy' in the sense Lord Wilson discussed in *Crawford* at [73]:

> "In the end I conclude that the arguments against renewed recognition of a tort of malicious prosecution of civil proceedings fail to override the need for the law to be true to the reason for its very existence. In *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 Sir Thomas Bingham MR referred, at p 663, to 'the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied'. The word in the rule is 'wrongs' as opposed to 'misfortunes': see *Gorringe v Calderdale MBC* [2004] 1 WLR 1057, para 2 (Lord Steyn). In *Jones v Kaney* [2011] 2 AC 398, para 113 Lord Dyson JSC said: 'The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional ..any justification must be necessary and requires [to be] strict and cogent."

541. It is difficult to see what 'cogent justification' there is for the absence of a remedy for fraudulent defence of a claim by forgery amounting to a contempt of court and/or abuse of process and/or a crime when the remedy would be consistent with the rationale of the tort of conspiracy itself and not inconsistent with the tort of malicious prosecution. Lord Toulson in *Withers* at [43]-[58] following Lord Wilson in *Crawford* at [72] considered a number of policy objections to extension of malicious prosecution to civil proceedings. There are five of relevance here:

541.1 'Floodgates': As discussed by Lord Toulson in *Willers* at [44] and Lord Wilson in *Crawford* at [72(e)], whether 'floodgates' will open is difficult to test in advance. I referred above to the Court of Appeal's decision in *Racing Partnership* that a conspirator need not know their conduct was unlawful. Whilst he did not use the term 'floodgates', Lewison LJ dissenting was plainly troubled about the consequences of the majority decision. However, his concern did not extend to crimes where ignorance of the law is not an excuse – see [264]. In any event, as Arnold LJ in the majority said at [143] of *Racing Partnership*, 'knowledge may be required where the unlawfulness of the means requires knowledge'. Even if it does not require 'knowledge' as such, forgery in litigation is 'obviously unlawful' and amounts to contempt of court, abuse of process or crime requiring a mental element. This higher threshold for liability than 'malicious' in malicious prosecution should limit claims to relatively few plainly meritorious cases.

541.2 'Finality': As Lord Toulson said in *Willers* at [46] and Lord Wilson in *Crawford* at [72(b)], malicious prosecution itself is an exception to finality. I would very respectfully add, so is an action to set aside a judgment for fraud, which if successful re-open proceedings anyway, just as in this case. But I will discuss below other 'finality' control mechanisms on re-litigation.

541.3 'Deterrence': As discussed by Lord Toulson in *Willers* at [45] and Lord Wilson in *Crawford* at [72(a)], it is unlikely a genuine claimant would be deterred by malicious prosecution. The only clear deterrent from 'litigation forgery' being 'unlawful means' in conspiracy would be to deter forgery.

541.4 'Inconsistency with absence of duties of care between litigants': As Lord Toulson said in *Willers* at [49], which applies equally in the present context:

> "There is a great difference between imposing a duty of care and imposing a liability for malicious prosecution [and I would respectfully add,

> 'litigation forgery']…..The distinction between careless and intentional conduct is..familiar [to]…the common law, reflected in Oliver Wendell Holmes Jr's often-quoted saying, 'Even a dog distinguishes between being stumbled over and being kicked'."

541.5 'Duplication of Remedies'. One specific duplication in recognising forgery in litigation amounting to a contempt of court, abuse of process or a crime as 'unlawful means' in conspiracy would be to give a successful defendant against a forging claimant another remedy in addition to malicious prosecution (with its lower threshold) for the same conduct. However, that is true of many legal rights – as of undue influence and resulting trust in this case. More importantly, unlike malicious prosecution, it would offer a remedy to defendants and claimants who were *unsuccessful* because of the other party's forgery. The general duplication point is, as Lord Toulson noted in *Willers* at [47], in *Gregory v Portsmouth CC* [2000] 1 AC 419, at 432, that Lord Steyn considered extending malicious prosecution to civil proceedings unnecessary because other torts (if necessarily extended) could address that. Whilst that did not persuade Lord Toulson in *Willers* or Lord Wilson in *Crawford* not to do so, accepting 'litigation forgery' amounting to a contempt of court, abuse of process, or crime as 'unlawful means' for the tort of conspiracy, may be just the sort of thing Lord Steyn had in mind.

542. Those arguments of policy and coherence in the law of tort seem to me to point strongly towards recognition, not refusal, of 'litigation forgery' constituting contempt of court and/or abuse of process and/or a crime amounting to 'unlawful means' in the tort of conspiracy. Yet the common law's main concern is not policy but *precedent*. There is a useful analogy – indeed about analogical judicial reasoning in tort – from Lord Reed on the approach to analysing duties of care in negligence in 'novel' cases, in *Robinson v CCWYP* [2018] AC 736 (SC) at [29]:

> "In the ordinary run of cases, courts consider what has been decided previously and follow the precedents. In cases where the question whether a duty of care arises has not previously been decided, courts will consider the closest analogies in the existing law, with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. They will also weigh up the reasons for and against imposing liability…to decide whether the existence of a duty of care would be just and reasonable."

543. Of course, I am not concerned even with negligence, let alone duties of care or the 'three-stage test' in novel cases of 'forseeability', 'proximity' and whether a duty of care would be 'fair, just and reasonable'. Nevertheless, when feeling in the half-light for the boundaries of a tort, this analogy appears to me very helpful. Having already weighed up 'justice and reasonableness' in the policy arguments for and against liability, it seems to me that, like in *Robinson*, I should consider the closest analogies in the existing law with a view to maintaining the coherence of the law and the avoidance of inappropriate distinctions. Indeed, Lord Reed again, in his 2022 lecture *'Time Present and Time Past: Legal Development and Legal Tradition in the Common Law',* offered an example from within the sphere of the economic torts of how policy and precedent entwine. He discussed *Health Secretary v Servier* [2021] 3 WLR 370 (SC) on the related 'economic tort' of 'intentionally causing economic loss by unlawful means'. *Servier* was concerned with determining the parameters of that tort, especially whether it was a requirement that the defendant used unlawful means to interfere with a third

party's freedom to deal with the claimant (not a requirement of unlawful means conspiracy, which has different elements: see *Total Network*). In his lecture, Lord Reed noted the Court in *Servier* considered a range of previous cases in very different factual contexts and concluded those different legal precedents supported such a requirement in contemporary times on policy grounds 'where competition is primarily regulated by legislation, and the scope of common law constraints on competition has to be kept within limits'.

544. In this case, quite aside from the policy arguments and Foxton J's concerns in *Lakatamia* (which I very respectfully hope to have considered in sufficient detail given their importance), in my judgement, precedent points firmly *towards* the incremental step of recognising forgery in litigation amounting to contempt of court and/or abuse of process and/or a crime as 'unlawful means' for conspiracy:

544.1 Given precedent, this would be a small step. A much greater step was taken in the similar case of *Surzur* by Waller LJ giving the judgment of the Court of Appeal. He anticipated by a decade the Lords' decision in *Total Network* that unlawful means did not have to be independently actionable at the suit of the plaintiff. He held that a conspiracy claim based on the unlawful means of contempt of court and abuse of process arising out of forgery of documents was itself actionable. Of course, the facts in *Surzur* are not identical – incremental cases never are. *Surzur* concerned the assumed facts of the faking of documents of transfer by companies subject to a freezing order intended to persuade the other party to agree to a variation. They did not agree, so the faking party applied to court to vary the order based on those fake documents. That eventually succeeded in obtaining a variation in the order. The faking party then made a different transaction in substance than the fake transfers, as they had always planned, which deprived the plaintiff of security for a later judgment. I return to Waller LJ's discussion of witness immunity. However, he also decided that conspiracy to use false documents, initially to vary a court order by consent, but 'if necessary' (as it proved) to mislead the Court, amounted to contempt of court and abuse of process and could be unlawful means for the tort of conspiracy. So, it would be a small step for 'litigation forgery' of documents deployed in litigation being a contempt and an abuse to do so, in the light of the larger steps already taken in *Surzur*, *Total* and *Khrapunov*.

544.2 Also, recognising litigation forgery as 'unlawful means' would be a limited and controlled step. In the language of negligence in cases like *Robinson*, the five elements of the tort of unlawful means conspiracy summarised in *Kuwait Oil* are key 'control mechanisms' on the imposition of liability for 'litigation forgery' amounting to 'unlawful means'. Conspiracy requires firstly causation of damage and secondly that the specific unlawfulness was 'indeed the means' of inflicting harm. As I said at paragraph 514 above, in the particular circumstances of this case where the Purle Judgment removed the Claimant's injunction restraining sales of the Properties by Gracefield as well as imposing a costs order (albeit later set aside), I would have found 'damage' proved even if the Claimant's claims for undue influence and resulting trust had not succeeded. However, in many 'litigation forgery' conspiracies, causation of damage would not be proved unless the underlying claim should have succeeded (as I have now found it does anyway). Thirdly, 'unlawful means' in conspiracy would not include a litigant innocently, negligently or even deliberately creating inaccurate documents about

lawful transactions (*Stocznia*/*Privalov*). Actual *forgery* of documents must be proved constituting a contempt of court (as in *Neil*), abuse of process (as in *Surzur*), or a crime (as in *Barton*). Conspiracy requires fourthly a combination of individuals (*Kuwait Oil*) – so it would not affect 'lone-forging litigants', as would likely be much more common. That is legitimate because it that combination has no just cause and liability would not interfere with legitimate competition or litigation (*Khrapunov)*. Unlawful means conspiracy fifthly requires intention - not just to amount to the crime, contempt or abuse of process to qualify as 'unlawful means' even without strict knowledge of unlawfulness (*Racing Partnership*) - but also intent to harm the claimant, even if not the predominant purpose (*Lonrho*). These requirements, like the 'dealing requirement' in 'unlawful interference' in *Servier*, serve to limit 'litigation forgery' in conspiracy.

544.5 Finally, further key control mechanisms for 'litigation forgery' as 'unlawful means' in conspiracy are finality in litigation and witness immunity.

Would recognising forgery in litigation to be unlawful means for the tort of conspiracy be inconsistent with (i) finality in litigation or (ii) witness immunity ?

545. Before turning to Foxton J's last concern in *Lakatamia* – witness immunity following *Marrinan v Vibart* [1963] QB 528 (CA) - there is of course another concern which I do not understand him to have expressed but I should address related to witness immunity: finality in litigation. As I observed at paragraph 541.2, finality is not a concern here where the Gasztowicz Judgment set aside the Purle Judgment for fraud and re-opened proceedings anyway. Nor would finality in litigation be a concern where (as actually should have happened here) forgery is not just suspected, but actually properly raised by amendment to the original pleadings to claim conspiracy. HHJ Purle QC should have been put in the position by the Claimant of having a prompt application for handwriting evidence rather than a last-minute application which – given his dim view of the 'Balber Takhar Account' and 'Options for Gracefield' – may well have tipped him into accepting the Claimant's case on undue influence and resulting trust in the first place. (Whether a conspiracy claim would have added anything then is a different issue).

546. However, if I am considering the potential implications and control mechanisms of 'litigation forgery' being accepted as 'unlawful means' in conspiracy in a *later* action, I should briefly address the principle of 'finality in litigation' even though – as it does not arise here - I have not been addressed about it. In other cases, 'finality' may raise the question whether taking this step would open up – if not 'floodgates' – then the risk of undermining finality by spurious collateral attacks on judgments by claims in conspiracy for 'litigation forgery'. As noted at paragraph 537 above, Lord Leggatt discussed in *Finzi* such spurious claims of fraud undermining finality in litigation and observed at [65] that one way it is protected is the Court's procedural power to prevent abuse of process. A good and very recent example published on *Bailii* as I was finishing this draft judgment is *El-Haddad v Rostamani & Others* [2024] EWHC 448 (Ch), where Fancourt J struck out a prolix and incoherent claim by a disgruntled litigant-in-person to set aside a judgment for 'fraud' alleged against lawyers in previous litigation. He did so as it was inadequately pleaded, had no reasonable prospects of success and on grounds of witness immunity - but as discussed below crucially not *forgery*, but 'dishonesty' in statements of case, witness statements, skeleton arguments etc.

547. I have already discussed 'the principle of finality' in the context of the doctrine of '*Res Judicata*' covering re-litigation between 'the same parties or their privies' (i.e. having a sufficient identification between the two to make it just that a decision against one should bind the other, albeit even a company and controlling shareholder may not be: *Johnson v Gore Wood* [2002] 2 AC 1 (HL) at 32 and 60). As between parties themselves, finality is also relevant to a judge's ability to change their mind before a judgment is sealed, as discussed by the Supreme Court in *AIC v FAA Nigeria* [2022] 1 WLR 3223 - Lords Briggs and Sales said at [29]:

> "[T]he higher courts have in a number of respects laid down important and binding principles regarding what justice requires in the context of litigation which are relevant to the application of the overriding objective in the CPR, and one of these is….finality in litigation. This is a general principle with various aspects, including the rule in *Henderson v Henderson*…This rule is firmly underwritten by and inherent in the overriding objective."

548. For the reasons discussed at paragraphs 41-52 above, '*Res Judicata'* offers considerable protection against spurious 'litigation forgery' conspiracy claims from disgruntled losing litigants. Whilst the Supreme Court in *Takhar* itself held that *Res Judicata* could not prevent an action to set aside a judgment for fraud, as Lord Diplock said in *Lasala v Lasala* [1980] AC 546 (PC) pg.561 (my underline):

> "Where a party to an action seeks to challenge, on the ground that it was obtained by fraud or mistake, a judgment or order that finally disposes of the issues raised between the parties, <u>the only ways</u> of doing it that are open to him are by appeal….or by bringing a fresh action to set it aside."

In *Lasala*, rather than an out-of-time appeal, or application to set aside a consent order for fraud, an ex-wife tried to re-open her financial remedy claim by a *fresh application for maintenance* alleging the consent order had been procured by fraud, but it was dismissed. The House of Lords reiterated the *Lasala* principle in *Kuwait Airways v Iraq Airways (No.2)* [2001] 1 WLR 429 in refusing to re-open themselves their judgment said to have been procured by fraud, insisting on an application to set aside to the High Court which could make findings of fact etc.

549. However, as explained in *Allsop v Banner Jones* [2021] 3 WLR 1317 (CA) at [22]-[27], *'Res Judicata*' (whether cause of action estoppel, issue estoppel or *Henderson v Henderson* abuse of process etc) simply does not apply as between different parties (or non-privies) such as a truly new defendant sued alone - or alongside the original defendant - and accused of a 'litigation forgery' conspiracy. These new defendants can however argue a narrower form of abuse of process for 'collateral attacks' on an earlier judgment derived from the Lords' decision in *Hunter v CCWMP* [1982] AC 529 (HL): a failed 'collateral attack' on their criminal terrorism convictions by the 'Birmingham Six' before their convictions were overturned. Collateral attacks on civil claims have a higher threshold to amount to abuse of process, as Marcus Smith J summarised in *Allsop* at [45]:

> "[T]he doctrine of abuse of process is best framed, at least in the context of a 'collateral' attack on a prior civil decision, by reference to the test expounded by Lord Diplock [in *Hunter*]…If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings, then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if (a) it would be manifestly

> unfair to a party to the later proceedings that the same issues should be relitigated or (b) to permit such re-litigation would bring the administration of justice into disrepute."

550. In *Allsop*, it was not abusive (indeed common) for a disgruntled losing litigant in divorce financial remedy proceedings to bring a professional negligence claim against his lawyers. Likewise, in *PWC v BTI 2014* [2021] EWCA Civ 9, it was not abusive for a claimant to bring a claim against a second defendant who had avoided joinder of the claim against it in the first proceedings. By contrast, in *Tinkler v Ferguson* [2021] 4 WLR 27 (CA) (the third of these cases decided within a week of each other and referring to each other), it *was* abusive for the claimant to pursue essentially the same allegations as already adjudicated, albeit through a different cause of action against a slightly different defendant (the directors of a company, not the company itself). Peter Jackson LJ said at [35]:

> "…[S]trike out for abuse of process is a flexible power unconfined by narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in the proper administration of justice and can be deployed for either or both… It is a serious thing to strike out a claim and the power must be used with care with a view to achieving substantial justice…where the court considers... its processes are being misused. It will be a rare case where the re-litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act."

So, a previous claimant re-arguing the same or closely-related point against a new defendant closely-related to the old defendant is more likely to be found abusive than a totally new allegation against a totally unrelated party. The new defendant can also argue 'no reasonable prospect' strike-out as well. Either way, this offers real protection against spurious 'litigation forgery' conspiracy claims.

551. 'Finality' also finds some expression in the doctrine of witness immunity, which Foxton J also raised in *Lakatamia* by reference to the case of *Marrinan* (to which I turn in a moment). As I noted above, Foxton J said in *Lakatamia* at [79]:

> "I have real doubts as to whether… the deployment of forged evidence at trial can provide the basis for a private law cause of action, or is a matter to be dealt with under the court's jurisdiction (through strike-out or committal) or under the criminal law (cf. *Marrinan v Vibart* [1963] 1 QB 234 (CA)"

I hope that I have already addressed, by reference to *Khrapunov*, Foxton J's wider concerns about the role of a private law cause of action to enforce contempt, abuse of process, or a crime in the form of 'litigation forgery'. However, as Foxton J implied, any liability in conspiracy for litigation forgery would be subject to the doctrine of witness immunity which *Marrinan* confirmed applied to conspiracy. As he anticipated, it is a significant restriction on liability for 'litigation forgery', (though he was not referred to cases which show that it does not prevent it totally).

552. *Marrinan* is a wonderfully colourful case from another age with enjoyably irascible judgments. The claimant had been a barrister who had been disbarred for advising his criminal client to escape from custody and to go on the run. Police officers overheard and gave evidence about it, both at the trial of his recaptured client and at his disbarring at his Inn. As this was covered by absolute privilege in defamation, the claimant

brought a claim for conspiracy to defame. The judge (later Lord Salmon) was having none of it and struck it out. The Court of Appeal (including the later Lord Diplock) agreed, noting the rationale for the immunity being the proper administration of justice and necessity for witnesses to attend: *Watson v M'Ewan* [1905] AC 480. In *Marrinan*, Sellers LJ stated at 535 that:

> "Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given."

553. A century later, in *Taylor v SFO* [1999] 2 AC 177 (HL) at pg.208, Lord Hoffmann re-articulated the rationale of the doctrine of witness immunity in modern terms:

> "The immunity from suit…is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say. It is generated by the circumstances in which the statement was made and it is not concerned with its use for any purpose other than as a cause of action. In this respect, however, the immunity is absolute and cannot be removed by the court or affected by subsequent publication of a statement."

In his invaluable survey of the principles of witness immunity from [20]-[69] in *Singh v Reading BC* [2013] 1 WLR 3052 (CA), Lewison LJ said at [27]:

> "As all the cases recognise, a rule designed to protect the innocent will, on occasion, protect the guilty. A witness does not lose his immunity simply because he has been dishonest or malicious in giving his evidence."

The same point was recently made by Fancourt J in *El-Haddad* at [83]-[88]. According to the learned editors of *Clerk & Lindsell* at paras.15-078-079, witness immunity covers perjury: *Hargreaves v Bretherton* [1959] 1 WLR 528 (CA); false statements of case and witness statements: *Watson*, (even if the witness does not give evidence on them or is simply an investigator before court proceedings: *Taylor*); and extends to 'evidence' other than at trial e.g. insolvency oral examinations: *Re MBI* [2022] 2 WLR 497 (CA).

554. In *Singh* at [27]-[37], Lewison LJ showed how attempts to outflank the immunity had failed in either (i) bringing a cause of action other than in defamation where the immunity was originally cast (as was tried and failed with conspiracy in *Merrinan*); or (ii) challenging not oral evidence but underlying statements (as was tried and failed at either end of the 20th Century in *Watson* and *Taylor*). Another attempt to outflank witness immunity recently failed in *El-Haddad*, where another allegation was made of dishonest statements of case, witness statements etc, but directed against lawyers, whom Fancourt J held were also covered. Lords Sumption and Lloyd-Jones summarised the immunity in *Khrapunov* [23]:

> "A witness…is absolutely immune from civil liability for things said in evidence or in circumstances directly preparatory to giving evidence. An action against him for negligence or defamation would fail. If it were framed in conspiracy, it would still fail, as it did in *Marrinan*…This is because the objection to such an action is not the absence of the necessary elements of a cause of action, but a special immunity based on a public policy that a witness should be able to give evidence without fear of adverse legal consequences other than prosecution for perjury or perverting the course of justice. The public policy is engaged by any attempt to

> found a claim on what the defendant did as a witness, irrespective of the legal label."

Therefore, on the face of it, conspiracies to give false evidence in litigation would be barred by the witness immunity rule, so would not be 'unlawful means' for the purposes of the tort of conspiracy, as in *Marrinan* itself. As Lewison LJ observed in *Singh* at [34]-[42], some wider statements in the authorities take that approach.

555. Nevertheless, in *Khrapunov* at [23], witness immunity did not apply, for the reasons quoted at paragraph 524. Moreover, the conspirators in *Khrapunov* had not relevantly *given evidence*, but conspired to circumvent the first defendant's freezing injunction. So, in *Khrapunov*, the Court did not need to refer to some cases cited to them on witness immunity, like *Roy v Prior* [1971] AC 470 (HL), *Darker v Chief Constable West Midlands Police* [2001] 1 AC 435 (HL) and *Surzur*. As Lewison LJ explained in *Singh*, consistently with withdrawing related immunities for advocates in *Arthur Hall v Simons* [2002] 1 AC 615 and expert witnesses in *Jones v Kaney* [2011] 2 AC 398 (SC), those three cases created 'inroads into witness immunity'. Whether described as 'inroads into', 'exceptions to', or 'limitations on' witness immunity, three are relevant here.

556. The first 'limitation' on witness immunity, as Lewison LJ noted in *Singh* at [59], (and Lord Toulson in *Willers* at [48]), is that in *Roy* the House of Lords certainly held that a claim for malicious arrest, malicious prosecution, or abuse of process, would not be barred by the immunity. In *Roy*, Lord Morris said at pgs.477-8:

> "[The immunity] does not involve that an action…not brought in respect of evidence given in court, but …alleged abuse of process of the court must be defeated if one step…involved giving of evidence….[A] defendant [sued]..for malicious prosecution [may] have given evidence in the criminal prosecution of which the plaintiff complains….So also in actions based upon alleged abuses of the process of the court it will often have happened that the court will have been induced to act by reason of some false evidence given by someone. In such cases the actions are not brought on or in respect of any evidence given but in respect of malicious abuse of process."

557. The second 'limitation' on witness immunity was an extrapolation from the first. In *Surzur* at 619, Waller LJ said that observation by Lord Morris in *Roy* could be interpreted in two ways. The narrower interpretation was that Lord Morris was simply making an exception to witness immunity for malicious prosecution and abuse of process, which was in any event one unlawful means in *Surzur* itself. However, Waller LJ preferred a wider interpretation of what Lord Morris said:

> "The statement…supports a broader proposition that if the action is not brought simply in respect of evidence given or supplied, but is brought in relation to some broader objective during the currency of which it may well be that evidence was given, witness immunity should not apply."

Such a wider interpretation of Lord Morris' comments in *Roy* has prevailed. As Lewison LJ noted in *Singh* at [48], in *Taylor* Lord Hoffmann said at pg.215:

> "As the….immunity is to encourage freedom of expression, it is limited to actions in which the alleged statement constitutes the cause of action."

In *Singh*, Lewison LJ also took a similar wider view of *Roy*, in holding that an employee's claim for constructive dismissal based on the allegation that her employer had pressured a colleague to give false evidence in a statement for an employment tribunal hearing was not barred by the immunity. He said at [66]:

> "(i) the core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court; (ii) the core immunity also comprises statements of case and other documents placed before the court; (iii) that immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked; (iv) whether something is necessary is to be decided by reference to what is practically necessary; (v) where the gist of the cause of action is not the allegedly false statement itself, but is based on things that would not form part of the evidence in a judicial inquiry, there is no necessity to extend the immunity; (vi) in such cases the principle that a wrong should not be without a remedy prevails."

Therefore, as the claimant's complaint in *Singh* was not about the content of the allegedly false statement, but the allegation of the pressure on the colleague to give false evidence - whatever its content was – it was not barred by the immunity.

558. The third 'limitation' on witness immunity is again an extrapolation from the second category and confirmed in *Darker*. In that case, criminal trials against the (later) claimants were stayed for abuse of process following the failure by the police to comply with disclosure orders. The claimants then sued the Police for unlawful means conspiracy (and misfeasance in public office) alleging that the Police had fabricated evidence against them in the prosecution. As Lord Hutton noted at pg.471D, the claimants did not allege malicious prosecution, as they did not allege absence of reasonable and proper cause for the prosecution on all the evidence. Instead they brought a conspiracy claim limited to the fabricated / forged evidence but it was struck out on grounds of witness immunity. The Lords distinguished *Marrinan* and held the claim of unlawful means conspiracy was not barred by witness immunity. Lord Hope at pg.449 based his conclusion on a similar wider reading of *Roy* as in *Taylor*, distinguishing a claim targeting *witness evidence itself* which was immune and the *fabrication of evidence* which was not:

> "[T]he distinction…I would draw [is] between the act itself and the evidence that may be given about the act or its consequences. This distinction rests upon the fact that acts which are calculated to create or procure false evidence or to destroy evidence have an independent existence from, and are extraneous to, the evidence that may be given as to the consequences of those acts. It is unlikely that those who have fabricated or destroyed evidence would wish to enter the witness box for the purpose of admitting to their acts of fabrication or destruction. Their acts were done with a view to the giving of evidence not about the acts themselves but about their consequences. The position is different where the allegation relates to the content of the evidence or the content of statements made with a view to giving evidence, and not to the doing of an act such as the creation or the fabrication of evidence. The police officer who is alleged to have given false evidence that he found a brick or drug in the possession of the accused or that he heard an accused made a statement or a remark which was incriminating is protected because the allegation relates to the content of his evidence. He is entitled to the immunity because he was speaking as a witness, if he made the

> statement when he was giving evidence, or was speaking as a potential witness, if he made it during his preliminary examination with a view to his giving evidence."

In *Darker*, Lord Hutton expressed the same point this way at 469 (my emphasis):

> "[T]he immunity in essence relates *to the giving of evidence.* There is, in my opinion, a distinction in principle between what a witness says in court (or what in a proof of evidence a prospective witness states he will say in court) and the *fabrication of evidence*, such as the forging of a suspect's signature to a confession or a police officer writing down in his notebook words which a suspect did not say or…planting…drugs on a suspect."

As noted in *Singh, Darker* was applied in *Smart v FSS* [2013] PNLR 32 (CA), where a forensic science company negligently mixed-up bullets between criminal investigations then fabricated exhibit records to try and cover it up. Whilst only negligence (and breach of the Human Rights Act 1998) were initially pleaded and the claim struck out based on witness immunity, the Court of Appeal allowed an amendment to also allege deceit in relation to the fabrication of evidence to which, following *Darker*, witness immunity did not apply (and having done so, also decided the original claims should not be struck out either). As Fancourt J put it in *El-Haddad* at [86], *Darker* confirmed that immunity applies to a claim that defendants conspired to give false evidence *to a court*, in the sense of 'giving evidence' in or to a court. However, *Darker* also confirmed that the immunity did *not* apply to the fabrication of documentary evidence then presented to a court – indeed that was its *ratio* (that issue of fabricated or forged documentary evidence was not live in *El-Haddad*, which is why Fancourt J had no need to discuss it).

559. Subject to those observations, I would agree with Mr Perring's helpful summary of the principles relevant to witness immunity in the context of 'litigation forgery'

559.1 No action lies against parties or witnesses for anything said or done, although falsely or maliciously and without any reasonable or probable cause, or in circumstances directly preparatory to giving evidence, in the course of legal proceedings, even if framed as conspiracy: *Khrapunov*.

559.2 The core immunity also comprises statements of case and other (genuine) documents placed before the court prepared before the litigation: *Singh.*

559.3 The policy reasons for the rule are: first, those engaged in litigation should be able to speak freely without fear of civil liability; and second, the wish to avoid a multiplicity of actions where one court would have to examine whether evidence given before another court was true or not*: Singh / Taylor.*

559.4 If giving of false evidence is not a necessary allegation in the claim but merely an incidental part of wider conspiracy, there is no immunity: *Surzur.*

559.5 The rule does not extend to cover the fabrication of false evidence: *Darker*.

560. I have of course reflected extremely carefully on whether 'litigation forgery' amounting to a contempt of court and/or abuse of process and/or a crime can constitute 'unlawful means' for the tort of conspiracy, given the recent doubts of Foxton J in *Lakatamia* and even more recent re-affirmation of the importance of witness immunity (albeit in a different context) by Fancourt J in *El-Haddad*. This is one reason why I have tried to analyse and anticipate the implications at length. Nevertheless, I consider that this is a

relatively modest step in precedent terms (especially from *Surzur, Total Network* and *Khrapunov*). It is consistent with: the underlying principles of 'unlawful means conspiracy stated in *Khrapunov*; the absence of a tort of malicious defence; and the principle that wrongs should be remedied in *Withers.* Indeed, in the context of a judgment being set aside for fraud, in *Singh* at [64], Lewison LJ even contemplated that damages could be awarded for such a fraud. The present step is much more incremental. Whilst it does create a risk of spurious claims of 'litigation forgery' by disgruntled litigants who failed to use evidence first time around (as in *Finzi*), or who make incoherent and hopeless allegations (as in *El-Haddad*), that risk can be sufficiently policed:

560.1 Firstly, a conspiracy claim for 'litigation fraud' pursued after a judgment is set aside for fraud (as here), or in parallel with it, has 'in-built' procedural protections. If issued in parallel with a set-aside claim, it can be stayed pending the determination of that, since as explained in *Highland*, the Court does not re-try the original claim. Either way, the claimant would first have to set the judgment aside on the strict *Highland* criteria, as emphasised in *Takhar* (see paragraphs 40-49 above). Moreover, if the claim to set aside a judgment is based on evidence available at the time, it may well be struck out as an abuse of process: *Finzi*. As explained at paragraphs 541.2 and 545 above, it also does not conflict with finality in litigation. If the judgment is not set aside for fraud, any parallel claim is likely to fail for the next reason.

560.2 Secondly, if a claim to set aside a judgment fails or is not made in the first place, a new conspiracy claim against the previous parties or their privies will be covered by strike-out, as in *Lasala,* or *Res Judicata*. Whilst a new conspiracy claim would not engage cause of action estoppel, issue estoppel and *Henderson v Henderson* abuse of process could still apply, since by definition the exception recognised by the Supreme Court in *Takhar* for claims to set aside judgments for fraud would not apply. Indeed, in this case, whilst the finding in the Gasztowicz Judgment of forgery in setting aside the Purle Judgment created an issue estoppel in the conspiracy claim against the Krishans, *until that finding*, the Purle Judgment created an issue estoppel against forgery against the Claimant, fatal to a conspiracy claim.

560.3 Thirdly, as discussed at paragraph 549 above, whilst *Res Judicata* generally and issue estoppel specifically is not available as against a defendant not previously a party (or their privy), abuse of process is available as against a new defendant for a collateral attack on an existing judgment unless it was set aside for fraud: *Allsopp* and *Tinkler*. A conspiracy claim against (by definition) a party who 'combined' with the previous party would be much closer to the situation in *Tinkler* where a similar claim against an associated party was struck out as an abuse of process, especially if there had been no claim to set aside a judgment for fraud, e.g. if evidence was not 'new' and that claim against the original party would have been an abuse as in *Finzi*.

560.4 Fourthly, the cases on witness immunity discussed at paragraphs 550-559 above show – just as Foxton J observed in *Lakatamia* at [79] and as illustrated by *El-Haddad* – witness immunity would be a formidable obstacle to a conspiracy claim based on 'litigation fraud'. Since that would by definition 'constitute the cause of action' of unlawful means conspiracy (*Taylor*), it would therefore be barred by witness immunity unless one of the three 'limitations' (there effectively

exceptions) applied – a claim for malicious prosecution or abuse of process like *Prior*, a wider conspiracy claim like *Surzur*, or forgery/fabrication like *Darker*.

560.5 Finally, whether or not those other protections were available, a defendant could apply to strike out the 'litigation forgery' conspiracy claim under CPR 3.4(2)(a) on the basis it stood no reasonable prospect of success given the different 'control mechanisms' for 'litigation forgery' and for conspiracy more widely discussed above. Indeed, in *Alsopp*, Marcus Smith J emphasised at [47(iii)] that a strike out application for 'no reasonable prospects of success' should generally be considered *before* one for abuse. Whilst a claim to set aside a judgment for fraud not in conspiracy (although effectively alleged), that was another ground for strike-out in *El-Haddad*.

Was the Krishans' forgery of the Claimant's signature in this case 'unlawful means' ?

561. My short answer is that it was and I give my conclusions briefly given what I have already decided in doubtless overlong detail in my findings of fact in this case. Working in reverse order through the topics I have covered in this 'chapter': I address witness immunity and what is and is not barred by it; then whether what is not barred could amount to unlawful means in conspiracy without inconsistency inside or outside that tort; then whether it was 'unlawful means' in the form of a crime, contempt of court or abuse of process consistent with precedent; then stand back to consider whether it amounted to 'unlawful means' in all the circumstances; before fitting that into my conclusions on conspiracy.

562. On witness immunity, on the face of it, (i) Dr Krishan's insistence on referring to the (forged) 'signed' PSA in the Defence and Counterclaim in March 2009; (ii) his and Mrs Krishan's witness statements in December 2009 and February 2009 and (iii) oral evidence to HHJ Purle QC in July 2010 to the effect the Claimant had been given a copy of the PSA to sign and they understood she had signed and returned it to SB, are all covered by witness immunity (*Watson/Taylor*). However, the conspiracy claim is mainly based on their *forgery* of the Claimant's signature on the PSA and reliance on it in the litigation. It is in fact not disputed that is *not* barred by witness immunity and I accept it was not barred for three reasons:

562.1 Firstly, using Lord Hutton's distinction in *Darker*, the Claimant's 'unlawful means conspiracy' claim is focussed on the Krishans' forgery of her signature on the PSA, namely their *fabrication* of evidence, not their *giving* of evidence, as Mr Perring accepted. It was analogous to the example of a fabricated confession in a notebook itself shown to the Jury, not the officer giving them oral evidence about it. After all, 'real' or 'documentary' evidence is often more powerful than oral evidence, as judges from Lord Pearce in *Onassis*, to Lord Bingham and on to Lord Leggatt in *Gestmin* consistently say. The forged PSA was presented by the Krishans to HHJ Purle QC not just in *their* oral evidence but as 'contemporaneous evidence' as he called it in [32] of the Purle Judgment, which outweighed his negative findings about the 'Balber Takhar Account' and 'Options for Gracefield'. As HHJ Purle QC also said at [21]-[22], as no forgery was alleged:

> "In the absence of Mrs Takhar giving a coherent explanation as to how her signature came to be on the scanned copy, I conclude that the Krishans' evidence, which I believe anyway, should be accepted and that Mrs Takhar

took the copy of the agreement that she was signed away, which was returned, probably by her…duly executed to [SB]..”

As found in the Gasztowicz Judgment, this proved the forged PSA was an operative cause of the dismissal by HHJ Purle QC of the Claimant’s claims.

562.2 Secondly, even if I am wrong about that, in my judgment, the Krishans’ evidence, statements and their Defence and Counterclaim in the Original Proceedings were simply part of a *‘broader objective during the currency of which it may well be that evidence was given*’, to adapt the wider reading of Lord Morris’ analysis in *Roy* by Waller LJ in *Surzur*. This point would have much simpler if the Claimant had narrowed her conspiracy claim to March 2008 onwards rather than October 2008 onwards (which is what puzzled me about that decision). As I found as facts at paragraphs 250-277 above, the Krishans first tried to cajole and pressure the Claimant into agreeing to sell from April to October 2008, before they turned to the ‘litigation fraud conspiracy’ by forging the Claimant’s signature on the PSA on 25th October 2008, albeit they only later ‘deployed’ it from late March 2009. Just like in *Surzur* (decided before the Lords confirmed a ‘fabricated evidence’ limitation in *Darker*) in this ‘March 2008-onwards’ conspiracy case the Krishans would have used false documents to try to trick the Claimant into selling the Properties, before forging the PSA in litigation to trick the Court into letting them sell them. However, whilst the Claimant has not run that case, even ignoring conduct before 24th October 2008, I accept that the Krishans’ evidence was only part of their new ‘scheme’ (c.f. *Kuwait Oil*) not just to win the case, but specifically to achieve sale of the Properties (and the benefits finally for the Krishans) not only with their forged PSA, but also the forged JS Invoice; and deliberately misleading documents the Altered Balber Takhar Account and indeed ‘Options for Gracefield’ (albeit the latter is not pleaded as part of the conspiracy). Whilst HHJ Purle QC rejected the latter two and ignored the JS Invoice and so they were not *causative*, all this shows the Krishans’ actual statements and oral evidence were just part of a wider scheme to mislead the Court. This only *included* forged and false documents, only deployed once the Claimant had resolved finally to serve her Particulars in February 2009: similar to *Surzur*.

562.3 Thirdly, even if I am wrong about that and even on the narrower reading in *Surzur* of Lord Morris’ limitation on witness immunity in *Roy* (also mentioned in *Willers*, albeit without mentioning the wider reading taken in *Surzur*, *Taylor* and *Singh*), in my judgment witness immunity does not apply to the Claimant’s narrowed conspiracy claim in any event because the pleaded conduct amounted to an abuse of process. It was unnecessary for that to be specifically pleaded as a variation of the ‘unlawful means’ argument, because it is simply a legal label attached to what is clearly pleaded at para. 36 CAPOC ‘The Defendants produced false evidence at the trial of the Original Claim in order to hide their dishonesty, procure judgment in their favour and continue to maintain control of the Properties and their proceeds of sale’, which as para.38 CAPOC pleads, they then did in 2011/2014. As I explained at paragraph 527 above, this was not the *free-standing tort* of abuse of process discussed in *Crawford*, but it was an abuse of process like the deployment of forged and false documentation in *Masood*, approved in *Summers*. Whilst those cases involved fraud by claimants initiating the whole proceedings that the Krishans did not, Waller LJ in *Surzur* considered use of false documentation *w*as an abuse of process by the respondent to the freezing injunction, albeit applying to vary it. Here, the Krishans were also

deploying their forged and false documentation as part of their own *counterclaim* – seeking a declaration in the end limited to the express and implicit terms of the PSA on which they had forged the Claimant's signature. Here, Lord Morris' words in *Roy* apply: '[Witness immunity] does not involve that an action…not brought in respect of evidence given in court, but…alleged abuse of process of the court, must be defeated if one step…involved giving of evidence."

563. I turn to the next issue: whether to uphold the Claimant's own 'unlawful means conspiracy claim' would be inconsistent with the role of that tort or its relationship with other torts and the law more widely. I have already discussed this at length at paragraphs 531-544 and can briefly summarise my conclusions:

563.1 If one stays with looking at the Original Proceedings 'through the lens' of the Krishans' (and Gracefield's) *counterclaim*, this was in many ways the nub of their 'procuring judgment in their favour' at para.36 CAPOC. As discussed at paragraph 514 above, the Claimant sustained 'damage' as a result of the Purle Judgment, not just from the dismissal of her claims of undue influence and resulting trust I have now upheld, but also from the declaration that Gracefield legally and beneficially owned the Properties, removal of restrictions and binding the parties to the 'PSA Plus' terms, as well as the discharge of the injunction. As I discussed at paragraphs 313-315 above, all that meant the Claimant and Bill were themselves injuncted by HHJ Purle QC in November 2010 from stopping the sales of the Properties. I discuss in the next chapter whether the Claimant sustained not just 'damage' but quantifiable 'loss' by those sales. However, the targeting of her conspiracy claim at the Krishans' (ab)use of the Original Proceedings 'to procure that judgment in their favour' means whilst I do not say the Claimant had a good claim for the specific tort of abuse of process in *Crawford*, her conspiracy claim at least goes with not against the grain of it (and for that matter, malicious prosecution, clearly unavailable to her).

563.2 Even if I am wrong on that specific 'counterclaim' point, more widely as discussed above at paragraphs 531-544, 'litigation forgery' being 'unlawful means' for the tort of conspiracy is consistent both with the role of that tort and with the torts of malicious prosecution and abuse of process. Such 'litigation forgery', as I discussed above, is precisely what the Krishans did here, even if one purely looks at their conduct as the defence of proceedings.

563.3 Finally, even if I am wrong about that too, it is indisputable the Claimant's conspiracy claim (as narrowed) is built on the foundation of the unappealed and binding Gasztowicz Judgment setting aside the Purle Judgment due to the Krishans' fraud by the forged PSA. That binding *factual* finding is the Claimant's key 'unlawful means' and the main focus of her unlawful means conspiracy claim. Indeed, I found that factual finding is subject to issue estoppel. So, the Claimant's claim is partly *built* on the principle of finality, let alone consistent with it (as in fact it is because the Gasztowicz Judgment re-opened the Original Proceedings in any event, as noted at paragraph 545). As I noted above at paragraph 560, Lewison LJ in *Singh* at [64] contemplated that damages could be available when a judgment was set aside for fraud. The recognition of 'litigation forgery' as 'unlawful means' for the tort of conspiracy in this case following a judgment being set aside for fraud is a much smaller step to the same result.

564. Speaking of small steps, I turn to whether it is consistent with precedent for the Krishans' forgery of the PSA and its deployment in the Original Proceedings to be recognised as 'unlawful means'. I have addressed this at paragraphs 521-530 above, but let me summarise my final conclusion, which also involves some of the other points I have considered from paragraph 531 onward:

564.1 The first point is as summarised at paragraphs 484-492, referring to my findings of fact at paragraphs 278-306 above, I have found as facts on the balance of probabilities – indeed so that I am sure – that (i) On 25th October 2008, having been made aware by H of the fact the Claimant had just issued proceedings, the Krishans forged the Claimant's signature on the copy PSA; (ii) they told J about the signed copy of the PSA, who told the Claimant's solicitors on 30th October 2008 that a signed copy of the PSA 'would follow'; (iii) they gave it to SB by 10th November 2008, when they signed (for the first time) their own copy of the PSA; (iv) with SB it stayed until Dr Krishan told his lawyers to refer to it in the Defence and Counterclaim in late March 2009; until (v) it was formally disclosed on 13th July 2009, after which it was referred to in the Krishans' statements and evidence and then accepted in the Purle Judgment, as indeed an operative cause of the dismissal of the Claimant's claims (and upholding of the counterclaim) in the Gasztowicz Judgment. The 'litigation fraud' has been proved twice over

564.2 Subject to the points about witness immunity at paragraph 562 above, I am also satisfied that the Krishans' conduct amounted to a contempt of court as in *Neil* and indeed *Surzur* (see paragraph 526 above); an 'abuse of process' as in *Surzur* (see paragraphs 527 and 561.3 above), and a crime, most obviously forgery itself (paragraphs 528-529 above). Of course, that does not mean the Krishans are now at risk of imprisonment and my finding that their conduct amounted to a crime is not a 'conviction' with any wider implications than its relevance to their liability in the tort of conspiracy.

564.3 However, for those reasons, I am also satisfied the Krishans' conduct amounted to 'unlawful means' as it was a crime (*Total Network*), contempt of court (*Khrapunov*), and/or an abuse of process (*Surzur*). Indeed, I am fortified in that by *Darker*, where it was not disputed that fabrication of evidence (albeit in criminal proceedings) could amount to 'unlawful means' in conspiracy, but simply whether witness immunity applied to that. Whilst I acknowledge the wide scope of witness immunity which might otherwise apply as 'litigation fraud' constitutes the cause of action (*Taylor*), I find all three effective 'exceptions' apply, most obviously the one in *Darker* itself.

I have endeavoured at some length to explain, with the benefit of detailed argument and a host of cases to which Foxton J was not referred in *Lakatamia*, upon what I hope has been very careful consideration why I very respectfully conclude that Foxton J's doubts are addressed by those authorities and indeed the implications and risks can be satisfactorily managed. I conclude as a matter of law that 'litigation forgery' can amount to 'unlawful means' in the tort of conspiracy and that would be consistent with authority – indeed with *Surzur*, *Khrapunov* and *Darker* is a straightforward application of them. For these reasons I am satisfied the Krishans' forgery of the PSA can be and was 'unlawful means'.

565. Finally, I then stand back and consider in the round whether the Krishans' conduct I have very briefly summarised at paragraph 563.1 above (but more fully summarised

and made findings of fact about above) amounted to 'unlawful means'. It is worth one last 'sense check'. I repeat once more in the Supreme Court *Takhar* judgment, Lord Briggs said of the (then-alleged) forgery at [89] if it were proven (as it has been): 'It was a very serious, pre-meditated, carefully planned and executed fraud..instrumental in the defeat of Mrs Takhar's claim, plainly aimed from start to finish at deceiving the court about the central issue'. Indeed, after Mr Gasztowicz QC had found the Krishans' forgery proved, when ordering them to pay indemnity costs, he said in his Costs Judgment at [9]:

> "[The Krishans] not only forged a key document in support of their case with a view to deceiving the court in the original action (which worked), but also went on oath in the present action to lie about what they had done and to seek to deflect blame for the forgery onto third party professionals, who were not before the court."

Given that, I consider that it is unlikely that members of the public would be tremendously surprised that 'litigation forgery' is not only unlawful but also could give rise to compensation for loss. (Whether those members of the public are on the London Underground, the Clapham Omnibus in 1962 reading in the newspaper about the then-recent but very different case of *Marrinan*, or indeed on a bus in 2024 on the Foleshill Road in Coventry going past the old Co-Op). Ultimately, my conclusion that the Krishans' conduct amounted to 'unlawful means' for the tort of conspiracy also fits in with my other conclusions at paragraphs 510-520 above on the other elements of that tort of: 'intention', 'combination', 'causation' (including the forgery was 'indeed the means' of inflicting the intended harm) and 'damage'. Therefore, I am satisfied that all the elements of unlawful means conspiracy are proven and that the Krishans are jointly liable for it. However, I must now finally turn to what damages – if any – they must pay.

Remedies

566. Finally, at last approaching the end of this over-long judgment, I turn to remedies, on which I heard submissions after the distribution of my draft judgment (including on issues I had flagged up in it). So, this 'chapter' of the judgment is the only one which is significantly different from the draft. As I shall explain, it also differs, particularly on interest, from my short oral conclusions at the end of argument on remedies (and which I said then would be subject to this judgment, as I entitled to correct my decision before making my final order: *AIC v FAAN*). Firstly, I pull together various findings of fact made above in relation to different points of time into conclusions on factual causation and valuation. Secondly, I set out the different items which the Defendants say must be 'offset' against any monetary award, some agreed and some disputed. Thirdly, I discuss the principles and my conclusions on remedy (including remedy) for undue influence. Fourthly, I do so for resulting trust. Fifthly, I do so for conspiracy. Sixthly, I consider interest. At the end of the judgment, I summarise my conclusions.

Findings on Factual Causation and Valuation

567. For these last factual conclusions, the contemporary documents not created by the parties are important (in one last return to *Gestmin*). The contemporary valuations, as I explained at paragraphs 103-105 above, mean that whilst I could not accept Ms Dobson's methodology or valuations of the Properties *after* refurbishment ('post-works') save for 2022 or her rental income calculations, I did accept her expert opinion

of the valuations of the Properties in April 2006 as they stood ('pre-works'), in March 2011 on sale of the Co-Op (and subject to a deduction, the Shops as well) and the Cinema on sale in August 2014. As I explained further at paragraphs 105 and 241-242 above, Ms Dobson's 'pre-works' April 2006 valuations were corroborated by the contemporary valuations in May 2007 (albeit with planning consent). Therefore, whilst the Krishans could (in their otherwise frequently unreliable evidence) justifiably in point to the contemporary documents about refurbishment costs and valuations in 2002-03, what was missing were contemporary valuations of the Properties in 2005-06, because they chose not to get those valuations, which formed part of my conclusions on the third fraudulent misrepresentation at paragraphs 197 and 343.

568. So, whilst I rejected Mr Graham's submission (at paras 349, 399 and 414) that the Claimant would have transferred the Properties to Gracefield even without undue influence, I now address his remaining 'counterfactual' causation submissions: 'what the Claimant would have done' had the Krishans not intervened from 2005 onwards. I make these findings on balance of probabilities - since it relates to her counterfactual conduct rather than that of third parties (see *Perry v Raleys* [2020] AC 532 (SC) at [20]). However, whilst *Perry* held *damages* reliant on third party conduct (including a Court) are assessed on the loss of a chance, since the Purle Judgment has been set aside and I have re-tried and upheld the undue influence and resulting trust claims, no discount need be made to them or to conspiracy damages to reflect the chance HHJ Purle QC would have found for the Krishans in 2010 in the absence of fraud. That would be an impossible exercise (not least since HHJ Purle QC has tragically died), the Purle Judgment caused the Claimant *damage*, but it was not 'damages'. Therefore, the 'counterfactual questions' that must be answered and their context are as follows:

568.1 Firstly, Mr Graham submitted that even if the Claimant would not have transferred the Properties to Gracefield or otherwise into the management of the Krishans in any event (as I have found), her financial situation was so dire in 2005-06 (especially on this hypothesis without their financial support) that neither the Claimant nor Bobby Takhar could realistically have managed or developed the Properties, nor have found a developer and so she would have sold the Properties at some point from 2006 to 2011/14. I will refer to this in short as Mr Graham's 'sale anyway' submission.

568.2 Secondly and linked to the first, after summarising why I have already rejected Mr Graham's submission that the market value for the Properties on transfer was £300,000 (instead accepting Ms Dobson's expert opinion of £890,000), I will consider Mr Graham's fallback counterfactual '£300,000 price' submission. This is the Claimant's financial condition was so dire in 2005-06 she would have sold the Properties for £300,000 anyway.

568.3 Thirdly, I summarise why, again despite Mr Graham's submissions, I have nevertheless accepted Ms Dobson's expert opinion on the 'pre-works' values of the Co-Op and Cinema at the point of actual sale in 2011/2014. However, I did make an adjustment on the Shops and the total value of the Properties in 2011/14 was £1,190,000 not £1,250,000 as Ms Dobson said.

568.4 Fourthly, Mr Graham's submission that conspiracy caused no added loss brings in Ms Dobson's valuations for the Properties in November 2022, on which I again summarise my conclusions made earlier.

568.5 Finally, I must consider Mr Graham's 'no net loss submission'. This is a counterfactual causation submission that the unlawful means conspiracy I have now upheld was not causative, as from 2008-2018 as the Claimant has already received her entitlement and so suffered no loss, or none beyond what she must give credit. However, as this relates to 'offsetting', I will come to it in the following section on 'offsetting'.

569. I do not (fully) accept Mr Graham's 'sale anyway' submission for these reasons:

569.1 I agree with Mr Graham (see paragraphs 170.1, 238 and 406.1 above), in 2005, the Claimant was 'asset rich, but cash poor'. With bailiffs and CCJs, there is no way she could have funded or arranged any lending to fund any refurbishment herself – which is why in 2006 she failed Natwest's credit check. Whilst the Krishans exploited that, the point is she failed the check. The very fact that the Claimant was in such dire financial straits in 2004-05 and yet did not think to sell one of the three derelict Properties from which she derived no income is telling. It shows she was not motivated by commercial self-interest, but by emotional attachments to the Properties.

569.2 I also agree with Mr Graham (see paragraph 170.2 above), as the Claimant and Bobby said themselves, Bill and Ian were unable or unwilling to help. In relation to Ian, I found at paragraphs 157-159 above he was plainly in dispute with Bill over the Claimants' ownership of the Properties. (Indeed, I found Mrs Krishan exploited that dispute in her 'rescue narrative'). Bill, cared passionately about the Properties, so after the Purle Judgment in July 2010, he fought hard to stop the sales, as I found at paragraphs 313-315. However, as I found at paragraphs 147-150 above Bill was not contributing even to the rates and Council Tax on the Shops, let alone willing to help with Bobby's plans for refurbishment. As I found at paragraph 157 above it was Bill's inertia which prompted Bobby to take on responsibility for the Properties in 2003. Surely if Bill had been in a position to support Bobby to develop the Properties himself in 2005, he would have objected to the Krishans in late 2005, not handed them the keys (see paragraph 201 above).

569.3 However, as I found at paragraphs 170 and 406.1 above, Bobby's ability to develop the Properties was more complex. Mr Graham is plainly right to submit that Bobby's own 'community use' ideas for the Properties were a non-starter: described by the Council bluntly but accurately as 'unrealistic'. Equally unrealistic is the suggestion that Bobby would be able to fund development out of his £80,000 savings. In January 2006, the Council's agent Donaldsons had estimated refurbishment costs of £606,000 for the Cinema and £925,000 for the Co-Op. Nor could Bobby – however good his credit rating – have raised that sort of lending given Ms Dobson herself on the Claimant's behalf valued in April 2006 the Cinema as £200,000 and the Co-Op as £450,000. Even taking into account Ms Dobson's 'post-works' values for 2011/2014 (which I have rejected), the Cinema would be worth £300,000 and the Co-Op worth £800,000, both less than the 2006 costings.

569.4 Nevertheless, as I said at paragraphs 119, 241 and 406.2 above, that did not mean there was 'no Plan B'. As Mr Halkerston's pre-trial Skeleton states and Bobby said in evidence, the family would have been prepared if necessary to sell the Cinema to develop the Co-Op. I find that were it not for the Krishans' intervention in July 2005, the Council's blunt rejection of their ideas and (gentle)

warning of CPOs in June 2005 would have forced the Claimant and Bobby to re-think, especially after the health centre idea for the Co-Op ended in February 2006. I find on the balance of probabilities for five reasons that by April 2006 the Claimant would have sold the Cinema (as I discuss below, for £200,000). Firstly, in 2005 the Cinema was the real bugbear for the Council with all the petitions (see paragraph 166) and the main reason they raised CPOs in June 2005. Secondly, in that June meeting and the Donaldsons report, the Cinema was described as a commercially attractive option whereas the Co-Op was not (see paragraph 168). Thirdly, the same report made clear the idea of a drama and literature centre was prohibitively expensive: more for the Cinema than the Co-Op (see paragraph 167). Fourthly, selling the Cinema would avoid having to find £606,000 to refurbish it. Finally, selling the Cinema in April 2006 for £200,000 would have paid off the Claimant's debts, given her a financial cushion and left enough for a 'development pot'. I find selling the Cinema would have been a 'no brainer' for Bobby and the Claimant and Bill would have accepted it (as he did the Krishans in 2005). In short, I find but for the Krishans, the Cinema would have been sold by April 2006.

569.5 However I do not accept that the Co-Op or the Shops would have been sold by the Claimant any relevant stage in the period of this litigation:

The Co-Op It was the Takhars' 'jewel in the crown' as Bobby described it in evidence – a faded glory of 1930s Coventry (paras. 146-147 above). It also had huge resonance for the Takhar family – Bill and Ian in better times had together run a large TTC shop there, that Bobby worked in as a youth. He and the Claimant in 2005 even dreamed of it as a cultural centre. Therefore, if they had sold the 'outlier' Cinema by April 2006 for £200,000, there is simply no way the Claimant and Bobby (especially given the feud between Bill and Ian) would ever have sold the Co-Op. This is illustrated by their horror at its proposed auction in 2008 (paragraph 250), unabated despite Mr Matthews' later advice to sell it (paragraph 264). After all, selling the Cinema would not only have solved the Claimant's financial problems, but created a 'development pot' for the Co-Op (which was her priority, not the Shops): probably enough for the £35,000 works to ensure s.215 notice compliance in 2009 (paragraphs 289-291 above) and to fund planning permission. Despite Donaldsons' doubts in 2005, that might have attracted investors like Mr Matthews. But without such external support, the Claimant would not have been able to afford to redevelop the Co-Op into accommodation. The Claimant and Bobby did not want to take the obvious step, which the new owner took in 2011, of returning the Co-Op to use as a shop at least on the ground floor (possibly for the 'low spec' costs estimated by Barneveld in 2003 as £400,000). But in the counterfactual world, if the Council had finally totally lost patience and formally proposed a (real) CPO, I find the Claimant and Takhar family would on the balance of probabilities have found a way to refurbish the Co-Op at a minimal cost to allow it to be rented out as a shop. After all, in the real world, the threat of losing the Properties had overcome her resistance to transfer them. Nevertheless, I simply do not have the reliable costings and valuations to value any rental income, since I did not accept Ms Dobson's methodology on that point. It would be pure speculation. Nevertheless, I can and do find in principle that the Co-Op was a potential income-generating asset which is relevant to its value. In any event, I have already found that in 2011

the Co-Op would have been worth *at least* its pre-works value of £700,000 and by 2022 *at least* £950,000, albeit without making any calculation as to rent.

The Shops Years before, the Shops had been TTC's electronics store where the Claimant had worked (see paragraph 145). They were part of family history in a way the Cinema never was and had it been sold, there would have been no need to sell the Shops. Indeed, Bobby made a start by tidying them in 2006. Ms Dobson using contemporary valuations at para.17-030 listed relatively minor remedial works, other than repairing the structural crack at no.558. However, I cannot rely on Ms Dobson's costings, post-works values or rents in 2011, as I said at paragraph 105 above. I reduced her 'pre-works' value in March 2011 from £300,000 to £240,000, the same as April 2006. I accepted her 2022 'pre-works' value of £380,000 and 'post works' of £540,000 bearing in mind one next-door property (in good condition) had sold for £202,000 in 2021. However, hey had sat empty for years and even with a 'development pot' from the sale of the Cinema, the Takhars' focus was the Co-Op. So, I will adopt the course of finding on the balance of probabilities that the Claimant would still own the Shops to this day and would have used the 'development pot' to pay for works to comply with any Council requirements e.g. in 2009 (paragraph 289), taking that expense into account in finding their net 'pre-works' value would have been *at the very least* £240,000 in March 2011 and £380,000 in November 2022

In short, I find on the balance of probabilities that but for the Krishans' intervention, the Claimant would still own the Co-Op and Shops to this day.

570. I also have not accepted Mr Graham's submission that in April 2006, the Properties in total were only worth £300,000, which I can summarise. For the reasons given at paras. 105, 241 and 242 above, I have accepted Ms Dobson's expert opinion that in April 2006, the 'pre-works' total value of the Properties totalled £890,000, not £300,000. The latter figure was an extrapolation from the Council's values in 2002/03 of the Cinema and Co-Op. However, as Ms Dobson pointed out, her values were corroborated by Savills' 2007 valuations, which said: 'Purchasers are paying a premium for derelict properties or [ones] in need of refurbishment, with or without planning consent'. Not only did that support Ms Dobson's evidence of the 'hot market' in 2006-07 before the 'Credit Crunch', Savills' total valuations of £1,085,000 with planning permission in 2007 supported Ms Dobson's total of £890,000 without planning permission in 2006. I accepted Ms Dobson's 'pre-works' valuations of the Properties in April 2006 of £450,000 for the Co-Op, £240,000 for the Shops and £200,000 for the Cinema. Indeed, I said at paragraph 241.1 above that if anything, Ms Dobson's valuation of the Cinema was surprisingly low. I find that £200,000 was a 'minimum value'.

571. Nevertheless, Mr Graham had another string to his bow – his '£300,000 price' submission that the Claimant was in such dire financial straits in 2005-06 that she would not even have got a market valuation, still less adopted it as the sale price. He submitted that such was her desperation to sell, even without the Krishans' undue influence, she would have sold them the Properties to £300,000. However, that submission cannot stand with my findings of fact, including on Mr Graham's 'sale anyway' submission at paragraph 569. I have found the Claimant on balance of probabilities would not have sold the Shops or the Co-Op. Whilst I have found the Claimant would have sold the Cinema, I find on the balance of probabilities that it would have been sold by April 2006 for its true market value of £200,000. In the

'counterfactual world', absent undue influence, I have found that Bobby would have remained as the Claimant's agent with Coventry CC with the Properties. It is true the Claimant was financially desperate, but Bobby was not – indeed, in 2008, he bailed his mother out the one – and largest – debt she had not told Mrs Krishan about – her daughter Nina's wedding bill for £22,000. After all, the Claimant already trusted Bobby with the Properties in 2005 and without the Krishans' undue influence, I find he would have supported her – from his savings of £80,000 (several times her total debt). Bobby may not be a numbers person, but once he accepted the reality of knowing the Cinema had to be sold, it would be fanciful to suggest he would have sold it without getting it valued – especially when the Claimant had her own survey of it back in 2004 (see paragraph 154).

572. Indeed, whilst I have found at paragraph 441 above that the Claimant held the Properties absolutely both legally and beneficially, as I added and found many times elsewhere including paragraph 149 above, she saw them as 'family properties' and she would have deferred to Bobby in getting a proper valuation. Therefore, I find that by April 2006, only the Cinema would have been sold – and for (at least) £200,000, so reject the '£300,000 price' submission. However, the Claimant would not have earned any rental income - indeed Mr Halkerston did not really pursue that loss in submissions. Not only do I not have a reliable methodology for assessing the lost rental income from Ms Dobson, the Cinema would have been sold but it would have been unrealistic to refurbish the Co-Op. Even though refurbishing the Shops may have been possible, that is speculative.

573. I have also already found the Properties' values in 2011/14 were not their actual total sale price of £1,041,000 but just under £150,000 higher at £1,190,000. At paragraph 317, I found the Shops' value in March 2011 totalled £240,000 not £300,000 as Ms Dobson valued them (on her own methodology). However, at paragraphs 316 and 318 above, I accepted her valuation of the Co-Op in March 2011 of £700,000 rather than the actual price of £675,000; and that the Cinema in August 2014 was worth £250,000 rather than the actual price of £191,000, although the Cinema's value in 2014 is academic as it would have sold in 2006 for £200,000. However, the Co-Op and Shops together in 2011 totalled £940,000.

574. I next consider the Properties' valuations in November 2022 (which the parties are also using as a proxy for the date of judgment in June 2024 despite the intervening almost two years). Given Ms Dobson's methodology for the 2022 values is solidly based on her inspection of the outside of the Properties in November 2022 itself, their then-actual use and their or comparable properties' sale prices in the preceding years, I have accepted at paragraph 319 above her valuations for both 'pre-works' values totalling £1,830,000 and 'post works' values for the Co-Op and Shops. Whilst that includes her 'pre-works' value for the Cinema in 2022 of £500,000, that is academic as I found it would have been sold for £200,000 in 2006. However, at paragraph 569.5 above, I have found the Claimant would have retained the Co-Op and Shops to this day as valuable 'family properties', which brings into play their values in 2022. However, I also found the Co-Op would not have been refurbished, so its value in November 2022 would still be Ms Dobson's 'pre-works' value of £950,000. Despite the fact the sale of the Cinema for £200,000 could have funded refurbishment of the Shops, given the state of the evidence, I have taken the more cautious approach of assuming they would not have been refurbished – and would have had no rental income - and accepting Ms Dobson's

'pre-works' value for the Shops in 2022 of £380,000. So, the Co-Op and Shops in 2022 had a total value of £1,330,000.

Potential 'Offsetting'

575. Against that background, I turn to the issue of 'offsetting'. I use that practical expression since (as discussed below) how the three different successful claims - undue influence, resulting trust and conspiracy – adjust for benefits the Claimant has received and allowances for expenditure the Krishans and Gracefield spent differ. After all, the first two are equitable claims, but then they are on very different bases. As I will discuss, resulting trust here gives rise to the remedy of equitable compensation. In this case, this has less in common – at least practically – with equitable rescission for undue influence than it does with conspiracy.

576. The first and largest item to be 'offset' which is agreed in respect of all three claims is what I will call 'the 2021 Payment'. I discussed this at paragraphs 32 and 312 above, namely Mr Gasztowicz QC's order having set aside for fraud the Purle Judgment, that Gracefield and the Krishans should 'repay' to the Claimant £363,975.60. Mr Gasztowicz QC explained in his costs judgment ([2020] Costs LR 1851) at [15]-[23] that this payment was intended to 'return' to the Claimant the costs that she had 'paid' to the Defendants as HHJ Purle QC had ordered in 2010. Mr Gasztowicz QC decided in principle he had jurisdiction to order 'repayment' as a consequential order upon his setting aside of the Purle Judgment, which in my respectful judgment is entirely correct (and has not been appealed). Mr Gasztowicz QC also noted there was a dispute about what the Defendants' costs in 2010 had been – the Claimant had submitted that '£560,653.60 was effectively paid' whilst the Defendants said it was £363,975.60, which he accepted out of caution. However, he does not seem to have been told in fact the Claimant had not 'paid' the Krishans even £363,975.60. Instead, it is clear from the directors' loan account documents that Dr Krishan *deducted* £560,653.60 from the Claimant's 'profit share' and so did not actually pay her anything when any of the Properties were sold. Likewise, the Claimant did not actually pay the Krishans anything in costs either. However, having been ordered by Mr Gasztowicz QC to pay the Claimant £363,975.60, the Krishans did so in April 2021. Therefore, as Mr Halkerston put it, the '2021 Payment' was 'an effective transfer to the Claimant of part of the equity in the Properties'. Therefore, it is agreed it falls to be offset against the awards in respect of undue influence, resulting trust and conspiracy. I mention it briefly when considering each claim.

577. The second agreed item to be offset against all three awards is the 'maintenance' paid to the Claimant of £13,800 by the Krishans. As I discussed at paragraph 254 above, that 'maintenance' was the payments to the Claimant Dr Krishan recorded on the Original Balber Takhar Account from late 2005 through to late 2007. As Mr Halkerston put it, I found at paragraph 410 that this 'maintenance' was part of the consideration for the transfers so intrinsic to the transaction. That is true, but it was also an actual benefit the Claimant received at the time of the transfers in March/April 2006 – indeed given it started in late 2005 even beforehand.

578. The third agreed item to be offset against all three awards are the taxes and bills the Krishans paid on the Properties, which I have found totalled £6,578.68. As I also discussed at paragraph 254 in more detail, the list on the Balber Takhar Account of payments made for Business Rates and Council Tax was not accurate and Coventry CC

records of receipt confirmed that only a total of £6,572.68 was paid by the Defendants until Bobby Takhar resumed making the payments. As Mr Halkerston put it, that total payment by the Defendants in the intervening period between 2006 and 2009/2010 was a discharge of the liability to the Council the Claimant would otherwise have had. Therefore, it was not only intrinsic to the transaction, it was again a benefit the Claimant received at the time – since she was relieved of the practical (albeit not the formal legal) obligation to pay it, which in 2004-2005 she was really struggling to fulfil.

579. However, there is no agreement by the Claimant to the fourth 'offsetting' item claimed by the Defendants – the £49,116.68 in bank interest and charges up to June 2010 which I accepted at paragraphs 93 and 248 above were paid by Gracefield. Mr Halkerston does not dispute that the charges and interest were incurred by Gracefield (and practically, the Krishans). However, he says that was simply the running cost of Gracefield which was the 'vehicle for their fraud' and those charges do not fall to be offset against any of the claims. I consider each claim below but repeat the point at paragraph 248 that there is in any event double-counting of bank charges, since as Mr Halkerston has pointed out, £19,582.35 of the £132,084.32 was also bank charges. Mr Graham accepted this; and so – subject to Mr Halkerston's points of principle – they agreed the additional bank charges and interest above and beyond the £132,084.32 totalled £29,534.33.

580. This leads on to the fifth item of 'offsetting', namely that agreed expenditure of £132,084.32 from 2006 to June 2010. As I discussed at paragraphs 93 and 113 above, Mr Johnson was taken through the £132,084.32 of expenditure in 2006-2010 and confirmed it had been accrued and it was not in the end disputed to have been expended. However, it is disputed that it falls to be offset against any award. As Mr Halkerston and Mr Lee said in their skeleton, effectively all the £132,084.83 related to the planning applications: £106,470.51 directly on fees and the balance indirectly on unspecified purchases and bank charges all of which fed into the planning applications (as did even the modest skip hire). After all, there was no physical improvement to the Properties at all. However, as explained above at paragraphs 102.5, 240 and 315-318, planning permission was obtained on the Shops in December 2006, the Co-Op in March 2007 and the Cinema in December 2007 and expired three years respectively from each date, so that none of the Properties had extant planning permission by the time of the sales of the Co-Op and Shops in March 2011, let alone in the Cinema in 2014. Mr Halkerston added there is no evidence any of the buyers of the Properties in 2011/14 actually bought them with a view to renewing the lapsed planning permission. The buyers of the Co-Op in March 2011 for £675,000 did not go on to develop it for retail below and accommodation above as Gracefield's planning permission had envisaged. Instead, they rented it out for use as a shop, for which it had always had planning permission – indeed how it had been used by TTC for many years. Likewise, the buyers of the Shops in March 2011 for £175,000 kept them as shops, rather than seeking to renew the planning permission to develop them into three dwellings as the Krishans had planned. Therefore, Mr Graham accepted that planning expenditure was not relevant to the sale prices or values of the Co-Op and Shops. In turn Mr Halkerston accepted one reason the Cinema had taken so long to sell was that planning permission to demolish it and to build residential accommodation had to be renewed (in the teeth of local opposition), as discussed at paragraph 317 above. As a result, it was not sold until

August 2014 and even then only for £191,000. Despite that low price, planning permission and related expenses were plainly relevant to the Cinema's sale price.

581. This leads on to Dr Krishan's schedule discussed at paragraph 318 above of £44,802.39 in expenditure from June 2010 to 2019. It falls into three categories:

581.1 Mr Halkerston accepts those planning and sale costs of the Cinema in August 2014 were £16,148.15 and they were relevant to the sale price and value of the Cinema, although he disputed that they should be offset at all.

581.2 Likewise, Mr Halkerston accepted that the sale-only costs of the Co-Op and Shops in March 2011 were £16,490.06, but again disputes any offsetting.

581.3 However, Mr Graham in turn accepted the balance of the £44,802.39, namely £12,164.18, appeared to relate to Gracefield's accountancy and tax costs from 2010 to 2014 which could not be offset against any award.

In summary of paragraphs 579-581, the maximum 'development-related expenditure' by Gracefield and the Krishans totalled £194,256.86. However, only £32,638.21 of that directly related or contributed to the Properties' sale prices in 2011/2014; or indeed values at that time or in 2022; and of course, did not affect their value in March/April 2006, as the expenditure substantially post-dated that. Indeed, that fact is highly relevant to whether any of it should be 'offset'.

582. The final and most complex item to be potentially offset is 'the Settlement Sum' of £300,000 paid by Challinors to the Claimant in settlement of their claim for unpaid fees in respect of the original litigation and her counterclaim for professional negligence in that litigation. As stated at paragraph 24 above, when the Claimant was sued by Challinors for their fees in October 2011, her Defence and Counterclaim in January 2012 alleged professional negligence, including failing to apply earlier for handwriting expert evidence. It said at paras 16-19:

> "16. Challinors was retained by the defendant [i.e. the present Claimant] in or about July 2008 and acted on her behalf up to and including the conclusion of litigation between her and the Krishans and an associated company, Gracefield, which the defendant lost.
>
> 17. As a result of losing the litigation against the Krishans and Gracefield:
>
> a. the defendant became liable to pay 80% of the Krishans and Gracefield's costs which have yet to be assessed but which may well amount to over £600,000;
>
> b. the defendant is unlikely to receive any benefit from the sale of the… Properties (which she understands has now occurred) because her entitlement to share in the proceeds of sale, as found by the court, is likely to be more than offset by her liability to pay the Krishans' and Gracefield's costs; and
>
> c. she did not recover any of her costs from the Krishans and Gracefield which costs, subject to assessment totalled c. £212,000.
>
> 18. Challinors was in breach of the terms of its retainer and/or negligent in:
>
> a. failing to procure in good time and deploy as required expert evidence which was necessary for the successful prosecution of the litigation against the Krishans and Gracefield;

> b. failing to advise her adequately as to the amount of the costs she would have to incur and might have to pay if the litigation was lost;
>
> c. failing to identify the need for and to procure for the defendant after-the-event insurance ('ATE insurance') which would have protected her in whole or in part against the risk of an adverse costs order and/or the risk of not recovering her own costs.
>
> 19. And the defendant accordingly seeks damages by this counterclaim for:
>
> a. the value of the lost chance of success which the defendant would have had but for the failure to obtain appropriate expert evidence; and
>
> b. the value of the lost opportunity to obtain ATE insurance which would have covered her against the risk of an adverse costs order and/or an inability to recover her own costs in the litigation against the Krishans and Gracefield in the event it had still been lost."

Those losses were elaborated at paragraph 106 of the Defence and Counterclaim:

(i) The value of the Properties (estimated using the 2007 Savills valuation as £1,085,000, less 'legitimate unrecouped expenditure incurred by the Krishans and Gracefield (a maximum of £170,000) and with credit for the £300,000 'profit share' found in the Purle Judgment: a subtotal of £615,000;

(ii) The avoidance of having to pay capital gains tax referable to the 'sale' of the Properties to Gracefield (which was unquantified and is not evidenced);

(iii) That she would have recovered 80% of her costs from the Krishans and Gracefield: £240,000 assuming £300,000 is the total costs for Challinors;

(iv) She would not have had to pay the costs now owing to the Krishans and Gracefield (estimated at £600,000);

(v) The lost value of the opportunity to settle the dispute (again, unquantified);

(vi) The value of the ATE insurance had the litigation been lost in any event, namely the amount of the costs for which she was assessed to be liable;

(vii) Interest owing to the Krishans and Gracefield;

(viii) The wasted expenditure on expert evidence, namely £10,500.

However, in January 2013, the Claimant and Challinors settled the dispute by a Tomlin Order which agreed to (1) remove Challinors' legal charge on the Claimant's property; (2) for Challinors to pay to the Claimant £300,000 in full and final settlement of all claims (with a waiver of all claims Challinors had against the Defendant, therefore including for their incurred costs and disbursements) and (3) for Challinors to pay the Claimant's costs of the litigation between them. They promptly paid her this £300,000 (i.e. the 'Settlement Sum').

583. Neither the settlement nor the Claimant in evidence offered any breakdown or explanation of the Settlement Sum or how she apportioned it between her pleaded losses. However, as Mr Graham said, as it was a net payment where Challinors' fees (and the expert fee disbursements) were written off, the £300,000 cannot have related to those. Nor was there any quantification of the Claimant's tx liability or the value of 'lost settlement' (which is subsumed in the other losses anyway). Therefore, the Settlement Sum in 2013 (as opposed to the writing off of costs) must have related to the

Claimant's liability for the Defendants' costs and also the value of the Properties (whether assessed in the way pleaded or not).

584. However, in relation to the Claimant's liability for the Defendants' costs, as just discussed in relation to the 2021 Payment, in 2011 Dr Krishan had fully discharged the Claimant's costs liability to them - £560,653.60 – from her supposed 'profit share' under the Purle Judgment of £575,000 (which comprised £300,000 plus £50% of the balance of the proceeds of sale in 2011 £850,000, namely £675,000 for the Co-Op and £175,000 for the Shops). So, by 2013, there was no longer any outstanding costs liability to the Defendants or Challinors (and consequently no remaining loss to be covered by ATE insurance either). So, whilst in my oral conclusions at the remedies hearing I thought the £300,000 Settlement Sum compensated what was in 2013 a 'mixture' of the Claimant's outstanding losses of the value of the Properties and her costs liability to the Krishans, on reflection I was incorrect (although as I shall explain, it does not change my eventual conclusions). By the time the Claimant and Challinors settled in 2013, her loss had been concentrated in the value of the Properties. After all, this is why she accepts that the Defendants can offset against that loss the 2021 Payment. Just like that payment, the Settlement Sum of £300,000 compensated the Claimant for that same loss. The issue is whether that necessarily means it should be offset, which differs as between the claims, as discussed below.

585. Before turning to those claims, I must briefly address Mr Graham's 'no net loss' submission. The 'offsetting' items in descending order of value are: (i) the 2021 Payment of £363,975.60; (ii) the Settlement Sum of £300,000; (iii) the 2006-2010 expenditure of £132,084.32; (iv) the 2010-2014 expenditure I accept is related to the development and sale of the Properties of £32,638.21; (v) the additional bank charges and interest of £29,534.33; (vi) the maintenance of £13,800 and (vii) the bills/taxes of £6,578.68. Even assuming all that can be offset, it totals £878,611.14. That is (albeit only just) less than the £890,000 total value I have found of the three Properties in March/April 2006, which I shall explain is the lowest 'gross' figure for any award, irrespective of the higher later total values in 2011/2014 and 2022. So, there is indeed a 'net' loss – what I must decide in truth is its *extent*. Against that background, I turn to that undue influence claim itself.

Remedies for Undue Influence

586. In *Agnew v Lansforsakringsbolagens* [2001] 1 AC 223 (HL) at 265 (as quoted in *Snell's Equity* (2022) 34th Ed para 8-037) Lord Millett observed that:

> "The party exercising undue influence incurs no liability. It is merely that the party whose consent was obtained by the exercise of undue influence is entitled to have the contract set aside."

(As noted at paragraph 415 above, that was why Gracefield is in the same position as the Krishans as a result of their undue influence on the Claimant in procuring the transfers). The equitable doctrine of set-aside is 'rescission'. The modern approach was summarised in *Cheese v Thomas* [1994] 1 WLR 129 (CA) by Sir Donald Nicholls V-C (as he then was). Like his own restatement of undue influence as Lord Nicholls in *Etridge*, I again quote it at length at pgs.134-138:

> "Restitution has to be made, not damages paid. Damages look at the plaintiff's loss, whereas restitution is concerned with the recovery back from the defendant

of what he received under the transaction. If the transaction is set aside, the plaintiff also must return what he received. Each party must hand back what he obtained under the contract. There has to be a giving back and a taking back on both sides…It is well established that a court of equity grants this type of relief even when it cannot restore the parties precisely to the state they were in before the contract. The court will grant relief whenever, by directing accounts and making allowances, it can do what is practically just: see *Erlanger v. New Sombrero Phosphate Co.* (1878) 3 App Cas. 1218, 1278-1279, *per* Lord Blackburn…..

> "….The basic objective of the court is to restore the parties to their original positions, as nearly as may be, consequent upon cancelling a transaction which the law will not permit to stand."

That is the basic objective. Achieving a practically just outcome in that regard requires the court to look at all the circumstances, while keeping the basic objective firmly in mind.….As with the jurisdiction to grant relief, so with the precise form of the relief to be granted, equity as a court of conscience will look at all the circumstances and do what fairness requires. Lord Wright [said] in *Spence v. Crawford* [1939] 3 All E.R. 271…p. 288:

> 'The remedy is equitable. Its application is discretionary, and where… applied, it must be moulded in accordance with the exigencies of the particular case'…...

If the defendant has improved the property he is ordered to return, the plaintiff may be required to compensate him. On the other hand, if the plaintiff has improved the property he seeks to return, he will not necessarily be entitled to a further payment from the defendant; it may not be just to require the defendant to pay for improvements he does not want. If the plaintiff has permitted the property to deteriorate, he may be required to make an allowance to the defendant for this when seeking an order compelling him to retake [it]. If a joint business venture is involved, such as an agreement between a pop star and a manager, and the agreement is set aside and an account directed of the profits received by the defendant under the agreement, the court in its discretion may permit the defendant to retain some profits, if it would be inequitable for the plaintiff to take the profits without paying for the expertise and work which produced them……. In *O'Sullivan v Management Agency* [1985] Q.B. 428, 468, Fox L.J. [held] a court should have power to make allowance to fiduciaries. He continued:

> "Substantial injustice may result without it. A hard and fast rule that the beneficiary can demand the whole profit without an allowance for the work without which it could not have been created is unduly severe. Nor do I think that the principle is only applicable in cases where the personal conduct of the fiduciary cannot be criticised. I think that the justice of the individual case must be considered on the facts of that case. Accordingly, where there has been dishonesty or surreptitious dealing or other improper conduct then….it might be appropriate to refuse relief; but it depends upon the circumstances."

What is true of profits must also be true of losses. In the ordinary way, when a sum of money is paid to a defendant under a transaction which is set aside, the defendant will be required to repay the whole sum. There may be exceptional cases where that would be unjust. This may the more readily be so where the personal conduct of the defendant was not open to criticism."

In *Cheese* itself, the defendant was indeed not open to criticism – he and his great-uncle the plaintiff bought a house together for the plaintiff to live in from the plaintiff's savings and the defendant's mortgage. When he struggled to service it, the house had to be sold for a loss in a falling market in the early 1990s recession. Yet Lord Nicholls in *Cheese* held this loss should be borne between both parties in proportion to their contributions to its price (almost a resulting trust in reverse).

587. The principles of rescission in *Cheese* can be illustrated with some examples:

587.1 The first is the case Lord Nicholls quoted in *Cheese* is *O'Sullivan.* This illustrates the boundaries of and alternative to recission. In *O'Sullivan*, a successful pop star's management contract was procured by undue influence, it was impossible to turn back time and put each party back in their original position by rescission, so the Court ordered an account of the defendant's profits to the plaintiff. However, it allowed the defendant to offset its reasonable remuneration including some (smaller) profit. Indeed, as Lord Nicholls quoted in *Cheese* (above), Fox LJ in *O'Sullivan* was clear that conduct was relevant to the entire award. This illustrates that - as *Snell* states at para.8-038 - the parties' conduct is relevant as part of all the circumstances (which I respectfully prefer to Prof Enonchong's view in passing at para.28-042 it is only relevant to depreciation as in *Cheese*).

587.2 However, if rescission is possible by what Lord Nicholls in *Cheese* called a 'giving and taking back on both sides', as *Snell* also points out at p.15-014, benefits do not have to be restored that a rescinding claimant cannot return because of a defendant's wrongdoing, citing *Borrelli v Ting* [2010] Bus LR 1718 (PC), where Lord Saville refused to allow a wrongdoer to rely on their duress of the other party into a settlement to avoid rescinding that.

587.3 Mr Halkerston also relied on *Snell's* analysis at 20-52 (citations omitted):

> "In general, a rescinding vendor must compensate their purchaser for any improvements or repairs the purchaser made to the asset while it was in their possession. This is subject to the provisos (a) that the improvements or repairs are substantial, permanent or lasting in nature; and (b) that at the time when the[y] were made the purchaser did not know of…the defect in their title…."

587.4 In *Smith v Cooper* [2010] 2 FLR 1521 (CA) (discussed above at paragraph 395), Lloyd LJ explained that *Cheese* did not require the accounting of expenditure during the whole of a given relationship, but rather simply concerning its property transactions. He held that where two people in an intimate relationship had each sold land to develop a joint home for them both, they should each have credit for 'their respective contributions to the overall acquisition cost, treating the renovation as part of the acquisition'.

587.5 In *Hart v Burbidge* [2014] EWCA Civ 992, which like the present case concerned the financial crisis and falling market in 2008. A daughter cajoled her mother into selling properties the mother had left in her will to other relatives to 'loan' the proceeds to the daughter and her husband. They bought a new property where the mother could live with them, but she promptly died no sooner had she moved in. As noted at paragraph 404 above, it was held this was procured by the daughter's undue influence. But Vos LJ also dismissed the appeal on relief at [59]-[64]. He rejected the argument that the mother wanted to make a new will, or that the relatives 'deserved' to be disinherited and accepted the judge's broad-brush

> approach of 'compensating' the relatives in the sum of the properties' values on sale in 2008, even though they may have been worth rather less in the falling market if sold after the mother's death in 'the executor's year'.

588. Notably, in *Hart* in particular, but also in *Smith* and in *Cheese*, the building or land which was the subject of the transaction had been sold, yet it was not suggested as a result that full restitution was impossible, any more than it would be suggested in the case of transactions in money or other fungibles. This is in harmony with the equitable principles of rescission in *Snell* at para.15.015:

> "If A transfers an asset to B under a voidable contract, and, before the contract is avoided, B sells the asset to C who does not have notice of the circumstances that make the contract voidable, C will take the asset free from any claim by A to recover it. [However]..the fact that the third party, C, has securely acquired an asset from the wrongdoer, B, has never....been treated in equity as barring rescission of the contract between A and B. Following rescission, the claimant A may be entitled either to trace into the proceeds of the sale if they remain identifiable in the B's hands, or else to claim a financial accounting of those proceeds."

Of course, in some cases the particular property sold, whether real or personal, may be irreplaceable in money terms, or there may be some other reason why full restitution is impossible. However, respective conduct must surely be relevant. I consider the Court should be slow to reach the conclusion that full restitution is impossible if the innocent rescinding party is content with restitution in money terms to replace the lost property, but the wrongdoing party resists it by relying on their sale of it to an innocent third party for value. Otherwise, as in *Ting*, the wrongdoer is relying on their wrongdoing to retain its fruits. Far from 'practical justice', that would work injustice. Yet, that does raise what the 'value' of the property lost was, at what time and why, which will depend on the particular facts.

589. On the present facts, the Properties themselves cannot be returned to the Claimant because they were sold to third party purchasers without notice for value. However, given the wide and practical approach to rescission in *Cheese*, *Smith* and *Hart*, no one suggests full restitution is impossible in the light of the sales. So, whilst I discussed in the draft judgment the alternative remedies of accounts for profits (as in *O'Sullivan*) and equitable compensation (discussed below), Mr Halkerston accepts that the Claimant is limited to rescission for undue influence. There are three alternatives as to what the Defendants should return to the Claimant. Firstly, there is the Properties' market value on transfer in March/April 2006, which I have found to be £890,000. Secondly, there is the Properties' market value on their respective sale dates, which I have found to be £1,190,000. Thirdly, there is the Properties' market value at the time of Ms Dobson's report in November 2022, which she found (and I accept) totalled £1,830,000. Certainly, the third option seems impermissible. I have not found a single rescission case where the wrongdoer had to pay the value of property after it rose in the hands of a third party who has refurbished it – as here. In *Cheese*, *Smith* and *Hart*, the relevant value was on the date of later sale not initial transfer. Those cases bind me and despite my musings in the draft judgment, on reflection they do not equate rescission with loss, but in reality they simply permit proper and full restitution and counter-restitution from each party, which can take into account later events.

590. However, whilst on reflection I accept that the Claimant could have sought rescission on the basis of the true market values of the Properties at the dates of sale in 2011 and 2014, she has limited her claim for rescission to the values at the time of transfer in March/April 2006, namely £890,000. She is entitled to do this, as explained in *Snell* at paras.15-012 and 15-014 (citations omitted):

> "The innocent party's equity to rescind is an entitlement to apply to the court for such an order. The contract remains in force until the order takes effect. Even then the relief may be expressed conditionally, such that the claimant is authorised to elect to rescind upon making counter-restitution or fulfilling other terms….Rescission will be barred where restitutio in integrum is impossible. [It] …will only be possible where the party seeking rescission is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. The concern of the bar is to protect a defendant from unjustified prejudice; that circumstances have changed such that it is no longer possible fully to restore the claimant will not preclude rescission. In making their election, it is for the claimant to decide whether they are content to get back less than they gave."

591. However, the corollary of the Claimant's election to limit rescission to March / April 2006 values of the Properties has an impact on offsetting of later 'benefits', otherwise there is not mutual 'giving back' as discussed in *Cheese,* but imbalance. The Claimant accepts she must 'give back' the 2021 Payment of £363,975.60 and the £13,800 in 'maintenance' and £6,578.68 However, Mr Halkerston and Mr Lee in their skeleton submitted the 2006-2010 expenditure of £132,084.32, the additional bank charges and interest of £29,534.33 and 2010-2019 expenditure of £32,638.21 (totalling £194,256.86) should not be offset. I agree for three reasons:

591.1 Firstly, as Mr Halkerston submitted by reference to *Snell* para 20-52(a) (quoted at para.587.3 above) the various items of expenditure the Krishans seek to offset did not make 'substantial, permanent or lasting improvement' to the Properties. On the contrary, as discussed, there was no physical development of the Properties at all. Most of the £194,256.86 spent related to (i) planning permission on the Properties which lapsed; or (ii) the costs of sales in 2011 and 2014 the Claimant did not want, indeed tried to stop.

591.2 Secondly, as Mr Halkerston also submitted, relying on *Snell* para 20.52(b), all the expenditure sought to be offset post-dated the transfers and the Defendants were plainly aware of their own misconduct and liability to rescission, which is why they forged the PSA in the Original Proceedings. Whilst the Claimant then offered to credit the Defendants' expenditure (as she did in her valuation of the Properties in her Challinors counterclaim), she did not have to do so then and certainly need not do so now.

591.3 Thirdly and most simply, as discussed, the Claimant has elected to limit her claim for rescission to the £890,000 value at the date of the transfer in March/April 2006. Therefore, it would be wrong in principle to take into account the Defendants' later expenditure, because it would not be the same exercise on each side of mutual 'giving and taking back' envisaged in *Cheese*. The Claimant would be taking back what she gave in 2006, but the Defendants would be taking back what they expended from 2006 onwards.

592. Turning to the Settlement Sum of £300,000, whilst this is a finely-balanced decision, I accept Mr Halkerston's submission that on *undue influence*, it does not fall to be offset (I will take a different view on resulting trust and conspiracy). On one hand, as I said, by 2013 the £300,000 only compensated the Claimant for the lost value of the Properties and the £890,000 she claims also relates to that lost value. Therefore, Mr Graham submits not offsetting the £300,000 would be a windfall. There is compelling force to that submission with the other claims with their later dates of higher valuations. However, on the other hand, with undue influence the Claimant has limited her claim to £890,000 from March/April 2006. So, in my judgement, it would again be imbalanced to allow the Defendants to offset a payment (even though relating to the Properties' value of £300,000) which she only received seven years later from a third party. This is especially true since the Claimant derived no benefit whatsoever from the transfers save £13,800 in maintenance and £6,578.68 in relief of liability for taxes and rates. The fact that the Claimant has *volunteered* to offset the 2021 Payment does not prevent her from *refusing to volunteer* to offset the 2013 Settlement Sum. I stress this is an unusual consequence of the Claimant's election and as I discuss, the same point does not apply to resulting trust or conspiracy, with the latter having a higher 'gross' and 'net' award (even with interest) than undue influence.

593. Accordingly, on undue influence, the monetary award is £890,000 less (1) the £363,975.60 2021 Payment, (2) the £13,800 'maintenance' and (3) £6,578.68 in taxes and rates paid. Therefore, the 'net' monetary award for undue influence is *£505,645.72*. I propose to address interest after considering all three claims since it is accepted they are alternative not cumulative claims for the Properties' value.

Remedies for Resulting Trust

594. In the draft judgment, I invited submissions on whether resulting trust could be invoked as against the Krishans as a proprietary remedy. Lord Browne-Wilkinson discussed this in *Westdeutschebank* at pgs.715-716 with his 'stolen bag of coins' analogy, but the solution he suggested to a proprietary remedy in a fraudster's ill-gotten gains was not resulting trust but constructive trust (as was actually done in *Van Zuylen v Whiston-Dew* [2021] EWHC 2219 (Ch)). As Mr Graham pointed out, neither resulting nor constructive trust is pleaded against the Krishans. Whilst I rejected his submission that resulting trust was not pleaded against Gracefield, I agree with him it would stretch that Delphic pleading beyond breaking-point to interpret it as a resulting still less constructive trust claim against the Krishans.

595. However, Mr Graham does accept that the Claimant's Consolidated Particulars of Claim did include in the Prayer a claim for an equitable account which would involve the Krishans as directors of Gracefield (which was resulting trustee of the Claimant's Properties as I have held) and in also in their personal capacities as recipients of the proceeds of sale. As *Snell* observes at para.20-013:

> "It is through the accounting procedure, and….the principles that govern it, that any personal liability a custodial fiduciary may have arising out of maladministration is ascertained and determined. For instance, where the fiduciary no longer has an asset which they should have, the accounting serves to convert the obligation to make it over into a personal obligation to pay an equivalent sum as 'an equitable debt or liability in the nature of debt'. Even where a full and formal accounting is not necessary, the same principles apply.

> *Third parties who receive misdirected trust assets with sufficient knowledge of their wrongful provenance are accountable in the same sense*." (citations omitted and my emphasis).

As Mr Graham also accepted, as resulting trustee Gracefield owed the Claimant fiduciary obligations; and likewise, I found that as the Claimant's agent with Coventry CC, Dr Krishan also owed her fiduciary obligations 'within the confines of that agency' as Mr Graham put it. Whether or not that would have entitled the Claimant to claim an account of profits for undue influence against Dr Krishan on that footing is now academic. However, he had a treble status as (i) fiduciary before the resulting trust; then along with Mrs Krishan (ii) joint director of the resulting trustee Gracefield; then (iii) joint recipient of the proceeds of the resulting trust (although Knowing Receipt was also not pleaded, factually I found they did receive the proceeds). That treble status for Dr Krishan (and double status for Mrs Krishan) reinforces the availability of an equitable account against them. Equitable accounting was explained by Lord Millett in the Hong Kong Final Court of Appeal in *Libertarian Investments v Hall* (2013) ITELR 1 (in deciding an account was unnecessary given findings of loss by fraudulent breach of trust):

> "[168] [A]n order for an account does not in itself provide the plaintiff with a remedy; it is merely the first step in a process which enables him to identify and quantify any deficit in the trust fund and seek the appropriate means by which it may be made good. Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed. This will produce a deficit which the defendant must make good, either in specie or in money….
> [170] If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account by asking for it to be taken on the basis of 'wilful default'…on the basis the property should be treated as if the defendant had performed his duty and obtained it for the benefit of the trust. Since….the property has not been acquired, the defendant will be ordered to make good the deficiency by the payment of money and in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss.
> [171] In an appropriate case the defendant will be charged, not merely with the value of the property at the date when it ought to have been acquired or at the date when the account is taken, but at its highest intermediate value. This is on the footing either that the defendant was a trustee with power to sell the property or that he was a fiduciary who ought to have kept his principal informed and sought his instructions.
> [172] At every stage the plaintiff can elect whether or not to seek a further account or inquiry. The amount of any unauthorised disbursement is often established by evidence at the trial, so that the plaintiff does not need an account but can ask for an award of the appropriate amount of compensation. Or he may be content with a monetary award rather than attempt to follow or trace the money, in which case he will not ask for an inquiry as to what has become of the trust property. In short, he may elect not to call for an account or further inquiry if it is unnecessary or unlikely to be fruitful, though the court will always have the last word."

596. Mr Halkerston pointed out that I have found the Krishans had personally received the proceeds of sale of the Properties by procuring them from the Claimant by undue influence through their own fraudulent misrepresentations, then squeezing her out of Gracefield, which they then used in knowing breach of Gracefield's resulting trust, to sell the Properties in the teeth of the Claimant's opposition by litigation fraud. Those proceeds were £1,041,000 (£675,000 for the Co-Op and £175,000 for the Shops in March 2011 and £191,000 for the Cinema in August 2014). Accordingly, Mr Halkerston submits, citing Lord Millett at [172] of *Hall,* that a full account is unnecessary and I could order the Krishans to pay that sum back without a pleaded claim for Knowing Receipt in a 'short-form account' process. However, I agree with Mr Graham that accounting is not so straightforward here. As I have said, the Krishans used £560,653.60 of those proceeds to pay to their own lawyers (hence the 2021 Payment) and may have spent more on the litigatiom since. So, ordering them to repay the sale proceeds *might* risk double-counting against the equitable compensation claim against Gracefield (which does not require an election – *Hall*) and prior costs orders affecting the Krishans, as with the 2021 Payment. So, I will order a full account, but stay it pending any appeal.

597. However, as Lord Millett also explained in *Hall* at [166], the ordering of such an account (especially as it is stayed here) is not inconsistent with ordering equitable compensation, albeit here only against Gracefield. But that raises whether the 'gross' compensation figure (subject to 'netting' by offsetting) should be the actual proceeds of sale of £1,041,000, or the actual market values of the Properties at the times of sale, which I found to have totalled £1,190,000 (namely in March 2011 £700,000 for the Co-Op, £240,000 for the Shops; and in August 2014, £250,000 for the Cinema). As Lord Millett said in *Hall* at [171] as quoted above, in an equitable account, a defaulting trustee can be 'surcharged' with a higher value for a missing asset than its actual value. The same principle must apply on an assessment of equitable compensation, because as Lord Millett also said in *Hall* at [170], the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss. *Hall* was discussed without criticism by the Supreme Court in *AIB v Redler Solicitors* [2015] AC 1503 where Lord Reed said:

> "135 The measure of [equitable] compensation should…normally be assessed at the date of trial, with the benefit of hindsight. The foreseeability of loss is generally irrelevant, but the loss must be caused by the breach of trust, in the sense that it must flow directly from it. Losses resulting from unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour, and not from the breach. The requirement that the loss should flow directly from the breach is also the key to determining whether causation has been interrupted by the acts of third parties….
>
> 136 It follows that the liability of a trustee for breach of trust, even where the trust arises in the context of a commercial transaction which is otherwise regulated by contract, is not generally the same as a liability in damages for tort or breach of contract. [But] of course the aim of equitable compensation is to compensate: that is to say, to provide a monetary equivalent of what has been lost as a result of a breach of duty..."

There should be no logical distinction between the valuation of equitable compensation – at least of property value – between equitable accounting and simple compensation (see *Redler* at [91]). Here, as I am compensating the Claimant's loss of her Properties

due to Gracefield's breach of resulting trust, the 'loss' should logically be the actual value of the Properties at the time, otherwise by relying on their sale at a £150,000 undervalue, Gracefield would be relying on its own failure as trustee to take reasonable steps to obtain market value. Therefore, the strictly correct gross figure should be £1,190,000 not £1,041,000. However, whilst I adopted £1,190,000 in my short oral conclusions, in fairness to the Defendants and Counsel, I have reflected upon that and alter my conclusion (as I am entitled to do before final order: *AIC v FAAN,* especially as this does not undermine 'the finality principle', it simply corrects my decision). I adopt the lower figure of £1,041,000 as the 'gross figure' for equitable compensation by Gracefield for breach of resulting trust for three reasons. Firstly, I suspect Counsel and myself may have been talking at cross-purposes as the figure of £1,190,000 was discussed as the actual proceeds of sale when it was the true value at time of sale. Since submissions were predicated on the 'proceeds of sale' figure (even if the wrong figure was given), I should adopt that actual figure of £1,041,000. Secondly, as I shall explain, the lower figure makes the offsetting process much more straightforward, in a way which benefits the Claimant, so it is 'swings and roundabouts'. Thirdly, the difference is entirely academic to my overall awards.

598. Those second and third points can be illustrated with the offsetting of the expenditure. As discussed, it is accepted that the £13,800 in maintenance and £6,578.68 should be offset, but the additional £132,084.32 in 2006-2010 expenditure, £29,534.33 in additional bank charges and interest and £32,638.21 in the sale costs of the Properties in 2011 and 2014 are again disputed. However, if the gross figure is the actual proceeds of sale of £1,041,000, then it follows that:

598.1 The £32,638.21 should be offset, because it would be unfair to award the Claimant the actual proceeds of sale without her giving credit for the actual costs of sale. Whilst Ms Dobson criticised sale by auction, the costs would be cheaper than a marketed sale (doubtless one reason the Krishans did that) so the Claimant can have no legitimate complaint on the sum of £32,638.21.

598.2 The £132,084.32 should not be offset, since as Mr Halkerston showed, it overwhelmingly related to the costs of obtaining planning permission for the Properties which had lapsed before they were actually sold; and in which the actual purchasers were not interested. Indeed, it is entirely possible that one reason for the undervalue (other than the sale by auction) was the fact that the lapsed planning permission to develop the Co-Op as part accommodation and the Shops as dwellings played no part in the price because the purchasers did not plan to seek its renewal (and have not done). Whilst the second planning application for the Cinema in 2011-2014 is relevant, that figure is included in the £32,638.21 that I have already offset. Insofar as the £132,084.32 is unrelated to the original planning application, as I said it was expenditure on the development that had no lasting benefit to the Properties and which is not suggested to have added to their value.

598.3 Likewise, the £29,534.33 additional bank charges and interest should not be offset, since that is simply the banking costs of funding the Defendant's development expenditure in 2006-2010. If I am right the actual expenditure does not fall to be offset, the banking costs of funding that cannot be either. Indeed, as Mr Halkerston said, '*equitable* compensation' for the Claimant cannot mean her paying for the Krishans funding their fraud by overdraft.

In any event, even if the Defendants were entitled to offset the £132,084.32 and £29,534.33 as well and that reduced the 'net figure' by £161,618.65, the Claimant would also be entitled to insist on increasing the 'gross figure' from £1,041,000 to £1,190,000 by £149,000, cancelling out the majority of the difference. Indeed, if I am wrong about the £132,084.32 but right in any event about the £29,534,33, the net award would actually be higher. Furthermore, since as I shall explain, the resulting trust award is actually the lowest of all three awards, which are alternative not cumulative, any of these adjustments are entirely academic.

599. For that reason, I shall deal with the Settlement Sum briefly (since I deal with it in more detail in conspiracy (which is the largest award so the most crucial). In my judgment, in equitable compensation for breach of resulting trust the Settlement Sum of £300,000 as well as the 2021 Payment of £363,975.60 must both be offset. For rescission in undue influence, hindsight was not appropriate as the Claimant had elected an earlier and lower 'gross figure' for value (i.e. £890,000 in March/April 2006), limiting what offsetting is equitable. By contrast, hindsight is relevant to equitable compensation for breach of resulting trust, as Lord Reed said in *Redler* at [135]. In *Hall*, Ribeiro PJ put it this way at [90]-[94]:

> "[I]n pursuing the restorative objective of equitable compensation, the common law rules requiring the loss to be foreseeable and not too remote do not apply. The court is therefore entitled to assess compensation 'with the full benefit of hindsight'. Consequently, the loss is assessed at the time of judgment and the court is entitled to take into account any post-breach changes affecting the value of the lost trust property…Where the plaintiff provides evidence of loss flowing from the relevant breach of duty, the onus lies on a defaulting fiduciary to disprove the apparent causal connection between the breach of duty and the loss (or particular aspects of the loss) apparently flowing therefrom….[W]hen in *Amaltal Corp Ltd v Maruha Corp*, a defaulting fiduciary sought an offset against the compensation payable for its default, the court required it to show that the proposed offset 'was an incontrovertible benefit to the person to whom the fiduciary duty was owed' emphasising 'that it is for the defaulting fiduciary to establish that such a benefit has been gained'." (citations omitted).

Since equitable compensation does not have precisely the same rules as common law concepts of 'loss' (*Redler*), I do not assume that the common law concepts of 'avoided loss' and 'collateral benefits' discussed below apply to it. Nevertheless, at least in this case, the concept of causation can also achieve 'offsetting', albeit the onus to break the causal chain the onus is on the Defendant. Since in equitable compensation the Court assesses the claimant's loss 'with the full benefit of hindsight' and can consider whether 'causation has been interrupted by the acts of third parties', where the defendant can show that a third party has made good to the claimant a part of the same loss being claimed against that defendant, then the claimant should give credit for that. This is not a case of importing common law concepts of remoteness and mitigation of loss which do not apply to equitable compensation, it is simply insisting on causation of loss (which does apply: *Redler*) and indeed ensuring that equitable compensation should only provide compensation which is equitable. Since I have found that by 2013 the Claimant's only outstanding loss to be compensated was the loss of the Properties, it is only equitable for her to give credit for the dimunition of that loss by £300,000 by Challinors' payment. As Mr Graham says, otherwise it would be a windfall and indeed *inequitable*. In any event, since she is claiming proceeds of sale not fully obtained until

2014, it is only fair that she give credit for a down-payment in 2013. That makes the analysis in resulting trust different from in undue influence where the Claimant elected to limit her claimed 'gross' award to the 2006 values.

600. Accordingly, on resulting trust, the monetary award is £1,041,000 less (1) the £363,975.60 2021 Payment, (2) the £300,000 Settlement Sum; (3) the £32,638.21 sale costs; (4) the £13,800 'maintenance' and (5) £6,578.68 in taxes and rates paid. Therefore, the 'net' monetary award for resulting trust against Gracefield is *£324,007.51* (again I return to interest later). This is exactly £149,000 less than the figure of £473,007.51 I gave in my oral conclusions, reflecting the reduction of the 'gross figure' from £1,190,000 to £1,041,000 for the reasons I have given. Since either award is lower than the award for undue influence of £505,645.72 for which Gracefield is also responsible; and those sums are alternative not cumulative, the adjustment I have made is entirely academic, not least because it does not directly affect the Krishans. Whilst they may be affected by my ordering of an account but staying it pending any appeal, I stress that the result of such accounting may or may not be the same figure. I hope it will prove unnecessary.

Remedies for Conspiracy

601. Unlike undue influence and resulting trust, conspiracy is a tort where the usual compensatory loss-based tortious measure of damages applies. The principles are helpfully summarised in by Thomas Grant KC and David Mumford KC in *Civil Fraud* (2022 1st Ed, 1st Supp) at paras.2-134-137, relied on Mr Perring. The learned editors observe that 'damages are at large' in a conspiracy claim which means that if the Claimant can prove loss as a result of the conspiracy, the Court is not limited to awarding those damages which are strictly proven and will consider all the circumstances of the case, including the conduct of a defendant and the nature of his wrongdoing. The exact factors going to precise assessment are not to be 'weighed in golden scales' as the exercise represents the Court's best assessment of financial loss in fact suffered, reflecting that in conspiracy, it may be difficult for a claimant to prove strictly what pecuniary loss has been caused by the conspiracy. However, damages are only available for actual pecuniary loss. This is confirmed by the leading case on conspiracy damages (noted at paragraph 514.2 above): *Lonrho v Fayed (No.5)* [1993] 1 WLR 1489 (CA). It was part of the long-running litigation and feud over Harrods between its owner Mohammed Al-Fayed and Lonrho's owner Tiny Rowland (which had already established unlawful means conspiracy did not require a predominant purpose to injure in *Lonrho v Fayed* [1992] 1 AC 448 (HL)). In *Lonrho (No.5)*, Rowland alleged Al-Fayed pursued an unlawful means conspiracy to defame him by proxies, including Mr Esterhuysen who was suing Lonrho. Stuart-Smith LJ said at 1505:

> "[T]he plaintiffs cannot recover damages for injury to reputation. Nor can they recover damages for injured feelings…. But the plaintiffs also contend that if they can prove some pecuniary loss…. they can also maintain some general, unspecified and unquantified plea of damage to goodwill arising from all the other overt acts relied upon which are wholly unconnected with any loss…I cannot accept this…[T]here must be a sufficient nexus between the act causing pecuniary loss and the other damage for which compensation is claimed. Since the tort of conspiracy to injure is not complete without pecuniary loss, any damages at large must be referable to the act causing the pecuniary loss which

> constitutes the tort. [Lonrho also claims] the costs of defending the Esterhuysen proceedings. In my judgment this claim is unsustainable. [Lonrho] accepts that [it] can have no claim unless [it] wins the Esterhuysen litigation….[But] …a party cannot recover in a separate action costs which he could have been, but was not, awarded at the trial of a civil action, or the difference between the costs he recovers from the other party and those he has to pay his own solicitors."

As unlawful means conspiracy involves intended harm (if not as the predominant purpose), as *Clerk and Lindsell on Torts* (2023 24th Ed) observes at para.2-146, back in *Quinn v Leathem* [1901] AC 495 (HL), Lord Lindley declared at pg.537: 'The intention to injure disposes of any question of remoteness'. *Clerk* adds:

> "Consequences intended by the defendant will never be too remote…. [Liability in the intentional torts]…extends to all the consequences which can be linked to the tortious conduct, provided those consequences are properly attributable as a matter of causation to the defendant's conduct and not to some [intervening cause]."

602. As Mr Halkerston pointed out, 'damages being at large' in conspiracy does not displace the general principle that damages in tort are designed to put the claimant back in the position she would have been in had the tort not been committed: as HHJ Russen KC stressed in *Palmer Birch v Lloyd* [2018] 4 WLR 164 (TCC) at [254]. However, this does not mean the date of valuation of assets lost due to tort is always the date of the loss itself. In the context of deceit, Lord Steyn said in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) at 284B-C:

> "[T]he normal method of calculating the loss caused by the deceit is the price paid less the real value of the subject matter of the sale. To the extent that this method is adopted, the selection of a date of valuation is necessary. Generally the date of the transaction would be a practical and just date to adopt. But it is not always so. It is only *prima facie* the right date. It may be appropriate to select a later date. That follows from the fact the valuation method is only a means of trying to give effect to the overriding compensatory rule..Moreover, and more importantly, the date of transaction rule is a second order rule applicable only where the valuation method is employed. If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it."

In *Smith New Court* (which is also quoted below), the Lords held that where shares had been purchased as a result of fraudulent misrepresentations which continued to operate after the deceit, the true measure of damages was not the difference between the price paid and the true value at the time of purchase, but between the price paid at purchase and the price received on later re-sale.

603. The same is true for sales of valuable assets which are procured by deceit. So, in *Tuke v Hood* [2022] QB 659 (CA), a fraudster had deceived the claimant into selling classic cars at a significant undervalue and their true value had increased still further by the time of trial. It was held the true measure of damages was the *combination* of (i) a 'base loss' which was the difference between the true value at the time of sale and the price paid; and (ii) a 'consequential loss', that was the difference in value between the true value of the cars at time of sale and their increased value by the time of trial. This is an

example of adopting a different method of calculating loss than valuation, as Lord Steyn said in *Smith New Court*. In *Tuke*, Andrews LJ gave a simple example which in their remedies skeleton argument Mr Halkerston and Mr Lee suggest has obvious resonance in this case:

> "40 If the aim is to put the injured party in the position that he would have been in if the fraud had not occurred, that aim is generally achieved by ensuring he gets back the value, in money terms, of what he parted with. So, for example, if he is fraudulently induced to sell an asset worth £10,000 for £4,000, he is compensated by an award of £6,000 because, by keeping the £4,000, he has received £10,000 in total. If he also had to give credit for interest notionally (or even actually) earned on the £4,000 he would be under-compensated, because he would receive less than the full £10,000 that the asset was worth at the time of sale. The notional interest to be earned in future is not part of the value he receives for the asset from the purchaser, nor is it properly described as a benefit conferred on him by the sale transaction.
>
> 41 The longer the delay in the award of the £6,000, the greater the amount of that under-compensation would be. The difference would not be eliminated by an award of interest on the £6,000 because that reflects the loss of use of that sum from the date on which it should have been paid…
> 42 Now suppose that the asset sold at an undervalue was bought as an investment, and by the time the balance of the £10,000 (i e the £6,000) is awarded, the asset is worth £25,000 and the injured party proves that he would have kept it (for the sake of simplicity, assume that there is no discount for uncertainty about that). The consequential loss is £15,000, which is the difference between the £25,000 (ie what the asset would now be worth if he had not sold it to the fraudster) and the £10,000, which is what it was worth when he did sell it to the fraudster…. If he receives the £15,000 on top of the £6,000 basic damages, he is put in the position in which he would have been but for the fraud….in total £25,000)."

604. Adjustment to date of valuation and consequential loss were compared in *Trafigura v Mediterranean Shipping* [2007] 2 CLC 379 (CA), a case on the tort of conversion. Shippers wrongfully retained copper in a dispute over title to it and its owner was held entitled to recover the value at date of judgment rather than at the date of conversion in a rising market. As Longmore LJ said at [40]-[43]:

> "[T]he fairest way to compensate the claimants is to award them the value of the cargo at the time when he gave his judgment….. Even if the judge had awarded damages based on the value of the cargo at the date of conversion, he would have been able to award the difference in value between the date of conversion and the date of judgment as loss consequential on the shipowners' breach of duty….This consequential loss could equally be described as damages for loss of use of copper between the date of conversion and the date of judgment and ought to be recoverable as such, provided that there is no allegation that the claimants have failed to mitigate their loss…[T]he judge also awarded the claimants interest on the invoice value of the goods between the date of conversion and the date of judgment on the basis that, for that period, the[y] had been out of their money. [But that] will give the claimants a double benefit. The basis of an award of the value of the goods at the date of judgment is that, although the claimants did not

> have the money when they expected to have it, they will be compensated for that by the increase in the value of the copper."

For the same reason, in her example in *Tuke*, in noting that interest on the 'base loss' did not adequately compensate the claimant, Andrews LJ did not suggest the claimant could have base loss, consequential loss and interest. I return to that. Of course, this case is one of conspiracy, not deceit or conversion. Nevertheless, in *EDF v Come Harvest* [2022] EWCA Civ 1704, the deceit measure of damages was adopted in an unlawful means conspiracy case, as Males LJ said at [32]:

> "It was common ground that the applicable measure of damages was that which applies to a claim in deceit, as established by the decision of the House of Lords in *Smith New Court*.... at 266H to 267D. Although the claim against [the defendant here] was for unlawful means conspiracy rather than deceit, the unlawful means in question consisted of deceiving [the claimant. In *Smith*] Lord Browne-Wilkinson described the applicable principles:
>
> > "In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property: (1) The defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) Although such damage need not have been foreseeable, it must have been directly caused by the transaction…..; (3) In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction….. (4) As a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered…. (5) Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

605. Pausing there, in the draft judgment I invited submissions on what the 'gross figure' for damages for conspiracy subject to 'netting' by offsetting should be. The first option was the value (not price) of the Properties on sale in 2011 and 2014, namely £1,190,000. Secondly, 'pre-works' value of the Properties in 2022, namely £1,830,000 (comprised of £950,000 for the Co-Op, £380,000 for the Shops and £500,000 for the Cinema). Thirdly, given my finding that but for the Defendants' unlawful acts, the Claimant would still have the Co-Op and Shops to this day but would have sold the Cinema in 2006 for £200,000, reducing that £1,830,000 to £1,530,000. Mr Halkerston and Mr Lee invited me to adopt that latter figure of £1,530,000 for different reasons. This was not on the basis of a later valuation date relying on *Smith New Court* or *Trafigura*, but rather as in *Tuke* by adding (i) the 'base loss' of the £200,000 value of the Cinema; (ii) the 'base loss' of the value of the Co-Op and Shops at the time of sale in March 2011, namely £940,000 (£700,000 and £240,000 respectively); and (iii) the

'consequential loss' of the capital appreciation of the Co-Op and the Shops, being the difference between that total of £940,000 and their joint value in 2022 of £1,330,000, namely £390,000. In short it added together (i) £200,000; (ii) £940,000; and (iii) £390,000, which totals £1,530,000. Mr Graham accepted that either course is open to me on the findings I have made (subject to any appeal against my factual findings). I also agree £1,530,000 is the correct 'gross figure':

605.1 Firstly, this 'consequential loss' analysis is not incorrect. In *Trafigura*, Longmore LJ suggested either moving the valuation date to trial or using a 'base loss plus consequential loss' approach were equally valid. Whilst *Tuke* was a case of deceit and *Trafigura* of conversion, I see no difficulty with adopting a similar approach for the tort of conspiracy, just as Males LJ saw no difficulty with adopting the deceit measure of damages in *EDF*. (However, as in *Trafigura*, making those adjustments does affect interest).

605.2 Secondly however, since it is clearer with interest, my preference is the other course in *Trafigura* and as discussed in *Smith New Court* - to adjust the valuation date of the Co-Op and the Shops to the 2022 pre-works values of £950,000 and £380,000 respectively. However, it would be inappropriate to award the 2022 value of the Cinema, since but for the Defendant's unlawful conduct, the Claimant would have sold it in 2006 for £200,000. In my judgment, it is therefore perfectly permissible by means of adjustment the other way to adopt the 2006 value, in effect because the Claimant would have converted the Cinema into £200,000, which would not be an appreciating asset but would have been able to earn interest. Alternatively, since the conspiracy did not complete until 2010 (as discussed in relation to limitation), I am content to adopt Counsels' method of value the Cinema at the time of the Purle Judgment in 2010. However, rather than assuming that in 2010 the Cinema would have already reached its 2014 value of £250,000 as Mr Halkerston suggested, I prefer Mr Graham's more cautious analysis that by 2010 it would still have had its 2006 value of £200,000, not least given the intervening financial crisis from 2008 (as noted above).

605.3 Thirdly, for the sake of clarity, if I had not upheld the undue influence and resulting trust claims, the Claimant's 'loss' from the conspiracy would only have been her costs liability to the Krishans of £563,650.80 (or £211,024.20 after offsetting of the 2021 Payment of £363,975.60). However, having upheld both of those claims, the loss caused by the conspiracy effectively subsumes the undue influence award against the Krishans (conspiracy is not claimed against Gracefield), as it relates to the lost value of the Properties to the Claimant up to today (valued using their 2022 values as a proxy).

606. Speaking of offsetting, that raises the topics of 'avoided loss' and 'collateral benefits' discussed in *Swynson Ltd v Lowick Rose LLP* [2018] AC 313 (SC) later in *Tiuta International Ltd v De Villiers Surveyors* [2017] 1 WLR 4627 (SC) and then *EDF*. A defendant can insist a claimant credit 'avoided loss' including recovery of loss from the defendant or third parties, unless a 'collateral benefit' (in the Latin, *'res inter alios acta'* which was loosely translated as 'none of your business' by Males LJ at [30] of *EDF*). In *Swynson* Lord Sumption said at [11]:

> "The general rule is that loss which has been avoided is not recoverable as damages, although expense reasonably incurred in avoiding it may be recoverable as costs of mitigation. To this there is an exception for collateral payments (*'res*

> *inter alios acta'*), which the law treats as not making good the claimant's loss. It is difficult to identify a single principle underlying every case. In spite of what the Latin tag…the critical factor is not the source of the benefit in a third party but its character. Broadly speaking, collateral benefits are those whose receipt arose independently of the circumstances giving rise to the loss. Thus, a gift received by the claimant, even if occasioned by his loss, is regarded as independent of the loss because its gratuitous character means that there is no causal relationship between them. The same is true of a benefit received by right from a third party in respect of the loss, but for which the claimant has given a consideration independent of the legal relationship with the defendant from which the loss arose. Classic cases include loss payments under indemnity insurance or disability pensions under a contributory scheme…
>
> …. In cases like these, as between the claimant and the wrongdoer, the law treats the receipt of the benefit as tantamount to the claimant making good the loss from his own resources, because they are attributable to his premiums, his contributions or his work. The position may be different if the benefits are not collateral because they are derived from a contract (say, an insurance policy) made for the benefit of the wrongdoer: …. or because the benefit is derived from steps taken by the Claimant in consequence of the breach, which mitigated his loss: These principles represent a coherent approach to avoided loss. In *Parry v Cleaver* [1970] AC 1, Lord Reid derived them from considerations of 'justice, reasonableness and public policy'. Justice, reasonableness and public policy are, however, the basis on which the law has arrived at the relevant principles. They are not a licence for discarding those principles and deciding each case on what may be regarded as its broader commercial merits."

So, in *Swynson* itself, the claimant lender Swynson sought damages from the defendant accountants HMT for a negligent due diligence report on the borrower EMSL, which defaulted. However, by the trial, Swynson had been repaid by its owner Mr Hunt via EMSL. Lord Sumption held this was not 'collateral' at [13]:

> "If…Mr Hunt had lent the money to Swynson to strengthen its financial position in the light of EMSL's default, the payment would indeed have had no effect on the damages recoverable from HMT. The payment would not have discharged EMSL's debt. It would also have been collateral. But the payments made by Mr Hunt to EMSL and by EMSL to Swynson to pay off the loans could not possibly be regarded as collateral….[T]he transaction discharged the very liability whose existence represented Swynson's loss."

By contrast, in *Tiuta* the claimant lender made a loan to a borrower, later refinanced and supplemented by a second loan to the borrower based on a negligent valuation by the defendant. Lord Sumption held the part of the second loan which discharged the first was not caused by the defendant's negligence; and was also not a 'collateral benefit' as it was neither a 'benefit' (as that part was debt-neutral), nor was it 'collateral' (as it was a key purpose of the second loan).

607. In *EDF*, Males LJ summarised these principles at [45] and [54]:

> "….[T]he Court [must first] identify 'the transaction' which has caused the claimant to acquire the property in question. Only then is it possible to identify any benefits received as a result of that transaction, as distinct, for example, from benefits received as a result of some other transaction. Benefits received as a

> result of some other transaction may be regarded as *res inter alios acta* or… collateral, although that term has generally been used in the context of avoided loss, which I would regard as a distinct matter. The next step is to identify [those] benefits received as a result of the transaction, which may require a decision to be made as to the date at which any benefits should be valued. In most cases those first two steps will be sufficient to assess the loss which the claimant has suffered and thus to arrive at the damages figure which it is entitled to recover….[A] further question may sometimes arise, whether the claimant has avoided that loss, either in whole or in part. When considering that last question, no account will be taken of benefits which are *res inter alios acta* or collateral…. Broadly speaking, a key test for whether a benefit is collateral is whether its receipt arose independently of the circumstances giving rise to the loss…[W]hether action diminish[ing] loss 'arises out of the transaction' as distinct from being independent or collateral is a question of causation…"

608. However, Mr Halkerston and Mr Lee qualified Males LJ's reference in *EDF* to 'causation' by reference to the observation by Toulson LJ (as he then was) in *Komercni Banka AS v Stone & Rolls Ltd* [2003] 1 Lloyd's Rep 383 at [167]:

> "The question whether an alleged benefit should or should not be taken into account cannot be determined by mere application of the 'but for' test. Where the wrongful conduct consists of causing the victim to enter into a venture or transaction which he would not otherwise have entered into and the wrongdoer alleges that the victim has received a subsequent benefit which he would not have received but for entering into the venture or transaction, it seems to me that the question to be asked is whether the receipt of the benefit was not merely a result of the venture or transaction, in a historical sense, but was part of the complex of obligations and benefits intrinsic, ie belonging naturally, to the venture or transaction. Otherwise, it is hard to know where to draw the line."

That analysis was endorsed by Andrews LJ in *Tuke*, in rejecting a submission that the defrauded seller of the classic cars had to give credit for the 'time value' of the (insufficient) money he had received from the fraudster. She said at [47]:

> "[W]hat Mr Tuke did, or may have done, with the cash he received after he received it, is irrelevant. If he had used the money to gamble and had won a further £1m, those winnings would not be brought into account in the computation of damages, any more than a loss of £1m would increase the recoverable damages. The gain or loss would not be a result of the transaction but of his own independent acts and decisions."

However, this is a very different analysis than in *Swynson* and *Tiuta* (which were not cited to the Court). On the facts of *Tuke*, Andrews LJ at [44]-[53] was giving understandably short shrift to an argument that a victim of a fraudster derived any 'benefit' from getting less money than he should have done, still less that he should credit to the fraudster speculative 'time value' of the money he received. To that extent, whilst not cited, the fundamental basis of *Tuke* on this point was that there was no 'benefit' at all, whether or not a 'collateral' one. In that way, it reaches a similar conclusion to *Tiuta*, even though it was not cited. Certainly, *Tuke* offers no support to Toulson J's analysis in *Komercni* insofar as it defines a 'collateral benefit' more widely than the concept is defined in *Swynson* and *Tiuta*.

609. More relevant here is *EDF* itself, where the 'unlawful means' were themselves forged documents. The claimant innocently bought them for $284m and sold them to a third party for $291m, who discovered the forgery. It settled the claimant's liability for a lesser sum on the basis it would sue the defendant to recoup both their losses. The Court held the defendant was liable for $281m, not the settlement sum, which did not even need to be credited. Males LJ held the two contracts between (i) the defendant and claimant and (ii) it and third party were really one transaction, from which the claimant's benefit was the $291m it was paid and its loss the $284m it had paid. This loss was not 'avoided' or abated by the settlement agreement, as it was not a simple release of the claimant's liability. Instead, in *EDF* Males LJ analysed the relevant settlement as a 'reorganisation of the terms on which those two parties would conduct litigation' against the fraudster as in *Mobil North Sea Ltd v PJ Pipe & Valve Ltd* [2001] All ER 289. *Mobil* had three parties, two suing the third settled as between each other on terms that the second would sue the third. The third's attempt to strike-out the second's claim on the basis the settlement avoided its loss was refused by Rix LJ at [32] as the settlement was 'not an attempt at mitigation; merely a … reorganisation of the terms upon which those two parties were (or were not) going to conduct litigation against it'. Mr Halkerston and Mr Lee suggest that also applies here.

610. However, I find the £300,000 Settlement Sum should be offset for five alternative reasons:

610.1 Firstly, the £300,000 settlement the Claimant received from Challinors in the present case was very different than the reorganisation of the terms of litigation between two parties against a third as in *EDF* and *Mobil*. Challinors never sued the Defendants and would have had no cause of action to do so. It was not part of the terms of the settlement between the Claimant and Challinors that she would again sue the Defendants. She had already tried to sue them and lost. The Settlement Sum was not about suing the Defendants, it was about reducing the loss they had caused the Claimant.

610.2 Secondly, the Settlement Sum was on true analysis the Claimant *mitigating* her loss of the value of her Properties by suing Challinors and recovering £300,000 of it from them. It was a classic case of what Lord Sumption called in *Swynson* a 'benefit' (which it plainly was) derived from steps taken by the claimant (which the counterclaim was) in consequence of the breach (her counterclaim relied on the loss of the Properties to the Defendants), which mitigated his loss' (which it did, by reducing that loss by £300,000).

610.3 Thirdly, even if not strictly 'mitigation' of the Claimant's loss, once understood that by 2013 the Claimant's costs and disbursements liability to Challinors had been discharged by the settlement and her costs liability to the Defendants had been extinguished by 'offsetting' against her supposed 'profit share', the only loss she had left was the full value of her Properties, of which she had received nothing. So, the Settlement Sum was a '(part) avoided loss', which as Males LJ explained in *EDF* at [45], is a distinct matter from 'collateral benefit'. Indeed, as discussed on resulting trust, not offsetting the Settlement Sum would plainly give the Claimant a windfall, just as the 2021 Payment would do if it were not offset against her damages.

610.4 Fourthly, even if that is wrong, whilst the £300,000 was plainly a 'benefit', it was plainly not 'collateral'. Analogous to the words of Lord Sumption in *Swynson*, the

Settlement Sum *in part* 'discharged the very liability whose existence represented her loss', it did not 'arise independently of the circumstances giving rise to the loss'. On the contrary, as Mr Graham submitted, the Settlement Sum specifically compensated the loss of the Properties by the Purle Judgment which I have found was procured by the conspiracy. As Lord Sumption also said in *Swynson*, it is the character not the source of the payment from the defendant or third party that matters. In the words of Males LJ in *EDF* at [45] and [54], the relevant 'transaction' for the conspiracy claim was not the 2006 transfer, but the Original Proceedings and Purle Judgment which the Settlement Sum compensated.

610.5 Fifthly, indeed on that causation point, even if the test for collateral benefit is Toulson J's test in *Komercni*: whether the benefit is 'not merely a result of the venture or transaction in a historical sense, but was part of the complex of obligations and benefits intrinsic and belonging naturally, to it', I am satisfied that in the circumstances of this case, that test is met anyway for the same reasons. It was not simply that 'but for' the conspiracy procuring the Purle Judgment the Claimant would have not received the Settlement Sum, it specifically compensated the Claimant for loss of the Original Proceedings. Far from being *independent* of the Claimant's loss caused by the conspiracy, the Settlement Sum was entirely *dependent* on it.

Therefore, not simply the 2021 Payment but the closely related Settlement Sum both fall to be offset from the £1,530,000 'gross damages' for conspiracy. Since the Claimant has sought permission to appeal on this point, it is convenient to deal with that now. The Claimant's submission contends that this offsetting was not pleaded by the Defendants and that I have also impermissibly used hindsight to conclude that the Settlement Sum compensated her for the loss of the Properties when at the time of the Settlement, that loss only constituted less than 30% of her £2.05m counterclaim. I respectfully disagree and refuse permission. Since I have given the Claimant some latitude on pleading resulting trust and conspiracy (and cross-examining on the latter), she may understand if I give similar latitude to the Defendants, especially when (i) the Claimant only disclosed the Settlement Sum documentation just before if not at trial; (ii) Mr Graham and Mr Perring specifically raised the question of offsetting the Settlement Sum at the start of trial and did in fact cross-examine the Claimant about it; and (iii) I specifically raised the question of offsetting in my draft judgment and invited submissions on the Settlement Sum at the consequentials hearing. As to the substance, I have explained for five alternative reasons why I consider the £300,000 Settlement Sum should be offset. The only reasons criticised are the third, fourth and fifth, so I take it the Claimant has no complaint about the first two which would individually and cumulatively justify my conclusion. In any event, I do not consider the criticisms of my third, fourth and fifth reasons show that they are even arguably wrong, still less that there is any other reason to grant permission to appeal. I made clear at para 610.3 that *by 2013* - i.e. the date of the settlement - many of the Claimant's pleaded potential losses against Challinors had fallen away. I do not accept Challinors would have overlooked that and fail to understand how they would have settled on the basis of a costs risk for the Claimant to the Defendants that had already been resolved. After all, if the Claimant accepted a settlement of only 30% of her counterclaim, that is presumably because she considered the other 70% was unlikely to succeed, as indeed it was given the losses had already fallen away. I have given reasons at paragraph 610.4 why I considered the Settlement Sum was not a collateral benefit. The Claimant's assertion that it is does not change my view. Finally, whilst my conclusion at paragraph

610.5 is criticised, I stand by my reason for that conclusion, which was in any event, my last alternative finding. It follows that I maintain my view that the whole not just part of the Settlement Sum should be offset and refuse permission to appeal on that point.

611. I can deal with the offsetting of expenditure more briefly. In my judgment, since not just the principles but the values sought are different than the sale proceeds in resulting trust, the answer is different, but only slightly. Here the real issue – as in *Tiuta* and *Tuke* – was whether the Claimant derived any 'benefit' from any of the Krishan's expenditure. Again, I address the three categories:

611.1 The £132,084.32 should not be offset for closely related reasons to those for resulting trust. As discussed, it overwhelmingly related to the expenses of planning permission which had lapsed. I have also found that but for the conspiracy and other unlawful conduct, the Claimant would have kept the Co-Op and Shops and since the planning permission has long lapsed and they have been used for existing purposes, it made no contribution to their value in 2022. As stressed by Andrews LJ in *Tuke*, any reduction must be pleaded and proved by a defendant and here the Defendants have not proved the lapsed planning permission increased value. In any event, it cannot have done for the Cinema, since I have adopted the equivalent of the 2006 value, which was before any planning permission. Other than planning-related expenses, the modest other expenditure (skip hire etc) made no contribution at all and the Claimant derived no benefit whatsoever from any of it.

611.2 Similarly, the £29,534.33 additional bank charges and interest should not be offset, since as discussed in relation to resulting trust, that is simply the banking costs of funding the Defendant's development expenditure in 2006-2010. Again, the Claimant derived no benefit whatsoever from it – indeed, if anything the case is even stronger then *Tuke,* as the Claimant did not receive a penny from the Krishans for handing over the Properties.

611.3 As with resulting trust, the £32,638.21 is different, but here not all of it should be offset. The sale expenses of the Co-Op and Shops in March 2011 of £16,490.06 should not be offset because unlike resulting trust, the value sought is not the sale proceeds at that time, but the value of the Co-Op and Shops in 2022, which I found but for the Defendants' unlawfulness the Claimant would have retained. Therefore, she would not have incurred any sale costs at all. However, as the Claimant would have sold the Cinema in 2006, the costs of sale of £7,124.15 (£16,148.15 less the £9,024 planning fees which the Claimant would not have incurred in 2006) should be offset. Whilst Ms Dobson assumed a market not auction sale, I will robustly assume the same cost, especially as the actual cost was in 2014 not in 2006.

612. Therefore, on conspiracy, the damages are £1,530,000 less (1) the £363,975.60 2021 Payment, (2) the £300,000 Settlement Sum; (3) the £7,124.15 Cinema sale-only costs; (4) the £13,800 'maintenance' and (5) £6,578.68 in taxes and rates paid. So, the 'net' damages for conspiracy against the Krishans are *£838,521.57.*

Judgments and Interest

613. I have not yet calculated interest because as I have explained, the three claims are alternative not cumulative. When I gave my short oral conclusions, I proceeded on the

basis the judgment against the Krishans would simply be those damages for conspiracy of £383,521.57 plus interest, as that exceeded the undue influence award; and the judgment against Gracefield would be the undue influence award of £505,645.72 plus interest, as that exceeded the resulting trust award, that was therefore academic (save the stayed account). However, on reflection it seemed to me the strictly appropriate approach is to calculate the interest on all three awards against Gracefield and the Krishans and then to adopt the highest award each one faces to ensure no double recovery (given that the loss in each case is the value of the Properties). On following that process through in finalising this judgment, it became apparent that if the interest rate is the same on all three awards as I decided in my short oral conclusions, whilst the resulting trust award is academic against Gracefield as I envisaged, the undue influence award against the Krishans is not, which I did not envisage. This prompted me to revisit the different interest rates in more detail. As I have said, I am entitled to do so before making my final order – *AIC v FAAN*. However, whilst this is not a case like that *AIC* of a party seeking to re-open a decision before a final order, since the adjustment is not academic, it is still necessary, in the words of Lords Briggs and Sales in *AIC* at [39], to ask 'whether the factors favouring re-opening the decision are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving it in place'. In any event, this is the reason that I invited short submissions on interest. The Defendants accepted my revised analysis. The Claimant did not and made both short submissions and sought permission to appeal on the point. I have borne those submissions in mind but see no reason to change my (revised) view and accordingly refuse permission to appeal on the point.

614. I turn first to the principles of statutory interest, which is claimed on conspiracy and undue influence. This is governed by s.35A Supreme Court Act 1981 ('SCA' which is limited to simple not compound interest: *Westdeutschebank*), that states:

> "In proceedings before the … [Court] for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and (a) in the case of any sum paid before judgment, the date of the payment; and (b) in the case of the sum for which judgment is given, the date of the judgment."

Obviously, conspiracy is a claim in damages; and undue influence, whilst equitable in origin, is a restitutionary claim in 'debt' for the purposes of s.35A: *R(Kemp) v Denbighshire Local Health Board* [2007] 1 WLR 639. The principles of statutory interest were set out in *Carrasco v Johnson* [2018] EWCA Civ 87, (quoted in *Watson v Kea Investments* [2019] 4 WLR 145 (CA)) by Hamblen LJ as he then was (who also gave a judgment in *Watson*). In *Carrasco* he said at [17]:

> "(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money. (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been. (3) In relation to commercial claimants the general presumption

> will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers. (4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate. (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates [There] are examples of cases….within that mid-category, justifying a blending between rates [where]..interest was awarded at 3% over base rate."

615. Mr Halkerston and Mr Lee's skeleton suggested (and Mr Graham did not demur) that with individuals and small businesses, a rate of Base + 3% is often adopted (rather than the usual Base + 1% for commercial claimants) to reflect likely higher borrowing costs: *Jaura v Ahmed* [2002] EWCA Civ 210. However, in some cases, statutory simple interest can be awarded at the Judgments Act rate of 8%, such as *Perry v Raleys Solicitors* [2017] PNLR 27, where Gloster LJ said at [67]-[68]:

> "The current edition of *Jackson and Powell on Professional Liability* 8th edn, at para.3–024…states: '….[T]he Court may take the rate applicable to judgments by s.17 of the Judgments Act 1838. However, that is only an option and should not be applied without considering whether some other, more flexible rate is more appropriate. In [other cases] interest was awarded on damages awarded against solicitors at the short-term investment rate'….
>
> I consider that it is wholly appropriate to adopt the judgment debt rate… That is not just because [it] more adequately compensates Mr Perry for the fact that he has been kept out of his money for so long, but also because the conduct of Raleys (or their insurers), in their long drawn-out defence of this claim, deserves appropriate sanction. [They]…refused to accept that they were in negligent breach of duty until two days before trial; [they]… raised every conceivable defence, including putting Mr Perry to proof that he would have succeeded in his claim under the Scheme…[they] effectively sidelined the findings of the jointly instructed sole expert…and attempted …to conduct a trial of the….hypothetical claim under the Scheme, based on a superficial cross-examination of an unsophisticated claimant by reference to historical medical records going back many years….
>
> [A] fair and just result justifies interest being awarded on the judgment debt basis. I note that it was not suggested in argument…Mr Perry or his advisers had been responsible for any delay in the resolution of the litigation."

By using the word 'sanction', Gloster LJ was not awarding 8% interest as a *punitive* rate, which is impermissible as Mr Graham says. Instead, she was adopting the Judgment Rate, statutorily fixed at 8%, because the claimant had not just been left out of his damages, he had 'salt rubbed in that wound' as to get his damages, he had to overcome the unreasonable obstacles the defendant put in his way. 8% *compensated him*, rather than *punishing them*. However, as the *White Book* explains at para.16AI.7, the judgment debt rate of 8% is not the normal rate for interest on damages or disputed debt (as opposed to after judgment), because it has no connection with the usual borrowing rate for claimants (e.g. Base plus 1, 2 or 3%) or investment rate (like the 'Special Account Rate' of 6%; or half of it for personal injury claimants). This is why *Jackson & Powell* states 'it should not be applied without considering whether some

other, more flexible rate is more appropriate'. As to period, as the *White Book* also explains, this will typically run from the date of the loss or when the cause of action arose, but in *Trafigura*, Longmore LJ discussed this needed adjustment if the loss was valued later:

> "…[T]he judge also awarded the claimants interest on the invoice value of the goods between the date of conversion and the date of judgment on the basis that, for that period, the[y] had been out of their money. [But that] will give the claimants a double benefit. The basis of an award of the value of the goods at the date of judgment is that, although the claimants did not have the money when they expected to have it, they will be compensated for that by the increase in the value of the copper."

616. For the conspiracy claim, I prefer to adopt a valuation date of November 2022 for the Co-Op of £950,000 and the Shops of £380,000 and a valuation date of July 2010 for the Cinema (albeit it was still £200,000 as in April 2006) because it simplifies interest. *Trafigura* decided in terms that valuing at date of judgment to reflect a rising market would lead to double-counting were interest awarded for earlier. I do not accept Mr Halkerston's attempt to differentiate income-earning assets like commercial property from non-income-earning ones like the copper. Either way, the later date still compensates the delay. With the 'base and consequential loss' approach, in *Tuke v Hood* [2021] EWHC 71 at [27] and [32], Jacobs J limited interest to 'base losses', as interest on 'consequential loss' would be double recovery. However, he only awarded 'consequential loss' on certain of the cars for 'loss of investment opportunity'. Therefore, the approaches in *Tuke* and *Trafigura* do indeed lead to the same result, as one would expect. Interest runs from the date of loss where its valuation date is not deferred, from the valuation date if it is deferred, but there is no interest if valuation is deferred until judgment. Whilst the Co-Op and Shops valuations are November 2022, the last applies here as that is being used as a proxy for judgment date (especially given relatively depressed property prices since then). Therefore, interest is limited to the proportion of the award relating to the Cinema. As s.35A SCA enables me to award interest 'for all or any part of the period' between damage and judgment and since £200,000 for the Cinema is 13% of the gross award of £1,530,000, I will award interest on only 13% of the net award of £838,521.57 i.e. £109,610.61 from July 2010. This is the working out, not the alteration, of my oral conclusion.

617. I turn to the rate of interest on that £109,610.61 portion of the conspiracy award. I adopt the 8% Judgment Rate. The Claimant has not just been 'kept out of her damages' for conspiracy since July 2010, as for her undue influence award since April 2006. As Mr Halkerston submitted, this is an even more egregious case of litigation misconduct by the Krishans than *Perry* was. If the case now resembles *Jarndyce v Jarndyce* in Dickens' *Bleak House* as Mr Graham fairly observed, that is because having lied to HHJ Purle QC, the Krishans used his declaration to force the sale of the Properties the Claimant tried to stop. Then when she did apply to set the Purle Judgment aside, they fought it tooth and nail every step of the way, including at the 2020 trial, by lying to Mr Gasztowicz QC (including trying to throw their loyal accountant SB under the bus by accusing her of the forgery). To top it all off, they then came up with an entirely new lie in dishonest evidence to me in 2023. The Claimant has had to overcome roadblock after roadblock to get her money. In fairness, this may explain her entrenched bitterness and anger. If this case does not merit the Judgment Rate of 8% interest, it is difficult to see what case ever would. So, I award 8% interest from July 2010 on £109,610.61. I

gratefully adopt Mr Halkerston and Mr Lee's calculation for simple interest on this basis of £231,689.80 with an ongoing daily rate of £183.79.

618. As I have said, in my short oral conclusions, I applied the same rate of simple interest of 8% to undue influence assuming it was academic for the Krishans, if not for Gracefield. However, it has become apparent that if I were to award simple interest of 8% on the undue influence award of £505,645.72 since April 2006 (the agreed date), the interest alone would be £738,270.76 and the total award would be £1,243,916.48: over £175,000 more than the conspiracy award. I have awarded 8% interest on the conspiracy award as the Claimant has had to fight the Krishans' litigation misconduct since 2010 to get them. However, all of that misconduct relates to the litigation fraud and the setting aside of the Purle Judgment. That is the focus of the conspiracy claim, not the undue influence one, especially since the Claimant narrowed her conspiracy claim so that it no longer ran from 2006. Without the litigation fraud conspiracy, she would have succeeded on undue influence (and resulting trust) in the Purle Judgment in 2010, but there would have been no grounds for 8% interest from 2006 to 2010. To award it on the undue influence award from 2010, effectively rendering the conspiracy claim academic, would be excessive against the Krishans and punitive against Gracefield, which is not liable for conspiracy. I therefore was minded to reduce the interest award for undue influence and so I invited short written submissions on that point. In response the Claimant submitted that I should award not just simple interest but compound interest on the undue influence claim. I do not agree. The undue influence claim may be a claim in Equity and I may have found equitable fraud, but compound interest is still discretionary. The Claimant sought compound interest because she 'had been kept out of ownership of the Properties since 2006'. However, as the Supreme Court in *Takhar* held, the Claimant had the opportunity to challenge the forged PSA in the Original Proceedings. I accept no formal finding has yet been made that she did in fact not use reasonable diligence in doing so, but that was the whole premise of the Supreme Court's judgment and I do not accept that judgment was entirely *obiter*. In any event, if necessary to reach that conclusion, on all the evidence I do so on the balance of probabilities and conclude it would be unfair and disproportionate to award compound interest when the Claimant is in part responsible for the delay of which she complains. Returning to the point on which I invited submissions, the Claimant did not otherwise criticise my provisional reasons for concluding that I should return to the more usual Base + 3% rate of simple interest. I prefer this 'middle-category' rate in *Carrasco*, rather than Base + 2% that Mr Graham suggested because whilst the Claimant does not neatly fit the usual categories the closest is small business (see *Jaura*); and whilst not awarding rental income, at para.569 I found she would have eventually opened the Co-Op as a shop again as the current tenants have done. I am grateful for and adopt Mr Halkerston and Mr Lee's calculation of simple interest of Base + 3% on the undue influence award of £505,645.72, namely £420,627.71, with an ongoing daily rate of £110.83.

619. That leads on to the resulting trust award against Gracefield (the account I have ordered but stayed affecting the Krishans is a different point). Here, the Claimant sought compound interest on the equitable basis. The jurisdiction is clearly engaged, described by Lord Browne-Wilkinson in *Westdeutschebank* at pg.702:

> "In the absence of fraud Equity only awards compound (as opposed to simple) interest against a defendant who is a trustee or otherwise in a fiduciary position by way of recouping from such a defendant an improper profit made by him. It is

> unnecessary to decide whether in such a case compound interest can only be paid where the defendant has used trust moneys in his own trade or (as I tend to think) extends to all cases where a fiduciary has improperly profited from his trust."

Here that situation and fraud both apply. Ribeiro PJ added in *Hall* at [142]:

> "[C]ompound interest may be appropriate where the trustee or fiduciary has misappropriated funds which the court assumes would have been used by him to earn profits and, instead of ordering an account of those profits, orders him to pay compound interest on the sum extracted. Where the fiduciary is ordered to pay equitable compensation on the basis of gains which the court finds would have accrued to the trust estate if he had duly performed his fiduciary duty, it would be double-counting and punitive to order the amount of equitable compensation to carry compound interest."

When inviting final written submissions, I indicated that I was minded to decline to exercise my discretion to award compound interest for breach of resulting trust because:

619.1 Firstly, as said in *Hall*, for an award of equitable compensation for breach of resulting trust in the alternative to an account of profits, it would be double-counting and punitive to award compound interest as well.

619.2 Secondly, as explained, the resulting trust claim is otherwise effectively academic because the award for it is lower than the other two awards. If I were to award compound interest of 5% as suggested, the total award against Gracefield would more than double the initial award of just over £470,000 and overtop its undue influence liability. That would be unfair when Gracefield was not legally responsible for the conspiracy or the delay.

619.3 Thirdly, there is a more proportionate and fairer alternative. This is neither to award 8% as with conspiracy, for the same reasons as on undue influence, nor Base+3% as for that claim, but rather 5% as a *simple* interest rate – the 'fraud' rate straightforwardly described by McCombe LJ in *Watson* at [41]:

> > "I can elect for 5% as you're a fraudster and you've had my money and kept it. I don't even have to go into what you've done with it."
>
> As Hamblen LJ said in *Watson* at [78]-[79], equitable interest on defaulting trustees is a proxy for profit, unlike the typical borrowing/investment basis of interest like Base + 3% under s.35A SCA in *Carrasco*.

The Claimant now seeks permission to appeal against my provisional decision to award 5% simple rather than 5% compound interest. Aside from that fact I made clear that this decision was only provisional and she has only really challenged my first conclusion, I reject the Claimant's challenge to this reasoning and confirm it and refuse permission to appeal on the basis I consider it is not arguably wrong. This is partly for the reasons I have given and partly for the following reasons. I do not accept this case is different from *Hall*. The point made in *Hall* was that compound interest was an alternative to an account of profits, but where the Court awards equitable compensation for gains which would have accrued if the trustee had performed their duties, it would also be double-counting to award compound interest. I have made an award for breach of resulting trust not simply on the value of the Properties at the transfer in 2006, but on the gains accruing to Gracefield by their sale in 2010/14. I have not assessed equitable compensation on any wider basis. Therefore, the analysis in *Hall* applies and it would

be double-counting to award compound interest. In any event, given the Claimant's responsibility for the delay, compound interest would be unfair and disproportionate. On that footing, interest of 5% since July 2010 on the resulting trust award of £473,007.51 would be £331,137.83. However, that is accordingly academic as it is less than that award against Gracefield for undue influence.

Summary

620. At long last, I can summarise my final conclusions:

620.1 I uphold the Claimant's claim that the March/April 2006 transfers were procured by the Krishans' undue influence, whether expressed as 'actual' (with or without fraudulent misrepresentation) or 'presumed'.

620.2 I find the Claimant can rescind the transfers for undue influence and full restitution is possible by the return of the market value of the Properties in 2006 subject to offsetting. So, I award against Gracefield and the Krishans jointly and severally £505,645.72 and simple interest at the rate of Base + 3% simple interest from April 2006 to date of judgment and adopt the figure of £420,627.71 and daily interest of £110.83.

620.3 I uphold the Claimant's claim (which I found pleaded) that Gracefield held the Properties on resulting trust for her until their respective sales.

620.4 I order an account but stay it pending any appeal, although I find Gracefield is in breach of that resulting trust by its sale of the Properties and liable to make equitable compensation of £473,007.51 plus 5% simple interest from August 2014 to the date of judgment. This would have totalled £804,145.34, but that award is subsumed within Gracefield's undue influence liability.

620.5 I uphold the Claimant's claim for unlawful means conspiracy limited to the Krishans' forgery of her signature on the PSA, its deployment in the Original Proceedings and causative effect in procuring the Purle Judgment.

620.6 I am satisfied the Claimant has suffered loss caused by the conspiracy and enter judgment against the Krishans for £838,521.57 plus simple interest of 8% from July 2010, apportioned in the way described and I adopt the interest calculation on that of £231,689.80 with ongoing daily interest of £183.79. Again, this renders the undue influence award academic as against the Krishans.

620.7 I make the costs orders stated at the consequential hearing for the reasons given there orally which it is unnecessary to reiterate in this judgment.

It is appropriate to end by saying that the quality of the advocacy in the case from Mr Graham and Mr Halkerston, ably assisted by Mr Perring and Mr Lee and the solicitors on both sides, has been exemplary. It has made perhaps the most complex case of my career one of the most interesting and even on occasion a pleasure, as it was conducted by them in the best spirit. I thank Counsel and the solicitors sincerely.
