Neutral Citation Number: [2019] EWHC 2314 (Ch)

Case No: D31MA124

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (Ch D)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: Wednesday 11 September 2019

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between :

(1) Glossop Cartons and Print Limited
(2) Brian Sidebottom, Jacqueline Cameron Sidebottom-Every, and Jillian Cameron Woodacre (suing as individuals and as the Raymond Joseph Partnership (a firm))

Claimants

- and –

(1) Contact (Print and Packaging) Limited
(2) Philip Smith
(3) Liberty Trustees Limited

Defendants

- -
- -

Mr John Dagnall (instructed by **Davis Blank Furniss**) for the **Claimants**
Mr Richard Lander (instructed by **Squire Patton Boggs**) for the **Defendants**

Hearing dates: 6-9, 12-15 August 2019

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Approved Judgment

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

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HIS HONOUR JUDGE HODGE QC

Judge Hodge QC:

1. Fraud unravels everything (as Denning LJ affirmed in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712). It is by invoking this principle that the claimants (represented by Mr John Dagnall of counsel) seek to present this claim as one for huge damages whereas, according to Mr Richard Lander (also of counsel), who appears for the defendants, it is at best a claim for modest damages about a blocked drain and problems with an electricity supply. Both of these matters were said by the defendants to be "the sorts of minor issues that inevitably crop up from time to time with a manufacturing business and the expert evidence is (unsurprisingly) that neither of them would have cost more than a few thousand pounds to resolve".

2. This judgment is structured under ten headings as follows:

   (A) Introduction and background

   (B) The trial and the witnesses

   (C) The applicable law

   (D) The electricity supply representation

   (E) The electricity power representation

   (F) The flooding representation

   (G) The fencing representation

   (H) The Brammall warranty claim

   (I) Loss and damages

   (J) Summary

   However, these headings are included for ease of reference and exposition only. Inevitably, my consideration of later issues has informed my decisions on earlier ones.

3. If, in the course of this judgment, I fail to address a particular point, it is not because I have overlooked it, but because I did not consider it to be sufficiently material to my ultimate decision to merit mentioning; and because, in the limited time available to me to consider and prepare this judgment, it has simply been impossible for me to address every single one of the very many points urged upon me by counsel. Mr Dagnall's written opening for the claimant comprised 65 pages of text (supplemented by a 13-page chronology); but this was eclipsed by Mr Dagnall's impressive written closing (produced overnight) which extended to some 104 pages. In his more modest 46 page written opening Mr Lander described the claimants' statements of case (with some justification) as "largely impenetrable"; and he accused the claimants of having "sought to over-complicate their claim, perhaps with a view to hiding its obvious and fundamental defects, and its complete lack of commercial reality". In short, the claimants were said to "have lost sight of the wood for the trees and presented a case which simply does not stand up to any sensible and rational scrutiny".

A: Introduction and background

4. By a claim form issued on 15 December 2017 the claimants seek damages for fraudulent (alternatively negligent) misrepresentations and breaches of warranty and an indemnity in relation to three linked agreements made between the parties on 23 November 2015 whereby the first claimant, Glossop Cartons & Print Limited ("**Glossop**"), and the second-named claimants, Brian Sidebottom ("**Brian**"), his wife Jacky Sidebottom-Every ("J**acky**"), and Jill Woodacre ("**Jill**"), who operate as the Raymond Joseph Partnership ("**RJP**"), purchased the principal part of Contact's business and assets from the first defendant, Contact (Print & Packaging) Limited ("**Contact**"), and the leases of three commercial Units known as Units 3, 4 and 5 Haigh Avenue, Stockport from the second defendant, Phil Smith ("**Mr Smith**") and the third defendant, Liberty Trustees Limited, who are the trustees of Mr Smith's pension fund.

5. The relevant misrepresentations are said principally to be contained in or implied by an email timed at 08.18 on Friday 13 November ("**the 13 November email**") from Mr Smith to Jacky (and copied to the defendants' solicitor at Brabners and to Mr Mulcahy and Mr Walker, respectively the chief executive officer and the financial director for the companies in the Contact Group). By an email dated 18 November 2019 Brabners confirmed to Davis Blank Furniss ("**DBF**"), the claimants' solicitors, that the 13 November email should constitute a reply as if it had been made through Brabners and thus (the claimants say, by implication) that it dealt with the flooding and the electricity supply issues which DBF had previously raised. I find that Brabners had consulted Mr Smith before sending this email and that this confirmation was sent with his actual knowledge and authority. The 13 November email had been sent by Mr Smith against the background of:

(1) Limited or unhelpful responses from Brabners to standard pre-contract enquiries.

(2) Two earlier emails from DBF to Brabners, one timed at 12.08 on Thursday 12 November seeking confirmation (amongst other things) that, in relation to the electricity sourced from Unit 2, "no problems or contentions have arisen in respect of the electricity", and the other, timed at 15.21 on the same day, inviting Brabners to "ask your client directly whether Unit 3 has suffered from flooding" in the light of investigations that had "revealed that Unit 3 flooded yesterday and also within the last month" and asking the defendants to confirm (i) the damage occasioned by the floods, (ii) specifically what remedial works had been carried out, (iii) whether they were aware of any problems with the drains and, if they were, the details of such issues, and (iv) the cost of remedying any defects. The email concluded that, considering the value of the equipment that would need to go into Unit 3, Glossop could not afford to take such a risk with so little information; and, as such, DBF proposed that a retention should be held back from the sale price to cover remedial works on the drains.

(3) An email from Jacky to Mr Smith, Mr Walker and Mr Mulcahy (and copied to the claimants' solicitors) timed at 15.11 on 12 November stating:

> "With regards to Unit 3, the poor drainage is concerning us … it was full of water yesterday when Jill and Vicky visited for a look around. How are we going to go forward with this? Reluctant to pop in very expensive kit in unit when it could flood. Did you get a cost to repair the drains? We don't want to stop this deal going ahead but feel that the building should be suitable as described to us and without

fault, we need some assurance from you that you will cover the cost of the problem drainage. Which we can sort out as the building is emptied of stock."

(4) A late session that Mr Smith, Mr Mulcahy and Mr Walker had with Brabners on the evening of Thursday 12 November 2015 at which (as I find) there was discussion about the subject-matter of the two emails that DBF had sent to Brabners that afternoon (because otherwise I would have expected some response direct from Brabners to DBF's two emails of 12 November). Mr Mulcahy recalled the meeting but he had very little recollection of what was discussed, indicating that the initial purpose of the meeting had been to sign the documents to lead to the sale of the business. He said that he had not previously seen either of the two emails from DBF to Brabners. Mr Walker also had very little recollection of the discussions at this meeting but he could remember being told that Matthew O'Brien of Brabners was still working on some answers to emails he had received. In cross-examination, Mr Smith originally said that he had not seen the two DBF emails to Brabners even though (i) in an email timed at 15.44 on 12 November Mr O'Brien had told DBF that he had forwarded the second of the emails (which had raised the flooding issues) to his client and (ii) Mr Smith had referred to that email in paragraph 23 of, and had exhibited it to, his first witness statement. When Mr Smith's attention was directed to this second point, he accepted that he must have been mistaken, that he must have seen the two emails, and that they would have been discussed at his meeting with Brabners.

6. So far as material, the 13 November email addressed three matters: (1) the flooding in Unit 3; (2) the electricity supply; and (3) rights of passage and the re-positioning of the boundary fence separating Unit 5 from Units 1 and 2. The material parts read as follows (correcting obvious typographical errors):

"Hi Jacky and Brian

Myself, Steve and Gary had a late session with Brabners last night and subject to the following we could be in a position to complete and sign later today.

Firstly Unit 3

To confirm our conversation earlier, the flooding issue emanates from a drainage problem during exceptionally heavy downpours and recent investigations uncovered a blockage in the drain below Unit 2 … coupled with excess water running down the hill in front of the unit.

The first issue has been discussed Teasdales the tenants in Unit 2 and they are very helpful and cooperative (Good neighbours) and they have undertaken to clean the drain regularly. There is also a problem with the gutter and downspout along Unit 2 and under a full repairing lease Teasdales are obligated to replace this and I believe that is in hand. That problem has added to the water running down the hill.

To eradicate that problem, I have spent in excess of £10,000 putting a new open gridded drain along the front of Unit 2.

> I have over the last two days been told there may be a small leak in the roof sheeting and I have engaged a builder to make the repair.
>
> We have also been informed by United Utilities that they have uncovered a blocked drain at High Avenue as a result of work they undertook some time ago and they have admitted liability and are correcting the matter and this may be the subject of an insurance claim.
>
> Electricity supply.
>
> Since Units 1/2 and 3 were built the electricity supply goes via the substation at the front into Unit 1 the nearest unit and it is then fed down to Units 2 and 3.
>
> There is a meter which separates the usage is in Unit 1 and the arrangement has always been the bill goes to the occupier of Unit 1 and since we vacated Units 1 and 2 Teasdales send us our bill and we pay it and it works well and Teasdales are happy with the arrangement and it fosters good relations.
>
> Mr Scoltock the landlord of Units 1 and 2 and who wants to acquire Unit 3 has, since our vacation asked us to put the electrical feed via Unit 4 at a cost of around £6K and I am prepared to undertake this but until the flooding issue is resolved it is leverage and as I said yesterday Scoltock wishes to sell Units 1 and 2 when the short lease expires in, I believe, 18 months' time. Mr Teasdale informed me that he would only acquire those Units if he could get Unit 3 … so it has a premium value and I should point out the valuation in April 2015 was £250K for Unit 3.
>
> Unit 3 has rights of passage through both front gates on the left and right side of Unit 1 and across the frontage and this will allow you to have a gate through to avoid using Haigh Avenue … as discussed yesterday.
>
> Also you have a right to reposition the dividing fence which Scoltock illegally erected over 1 metre onto Unit 5 land. I hope this makes clear the situation but I will give every assistance regarding this Unit post deal."

The email then proceeded to address other matters. Later that same morning (at 10.21) Mr Smith sent a further email to the same recipients as the first stating:

> "Jacky,
>
> Sorry I have amended slightly as I should have said the new gridded drain runs along the front of Unit 3."

Clearly, Mr Smith had been giving some thought as to the accuracy of his earlier email.

7. The claimants say that they were comforted by these emails and that it had been represented to them, and they understood and assumed (at least), that:

(1) The flooding had been dealt with and there was no (and there was not thought to be any) continuing problem (so long as Mr Teasdale kept clearing out the drains under Unit 2).

(2) The electricity supply was as described and was a Major Supply. The Scoltocks had asked for it to be re-routed and Mr Smith would, if he wished, lawfully re-route an alternative Major Supply (for which he had already a price of £6,000 and which he would pay) but the Scoltocks had no right to insist upon any re-routing.

(3) The claimants would be able to require the Scoltocks to re-site the boundary fence, or do it themselves, at the Scoltocks' expense.

(4) In relation to all such matters the claimants were being told everything material (i.e. the whole truth).

8. Prior to the transactions which have given rise to this claim, Contact was ultimately owned and controlled by Mr Smith and it ran a printing and packaging business from Units 3, 4 and 5. In the latter years, that business had been massively loss-making. The freehold title to the three Units was owned by Stockport Metropolitan Borough Council. Long leases of Units 4 and 5 were held by Contact, and a long lease of Unit 3 was held by the second and third defendants (as part of Mr Smith's pension fund). A steep grass bank and grassed area divides Unit 4 from Units 1, 2 and 3, and Unit 5 is separated from them by Units 1 and 2 (which adjoin Unit 3). At all material times the long lease of Units 1 and 2 was (and still is) vested in the trustees of Mr and Mrs Scoltock's pension scheme.

9. For some considerable period until about November 2010, when its sub-lease had determined, the Scoltock pension trustees had sub-let Units 1 and 2 to Contact (which had acquired the business of a company owned and controlled by Mr and Mrs Scoltock in a management buy-out involving, amongst others, Mr Smith in 1989). After about two years, Units 1 and 2 were sublet to a company controlled by Mr Barry Teasdale until it went into administration in January 2019 (although Mrs Scoltock stated that it had entered into liquidation in May 2019). From about 1992 Mr Smith had not been on speaking terms with the Scoltocks (as a result of him purchasing the long lease of Unit 3, which they had wished to acquire for their pension fund). When the Contact sub-lease of Units 1 and 2 determined, there was litigation between Contact and the pension trustees in the County at Court at Liverpool (under Case No 1LV21464) over the boundary and easements between the respective Units which was compromised on the day of the trial by a Tomlin Order dated 9 November 2011. As part of that settlement, Contact agreed to erect, at its own expense, a new steel palisade fence upon its own land and abutting the line of the agreed boundary between Unit 5 and Units 1 and 2 ("**the fencing undertaking**").

10. There was later litigation between the same parties in the Queen's Bench Division in Manchester (under Case No A50MA049) which was compromised after a seven days trial before HHJ Stephen Davies by an Order dated 27 March 2015. The issues arising under Item No 58 in the Scott Schedule produced in connection with that claim (relating to a dispute as to the electricity supply which fed through from Units 1 and 2 into Unit 3) were compromised by the terms of a letter dated 25 February 2015 from DLA Piper (the solicitors then acting for Contact, and also for the second and third defendants as the registered long leasehold proprietors of Unit 3) to Ralli Solicitors ("**Ralli**"), who

were acting for the Scoltock pension trustees, under which the second and third defendants undertook to the pension trustees "… to arrange for the disconnection of the electricity supply at the point at which it enters into Unit 3 … ([to] include any necessary making good) to be carried out at their own expense and as soon as practicable" ("**the disconnection undertaking**"). It is Mr Smith's (now) admitted failure to disclose the existence of the obligation assumed by the disconnection undertaking, and the Scoltock pension trustees' consequent right to cut-off the supply of electricity to Unit 3, which constitutes the claimants' main complaint in this litigation.

11. Glossop was owned by Brian, Jacky, Jill and a third sister, Vicky Every. Jacky and Brian were Glossop's joint managing directors, with Jacky being responsible for sales and Brian for operations. Glossop ran a largely similar business to Contact from premises at Raymond Joseph Works, Platt Street, Padfield, Glossop ("**the Old Mill**"), which was (and indeed still is) owned by RJP.

12. By the three separate transactions which have given rise to this claim, each of which was entered into and completed on 23 November 2015 but involved different parties:

    (1) Contact sold the majority of its business assets (as defined) to Glossop for some £1.253 million payable by instalments (with the final instalment of £112,500 becoming due on 30 December 2017). This involved the transfer of a number of employees under TUPE regulations. This has been referred to as the Asset Purchase Agreement ("the **APA**").
    (2) Contact sold Units 4 and 5 to RJP for £1.163 million (which then granted two underleases to Glossop). This has been referred to as the Property Sale Agreement ("the **PSA**").
    (3) The second and third defendants sold Unit 3 to RJP for £200,000 (which then granted an underlease to Glossop). This has been referred to as the Lease Sale Agreement ("the **LSA**")

13. After completion of the three transactions, Glossop has continued to carry on its enlarged business from both the Old Mill and Units 3, 4 and 5, having taken (apparently at the insistence of Glossop's bank) a five years lease of the Old Mill from RJP.

14. The claimants' case is said by Mr Lander to fall into three parts. The first concerns alleged misrepresentations relating to Unit 3 (and associated contractual claims). At some risk of over-simplification, the claimants say that the defendants made fraudulent (alternatively negligent) misrepresentations to the effect that:

    (1) The defendants had been asked by the owners of Units 1 and 2 to disconnect the supply of electricity to Unit 3 from Units 1 and 2, a property in third party ownership, and were prepared to do so when in fact they had given an undertaking to disconnect the supply, and thereby (impliedly) that Unit 3 enjoyed a reliable right to a continuing supply of electricity when in fact a third party had the right to cut it off ("**the electricity supply representation**"); and

    (2) (Impliedly) that electricity supply was a 'Major Supply', which was defined by the claimants in their statements of case and witness statements as "at least 300 amps 3 phase electricity supply" ("**the electricity power representation**") although during the

course of the trial Mr Dagnall sought to reduce this to a 238 amps supply, which he distinguished from a "Minor Supply"; and

(3) Unit 3 did not suffer from continuing drainage problems and would provide a safe and dry environment for the claimants' digital printing machines ("**the flooding representation**").

15. The second aspect concerns alleged misrepresentations (and associated contractual claims) relating to the fencing undertaking ("**the fencing representation**"). The third aspect concerns Glossop's alleged entitlement to a contractual indemnity in respect of a settlement sum (and associated legal costs) paid to Contact's former general manager, Miss Samantha Brammall, in relation to an equal pay claim which she had brought after she had been made redundant on 29 February 2016 with effect from the end of the following month ("**the Brammall warranty claim**").

16. The vast majority of the pleaded claim is said by Mr Lander to stem from an allegation that Glossop was precluded by electricity and drainage/flooding problems from occupying Unit 3 as its digital printing centre. That allegation is said to be demonstrably flawed in relation to electricity; and the suggestion that a business completely changed its entire scheme of operations merely because of a blocked drain is said to lack any sense of commercial reality. Mr Lander submits that Glossop's original insistence that their digital printing centre required a Major Supply (as defined) presents Glossop with considerable difficulties in advancing a case founded upon the electricity supply and power representations given that (1) at no point have Glossop alleged that Mr Smith made any express representation that the supply to Unit 3 was a Major Supply and (2) the evidence from Glossop's own electrical contractor, Mr Lee Shufflebotham, is that the cabling that was present in Unit 3 was only ever capable of carrying a 238 amps supply, and that not even a 300 amps supply would have been enough to run the digital machines intended to be operated by the claimants in their proposed digital printing centre. In other words, on the evidence of the claimants' own electrician, none of the original Unit 3 electrical supply when it was used for manufacturing, the infrastructure in place to support it, or even a Major Supply (which has formed the core of the claimants' case) would have been enough for the purposes of its proposed digital printing suite. On any analysis, Glossop would have had to put in a new supply in order to operate its digital suite, regardless of whether or not the old supply was cut off.

17. In his second witness statement Brian had originally accepted the evidence that even a Major Supply (as defined) would not be enough for the digital suite. This confirmed Jacky's evidence (at paragraph 35 of her first witness statement) that without at least a 300 amps supply, Glossop's digital machines "simply do not work at all". However, in what is said by Mr Lander to be a slightly desperate third witness statement (made as recently as 2 July 2019), Brian has since sought to row back from that position, asserting that it would have been possible to run a digital suite with 238 amps per phase. This is said by Mr Lander to be flawed for the reasons he advances at paragraph 28 of his written opening. The reality is said to be that the problems with the existing electricity supply to Unit 3 made no difference to Glossop's intention to create a digital suite in Unit 3; to do so it would have had to install a new, and more powerful, supply in any event. There is no suggestion that it had any right to do so via Units 1 and 2 or that the defendants ever suggested that it did.

18. In the event, Glossop took the decision to put the digital machines in Unit 4 instead of Unit 3. They have sought to portray this decision as having been taken as a consequence of the electricity supply to Unit 3 being cut off by Mr Scoltock. However, this is said by Mr Lander to be quite obviously untrue. The incontrovertible evidence is that the electricity was cut off on or around 24 February 2016. The claimants' repeated evidence is that the decision to install a major supply to Unit 4 was taken *after* the electricity supply to Unit 3 had been disconnected. However, at the same time as serving Brian's second witness statement (dated 18 June 2019), the claimants disclosed, for the first time, the documents which Mr Lander says expose the lie and show that the decision to put the digital machinery in Unit 4 had occurred long before the power supply was cut off, and therefore the disconnection of the power supply had nothing to do with that decision. It is said that Brian had clearly taken the decision that he wanted much more than a 300amps Major Supply, and he had instructed Vicky to arrange for a *500* amps supply to be installed in Unit 4 by early January 2016. Indeed, Vicky's first email to Orchard Energy was dated 7 January 2016 and said: "We need to increase the supply to one Unit 4 Haigh Avenue to 3 phase, 500 amp please to accommodate our digital machines. What do we need to do?" A later email from Vicky to Orchard Energy (sent on 7 March 2016) made it clear that: "There are 5 machines going to be installed in that unit [Unit 4] which will require approx. 400 amp but we are asking for 500 amp for future capacity as there is room to grow that department." This recently disclosed email is said to give the lie to Brian's protestations that Glossop was only intending to use Unit 4 for one digital machine (the Beam). In the event, a 500 amps supply was not available and so Glossop had to be content with a 400 amps supply to Unit 4.

19. Having made the untruthful assertion that the decision to put the claimants' digital machines in Unit 4 was taken following the disconnection of the power supply to Unit 3, Mr Lander points out that the claimants have also sought to recover the costs of a generator they used initially. The need for the generator was nothing to do with the disconnection of the electricity supply to Unit 3; it was because of delays in obtaining the Unit 4 supply in time for the arrival of the Beam. Mr Lander says that the installation of the Major Supply itself was something that the claimants were inevitably going to have to pay for, bearing in mind that there had never been such a supply in the first place and that, even if there had been a 300 amps supply, this would not have been sufficient for the claimants' purposes.

20. Mr Lander says that the only potential electricity complaint left available to the claimants is that the existing minor supply to Unit 3 was cut off. However, irrespective of any argument about whether they were liable, he submits that the only reason that the defendants did not resolve this (or that the claimants did not resolve this at the defendants' own cost) was Jacky's insistence that Mr Smith should provide a Major Supply for Unit 3, on the false basis that this was what had been there in the first place.

21. The other problem that the claimants have faced with Unit 3 is that it has flooded. The drainage representation claim is said to face fundamental problems. In short, the suggestion that it was as a result of a blocked drain that the claimants chose to install their digital suite in Unit 4 and otherwise re-ordered its business is said by Mr Lander to lack any credibility for the reasons he identifies at paragraph 42 of his written opening.

22. Mr Lander notes that a large part of the claimants' claim is based upon an assertion that it is because of the problems with Unit 3 that it has had to retain the Old Mill yet, once

again, the true position has only recently come to light with the discovery of a Zoopla search showing that the Old Mill was currently on the market and had been on the market since at least 31 January 2017. By a consent order agreed in July 2019, the claimants were ordered to give disclosure of "all the documents relating to the marketing of the Old Mill premises"; but all they have disclosed in response to this order are copies of two sets of sales particulars. Mr Lander complains that it cannot sensibly be contended that these are the only documents. A recently disclosed letter dated 23 July 2019 from the marketing agents, Roberts & Roberts, discloses that the Old Mill was originally marketed in early 2017 seeking offers in the (optimistic) region of £900,000 but the only indicative offer received was round about the (unacceptably low) level of £500,000. The letter concludes that the Old Mill could have been sold in 2017, and could be sold now, if the claimants were willing to accept a price below £600,000 but that it would only be worth selling the property at that "discounted quick sale price" once it becomes entirely surplus to the claimants' requirements and therefore becomes a drain on their resources rather than an additional facility for them to use. The letter also refers to the failure to secure a letting of the Old Mill on a short-term basis at a rent of £80,000 per annum or with a lease outside the Landlord & Tenant Act 1954 at £60,000 per annum. In his second witness statement, Brian (at paragraph 135c) refers to "low verbal offers to buy and also to rent the Old Mill" (which he does not quantify) and which were dismissed because "we are still using it for storage". I note that the pleaded claim (even in its amended form) attributes a sale value to the Old Mill in the region of £800,000 and a rental value of approximately £90,000 per annum and that Jacky and Brian did not resile from these overstated figures in their evidence.

23. As for the fencing representation, Mr Lander notes that there is no suggestion that this has had any effect on the claimants' business and he suggests that, at best, it is a small claim for less than £5,000.

24. Finally, Mr Lander invited the court to note that despite knowing of the issues said to give rise to their complaints, Glossop paid the second and third instalments due under the APA, making some deductions for matters such as redundancy costs. They did so without seeking to make any deductions for the matters complained of in this case, despite the various issues having already arisen. It was only when the final instalment fell due that the claimants sought to resist payment. That led to a reference to, and an opinion from, an independent barrister (Mr Henry Webb) nominated pursuant to clauses 6.4 and 6.6 of the APA, who expressed the view that, on the balance of probabilities, Contact would be found liable in respect of Unsubstantiated Claims in misrepresentation in the sum of £120,000. It is common ground that that opinion is not binding on this court; but in the course of the reference written statements were produced by Jacky and by Mr Smith. Contact counterclaims for the outstanding final instalment of the sale price under the APA of £112,500 in response to which Glossop contends for contractual and other set-offs. Subject to the Glossop's claims, there is no dispute as to Contact's entitlement to the outstanding balance of this final instalment of the sale price.

25. The history of the transactions giving rise to this dispute, and its subsequent evolution and development, appear sufficiently clearly from the documents in the trial bundles. They are noted in Mr Dagnall's chronology (with Mr Lander's tracked comments) and are described at paragraphs 16 through to 66 of Mr Dagnall's written opening. In

response to Mr Lander's opening invitation to focus on the wood rather than the trees, I do not find it necessary to relate this history in detail.

B: The trial and the witnesses

26. The trial took place in Manchester over 8 days (preceded by a day's pre-reading), starting at 10.30 am on Tuesday 6 August and concluding at about 5.45 pm on Thursday 15 August 2019. After the first day, the court sat at 10.00 am on each of the next five days to receive the witness evidence. In addition to the statements from witnesses of fact, there were single joint experts' reports, and responses to questions, from a building surveyor (Mr Chris Milnes), who addresses the remediation of the electricity supply, the drainage/flooding, and the fencing issues, and from a property valuer (Mr Michael King). There were also separate reports from expert accountants for the claimants (Mr John Green) and the defendants (Miss Beverley Ibbotson) who deal with the financial consequences of the electricity supply and the drainage/flooding issues. On the morning of Day 1 of the trial, at the invitation of Mr Lander (and without opposition from Mr Dagnall, who declared his stance to be neutral on the issue) I ruled that consideration of the expert evidence should be deferred to a future hearing after the court had made its findings of fact on liability and causation. During his closing submissions, Mr Dagnall acknowledged that, in the circumstances (and not least because it would have been impossible to shoe-horn the expert evidence into the time allotted for the trial), it had been immensely helpful to have split the trial in this way. He submitted (and I accept) that at this stage I should deal with issues of principle and the correct approach to damages so that the expert accountants will know what more is required of them but not with individual items of damage. I made it clear during closing speeches that I would regard any findings in this judgment on matters touched upon in the expert accountancy evidence as provisional only and open to re-consideration in the light of that evidence (and any further expert accountancy evidence that may be appropriate in the light of my findings).

27. There was a core bundle of some 267 pages and five further tightly-packed lever-arch files comprising over 2,900 pages of documents.

28. The claimants called seven witnesses of whom only Jacky and Brian were the subject of lengthy cross-examination. There were also two witness statements from Mr Lee Shufflebotham, the claimants' consultant electrician, who had been expected to attend trial to give evidence but who was out of the country on honeymoon in Florida (a matter about which Brian indicated that he would be having words with him upon his return to the UK). Jacky gave evidence for a little under nine hours, from 2.00 pm on Day 1 until a little after 11.00 am on Day 3. Brian gave evidence for about 3 ¾ hours starting at about 11.30 am and concluding at about 4.14 pm on Day 3. On the morning of Day 4, I heard from Vicky (Jacky's sister and Glossop's Marketing and Commercial Manager), from Miss Jane Brocklehurst (Glossop's HR and Procedures Manager and formerly a long-term employee of Contact), from Miss Glyneth Renshaw (Glossop's Deputy Factory manager and formerly another long-term employee of Contact), from Mr Robert Stead (an internal sales accountant with Glossop since 2016 and a former employee of Contact until he was made redundant in 2009), and from Mrs Pamela Scoltock (who was present throughout virtually all of the trial). Mrs Scoltock was in the witness box for the longest time (about 50 minutes) and Miss Renshaw for the shortest time (about seven minutes). It was never revealed to me why Mrs Scoltock was giving evidence before me rather than (or as well as) her husband.

29. The defendants called four witnesses of whom only Mr Smith was the subject of lengthy cross-examination. He was in the witness box for about 10 ½ hours in total, from about 12 noon on Day 4 until about 1.25 on the afternoon of Day 6. Mr Smith was therefore incommunicado over the weekend; and because Miss Brammall (who gave evidence for about 1 ¼ hours) was interposed during his evidence on the morning of Day 5, he was unavailable to comment upon her evidence while it was being given. Mr Steve Mulcahy and Mr Gary Walker, respectively the chief executive officer and the financial director for the companies in the Contact Group, gave evidence on the afternoon of Day 6, for about one hour and for 40 minutes respectively. At the end of his cross-examination of Mr Walker (whose evidence had addressed the issue of off-site storage costs), Mr Dagnall indicated that the claimants would accept that, on the balance of probabilities, even without the electricity supply and the drainage/flooding problems, Glossop would still have had to incur additional storage costs, even though he said that the contrary view had been a reasonable one for the claimants to have taken. In closing, Mr Lander pointed out that this late change in the claimants' case had prevented him from cross-examining Jacky (and Brian) about why they had changed their position on this issue.

30. On Day 7 of the trial Mr Lander addressed the court in closing for about 4 ¾ hours. During the course of the morning, and after he had highlighted at length the unreliability of the witness evidence from both Jacky and Brian, Mr Lander indicated that, in the light of the evidence given by Mr Mulcahy, the defendants could no longer sensibly submit that there had been no actionable misrepresentation in relation to the electricity supply; and that Mr Lander did not seek to do so. In response to a question from the Bench asked just before the short adjournment, when the court resumed for the afternoon session Mr Lander indicated that, for the purposes of these proceedings, the defendants accepted that the court should proceed on the basis of fraud in relation to that representation. For reasons that will become apparent when I deal with the electricity supply representation, I consider that these concessions were entirely appropriate; and it is to Mr Smith's credit that he authorised them to be made, however inevitable they were and however belatedly they were proffered. However, they did enable Mr Dagnall, in closing, to submit that the claimants should be seen and treated (as they were) as the victims of fraud; and as people trying to deal with a situation which they should never have been in. Moreover, on Mr Dagnall's case, the admissions have had a transformative effect on the proper approach to the assessment of damages.

31. On Day 8 of the trial Mr Dagnall addressed the court (by reference to his written closing) for about 5 ½ hours; and there were then a reply from Mr Lander (for about 40 minutes) and a rejoinder from Mr Dagnall (for about 15 minutes). The trial concluded at about 5.45 pm on Day 8 for the court to consider its judgment. Since the conclusion of the trial Mr Dagnall has supplied me with copies of three further authorities by email (one a major recent Commercial Court authority on deceit, one cited during the course of the trial, and a third said to have been prompted by that latter authority).

32. In his oral closing, Mr Lander submitted that all of the minor witnesses (including the absent Mr Shufflebotham) were clearly honest witnesses who had been doing their best to assist the court. The court could accept their evidence even when not corroborated by documentary evidence. I accept Mr Lander's assessment of the minor witnesses (although I am only prepared to accept the untested written evidence of the absent Mr

Shufflebotham to the extent that it is either neutral in its effect or adverse to the interests of the claimants as the party adducing it in evidence).

33. Unsurprisingly, Mr Dagnall accepted that the claimants' minor witnesses who gave evidence at the trial were all honest and credible. (Mr Dagnall understandably omitted any assessment of the absent Mr Shufflebotham, who he had anticipated might have been the subject of lengthy cross-examination.) However, Mr Dagnall was more equivocal about the defendants' minor witnesses. He accepted that Mrs Brammall was essentially an honest witness (and much of her evidence assisted the claimants); but he pointed to her obvious dislike of the claimants – entirely understandable after they had made her redundant after more than 27 years of loyal service to Contact – and (at paragraph 25 of his written closing) he criticised the reliability of parts of her evidence, expressing real doubts about her alleged pre-report discussion with Brian of Drain Alert's investigation into the causes of the flooding, to which no reference had been made at paragraphs 14 and 15 of her witness statement.

34. I find Miss Brammall to be an impressive witness and I accept her evidence entirely. She was ready to make appropriate concessions which favoured the claimants' case (as when (a) she said that there had to be "heavy rainfall when it absolutely pelted it down" to cause Unit 3 to flood but, after carefully considering the question, she accepted that that was not really unusual for Stockport, (b) she accepted that it had been necessary to stem Contact's losses, and (c) she accepted that Jacky and Brian had been very busy after completion of the transaction and had been doing their best to keep the business on an even keel). I accept Miss Brammall's evidence that she did not send the Drain Alert Report of 30 November 2015 to Mr Smith: she had had no involvement in Mr Smith's email to Jacky of 13 November 2015 and once he had sold the business and Unit 3 there was no reason for Mrs Brammall to send the Report to Mr Smith; and I accept Miss Brammall's evidence that she would not have done so without Brian's agreement (which it is not suggested was ever sought or given). Miss Brammall's account of telling Brian about the visual results of Drain Alert's investigations on 24 November 2015 has the ring of truth about it. She said that it had been raining heavily all day and that Brian had commented that she had looked like a "drowned rat". Miss Brammall had viewed the CCTV images taken by Drain Alert which had showed a potential blockage in the drain, and she said that she had been relieved that they appeared to have found a solution to a problem she had been working on for some time. Miss Brammall said that Brian (who she said was working with the electrician in Unit 3) was quite blasé about the news and did not really say anything about it. The reference to an electrician would be consistent with paragraph 7 of Mr Shufflebotham's first witness statement, where he states that he recalls attending Contact's site in Stockport after Glossop had purchased the premises and going into Unit 3 and discussing with Brian how Mr Shufflebotham's company might assist in installing Glossop's two digital printing machines from the Old Mill. Mr Shufflebotham was, of course, not available to be cross-examined. Mr Dagnall was right to observe that it had not proved possible to explore Miss Brammall's account with Brian in cross-examination because she had made no mention of it in her witness statement (which had focussed instead on the later receipt of the written Drain Alert Report and Quotation for future works).

35. Mr Dagnall accepted that Mr Mulcahy was an essentially honest witness although he pointed out that his recollection of the meeting in May/June 2015 when he had toured Unit 3 with Jacky, Brian and Mr Smith was "odd" as it did not appear in his witness

statement (particularly as the statement had contained a section headed "Pre-completion meetings and visits"). However, Mr Dagnall rightly relies upon various parts of Mr Mulcahy's evidence in cross-examination (as set out at paragraph 26 of Mr Dagnall's written closing) in aid of the claimants' case.

36. I find Mr Mulcahy to be a reliable and truthful witness. His evidence destroyed Mr Smith's evidence and case that he had told Brian and Jacky that he had *undertaken* (and thus was obliged) to disconnect the electricity supply to Unit 3, and this led to the defendants' late concession that the electricity supply representation constituted a fraudulent misrepresentation. Mr Mulcahy acknowledged that Mr Smith's obligation to remove the power supply to Unit 3 would have been of great importance to the claimants because they needed a supply of electricity to Unit 3 to power whatever machines they required for their intended digital suite. I find that Mr Smith had kept Mr Mulcahy in the dark about the letters from Ralli relating to the disconnection of the electricity supply to Unit 3, which was something Mr Mulcahy said he would have expected to have been told about. Mr Mulcahy was also clear that he would have expected Mr Smith's email of 13 November to have contained some reference to the Drain Alert quotation of 6 October 2015 for a CCTV survey and tanker jetting because that was what was being undertaken. Mr Dagnall contended that in cross-examination, Mr Mulcahy had accepted that on the "tour" of Unit 3 (to which Mr Mulcahy had made no reference in his witness statement) he had been some 6-10 feet behind Jacky, Brian and Mr Smith and, as a result, that Mr Mulcahy would not have been able to hear the alleged conversation about the electrical supply. Mr Mulcahy accepted that he had not been leading the tour (having hardly ever been in Unit 3); but although he had not seen Mr Smith pointing to the switch-gear cabinet or the electricity supply, this had not been because he had been at the rear of the party touring Unit 3. Mr Mulcahy said that Mr Smith had given an account of the production facilities that had formerly been in Unit 3 (until about 2009). Mr Mulcahy did not support Brian's oral evidence in cross-examination that Brian had commented on there being a 400 amps supply and that, by not contradicting him, Mr Smith had impliedly endorsed Brian's statement. I accept Mr Mulcahy's evidence on this issue (despite the surprising absence of any reference to the tour of Unit 3 in his witness statement) because Mr Mulcahy was honest in his evidence on other matters which are highly prejudicial to Mr Smith's evidence and the defendants' case and also because I am satisfied that Mr Mulcahy is both an honest and a reliable witness.

37. As Mr Dagnall pointed out (at paragraph 27 of his written closing), Mr Walker's evidence contained much that actually assisted the claimants' case although it also led to the concession (recorded above) of Glossop's need for additional storage facilities. I do not accept Mr Dagnall's description of Mr Walker as "guarded". He was an honest and reliable witness who made it clear that he would not have endorsed Brabners' response ("Not so far as the Seller is aware") to question 20 of the Commercial Property Standard Enquiries (regarding disputes) if he had known about the correspondence from Ralli which had been insisting upon compliance with the disconnection undertaking, accepting that Ralli's letters had been "contentious".

38. I turn then to the major players: Jacky, Brian and Mr Smith. Mr Lander submitted that there were unsatisfactory elements to the evidence of all three of them. He acknowledged (as he had to) that Mr Smith's evidence was not entirely satisfactory; but he spent the early (and a major) part of his oral closing urging the court to be very slow

to accept the evidence of Jacky and Brian, submitting that the court should only do so if it was backed up by the contemporary documents or other evidence which the court considers to be reliable. For reasons which he developed at length, Mr Lander submitted:

(1) That Brian had admitted in cross-examination that "technically" he had lied to Orchard Energy (in the email timed at 09.41 on 7 March 2016 which Vicky had written on Brian's instructions) in stating that there were five machines going to be installed in Unit 4. Brian said that he had done so as a bargaining tool because the electricity supplier would not provide the power supply the claimants had been seeking. (Although I accept, from the timing of the emails, and the reference to Vicky having "spoken to Lee", that it was Mr Shufflebotham, rather than Brian, to whom Vicky had spoken before sending her email, I am satisfied that the information about the number of machines, and the need for "future capacity as there is room to grow that department", ultimately had come from Brian, even if some of it may have been passed on to her through Lee. In her evidence, Vicky accepted that she would not have had that information within her own knowledge; and she said that she imagined that that was what Brian would have told her.) Mr Lander submits (in my view correctly, because of the request for a minimum 400 amps supply) that in fact the lie came at a later stage, when Brian denied the accuracy of the assertion in the email that five machines were going to be installed in Unit 4. But Mr Lander submits (with some justification) that the evidence of a person who accepts telling a lie as a bargaining tool to get what he wants in a commercial context should be treated with reserve. Brian seemed to me to be wriggling in this part of his cross-examination.

(2) That both Jacky and Brian were prepared to say one thing when it suited them and something inconsistent with that when it suited them to change their case. Mr Lander instanced the evolution of the claimants' evidence and case on the level of the electricity supply needed to service the proposed digital printing suite and the number of machines intended to be used. Again, I consider there to be merit in this criticism.

(3) That aspects of the evidence of Jacky and Brian flew in the face of the documentary evidence or reality. I was not particularly impressed by the examples provided by Mr Lander and I consider that this is a criticism more appropriately directed to the evidence of Mr Smith.

(4) That Jacky in particular was prone to making forceful points without checking the underlying facts. Mr Lander instances paragraph 80 of her first witness statement (regarding the maintenance of the grass bank bordering Unit 4) which she had to correct in her oral evidence, and also paragraphs 38 and 46 (regarding electricity supply requirements) which were more properly Brian's province than hers (as confirmed by Jacky's repeated refrain in answer to questions in cross-examination: "Not my remit"). In my judgment, there is some limited force in this point.

(5) That the claimants had failed to comply with their disclosure obligations in ways which could have led to a serious miscarriage of justice. Mr Lander instanced the late disclosure of the documents evidencing the early decision to install a major supply of electricity into Unit 4 (contradicting the claimants' evidence and case as to their reason for this) and the failure (still continuing) to give proper disclosure of documents relating to the marketing of the Old Mill (which would tend to refute the pleaded sale value in

the region of £800,000 and the pleaded annual rental value of approximately £90,000). In my judgment, there also force in this criticism.

(6) Both Brian and Jacky (and particularly the latter) were evasive in their replies to questions in cross-examination. Moreover, the late concession of the need for additional storage facilities had deprived Mr Lander of the opportunity to cross-examine Brian and Jacky on this change in the claimants' case. Again, I accept this criticism.

39. In his written closing, Mr Dagnall submitted that both Jacky and Brian were honest witnesses. He sought to address, and respond to, Mr Lander's attacks upon their evidence and conduct of the case. Even if there were valid criticisms of Brian and Jacky, this was said to be no reason to reject their evidence wholesale. Their evidence and credibility was said to be wholly different in character from those of Mr Smith. It was Mr Smith who was effectively on trial here and it was he who had admitted fraud, not Brian and Jacky (who were his victims). Even if the court were to reject one or more elements of their evidence, that was said to be no reason to reject the rest. In any event, everything of importance that had come from Brian and Jacky was said to be supported by other witnesses or by documents and/or the inherent probabilities of the situation.

40. Since Mr Dagnall's closing submissions are in writing it is unnecessary for me to refer to them in full. I have borne them all firmly in mind; but I find that both Jacky and Brian were unsatisfactory witnesses whose evidence I should scrutinise with great care, save to the extent that it is supported by the contemporaneous documents or other evidence which I consider to be reliable. I am satisfied that both Brian and Jacky were prepared to say anything that they considered would advance the claimants' case in this litigation. I have already indicated that I consider the majority of Mr Lander's criticisms of their evidence to be well-founded. In addition, I treat the evidence of both Jacky and Brian with reserve because (in no particular order of importance):

(1) During the course of her evidence, I found Jacky to be evasive in answers to difficult questions in cross-examination. As I have already mentioned, a constant refrain from Jacky in response to questions (particularly in relation to matters concerning the power supply) was: "That's not my remit". That may have been the case; but Jacky had invited questioning about such matters by purporting to give evidence about them in her first witness statement. I also find Jacky to be "ruthless" in matters of business (an adjective she herself employed in an email of 23 February 2016 to Mr Mulcahy and Mr Walker, which was copied to Brian). In cross-examination Jacky said that redundancies had always been scheduled and that "most of the people who left I wasn't heartbroken about." During the course of his cross-examination, I found Brian to be evasive and dissembling in his evidence to the court.

(2) On 30 January 2017 Jacky had sent an email to Drain Alert seeking confirmation of the dates of (1) their instructions, (2) the works they had carried out to Unit 3, and (3) the quote they had provided after their initial works. The email had been prefaced by the statement that Jacky "… would sort out a date for you to do this work in the next few months". Drain Alert responded (by email dated 1 February 2017) stating that they had been to assess the site on 6 October 2015, that they had produced a quotation for a further survey, and that Miss Brammall had telephoned them on 16 November and had instructed them to go ahead with the work, which Drain Alert had done on 24 November

2015, supplying a quotation for follow-up works dated 30 November 2015 after their investigations on 24 November 2015. Jacky never did give any instructions to Drain Alert for them to carry out any further works to the drains serving Unit 3. Although Jacky denied this (saying that she might have had second thoughts and wanted to instruct someone else to do the works with whom Glossop was more familiar), I am satisfied that Jacky deliberately lied about sorting out a date for Drain Alert to do the works. She had never instructed them in the previous 14 months, and she never contacted them again. Like Brian, Jacky was prepared to lie in order to secure the confirmation that she sought and thereby promote Glossop's business interests.

(3) I am satisfied that both Jacky and Brian exaggerated the capital and rental values of the Old Mill and that they deliberately sought to conceal the true position from the defendants and the court. I am satisfied that the claimants could not have sold the Old Mill for anything like the price that would have been required to satisfy either the claimants or their bank.

(4) Jacky was prepared to give exaggerated evidence, saying (when pressed) that she would only have been prepared to install Glossop's digital machines in Unit 3 if the risking of flooding had been once in every 20 years. This was at odds with the position expressed in her email to Mr Smith of 12 November 2015 (cited above) that she was "*reluctant* to pop in very expensive kit when [Unit 3] could flood" but that Glossop did not "want this to stop the deal going ahead".

(5) Both Jacky and Brian were clear in their witness statements in this litigation (and also in paragraph 40 of Jacky's witness statement to the Independent Barrister), and they maintained in cross-examination, that the decision to install a new major electricity supply to Unit 4 had only been taken *after* Mr Scoltock had already disconnected the electricity supply to Unit 3 on 24 February 2016; Brian put the date in around April 2016: see paragraph 40b of his first witness statement. However, I am satisfied that the decision had in fact already been taken (as I find) by 7 January 2016 (as evidenced by Vicky's email to Orchard Energy of that date). Jacky and Brian then sought to conceal this fact from the defendants and the court. When the true position was revealed, Jacky and Brian further sought to justify their decision to install a new major electricity supply to Unit 4 by reference to Mr Scoltock's threat to cut-off the electricity supply; but even after Jacky had received Ralli's letter and email of 11 December 2015, threatening to disconnect the electricity supply on or after close of business on 17 December 2015 (and attaching the disconnection undertaking), Jacky had been prepared to email Mr Smith (on 14 December) venting her anger at Mr Scoltock ("words cannot explain what a dreadful man Scoltock is") but adding that she was "not too worried" and that she refused "to rush into something that Barry Teasdale is not concerned about". I am satisfied that this (belated) revised explanation for the decision to install a new major electricity supply to Unit 4 before 7 January 2016 was false and was designed to cover up Jacky and Brian's earlier inaccurate evidence about the date when they first gave instructions for the installation of this supply. Despite Brian's dismissal of the proposition in cross-examination as "absolute rubbish", I am satisfied that the inadequacy of the existing power supply serving Unit 3 was something that Glossop must have discovered before 7 January 2016 and that it was this that had motivated the decision that Glossop had by then taken to install a new and major electricity supply to Unit 4. Although this is not consistent with the evidence of Mr Shufflebotham, no other satisfactory explanation has been provided for the early decision to seek a major

electricity supply for Unit 4. The lack of clarity in the evidence as to how the discovery of the inadequacy of the existing power supply serving Unit 3 came to be made is directly attributable to the lack of transparency and honesty in the claimants' evidence on this topic. It is noteworthy that it was Vicky who was dealing with the installation of the electricity supply to Unit 4 yet this issue received no mention whatsoever in her witness statement (which was directed solely to the issue of damp in Unit 3) even though Vicky is a shareholder in Glossop and so has a financial interest in this litigation.

(6) In order to counter-act the effect of Mr Shufflebotham's evidence (which Brian had originally accepted in his second witness statement), both Jacky and Brian later sought to row back and to resile from their previous evidence (in paragraph 70 of Jacky's witness statement to the Independent Barrister) that Glossop would have put all three digital machines into Unit 3 and had the three machines working together during business hours and (in paragraph 35 of Jacky's first witness statement) that Glossop's machines "simply do not work at all without *at least* a 300 amp 3 phase electricity supply". Brian was even prepared to contradict paragraphs 35 and 40 of his own second witness statement about the need for offices in a digital printing suite. Through Mr Dagnall, they sought effectively to re-formulate Glossop's previous definition (in the claimants' statements of case and witness evidence) of a "Major Supply". I am satisfied that Jacky and Brian did this in order falsely to bolster their case in this litigation and also because they had realised that they had made a serious error in proceeding to complete the three agreements without first having checked the adequacy for their purposes of the power supply to Unit 3. They accepted that they had never asked Mr Smith what the power supply to Unit 3 was and that he had never told them (although they both claimed that he had "alluded to it" or "insinuated" that it was a major supply). Both Jacky and Brian accepted in cross-examination that the £6,000 cost quoted by Mr Smith in the 13 November email for putting in a new electrical feed via Unit 4 would not have covered the costs of providing a major electrical supply from the sub-station; but they said that (to quote Jacky's evidence in cross-examination) this "did not set alarm bells ringing". Indeed, Brian got tied up in knots over this £6,000 quotation in cross-examination because he accepted that he had known that Unit 4 only had a minor supply yet in paragraph 32 of his first witness statement he had said that the £6,000 quotation had led him to the belief that Unit 4 had enjoyed a major supply. I am satisfied that (as Mr Lander commented in cross-examination) Brian included paragraph 32 in his first witness statement in order to avoid having to admit that he must have realised that Mr Smith was only offering to put in a minor supply to Unit 3 after the disconnection of the existing supply. I am satisfied that the inadequacy of the existing power supply serving Unit 3 was something that Glossop had discovered before 7 January 2016, and that this was the reason why Vicky was instructed to source a major new supply for Unit 4 (because this would be cheaper than running such a supply the longer distance from the sub-station to Unit 3, a point made at paragraph 40 of Jacky's witness statement to the Independent Barrister). I am satisfied that Jacky and Brian have not been open and honest in their evidence to the court about these matters. Brian's third witness statement was a disingenuous attempt to dig Glossop out of the hole in their case created by Mr Shufflebotham's second witness statement rather than a genuine attempt to clarify the true facts. At paragraph 4 of that statement Brian said that he had no reason to disagree with anything set out in Mr Shufflebotham's second witness statement; but he then proceeded to do precisely that.

(7) For the first time, and under cross-examination, Brian asserted that after Mr Smith had finished describing the former production operations within Unit 3, he (Brian) had said that there was obviously a big electricity supply. Brian claimed that Mr Smith had then waved his arm at the electrical supply box. Brian noticed that the box had a sign saying 400 amps and that he had thought that that was a good supply. A little later, Brian said that he had referred to 400 amps and had commented that that was a good supply. Later, in re-examination, my note records that Brian said that he had commented that 400 amps would be great; and that he was standing very close to Mr Smith, Jacky and Mr Mulcahy. Nothing more had been said; that was the end of it. At this point, they had been near the end of the tour of Unit 3. When asked by Mr Lander why he had never mentioned any of this before, initially Brian said that he could not really answer that although he denied saying it to strengthen his case. Later Brian suggested that his solicitor had never asked him that question. At paragraph 20c of his written closing, Mr Dagnall submitted that it was for the court to consider whether what Mr Dagnall termed Brian's "vocalisation" of 400 amps during the "tour" of Unit 3 was a true recollection or simply Brian's brain "recollecting" in the way a subconscious brain does because it subconsciously wishes to do so. Brian's evidence about this aspect of the tour of Unit 3 was not supported by the evidence of any of the other participants in that tour and it had not previously been recollected by Brian during the course of preparing any of his three professionally crafted witness statements. I am satisfied that it was pure spur of the moment fabrication intended to bolster the claimants' case. I am satisfied that there was no "vocalisation" of a 400 amps power supply during the course of the tour of Unit 3 and that Brian was lying when he said that there had been.

(8) Glossop has pursued a complaint in relation to the fencing undertaking even though Jacky acknowledged that Mr Scoltock has not asked Glossop to move the fence and there was no reason to think that he would ever do so. In this connection, however, I should not be too harsh on Jacky and Brian, who may simply have been acting upon legal advice. Mr Smith did very much the same. At paragraphs 73 to 76 of his written opening, Mr Lander had advanced the contention that the disconnection undertaking had not been binding upon the second or third defendants; terms had been agreed in principle but the electricity supply point had not been settled. In cross-examination, Mr Smith accepted (as he was bound to do in the light of paragraph 11 of his witness statement) that both he and DLA Piper, as the solicitors then acting for him in the dilapidations claim concerning Units 1 and 2, had always considered the disconnection undertaking to have been binding, and that the contrary suggestion had simply been what Mr Dagnall termed "a construct of his lawyers in this litigation".

41. Consistently with Mr Dagnall's submissions, however, any deficiencies in the evidence and the credibility of Jacky and Brian have to be weighed against the even more obvious deficiencies in Mr Smith's own evidence and credibility. In closing Mr Dagnall had acknowledged that most of the witnesses had had their own flaws - a submission which I do not accept in relation to any of the minor witnesses who gave oral evidence at the trial - and that it was of crucial importance for the court to consider the contemporaneous documents and the inherent probabilities in assessing what had or had not been shown on the balance of probabilities to be the true facts. There was, however, according to Mr Dagnall, one exception to this and that was Mr Smith himself. Mr Dagnall submitted that his evidence, where it sought to contradict the claimants' evidence and case, was worthless, and that its various falsities strongly supported the

claimants' case in fraud; indeed, it was now accepted that Mr Smith had been fraudulent. Mr Dagnall noted that Mr Lander had at no point sought to suggest that Mr Smith's evidence had any credibility at all, an assessment which Mr Dagnall said was thoroughly realistic.

42. I have no doubt that I should not accept any of Mr Smith's evidence save to the extent that it is supported by the contemporaneous documents or the inherent probabilities or by other evidence which I consider to be reliable. Apart from the fact that Mr Smith has belatedly admitted one fraudulent misrepresentation, Mr Dagnall has presented a detailed, and well-merited, critique of Mr Smith's evidence at paragraph 24 of his written closing. Mr Smith was hopelessly unclear about the number and the dates of his various meetings with Jacky and Brian but it was (I think) common ground (and, if it is not, I so find) that the principal meeting and discussions (and the tour of Unit 3) had taken place at a fairly early stage, probably on 29 May 2015 (although an email of 20 May suggests that Mr Smith may have been on holiday in Ireland on that day) and certainly before the visit to the Old Mill which (from a series of email exchanges on 2 and 3 July 2015) appears to have taken place on 4 July 2015. As Mr Dagnall pointed out, Mr Smith's account of what was said at the meeting with Jacky and Brian at paragraphs 12 and 13 of his first witness statement simply could not have been said at that meeting because the matters spoken to there by Mr Smith clearly post-dated that meeting: the new storm drain was not installed until the end of July or the beginning of August and the first reference to flooding did not come until as late as DLA Piper's letter of 23 October 2015 (responding to the first letter from Ralli seeking compliance with the disconnection undertaking on 21 October). Paragraphs 17 and 18 of Mr Smith's first witness statement do not make any sense because paragraph 10c of the draft Heads of Terms attached to Mr Smith's email of 5 July 2015 clearly referred to a lease of Unit 3 rather than a sale of that Unit. It emerged during the cross-examination of Mr Smith that paragraph 19B(1) of the Defence was false: the advice from Brabners that Mr Scoltock had no right to cut off the supply of electricity to Unit 3 had been given not at the time the disconnection undertaking was given but at the much earlier time when Contact's lease of Units 1 and 2 had come to an end and Mr Scoltock had first threatened to cut off that supply, yet that falsity had not been corrected in Mr Smith's response to the claimants' request for further information about that sub-paragraph.

43. Mr Smith was a deeply unsatisfactory witness who had a tendency to qualify or contradict what he had said in answer to earlier questions and to continue to maintain the indefensible in cross-examination (such as the false assertion that he had mentioned using the disconnection undertaking as "leverage" to require Mr Scoltock to undertake the flooding repair works during the tour of Unit 3 in or about May or June 2015 when it was clear from Mr Smith's email to Mr Teasdale of 14 August that Mr Smith was not in contact with Mr Scoltock about the flooding at that time and from the later correspondence and emails that the first mention of this had only surfaced in DLA Piper's letter of 23 October). Mr Smith also falsely sought to distance himself from decisions taken both in relation to the sale of Contact and also the attempt to remedy the drainage problems afflicting Unit 3. In this respect, Mr Smith's evidence was contradicted by that of Miss Brammall who (speaking in the context of the flooding problems) said that Mr Smith "did like to know what was going on". Mr Smith accepted that he had been prepared to breach the disconnection undertaking if it was in his own interests to do so. By the late concession of fraud in relation to the non-disclosure of

the disconnection undertaking, Mr Smith has impliedly accepted that he had given false evidence to the court both in paragraph 11 of his first witness statement and when maintaining in cross-examination that he had made it clear to Jacky and Brian at their first meeting that there was an obligation to remove the existing electrical feed into Unit 3 (and that Mr Mulcahy had been there when that had been said). This was not a minor lie uttered to bolster a genuine case. Rather it went to the very core of the defendants' case. In my judgment, Mr Smith's evidence was thoroughly discredited; and save in relation to Brian's recent invention of the "vocalisation" of the 400 amps supply representation, I prefer the evidence of Brian and Jacky as to their dealings with Mr Smith where the two are inconsistent.

C: The applicable law

44. There was very little dispute between counsel as to the applicable law, which was addressed at length in Mr Dagnall's written opening and closing. After I had reserved to consider my judgment, Mr Dagnall referred me (by email) to the recent decision of Jacobs J, sitting in the Commercial Court, in *Vald.Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) and he attached selected excerpts from his lengthy and comprehensive judgment. Jacobs J set out the legal principles applicable to claims founded upon the tort of deceit at Section C of his reserved judgment (comprising paras 130 to 159). The tort of deceit requires the claimant to show that: (1) the defendant made a false representation to the claimant; (2) the defendant knew the representation to be false, or had no belief in its truth, or was reckless as to whether it was true or false; (3) the defendant intended the claimant to rely on the representation; (4) the claimant did rely on the representation; and (5) as a result, the claimant has suffered loss and damage. The judge proceeded to consider each of these requirements in turn. Of particular relevance to the facts and circumstances of the present case are the passages on implied representations (at paras 136 and 137), ambiguous representations (at paras 140 and 141), and inducement (at paras 152-158). Jacobs J addressed the legal principles governing the assessment of damages and causation in claims for deceit at Section H4 of his judgment (at paras 484 to 491). Of particular importance in the context of the present case is the rule that the normal method of calculating the loss caused by the deceit is the price paid less the real value of the subject matter of the transaction.

45. Although not included in the excerpts from the judgment supplied by Mr Dagnall, I have also had regard to parts of Section H5 of the judgment, setting out the judge's analysis and conclusions on causation. I have derived particular assistance from:

(1) para 504, where the judge recognised that, in the context of causation, the misrepresentations were also evidentiary weapons against the defendants: The reason why the representations were made was because the defendants were not prepared to risk the consequences of telling the truth; they recognised that there was a serious risk of jeopardising the sale to their favoured buyer at the price offered; and

(2) paras 506-507, where the judge recognised that if the misrepresentation as to equality of information had not been made, then it would have become known that the previous due diligence work had been conducted on a false basis; and whilst it was impossible to say exactly what would have happened if the true state of affairs had been revealed, it was improbable in the extreme that matters would have proceeded in the same way as they had in fact proceeded.

I have directed myself by reference to Sections C, H4 and H5 of Jacobs J's judgment, which should be treated as incorporated herein. I agree with Mr Dagnall that the law as stated in this authority is broadly consistent with the submissions advanced at the trial of this case.

46. In his oral closing, Mr Dagnall laid particular emphasis upon the decision of the House of Lords in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, citing extensively from both the speeches and the discussion of that case (and other authorities) in *Chitty on Contracts* (33rd edn), Vol.1 at paras 7-059 and following (particularly para 7-061). He submitted, in my view correctly, that if, as a result of a fraudulent misrepresentation, the claimant acquires a flawed asset, he can recover the full loss attributable to those flaws even though they are wholly unconnected to the fraudulent misrepresentation because those flaws feed into, and inform, the true value of the subject matter of the sale transaction as at the date of the relevant sale. The position is otherwise if the flaws post-date the entry into the transaction. Mr Dagnall's submissions on damages for misrepresentation are set out in detail at para 91 of his written closing. Effectively, he submits that the concession as to the fraudulent misrepresentation in relation to the disconnection undertaking means that the defendants are to be held liable for the inadequacy of the electricity supply serving Unit 3, for the effects of the drainage problems and consequent flooding of Unit 3, and for any losses resulting from the existence of the fencing undertaking. In summary, Mr Dagnall submits that it matters not that he is unable to establish any other fraudulent misrepresentation; because of the fraudulent misrepresentation as to the electricity supply, the damages are the same. In his brief rejoinder, I did not understand Mr Lander to seek to challenge this submission (which, in any event, I accept); but he pointed out that the fact that this is a fraud claim should not affect the court's approach to the evidence or to the claimants' duty to mitigate their losses.

47. In his second post-trial email Mr Dagnall supplied me with the case (cited by Mr Lander) of *Williams v Natural Life Health Food Ltd* [1998] 1 WLR 830 where it was held by the House of Lords that the director of a company was not liable for negligent misrepresentations made by him on behalf of his company absent some assumption of personal responsibility. Mr Lander had relied on that case as authority for the proposition (which I accept) that Mr Smith could only be held personally liable for misrepresentations made by him on behalf of the first or third defendants if he had made them fraudulently rather than negligently. Reading that authority was said to have reminded Mr Dagnall of the decision of the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corporation (Nos 2 & 4)* [2002] UKHL 43, [2003] 1 AC 959 dealing with: (1) the personal liability of a director who makes a fraudulent misrepresentation on behalf of their company: see e.g. paras 22 and 41; (2) the absence of contributory negligence as a defence: see paras 18 and 42; and (3) the irrelevance of the representee having also relied upon other (mistaken, negligent or irrational) matters as well as the fraudulent misrepresentation: see e.g. paras 15-16. This was all said by Mr Dagnall to be in accord with the submissions which he had made already and the law as set out in *Chitty on Contracts*. The claimants' case was that all three defendants were liable for the deceit of Mr Smith since he had been acting as the agent of both the first and third defendants. I would accept that submission.

48. The only potentially controversial aspect of the law was Mr Dagnall's submission that a misrepresentation would be fraudulent not only on the orthodox basis that it was made

knowingly (without belief in its truth) or recklessly (not caring whether it was true or false) but also where, on the basis of the facts subjectively known by the representor, they had acted in a way that a reasonable and honest person would consider to be dishonest. If, on the basis of the facts subjectively known to Mr Smith, an objective observer would have viewed the 13 November email as dishonest, then that should suffice to render Mr Smith fraudulent and thus liable for the tort of deceit. Mr Dagnall submitted, in reliance on observations of the Court of Appeal in *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, [2018] 1 WLR 3529 at para 158, that "in view of the change to an objective test of 'dishonesty', that outcome should follow". Mr Lander submitted that the observations in that case did not say that the test for the mental element in deceit was now objective and they did not assist Mr Dagnall.

49. I accept Mr Lander's submission. All the Court of Appeal was saying in the *Property Alliance Group* case was that where the implication of an alleged implied representation was not present to the representor's mind, it might be the case that such a representation could never (or quite rarely) be fraudulent, although recent decisions about dishonesty, such as *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476 and *Ivey v Genting Casinos UK Ltd* [2017] UKSC 67, [2018] AC 391, might be relevant; but that it was unnecessary for the Court of Appeal to resolve that question in the case that was before them. There is nothing in these observations to warrant either a partial re-writing of the law as to the mental element required to found a claim in deceit or any reformulation of the classic statement of that mental element as set out in the speech of Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337. As Jacobs observed in the *Vald.Nielsen* case at para 147:

> "It is not necessary that the maker of the statement was 'dishonest' as that word is used in the criminal law … What is required is dishonest knowledge, in the sense of an absence of belief in truth."

Nor, in my judgment, does the recent Supreme Court decision in *Ivey v Genting Casinos* assist the claimants. That was a case considering dishonesty in the context of cheating in gambling. At para 74 Lord Hughes JSC indicated that when dishonesty was in question, the court must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts; when it had done so, the question of whether his conduct was honest or dishonest was to be determined by the court applying the (objective) standards of ordinary decent people. I accept Mr Lander's submission that if the representor did not intend to make a representation that he knew to be false (or did not believe to be true, or about the truth of which he was consciously indifferent), because the (false) implication of that representation was not present to his mind, then the second aspect does not arise. I derive support for this conclusion from paragraph 137 of Jacob J's judgment in the *Vald.Nielsen* case.

D: The electricity supply representation

50. In closing, Mr Lander did not maintain the position advanced in opening that the disconnection undertaking had not been binding upon the second or third defendants because, although terms had been agreed in principle, the dispute about the electricity supply had not been finally settled. He was right not to do so. I am satisfied that the undertaking on the part of the second and third defendants contained within the letter from their solicitors (DLA Piper) of 25 February 2015 was binding upon them as a

matter of contract. The consideration for that undertaking was the agreement in principle between the Scoltock pension trustees and Contact to compromise the electricity supply issues in the dilapidations claim on the terms of the order made by HHJ Stephen Davies on 27 March 2015. Although there was only agreement in principle as between the parties to the dilapidations claim (the Scoltock pension trustees and Contact), I am satisfied that there was a concluded and binding agreement as between the Scoltock pension trustees and the second and third defendants (as both Mr Smith and his solicitors recognised). The final paragraph of HHJ Stephen Davies's order (directing the Scoltock pension trustees and Contact to lodge at court any concluded agreement they might make in respect of the electricity supply issues by 4pm on 22 April 2015 and, in the event that no such concluded agreement had been made by that date, giving either party permission to apply) did not derogate from the binding effect of the undertaking as between the pension trustees and the second and third defendants.

51. I have already referred to Mr Lander's late concession in closing that (in the light of the evidence of Mr Mulcahy) the defendants could no longer sensibly submit that there had not been a fraudulent actionable misrepresentation in relation to the electricity supply representation and that he did not seek to do so. I have also already recorded that the consequence of this concession is that Mr Smith has impliedly accepted that he had given false evidence to the court on a matter which lies at the heart of the defence to this claim: that he had made it clear to Jacky and Brian that there was an obligation to remove the electrical feed into Unit 3. The fact that Mr Smith thought it necessary to lie in this way shows that he knew that the 13 November email was deliberately misleading in giving the false impression that the decision to relocate the electricity feed via Unit 4 was entirely within Mr Smith's gift when in fact he knew that he had given a binding undertaking to do so. Mr Smith accepted in cross-examination that the 13 November email would have been read on the basis that it was telling the full story. In closing, Mr Lander expressly accepted that the 13 November email did not properly represent the true situation regarding the electricity supply to Unit 3 because there was a clear distinction between being prepared to put an electrical feed through Unit 4 and having given an undertaking to disconnect the existing electricity supply from Units 1 and 2 and he also accepted that this should have been explained properly by Mr Smith. Mr Lander also accepted that Mr Smith had had no reasonable basis for thinking that the earlier advice which he had received from Brabners about Mr Scoltock's inability to disconnect the electricity supply continued to hold good after the second and third defendants had given the disconnection undertaking. Mr Lander also accepted that, in the light of Mr Mulcahy's evidence, he could no longer continue to submit that the position had been fully explained to Jacky and Brian during the tour of Unit 3.

52. As well as the 13 November email, Brabners' 11 November 2015 response ("Not so far as the Seller is aware") to Enquiry No 20 (headed "Disputes") to Standard General Pre-Contract Enquiries was demonstrably false in the light of the correspondence passing between Ralli and DLA Piper from 12 October 2015; whilst Brabners' contemporaneous response ("Yes") to Supplemental Enquiry No 4.4 ("Do you have uninterrupted use of all facilities necessary for the use and enjoyment of [Unit 3]?") was highly misleading in view of the existence of the disconnection undertaking. Mr Smith accepted in cross-examination that Ralli's letter of 21 October had constituted a "demand"; and DLA Piper's response was expressly written on their clients' (i.e. Mr Smith's) instructions. Ralli's letter of 6 November expressly invited DLA Piper to

"take your client's urgent instructions and confirm that disconnection will now take place to avoid further Court proceedings"; and Mr Smith accepted that the correspondence from Ralli had constituted a demand, a complaint and also a threat of legal proceedings. I have no doubt that had Brabners known of this correspondence, they would have qualified their answers to Enquiry No 20 and Supplemental Enquiry No 4.4 because they were false or highly misleading (and were known to be such by Mr Smith). Mr Smith accepted in cross-examination that the way that the reply to Enquiry No 20 was worded did not reflect the true situation; but he claimed that he did not know that that reply was being given or that it was false. In relation to the reply to Supplemental Enquiry No 4.4, Mr Smith said that in his opinion there had always been going to be a continuation of the electricity supply to Unit 3, and that he would have contacted the electricity supply company. In the absence of any supporting evidence from Brabners, and in view of Mr Smith's almost comprehensive unreliability as a witness, I cannot accept that Brabners would have replied to Pre-Contract Enquiries without taking their client's (i.e. Mr Smith's) express instructions; and that was supported by the evidence of Mr Mulcahy and Mr Walker who, having only relatively recently come on to the scene, were in no position to assist Brabners in their responses to these enquiries. I find that Mr Smith had deliberately kept Brabners in the dark about the disconnection undertaking so as not to jeopardise the sale of Contact's business to the claimants, which was Mr Smith's preferred way of addressing the persistent losses that Contact had been suffering. The first two ingredients of the tort of deceit were rightly admitted in relation to the electricity supply representation.

53. I have no doubt that Mr Smith intended that the claimants should rely upon the electricity supply representation in the 13 November email (and the replies to Enquiry No 20 and Supplemental Enquiry No 4.4). The email was a response to two earlier emails from DBF to Brabners, the first of which had sought specific confirmation "that no problems or contentions have arisen in respect of the electricity". The importance of the 13 November email was reflected in DBF's later email of 16 November seeking Brabners' confirmation (which was forthcoming on 18 November) that the 13 November email should constitute a reply as if it had been made through Brabners. Had such confirmation not been given, Brabners would have had to answer the query (in DBF's email of 16 November timed at 15.07): "Please confirm the arrangements for the sourcing of electricity from unit 2 as raised in my earlier email of 12 Nov 12:08." Mr Smith's appreciation of the importance of achieving accuracy in the contents of the 13 November email is reflected in his later email of 13 November (timed at 10.21) correcting the location of the new gridded drain. The third ingredient of the tort of deceit is established in relation to the electricity supply representation.

54. I find that Jacky read the 13 November email on the basis that it was telling the full story. She understood that the decision to relocate the electricity feed via Unit 4 was a matter entirely within Mr Smith's gift whereas in fact he had given a binding undertaking to do so. As a result of the responses to Enquiry No 20 and Supplemental Enquiry No 4.4 and the 13 November email, the claimants were entirely ignorant of the disconnection undertaking. Through Jacky, that misunderstanding, and thus the electricity supply representation, were actively present in the claimants' minds when they entered into each of the APA, the PSA and the LSA. During the course of the trial, Mr Lander emphasised that the disconnection undertaking had only been given by the second and third defendants, who were parties only to the LSA (and not the APA or the PSA), and not also by Contact, which was the party which entered into the APA and

the PSA. However, it is the existence of, and not the identity of the parties to, the disconnection undertaking that is the crucial feature of the electricity supply representation. I find that the electricity supply representation was a matter of significance to the claimants and that it was an inducing cause of the claimants' entry into their respective agreements for the sale of Contact's business and assets to the claimants. I am satisfied that the claimants have discharged the burden of proving inducement: they did rely upon the electricity supply representation, and the fourth ingredient of the tort of deceit is therefore established.

55. I find that none of the claimants would have acted in the same way as they did in the absence of that representation. I find that the claimants required a continuing and secure supply of electricity to Unit 3 to power whatever was required for their digital printing suite (as Mr Mulcahy was ready to acknowledge). I find that at least up to the time of completion of the three agreements, the claimants had intended to use Unit 3 as their digital printing centre and that this fact was known to and understood by Mr Smith (as evidenced by his email to Jacky of 6 August 2015). I accept Jacky's evidence that having no electricity supply to Unit 3 would have been "a real deal breaker". However, I do not consider that the discovery of the disconnection undertaking, of itself, would have caused the claimants to walk away from the deal straight away. I find that the opportunity to acquire a business with the attributes of Contact's business, and within reasonable proximity to the claimants' existing business at the Old Mill, was perceived by the claimants as being one that was too good to be missed and also that the claimants needed to act quickly to find somewhere suitable to accommodate the Beam machine of which they were due to take delivery in March 2016. I have no doubt that the claimants would not have walked away from the deal without having first taken steps to investigate whether, and how quickly, and at what cost, a Major Supply could be secured for Unit 3; and they would then have addressed the costs of this with Mr Smith, with a view to negotiating some reduction in the price of the global deal. I find as a fact that the three agreements would not have been completed in the form that they took but for the electricity supply representation.

56. In this connection (as with the *Vald.Nielsen* case) I view the electrical supply representation as operating as an evidentiary weapon against the defendants: The reason why that representation was made was because Mr Smith was not prepared to risk the consequences of telling the truth; he recognised that there was a serious risk of jeopardising the sale to the claimants at the agreed price if the disconnection undertaking came to light. Further, if the electricity supply representation had not been made, the claimants would have been prompted to investigate the electricity supply to Unit 3, potentially leading to the discovery of the inadequacy of the existing power supply; and whilst it was impossible to say exactly what would have happened if the true state of affairs had been revealed, it was improbable in the extreme that matters would have proceeded in the same way as they did in fact proceed. I find that the fifth (and final) ingredient of the tort of deceit is established in relation to the electricity supply representation.

57. In his written opening, Mr Lander sought to confine the effect of any actionable misrepresentations to RJP, as the purchasers of Unit 3, to the exclusion of any claim by Glossop; and in his oral closing he submitted that the real question was to identify the person to whom the representation had been made. He contended that the claimants had elected to sever their trading interests from their property interests, keeping their

business activities within Glossop and their property-owning activities within RJP. Thus, had RJP not paid for Unit 3, the second and third defendants could not have sued Glossop for the price; and if there had been any breach of warranty in respect of the assets sold under the APA, RJP could not have sued Contact under that agreement. Having chosen to keep their activities separate in this way, it is said that the claimants cannot be permitted to have their cake and to eat it too; to do so would be to lead to serious injustice. The problems with Unit 3 concern an asset that Glossop never acquired. Mr Lander submits that on the proper measure of loss, it has suffered no loss in relation thereto.

58. I would accept that Glossop cannot maintain an action in respect of any loss in respect of the capital value of Unit 3 because it was not the purchaser of that Unit and has suffered no loss in relation thereto. I would also accept that Glossop cannot maintain an action against the second and third defendants under section 2(1) of the Misrepresentation Act 1967 because that sub-section only applies to confer a cause of action in damages "where a person has entered into a contract after a misrepresentation has been made to him *by another party thereto* and as a result he has suffered loss"; and Glossop was not a party to any contract entered into with the second or third defendants. However, I consider that Glossop (as well as RJP) can maintain a cause of action in deceit against all three defendants in respect of any recoverable loss and damage sustained by Glossop as a result of any fraudulent misrepresentation to which that defendant was a party, even though that loss and damage is referable to the APA to which only Contact was a party. In cross-examination Mr Smith accepted (as I find was the fact) that all three agreements together formed a global package: no one agreement would have been executed without the other two. As Jacky said (in unchallenged evidence) at paragraph 16 of her first witness statement: "It was 'all or nothing'." I find that the electricity supply representation was a matter of significance to *all three* of the claimants and that it was an inducing cause of all three claimants' entering into their respective agreements for the sale of Contact's business and assets to the claimants. I am satisfied that all three of the claimants have discharged the burden of proving that they would not have acted in the same way as they did in the absence of the electricity supply representation. The necessary ingredients of the tort of deceit are therefore established on the part of all three claimants.

59. In summary, therefore, the claim in fraud succeeds in relation to the electricity supply representation. The issue of loss and damage will be addressed further in section I below.

60. For what it is worth, it seems to me that Mr Dagnall is correct in his contention that the existence of, and the threats to enforce, the disconnection undertaking amounted to a breach of the warranties contained in clause 8, and paragraphs 9 and 11.2 of Schedule 7, of and to the APA (but not of the warranty contained in paragraph 7.3 of Schedule 7 because, with the termination of the lease thereof, Units 1 and 2 were no longer being used for the purpose, or in the operation, of Contact's business and Contact was not a party to the disconnection undertaking).

61. In the light of Mr Dagnall's submission (founded upon the case of *Smith New Court*) that if, as a result of a fraudulent misrepresentation, the claimant acquires a flawed asset, he can recover the full loss attributable to those flaws even though they are wholly unconnected to the fraudulent misrepresentation (because those flaws feed into, and inform, the true value of the subject matter of the sale transaction at the date of the

relevant sale), it is strictly unnecessary for me to consider the remaining alleged misrepresentations; and it is tempting for a hard-pressed judge not to do so. Nevertheless, since I have heard the evidence, and received extensive submissions, about them, I will proceed to set out my conclusions on the remaining alleged misrepresentations, albeit at somewhat shorter length than I might otherwise have done.

E: The electricity power representation

62. The issue here is whether the electricity power representation was actually made. Mr Lander accepts that if there was an express or implied representation that Unit 3 enjoyed a Major Supply then it was false because it had never enjoyed such a supply. As Mr Lander acknowledged in his written opening, the alleged representations relating to the size of the electricity supply to Unit 3 are said to have been made orally or (largely) by conduct. In the light of my rejection of Brian's evidence that there was ever any "vocalisation" of a power supply of 400 amps during the tour of Unit 3, I find that there was never any discussion about either the size of the power supply enjoyed by Unit 3 (and whether it was a Major Supply or not) or the size of the power supply that would be required by the claimants in order to run their digital machines in Unit 3. I find that Mr Smith explained how Unit 3 had previously been used for production, and how it had used to have various items of printing machinery within it but that it had reverted to being a warehouse facility in 2009. I accept Mr Shufflebotham's evidence, and I find, that the labelling on the switchgear within Unit 3 indicated a 400 amps per phase electricity supply but that the cabling within Unit 3 only had a capacity of 238 amps per phase. I therefore find that the machines previously operated within Unit 3 had only needed a maximum power supply of 238 amps, although I note Mr Lander's point that the mere fact that the cabling could carry 238 amps does not necessarily mean that it had actually carried that level of power supply, which would depend upon the size of the electricity supply available within units 1 and 2 (which was not a matter investigated in evidence at trial in the light of the claimants' pleaded case that they had required a power supply of at least 300 amps to power their digital printing suite). I also find that during the tour of Unit 3 Mr Smith (who I accept had no personal experience of digital machines or their power consumption) said that Unit 3 would be a "good option" for a digital suite and "the logical place" in which to locate it because it had a self-contained office suite with toilets and a small canteen. Mr Smith also acknowledged in cross-examination that he had been aware in 2015 that the capacity of the electricity supply to Unit 3 had been reduced at some time after it had ceased to be used as a production facility but that he had not mentioned this reduction in the power supply to the claimants.

63. Mr Lander submits that Mr Smith's suggestion that Unit 3 would be the better location for a digital printing suite cannot properly be construed as any representation that it had in place either the infrastructure or the contractual utility arrangements necessary for that purpose. To say that one of two shop units would be the better option, or the logical place, for a restaurant cannot be construed as a representation that it possesses the required infrastructure for restaurant use. Mr Lander also submits that the fact that Unit 3 had previously been used for production, with various machines from that previous use still present, and that the switchgear contained labelling referencing a 400 amps power supply, cannot amount to an implied representation that there had once been a Major Supply to Unit 3, still less that such supply was still available some years after all manufacturing had ceased, with the Unit presently being used for warehousing

(which requires much less power than a production facility). Mr Lander drew an analogy with the speedometer on a car: the fact that it goes up to a top speed of 160 mph does not amount to a representation that the car can attain that speed, still less that it has ever been driven at that speed even if (to take Mr Dagnall's example) one is also told that the car has been driven at high speeds on the autobahns in Germany where there are no legal speed limits.

64. As Jacobs J emphasised at paragraph 136 of the *Vald.Nielsen* case, there must be clear words or conduct of the representor from which the relevant representation can be implied; and, as was made clear at paragraph 138, it is necessary for the statement relied on to have the character of a statement upon which the representee was intended, and entitled, to rely. In my judgment, nothing said or implied by Mr Smith satisfies these requirements. I accept Mr Lander's submissions. I find that Mr Smith cannot be taken to have been impliedly representing that Unit 3 had a Major Supply (in the sense originally defined by the claimants) from the fact that Unit 3 had previously been used for production because the cabling within that Unit could only accommodate a 238 amps supply. Nor could Mr Smith be taken to have been impliedly representing that Unit 3 had an electricity power supply capable of serving the claimants' proposed digital suite when: (1) he had no personal experience of digital printing machines and no idea of their power consumption and (2) at that time the claimants' view was clearly that (in Jacky's words at paragraph 35 of her first witness statement): "Our digital machines …. simply do not work at all without at least a 300 amps 3 phase electricity supply". In any event, I find that it would have been entirely unreasonable for the claimants to have placed reliance on any implied representation as to the level of electricity supply serving Unit 3. This was a matter about which they should have carried out their own investigations and made their own inquiries. I find that the claimants have not established the first ingredient of the tort of deceit in relation to the electricity power representation.

65. I also accept Mr Lander's further submission that the second ingredient of the tort of deceit (the necessary mental element) is not made out in relation to the electricity supply representation. I find that Mr Smith did not understand himself to be making any implied representation as to the size of the electricity supply serving Unit 3 or as to its adequacy for the claimants' purposes. As Jacobs J emphasised at paragraph 137 of the *Vald.Nielsen* judgment, a person cannot make a fraudulent representation unless he is aware that he is making that representation; and to establish liability in deceit it is necessary to show that the representor intended his representation to be understood by the representee in the sense in which it was false. In my judgment, neither of these elements is satisfied on the facts of this case as I find them. On the basis of Mr Smith's subjective knowledge and understanding, an objective observer would not have regarded his state of mind as dishonest. It also follows that the third and fourth elements of the tort of deceit are also missing: Mr Smith never intended the claimants to act upon the implied representation because he was not aware that any such representation was being made; and it could not be an inducing cause of the claimants entering into the transaction on the terms that they did because no implied representation was ever made.

66. In my judgment, the fact that fraud has not been made out in relation to the electricity power representation is of itself fatal to any claim founded upon that representation. Since the electricity power representation was not contained in any written or emailed reply to enquiries raised during the formal conveyancing process, Clause 16.2 of the

LSA (corresponding to clause 17.2 of the PSA and clauses 15.2 and 26.2 of the APA) prevents any claim being pursued in relation to that representation. I am satisfied that it is entirely reasonable (for the purposes of section 3 of the Misrepresentation Act 1967) for the defendants to be entitled to rely upon Clause 16.2 in answer to any claim for non-fraudulent misrepresentation: in my judgment it is entirely reasonable for legally-represented parties engaged in a formal commercial conveyancing process to provide by contract against the elevation of implied and informally expressed representations of this kind into actionable representations. Otherwise, as Mr Lander submitted, there would be a serious, and unwarranted, departure from the principle of caveat emptor.

67. In summary, therefore, the claims in fraud and in misrepresentation fail in relation to the electricity power representation.

F: The flooding representation

68. The claimants' case is that the flooding representation is to be implied from the 13 November email. Mr Lander rightly accepts that since (by virtue of Brabners' email of 18 November) the 13 November email is to be treated as if it had been sent by Brabners, any representation it may contain is actionable without proof of fraud. The 13 November email has to be read against the background of the emails that had preceded it. On Thursday 12 November at 15.11 Jacky had sent an email to Mr Smith saying (in relation to Unit 3) that the poor drainage was concerning the claimants. It had been "full of water" the previous day when Jill and Vicky had visited Unit 3 for a look around. Jacky inquired how they were going to go forward on this. She was "reluctant to pop in very expensive kit in [the] unit when it could flood". Jacky enquired whether Mr Smith had got "a cost to repair the drains". She concluded:

> "We don't want this to stop the deal going ahead but feel that the building should be suitable as described to us and without fault. We need some assurance from you that you will cover the cost of the problem drainage. Which we can sort out as the building is emptied of stock."

Ten minutes later DBF sent an email to Brabners inviting them to ask their client directly "whether Unit 3 has suffered from flooding". The claimants' investigations were said to have:

> "… revealed that Unit 3 flooded yesterday and also within the last month.
>
> My clients have advised that on direct questioning (following the earlier flood) Contact, who are currently tenants at unit 3, confirmed that it had been a problem but that they would get the drains dredged. However, even though the remedial works have now apparently being carried out, as of yesterday the property was still liable to flooding. As you are aware we have had a satisfactory Flood Search which suggests, more than anything, that the flooding is a more localised issue which would be within the power of your client to remedy.
>
> As such please ask your client to confirm:
>
> (1) The damage occasioned by the abovementioned floods;

> (2) Specifically, what remedial works were carried out;
>
> (3) Whether they are aware of any problems with the drains and if they are the details [of] such issues; and
>
> (4) The cost of remedying any defects.
>
> I have taken my clients' instructions and they are of the view that considering the value of the equipment which will need to go into unit 3 they cannot afford to take such a risk with so little information. As such we proposed that a retention is held back from the sale price to cover remedial works on the drains."

I am satisfied that this email was forwarded on to Mr Smith (as stated in Brabners' email to DBF timed at 15.44 on 12 November) and that it was discussed at his "late session" with Brabners that evening.

69. Before sending the 13 November email, Mr Smith had had a conversation with Jacky which had addressed the flooding issue. Although Mr Smith did not accept that it was true, I accept Jacky's account of that conversation at paragraph 98 of her first witness statement because it is consistent with the general tenor of Mr Smith's later email. I do not accept Mr Smith's assertion that Jacky knew that the defendants were still investigating the flooding issue because if that were the case it would have been mentioned in his email and it was not. In summary, Mr Smith led Jacky to believe that there was nothing to worry about and that he had already taken the necessary steps to remedy the flooding issue. As regards flooding, the 13 November email stated as follows:

> "To confirm our conversation earlier, the flooding issue emanates from a drainage problem during exceptionally heavy downpours and recent investigations uncovered a blockage in the drain below Unit 2 … coupled with excess water running down the hill in front of the unit.
>
> The first issue has been discussed with Teasdales the tenants in Unit 2 and they are very helpful and cooperative (Good neighbours) and they have undertaken to clean the drain regularly. There is also a problem with the gutter and downspout along Unit 2 and under a full repairing lease Teasdales are obligated to replace this and I believe that is in hand. That problem has added to the water running down the hill.
>
> To eradicate that problem, I have spent in excess of £10,000 putting a new open gridded drain along the front of Unit 2.
>
> I have over the last two days been told there may be a small leak in the roof sheeting and I have engaged a builder to make the repair.
>
> We have also been informed by United Utilities that they have uncovered a blocked drain at High Avenue as a result of work they undertook some time ago and they have admitted liability and are correcting the matter and this may be the subject of an insurance claim."

70. According to Miss Brocklehurst, "It was the norm for Unit 3 to flood during heavy or prolonged rainfall" (paragraph 23). Miss Renshaw said that, "Unit 3 would flood when there was a moderate level of rainfall for a long period of time or heavy rainfall" (paragraph 14). Mr Stead said that, "Unit 3 did not only flood during periods of exceptionally heavy rain – it would flood after prolonged moderate rain or heavy rain" (paragraph 18). None of these assessments were challenged in cross-examination. Miss Brammall said in cross-examination that there had to be "heavy rainfall" when it "absolutely pelted it down" to cause Unit 3 to flood; but, after carefully considering the question, she accepted that that was not really unusual for Stockport. At paragraph 12 of his first witness statement, Mr Smith said that during the tour of Unit 3 he had revealed that Unit 3 had suffered flooding "after very heavy downpours of rain". During his cross-examination, Mr Smith maintained that it was his opinion that Unit 3 flooded during "torrential heavy downpours". The general consensus was that Unit 3 flooded between two and four times a year. I am not prepared to find that Mr Smith was guilty of misrepresentation when stating that flooding occurred "during exceptionally heavy downpours". As Mr Lander submits, this expression is not a term of art. What to one person may appear to a "heavy downpour" may appear to another to be "an exceptionally heavy" or "torrential" downpour.

71. In any event, Mr Lander submits that the debate about the meaning of "exceptionally heavy" downpours ignores the real question, which is whether the representation was materially false: on any analysis Mr Smith correctly reported that there were occasions when Unit 3 flooded, which were likely to occur sufficiently frequently to cause a problem to somebody installing expensive machinery in that unit. Perhaps the clearest analysis (which Mr Lander adopted by way of submission) was said to be that given by the valuer, Mr King, when asked by the claimants to assess different scenarios about flooding (at para 1.2.25 of his response):

> "There is not a standard definition for the 'exceptional rainfall' referenced in the questions as far as I am aware, and upon which I can rely. It is a relative and subjective statement. In any event, I am of the view that a 'willing purchaser' is likely to require a complete remedy for a known flooding problem regardless of the background source of occurrence or severity. A flooding industrial unit would not be acceptable regardless of degree."

Mr Lander submits that Mr Smith did not say that all the drainage issues had been resolved, but quite the contrary. Not only did Mr Smith say that the unit flooded in exceptionally heavy downpours but he later said, with regard to the electrical feed (and using the present tense), that "… until the flooding issue *is* resolved it is leverage". Indeed, the 13 November email was written in the context of the emails from Jacky and DBF the previous day from which it was clear that the claimants were aware that Unit 3 was still flooding and that the drainage issues had clearly not been resolved. However, this seems to me to miss the significance of what the 13 November email does not say, and what it therefore clearly implied.

72. As I have already indicated, Mr Smith accepted in cross-examination that the 13 November email would have been read on the basis that it was telling the full story. In my judgment it did not do so. It did not reveal that Drain Alert had produced a quotation on 6 October 2015 recommending a CCTV survey and tanker jetting at an estimated cost (exclusive of VAT) of nearly £1,100; or that (as I find) Mr Smith had discussed the flooding issue with Miss Brammall on Tuesday 10 November (as foreshadowed by

Mr Smith's email to Miss Brammall timed at 13.38 on 9 November) at which he had authorised her to instruct Drain Alert to go ahead with the works (which she was to do by telephone on 16 November). Although Mr Smith denied this in cross-examination, I am satisfied that the 13 November email told only a partial story about the works being undertaken to address the flooding issues affecting Unit 3. It led Jacky to understand that the underlying causes had been identified and were being addressed when in fact investigations were still ongoing. Miss Brammall accepted in cross-examination that there was still a problem at this stage which she had discussed with Mr Smith and which was in the course of being addressed by way of a further instruction to Drain Alert. Miss Brammall indicated that she would have told Mr Smith that she had instructed Drain Alert on 16 November if he had ever asked her. I consider a comment made by Mr Smith in cross-examination by Mr Dagnall (when it was being suggested to him that he had known that the 13 November email was telling only a half-truth) to be revealing: "My biggest concern was to secure the future of the employees going forward."

73. I am satisfied that Mr Smith deliberately omitted to reveal to Jacky the full picture about the ongoing flooding investigations in the 13 November email because he feared that it would throw the sale of Contact's business and assets to the claimants into jeopardy. I am satisfied that the 13 November email falsely represented to the claimants that the underlying causes of the flooding problems affecting Unit 3 had been identified and were being addressed when in fact investigations were still ongoing and further remedial works might be required (as proved to be the case). I am satisfied that Mr Smith knew and intended that the 13 November email would be read and understood in that way by Jacky (and through her the claimants); and that his purpose in misleading them in this way was to progress the sale of the Contact business and assets to the claimants through to completion. Mr Smith knew (from DBF's email of 16 November 215 timed at 15.07) that the claimants were relying upon the 13 November email as an alternative to Brabners confirming the situation in relation to the flooding as raised in DBF's earlier email of 12 November timed at 15.21. I am satisfied that the first three ingredients of the tort of deceit are all made out in relation to the flooding representation.

74. Mr Lander's principal line of defence to the flooding representation was in relation to the fourth ingredient of the tort of deceit: whether the flooding representation was a material inducement. Mr Lander submits that this representation cannot have operated on the minds of the claimants because it was known that the flooding had not been resolved. He submits that Jacky's evidence (at paragraph 110 of her first witness statement) that she would have "walked away" from the deal if Mr Smith had made full and proper disclosure of the continuing flooding issues at the time of completion is contradicted by the statement at the end of her email of 12 November (cited above) that she would have merely looked for some assurance from Mr Smith to cover the costs of sorting out the problem drainage. Mr Lander refers to Jacky's attempt to explain this away in paragraph 111 of her first witness statement on the basis that this would only have applied "on the basis that it was understood that the resolution of the drainage issued would be relatively minor". Mr Lander submits that the costs (as at November 2015) attributed by Mr Milnes, the single joint expert building surveyor, to both repairing and relining the drain and excavating and replacing the affected section of drain (less than £4,600 and £13,700 (exclusive of VAT) respectively) are "relatively minor" in the context of a deal worth over £1m. Mr Lander points to Jacky's evidence,

when pressed in cross-examination, that she would only have been prepared to install Glossop's digital machines in Unit 3 if the risking of flooding had been once in every 20 years. Clearly the 13 November email had done nothing to provide that level of assurance, yet the claimants had proceeded to completion and therefore that email could not have been even *an* inducing cause of the claimants entering into the transaction that they did. I have already indicated (when reviewing Jacky's evidence) that I consider that this part of her evidence was deliberately exaggerated for effect and I attach no weight to it as an accurate statement of Jacky's state of kind (although it is clearly relevant to her credibility as a witness).

75. As Jacobs J explained (at paragraphs 155 and 157 of the *Vald.Nielsen* case):

(1) It is sufficient for the misrepresentation to be *an* inducing cause of the claimant entering into the transaction on the terms that he did. It is not necessary for it to be the sole cause; and

(2) If the representation is of no real significance, then a court will decline to hold that it was one of the reasons which induced the contract. If, however, it was a matter of significance, the decision will be the other way.

76. I am satisfied that the flooding representation was a matter of significance and that it was *an* inducing cause of the claimants entering into the transaction at the time and on the terms that they did. Had the claimants known about the Drain Alert quotation and of the recommendation for further investigations that it contained, and had they known that Miss Brammall had been authorised to put such further investigations in train, then (as Mr Dagnall submitted) I am satisfied that they would have inquired as to the likely timescale for such investigations. Had the claimants been told that the quotation had been accepted on 16 November (two days before Brabners' confirmatory email of 18 November) and that the investigations were to be undertaken on 24 November, I am satisfied that completion of the transactions would not have taken place on the previous day but would have been delayed to await the result of those investigations. I am satisfied that once the results of those investigations had been received, the claimants would have sought to secure that a retention was held back from the sale price to cover the remedial works on the drains (as indicated in DBF's email of 12 November timed at 15.21). That retention would have been a sum somewhere between the two figures referred to by Mr Milnes (and identified above). That, however, assumes that the flooding representation had been the only live misrepresentation. Had the claimants also been aware of the disconnection undertaking, the transaction would not have proceeded to completion, even with a retention, until the issue of the provision of a Major Supply to Unit 3 had been satisfactorily addressed. I am satisfied that the claimants would not have acted in the same way but for the flooding misrepresentation. The remaining ingredients of the tort of deceit have been made out. I therefore find that the claim in fraud succeeds in relation to the flooding representation.

G: The fencing representation

77. Mr Lander rightly characterised this representation as something of a "side-show". As I have already observed, Jacky acknowledged in cross-examination that Mr Scoltock has not asked Glossop to move the fence and there was no reason to think that he would ever do so. Moreover, the obligation to move the fence is a positive obligation which

is personal to Contact and does not run with the land so as to bind any of the claimants or expose them to any conceivable personal liability.

78. The 13 November 2015 email stated that the claimants "… have a right to reposition the dividing fence which Scoltock illegally erected over 1 metre onto Unit 5 land". It is said that this misrepresents the position in two respects: (1) that there was a *right* to re-position the fence rather than an *obligation* to do so; and (2) that since the fence was said to have been "illegally erected", there was an implied representation that the costs of repositioning the fence could be recovered from the Scoltock pension trustees as damages for trespass. Clearly the email misrepresented the true position in the first of these two respects. However, I am entirely satisfied that Mr Smith genuinely viewed the obligation which he had assumed towards the Scoltock pension trustees to reposition the fence as being in the nature of a right rather than an obligation. I accept Mr Lander's submission that Mr Smith genuinely believed the agreement was one that Mr Scoltock was never likely to enforce because he enjoyed the benefit of the additional land so that, as a matter of substance, there was really nothing more than a right to move the fence if Contact chose to do so. As indicated above, Jacky acknowledged the validity of this analysis in cross-examination. Although there was a misrepresentation as to the true position in the first of the two respects identified above, I am satisfied that it was not actionable as a *material* misrepresentation. As Jacobs J indicated (at paragraph 144 of the *Vald.Nielsen* judgment):

> "The representation must be false. A representation may be true without being entirely correct, provided that it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts …"

In my judgment, that is the position in the present case.

79. Had I found that there was a material misrepresentation in the first respect, I would not have found that it was fraudulent; as explained above, I am satisfied that Mr Smith genuinely believed it to be true. Mr Smith genuinely believed that there was an option to move the fence because he considered that there was no way that Mr Scoltock would want to enforce an obligation which, in practice, would have resulted in the area of land he could use being reduced in area. On the basis of Mr Smith's subjective knowledge and understanding, I am satisfied that an objective observer would not have regarded his state of mind as dishonest. Therefore, applying *Williams v Natural Life Health Food* (cited above), there could be no personal liability on the part of Mr Smith for that misrepresentation. I am satisfied that Contact had no reasonable grounds for believing the misrepresentation to be true so that, in principle, there might have been liability under s. 2(1) of the Misrepresentation Act 1967. However, if necessary to do so, I would have found (in reliance on Jacky's acknowledgment referred to above), and notwithstanding the evidential presumption of inducement, that the misrepresentation was of no real significance; and I would have declined to hold that it was one of the reasons which had induced the claimants to enter into the three agreements. I accept Mr Lander's submission that there is no evidence that the fence had any material bearing whatsoever on the claimants' decision to proceed with the purchase.

80. Turning to the other aspect of the alleged misrepresentation, I do not accept that there was any implied representation that the costs of repositioning the fence could be

recovered from the Scoltock pension trustees as damages for trespass. I do not consider that a reasonable representee in the position, and with the known characteristics, of the claimants would reasonably have understood that an implied representation was being made or that it was being made substantially in the terms or to the effect alleged (to paraphrase paragraph 136 of the *Vald.Nielsen* judgment). I find that Mr Smith had discussed the earlier litigation over the boundaries of Unit 5 and its settlement with Jacky on 12 November (as evidenced by the phrase "as discussed yesterday" in the 13 November email). I find that liability for the costs of repositioning the fence was not discussed because this was never considered to be a live issue. Against that background knowledge, I do not consider that any reasonable reader of the 13 November email would have construed the reference to the fence as having been "illegally erected" as necessarily connoting that the costs of repositioning the fence could lawfully be recovered from Mr Scoltock or his pension trustees without first inquiring about, and referring to the full terms of, the settlement agreement. In any event, as related at paragraph 52 of her first witness statement, on 11 November 2015 Jacky had been told by Ralli that Mr Scoltock had an outstanding costs order against Contact and that he was a significant creditor of that company. As a result, he would have been in a position to set that debt off against any liability for the costs of repositioning the fence. This should have been apparent to Jacky. I also find that Mr Smith did not understand that he was making any implied representation as to the liability for the costs of repositioning the fence or that it had the misleading sense alleged, thereby negativing any claim in deceit and thus any personal liability on his part. Further, for the reasons I have already given, and notwithstanding the evidential presumption of inducement, if necessary to do so, I would have found that any misrepresentation as to the liability for the cost of repositioning the fence would have been viewed by the claimants as being of no real significance, and I would have declined to hold that it was one of the reasons which had induced the claimants to enter into the three agreements.

81. I therefore find that the claims in fraud and in misrepresentation fail in relation to the fencing representation.

82. The reasoning set out above would apply to negative any other claim in misrepresentation founded upon any response to pre-contract enquiries about the true boundaries of Unit 5.

83. Mr Dagnall submitted that Contact was in breach of the warranty contained in clause 8 and paragraph 11.3 of Schedule 7 of and to the APA in that the fencing undertaking had not been disclosed and was an existing judgment which "affected the Business or any of the Assets". Given the definitions of "the Business" and "the Assets", and the express exclusion of the property detailed in the PSA (including Unit 5), I would not accept that there was any breach of this warranty. Even if there was, I cannot see that this has resulted in any recoverable loss or damage to Glossop. Glossop is not bound by the fencing undertaking, and Mr Scoltock has never asked Glossop to move the fence and there is no reason to think that he will ever do so. I cannot see how the fact that Glossop might strictly be entitled to an additional area of land than that delimited by the existing boundary fence can give rise to any claim to damages for loss of bargain. As Mr Lander submits, RJP purchased Unit 5 with the existing fence in place, and they received precisely what they bargained for.

H: The Brammall warranty claim

84. On 29 February 2016 Glossop notified Miss Brammall that she was being made redundant with effect from the end of the following month. Miss Brammall subsequently brought an equal pay claim against Glossop, contending that she had not received equal pay with an appropriate male comparator for work of equal value. This claim was ultimately settled for a sum of £5,000. Glossop incurred (exclusive of recoverable VAT) irrecoverable legal costs of £16,627.20 in defending this claim. I am entirely satisfied that this constituted a reasonable compromise of the claim entered into between both parties at arms' length and acting in good faith. Glossop claims that it is entitled to recover these sums by way of damages under various paragraphs of clause 16.2 of the APA.

85. Initially Mr Lander sought to contend that Glossop was out of time to bring such a claim by virtue of clause 9.1 and paragraph 3.1 of Schedule 8 of and to the APA. However, by the end of the trial Mr Lander rightly accepted that these time notification provisions did not apply to a claim under clause 16.2 of the APA. Mr Lander now seeks to contest Glossop's entitlement to an indemnity in respect of the Brammall settlement sum (and associated legal costs) on the basis that the court does not have the material before it to decide whether the underlying claim was well-founded. I would accept the factual premise of this submission: despite the patent honesty of Miss Brammall, and the genuineness of her belief in the validity of her claim, this court is in no position, in this notoriously complex field of law, to adjudicate upon and determine whether the equal pay claim was well-founded both in fact and in law. That in my judgment disposes of the claim to an indemnity under all the paragraphs of clause 16.2 of the APA with the potential exception of clause 16.2 (i). Whether or not Glossop can recover an indemnity under this paragraph (including an indemnity in respect of irrecoverable legal costs) depends upon whether the Brammall equal pay claim can properly be characterised as a "Demand", which is defined as meaning "any action, liability arising from an Employment Tribunal or court ruling (excluding for the avoidance of doubt any amount paid by way of settlement) or liability for employment costs or statutory termination costs, claim or other legal recourse, complaint, cost, debt, demand, expense, fine, loss, outgoing, penalty or proceeding".

86. Mr Lander submits that "Demand" is a defined term which specifically excludes "any amount paid by way of settlement". It follows that neither the sums paid by way of settlement nor the associated legal fees are recoverable. The clear commercial purpose of this is said to be to ensure that Glossop does not simply go off and settle claims on the basis that it can then recover the costs of doing so from Contact regardless of the merits. In other words, if there is to be a settlement, it is incumbent upon Glossop to ensure that Contact (which would ultimately end up footing the bill if the claim proceeds and is lost) has agreed to the settlement and to pay it.

87. Mr Dagnall submits that all the relevant exclusion does is to prevent the Tomlin order incorporating the settlement from being a "Demand"; it does not prevent Miss Brammall's "claim" from being a "Demand" or prevent the expenditure relating to it from being recoverable. Mr Lander's arguments are said to ignore the remainder of the words in the definition of "Demand". Otherwise:

(1) Glossop could never settle a claim against it, which would be wholly uncommercial and a result that does not, in any event, follow from the wording.

(2) If Glossop were sued, then it would have to fight to the end; but if Glossop were not sued, but merely received a demand, then it would not have to fight at all.

The claimants' construction is said to fit the wording of the definition. A settlement is not enough on its own. The resolution has to be a reasonable settlement of a genuine claim. However, Miss Brammall's claim satisfied this requirement.

88. I have not found it easy to construe the definition of "Demand" for the purposes of the APA or to comprehend the thinking (if any there was) underlying the "torrential" style of drafting employed in this definition. I can discern little purpose or justification for expressly excluding any amount paid by way of settlement of an Employment Tribunal or court ruling in view of the all-encompassing list of qualifying demands that follow: even if a settlement would not qualify, the underlying claim would appear to do so in which case, on Mr Dagnall's construction, the exclusion would appear to have no real application. Nevertheless, I cannot ignore the all-encompassing width of the definition. Whilst I can see the force of Mr Lander's submission, I prefer Mr Dagnall's submissions as to the true meaning, scope and effect of clause 16.2 (i) of the APA. Moreover, it seems to me that there is force in Mr Dagnall's further submission that Glossop has a free-standing entitlement to recover its legal costs of the Brammall equal pay claim (comprising the bulk of this head of claim) by virtue of sub-paragraph 16.2. (i) (ii) as an expense incurred arising from or in connection with Miss Brammall's employment on or prior to the close of business on the date of completion of Glossop's sale and purchase of Contact's business.

89. For these reasons, I find that Glossop is entitled to a contractual indemnity in respect of the settlement sum (and associated legal costs) paid to Miss Brammall, in relation to her equal pay claim. I consider that there is also merit in Mr Dagnall's alternative submission that Glossop can, in the alternative, claim to recover these costs and expenses by way of damages for fraud on the basis that they operate to reduce the value of the Contact Business as the settlement was (as I find) on any basis reasonable mitigation.

I: Loss and damage

90. In a claim for deceit, the decision of the House of Lords in the *Smith New Court Securities* case establishes that the defendant is bound to make full reparation for all the damage directly flowing from the transaction. In closing, Mr Dagnall emphasised that it was the damage suffered by entering into the transaction that was recoverable and not merely the damage flowing from the fraudulent electricity supply and flooding misrepresentations. In the context of the present case, I am satisfied that "the transaction" for this purpose is the global package, comprising the purchase by Glossop of Contact's relevant business and assets and RJP's purchase of Units 3, 4 and 5. The normal method of calculating the loss caused by the deceit is the price paid less the true value of the subject matter of the transaction at the appropriate valuation date. In addition, the claimants are entitled to recover consequential (including any relevant trading) losses caused by the transaction; although they must have taken all reasonable steps to mitigate their loss once they have discovered the fraud.

91. Although in closing Mr Dagnall submitted that the appropriate valuation date should be 7 January 2016 (when instructions were given to install a major electricity supply serving Unit 4) or shortly thereafter, in my judgment the appropriate valuation date

should be 11 December 2015, when Glossop received an email from Ralli enclosing a letter to Glossop disclosing the full background to the disconnection undertaking and supplying a copy of it. This followed up on a telephone call made by Christian Eagle (of Ralli) to Jacky on or before 4 December 2015 when he had apparently told her of Mr Smith's obligations and of what he had promised in court as regards Unit 3 (as reported in an email of that date from Jacky to Mr Mulcahy and Mr Walker timed at 11.29 in which Jacky was already expressing the wish that they had not bought Unit 3). By that date, Glossop was in possession of documentary proof of the true position as regards the disconnection undertaking (and it also had received the Drain Alert report and further quotation dated 30 November 2015) and so it was aware of the true facts. No further disclosure of any significance occurred between 11 December 2015 and 7 January 2016. In my judgment, the earlier date should be taken as the appropriate valuation date (although I am not aware that any significant developments relevant to value occurred between these two dates or, indeed, since completion on 23 November 2015).

92. Mr Lander points out that there is expert evidence from Mr Milnes as to the costs of various remedial works and expert evidence from Mr King as to the crucial issue of the value of Unit 3 both with and without the drainage problems and electricity supply issue. On the basis of that evidence, there is said to be no loss in terms of the true value of Unit 3 when compared with the price paid for it. Glossop had actually paid less for Unit 3 than it was really worth even when the electrical supply issues and the flooding problems were taken into account and so it has received more than it had bargained for in any event.

93. I have already referred (in Section C above) to Mr Lander's submission that the fact that this is a fraud claim should not affect the court's approach to the evidence or to the claimants' duty to mitigate their losses. There was no issue between the parties as to the applicable law governing the mitigation of damage. A "victim" is under a duty to act reasonably in seeking to mitigate their loss. If they do not do so, then they can only claim to recover such losses as they would have suffered had they acted reasonably at the time when they discovered the fraud. However, the burden on the "victim" to act reasonably is a low one. The court will take full account of the situation they were in (due to the fault of the wrongdoer), giving them a wide margin of appreciation, and only taking a very wide view of what was reasonable, without applying hindsight against them. Mitigation, as with other causation issues, involves the wrongdoer having to take the victim as they find them. Mr Dagnall suggested that it was also generally reasonable for a victim to wait for settlement discussions or for liability to be established; but, in my judgment, this must depend upon the particular circumstances, including whether a claim has been intimated, the level of expenditure involved, and whether there is some means of achieving reimbursement otherwise than by resort to legal proceedings (such as the price adjustment machinery in clause 6 of the APA). Mitigation requires an objective, rather than a subjective, assessment. The burden of proof in mitigation, both as to what is involved and what costs would be saved, is on the wrongdoer, applying the civil standard of proof. The claimant has to prove their actual loss; and the defendant may then seek to prove that it should have been less. I remind myself that contributory negligence is not available in claims involving a non-negligent breach of contract or for fraud. I also bear in mind that where there are alternative claims in contract and for fraud, and that the claimant can choose whichever

remedy produces the higher award of damages; and where they have made a bad bargain, they will generally prefer to pursue a claim in fraud.

94. In terms of the claim for consequential losses, Mr Lander submits that the suggestion that the loss to the claimants as a result of the electricity supply and flooding misrepresentations ran into hundreds of thousands of pounds is plainly nonsense. In closing, he submitted that the damages claim had no basis in reality and existed only in a world of fantasy. The claimants were said to have sought to build layer upon layer of loss which had no reality in the world of business. Mr Lander sought to draw an analogy with the nail in a car tyre which leads to a headlong spiral of ever-worsening disasters involving the loss of the driver's job and then his marriage and ultimately ends in the driver suffering a nervous breakdown.

95. The reality, according to Mr Lander, was that within a very short time after completion, two obstacles to the use of Unit 3 as a digital suite had emerged: the first was the lack of a secure and adequate electrical supply and the other was the problems with the drainage. Neither problem was going to resolve itself or to go away of its own accord; each needed to be satisfactorily addressed. Since neither Unit 3 nor Unit 4 had an adequate power supply to service a digital printing suite, the only significant difference between those Units 3 was that Unit 3 (unlike Unit 4) was prone to flooding and it needed its drains fixing; but rather than getting the drains fixed, the claimants elected (by 7 January 2016) to seek to secure a 500 amps power supply for Unit 4 expressly "to accommodate our digital machines". As at 7 March 2016 there were "5 machines going to be installed in that unit which will require approx. 400 amp but we are asking for 500 amp for future capacity as there is room to grow that department". In the event, a 400 amps supply was installed in Unit 4 when it became apparent that a 500 amps supply would require a new substation and an investment in excess of £100,000: see the email dated 5 April 2016 timed at 8.22, after which the order for 500 amps was put on hold. It was not the disconnection of the electricity supply to Unit 3 which had prevented it from being used as a digital printing suite because the existing power supply was inadequate to enable it to be used for that purpose in any event. Even by the time of the audit by The Authentic Food Company ("**Authentic**") on 15 July 2016, almost 8 months after completion, no further work had been undertaken even to investigate the problems affecting the drains serving Unit 3, still less to find a long-term solution. Although (as Miss Brammall acknowledged in cross-examination) Brian and Jacky were very busy after the completion of the transaction and were doing their best to keep the business on an even keel and stem its losses, they should have instructed Miss Brammall to continue the work she had been doing to rectify the drainage issues and so eradicate the flooding problems. There was said to be no credible evidence to support any suggestion that the claimants had lacked the financial resources to address the electrical supply and flooding issues; and if this argument had been going to be pursued, it should have been the subject of proper disclosure by the claimants (which it was not).

96. Mr Lander submitted that the claim to massive consequential losses was wholly unjustified. That was exemplified by the claim in relation to the loss of business from Authentic. The records showed that sales to Authentic had been falling, and had more than halved, *before* the audit in July 2016; and they actually rose again after the undertaking not to use Unit 3 had been given. The subsequent further decline in sales took place after July 2017, and this was clearly not attributable to the problems with Unit 3. The audit itself had come about because of quality control issues and not any

pre-existing concerns about the unsuitability of Unit 3. There were clearly major problems faced by the business quite independently of the problems affecting Unit 3, as evidenced by Jacky's email to Mr Mulcahy and Mr Walker (copied to Brian) of 23 February 2016 referring to "dire" sales at Stockport, "volatile" markets, customers who "have bombed" and "a seepage" at Authentic. After Glossop's purchase of the Contact business, there were cost-cutting and quality control issues, and staff were de-motivated and left the business or were made redundant (taking work with them). I find that these points have been made out by the defendants. Despite their best efforts, Jacky and Brian had over-reached themselves; they had simply under-estimated the difficulties involved in integrating the two businesses (as exemplified by an email Jacky sent to Mr Smith on 17 August 2016 which described life as "very hard here" with half the staff "on board and working with us and working hard, the rest are lazy, will not work hard or overtime and have caused quite a few issues. I think because they have only worked at [Contact] they feel immune to any outside world. We will work it out but it's a long hard slog."). I find that the reality is that Glossop simply failed to achieve the volume of orders for which it had been hoping, quite independently of the issues affecting Unit 3.

97. In relation to consequential losses and the duty to mitigate, Mr Lander had made the following points in his written opening (and thus before any cross-examination):

(1) Even if there had been a 300 amps supply to Unit 3, that would not have been enough for the claimant's proposed digital printing centre and so there would have been a need for a new electricity supply to be brought into Unit 3 in any event. I accept this point. The actual level of the supply to Unit 3 at the time of completion was not established in evidence but it clearly did not exceed 238 amps.

(2) Glossop had started the process of obtaining a suitable supply to Unit 4 early in January 2016, soon after completion of the agreements; that it took so long actually to obtain it (meaning that a generator was needed in the meantime) is not the direct fault of the defendants. I accept this point. I find that the timescale involved in sourcing the 400 amps supply for Unit 4, and in completing the necessary works to distribute that supply within that Unit (some 10 months, until about October 2016) is a reliable guide to the minimum period required to source and install such a supply for Unit 3.

(3) By the time the electricity supply to Unit 3 was cut off Glossop had no need for a Major Supply to Unit 3 because it had already decided to set up its digital printing suite in Unit 4; its refusal to accept Mr Smith's offers to install a new minor supply to Unit 3 was therefore unreasonable. I accept this point; the reason that Mr Smith's offers were rejected was not because he had lied to the claimants in the past but because they were insisting on a Major Supply for Unit 3. Although, at the time of completion, I find that the claimants had intended to use Unit 3 as their digital printing suite, this had clearly changed by 7 January 2016. The reasons for this change of heart were not established at the trial due to the deficiencies in the claimants' own evidence; but I find that this was not due to any flooding issues affecting Unit 3. There is no evidence of any further flooding between 23 November 2015 and 7 January 2016 (or indeed until 8 June 2016: see Jacky's emails to Mr Smith of that date); and the claimants had shown no interest in or concern about the Report and Quotation from Drain Alert dated 30 November 2015. Nor was it due to Mr Scoltock's threat to disconnect the electricity supply to Unit 3 because at that early stage Jacky "was not too worried" and refused

"to rush into something" that Mr Teasdale was not concerned about (as stated in her email to Mr Smith of 14 December 2015).

(4) In relation to the drains, there was a failure to mitigate. The claimants had become aware of the continuing problems affecting the drains soon after completion. It is totally unrealistic to argue that a large business is not equipped to deal with an issue such as a blocked drain; still less realistic to suggest that it was not even obliged to investigate the drains, despite having been provided with the Drain Alert report shortly after completion of the agreements. I accept this point. I do not accept that the claimants had insufficient human or financial resources to address this issue. Glossop should have instructed Miss Brammall to follow up on the Drain Alert Quotation and Report of 30 November 2015 as a matter of urgency. The problem was clearly not going to go away, and it needed to be addressed. If (as I accept) Brian and Jacky were hard-pressed dealing with the integration of the two businesses and the problems of working on two sites, Miss Brammall was the ideal person to whom to delegate the task given her obvious competence and her previous involvement in addressing the drainage issues and dealing with Drain Alert. The problem should have been satisfactorily addressed before Miss Bramall was given notice of her redundancy on 29 February 2016, or else that notice should have been delayed by a few weeks. Mr Dagnall took me to clause 16.4 of the APA which gave Glossop the right to claw-back any statutory redundancy payments up to a certain level if Glossop had terminated or given notice to terminate the employment of any employee by reason of redundancy before 15 April 2016. The existence of this time limit was all the more reason why the drains issue needed to be addressed promptly, and before the last date for giving notice of redundancy to Miss Brammall on 15 April 2016. This would also have had the advantage of enabling Glossop to seek to retain half the costs of rectifying the drainage problems from the second instalment of the deferred purchase consideration due on 30 December 2016 pursuant to the adjustment mechanism in clause 6 of the APA.

(5) It cannot be said that the claimants took no steps with regard to the drains because they were waiting for the defendants to accept liability because they did not intimate any claim at all until much later. I accept this point.

(6) There is no sensible evidence that the claimants could not have afforded to investigate or to repair the drains. Glossop had cash at the bank and it has asserted in these proceedings that it has spent large sums of money dealing with matters consequential to the alleged misrepresentations, rather than actually dealing with the subject matter of the representations. It also had the possibility of seeking to withhold half of the monies from each of the two instalments of the deferred consideration payable to Contact on or before 30 December in each of the years 2016 and 2017. I accept this point.

(7) There is no evidence of specific administrative costs in dealing with the drains, and these would be minimal in any event. I accept this point. Miss Brammall could have dealt with this. Vicky was dealing with the installation of a Major Supply to Unit 4 and she could have dealt with any new supply required to Unit 3.

(8) The allegation that the claimants have sought to mitigate their losses and/or have suffered consequential losses by retaining the Old Mill is untrue. Despite the claimants' limited disclosure, the evidence shows that they had been trying unsuccessfully to sell the Old Mill but that they could not do so at the price they required. I accept this point.

Further, as a result of Mr Dagnall's late concession that even without the electricity supply and the drainage/flooding problems, Glossop would still have had to incur additional storage costs, I am satisfied that the claimants would not have disposed of the Old Mill until the issue of additional storage had been adequately addressed.

(9) The suggestion that business went downhill, and in particular that the contract with the customer Authentic was lost, as a result of problems with Unit 3 is misconceived. As previously indicated, I accept this point. The business had fallen into decline long before Unit 3 was actually intended to be used as the claimants' digital printing centre (as evidenced by the email dated 23 February 2016 cited above); and the problems affecting Unit 3 were not the real reason for any ongoing problems with Authentic.

(10) The suggestion that it would not be possible to mitigate the loss in relation to the electricity supply to Unit 3 because of a supposed ransom strip owned by Stockport MBC at the junction of the long leasehold titles to Units 3 and 4 does not stand up to any sensible analysis. It is a contrived argument, conceived and raised by the claimants' lawyers some years after the event. I accept this submission but only up to a point. This concern has not stopped the claimants from putting in a temporary minor supply to Unit 3 and then upgrading it to something slightly more permanent (as described in Mr Shufflebotham's two witness statements). The claimants' evidence in cross-examination was that they had given no thought to the position of Stockport MBC when putting in these new electrical supplies and that it had had no bearing on their thinking. However, now that the point has been identified and raised by the claimants' lawyers, I do not consider that it can be dismissed out of hand, particularly if the claimants were to contemplate the possibility of a future sale of Unit 3 independently from Unit 4, and also if they were considering upgrading to a Major power supply for Unit 3, with its attendant greater costs and risks.

(11) The suggestion that Mr Scoltock might have objected to the installation of a cable over land which he quite clearly did not own is, frankly, bizarre, and again has the hallmarks of having been thought up late in the day to disguise a painfully obvious need to mitigate. This point has been rather overtaken by the surprising evidence from Mrs Scoltock, during her oral evidence, that the Scoltocks had always been quite happy for Mr Smith to install a new electricity supply from Haigh Avenue straight down the drive leading to Unit 3. In view of the fact that Mrs Scoltock was tendered as a witness by the claimants, I find it surprising that she should have said that this had never been discussed with Jacky or Brian. It suggests to me that they were simply not interested in finding a solution to the electricity supply issue affecting Unit 3. Neither Jacky nor Brian could be asked about this because the point only emerged in the later evidence of Mrs Scoltock, even though it was they who had called her as a witness. Whatever the long-standing enmity between Mr Smith and the Scoltocks, this would not appear to have extended to the claimants in view of Mrs Scoltock's apparent willingness to give evidence for them and her presence throughout this trial.

However, it will be necessary for me to evaluate the extent to which my acceptance of Mr Lander's points, as matters of fact, feeds in to the claim for damages.

98. During his closing submissions, Mr Dagnall submitted that it would not be appropriate or consistent with my decision to defer receiving the expert accounting evidence for the court to go into individual heads of alleged loss at this stage unless they were matters of free-standing principle; and I do not propose to do so. I have already indicated that

I made it clear during closing speeches that I would regard any findings on matters touched upon in the expert accountancy evidence as provisional only and open to re-consideration in the light of that evidence (and any further expert accountancy evidence that may be appropriate in the light of my findings). It will be necessary for the parties' counsel to consider what further directions to the expert accountants may be appropriate in the light of this judgment. But I would urge counsel not to over-complicate matters, and to make the experts' (and thus the court's) task as easy as possible by avoiding such detailed directions (incorporating multiple alternative assumptions) as were contained in DJ Matharu's order of 1 May 2018.

99. In his closing, Mr Dagnall submitted that the key question is the actual value of the Contact business at the valuation date. Every problem from which the Contact business then suffered (whether or not it was latent within it) is said to be relevant to diminish that value unless the claimants had fully appreciated it and factored it into the purchase price. It did not matter in relation to any problem that: (1) Glossop had not understand what the problem was or whether or not Glossop's failure to understand it was Glossop's own fault; (2) the problem had no connection with the relevant representation; (3) the loss was not foreseeable; or (4) the loss would have been suffered even had the relevant representation been true. Mr Dagnall accepted that if Glossop had failed to mitigate (i.e. it had failed objectively to act reasonably in Glossop's own situation as a victim of fraud), then the loss was to be considered that which it would have been (on the above bases) had Glossop taking the steps of acting reasonably to mitigate its loss; but the burden of proof was on the defendants not only to identify those steps but also to prove that the loss would then have been less and also how much less it would have been had those steps been taken. It was said to be essential to consider the basis and assumptions on which the claimants went into the transaction as that was the basis which had informed the price that they had agreed to pay. If those bases or assumptions were wrong, then the claimants would have overpaid; but even if that were the result of their own carelessness or over-optimism, they would still have suffered damage equivalent to the amount of that faulty overpayment. Essentially, it is said that in a case of fraudulent misrepresentation, the claimants can recover the cost of their own bad bargain.

100. Mr Dagnall submitted that the claimants had entered into and completed the three agreements on 23 November 2015 with the intention, and having negotiated and agreed the purchase price on the bases, that:

(1) They would have moved the entire Glossop operation into the three Units so as to combine it with the Contact business by no later than April/May 2016 (if not earlier).

(2) There was at least a 300amps Major Supply to Unit 3 and that would be sufficient for their digital machines.

(3) The flooding problems affecting Unit 3 had been resolved without the need for any further investigations or steps by them, subject to Mr Teasdale doing what he had promised to do to clean out the drains under Unit 2.

(4) The claimants intended to have their digital printing suite and all their digital machines in Unit 3 so that they would not need to keep any of them at the Old Mill.

(5) The claimants believed that they could operate and store everything required for the combined business at Stockport and without any need for external storage.

(6) The Old Mill would be vacant so that it could be marketed and sold.

101. Various consequences were said to flow from this:

(1) The claimants did not contract on the basis that they would need to incur substantial external storage costs or provide an external storage facility. It is now common ground that even if they had mitigated their loss (so that there were no electricity or flooding problems) they would have needed to do that. Therefore, it is said that they can recover the relevant costs.

(2) The facts that the claimants mistakenly thought that (i) they were buying Unit 3 with a 300amps supply when it actually had less and (ii) a 300amps supply would be sufficient for their purposes when (as I find) it was not do not assist the defendants because the claimants bought and paid the price on that basis. If (as it turns out) they were wrong and had made a bad bargain, they can still recover the entire overpayment.

(3) The fact that (as I find) the claimants developed a plan in January 2016 to put all their digital machines into Unit 4 is essentially irrelevant. Its implementation would not have removed their "two sites" problem.

(4) Even if (as I find) the claimants had failed fully to appreciate the problems with Contact and its losses, and the difficulties of integrating the two businesses and of being able to realise the Old Mill, and were over-optimistic as to all of those matters, and also as to the potential profits even if there had been no problems, the claimants can still sue for the resultant over-payment of the acquisition price (as difference in value) and/or the resultant costs (as consequential losses). It does not matter that these are not connected with the misrepresentations or that they were the result of the claimants' own over-optimism or lack of subsequent trading success.

(5) Likewise, recovery also extends to the unforeseen equal pay claim by Miss Brammall and the cost of relocating the fence, both of which related to matters latent within the Contact business. These had nothing to do with the electricity supply and the flooding misrepresentations; rather they are said to flow from the transaction and so form part of the damages claim. Later, Mr Dagnall contended that the same principle also extended to the costs of the reference to the Independent Barrister under clause 6.4 of the APA.

102. In my judgment, there is considerable force in these submissions. But they must be qualified by a number of countervailing considerations:

(1) As I have already indicated, I cannot see that the existence of the fencing undertaking has resulted in any recoverable loss or damage to the claimants.

(2) The claimants knew that they were buying into a loss-making business which would require turning round and that this would involve staff having to be made redundant. This was presumably factored into the purchase price. In my judgment, the risks of any loss of business that might be suffered by the claimants as a result of the need to address

those issues should similarly fall to be treated as having been appreciated by the claimants and factored into the purchase price.

(3) The claimants knew that Unit 4 did not have a Major power supply and that if one were to be installed, they would have to bear the costs of this.

(4) The defendants have established that the claimants failed to act reasonably to mitigate their losses by failing to address the flooding problems affecting Unit 3 upon receipt of the Drain Alert report and quotation dated 30 November 2015, and whilst Mrs Brammall remained in their employment. Damages should fall to be calculated on the basis this should have been done in sufficient time to have avoided the next documented flooding incident in early June 2016. It follows that Unit 3 could have been used for storage from around that time.

(5) If and to the extent that the claimants wished to secure a Major power supply to Unit 3 (in addition to the Major supply they proceeded to secure for Unit 4), then, subject to the resolution of any title issues with Stockport MBC and/or the Scoltock pension trustees, the proper discharge of the claimants' duty to mitigate required the claimants to have secured such a Major power supply by no later than the end of October 2016; and damages should fall to be assessed on the basis that this had been achieved. Since the resolution of the title issues essentially depends upon the attitude and approach that would have been taken by third parties, it may be appropriate for the court to receive further submissions on the question (not ventilated before me) whether the title issues should properly fall to be addressed by reference to the balance of probabilities (with the burden being on the defendants as the parties alleging a failure to mitigate) or on a "loss of chance" basis.

(6) In the light of the foregoing, it is difficult to see how the claimants' decision to retain the Old Mill after June, or alternatively October, 2016 can properly be laid at the door of the defendants. In any event, despite the failure finally to resolve the flooding and electrical power supply issues affecting Unit 3, the claimants did in fact put the Old Mill on the market in January 2017 but it failed to find a buyer at a price acceptable to the claimants. There is no reason why the position should have been any different had the Old Mill been placed on the market a few months earlier (as the claimants had originally intended).

103. The decision of the House of Lords in the *Smith New Court Securities* case establishes that a defendant who induces the claimant to enter into a transaction as the result of a fraudulent misrepresentation is bound to make full reparation for all the damage directly flowing from that transaction. However, those damages must be assessed on the basis that the innocent claimant has acted reasonably to mitigate its loss upon discovering the fraud. Nor should a claimant be entitled to recover in respect of potential losses which it had fully appreciated and factored into the purchase price. I have already pointed out that if the electricity supply representation had not been made, the claimants would have been prompted to investigate the electricity supply to Unit 3, potentially leading to the discovery of the inadequacy of the existing power supply; and whilst it was impossible to say exactly what would have happened if the true state of affairs had been revealed, it was improbable in the extreme that matters would have proceeded in the same way as they did in fact proceed. This justifies an approach to the assessment of damages that compensates the claimants for the fact that Unit 3 suffered from an inadequate power supply; but it should not operate to insulate the claimants from

potential commercial risks which they had appreciated and had factored into their calculation of the purchase price because to do so would over-compensate the claimants for the consequences of the defendants' fraud.

104. I do not consider that I can or should, go further than this in addressing the issue of loss and damage.

J: Summary

105. For the reasons set out above, I conclude that:

(1) The claim in fraudulent misrepresentation succeeds in relation to the electricity supply representation. For what it is worth, Contact was also in breach of the warranties contained in clause 8, and paragraphs 9 and 11.2 of Schedule 7, of and to the APA (but not of the warranty contained in paragraph 7.3 of Schedule 7).

(2) The claims in fraud and in negligent misrepresentation fail in relation to the electricity power representation.

(3) The claim in fraudulent misrepresentation succeeds in relation to the flooding representation.

(4) The claims in fraud and in negligent misrepresentation fail in relation to the fencing representation. There was no breach of the warranty contained in clause 8 and paragraph 11.3 of Schedule 7 of and to the APA. Even if there was, I cannot see that this has resulted in any recoverable loss or damage to Glossop.

(5) Glossop is entitled to a contractual indemnity in respect of the settlement sum (and associated legal costs) paid to Miss Brammall in relation to her equal pay claim.

(6) The relevant valuation date is 11 December 2015.

106. Guidance as to the assessment of loss and damage in contained within Section I of this judgment and, in particular, paragraphs 102 and 103 thereof.

107. I must conclude by expressing my thanks to Mr Dagnall and to Mr Lander for shoe-horning this case into the time allotted to it and my indebtedness for their helpful submissions and realistic concessions.

Addendum

108. When submitting his proposed corrections to my draft judgment by email on the afternoon of 9 September 2019, Mr Dagnall raised the claimants' concern that one of their contractual claims had not been addressed in the draft judgment. Mr Dagnall pointed out that RJP had also advanced claims in contract under and/or for breach of condition 9.1 of the Standard Commercial Property Conditions, as incorporated within the LSA (in relation to Unit 3 and the electricity supply and the flooding representations) and the PSA (in relation to Unit 5 and the fencing representation) on the basis of misleading and inaccurate statements. He referred me to paragraphs 48B and 112 and 113 of the claimants' written closing submissions. He complained that these did not appear to have been addressed within the draft judgment. The claimants submitted that these breaches were established (at least with regards to the LSA) as a

result of the findings of fact made in the draft judgment, although Mr Dagnall recognised that the effect of my findings in the draft judgment might be destructive of the PSA claim. Mr Dagnall submitted that in closing, Mr Lander had appeared to accept that the LSA claims were made out in contract (but only to the extent of certain remedial costs, as appeared in Mr King's valuation report). Mr Dagnall submitted that the draft judgment should be amended to include such a determination of liability in relation to these claims. This Addendum addresses Mr Dagnall's complaint.

109. Mr Dagnall is correct that the draft judgment had not addressed these matters. That is because they had seemed to me to add nothing of substance to the claimants' other complaints, particularly in the light of Mr Dagnall's acknowledgment that there could be no double recovery in respect of the same loss. Reliance upon them had seemed to me to be another example of the claimants' propensity to seek to rely upon every conceivable cause of action, whether or not it added anything of substance to their damages claim. However, since Mr Dagnall has raised the issue, it is appropriate for me to deal with it, lest this case go further.

110. Clause 16.4 of the LSA varies condition 9.1.1 of the Standard Conditions to read:

> "If any plan or statement in the contract, or in written replies which the seller's conveyancer has given to any written enquiries raised by the buyer's conveyancer before the date of this contract is or was misleading or inaccurate due to an error or omission the remedies available are as follows."

Clause 17.5 of the PSA is in similar terms. Condition 9.1.2 of the Standard Property Conditions (which are incorporated within both the LSA and the PSA) confers a right to damages upon the buyer

> "… when there is a material difference between the description or value of the property as represented and as it is …"

111. Since, by virtue of Brabners' email of 18 November 2015, the November 2015 email is to be treated as if it had been sent by Brabners, as the seller's conveyancer, its contents fall within the scope of clause 16.4 of the LSA (and clause 17.5 of the PSA). In the light of my findings, there was a breach of clause 16.4 of the LSA in relation to the electricity supply representation, and also the flooding representation, but not the electricity power representation. My provisional view is that there was a material difference between the *description* of Unit 3 as represented and as it was. Whether there was also, or alternatively, a material difference in the *value* of Unit 3 seems to me to be a matter for the further hearing directed to the issue of loss and damage.

112. In the light of my findings, there was a breach of clause 17.5 of the PSA in relation to the representation in the November 2015 email that there was a *right* to re-position the fence rather than an *obligation* to do so but not in relation to the further alleged representation that the costs of repositioning the fence could be recovered from the Scoltock pension trustees as damages for trespass. However, it does not seem to me that there was any material difference between the description or value of Unit 5 as represented and as it was and therefore that breach does not sound in damages.