Neutral Citation Number: [2021] EWHC 2452 (Ch)

Case No: BL-2020-000765

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

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London, EC4A 1NL

Date: 6 September 2021

Before:

HIS HONOUR JUDGE KEYSER QC
sitting as a Judge of the High Court

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Between:

MARANELLO ROSSO LIMITED — **Claimant**
- and -
(1) LOHOMIJ BV
(2) BONHAMS 1793 LIMITED
(3) BONHAMS & BUTTERFIELDS AUCTIONEERS CORPORATION
(4) EVERT LOUWMAN
(5) ROBERT BROOKS
(6) JAMES KNIGHT
(7) ANTHONY MACLEAN — **Defendants**

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Justin Fenwick QC, Tim Chelmick and **Usman Roohani** (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Richard Eschwege (instructed by **Morrison & Foerster (UK) LLP**) for the **First and Fourth Defendants**
Daniel Toledano QC and **Oliver Butler** (instructed by **RPC**) for the **Second, Third and Sixth Defendants**
Matthew Collings QC (instructed by **Kastle Solicitors**) for the **Fifth Defendant**
Robert Weekes (instructed by **Foot Anstey LLP**) for the **Seventh Defendant**

Hearing dates: 18, 19, 20 and 21 May 2021
Judgment circulated in draft: 23 August 2021

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Approved Judgment

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

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on 6 September 2021.

JUDGE KEYSER QC:

1. This is my judgment upon applications by the various defendants for orders striking out the claims against them pursuant to CPR r. 3.4 or for summary judgment in their favour pursuant to CPR r. 24.2. The applications were heard remotely over four days by Microsoft Teams.

2. I am grateful to counsel and solicitors for the respective parties for the manner of their preparation and conduct of the applications. There was a fair amount of overlap in the submissions, at least those on behalf of the defendants, and in what follows I shall from time to time attribute certain submissions to particular counsel, although others may have made the same points; for which, my apologies.

3. This judgment will be structured as follows:

   A. A general survey of the parties and the claims: paragraphs 4 to 10;

   B. A short summary of the applications: paragraphs 11 to 15;

   C. A summary of the law concerning CPR r. 3.4 and r. 24.2: paragraphs 16 to 25;

   D. A factual narrative: paragraphs 26 to 76;

   E. A brief outline of the allegations made in the Particulars of Claim in their proposed amended form: paragraphs 77 to 83;

   F. A discussion of the Settlement Agreement between the parties: paragraphs 84 to 124;

   G. A discussion of causes of action pre-dating the Settlement Agreement: paragraphs 125 to 170;

   H. A discussion of causes of action arising after the Settlement Agreement: paragraphs 171 to 356. This comprises:

      - Summary of pleadings: paragraphs 174 to 179;

      - Statement of facts: paragraphs 180 to 301;

      - Discussion: paragraphs 302 to 356.

   I. A summary of the conclusions: paragraphs 357 to 361.

A. General Survey of the Claims and the Parties

4. The claimant, Maranello Rosso Limited ("MRL"), is a company registered in Guernsey. It was incorporated in 2013 by Mr Graham Sullivan, who is one of its ultimate beneficial owners, for the specific purpose of purchasing the company that owned the collection of classic cars, comprising 33 Ferraris and 38 Abarths, in the Violati Maranello Rosso Museum. I shall refer to the collection as "the Collection" and to the

cars contained in it as "the Cars". MRL's intention, once it had acquired the Collection, was to sell the Cars at auction.

5. The first defendant, Lohomij BV ("Lohomij") is a company based in The Netherlands. It is part of Louwman Group ("LG"), which carries on business in the automobile industry, and is controlled directly or indirectly by the fourth defendant, Mr Evert Louwman. The Louwman family has a museum of classic cars in The Hague. By a loan agreement dated 29 May 2014 ("the Facility Agreement") Lohomij lent €90m to MRL ("the Loan") to enable it to acquire the Collection, on terms that required MRL to sell the Cars through the second defendant.

6. The second defendant, Bonhams 1793 Limited ("Bonhams"), is a well-known auction house in London. The third defendant, Bonhams & Butterfields Auctioneers Corporation ("B&B"), is a US affiliate of Bonhams. I shall refer to Bonhams and B&B together as "the Bonhams Defendants". The Bonhams Defendants acted in the sale of the Cars by MRL pursuant to an agreement dated 30 June 2014 ("the Commercial Agreement").

7. The fifth defendant, Mr Robert Brooks, was a former chairman of Bonhams. Sadly, he died on 23 August 2021, after the hearing but before this judgment was handed down. By an order dated 3 September 2021 I have made provision for his estate to be represented for the further purposes of these proceedings.

8. The sixth defendant, Mr James Knight, was at the material times a specialist in classic cars at Bonhams.

9. The seventh defendant, Mr Anthony MacLean, was a non-executive director of Bonhams from 11 April 2002 until 8 June 2016; during that period he did not have responsibility for the day-to-day management of the company and did not even attend board meetings, but he assisted it in various projects, including the sale of the Cars. From 2014 he also provided assistance to MRL as a consultant in respect of efforts to sell some of the Cars. After July 2015, which is a significant date in this case, his only involvement in respect of the Cars was in acting for and on behalf of MRL. Mr MacLean has never been a shareholder in Bonhams or any of its associated companies or in any of the companies within the Louwman Group.

10. The general nature and basis of MRL's claims are conveniently set out in the Executive Summary at the beginning of the Particulars of Claim:

> "1. This is a claim for, amongst other things, unlawful means conspiracy and deliberate breaches of fiduciary duty against the Defendants relating to the sale of the world-renowned Violati Maranello Rosso Museum collection of 71 classic cars including 33 important Ferrari road and racing cars worth over £150 million. This involved some of the most well-known names in the industry. In summary, the Defendants (and in particular Mr Robert Brooks of Bonhams and Mr Evert Louwman of Lohomij) acted dishonestly and conspired to force a sale of a selection of the cars contained within the collection, including the $60 million plus 250 GTO, in the USA, thereby breaking up the collection, when the best price would have been achieved by

selling all of the cars together in England as had originally been envisaged and agreed. They did so solely to advance the reputation and international profile of Bonhams in advance of a proposed sale of the business to a private equity investor. They dishonestly put their own financial interests above those of their client in breach of the fiduciary duties owed by Bonhams, B&B and their servants and agents.

2. Ten of the cars, including the most valuable, were ultimately sold without reserve at an auction in the USA, which was illegally conducted by Mr Brooks and B&B. This achieved a far lower price than if they had been sold as part of the Collection in England but nevertheless achieved the purposes of Bonhams and Lohomij (or at least Mr Brooks and Mr Louwman) as the sale generated significant publicity for Bonhams and still included a world record price for one car, the 250 GTO. This sale substantially increased their market share in the USA.

3. After the auction Bonhams breached the Commercial Agreement by refusing to sell 43 of the remaining 60 cars, worth in excess of £85 million, in September 2014 at the Goodwood Revival meeting.

4. The Claimant, Bonhams and Lohomij then entered into a settlement agreement [the "Settlement Agreement" between MRL, Bonhams, B&B and Lohomij dated 31 July 2015] to compensate the Claimant for losses that it suffered on the assumption that the auction was carried out negligently. The Claimant now has knowledge leading them reasonably to conclude and plead that Bonhams, Lohomij and their respective principals were acting dishonestly. Such claim was neither compromised nor barred by the Settlement Agreement.

5. The unlawful means conspiracy continued after the auction and after the date of the Settlement Agreement as Lohomij deliberately interfered in and unreasonably refused to consent to sales of various cars (and so also acted in breach of contract). It did so by relying on valuations from Mr James Knight which cannot have been honestly given. The purpose of this appears to have been to ruin the Claimant along with one of its principals, Mr Graham Sullivan, and to force the sale of certain cars to associates of Mr Louwman at an undervalue. It may also have been Lohomij's intention to increase the ultimate sums due and owing to Lohomij under the terms of the Amended Facility Agreement [an agreement between Lohomij and MRL dated 31 July 2015, which amended the Facility Agreement].

6. As a result, it is now clear that the Defendants were acting pursuant to an unlawful means conspiracy and that Bonhams (through Mr Brooks, Mr Anthony Maclean and Mr Knight) were

> acting in deliberate breach of their fiduciary duties owed to the Claimant from the start."

B. The Applications

11. The claim was issued on 20 May 2020. Particulars of Claim, with a statement of truth signed by Mr Sullivan, were served on 17 September 2020.

12. Defences and Counterclaims have been filed on behalf of all defendants, except Mr Brooks, who made the first of the present applications. The Defence and Counterclaim of Lohomij and Mr Louwman was served on 19 November 2020; the statements of truth were signed by a company officer for Lohomij and by Mr Louwman on his own behalf. The Defence and Counterclaim of Bonhams, B&B and Mr Knight was served on 31 December 2020; the statements of truth were signed by company officers for the two companies and by Mr Knight on his own behalf. The Defence and Counterclaim of Mr MacLean was served on 12 February 2021; he signed the statement of truth. In response to each of these respective documents MRL has served a Reply and Defence to Counterclaim, with a statement of truth signed by Mr Sullivan.

13. Mr Brooks filed his application notice on 22 October 2020. Lohomij and Mr Louwman filed their application notice on 21 December 2020. Bonhams, B&B and Mr Knight filed their application notice on 29 January 2021. Mr MacLean filed his application notice on 19 February 2021. These applications are substantially similar in seeking orders that the claims against them be struck out or that summary judgment be entered in their favour. (As I shall mention, the focus shifts between r. 3.4 and r. 24.2, depending on which claim is under consideration.) Mr Louwman's application does not seek any order in respect of one particular claim of conversion against him; while he disputes that claim, he accepts that it is not suitable for summary determination at this stage.

14. The application notices do not in terms seek summary judgment on the respective counterclaims. However, to the extent that the applications were entirely successful in respect of one category of claim, the relief sought in the counterclaims, namely an indemnity in respect of the costs incurred by reason of the making of claims in that category, would follow.

15. In addition to a large number of documents, extensive witness evidence was adduced on the applications:

- For Mr Brooks, two statements from his solicitor, Mr Craig Campbell Shuttleworth, the principal of Kastle Solicitors;
- For Lohomij and Mr Louwman, two statements from Ms Marlène Volf, the Chief Legal & Compliance Officer of LG;
- For Bonhams, B&B and Mr Knight, two statements from Ms Davina Given, a partner in Reynolds Porter Chamberlain LLP;
- For Mr MacLean, two statements of his own;

- For MRL, a statement from its solicitor, Ms Amanda Gray, a partner in Mischon de Reya LLP; two statements of Mr Sullivan; a statement of Mr Roy Hilder, who with Mr Sullivan is one of the ultimate beneficial owners of MRL; two statements of Mr James Benjamin ("Ben") Walmsley, the solicitor who as a partner in Spring Law acted for MRL in the transactions giving rise to these proceedings; a statement from Mr Mark Williams, a businessman and car enthusiast and a friend of Mr Sullivan; a statement of Mr Bernhard Mayr, a businessman and classic car collector based in Bavaria; a statement of Mr Robin Clayton, a director and financier.
- Additional evidence concerning matters of Californian law was provided for the Bonhams Defendants and Mr Knight in a statement from Mr Michael Louis Novicoff, and for MRL by Mr Thaddeus J. Stauber. Both Mr Novicoff and Mr Stauber are members of the California bar.

C. CPR Part 24 and Part 3: the Law

Summary judgment: Part 24

16. CPR rule 24.2 provides, so far as relevant to these applications:

> "The court may give summary judgment against a claimant … on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; …
>
> and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

17. The Practice Direction accompanying Part 24 contains the following provisions:

> "4. Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order, as described below.
>
> 5.1. The orders the court may make on an application under Part 24 include:
>
> (1) judgment on the claim,
>
> (2) the striking out or dismissal of the claim,
>
> (3) the dismissal of the application,
>
> (4) a conditional order.

> 5.2. A conditional order is an order which requires a party:
>
> (1) to pay a sum of money into court, or
>
> (2) to take a specified step in relation to his claim or defence, as the case may be, and provides that that party's claim will be dismissed or his statement of case will be struck out if he does not comply."

18. Many cases have explained the correct approach to applications for summary judgment, including the following: *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [8]–[10] (Potter LJ); *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] (Lewison J), approved by the Court of Appeal in *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37, [2017] 4 WLR 163; *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at [41]-[42] (Asplin LJ, dealing with the similar test for permitting amendment of a statement of case); *Skatteforvaltningen v Solo Capital Partners LLP* [2020] EWHC 1624 (Comm) at [3]-[4] (Andrew Baker J); *Foglia v The Family Officer Ltd* [2021] EWHC 650 (Comm) at [11]-[18] (Cockerill J).

19. Without seeking to offer any alternative statement to Lewison J's classic summary in the *EasyAir* case, I think that the main points for present purposes are as follows. Summary judgment will be given against a claimant on a claim or issue only if the court is satisfied that the claim or issue has no real, as opposed to fanciful, prospect of success; a claim or issue that is merely arguable but carries no degree of conviction will not have a real prospect of success. The court will not conduct a mini-trial and, in circumstances such as the present, will be mindful that full disclosure has not yet taken place and that there might be more evidence to come. Accordingly, where there are disputed questions of fact, it will not generally attempt to determine where the probabilities lie. However, and importantly, the court ought to carry out a critical examination of the available material and is not bound to accept the mere say-so of anybody; where it is clear that a factual case is self-contradictory or inherently incredible or where it is contradicted by the contemporaneous documents, the court, after careful consideration of the evidence that is currently before it and having regard to the nature of such further evidence as might reasonably be expected to be available at trial, is entitled to reject that case even on a summary basis. The court will not be dissuaded from giving judgment by mere Micawberism. Where the claim turns on a point of law that can properly be determined on the available evidence, the court is entitled to go ahead and determine it; though it should be very cautious before making findings of dishonesty on a summary basis. The complexity of litigation is not itself a reason for refusing summary judgment: the circumstances may be such that determination of the case is impossible without a trial; on the other hand, it might be possible to analyse the case sufficiently at an early stage and thereby avoid the unnecessary time and expense of the continuation of litigation until trial. In all cases, r. 24.2(b) falls to be considered in principle.

20. In *Kawasaki Kisen Kaisha Limited v James Kemball Limited* [2021] EWCA Civ 33, at [18], Popplewell LJ, with whom Henderson and David Richards LJJ agreed, explained what is meant by saying that a case has a "real prospect of success":

> "(1) It is not enough that the claim is merely arguable; it must carry some degree of conviction: *ED & F Man Liquid Products*

> *Ltd v Patel* [2003] EWCA Civ 472 at paragraph 8; *Global Asset Capital Inc. v Aabar Block SARL* [2017] 4 WLR 164 at paragraph 27(1).
>
> (2) The pleading must be coherent and properly particularised: *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204 at paragraph 42.
>
> (3) The pleading must be supported by evidence which establishes a factual basis which meets the merits test; it is not sufficient simply to plead allegations which if true would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct: *Elite Property* at paragraph 41."

Strike-out: Part 3

21. CPR rule 3.4 provides in part:

> "(1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
>
> (2) The court may strike out a statement of case if it appears to the court –
>
> (a) that the statement of case discloses no reasonable grounds for bringing … the claim; …"

22. CPR Part 3 is supplemented by Practice Direction 3A, which contains the following provisions:

> "1.1 Rule 1.4(2)(c) includes as an example of active case management the summary disposal of issues which do not need full investigation at trial.
>
> 1.2 The rules give the court two distinct powers which may be used to achieve this. Rule 3.4 enables the court to strike out the whole or part of a statement of case which discloses no reasonable grounds for bringing or defending a claim (rule 3.4(2)(a)), or which is an abuse of the process of the court or otherwise likely to obstruct the just disposal of the proceedings (rule 3.4(2)(b)). Rule 24.2 enables the court to give summary judgment against a claimant or defendant where that party has no real prospect of succeeding on his claim or defence. Both those powers may be exercised on an application by a party or on the court's own initiative.
>
> …
>
> 1.4 The following are examples of cases where the court may conclude that particulars of claim (whether contained in a claim form or filed separately) fall within rule 3.4(2)(a):

> (1) those which set out no facts indicating what the claim is about, for example 'Money owed £5000',
>
> (2) those which are incoherent and make no sense,
>
> (3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant.
>
> …
>
> 1.7 A party may believe he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate.
>
> 1.8 The examples set out above are intended only as illustrations."

23. Although little if anything turns on the point for present purposes, I am proceeding on the basis that, even if a statement of case contains all the factual averments necessary to establish a claim, yet it may be struck out under r. 3.4(2)(a). This is shown by paragraph 1.7 of Practice Direction 3A and has been confirmed by the Court of Appeal in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326, where Coulson LJ said at [21]:

> "In a case of this kind, the rules [that is, r. 24.2 and r. 3.4(2)(a)] should be taken together, and a common test applied. If a defendant is entitled to summary judgment because the claimant has no realistic prospect of success, then the statement of claim discloses no reasonable grounds for bringing the claim and should be struck out".

24. If dicta in *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7 are interpreted to suggest that r.3.4(2)(a) cannot be used in such a case, I would respectfully doubt them and prefer the approach in the *Begum* case, which is consistent with the Practice Direction. In the *Allsop* case, Marcus Smith J, with whose judgment Lewison and Arnold LJJ agreed, said at [7] (I show the footnotes in parentheses):

> "In contrast with the applications under CPR 3.4(2)(b), the applications under CPR 3.4(2)(a) and CPR 24.2 are concerned with the merits of the claim, specifically whether the claim meets the (low) threshold of what I shall call 'reasonable arguability'. (I appreciate that CPR 3.4(2)(a) refers to a statement of case disclosing 'no reasonable grounds for bringing … the claim', whilst CPR 24.2 refers to the claimant having 'no real prospect of succeeding on the claim or issue'. I adopt the terms 'reasonable arguability' or 'reasonably arguable' as a convenient shorthand to refer to both tests.) Although it can be said that

> there is no material difference between the test applied by these two provisions, there is an important distinction between CPR 3.4(2)(a) and CPR 24.2, in that an application under CPR 24.2 can be supported by evidence, whereas an application under CPR 3.4(2)(a) should not involve evidence regarding the claims advanced in the statement of case. (As to the distinction, see *Libyan Investment Authority v King* [2020] EWCA Civ 1690 at [96], *per* Arnold LJ.)"

The dictum of Arnold LJ mentioned by Marcus Smith J was as follows:

> "The judge … noted that, under CPR rule 3.4(2)(a), 'a court may only strike out a statement of case if satisfied that it is bound to fail'. At [42]-[47] he discussed the tests applicable under CPR rule 24.2: did the claim have a real prospect of success, and if not was there some other compelling reason for trial? The judge was correct to distinguish between the two tests in that way. As is well established, under rule 3.4(2)(a) the facts pleaded must be assumed to be true and (unlike under r.3.4(2)(b) and (c)) evidence is inadmissible, whereas under rule 24.2 no such assumption is required and evidence is admissible to show that the pleaded allegations are fanciful. Furthermore, as can be seen from Practice Direction 3A paragraph 1.7 (quoted by Nugee LJ in paragraph 57(5) above), 'bound to fail' in rule 3.4(2)(a) means bound to fail 'because of a point of law' even if it has a real prospect of success on the facts."

With respect, the reasoning in that dictum does not seem (to me) entirely convincing. The test under r. 3.4(2)(a) is not "bound to fail" but "no reasonable grounds". The words "bound to fail" come from paragraph 1.7 of PD3A; and, although they are there used with reference to a point of law, they come after a reference to an application grounded on the facts: "A party may believe he can show without a trial that an opponent's case has no real prospect of success on the facts, **or** that the case is bound to succeed or fail, as the case may be, because of a point of law" (my emphasis). This provides alternatives: (i) that the opponent's case has no real prospects on the facts; (ii) that the opponent's case is bound to fail on a point of law. This distinction was noted by Nugee LJ in his judgment in the *Libyan Investment Authority* case at [57(4)]:

> "The question was raised in argument whether it was appropriate for the Judge to use the power in CPR Part 3 to strike out the claims rather than the power in CPR Part 24 to grant summary judgment on them, given that the basis for his October 2018 Judgment was that the claims then pleaded had no reasonable prospect of success. I do not myself see that anything significant turns on this …, but for what it is worth I think he was probably entitled to do that. As Mr Green pointed out, the wording of CPR r 3.4 which confers the power to strike out is not in the same terms as the former RSC Ord 18 r 19. CPR r 3.4(2)(a) provides that the Court may strike out a statement of case if it 'discloses no reasonable grounds for bringing or defending the claim'; RSC Ord 18 r 19(1)(a) by contrast provided that the Court might order

> to be struck out any pleading on the ground that it 'discloses no reasonable cause of action or defence, as the case may be' and, significantly, Ord 18 r 19(2) provided that on an application under paragraph (1)(a) no evidence should be admissible. That illustrates that the practice on such an application was to consider, without evidence, whether what was pleaded, assuming it could be proved, disclosed a cause of action. It is not obvious, at any rate to me, that the same is true under the CPR where the words 'no reasonable grounds for bringing the claim' are rather looser than the former Ord 18 r 19(1)(a), and the former Ord 18 r 19(2) has not been reproduced. Instead Practice Direction 3A, which supplements CPR r 3.4, provides at paragraph 5.2 that while many applications under r 3.4(2) can be made without evidence, it is for the applicant to consider whether facts need to be proved and evidence should be filed and served; and at paragraph 1.7 that:
>
> > 'A party may believe that he can show without a trial that an opponent's case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case may be, because of a point of law (including the construction of a document). In such a case the party concerned may make an application under rule 3.4 or Part 24 (or both) as he thinks appropriate.'
>
> Since, as I have said, nothing in my view turns on it, I do not think we have to reach any concluded view on the point, but this certainly suggests that there is nothing wrong in the practice of bringing an application under both Part 3 and Part 24 on the basis that the claim is factually hopeless (something that Mr Green suggested happens every day up and down the country), and that HHJ Barker was entitled to strike out the RAPOC under the powers in Part 3 of the CPR rather than grant summary judgment under Part 24."

25. The important point is that, if a defendant seeks to defeat a claim on the grounds that the matters pleaded by the claimant are not sufficient on their face to demonstrate a case that could succeed, it is neither necessary nor appropriate to rely on evidence in support of that ground: the application should be advanced on the basis of analysis of the text of the statement of case itself. On the current state of the Rules and the authorities, however, a party who wishes to contend that the opponent's case has no real prospect of success on the facts may, in my view, apply under either r. 3.4(2)(a) or r. 24.2—common practice, indeed, is to do so under both rules—and may adduce appropriate evidence in support of the contention whichever rule is relied on. From time to time in this judgment, I shall adopt Marcus Smith J's useful terminology of "reasonable arguability" to cover the test under either rule.

D. Factual Narrative

26. Counsel's submissions analysed the facts in considerable detail and it is necessary that I should do so also. Many of these facts appear from, or even consist in, the documents or agreements, from which I shall quote extensively. In this section, however, the facts relating to the claims referred to in paragraph 5 of the Particulars of Claim will be mentioned only in the barest outline. They will be set out at length in Section H below.

27. Formerly, the Collection was owned by a San Marino company called Stelabar S.p.A. ("Stelabar"). Mr Sullivan had been in discussion with the owners of Stelabar since 2012, and he and two other individuals had been granted an exclusive option to purchase the entire issued share capital in Stelabar. In March 2013 Mr Sullivan caused MRL to be incorporated for the purpose of acquiring the Collection. By 2014 the option to purchase the share capital in Stelabar had been transferred to MRL. There were now two questions for MRL: first, how to finance the acquisition of Stelabar; second, how most advantageously to sell the Collection once it had been acquired.

28. On 13 February 2014 Mr Sullivan and Mr Hilder had a meeting with Mr Brooks and Mr MacLean in order to discuss potential sales strategies. It is MRL's case that Mr Brooks and Mr MacLean had made overtures to Stelabar in 2013 in an attempt to procure the sale of the Collection to Bonhams and now expressed the firm view that best price for the Collection would be obtained if it were sold as one and in or around London—probably at the Goodwood Festival of Speed, but possibly at another venue. On 14 February 2014 Mr Brooks wrote to Mr Sullivan, setting out an "outline proposal" for the sale of the Collection. The letter read in part:

> "We will offer the entire collection by auction, protected by agreed reserves, at this year's Goodwood Festival of Speed on June 27th. Bonhams are as you know founder sponsors of Goodwood Motor Sport and enjoy a unique and exclusive relationship with the Goodwood Estate. This is the prime exclusive venue for the sale of motor cars anywhere in the world.
>
> …
>
> A massive, worldwide and comprehensive advertising campaign will literally blitz the specialist media over a short, focused and intensive campaign thereafter, conducted in the lead-up to Goodwood.
>
> …
>
> I will personally conduct the auction.
>
> …
>
> I am incredibly excited by this exceptional opportunity—undoubtedly the most magnificent sale of its kind ever held."

29. MRL's case is that in April 2014 Mr Louwman made efforts to purchase the Collection but was unable to do so because of MRL's exclusive option. This is said to be relevant

to the motivation of various defendants in what followed and to the allegation that there was a conspiracy among them.

30. On 9 April 2014 MRL entered into a Sale and Purchase Agreement ("the SPA") for the purchase of the entire issued share capital in Stelabar. MRL paid a non-refundable deposit of approximately €2m, and the consideration of approximately €78m was due by 29 May 2014. Finance for the purchase was not yet in place.

31. MRL had been communicating not only with Bonhams but with another auction house, RM Auctions ("RM"), regarding the intended sale of the Collection. MRL says that Bonhams was its preferred auction house for the sale of the Collection, because it had been advised, not least by Bonhams, that the best manner of selling the Cars was as a single sale of the Collection in the UK, and because Bonhams was the pre-eminent car auction house in the UK; RM was based in the USA. However, MRL's case is that its negotiations with Bonhams stalled because, unlike RM, Bonhams was unwilling to purchase the Collection from MRL and sell as owner, dividing the profit. By 19 May 2014 MRL had reached an agreement in principle with RM for a back-to-back transaction, whereby RM would buy all but one of the Cars from MRL for £74m on 29 May 2014 (thereby enabling MRL to pay the price due under the SPA) and would then auction the Cars; RM would retain £80m of the hammer price proceeds plus an agreed percentage fee, and the balance of the sale proceeds would be paid to MRL; all the cars in the Collection valued at over £1m were to have an agreed reserve price.

32. There followed further discussions between MRL and Bonhams. MRL's case is that Mr Brooks initiated these discussions when he learned of the agreement that MRL had reached with RM.

33. On 21 May 2014 there was a meeting between Mr Sullivan, Mr Hilder, and Mr Walmsley, on behalf of MRL, and Mr Brooks and Mr MacLean on behalf of Bonhams. The Particulars of Claim do not allege that any agreement was reached at this meeting. According to Mr Sullivan: "Mr Brooks agreed in principle to match RM's terms but said that he would need to confirm that Bonhams could get the funds to buy the Cars" (first statement, paragraph 27). Mr Walmsley's evidence is to the same effect, though he only says that Mr Brooks said he "had to confirm that he could get the funding" (first statement, paragraph 8). The precise facts cannot be determined on this application. However, the silence of the Particulars of Claim regarding an agreement is important, for reasons identified by Mr Weekes in his submissions. First, MRL's case does not rest on an oral agreement on 21 May 2014. Second, more importantly, when construing what is said to be an agreement comprising the text of a subsequent email, the court on an application to strike out the claim as disclosing no reasonable grounds on its face is neither required nor permitted to interpret such an email in the light of any alleged prior oral agreement. MRL has not pleaded reliance on any such agreement as forming part of the factual matrix relevant to the construction of a subsequent agreement made wholly or in part in writing.

34. After the meeting, on the same day, Mr Walmsley sent by email a letter to Mr Brooks, in terms confidential to Mr Brooks as Chairman and Mr MacLean as a director of Bonhams, setting out the terms that had been agreed between MRL and RM for the sale of the Collection. The letter did not say or imply that any agreement had yet been reached between MRL and Bonhams.

35. On 22 May 2014 Mr MacLean sent an email to Mr Walmsley, copied to Mr Brooks and MRL ("the 22 May Email"). The critical parts of the email are as follows:

> "Further your meeting with Robert Brooks yesterday and to our phone conversation this afternoon,
>
> I confirm that (1) a member of the Louwman Group will make funds available, subject to contract, to your client MRL to assist in acquiring the entire issued share capital of Stelabar SpA (2) Bonhams 1973 Ltd will sell the 70 Ferraris and Abarths owned by Stelabar by public auction at the Goodwood Revival in September 2014 or on/at such other dates and venues as may be agreed between MRL, Bonhams and LG. The transaction is to be substantially on the terms set in your letter to Robert Brooks, attached to your email to him and to me yesterday.
>
> The above is subject to your confirmation to me by return, as agreed in principle in our phone call this afternoon, that (1) MRL has received an offer from RM in the terms set out in your letter to Robert Brooks yesterday which has not been withdrawn, is open for acceptance by MRL and is not subject to any conditions or other terms which are not set out in your letter (2) with immediate effect Louwman Group and Bonhams 1793 have exclusive worldwide rights on this transaction, and (3) without prejudice to (2) neither MRL nor Graham Sulivan nor any person or entity associated with them will enter any discussion or negotiation with anyone other than Louwman Group and Bonhams 1793 Ltd in relation to this transaction and will immediately discontinue any discussions or negotiations in relation to this transaction with RM Auctions or any associated person or entity.
>
> We will do our best to meet the timetable discussed with you with a view to making funds available and completing the transaction on 29th May. This is subject to receiving from you soonest copies of all material documents and information and to your full co-operation in assisting us fully to investigate and understand this transaction with the benefit of the advice and professional opinions which your clients have received from Eversheds, Milan and others. As discussed with you today, the most efficient and quickest way for us fully to understand the transaction will be for you and me to meet Eversheds, Milan and Jones Day, Milan (representing LG and Bonhams) next Tuesday 27th May and to work full time without interruption for as long as is necessary to understand all the relevant issues and documents.
>
> If you wish, LG will arrange for confirmation to you from their bank that the funds are available to carry out this transaction on the anticipated timescale, subject to the conclusion of satisfactory investigations and subject to contract. In view of my

> confirmation to you in the first paragraph above, which is given with the full authority of LG and of Bonhams, and of the standing and reputation of LG and of Bonhams, I hope that no such confirmation will be necessary.
>
> Will you please send me by return the confirmations requested in the second paragraph above, followed by copies of all material documents and information, which will be treated in strict confidence by LG and by Bonhams?"

When Mr Sullivan quotes from that email in his first witness statement, he omits the first three lines of the second paragraph, "I confirm that … Stelabar Spa (2)".

36. Mr Walmsley's first witness statement states (paragraph 8(b)) that he understood the 22 May Email to mean that:

> "while there may be some negotiation around the detail of the specific terms of the agreement, the key commercial terms would remain the same (i.e. Bonhams would purchase the Collection, would auction the Collection at a single auction in or around London, and any sales proceeds over £80million plus interest would be paid to MRL). "

Whatever Mr Walmsley's understanding of the 22 May Email, it does not say what Mr Walmsley says he understood it to mean, that Bonhams would purchase the Collection and auction it. It says that a member of the Louwman Group would make funds available to MRL to buy the shareholding in Stelabar and that Bonhams would then sell Stelabar's Collection. Perhaps the parties were, at this stage, at cross-purposes; I cannot resolve that question now. But the meaning of the email is clear.

37. That evening, Mr Walmsley replied to Mr MacLean:

> "Many thanks for your email.
>
> I am delighted that you wish to proceed with the transaction.
>
> I can confirm the matters set out in your email numbered (1), (2) and (3) specifically:
>
> - that MRL has an agreed offer from RM on the terms set out in my letter to Robert yesterday which has not been withdrawn and is still proceeding;
>
> - that with immediate effect Louwman Group and Bonhams 1793 Limited have worldwide exclusivity to the transaction; and
>
> - Graham and MRL will discontinue discussions all other parties and will terminate discussions with RM Auctions this evening.

> Graham and I will get to Milan for Tuesday and I agree that we will do all that is necessary to get the transaction done.
>
> I look forward to working with you over the next week to complete the deal.
>
> I will start sending the DD and other deal documentation to you later this evening."

At Mr MacLean's request, Mr Walmsley provided some further clarification of the confirmations he had given. In an email later that evening he wrote:

> "… I also confirm that neither MRL nor Graham Sullivan nor any person or entity associated with them will enter any discussion or negotiation with anyone other than Louwman Group and Bonhams 1793 Ltd in relation to this transaction and will immediately discontinue any discussions or negotiations in relation to this transaction with RM Auctions or any associated person or entity."

38. MRL says that, in accordance with the terms of Mr Walmsley's confirmations, it informed RM that it no longer wished to contract with it on the terms previously agreed in principle and broke off discussions with RM. Its case is that by giving, or acting on, the required confirmations it made what it calls "the Exclusivity Agreement", whereby Bonhams and the Louwman Group had exclusivity over the proposed transaction upon substantially the terms that MRL had previously agreed with RM.

39. Communications continued over the following days. With his second witness statement, Mr Walmsley produced a number of emails from 23 May 2014. One of them, sent to Mr MacLean and copied to Mr Brooks and Mr Sullivan, set out "summary proposed transaction steps"; these included, after completion of the SPA: "MRL shall then transfer title to the 70 cars to LG on the agreed terms". This supports Mr Walmsley's contention that at this stage he was proceeding on the basis that the Collection would be acquired from MRL. It is contrary, however, to the pleaded case that the agreement was that *Bonhams* would purchase the Collection: Particulars of Claim, paragraph 26.

40. On 25 May 2014 Mr Walmsley sent an email to Mr Dan Coppel of Jones Day, the solicitor acting for both Bonhams and Lohomij, which read in part:

> "Just in terms of structure, when we met on Friday we were discussing a sale of the cars to your client.
>
> Now that we are dealing with a loan, I probably need to fill in a couple of further gaps, just in case we did not cover everything.
>
> Maranello Rosso Limited has granted debenture security to Capital Hair & Beauty Limited to support the £2m loan advanced to enable exchange to take place.

> The principal amount of the loan will be repaid at completion this week, but a lump sum return of £5m will remain outstanding.
>
> In addition to the loan and security documents that you require, we will also need a intercreditor agreement to reflect the fact that the LG loan, plus interest, plus fee/return will rank in priority to the CHB sums due.
>
> I have copied Mark, who you are aware acts for CHB, please can you copy Mark into correspondence on the loan and security documentation. I will be dealing primarily on behalf of MRL, but Mark will also review from CHB's perspective, although we are effectively working together to get this deal done with you by Thursday morning."

41. In his second witness statement, Mr Walmsley states that he sent that email after a conversation with Mr Coppel on the evening of Sunday 25 May, and that it was then that Mr Coppel for the first time said that he had been instructed to work on the basis that a loan was to be provided by Lohomij to MRL to purchase the Collection. Mr Walmsley states that he replied that this was contrary to what had previously been discussed and agreed; that the change of position is reflected in his email; and that he first spoke to Mr Sullivan about the matter on 26 May 2014, when Mr Sullivan was very clear in his rejection of the proposal. Mr Sullivan's second witness statement is to the same effect. In this regard I make the following observations.

    a) The first witness statements of Mr Sullivan and Mr Walmsley and the Particulars of Claim all clearly indicate that the parties were proceeding on the basis of a purchase by Bonhams, not a loan by Lohomij to MRL, right up until the question of a loan was raised on 27 May 2014. In his second statement Mr Walmsley maintains that he did not say in terms that the question of a loan was *first* raised on 27 May 2014. That is correct, but it was the plain implication of the witness statements and Particulars of Claim.

    b) The second witness statements were produced because Mr MacLean drew MRL's attention to the email of 25 May 2014 as falsifying the claim that the proposal for a loan was sprung upon MRL on 27 May 2014.

    c) Mr Walmsley's evidence that his email to Mr Coppel on 25 May 2014 was in response to a conversation in which for the first time a loan had been mentioned—and a conversation in which he responded that a loan was contrary to what had been agreed—is plainly wrong. First, the email raises no objection to a proposal that contradicted what had previously been agreed; nor does it say anything about needing to speak to Mr Sullivan, although the proposal is now said to affect a fundamental aspect of the transaction and Mr Walmsley says that he did not discuss the matter with Mr Sullivan until the following day. Second, Mr Walmsley's email to Mr Coppel was copied to Mr Mark Henry, a partner in Birketts Solicitors, who acted for the holder of a debenture in respect of MRL's assets. Mr Walmsley could not possibly have copied a third party into the email in the circumstances he now says he remembers them to have been. He would have had to get his client's instructions first. Third, the final paragraph makes clear that Mr Henry was already involved on behalf of his own

client in respect of the security documentation. It is simply incredible, therefore, that Mr Walmsley was first presented with a suggestion of a loan in a conversation on 25 May 2014.

42. A meeting in Milan was arranged for 27 May 2014 between Mr MacLean, Mr Sullivan, Mr Walmsley and MRL's Italian lawyers. On the afternoon of the previous day, 26 May, Mr MacLean sent an email to Mr Louwman setting out a "summary of the deal as it looks at present". The following passages give the gist for present purposes:

> "2. On completion [of the Share Purchase Agreement] LG will lend approximately €86 million to MRL which will use the loan to pay for the shares of Stelabar and stamp duty and related costs. Stelabar will sell the cars to MRL for €65 million which will be left outstanding as a debt due from MRL to Stelabar. … On completion MRL will consign the cars to Bonhams for sale at the Goodwood Revival in September (or maybe some cars at Quail Lodge in August). On completion the cars will be immediately collected by Polygon and GPS from San Marino and taken to storage in England.
>
> 3. The sale proceeds will be used to repay the LG loan and all interest, fees and costs due to LG and any sums due to Bonhams; the balance will be retained by MRL. …
>
> 4. We are told that all the steps referred to above have been approved by San Marino and Italian lawyers and tax advisers retained by MRL and by the notary who will be responsible for dealing with the sale of the Stelabar shares to MRL.
>
> …
>
> 6. Robert and you must obviously be satisfied that the value of the cars is well in excess of the LG loan amount.
>
> 7. I have meetings tomorrow in Milan first with GS, his English lawyer, Ben Walmsley, and their Italian lawyers and then with Andrea Vicari. I think that by the end of tomorrow, we will see in which direction this deal is heading and how it can best be implemented on terms acceptable to LG and to Bonhams."

43. Mr Sullivan states that he did not see this email until disclosure in the current proceedings (which is very probably correct) and complains that it is entirely contrary to what had been agreed in terms of matching the terms offered by RM. However, I make the following observations.

a) The structure of the transactions described in this email is consistent with the 22 May Email.

b) The fact that a loan rather than a purchase of the Collection by Bonhams was proposed is reflected in Mr Walmsley's email of 25 May 2014.

c) Mr MacLean's email records that the scheme of the transactions had been considered by professional advisers instructed by MRL. It is scarcely credible that Mr MacLean would have told Mr Louwman that it had been so considered if it had not been—especially if, as Mr Sullivan purports to believe, those two men were co-conspirators against MRL. It is scarcely credible that Bonhams or Lohomij could have envisaged that a transaction of this sort, concerning overseas companies and the importation and sale of overseas assets, could have proceeded unless MRL had had a chance to take proper advice on the matter. And it is scarcely credible that a meeting with MRL's lawyers in Milan would have been arranged to discuss a transaction different from that on which those lawyers had been instructed.

d) A further point, made by Mr Weekes on behalf of Mr MacLean, is that this email between supposed co-conspirators is directly contradictory of MRL's pleaded case concerning the conspiracy. Paragraph 117 of the Particulars of Claim identifies the first purpose of the conspiracy that existed from at least May 2014 and being "[t]o auction ten cars in California". Yet the second numbered paragraph in Mr MacLean's email is inconsistent with a conspiracy for that purpose.

44. Nevertheless, MRL's case (at least, until the second statements of Mr Sullivan and Mr Walmsley) has been that it was only on 27 May 2014, at a meeting in Rimini, that Mr MacLean informed MRL that Lohomij's preference was to lend money to MRL to complete the SPA, rather than to fund Bonhams' acquisition of the Collection from MRL. Mr Sullivan states: "I immediately refused this suggestion, referring to the terms of the deal that had been agreed in the letter from Mr Walmsley to Mr Brooks" (first statement, paragraph 37). In my view, it will not do to say that we have here a conflict of evidence as to the course of events. MRL's case as to the circumstances in which a loan was first mooted makes no sense on its own terms and is incredible in the light of the documents. (Of course, it is important never to lose sight of the fact that, however the proposal to deal with matters by a loan first arose, MRL did in fact agree to it.)

45. On 27 May 2014 Jones Day sent by email to Mr Walmsley the drafts of a facility agreement between LG and MRL, a draft debenture to secure the loan, a draft subordination agreement, and a draft guarantee to be given by Mr Sullivan to LG. The draft facility agreement provided that LG would make available to MRL "a euro term loan facility" (clause 2) and that MRL should apply all amounts borrowed under the facility "towards financing the acquisition of the Target [Stelabar] pursuant to the SPA" (clause 3.1).

46. In his first witness statement, Mr Walmsley refers to what Mr MacLean said on 27 May 2014 and to the documentation sent by Mr Coppel on the same day, and says (paragraph 8(c)):

> "At one point, on or around 27 May 2014, Mr Maclean indicated that Evert Louwman … would prefer for Lohomij to lend the money to MRL, so that it would purchase the Collection instead of Bonhams, and would retain ownership of the Collection rather than selling it to Bonhams. They even sent draft documents to this effect. I immediately took exception to this proposal as it represented a material change in the terms of the deal that had

> been agreed between MRL and Bonhams (and was clearly far riskier for MRL). As far as I recall, we then heard nothing further of this proposal (until the following day) and proceeded upon the previously agreed terms."

The obvious difficulties with that evidence are: first, that it is unsupported by the 22 May Email; second, that it is contradicted by Mr Walmsley's own email of 25 May; third, that it supposes that Mr Coppel and Mr Walmsley were like ships that passed in the night, because Jones Day were providing loan documentation apparently oblivious to the fact that both Mr Walmsley and Mr Sullivan had taken exception to any suggestion of a loan transaction; fourth, that there is an absence of documentation showing Mr Walmsley taking issue with Mr Coppel's drafts or the scheme they embodied; and, fifth, that for reasons indicated above it does not make any practical sense.

47. The negotiations also related to what would become the Commercial Agreement between MRL, Lohomij and Bonhams. The first draft of that Agreement, dated 28 May 2014, provided in clause 2.1 that the Cars would be consigned to be sold at auction by Bonhams or one or more of its Affiliates and, in clause 2.2: "The Cars may be sold in one or more auction sales to be determined by Lohomij and Bonhams in their discretion … and MRL shall promptly take all necessary action to facilitate such sales as may from time to time be requested by Lohomij and/or Bonhams …" (Those provisions remained unchanged when the Commercial Agreement was eventually executed.) However, as MRL's solicitors said in a letter before action dated 13 April 2015 ("the Spring Law Letter", discussed below), on account of the very tight time constraints for completing the financing arrangements, it was agreed that finalising the Commercial Agreement would be deferred until after finance had been completed.

48. MRL's case is that, when it was told of the proposal that Lohomij would fund the purchase price under the SPA but that Bonhams would not buy the Collection in a back-to-back transaction, it rejected the proposal, because it was contrary to what had always been discussed and what was envisaged in the Exclusivity Agreement and because it had the effect of transferring all of the risk to MRL. It says that on the afternoon of 28 May Mr Louwman accordingly instructed that €90 million be sent to Bonhams' lawyers to enable it to purchase the Collection from MRL but that, shortly before midnight on the same day, and hours before MRL's deadline for completing the SPA, he did a volte-face (as Mr Brooks is said to have put it, "the greedy bastard [Mr Louwman] had changed the deal"), thereby leaving MRL with no choice but to accept his insistence that the money be loaned directly to MRL. Mr Hilder gives evidence to similar effect (statement, paragraph 7(j)).

49. On 29 May 2014 three agreements were executed: the Facility Agreement; a Debenture to secure repayment of the moneys due under the Facility Agreement; and a personal guarantee to Lohomij by Mr Sullivan.

50. By the Facility Agreement Lohomij made available to MRL a loan facility of €90m for the purpose of acquiring the Collection. The Loan was repayable in full on 31 December 2014. Clause 3.1 stated the purpose of the Loan:

> "The Borrower shall apply all amounts borrowed by it under the Facility towards financing the acquisition of the Target

> [Stelabar] pursuant to the SPA and to make payment of the costs and expenses arising in relation to the acquisition of the Target and its financing …"

The Facility Agreement provided that MRL was to pay Lohomij an arrangement fee of €10m and fixed interest of €3.6m, and that it was to sell the Cars through Bonhams. Clause 14.4 provided that MRL could not dispose of the Cars without the prior written consent of Lohomij.

51. On the same day, 29 May 2014, MRL drew down the funds under the Facility Agreement and completed the purchase of Stelabar's share capital pursuant to the SPA.

52. The Commercial Agreement was made between MRL, Lohomij and Bonhams on 30 June 2014, though it provided that it was to have retrospective effect as of 29 May 2014. Clause 2 included the following provisions:

> "2.1 The Parties agree to consign the Cars to be sold at auction by Bonhams or one or more of its Affiliates (the 'Auction House').
>
> 2.2 The Cars may be sold in one or more auction sales to be determined by Lohomij and Bonhams in their discretion ('Auction Sales') and MRL shall promptly take all necessary action to facilitate such sales as may from time to time be requested by Lohomij and/or Bonhams …
>
> 2.3 The Cars listed in Appendix A shall be sold without reserve by Bonhams & Butterfields at Quail Lodge on or about 14 August 2014. The Cars listed in Appendix B shall be sold by Bonhams on or about 13th September 2014 at the Goodwood Revival.
>
> 2.4 No Cars may be sold by private treaty without the prior written consent of each of MRL and Lohomij.
>
> 2.5 The reserve price for each Car shall be determined between Lohomij and Bonhams in their reasonable discretion, but in full consultation with MRL.
>
> 2.6 Lohomij and Bonhams shall be entitled to determine that all Cars estimated at a valuation of less than £1 million may be sold without a reserve price. In the case of any other Car, Lohomij and Bonhams, acting reasonably, shall together determine a reserve price below which the relevant Car shall not be sold."

Clauses 2.1 and 2.2 had been contained in the earlier drafts of the Commercial Agreement, but clause 2.3 had not been included in a prior draft.

53. On the same day, 30 June 2014, a further agreement ("the Consignment Agreement") was made between MRL and B&B for the consignment to B&B of the 10 cars to be sold at Quail Lodge.

54. There is an issue as to the course of the discussions that resulted in the execution of the Commercial Agreement and the Consignment Agreement.

1) The evidence of Mr Sullivan is that all discussions since 21 May 2014 had been on the same basis as Mr Brooks had set out in his letter of 14 February 2014, namely that the Collection would be sold together at a single auction in or around London, probably at Goodwood, in order to achieve the best price. He states that on 30 June 2014, when he, Mr Walmsley and Mr Hilder met Mr Brooks and Mr MacLean for what was expected to be a simple meeting to sign the Agreements and discuss the forthcoming auction, Mr Brooks announced out of the blue that ten of the most important and valuable cars, including the Ferrari 250 GTO that was the prize of the Collection, would be sold at auction in California without reserve. Mr Sullivan states that a heated discussion ensued, in which Mr Brooks and Mr MacLean attempted to persuade him that this course of action was in the best interests of MRL; eventually, when he and his colleagues remained unconvinced, Mr Brooks and Mr MacLean told them that, if they did not agree, Lohomij would simply wait for MRL to default under the Facility Agreement and would then foreclose in accordance with the terms of the Debenture and sell the Cars through Bonhams anyway. "Despite my significant objections, I felt that MRL had no choice but to accept these new terms. We had been ambushed again" (Mr Sullivan, first statement, paragraph 61). Mr Hilder gives evidence to similar effect (statement, paragraph 7(m)-(q)).

2) The Bonhams Defendants, Mr Brooks and Mr MacLean all deny that there was any fundamental last-minute change or ambush. They say that the possibility of a sale of selected cars at Quail Lodge, in the interests of achieving an earlier sale of some Cars, generating publicity for the subsequent auction of other Cars, encouraging bids from the American market, and mitigating tax consequences for MRL, had been discussed earlier in June 2014. By way of example, by email on 9 June 2014 Mr MacLean wrote to Mr Walmsley and Mr Sullivan:

> "We need now to determine the EU tax treatment of the cars. I suggest you discuss this further with Eversheds. It seems that EU tax i.e. VAT will be payable – it may be that 'no EU duty is payable' but this is meaningless as on import into the EU from any country in the world VAT is the only tax or duty payable.
>
> The cars can be imported into the UK using Bonhams' bond (subject Bonhams' and HMRC's approval) so postponing the payment of tax which should be available at the concessionary rate of 5% for historic cars. Tax would then be payable by the buyer on any car which remains in the EU after sale. This may be a deterrent to some buyers.
>
> The alternative is to sell the cars in the US where duty at 2/2.5% is payable on import (no deferment) but will eventually be refunded after US customs delays and less a handling charge which they make.

> We nee[d] to decide on these issues soon and to agree a sales programme."

(Mr Sullivan acknowledges that he would have seen that email, but he says that he would not have taken much notice of it, because "by then the plan had been long agreed": first statement, paragraph 69.) Mr Brooks and Mr MacLean also deny that they threatened that, if MRL did not agree to the proposed terms, Lohomij would simply wait for MRL to default under the Facility Agreement and would then foreclose and sell the Cars through Bonhams. Mr MacLean (first statement, paragraph 61) states that it would have "defied all commercial logic" and been "ludicrous" to make such a threat at the outset of a potentially valuable commercial relationship.

3) The defendants observe, further, that MRL, whose solicitor Mr Walmsley was present on 30 June 2014, did enter into both the Commercial Agreement and the Consignment Agreement and, far from seeking to impeach them, actually seeks in these proceedings to enforce the Commercial Agreement.

55. At the auction at Quail Lodge on 14 August 2014 ("the Auction"), 10 cars were sold for a total of US$59.95 million (hammer price), which included what was then a world record figure of $34.65 million (hammer price) for the Ferrari 250 GTO. MRL says that the total realised was significantly less than Mr Brooks' assurances and the projected sales values provided by RM had led it to expect. MRL makes a number of complaints of misconduct against the Bonhams Defendants and Mr Brooks in respect of the conduct of the Auction, including in particular the following allegations:

a) The very fact that the Auction was held in California rather than the UK, though it was in the Bonhams Parties' own interests, was likely to and did result in the achievement of lower prices. (The location of the Auction was, however, specified in both the Commercial Agreement and the Consignment Agreement.)

b) No reserve price was allocated to any of the Cars. (This, again, was in accordance with both the Commercial Agreement and the Consignment Agreement.)

c) The arrangement and conduct of the Auction were incompetent: insufficient time was allowed to promote the sale of the cars properly; the date of the Auction clashed with other auctions; the bidding for the Ferrari 250 GTO was started at $10 million, which was far too low; that Car, although the prize lot, was sold as lot 3 out of 10 instead of being reserved to the end; and B&B did not inform MRL that one significant potential bidder, Mr Les Wexner, was currently boycotting auctions conducted by Bonhams.

d) On the day before the Auction, MRL received an oral offer from Mr Bernhard Mayr to buy the Ferrari 250 GTO for €42 million ($57 million) provided the sale took place privately. Mr Brooks informed MRL that Lohomij, whose consent was required before the offer could be accepted, did not consent to the proposed sale; and he said that he was confident that a price of $60-$80 million would be achieved at the Auction. In the event, the Car was sold at the Auction for a significantly lower price to Mr Carlos Monteverde, a long-time acquaintance of Mr Brooks. The reason for the refusal to permit the sale of the

Car privately was (MRL alleges) that the Auction would generate significant positive publicity for the Bonhams Parties, to the financial advantage of Mr Brooks and Mr Louwman.

e) Prior to the Auction, and unbeknown to MRL, Mr Brooks agreed a special payment plan with Mr Monteverde. This payment plan was contrary to MRL's interests, in particular because it involved the extension of credit until a date after the loan under the Facility Agreement fell due for repayment. Further, the offer of special payment terms was unlawful under Californian law, because no offer of identical terms was made to the other bidders. (B&B had also agreed a payment plan with another potential buyer of the Ferrari 250 GTO, a Mr Adrian Labi, again with a final payment date after MRL was required to repay the loan from Lohomij.)

56. In this judgment, I proceed on the assumption that MRL's complaints concerning the conduct of the Auction are correct, though they are contested.

57. On 13 September 2014 17 of the remaining 60 Cars were sold at the Goodwood Revival for a total of £2.5 million. MRL alleges that, in breach of the Commercial Agreement, Bonhams nevertheless refused to sell the remainder of the Collection on that occasion.

58. In November 2014 a further four cars were sold at an auction at New Bond Street.

59. On 21 November 2014, by the "First Amendment", the Facility Agreement was amended so that Lohomij advanced a further €2m to enable MRL to acquire an alleged duplicate chassis for one of the Cars (usually referred to by its chassis number, #0818), with a view to increasing the value of that Car.

60. On 31 December 2014, when the Loan fell due for repayment, the term for repayment of the outstanding balance of €56.46m was extended until 31 May 2015 by the "Second Amendment" of the Facility Agreement.

61. A further 14 Cars were sold by the end of March 2015.

62. By a letter dated 13 April 2015 (the Spring Law Letter), Spring Law, the solicitors then acting for MRL, intimated a claim against Bonhams "for negligence and breach of contractual and common law duties relating to the significant losses suffered by MRL directly resulting from Bonhams promotion and conduct of the Auction." MRL's losses were said to exceed £20m. The Spring Law Letter is important, and I shall set out extensive passages from it. The case relating to Bonhams' alleged breaches of duty was set out in the following passages:

> "Bonhams was negligent in its promotion and execution of the Auction for the following reasons:
>
> (i) recommending and insisting that all ten Cars be sold without reserve;
>
> (ii) failing to allow sufficient time to properly promote the sale of the Cars;

(iii) failing to contact the parties previously in negotiations with MRL to acquire the Cars; and

(iv) selecting Quail Lodge in California, USA as the venue for the Auction of the Cars.

…

Unfortunately, the strategy of having no reserve prices meant that the Auction was a disaster. This was compounded by an inadequate period of time to allow for the proper marketing of the Cars and the choice of the USA as the venue for the Auction.

The Cars sold at Quail Lodge sold for an aggregate price, including buyer's premium of US$65,945.000. This aggregate price achieved for the Cars at the Auction was approximately £22,000,000 less than the private offers received by MRL, £21,000,000 less than RM Auctions projected sales values and more than £19,000,000 less than MRL's independent valuation of the Cars.

As stated earlier in this letter and for the reasons outlined, Bonhams was negligent in its promotion and execution of the Auction.

In addition, Bonhams owed MRL a special duty of care as experts and specialist auctioneers of vintage cars and as MRL's agents. The unique circumstances of the transaction whereby a significant shareholding in Bonhams is held by the same beneficial owners as Lohomij B.V., MRL's secured lender, means that MRL was beholden to Bonhams in a way that they would not have been with any other auctioneer.

Addressing each of the individual headings of negligence:

(i) In no other circumstances would MRL have agreed to sell the majority of its very valuable assets by way of auction without reserve. Indeed in relation to the highly unusual nature of offering such a valuable lot without reserve, Mr Brooks, when asked 'Why is it a big deal that it is being offered without reserve?' in response to a question raised by a journalist replied: 'I think people were surprised that sellers would be prepared to put a car of this significance and value forward for sale without reserve, that is a little unusual. I believe however it was a logical decision and I hope and believe their confidence in the marketplace will be justified by the results.

It is clear from the facts of this matter, that it was not 'the sellers' who were prepared to offer any car for sale without reserve, but Bonhams who forced MRL into a position where they had no option but to rely on Bonhams as to the timing and strategy of

the sale process. There is no doubt, that any expert in this field would recommend a reserve price. It was entirely unreasonable for Bonhams to propose that the Cars be sold without reserve and Bonhams were negligent in recommending such.

If the Cars had reserve prices, either the Cars would have sold at prices acceptable to MRL or the Cars would have been returned to MRL who, in turn, could have then sold them privately. MRL would have then suffered no loss.

We understand that the day before the Auction itself, so worried was Mr Brooks about the sale of the Ferrari 250 GTO and the low interest from credible buyers, that he proposed to Mr Sullivan that a mutual contact who was present in California be asked to bid on that Car and that he would be financed if required if successful. Such practice is unlawful in California and Mr Brooks withdrew his proposal on the morning of the Auction intimating that he has resolved the matter. Mr Brooks nervousness ahead of the Auction was in stark contrast to the confidence previously displayed by Mr Brooks when recommending no reserves and potential sale prices for the GTO alone of '$50m, $60m or even $70m…'.

Further, in selling the Cars without reserve, Bonhams were guaranteed to sell the Cars and, therefore, guaranteed to receive buyer premium. After all, the disaster for MRL still netted in excess of US$6m for Bonhams in fees.

To compound the reckless manner in which the Cars were sold, we understand that Bonhams agreed preferential payment terms with the ultimate buyer of the Ferrari 250 GTO such that he could part exchange other cars in lieu of paying cash and pay for the balance over a twelve month period. We find it extraordinary that such an arrangement could be put in place with only one potential buyer and without the proper prior agreement of the seller.

(ii) Any prudent and reasonable auctioneer would allow more than three weeks to promote a collection of cars with an estimated value of £50-60m. Mr Brooks himself, by way of letter dated 14 February 2014 to Mr Sullivan when initialling proposing terms for Bonhams to sell the Collection, emphasises the need for a 'massive, worldwide and comprehensive advertising campaign' for the Collection. Bonhams had previously advised a minimum three month marketing period to MRL. Its decision to try and promote the Ferrari GTO in a six week period globally and the other nine Cars in less than four weeks was disastrous for MRL.

It is clear that, although the Catalogue is an impressive document, testament to the quality of the ten Cars, its production

in print a mere two weeks before the Auction Date and a total marketing period of six weeks was negligent.

In simple terms, Bonhams did not allow itself sufficient time to generate the interest required to sell a collection of ten cars as valuable as the Cars.

To further compound matters, MRL have since been advised that Bonhams were engaged in a dispute with a Mr Wexner who would have been a buyer of many of the Cars at much higher prices than were realised had it not been for his pending action regarding a 375plus Ferrari previously sold by Bonhams. Bonhams withheld this crucial information from MRL.

(iii) MRL provided Bonhams with a detailed contact list of more than a dozen parties who were interested in acquiring all or certain of the cars within the Collection. Prior to completion of the acquisition of Stelabar SpA, the single biggest stumbling block to competing any deal had been the corporate structure within which the Cars were owned and the jurisdiction that they were located. Following completion of the transaction, both of those impediments were removed and many of those parties were keen to progress with negotiations. Bonhams, as part of the agreed terms set out in the Agreement, insisted that MRL itself cease all discussions and pass them on to Bonhams as a sole sales and communication channel. Bonhams, however, did not follow up with those discussions on the grounds that it was their negligent opinion that the Auction was the best way to realise the maximum value for the Cars. Further, it seems that Bonhams did not even contact these prospective buyers to ensure that they had all the necessary auction information.

(iv) The Maranello Rosso Collection was widely known within Europe. The decision to sell ten of the most valuable and prestigious cars on the west coast of the USA was not a reasonable one.

In the USA, Bonhams are, at best, the third largest auction house for vintage cars. …

It was a unanimous decision by all the auction houses who had knowledge of the Collection, that the Collection must be auctioned in London and that was why MRL chose Bonhams. If the advice had been that the best venue was the USA, MRL would have elected to go with the largest auction house for vintage cars in the USA, RM. Using Bonhams in the USA was akin to using a smaller and lesser known auction house like Coys in the UK.

It is MRL's contention that Bonhams were solely motivated by the publicity that would be generated for Bonhams itself in

selling the Cars without reserve and in the USA. Bonhams are lesser known in the USA as an auction house for vintage cars and the Maranello Rosso Collection presented a unique opportunity for Bonhams to promote themselves in the USA.

Indeed, since the Auction, both in its immediate aftermath and since, Bonhams have made much of the auction world record price achieved for the Ferrari 250 GTO whilst ignoring the obvious fact that it was sold for a sum significantly below any sensible reserve price for that car, never mind its true market value or the level of offers being previously negotiated.

… Unfortunately, it is clear that Bonhams went against their own recommendation in selecting the USA, the simple rationale being that it suited their own purposes and not those of its client.

We are aware that during the period of late Spring and early Summer, Bonhams were seeking bids to acquire the company. It is quite obvious that the guaranteed fee income from selling valuable items without reserve together with the increased publicity of holding the Auction in the USA was hugely beneficial to Bonhams at that point in time in terms of increasing or preserving its own valuation and its attractiveness as an acquisition target. We note that just before the Auction, press stories were emerging about the number of bidders being reduced to one. It seems that Bonhams focus on its own sale process led to a conflict with it acting in the best interests of its clients.

…

MRL's substantial losses are directly attributable to Bonhams negligence and its breach of the duty of care it owed to MRL.

MRL's loss is compounded by Bonhams greatly profiting from the decisions made both in terms of the large fees received from the sale of the Cars and the global publicity Bonhams generated for themselves from undertaking the Auction and publicising the world record auction price achieved for the Ferrari 250 GTO. Bonhams, however, are well aware that its world record boasts ring hollow with vintage car experts everywhere who fully understand the failure of the no reserve strategy.

Following the 2014 sales, Bonhams approach to the Collection has compounded MRL's loss. Bonhams clearly had no strategy for the Collection as a whole and merely cherry-picked the Cars that suited its own purposes best for promotion of itself in the USA. Bonhams has undervalued the remaining cars and MRL has now had to adopt an approach of privately selling the balance of the cars to avoid further losses, which will result in additional third party fees and costs."

In addition, the letter contended that MRL had effectively been coerced into agreeing to the inclusion of terms in the Commercial Agreement that were contrary to those that had formed the basis of the negotiations. The following passages set out the general point:

> "The terms of the Agreement were finalised at a meeting on 30 June 2014 at Bonhams offices New Bond Street, London. Bonhams had arranged that they would announce the auction of the Maranello Rosso Ferrari 250 GTO on the evening of 30th June at a special Bonhams event, the Ferrari 250 GTO having been delivered specifically for that purpose to Bonhams premises. Mr Brooks made it clear to MRL that he would not announce the auction unless the terms of the Agreement were finalised and the Agreement executed prior to the event at 7pm that evening.
>
> MRL reluctantly agreed to the final terms of the Agreement wholly in reliance on Mr Brooks and Bonhams expertise as both auctioneers and vintage car specialists together with Mr Brooks unequivocal assurances that selling the Cars with no reserve would achieve the best price for the Cars. Further, MRL understood the importance of the press launch and were not in any position to prevent the launch, accordingly, they had no choice but to agree to the terms of the revised Agreement being proposed to them by Bonhams.
>
> The final terms of the executed Agreement have the following substantive changes to the draft as at 29 May 2014 …
>
> …
>
> It is very important to highlight that the terms of the draft Agreement were negotiated and agreed between Lohomij B.V., Bonhams and MRL throughout June and, indeed, within the 'execution version' of the Agreement emailed by Jones Day Solicitors, acting on behalf of Lohomij B.V. and Bonhams, to this firm at 16.37 on Friday 27 May 2014, clause 2.3 remained unchanged from the draft in circulation as at 29 May. From MRL's perspective, the requirement to have reserve prices on all of the Cars with a value in excess of £1m remained of paramount importance.
>
> The revised wording inserted at clause 2.3 detailed above was only inserted on the afternoon of 30 June 2014 at Bonhams insistence. MRL's agreement was effectively only provided under duress in complete reliance on the professional advice of Bonhams."

63. On the same day, 13 April 2015, Spring Law sent a second letter, marked "without prejudice", to Bonhams. The letter ("the Without Prejudice letter") set out "two alternative options upon which MRL would agree to settle all claims present and future

fully and finally with Bonhams (and Lohomij B.V. to the extent required and or requested by Lohomij B.V.).” After setting out the options, the letter said:

> “In each of the above offers, Bonhams shall procure that Lohomij B.V. waive interest on its loan accrued since 1 January 2015 on the basis that the Collection should have been sold in its entirety prior to the end of 2014 and that Lohomij B.V. is to be repaid the full amount of its loan and premium.
>
> Each of the above offers would be in full and final settlement of all losses and claims of MRL and all related parties against Bonhams and all related parties.”

64. There then followed settlement negotiations. Mr Sullivan’s evidence is that in a without prejudice meeting in May 2015 Mr Brooks said to him, “You may bloody my nose, Sullivan, but I will fucking destroy you” (Mr Sullivan, first statement, paragraph 106). Mr Brooks does not admit using those words, though he accepts he “may have expressed himself strongly” (Mr Shuttleworth’s second statement). More generally, MRL’s case is that in the course of the settlement negotiations Mr Brooks and Mr MacLean made it clear that, if MRL did not settle on the terms being advanced by Bonhams and Lohomij (though no claim was intimated against Lohomij), Lohomij would foreclose on the Loan, repossess the remaining Cars and enforce Mr Sullivan’s personal guarantee. Paragraph 63 of the Particulars of Claim states that “Lohomij insisted on entering into the Settlement Agreement and Amended Facility Agreement notwithstanding that: (1) no claim had been made against Lohomij at that time; (2) Lohomij would have directly benefitted from MRL’s successful claim against Bonhams, as this would have allowed MRL to repay the Loan in full.”

65. On 31 July 2015 MRL, Bonhams, B&B and Lohomij (together described as “the Parties”) entered into the Settlement Agreement, which is one of the key documents for the purposes of the defendants’ applications. By virtue of clause 1.2 the Recitals were to form part of the agreement; they included the following:

> “(D) MRL has: (a) made numerous allegations as regards the conduct of Bonhams 1793 (and its Agents) in relation to the 30 June Agreement [i.e. the Commercial Agreement] and particularly as regards the promotion and execution of the Auction; and (b) threatened to issue legal proceedings. All of the allegations are denied by the Bonhams Parties.
>
> (E) Lohomij has agreed to extend the maturity of the Facility and grant various other amendments to the Facility and Bonhams 1793 has agreed to vary the terms of the 30 June Agreement in certain respects in favour of MRL. In connection with those amendments, the Parties have, subject to the terms of this Agreement, agreed to settle MRL’s claims against the Bonhams Parties and/or Lohomij and/or any of their Affiliates or Agents relating to, arising from or otherwise connected with the initial acquisition of the Collection and its financing, the sale of the Collection, or the 30 June Agreement, including all claims

alleged in Spring Law's letter to Bonhams 1793 dated 13 April 2015."

Clause 3 provided as follows:

"3.1 The Parties agree (for themselves and on behalf of each of their Affiliates and Agents) that this Agreement shall constitute full and final settlement, and irrevocable and unconditional waiver and release, of all and any Claims.

3.2 MRL covenants and undertakes in favour and for the benefit of each of the Bonhams Parties, Lohomij and their Affiliates and Agents that:

(A) they shall not make or maintain, and shall procure that none of their Affiliates or Agents make or maintain, any Claim against any of the Bonhams Parties, Lohomij and/or any of their Affiliates and/or Agents;

(B) they shall not at any time sell, assign or otherwise transfer or purport to sell, assign, or otherwise transfer any Claim to any person (including their Affiliates and Agents) who is not bound by the terms of this Agreement;

(C) they shall not in any way support, encourage, incite, maintain, assist, cause, or procure any person who is not bound by the terms of this Agreement (including any Affiliate or Agent) to assert, institute or continue any Claim against the Bonhams Parties, Lohomij and/or any of their Affiliates and/or Agents; and

(D) they shall not bring a Claim against a third party who may then have recourse against the Bonhams Parties, Lohomij and/or any of their Affiliates and/or Agents,

and MRL will indemnify, and keep indemnified, the Bonhams Parties, Lohomij and their Affiliates and Agents against all costs and damages (including interest and reasonable legal costs and disbursements) incurred as a result of any breach of this clause 3.2.

3.3 Clause 3.1 does not and shall not apply to any claims the Bonhams Parties and/or Lohomij and/or any of their Affiliates or Agents may have against MRL and/or any of its Affiliates or Agents."

Three definitions in clause 1.1 are relevant:

"'Affiliate' means, in relation to a Party:

> (a) any person which, from time to time directly or indirectly controls, is controlled by or is under common control with that Party, where control means having the ability (whether solely or together with any other person) to exercise a dominant influence over the other, whether by ownership, the right to use all or part of the other's assets, rights in respect of the composition, voting or decisions of the other, the right to appoint or remove directors or members of any other managing body of the other, or otherwise; and
>
> (b) that Party's parents, siblings, spouse, children, grandchildren, and each of their respective issue.
>
> For the avoidance of doubt, the Bonhams Parties shall not be an Affiliate of Lohomij and Lohomij shall not be an Affiliate of the Bonhams Parties;"

> "'Agent' means, in relation to a Party, that Party's respective officers, employees, directors, sub-contractors and agents and those of its Affiliates;"

> "'Claims' means all claims, causes of action, rights or other interests (whether present, actual, prospective or contingent, whether or not known to the Parties at the date of this Agreement, and whether arising in contract, tort, under statute or otherwise), in any jurisdiction by MRL and/or any of its Affiliates or Agents against the Bonhams Parties and/or Lohomij and/or any of their Affiliates or Agents which relate to, arise from, or are otherwise connected with, the initial acquisition of the Collection and its financing, the sale of the Collection and/or the 30 June Agreement, including all claims alleged in Spring Law's letter to Bonhams 1793 dated 13 April 2015, and which in each case relate to the existence or occurrence of facts, matters or circumstances at or prior to the date of this Agreement, but excluding for the avoidance of doubt, any claims that the Bonhams Parties and/or Lohomij and/or any of their Affiliates or Agents may have against MRL and/or any of its Affiliates or Agents".

Clause 1.2 (D) provided that, unless the context otherwise required, words in the singular should include the plural and vice versa.

Clause 6 provided:

> "The Parties covenant with each other (for themselves and on behalf of each of their Affiliates and Agents) not to do or say anything which is harmful to the reputation of any of them or which may lead a person to cease to deal with any of them."

Clause 8.2 provided:

> "Each Party shall at all times act in good faith in exercising their rights and undertaking their obligations under this Agreement in order to ensure that this Agreement is fully and properly implemented and that the Parties receive the full benefit and effect of the provisions of the Agreement."

Clause 14.7 provided:

> "In relation to the Contracts (Rights of Third Parties) Act 1999:
>
> (A) where any term of this Agreement is expressed to be made in favour of or is capable of applying for the benefit of any Affiliate of a Party or Agent of a Party or of a Party's Affiliates, such person shall be entitled, with the prior written consent of such Party, to enforce that term in accordance with that Act but may not assign the benefit of their rights under it;
>
> (B) save as described in clause 14.7(A), the Parties do not intend that any term of this Agreement is enforceable under that Act by a person who is not a Party; and
>
> (C) the consent of any person who is not a Party shall not be required for the amendment, variation, rescission or termination of this Agreement."

66. Also on 31 July 2015, Lohomij and MRL entered into the Amended Facility Agreement. Among its provisions were the advancement of further funds to MRL, the extension of the period for repayment of the outstanding balance of €38.45m until 31 December 2015 and the waiver by Lohomij of the Facility Fee of €13.6m to which it was entitled under the Facility Agreement. Clause 8 provided for Bonhams to continue to be involved in the sale of the 13 remaining unsold Cars. Clause 9 provided:

> "The Borrower acknowledges that the Cars comprise Charged Property (as defined in the Debenture) and accordingly acknowledges, in accordance with Clause 7.2(A) of the Debenture, that no disposition of any of the Cars or any other car in the Collection shall take place without the prior written consent of the Lender such consent not to be unreasonably withheld."

67. As at 31 July 2015, 13 of the Cars (11 Ferraris and 2 Abarths) remained unsold, and the outstanding balance of the Loan was €38.45 million.

68. The Settlement Agreement forms a major basis of the present applications; therefore events after July 2015 can be mentioned briefly at this point and in more detail below.

69. MRL made efforts to sell the remaining Cars. So far as concerns the allegations in the Particulars of Claim, the relevant efforts concerned four Cars (identified by numbers: #0818, #0828, #1461 and #2025) and a further car that was not part of the Collection (#1953). Any sale required Lohomij's consent, in accordance with clause 9 of the

Amended Facility Agreement. On a number of occasions Lohomij sought advice from Mr Knight. MRL complains that Lohomij unreasonably refused consent to a number of proposed sales, in breach of the Amended Facility Agreement. MRL says that Lohomij and Bonhams were also in breach of the Settlement Agreement. In brief, MRL alleges that:

a) In June and July 2016 Bonhams and Lohomij sabotaged a proposed sale of four vehicles, by disclosing to the prospective buyer that they were subject to a debenture and leading it to believe that the vehicles were likely to be repossessed and to become available at a lower price;

b) In November 2016 a proposed sale of a valuable car collapsed because of Lohomij's persistent and unreasonable refusal to consent to the sale;

c) In June 2017 a transaction involving the sale of a total of four vehicles and a refinancing of the existing debt was abortive because Lohomij refused to consent, subsequently justifying its decision on the specious ground that the proposed sale was at an undervalue.

I shall set out the facts relevant to the claims in respect of these vehicles when I discuss the applications relating to those claims.

70. On 25 August 2015 Lohomij consented to the sales of two Cars (#11265 and #17261) for €515,000. This left 11 Cars remaining in the Collection. Efforts to sell more Cars continued in the second half of 2015 but had been unsuccessful by the date when the Loan became repayable, namely 31 December 2015.

71. On three further occasions Lohomij granted extensions of the time for repayment of the balance outstanding under the Amended Facility Agreement: on 13 January 2016 by the Third Amendment Letter, extending the repayment date to 30 June 2016; on 11 July 2016 by the Fourth Amendment Letter, extending the repayment date to 31 July 2016; and on 25 November 2016 by a Standstill Agreement and the Fifth Amendment Letter, extending the repayment date to 2 December 2016.

72. From 3 December 2016 onwards MRL was in default of its payment obligations. Lohomij did not, however, enforce its security rights over the remaining Cars or enforce Mr Sullivan's personal guarantee. MRL remained in default during 2017 and the first months of 2018.

73. Eventually, on 19 June 2018, Lohomij served a demand on MRL, making the outstanding balance of the Loan immediately due and payable and requiring payment of £12.5 million by 20 June 2018. As no payment was made, on 20 June 2018 Lohomij appointed Grant Thornton LLP as receivers over secured property including Cars #0818, #1461 and #0539. (The receivers did not in fact sell any of the Cars before MRL finally discharged the outstanding balance of the Loan.)

74. On 8 November 2018 MRL sold four Cars. Three of those Cars (#0818, #1461, and #0539) were sold to Mr Sullivan for a total price of approximately €21 million, which was paid as to €15.5 million in cash and as to the balance by the provision of two vehicles in part-exchange with an approximate value of €5.5 million.

75. On 9 November 2018 MRL repaid the outstanding balance of €17.1 million to Lohomij.

76. There is one other piece of narrative that, though disputed, is important for an understanding of how these proceedings have come about. According to the evidence of Mr Sullivan and Mr Hilder, in a conversation on 12 November 2017 Mr MacLean told them (a) that Bonhams had always intended to auction some of the Cars in the United States in order to boost its presence there and so increase its value ahead of a prospective sale of its business, (b) that Bonhams had never intended to auction the premium Cars in the UK, (c) that this is why they did not enter into the Commercial Agreement at the same time as entering into the Facility Agreement, because Mr Brooks knew that Mr Sullivan would never agree if he knew the truth, and (d) that the Auction was conducted illegally. It is largely on the basis of this alleged conversation that MRL has recast much of the substance set out in the Spring Law Letter into a claim based on conspiracy and dishonesty. Mr MacLean denies that he said what is alleged; he describes Mr Sullivan's evidence on the point as "a lie". For the purposes of this application, it is unnecessary to recite Mr MacLean's own account of what was said when he met Mr Sullivan and Mr Hilder.

E. The Amended Particulars of Claim

77. The claim form was issued on 20 May 2020. The Particulars of Claim are dated 17 September 2020. On 4 May 2021 MRL served draft amended Particulars of Claim ("APOC"). The defendants have not consented to the amendments. However, the only issue concerning them is whether the case they advance has a real prospect of success, which is the issue raised by the defendants' applications. Therefore I shall simply consider MRL's case as found in APOC and, in the light of the narrative set out above, shall focus on the causes of action relied on.

78. First, APOC alleges that all of the defendants were privy to an unlawful means conspiracy to injure MRL (paragraphs 117 to 122).

    1) The purpose of the conspiracy included: (a) to further the interests of Bonhams, at the expense of the interests of MRL, by selling several of the premium Cars, including the Ferrari 250 GTO, at auction in California; (b) to prevent MRL from repaying the moneys due under the Amended Facility Agreement by refusing to consent to sales and by preventing MRL from refinancing the debt; (c) as stated by Mr Brooks "on multiple occasions", to "destroy" Mr Sullivan and thereby MRL; (d) to force MRL to sell Cars to Lohomij's or Bonhams' associates or preferred collectors, by refusing to consent to proposed sales by MRL and thereby damaging MRL's reputation in the classic car market. (Paragraph 117)

    2) All defendants except B&B are said to have been privy to the combination from at least May 2014. B&B is said to have been involved in the conspiracy only at the stage of the decision to sell the 10 Cars at the Auction and in the carrying out of that sale. Facts said to evidence the conspiracy include both the events prior to the Settlement Agreement and the matters of complaint relating to the attempted sales thereafter. (Paragraphs 117 and 119)

3) The defendants are said to have intentionally injured MRL by, in particular: (a) forcing it to accept the terms of the Facility Agreement, which altered the prior agreement as to the nature of the transaction; (b) forcing it to accept the last-minute change to the terms of the Commercial Agreement, whereby 10 premium cars were to be sold at the Auction; (c) carrying out the Auction in a manner contrary to MRL's interests; (d) forcing MRL to abandon its claims against Bonhams and enter into the Settlement Agreement; (e) thereafter, sabotaging MRL's attempts to sell the remaining Cars and to refinance the debt to Lohomij. (Mr Louwman's retention of one Car, which is the sole cause of action not subject of the present applications, is also relied on as injury caused by the conspiracy.) (Paragraph 120)

4) Numerous unlawful acts (in addition to Mr Louwman's alleged conversion of one Car) are said to have been committed pursuant to and in furtherance of the conspiracy. I deal with these in the next paragraph.

79. Second, in respect of the period before the Settlement Agreement, each of the following matters is relied on as unlawful means employed in the conspiracy and, with the exception of the last three unlawful means listed below (which MRL accepts fall within the scope of the release in the Settlement Agreement), as a freestanding cause of action. (The matters set out in paragraphs 81-83 below, in respect of the period after the Settlement Agreement, are also said to be unlawful means employed in the conspiracy.)

1) *Breach of the Exclusivity Agreement by Bonhams:* The breach is said to consist of the facts (a) that the "transaction between Bonhams, Lohomij and MRL" was not, as it was agreed it would be, on substantially the same terms as the deal agreed with RM, (b) that the Cars were not sold, as it was agreed they would be, at a single auction at the Goodwood Revival or such other venue as might be agreed, and (c) that the 10 Cars sold at the Auction were sold without reserve. (Paragraphs 26 and 123)

2) *(Alternatively) Fraudulent or negligent misrepresentation:* If the Exclusivity Agreement was not a contract, it comprised representations (presumably, by Mr MacLean and/or Mr Brooks acting as a servant or agent of Bonhams) that were fraudulently, alternatively negligently, made and were relied on by MRL. (Paragraph 124)

3) *Breach of fiduciary duty and/or a duty of good faith by Bonhams (and, possibly, Mr MacLean and Mr Brooks) in respect of the making of the Commercial Agreement:* MRL avers that, by reason of the Exclusivity Agreement in May 2014, Bonhams owed to MRL a fiduciary duty (and/or a duty of good faith) to act in its best interests as its agents in the transaction and/or to obtain the best price for the Collection (Paragraphs 28 and 45). Bonhams' change of position between 27 June and 30 June 2014 amounted to a breach of fiduciary duty and/or a breach of the duty to negotiate in good faith, because Bonhams was seeking to profit from the fact that, in compliance with the Exclusivity Agreement, MRL had terminated its negotiations with RM and so had no alternative but to contract with Bonhams. (Paragraph 125) (The same paragraph alleges that Mr MacLean and Mr Brooks were in breach of fiduciary duty and/or a duty of good faith, but there is no plea that they owed such duties.)

4) *Dishonest assistance by Lohomij and/or Mr Louwman in Bonhams' breach of fiduciary duty:* The dishonest assistance took the form of insistence that the sale of the Cars should take place in California and not in London, when it knew that a sale in London would achieve the highest price. (Paragraph 126)

5) *Breach of fiduciary duty by Bonhams, Mr Brooks and/or B&B in agreeing to sell Cars at the Auction:* The act of "accepting instructions" to sell the Cars at the Auction is said to constitute a breach of fiduciary duty because (a) there was a conflict between Bonhams/B&B's interests and those of MRL and (b) there was a conflict between Lohomij's interests and those of MRL. (Paragraph 127: the plea is against not only Bonhams but also Mr Brooks and B&B as those who conducted the Auction, but there is no express plea that Mr Brooks and B&B owed to MRL a fiduciary duty or as to the basis of such a duty.)

6) *Breach of fiduciary duty by Bonhams, Mr Brooks and/or B&B in the conduct of the Auction:* The various matters complained of in the conduct of the Auction were, it is said, "deliberately designed to harm MRL and so amounted to a deliberate breach of fiduciary duty". (Paragraph 128)

7) *Breach of contract by Bonhams in respect of the conduct of the Auction:* The matters of complaint were a breach of Bonhams' implied contractual duty under the Commercial Agreement to act with reasonable skill and care, honestly and/or in good faith. (Paragraphs 45 and 129)

8) *Negligence by Bonhams, Mr Brooks and/or B&B in the conduct of the Auction:* The matters of complaint constituted negligence. (Paragraph 129)

9) *Breach by Bonhams of the Commercial Agreement:* Bonhams was in breach in that it failed to set a reserve price for cars valued at over £1 million (contrary to clause 2.6), it failed to keep MRL informed of offers and expressions of interest (contrary to clause 6), and it failed to sell 43 of the remaining Cars at the Goodwood Festival (contrary to clause 2.3) (Paragraph 130).

80. Third, in respect of claims relating to the period up to the making of the Settlement Agreement, MRL contends that "the Settlement Agreement did not settle any claims in dishonesty, fraud and/or conspiracy which MRL had against the parties" (Paragraph 66).

81. Fourth, MRL avers that Lohomij was in breach of clause 6 (reputational damage etc) and clause 8 (good faith) of the Settlement Agreement in respect of refusal of consent to Sales 1, 2 and 3 and attempts to prevent MRL refinancing. (Paragraph 132)

82. Fifth, MRL avers that by its conduct in respect of Sales 1, 2 and 3 Lohomij was in breach of (i) clause 9 of the Amended Facility Agreement, (ii) an implied term of the Amended Facility Agreement that Lohomij would not prevent and/or interfere with any proposed sale of the Cars and/or would act in good faith and/or (iii) its common law duty not to interfere with the release or potential release of the security. (Paragraphs 67A and 134)

83. Sixth, MRL avers that, by reason of Mr Knight's intentional overvaluation and undervaluation of Cars in respect of Sales 2 and 3, (i) Bonhams was in breach of clauses

6 and 8 of the Settlement Agreement and (ii) Bonhams and Mr Knight procured Lohomij's breach of the Amended Facility Agreement. (Paragraph 135)

F. The Settlement Agreement

84. The main issue in the case concerns the extent to which the claims now advanced by MRL were compromised by the Settlement Agreement, the most important provisions of which are set out at paragraph 65 above. The defendants contend that, on its true construction, the release in the Settlement Agreement covers all of the claims made by MRL in these proceedings, with the exception only of the free-standing causes of action relating to the period after the Settlement Agreement. MRL contends to the contrary that the Settlement Agreement did not release any claims in "dishonesty, fraud and/or conspiracy" (APOC paragraph 66) and that, accordingly, the claims in conspiracy, fraudulent misrepresentation, breach of fiduciary duty and the duty of good faith, and dishonest assistance have not been released. It is common ground that freestanding causes of action relating to the period after July 2015 were not released by the Settlement Agreement.

85. The issue between the parties turns on the correct construction of the Settlement Agreement. All matters concerning the factual matrix of the Agreement are before me (MRL has not pleaded reliance on any part of the factual matrix) and there is no good reason why I should not decide the point of construction now.

General principles of construction

86. The general principles of construction of written contracts were summarised by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

The judgment of Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 contains at [17]-[19] a convenient summary of the way in which the ramifications of that approach have been worked out in recent cases:

> "17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> 18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:

(i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

(ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

(iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

(iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in

> the position of the parties, as at the date that the contract was made;
>
> (v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;
>
> (vi) When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties.

> 19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

BCCI v Ali

87. Much of the argument before me focussed on *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251, where the House of Lords considered the correct approach to the construction of contractual releases. The case concerned a redundancy agreement, by which employees accepted the bank's terms "in full and final settlement of all or any claims … of whatsoever nature that exist or may exist" against the bank. The actual decision in the case (Lord Hoffmann dissented) was that the release did not extend to a claim for damages in respect of disadvantage on the labour market, because the parties could not reasonably be supposed to have intended the release to extend to such a claim, as no such claim was recognised in English law until several years after the agreement was made. For present purposes, the most important passages in the speech of Lord Bingham of Cornhill (with which Lord Browne-Wilkinson agreed) are as follows:

"8. I consider first the proper construction of this release. In construing this provision, as any other contractual provision, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified. The general principles summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896,912-913 apply in a case such as this.

9. A party may, at any rate in a compromise agreement supported by valuable consideration, agree to release claims or rights of which he is unaware and of which he could not be aware, even claims which could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that that is his intention. … This seems to me to be both good law and good sense: it is no part of the court's function to frustrate the intentions of contracting parties once those have been objectively ascertained.

10. But a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware. … [Lord Bingham then cited passages from several authorities.]

…

17. In his judgment in the present case [2000] ICR 1410, 1418, para 22 Sir Richard Scott V-C held: 'In my judgment, there are no such things as rules of equitable construction of documents.' Buxton LJ, at pp 1440-1441, para 88.4, agreed with Sir Richard Scott V-C's proposition. I also agree with it. More than a century and a quarter have passed since the fusion of law and equity and it would be both destructive of that great reform and altogether anomalous if it were not correct. But acceptance of that proposition should not lead one to regard the authority cited above as spent, or as a dead letter. Some of the cases, I think, contain statements more dogmatic and unqualified than would now be acceptable, and in some of them questions of construction and relief were treated almost indistinguishably. But I think these authorities justify the proposition advanced in paragraph 10 above and provide not a rule of law but a cautionary principle which should inform the approach of the court to the construction of an instrument such as this. I accept, as my noble and learned friend, Lord Hoffmann, forcefully

> points out, that authorities must be read in the context of their peculiar facts. But the judges I have quoted expressed themselves in terms more general than was necessary for decision of the instant case, and I share their reluctance to infer that a party intended to give up something which neither he, nor the other party, knew or could know that he had."

Lord Bingham explained his conclusion as to the particular release under consideration as follows:

> "19 What, then, of the claim for stigma damages which lies at the heart of this appeal? The bank, through its senior employees, is fixed with knowledge of the bank's insolvency and nefarious practices, although it seems unlikely that those negotiating with the employees were alert to these facts, very carefully concealed from the world. Mr Naeem had no such knowledge. Neither the bank, even when fixed with such knowledge, nor Mr Naeem could realistically have supposed that such a claim lay within the realm of practical possibility. On a fair construction of this document I cannot conclude that the parties intended to provide for the release of rights and the surrender of claims which they could never have had in contemplation at all. If the parties had sought to achieve so extravagant a result they should in my opinion have used language which left no room for doubt and which might at least have alerted Mr Naeem to the true effect of what (on that hypothesis) he was agreeing."

88. Lord Nicholls of Birkenhead agreed with Lord Bingham as to the applicability of the general principles of construction, but he did not approach the particular construction exercise by reference to the "cautionary principle". His approach appears from the following passages:

> "22. My Lords, this appeal raises a question of interpretation of a general release. By a general release I mean an agreement containing widely drawn general words releasing all claims one party may have against the other. The release given by Mr Naeem was of this character. Mr Naeem accepted a payment from BCCI 'in full and final settlement of all or any claims . . . of whatsoever nature that exist or may exist'.
>
> 23. The circumstances in which this general release was given are typical. General releases are often entered into when parties are settling a dispute which has arisen between them, or when a relationship between them, such as employment or partnership, has come to an end. They want to wipe the slate clean. Likewise, the problem which has arisen in this case is typical. The problem concerns a claim which subsequently came to light but whose existence was not known or suspected by either party at the time the release was given. The emergence of this unsuspected claim gives rise to a question which has confronted the courts on many occasions. The question is whether the context in which the

general release was given is apt to cut down the apparently all-embracing scope of the words of the release.

…

25. … Today there is no question of a document having a legal interpretation as distinct from an equitable interpretation.

26. Further, there is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?

27. That said, the typical problem, as I have described it, which arises regarding general releases poses a particular difficulty of its own. Courts are accustomed to deciding how an agreement should be interpreted and applied when unforeseen circumstances arise, for which the agreement has made no provision. That is not the problem which typically arises regarding a general release. The wording of a general release and the context in which it was given commonly make plain that the parties intended that the release should not be confined to known claims. On the contrary, part of the object was that the release should extend to any claims which might later come to light. The parties wanted to achieve finality. When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made. For instance, a mutual general release on a settlement of final partnership accounts might well preclude an erstwhile partner from bringing a claim if it subsequently came to light that inadvertently his share of profits had been understated in the agreed accounts.

28. This approach, however, should not be pressed too far. It does not mean that, once the possibility of further claims has been foreseen, a newly emergent claim will always be regarded as caught by a general release, whatever the circumstances in which it arises and whatever its subject matter may be. However widely drawn the language, the circumstances in which the

> release was given may suggest, and frequently they do suggest, that the parties intended, or, more precisely, the parties are reasonably to be taken to have intended, that the release should apply only to claims, known or unknown, relating to a particular subject matter. The court has to consider, therefore, what was the type of claims at which the release was directed. For instance, depending on the circumstances, a mutual general release on a settlement of final partnership accounts might properly be interpreted as confined to claims arising in connection with the partnership business. It could not reasonably be taken to preclude a claim if it later came to light that encroaching tree roots from one partner's property had undermined the foundations of his neighbouring partner's house. Echoing judicial language used in the past, that would be regarded as outside the 'contemplation' of the parties at the time the release was entered into, not because it was an unknown claim, but because it related to a subject matter which was not 'under consideration'.
>
> 29. This approach, which is an orthodox application of the ordinary principles of interpretation, is now well established. Over the years different judges have used different language when referring to what is now commonly described as the context, or the matrix of facts, in which a contract was made. But, although expressed in different words, the constant theme is that the scope of general words of a release depends upon the context furnished by the surrounding circumstances in which the release was given. The generality of the wording has no greater reach than this context indicates.
>
> …
>
> 32. Thus far I have been considering the case where both parties were unaware of a claim which subsequently came to light. Materially different is the case where the party to whom the release was given knew that the other party had or might have a claim and knew also that the other party was ignorant of this. In some circumstances seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice. When this is so, the law would be defective if it did not provide a remedy.
>
> 33. That is not the present case. …"

Lord Nicholls' own conclusion as to the construction of the general release in that case was stated as follows:

> "35. [C]leary the release is confined to claims arising out of the employment relationship. The release cannot reasonably be regarded as embracing any claim the employee might have as a depositor or borrower. I am inclined to think that the release is

> to be construed even more narrowly as restricted to claims arising out of the ending of the employment relationship. … Whether this is so or not, I consider these parties are to be taken to have contracted on the basis of the law as it then stood. To my mind there is something inherently unattractive in treating these parties as having intended to include within the release a claim which, as a matter of law, did not then exist and whose existence could not then have been foreseen. This employee signed an informal release when he lost his job, in return for an additional month's pay. The ambit of the release should be kept within reasonable bounds. Mr Naeem cannot reasonably be regarded as having taken upon himself the risk of a subsequent retrospective change in the law. A claim arising out of such a change cannot be regarded as having been within the contemplation of the parties. I too would dismiss this appeal."

89. Lord Clyde, who agreed in the decision, applied the general principles of construction; he made no reference to Lord Bingham's "cautionary principle". At [80] he remarked that, although a literal reading of the words of release would "seem to include every claim of every kind", the "plain meaning of the words [could not] be taken as conclusive." At [82] he expressed the opinion that "the context of the agreement [was] the desire of the employer to finalise any contractual debts due to the employees whose employment was being terminated together with all statutory or common law obligations arising upon the termination of the contract." He continued:

> "85. … [I]t seems to me improbable that the parties, in the context in which they were making this agreement, were intending to cut out all future claims of any kind not related to the termination [of employment]. …
>
> 86. … The stigma claim is one which neither party could have contemplated even as a possibility as the law stood at the time when the agreement was made. At that time it would not be known whether or not the employee would have any difficulty at all in finding alternative employment. The bank's conduct had not yet achieved the notoriety which could create the stigma. But even if those facts had been even suspected as a possibility the prospect of any liability falling on the bank to a former employee is something which must have been far beyond the reasonable contemplation of the parties. Even without formulating any definition of the precise scope of the agreement, it seems to me that if the parties had intended to cut out a claim of whose existence they could have no knowledge they would have expressed that intention in words more precise than the generalities which they in fact used. In so far as Mr Naeem may also seek to present a claim in tort for fraudulent misrepresentation inducing him to start the employment in the first place or to continue in it thereafter, while the legal basis for such a claim may not be particularly novel, the idea of such a claim at the time when the parties made the agreement at the

> termination of the employment seems to me correspondingly remote from what the parties might reasonably be taken in the circumstances to have contemplated.
>
> 87. … Having reached the view which I have on the matter of construction it is unnecessary to say anything about any equitable considerations which might operate to prevent the bank relying upon the agreement, were it wide enough to comprehend the stigma claim."

90. Although Lord Hoffmann dissented in the result, his speech repays (with respect) careful consideration. Among the points that may be noted are the following. First, he affirmed that the normal principles of contractual construction applied. Second, he rejected the introduction of any further or special principles of construction for releases. Third, at [51] he observed that "the quest to discover what a reasonable man would have understood specific parties to have meant by the use of specific language in a specific situation at a specific time and place" could not be affected by authority or judicial dicta, save perhaps where parties in a legal context used words in a technical sense. (It is possible that a great deal of wasted time and effort might be avoided by taking that observation to heart.) Fourth, at [67] he pointed out that the construction of an agreement could not be affected by matters within the knowledge of only one party to the agreement. Fifth, he addressed the question of sharp practice as follows:

> "69. … On a principle of law like this, I think it is legitimate to go back to authority, to Lord Keeper Henley in *Salkeld v Vernon* 1 Eden 64, 69, where he said: 'no rule is better established than that every deed obtained on suggestio falsi, or suppressio veri, is an imposition in a court of conscience.'
>
> 70. In principle, therefore, I agree with what I consider Sir Richard Scott V-C [2000] ICR 1410, 1421 to have meant in the passage in paragraph 30 of his judgment which I have quoted (ante, paragraph 11), and with Chadwick LJ, that a person cannot be allowed to rely upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim. I do not propose any wider principle: there is obviously room in the dealings of the market for legitimately taking advantage of the known ignorance of the other party. But, both on principle and authority, I think that a release of rights is a situation in which the court should not allow a party to do so. On the other hand, if the context shows that the parties intended a general release for good consideration of rights unknown to both of them, I can see nothing unfair in such a transaction.
>
> 71. It follows that in my opinion the principle that a party to a general release cannot take advantage of a suggestio falsi or suppressio veri, in other words, of what would ordinarily be regarded as sharp practice, is sufficient to deal with any unfairness which may be caused by such releases. There is no need to try to fill a gap by giving them an artificial construction."

91. These are the main points that I would draw from the speeches in *BCCI v Ali*:

1) The normal principles of construction apply to the interpretation of contractual releases.

2) No special principles of construction apply to the interpretation of contractual releases.

3) Lord Bingham's "cautionary principle" is not a rule of law. He himself said as much, and the conclusion follows from points (1) and (2) already mentioned, as well as from Lord Hoffmann's salutary warning that the reasonable understanding of specific words in a specific context cannot turn on judicial dicta. As the cautionary principle is not a rule of law, I do not for my own part think that it greatly matters how many of their Lordships in *BCCI v Ali* espoused it.

4) The cautionary principle ought rather to be seen as a useful distillation of judicial wisdom. As the "principle" is not one of law, I paraphrase it as follows: If the plain meaning of a release would appear to indicate that a party was agreeing to give up rights of action of which he was not aware and of which he could not reasonably have been aware, the court, before concluding that that is indeed what the release does mean, ought to pause, ask itself whether that is really what the release means, and carefully examine the context to see whether the words more appropriately bear some more restricted meaning. In reaching its decision, however, the court will apply normal principles of construction, not specially restrictive ones. If the cautionary principle were to mean more than this, it would be assuming the status of a principle of law and would contradict points (1) and (2) above.

5) As there are no special principles of construction applicable to releases, the private knowledge held by one party to a release but not by the other parties is irrelevant to the interpretation of the release.

6) It is arguable (the point was considered obiter in *BCCI v Ali* and was addressed only by Lord Nicholls and Lord Hoffmann) that there is an equitable "sharp practice" principle that will in suitable circumstances prevent a party from relying upon a release in general terms if he knew that the other party had a claim and knew that the other party was not aware that he had a claim.

Subsequent cases

92. In my judgment, the law has not changed since *BCCI v Ali* and the subsequent authorities do not contradict the summary in the previous paragraph. I was referred to a number of later cases in which contractual releases have been construed. Although I mention the cases below, largely for illustrative purposes, I shall for the most part not recite the detailed facts and contractual provisions that provide the full context for the judgments; these appear from the cases themselves, and the interpretation of a contractual provision is not greatly assisted by a "compare and contrast" exercise.

93. In *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm), Moore-Bick LJ considered *BCCI v Ali* in the context of a general release contained in a

settlement agreement arising out of claims for breach of warranty in a share purchase agreement. One question was whether the release extended to fraud claims. Moore-Bick LJ, whose discussion of the point was strictly obiter, referred to *BCCI v Ali* and continued:

> "207. Two points of particular importance on which all of their Lordships were agreed emerge from the speeches. The first is an insistence that the same approach is to be adopted when construing a general release as when construing a contract of any other kind. No special rules apply. The second is the emphasis which all their Lordships placed on the importance of the context in which the release is given. However wide the language in which it is cast, it is always necessary to understand the context in which a release was agreed in order to decide what the parties intended its true scope to be.
>
> 208. The context in which the release is given will inevitably vary from case to case. I accept that the court should be cautious in coming to the conclusion that a person has given up rights of which he was not and could not have been aware, but it may be clear having regard to language used and the context in which the agreement was made that that is indeed what was intended. … The release [in this case] is not worded in very general terms or in terms which suggest that the parties intended to waive all claims of any kind that might subsequently be discovered. … On the other hand, the expression 'current, past and future claims … that MAN may have, or may otherwise have had', together with the exclusion in paragraph 4 of environmental and taxation claims, strongly suggests that the parties did intend to compromise claims of which MN was still unaware.
>
> 209. Mr. Kendrick submitted that the parties cannot have intended to compromise claims for misrepresentation or breach of warranty based on fraud, both because of the fact that they were grounded in fraud and because they were claims whose existence was unknown at the time. In my view, having regard to the context in which the parties entered into the settlement agreement and the language in which they expressed themselves, it was their intention that Western Star should be discharged from any further liability under section 4.1 of the Share Purchase Agreement, whether the possibility of a claim was known to MN at the time or not. I find it more difficult to say that they intended to release Western Star from liability for claims arising out of its own fraud, however. I am satisfied that neither party had the possibility of fraud in mind. As Rix LJ said in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2001] EWCA Civ 1250, [2001] 2 Lloyd's Rep. 483 at page 512, fraud is a thing apart because parties contract with one another in the expectation of honest dealing. Moreover, the manner in which fraud is treated in Article 12 of the Share Purchase Agreement reinforces

> the conclusion that the parties in this case regarded it as giving rise to fundamentally different considerations. If, therefore, Mr. Ellis's knowledge is to be imputed to Western Star so as to render any of the representations not only false but fraudulent, I do not think that the settlement agreement was intended to deprive MN of its right to pursue a claim in respect of them."

94. I regard those passages as being consistent with the conclusions that I drew from *BCCI v Ali*. They make a further point, in respect of fraud, which I understand as follows. The question whether a release of claims as yet unknown extends to claims based on fraud is to be answered according to the normal principles of contractual interpretation. The fact that parties generally contract with one another in the expectation of honest dealing does not introduce a new principle of construction; however, it may be a matter to be taken into account as part of the context of the contract containing the release and, as such, may affect its interpretation according to normal principles. (Mr Toledano QC pointed out that Rix LJ's remarks in the *HIH Casualty* case were made in the rather different context of exclusion clauses. But I do not think that this fact has any material bearing on the point that Moore-Bick LJ was making, properly understood.)

95. In *Satyam Computer Services Limited v Upaid Systems Limited* [2008] EWCA Civ 487, there was a release of claims arising out of a Services Agreement. The Court of Appeal was concerned with a question whether the claimant's claims arose out of a services agreement, which was subject of a release in a settlement agreement, or out of a different contract in respect of which there was no release. The Court held that they arose out of the different contract and were therefore not caught by the release at all. However, Lawrence Collins LJ, with whom Waller and Rimer LJJ agreed, went on to consider obiter whether the release would have applied to unknown claims that arose after the date of the settlement agreement and to unknown claims involving allegations of fraud. He referred to *BCCI v Ali* and *MAN Neufahrzeuge AG v Freightliner Ltd* and to the decision of Flaux J at first instance and recorded the appellant's submission that it must have been intended to compromise unknown claims and fraud-based claims because the settlement agreement was a termination of the whole relationship, and he continued:

> "84. I do not accept this submission. I would agree that the exclusion clause cases should not be automatically imported into the area of releases, but that is not what either Moore-Bick LJ did in *MAN Neufahrzeuge AG v Ernst & Young* [sic], or what Flaux J did in the present case. Lord Bingham said (*Bank of Credit and Commerce International (in liquidation) v Ali* (at [10]) that 'a long and … salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware.' Lord Browne-Wilkinson agreed, and Lord Clyde (at [86]) expressed substantially the same view. It seems to me to be clear that the same principle must apply to fraud-based claims. If a party seeking a release asked the other party to confirm that it would apply to claims based on fraud, it would not, in most cases, be difficult to anticipate the answer.

> 85. It is not, I think, very helpful to consider whether the release/covenant not to sue applies in the abstract to unknown claims, and then separately whether it applies to fraud-based claims. The true question is whether on its proper construction it applies to claims of the type made in the Texas proceedings, namely that, unknown to Upaid when the Settlement Agreement was entered into, Upaid was supplied by Satyam with forged assignments. To that question it seems to me that there is only one possible answer. In my judgment, express words would be necessary for such a release. The provision in clause 2.6 for destruction of documents does not assist. It was plainly designed to deal with Upaid's confidential information and does not support the argument that the Agreement was designed to draw a line under all possible claims. If it were necessary to decide separately whether the release/covenant not to sue applied to (a) unknown claims, and (b) fraud-based claims, I would have come to the same conclusion as the judge."

96. It seems to me that there is (with respect) much to be gained from the suggestion that the interpretative exercise is better conducted concretely, by reference to the claims under consideration, than in the abstract. It serves to focus the enquiry and makes it easier to avoid the pitfall of carrying out the construction exercise by trying to force the analysis into fixed categories (cf. paragraph 116 below).

97. More importantly, I reject the submission that Lawrence Collins LJ at [86] was purporting, even obiter, to state any principle of law that express words are required for a release of either unknown claims or claims in fraud. As Lord Hoffmann remarked in *BCCI v Ali*, such statements (rather like contractual provisions) are to be read contextually. To treat the dicta at [86] as a statement of law would be contrary to the unanimous opinion of the House of Lords in *BCCI v Ali* that the interpretation of contractual releases is subject to, and only to, the normal principles of contractual construction. Lawrence Collins LJ's dictum does, however, provide an example of the application of normal principles to the facts in the case and the conclusion that, on the facts, express words would have been needed to release the claims under consideration. Whether anything is gained in the construction exercise by imagining what one party might have said to a query by the other party seems to me to be doubtful, but it is unnecessary to consider the question.

98. In *Brazier v News Group Newspapers Ltd* [2015] EWHC 125 (Ch), the claimant had sued the defendant for "phone hacking" and the claim had been settled by a Tomlin Order, the schedule to which recited that the parties had "agreed terms in full and final settlement of the claimant's claim in proceedings [the number of the case] 'the Claim') as follows:"; then the terms were set out. Subsequently the claimant brought a second action, again for phone hacking, after he learned of new information which suggested that there had been additional instances of hacking, this time by the Features desk, not the News desk, resulting in the wrongful use of private information in three specified articles, none of which were relied on in the first action. The defendant applied to strike out the second action. Mann J noted at [60] that the issue involved identifying what the "claim" in the compromise and in the first action really was. He referred to *BCCI v Ali*, noting at [63] that it had concerned a general release, whereas the case before him

concerned a specific release. Having considered the reasoning in the various speeches, he continued:

> "70. Mr Sherborne [for the claimant] submitted that the effect of all this is that very strong language must be used in order for a release to cover claims or causes of action which were not known about at the time of the compromise. I think that this overstates the matter. What all their Lordships were doing was construing the release in question in that case in the light of the circumstances. In order to ascertain what was being released they looked to all the circumstances, and the context of the release itself. While Lords Bingham and Browne-Wilkinson indicated that the courts would be slow to construe a document as releasing a claim which was not known to exist, as a general proposition, the remainder of their lordships did not adopt that formulation. They looked more to the particular circumstances of the case. This reflects the fact that at the end of the day each case will turn on the wording of the release clause and the circumstances in which it was entered into. What Lords Bingham and Browne-Wilkinson were doing was indicating a need for particular caution in ascertaining the intentions of the parties in relation to unknown claims. There is no principle that parties cannot be taken to have settled unknown claims (as acknowledged by Lord Nicholls), nor indeed any presumption."

With respect, I entirely agree with Mann J's analysis in that paragraph.

99. Concerning the application before him, Mann J concluded that the "claim" in the first action had been in respect of all phone-hacking activities of the defendant directed against him; additional instances coming to light on disclosure or exchange of evidence would have been included in the case; see [75]-[78]. He went on to consider whether the fact that the new incidents were unknown to the claimant at the time of the compromise excluded them from its scope, and he decided that it did not. He distinguished the case from *BCCI v Ali*, where neither party had known that there might be further claims:

> "87. While Mr Brazier did not know of the parallel operation being conducted at the Features desk, it is not true to say that he was totally ignorant of the existence of further claims going beyond Mr Mulcaire's activities. He positively averred that there were additional activities, and according to the generic Particulars of Claim he was going to invite the court to infer that they were substantial. … So he believed he had further claims. What he did not know was their scope. He hoped that that would become more apparent as the action progressed, and his pleading anticipated an extension of the claims as those circumstances unfolded. …
>
> 88. Accordingly, when Mr Brazier settled his case he settled a case in which he did not know the full extent of his claim, but unlike the claimant in Ali he was aware of his ignorance. In

> other words, he knew in general terms what it was that he did not know in detail. It was a 'known unknown'. What is more, he knew that a stage was coming shortly when he might become better informed, because disclosure was to take place within the foreseeable future … and the newspaper's solicitors had, to a degree, flagged up the fact that some additional data would be available. When he received the offer from the defendant newspaper he had a choice. He could have declined it and pressed on and become better informed about his claim. Alternatively, he could take a view on what he knew, and what he thought was likely to happen, and decide whether the offer adequately reflected that assessment and the risks involved in the litigation exercise. He decided to do the latter. His known ignorance must be taken to have been factored into the calculation.
>
> …
>
> 90. The case is therefore not one in which the releasor was completely ignorant of a further cause of action, as in *Ali*. He was aware of further causes of action, and did not know how many, but, crucially, was aware that he did not know how many. A decision to settle in those circumstances, taking some sort of view on the probabilities and deciding whether it is worth going on in the action, is entirely rational and nothing like the situation in Ali and the cases referred to there where there is an unappreciated ignorance of another cause of action. The latter situation might drive the court to the view that the parties cannot have intended to settle that of which they were ignorant, but there is no justification for forming that view in the former."

100. Mann J's materially identical reasoning, in the same judgment, in respect of the similar claim of another claimant was upheld by the Court of Appeal in *Leslie v News Group Newspapers Ltd* [2016] EWCA Civ 79. Lewison LJ, with whom the Chancellor of the High Court and Ryder LJ agreed, said:

> "31. Mr Ullstein's first point was that the judge was wrong to conclude that the compromise included matters that Mr Leslie did not know about and could not have known about. There is no legal obstacle to the compromise of claims of which the parties are unaware: whether they have done so depends on the terms of the compromise. The first part of this submission is, in my judgment, plainly contradicted by the terms of the agreed statement which formed part of the compromise, as well as the form of the pleadings themselves. It was an important part of the case pleaded in the first action that Mr Leslie did not know the full extent of NGN's activities. To echo the judge at [88] (borrowing from Mr Donald Rumsfeld) this was a 'known unknown'. The second part of the submission depends in part on what you mean by 'could not have known'. The judge referred to the arrangements about disclosure in the first action

> and pointed out at [128] that Mr Leslie chose to compromise his action before disclosure was complete. He thus chose to forego the chance of finding out more. This is not a case like *BCCI v Ali* [2001] UKHL 8, [2002] 1 AC 251 where the cause of action asserted in the second action was unknown to the law at the time of the compromise of the first action. In Mr Rumsfeld's terminology that would have been an 'unknown unknown'. In this case Mr Leslie could have found out more by pursuing the claim at least as far as disclosure. In my judgment this, too, was a 'known unknown'. I reject this ground of appeal."

101. *Marsden v Barclays Bank plc* [2016] EWHC 1601 (QB) concerned a settlement agreement by which the claimant, who had complained that his bank had mis-sold him interest-rate swaps, agreed to settle "all claims … in any way connected with the Swaps". When he later sued the bank on the basis (among others) of what he alleged was the bank's fraud in relation to the sale of the swaps, Phillips J granted summary judgment to the bank, on the grounds that the claims were released by the settlement agreement. At [46] he cited *BCCI v Ali* as authority for the proposition that the question in that case "was one of construction of the general release according to usual principles, there being no special rules of interpretation applicable to a general release." Having referred to Lord Bingham's cautionary principle and Lord Nicholls' remarks about sharp practice, he rejected the claimant's submissions that the settlement agreement did not release unknown claims and did not release claims based on fraud. The particulars of the case do not matter; what is relevant is Phillips J's general approach. As to unknown claims, he said:

> "51. Mr Hurst first contended that the Bank had engaged in such widespread misconduct, in gross breach of its regulatory duties, in selling interest rate swaps to its customers, that the court should not countenance the proposition that claims arising from that misconduct had been released or were intended to be released. I do not accept that proposition. The Settlement Agreement was plainly designed, by lawyers acting for each party, to draw a line under all claims, present or future, in relation to the Swaps, as part of a restructuring exercise of considerable utility to Mr Marsden. The subject matter was very clearly defined and relatively limited, but the release in relation to that subject-matter was extremely wide. It is plain that it was intended to encompass all claims, however put (except possibly in fraud, as discussed below), in relation to the alleged mis-selling of the Swaps, the agreement being required precisely because Mr Marsden had made a formal complaint in that regard. It is not arguable that the fact that mis-selling may have been more widespread, involved regulatory breaches and may even have been systematic affects the interpretation of the Settlement Agreement, designed as it was to address the relationship between Mr Marsden and the Bank. The effect of the House of Lords decision in *BCCI v Ali* was to re-affirm the freedom of a party to contract to release claims for valuable consideration, including to release unknown claims. The gist of Mr Hurst's

> argument, that it was simply not possible for Mr Marsden to release his claims in relation to the Swaps in 2011, is directly contrary to that approach."

As to fraud, deceit and sharp practice, Phillips J said this:

> "52. Mr Hurst's second argument was that the Settlement Agreement did not encompass the Bank's allegedly egregious and unconscionable conduct, applying the principle that 'fraud unravels all'. In so far as this is just another way of formulating the first argument addressed above, it plainly fails for the same reason: the Settlement Agreement, on its true construction, was plainly intended to encompass mis-selling the Swaps to Mr Marsden, no matter how that mis-selling came about or its regulatory or other context.
>
> 53. The more difficult question is whether the Settlement Agreement, on a true construction, covers a claim in deceit. It is clear from the authorities referred to above that even very wide wording will not usually be sufficient to show that the parties intended to settle fraud claims, unless express words are used. But it remains a question of construction of the words used in their proper context. In the present case Mr Marsden had already made an allegation that he had been mis-sold the Swaps, connoting that the Bank had misrepresented matters to him. In his letter dated 16 July 2010 to the Bank, at the start of discussions leading up to the restructuring and the Settlement Agreement, Mr Nurse referred to an allegedly false statement by Mr Moriarty to Mr Marsden to the effect that it was a condition of a mortgage deed that Mr Marsden enter a new swap. Mr Nurse stated 'This may have been a mistake on Mr Moriarty's part or it may have been deliberate but it created potential for enormous losses …' That was an express reference to a potential claim in deceit. In that context, the Settlement Agreement's reference to 'all causes of action which arise directly or indirectly …' would seem not only wide enough but clearly intended to encompass the existing threat of misrepresentation claims, including those in deceit.
>
> 54. Mr Hurst's third argument was that this was a case of sharp practice, the Bank knowing of claims which were unknown to Mr Marsden, in particular because it must have been aware of regulatory breaches which were subsequently investigated by the FSA. I see no merit at all in that argument. The gist of Mr Marsden's claim, although put in many and varied ways by Mr Hurst, is that he was mis-sold the Swaps. That was the very allegation in contemplation at the time of the Settlement Agreement. Mr Marsden was represented by solicitors who were fully able to take instructions as to what had occurred and to assess and advise as to the claims which might arise in consequence, including breaches of regulations. Given that Mr

> Marsden was just as aware of the relevant facts as the Bank and had access to legal advice, no question of sharp practice on the part of the Bank can arise."

102. That approach was entirely consistent with principle as established in *BCCI v Ali*. In particular, the application of the release to unknown claims and claims in deceit was done straightforwardly by reading the words of the release in the particular factual context; and, as shown in particular by [51] and [54], Phillips J had regard to the substance of the complaints in question and not merely to the various different ways in which they might be formulated.

103. In *Tchenguiz v Grant Thornton UK LLP and others* [2016] EWHC 865 (Comm), Mr Johannsson applied for summary judgment in respect of claims brought against him for (among other things) conspiracy and malicious prosecution, on the ground that the claims had been released by a settlement agreement. The settlement agreement was drafted in very wide terms. It released "any claim or cause of action arising out of or in relation to the Dispute, whether known or unknown, howsoever and whenever arising, and whether presently existing or arising in the future"; and "Dispute" was defined to mean "all actual or potential claims, controversies, demands or causes of action based upon any act or failure to act, or the existence or non-existence of any fact, matter, condition, circumstance or allegation at any time prior to the execution of this Settlement Agreement, including but not limited to the Specified Disputes". There was a definition of Specified Disputes. Knowles J referred to *BCCI v Ali* and to the *Satyam Computer Services* case. The nature of the reasoning that led him to conclude that the settlement agreement in the case before him released unknown claims in fraud appears from the following passage in his judgment:

> "42. There is no reference in terms to claims based on misconduct or deliberate wrongdoing, but Mr Miles QC is right to note that that reflects the fact that the parties have chosen to use language directed to subject area rather than cause of action.
>
> 43. In the subject area of investigations or actions by the SFO, an allegation of misconduct or deliberate wrongdoing would be what, objectively, the parties would have in contemplation as likely to be asserted in any attempt to ground a claim against Kaupthing or Mr Johannsson. It is not easy to see on what other basis a claim by the Claimants against Kaupthing or Mr Johannsson concerning the Investigation could be asserted.
>
> 44. Parties in the position of the Claimants might not know the facts or detail of what they now allege Kaupthing and Mr Johannsson did, but they would appreciate that by including in the drafting 'investigations carried out or actions taken by any authorities in relation to any of the TFT Parties or the affairs of Kaupthing or its counterparties', and 'the provision of any documents or information to any authority' they were putting out of reach claims in that subject area if and when they found out more.

> 45. Indeed it is only realistic to note that, in light of the Investigation, among the very types of allegation the parties, viewed objectively, would be looking to prevent in the present case would be allegations of misconduct or deliberate wrongdoing. These are the type of allegation that, regardless of merit, readily have an impact on reputation, cost and time.
>
> 46. Lawrence Collins LJ asked in *Satyam v Upaid* what the answer would be if a party seeking a release asked the other party to confirm that it would apply to claims based on fraud. As he said, in most cases it would not be difficult to anticipate the answer. The present case is different to most cases. In the present case if the party seeking a release asked the other party to confirm whether the release in relation to claims allegations of misconduct or deliberate wrongdoing the answer to be expected would be yes. This is because the other party would realise that an end to any prospect of an allegation of that type was important to securing the agreement to the Settlement Agreement (and to the other agreements also entered into) by the party seeking the release.
>
> 47. It was moreover in the context described above that the parties chose, by Clause 7.2, to state expressly that the Specified Disputes were released where 'unknown' and not simply where 'known'.
>
> 48. I consider the Qualification [not relevant for the purposes of this case] in the next section of this judgment. Subject to that, in my view the Settlement Agreement on its true interpretation compromises the Claims. In context the words used by the parties in the Settlement Agreement are sufficiently express, and the interpretation sought by Mr Johannsson does not rest on inference.
>
> 49. Generally speaking it is important for it to be possible for parties to be able, if this is what they wish, to achieve a compromise that puts the past behind them and gains certainty for the future. So far as material, that is what, in my judgment, the parties to the Settlement Agreement did in the present case."

104. That reasoning is an orthodox application of the law as set out in *BCCI v Ali*. If the contractual provisions, interpreted in accordance with the normal principles of construction, show an intention to release even unknown claims based on fraud, effect will be given to that intention even in the absence of express words to that effect.

105. Knowles J also considered the "sharp practice" principle. Having cited the dicta of Lord Nicholls and Lord Hoffmann in *BCCI v Ali,* he said at [58]:

> "58. These passages in these speeches address a question of the policy of the law. Lord Nicholls and Lord Hoffmann confined their words to a general release. On this application I must reach

> a conclusion on whether the present case is arguably of the type they describe. My conclusion is that it is not. Although, as Mr Tager QC points out, there is some general wording used, the releases for 'Specified Disputes' are not equivalent to the 'general release' under discussion by Lord Nicholls and Lord Hoffmann. They include a specific release of claims in relation to investigations and actions by authorities and provision of documents and information to authorities."

106. In his judgment on a subsequent application in the same case, [2016] EWHC 3727 (Comm), Knowles J returned to the same point:

> "56. On the First Application I said that Lord Nicholls and Lord Hoffmann confined their words to a general release. On the present application Mr Hancock QC described what was involved as a pure doctrine of equity, in an area of law that was in its infancy. Mr Hancock QC argues that the doctrine is not confined to a general release. The reason for the reference to general release in the House of Lords is, he submits, because that is the context in which the argument would tend to arise.
>
> 57. I am still left with the need to reach a conclusion on whether the present case is arguably of the type Lord Nicholls and Lord Hoffmann described. My conclusion remains that it is not. Lord Nicholls and Lord Hoffmann were referring to general releases not because of context but because that was where the law might have to recognise a limit, effectively to freedom of contract. Lord Hoffmann expressly did not propose any wider principle than one that engaged where there was a release in general terms. 'A transaction in which one party agrees in general terms to release another from any claims upon him has special features' (Lord Hoffmann, above).
>
> 58. The present case is one of a specific release of claims. So far as is material for these proceedings, the parties to the Settlement Agreement focussed on areas to which they applied the term 'Specified Disputes', and of which investigations and actions by authorities was one. Each party, with the benefit of legal advice, took the risk that they might be giving up a claim that another party knew of but they did not. The law allows that freedom where the release is not a general release. The bargain that is the Settlement Agreement stands in accordance with its terms."

107. In *Elite Property Holdings Ltd v Barclays Bank plc* [2019] EWCA Civ 204, the judge (HHJ Waksman QC) had refused permission to the claimants to amend the particulars of claim to introduce claims based on, among other things, unlawful means conspiracy in the context of the mis-selling of interest-rate swaps; one of the grounds of his decision was that those claims were precluded by certain contractual releases. The Court of Appeal upheld that decision. Asplin LJ, with whom Hamblen LJ and Nugee J agreed, said:

> "44. It was agreed that the 2014 Releases must be construed in accordance with the principles in *Arnold v Britton* [2015] AC 1619. Those principles were endorsed by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] AC 1173. As Lord Hodge explained at [10] of his judgment, the court must ascertain the objective meaning of the language which the parties have used and in doing so 'must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning.' He also reiterated the principle that the interpretation of contracts is a unitary exercise, stated that the process is an iterative one and added at [12]:
>
>> 'To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.'"

With reference to the specific facts and contractual provisions under consideration in that case, Asplin LJ continued:

> "49. It seems to me that the definition of 'Claims' in clause 2(a) viewed in the context of the Revised Redress Offer as a whole and clause 2(a) in particular, and in the light of its relevant factual context, is extremely wide and is sufficient to include the claim of unlawful means conspiracy. 'Claims' are defined to include '<u>all</u> complaints, claims and causes of action <u>in any way connected</u> to the sale of the IRHPs' (emphasis added). The language used is broad and unambiguous and it seems to me to be inescapable that it is sufficiently wide to include the claim as pleaded in the proposed amended pleading which contains numerous references to the sale of the IRHPs and their effects upon the Appellants."

108. Finally, I mention *Yukos Hydrocarbons Investments Limited v Georgiades* [2020] EWHC 173 (Comm), where Moulder J considered, among other things, the "sharp practice" principle. After referring to dicta in *BCCI v Ali, Elite Property Holdings Ltd v Barclays Bank* and *Tchenguiz v Grant Thornton,* Moulder J stated her conclusion at [223]:

> "The key phrase in my view of Lord Nicholls is as follows:
>
>> 'In some circumstances seeking and taking a general release in such a case, without disclosing the existence of the claim or possible claim, could be unacceptable sharp practice.'

> From this (and having regard to the statements of Lord Hoffmann) I derive the following propositions:
>
> (i) where there is a general release the principle of 'sharp practice' may apply;
>
> (ii) however even where there is a general release, the principle of 'sharp practice' does not apply in all circumstances;
>
> (iii) a general release without disclosing the existence of a known claim 'could' be unacceptable if the law would be defective if it did not provide a remedy."

Discussion

109. In my judgment, the Settlement Agreement effected a release of all of the claims now brought by MRL in these proceedings, except for those based on freestanding causes of action arising after July 2015.

110. The starting point is the text of the Settlement Agreement. The text is where the meaning and intention of the parties find expression, and its natural meaning is especially worthy of respect where, as here, the drafting of the contract has obviously been carefully considered and is of a high order. I refer in particular to the first and second of the factors chosen for mention by Lord Neuberger of Abbotsbury PSC in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook* [2009] AC 1101, paras 16—26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again, save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural

> meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve."

See also the observation of Lord Clarke of Stone-cum-Ebony in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 5, [2011] 1 WLR 2900, at [23]: "Where the parties have used unambiguous language, the court must apply it"; though I would add that what at first sight appears unambiguous may be rendered ambiguous by surrounding circumstances and that Lord Clarke's remarks are not to be taken as permitting acontextual interpretation of written contracts.

111. On its own terms, the language of the Settlement Agreement is clear, precise, wide-ranging and comprehensive. In respect of the "Claims" to which it relates, the effect of the Settlement Agreement is expressed in clear and unambiguous terms in clause 3.1: it is a "full and final settlement" and an "irrevocable and unconditional waiver and release". Similarly, the persons entitled to the benefit of the settlement are identified in clauses 3.1 and 3.2 in terms that are wide and far-reaching. They include not only the Bonhams Defendants but Lohomij, against whom no allegations had been made; and they include both Agents and Affiliates, words that are given a wide meaning by clause 1.1 and include the other defendants. Similarly, clauses 3.1 and 3.2 show that the release is intended to be effective not only against MRL but against MRL's Affiliates and Agents. The impression is given that the draftsman and, therefore, the parties wished to cover all bases in drawing a line under their past dealings concerning the Collection.

112. This impression is confirmed when one turns to the text that identifies what is being released. The definition of "Claims" is very wide indeed. It includes (all emphases are mine) "<u>all</u> claims, causes of action, rights or other interests"; those claims need not be present or actual claims, they may be "<u>prospective</u> or <u>contingent</u>"; and they are released "<u>whether or not known</u> to the Parties" at the date of the Settlement Agreement (a distinction from the wording in *BCCI v Ali*). The claims are released whether they arise "in contract, <u>tort</u>, under statute <u>or otherwise</u>", and "in <u>any jurisdiction</u>". The definition is not limited to "causes of action", whether already mentioned in the Spring Law Letter or otherwise, but includes also "all claims, … rights or other interests". The Claims of that nature so released are identified in terms that carefully identify their subject matter: "[Claims] which <u>relate</u> to, <u>arise</u> from, or are <u>otherwise connected</u> with, the initial <u>acquisition</u> of the Collection and its <u>financing</u>, the <u>sale</u> of the Collection and/or the <u>30 June</u> [i.e. the Commercial] <u>Agreement</u>, including all claims alleged in [the Spring Law Letter], and which in each case <u>relate</u> to the existence or occurrence of <u>facts</u>, <u>matters</u> or <u>circumstances</u> at or prior to the date of this Agreement". The wording of the release tends to show that the draftsman and, therefore, the parties "meant business" (to echo Lord Hoffmann's words in *BCCI v Ali*) and were seeking to draw a line under events up to the date of the Settlement Agreement.

113. The text of the Settlement Agreement must be interpreted in the context of the factual matrix, comprising facts or circumstances which existed at the time the contract was made and which were known or reasonably available to all parties to the agreement. MRL has not pleaded reliance on any factual matrix as affecting the interpretation of the Agreement and is therefore to be taken to rely on the matters appearing from the Agreement itself, including the Recitals, of which the most important are (D) and (E). This includes the Commercial Agreement, the intimation of claims in the Spring Law

Letter, and the Amended Facility Agreement. The defendants have referred to various other matters. I make the following observations in respect of the factual matrix.

a) The Spring Law Letter has a particular importance, because it is mentioned in the Settlement Agreement and because it sets out a lengthy account of MRL's grievances. I shall highlight some of its contents below.

b) The financial connection between Bonhams and Lohomij forms part of the relevant background, because it was known to MRL and was mentioned in the Spring Law Letter.

c) The factual matrix also includes matters concerning the negotiation and agreement of the various contracts, including: (i) any alleged insistence on the part of Lohomij on changing the nature of the financing arrangements in late May 2014; (ii) the progress of discussions and negotiations relating to the finalising of the Facility Agreement and the Commercial Agreement, including any alleged last-minute imposition by Bonhams of a revised text in the Commercial Agreement; (iii) the Without Prejudice letter: (iv) the ensuing negotiations that led to the Settlement Agreement, including any alleged threat by Mr Brooks—according to APOC paragraph 117, repeated in substance "on multiple occasions"—to "fucking destroy" Mr Sullivan (for these last two points, see *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662); and (v) the Amended Facility Agreement, which though a separate contract formed part of the same overall settlement deal and provided MRL with consideration of very substantial financial value.

114. If, as proposed by Lawrence Collins LJ, one begins the analysis by identifying the particular claims that MRL now seeks to advance, they all (save for the freestanding claims relating to the period after July 2015) clearly fall within the scope of the release according to its natural meaning. All of them relate to, arise from or are connected with one or more of MRL's acquisition of the Collection, the financing of the acquisition, the Commercial Agreement, and the sale of the Collection. All of them, including the claims in conspiracy, dishonest assistance and breach of fiduciary duty, relate to facts, matters or circumstances existing or occurring prior to or at the date of the Settlement Agreement.

115. None of the factual matrix indicates that the text of the Settlement Agreement ought to bear any other meaning than is given by a plain reading of the unambiguous wording. On the contrary, it reinforces the interpretation that would follow from the plain language of the release.

1) Although the Spring Law Letter expressly identified only a cause of action in contractual or tortious negligence, it did not present the matters complained of as the result of mere incompetence by the Bonhams Defendants. Bonhams "owed MRL a special duty of care as experts and specialist auctioneers of vintage cars <u>and as MRL's agents</u>" (my emphasis, here and elsewhere). The "unique circumstances" concerning the relationship between Bonhams and Lohomij meant "that MRL was <u>beholden</u> to Bonhams in a way that they would not have been with any other auctioneer." "In no other circumstances" would MRL have agreed to the sale of Cars without reserve. Bonhams "<u>forced</u> MRL into a position where they had <u>no option</u> but to rely on Bonhams as to the timing

and strategy of the sale process." In advance of the Auction Mr Brooks proposed a "practice [that was] unlawful in California." The decision to sell Cars without a reserve, though disastrous for MRL, meant that Bonhams was "guaranteed to receive buyer premium." Bonhams "withheld … crucial information from MRL" concerning a dispute that it had with a potential buyer. "It is MRL's contention that Bonhams were solely motivated by the publicity that would be generated for Bonhams itself …" "Unfortunately, it is clear that Bonhams went against their own recommendation in selecting the USA, the simple rationale being that it suited their own purposes and not those of their client." Bonhams' concern to attract bids from those seeking to acquire it "led to a conflict with it acting in the best interests of its clients." Indeed, MRL's losses attributable to the Bonhams Defendants' negligence were "compounded by Bonhams greatly profiting" from the decisions it made in its own interests, including the alleged facts that it "merely cherry-picked the Cars that suited its own purposes best" for the Auction and thereafter "undervalued the remaining cars". As for the contractual arrangements between the parties, MRL had "no choice" but to agree to the revised terms of the Commercial Agreement, which materially differed from the previous draft that had "remained unchanged" since 29 May 2014; the revised wording was introduced on the afternoon of 30 June "at Bonhams' insistence" and "MRL's agreement was effectively only provided under duress".

2) The Spring Law Letter expressly mentioned the connection between Bonhams and Lohomij, and the Without Prejudice letter assumed that Bonhams had the ability to "procure" Lohomij's agreement to revised financial terms. According to its own case, MRL knew of Lohomij's late insistence on changing the nature of the financial arrangement from what had been envisaged in the Exclusivity Agreement to what was ultimately embodied in the Facility Agreement. It also knew (according to its own case) how Bonhams had ambushed it in the negotiations for the Commercial Agreement. This included the threat that Lohomij would wait for MRL to default under the Facility Agreement, then enforce the security under its Debenture; this has been set out above, as has MRL's contention that it was thereby coerced into agreeing to the proposed terms. In these proceedings, MRL expressly avers: "Such threats could not have been made unless Bonhams and Lohomij acted in combination" (APOC paragraph 119(2)). This observation does nothing to advance MRL's contention that conspiracy was not within the reasonable scope of the parties' contemplation, or to suggest that the words of the Settlement Agreement ought not to be given their natural meaning and effect.

3) It is relevant that Lohomij was privy to the Settlement Agreement that was "in full and final settlement of all losses and claims of MRL and all related parties against Bonhams and all related parties", even though Lohomij had no part in the sale of the Cars and no allegation of negligence or other wrongdoing had been made against it. The inclusion of Lohomij within the release tends naturally to imply the possibility that it might have some liability in respect of the matters being alleged against the Bonhams Parties. Indeed, this is MRL's own express case, as set out in APOC paragraph 119(4): "There was no reason for Lohomij to be protected by the Settlement Agreement unless it was also a party to the wrongdoing perpetrated by Bonhams." In paragraph 115 of his first

witness statement, Mr Sullivan says that the inclusion of Lohomij in the Settlement Agreement resulted from a draft produced by the Bonhams Defendants' lawyers and that he "had no idea why [Lohomij was included], as Lohomij were not involved in this dispute." In fact, however, the inclusion of Lohomij within the release had expressly been countenanced by MRL in the Without Prejudice letter, and the settlement involved Lohomij giving up valuable financial rights. (Mr Sullivan's evidence is not made less surprising by the fact that, at paragraph 40 of his first statement, Mr Sullivan states that during the period of their dealings it was Mr Louwman who took all major decisions both for Bonhams and for Lohomij.) However, even if Mr Sullivan did not subjectively understand why Lohomij should want to be included in the release, MRL's own case shows that the objective contemplation of the parties must have extended to claims against Lohomij as being complicit in the Bonhams Defendants' wrongdoing. The release thus extended to such "known unknowns".

116. In these circumstances, I accept Mr Toledano QC's submissions (a) that it is unrealistic of MRL to contend that an allegation of a conspiracy between Bonhams and Lohomij to target MRL was objectively outside the scope of the parties' contemplation when the Settlement Agreement was made and (b) that allegations that the matters complained of were not merely negligent but deliberate wrongdoing were precisely the sort of allegation which, viewed objectively, the parties would be looking to prevent. Further, the release expressly extended to unknown claims relating to the subject matter specified in the definition of "Claims" and MRL thereby took the risk that the element of bad faith might be worse than it then believed.

117. For MRL, Mr Fenwick QC submitted that, in the absence of express words releasing claims based on fraud or dishonesty, the release was not to be taken to extend to any such claims, including in particular the claim that there was an unlawful means conspiracy. I reject that submission. First, there is no rule of law requiring that express words referring to claims based on fraud or dishonesty be used if a release is to extend to them. As a matter of common sense, in the absence of such words one will not readily conclude that a reasonable person would understand a release to refer to such claims. However, if the normal principles of construction lead to the conclusion that the release does indeed extend to such claims, the conclusion must be respected. Parties are entitled to reach such an agreement if they choose to do so, and it is no business of the court to obstruct their expressed intention. Second, the words of the release seem to me to be unequivocal and unambiguous and to evince a plain intention to omit nothing and leave no loopholes. Third, the absence of express words referring to deliberate wrongdoing or dishonesty is explicable not only by the very comprehensive words actually used but by the way in which the release is framed by reference to subject matter rather than specific causes of action; cf. the *Tchenguiz* case, *per* Knowles J at [42].

118. Mr Collings QC submitted that, even if there were a principle requiring express words to include fraud-based claims within the scope of a release, such a principle could not avail MRL in respect of the claim for unlawful means conspiracy. He referred to *Interactive E-Solutions JLT v O3B Africa Ltd* [2018] EWCA Civ 62, where the Court of Appeal considered a clause that limited liability for all claims "excluding fraud". Lewison LJ, with whom Arden and Asplin LJJ agreed, said at [25]: "In the context of

legal liability for claimed loss, it seems to me that the only workable criterion is whether an allegation of fraud is a necessary ingredient of the legal basis on which loss is claimed: in other words, whether an allegation of fraud is a necessary averment to support a cause of action." Mr Collings submitted that fraud or dishonesty is not a necessary ingredient of unlawful means conspiracy, because knowledge of the unlawfulness of the means is not a necessary ingredient of that tort: see *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300, [2021] Ch 233, *per* Arnold LJ at [139] and [144] and Phillips LJ at [171]. As to this submission, I make the following observations.

1) As Mr Fenwick QC observed, in the first-instance decision in *Satyam Computer Services Ltd v Upaid Systems Ltd* [2008] EWHC 31 (Comm), [2008] 1 All ER Comm 737, Flaux J considered *obiter* that Lord Bingham's cautionary principle applied to any claim involving an allegation of dishonesty, regardless of whether dishonesty was a necessary ingredient of the cause of action: see [78]-[80], referred to on appeal by Lawrence Collins LJ at [2008] EWCA Civ 487 at 81.

2) In the *Interactive E-Solutions* case, the Court of Appeal was construing express words; the exercise was not quite the same as arises in the present case, where the issue is the scope of an unexpressed exclusion. Nevertheless, if it is said that certain categories of claim are outside the scope of the release, it is necessary to give some definite content to those categories. I am unconvinced that Flaux J's approach, if interpreted as a principle of law, could provide a workable criterion. Further, MRL's case remains unclear, as is illustrated by the fact that paragraph 129(1) of the Particulars of Claim alleges that Bonhams was in breach of a contractual duty "to act with reasonable skill and care, honestly and/or in good faith" but paragraph 131 accepts that "any such cause of action would have been settled under the Settlement Agreement". (In his submissions Mr Fenwick confirmed that the causes of action in paragraph 129 had been settled.) I must assume that, if the matter went to trial, this point would be refined and clarified in the course of further submissions.

3) In general, however, the way of cutting through these issues seems to me to be twofold: first, by keeping firmly in mind that Lord Bingham's cautionary principle is not a rule of law and does not alter the method of construing contracts; second, by remembering, in line with Lawrence Collins LJ's suggestion in the *Satyam Computer Services* case, that the question is not whether certain pre-defined categories of claim are outside the scope of the release but whether these particular claims are outside its scope. The facts of the *Satyam Computer Services* case were very different from those of the present case. I have said enough already about those in this case.

119. Mr Fenwick submitted that, if as a matter of construction the release extended to the claims now advanced, nevertheless Lord Nicholls' "sharp practice" principle ought to preclude the defendants from reliance on the release. I reject that submission. In my judgment, it has no connection with the reality of the position. For present purposes, I accept that it is arguable that there is a "sharp practice" principle, in accordance with the remarks of Lord Nicholls and Lord Hoffmann in *BCCI v Ali*, because there are circumstances in which reliance on the full scope of a release might be an "imposition in a court of conscience". It is unnecessary to explore the scope of the principle, if it

exists; the general idea is that it will apply, for example, where A, who has perpetrated a fraud on B of which B is unaware, manages to persuade B to enter into a release which is wide enough to cover the fraud but which B in his ignorance assumes will do no more than release claims of a quite different nature of which he is aware. However, the case now brought by MRL does not raise the same considerations at all. The substance of the matters now advanced is exactly the same as the substance advanced in the Spring Law Letter. MRL was complaining that it had suffered financial harm because the Bonhams Defendants, occupying a unique position because of their relationship with Lohomij as financier, had forced it into a position in which it had to agree to the Facility Agreement and the Commercial Agreement, had then gone about the sale of the Collection in a manner that was not in MRL's interests, and had done so with regard purely to their own interests. The difference now, to put the matter rather bluntly, is that, to the same matters of complaint, MRL now adds: "And all of those things of which we complain were not done ad hoc but were planned and done in furtherance of a conspiracy to injure us by doing them." If there is any unconscionability, it seems to me rather to lie with MRL's attempt to make substantially the same complaints under a very slightly different guise—and, moreover, when by the Settlement Agreement it freely gave up the opportunity of learning more about the background to the self-interested conduct of which it complained. Its complaints regarding the acquisition of the Collection, the financing of that acquisition, the Commercial Agreement and the sale of the Collection were all settled for substantial value in a contract reached by commercial parties with equal bargaining positions and legal representation. And that settlement expressly included a release of unknown claims in circumstances where MRL had (on its own case) objective grounds of knowledge of deliberate wrongdoing by the Bonhams Defendants and a combination involving Lohomij. Yet now it seeks to sue for precisely the same matters because of what it says is new information concerning the defendants' motivations for doing the very things previously complained of. I regard this as a simple attempt to avoid the effect of a commercial contract freely entered into, and I unhesitatingly reject the suggestion that equity should relieve MRL of the consequences of its contract. Mr Toledano and Mr Butler put the nub of the point well in paragraphs 128 and 130 of their skeleton argument, albeit in the context of construction rather than "sharp practice":

> "The only matter that appears to be new in these proceedings is the suggestion that, rather than forming the intention to 'coerce' MRL to sell cars in the USA seemingly at some point after the Facility Agreement but before the Commercial Agreement, Bonhams and Lohomij intended to do so even before the Facility Agreement, from 22 May [2014]. It cannot seriously be suggested that this change in date, and the label of conspiracy, put the conspiracy claim outside the scope of the release.
>
> … It would be fundamentally uncommercial to suppose that these parties intended that the same complaints raised in the Spring Law Letter could simply be re-packaged, as a matter of legal labelling, into an 'unlawful means conspiracy' wrapper and thereby survive the S[ettlement] A[greement]."

120. However, I do not rest this conclusion on the defendants' submission that the "sharp practice" principle, if it exists, applies only to general releases and that the release in

the Settlement Agreement was not a general release. I remain unconvinced that there is a relevant difference between a release of "all claims concerning anything" and one of "all claims concerning such-and-such subject matter", or that the application of an equitable principle that exists to prevent an offence to the conscience of the court can turn on the categorisation of releases (which come in all shapes and sizes) as general or specific. However, as it seems obvious to me that, no matter what the proper scope of the sharp practice principle, it will not avail MRL, this does not seem to be an occasion for discussing the matter further.

121. MRL contends that, even if the Settlement Agreement precludes it from advancing claims based on matters pre-dating August 2015, it is nevertheless entitled to rely on unlawful means employed after July 2015 in support of an allegation of unlawful means conspiracy. I reject that contention. In these proceedings only one conspiracy and one combination are alleged, and the combination is alleged to pre-date the Settlement Agreement, albeit that some of the unlawful means are alleged to post-date it. MRL has not alleged a new conspiracy after July 2015. A tort or breach of contract or breach of fiduciary duty committed after July 2015 can in principle be relied on by MRL as a freestanding cause of action. But, if it were to be relied on as unlawful means under the pleaded conspiracy, it "relate[s] to the existence or occurrence of facts, matters or circumstances at or prior to the date of [the Settlement] Agreement"; therefore such reliance would be precluded by the release.

122. Mr Fenwick objected that this conclusion would mean, absurdly, that the conspirators could carry on their conspiracy with impunity after the Settlement Agreement. However:

1) It would only mean that a cause of action reliant on an existing combination had been settled. If there were a later combination, that would constitute a new cause of action. No such later combination is relied on by MRL.

2) The employment of unlawful means after the release would be actionable as freestanding causes of action.

3) This is all academic in the present case, because there is no reasonably arguable case that unlawful means were employed after the Settlement Agreement. This is explained below.

123. Accordingly, I hold that MRL's claims for relief for unlawful means conspiracy and for freestanding causes of action before August 2015 have no real prospect of success, as they have been released by the Settlement Agreement.

124. In these circumstances, it is unnecessary for me to discuss the conclusions I would have reached if I had accepted MRL's contention that the Settlement Agreement did not settle any claims in dishonesty, fraud or conspiracy. Nevertheless, I shall do so, albeit more briefly and without attempting to deal with all of the nuances of the arguments advanced before me.

G: Pre- Settlement Agreement causes of action

Claim against Bonhams for breach of the Exclusivity Agreement

125. The allegations by MRL are (APOC paragraph 123):

i. That MRL's reliance on the 22 May Email gave rise to a contract between MRL and Bonhams (the Exclusivity Agreement) on terms that: (a) Bonhams would purchase the Collection itself; (b) Bonhams would sell the Collection at a single auction at the Goodwood Revival or such other venue as might be agreed; and (c) Bonhams would sell cars valued at more than £1 million with a reserve. (APOC paragraph 26)

ii. That Bonhams was in breach of the Exclusivity Agreement because: (a) it did not purchase the Collection itself, but instead Lohomij advanced money for MRL to purchase the Collection and Bonhams was involved only as auctioneer; (b) Bonhams did not sell the Collection at a single auction in or around London but rather sold 10 of the Cars at the Auction in California and thereafter only 17 further Cars at the 2014 Goodwood Revival; (c) the 10 Cars sold at Auction in California were sold without reserve.

126. In my judgment, this claim has no real prospect of success.

127. First, although MRL describes the alleged agreement as an "Exclusivity Agreement", the case it advances regarding breach has nothing to do with exclusivity but with the commercial terms on which Bonhams would act in respect of the acquisition and sale of the Collection. However, the 22 May Email cannot reasonably be construed as evincing an intention to create legal relations in respect of the acquisition and sale of the Collection. The email twice makes clear expressly that the agreement is subject to contract and it envisages that there will be a due diligence process before the agreement is finalised. In my view, the situation was the same as commonly obtains in substantial dealings between business parties who are agreed that they want to do business on terms that they have discussed but want to place matters into the hands of professional advisers before the transaction and its detailed terms are finalised.

128. If the 22 May Email gave rise to any legal relations, it did so only in respect of an exclusivity obligation, whereby MRL was bound not to negotiate with third parties in respect of the sale of the Collection. I think it doubtful whether there was sufficient certainty in respect of the duration of any period of exclusivity. However, no breach of exclusivity is alleged.

129. Second, if indeed there was a legally binding contract regarding the acquisition and sale of the Collection, MRL's case as to the terms of that contract and as to breach is not reasonably arguable.

a) The alleged obligation upon Bonhams to buy the Collection is inconsistent with the express terms of the 22 May Email, which states that finance is to be provided to MRL to acquire the share capital of Stelabar and that Bonhams will sell the Cars owned by Stelabar at auction. Mr Fenwick sought to get around this point by saying that the 22 May Email must be construed in the disputed context of the meeting of 21 May 2014. That argument will not work: first,

APOC makes no relevant plea concerning the terms of the discussion at the meeting on 21 May 2014, such as might constitute a factual matrix for the construction of a contract subsequently made partially in writing; second, not even in the witness statements is it said that there was any agreement other than "in principle" at the meeting of 21 May 2014; third, the 22 May Email is clear on the point.

b) Even if MRL were correct as to the terms of the initial agreement, by 29 May 2014 the position was certainly different. MRL agreed to enter into the Facility Agreement, which necessarily involved a transaction on different terms with Bonhams. Having done so, it can hardly complain that Bonhams was in breach of contract for not proceeding in accordance with a prior agreement that its own contractual arrangements with Lohomij had superseded.

c) As regards the venue of the auction, clause 2.3 of the Commercial Agreement contained an express agreement for the sale of 10 specified Cars at the Auction and for the sale of other specified Cars at the Goodwood Revival thereafter. Although MRL has complained about the manner in which its consent to the terms of the Commercial Agreement was procured, it has never sought to set that Agreement aside and in these proceedings it advances claims on the basis of its provisions.

d) The alleged term as to a reserve price rests again on the allegation that the transaction was to be "substantially on the terms" offered by RM. Even if that suffices for a contractual term, however, the same point applies: clause 2.3 of the Commercial Agreement provided that the 10 Cars to be sold at the Auction should be sold without reserve.

130. Third, MRL's case that there was a contract, sufficiently certain, on the terms it alleges rests on the statement that the transaction was to be on "substantially the same terms" as those offered to MRL by RM. The problem is in ascertaining what is meant by that vague expression. The problem is highlighted by the very contention on which MRL relies, namely that "substantially the same terms" means that Bonhams was to buy the Collection in a back-to-back transaction. That was what RM was proposing to do. But the 22 May Email expressly states a different proposed transaction, namely that MRL would buy Stelabar and Bonhams would sell Stelabar's Collection. (And, as I have pointed out, on 23 May 2014 Mr Walmsley appeared to think that it was LG, not Bonhams, that would be acquiring the Collection.) In my view, this simple fact undermines MRL's reliance on the words "substantially the same terms".

131. Fourth, more generally, if the 22 May Email was a contract, it was superseded by the Commercial Agreement. Although MRL does not rely on alleged breaches of the Commercial Agreement as freestanding causes of action in these proceedings, it does rely on them as unlawful means in furtherance of the alleged conspiracy and it has not sought to set aside or impugn the Commercial Agreement. In my judgment, the entry by Bonhams into a contract with MRL that MRL positively affirms cannot possibly constitute a cause of action for MRL against Bonhams.

Claim against Mr MacLean and/or Mr Brooks and/or Bonhams for fraudulent/negligent misrepresentation

132. On any view, a claim based on negligent misrepresentation would have been released by the Settlement Agreement. Therefore only a claim based on fraudulent misrepresentation falls to be considered.

133. The plea of misrepresentation is in APOC paragraph 124:

> "124. Alternatively, if the terms of the Exclusivity Agreement referred to above were representations, then those representations were fraudulently, alternatively carelessly, made. MRL relied on such representations in entering the Exclusivity Agreement and/or by cancelling the agreement with RM."

134. I do not consider that this is a proper plea of fraudulent misrepresentation.

1) It does not actually state, even in the alternative, that "the terms of the Exclusivity Agreement … were representations". It only states, in the alternative, what is the case if they were representations. This is not a matter of being picky. If a party wants to say, even in the alternative, that words or conduct constituted a representation, it can and ought to say so. But the way the matter is put in APOC paragraph 124 avoids—perhaps deliberately—the need to commit to such an averment.

2) It does not identify representations, contrary to CPR Practice Direction 16, paragraph 8.2. Contractual promises by Bonhams are not themselves representations, because they are not statements of present fact. A promise may imply a representation of present intention to do what one promises to do. However, APOC does not identify any such representation. This is important, not least because the claim in deceit requires that MRL "show that the representor intended his statement to be understood by the representor in the sense in which it was false": *Goose v Wilson Sandford & Co* [2000] EWCA Civ 73, [2001] Lloyd's Rep PN 189, at [41].

3) For much the same reason, not even the falsity of the representations is pleaded. What is actually alleged is merely non-compliance with a promise, which is a different thing.

4) The alleged Exclusivity Agreement does not imply any of the representations that MRL would have to allege to get this part of the case to work.

    a) A representation of intention on the part of Bonhams to buy the Collection is inconsistent with the terms of the 22 May Email.

    b) A representation of intention to sell the Collection at a single auction in London is inconsistent with the words "or on/at such other dates and venues as may be agreed between MRL, Bonhams and LG" in the 22 May Email. (There is, perhaps, an additional question whether

Goodwood, which is expressly mentioned in the 22 May Email, can reasonably count as London, even allowing for urban sprawl.)

c) A representation of intention to sell Cars valued at over $1 million without a reserve price is not reasonably implied by the mention in the Exclusivity Agreement that the transaction will be "substantially on the terms" offered by RM.

5) There is no acceptable plea of fraud. In *Three Rivers District Council v Bank of England* [2001] UKHL 16, [2003] 2 AC 1, Lord Millett said at [183]-[187], [2003] 2 AC 291-292:

> "183. … The rules which govern both pleading and proving a case of fraud are very strict. In *Jonesco v Beard* [1930] AC 298 Lord Buckmaster, with whom the other members of the House concurred, said, at p 300:
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> > 'It has long been the settled practice of the court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, *as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires*' (my emphasis).
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> 184. It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on Fraud and Mistake* 7th ed (1952), p 644; *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney General for Victoria* [1901] AC 196; *Armitage v Nurse* [1998] Ch 241, 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.
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> 185. It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.
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> 186. The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of

> pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.
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> 187. In *Davy v Garrett* 7 Ch D 473, 489 Thesiger LJ in a well known and frequently cited passage stated:
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>> 'In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent.'
>
> This is a clear statement of the second of the two principles to which I have referred."
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> (See also *per* Lord Hope of Craighead at [55]. And cf. paragraph C1.3(c) of the *Commercial Court Guide.*) In the present case, no facts are alleged as giving rise to an inference of fraud; indeed, the inference of fraud is merely stated in the alternative to negligence.

<u>Breach of fiduciary duty by Bonhams, Mr MacLean and Mr Brooks in respect of making the Commercial Agreement</u>

135. The allegation is that: (1) by reason of the Exclusivity Agreement and MRL's consequent termination of negotiations with third parties, Bonhams owed to MRL (a) a fiduciary duty and/or (b) a duty to negotiate in good faith; and (2) Bonhams' alleged late change of position very shortly before the execution of the Commercial Agreement was a breach of those duties.

Fiduciary duty

136. In my judgment, it is plain that Bonhams did not owe any fiduciary duty to MRL before the making of the Commercial Agreement.

137. In *Bristol and West Building Society v Mothew* [1998] Ch 1 Millett LJ discussed the nature of fiduciary duties at some length. At 18, in a passage that has been cited and followed countless times, he said:

> "A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

138. More recently, in *Children's Investment Fund (UK) v Attorney General* [2020] UKSC 33, [2020] 3 WLR 461, Lady Arden at [44] said: "it is generally accepted today that the key principle is that a fiduciary acts for and only for another. He owes essentially the duty of single-minded loyalty to his beneficiary, meaning that he cannot exercise any power so as to benefit himself." She continued:

> "45. So the distinguishing obligation of a fiduciary is that he must act only for the benefit of another in matters covered by his fiduciary duty. That means that he cannot at the same time act for himself."

This "distinguishing obligation" explains why, outside settled categories of relationship, fiduciary duties rarely arise in a commercial context. In *Secretariat Consulting Pte Ltd and others v A Company* [2021] EWCA Civ 6, [2021] 4 WLR 20, Coulson LJ, with whose judgment Males LJ and Carr LJ concurred, said:

> "40. Fiduciary duties normally arise in certain settled categories of relationship, such as between a trustee and a beneficiary, or a solicitor and his client or the agent and his principal. It is exceptional for fiduciary duties to arise other than in those settled categories: see Leggatt LJ in *Sheikh Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [157]. Whilst fiduciary duties may exist outside such established categories, the task of determining when they do is not straightforward because there is no generally accepted definition of a fiduciary. In the same case at [159], Leggatt LJ said:
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> > '159. Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person. (Such duties may also arise where the responsibility undertaken does not directly involve making decisions but involves the

giving of advice in a context, for example that of solicitor and client, where the adviser has a substantial degree of power over the other party's decision-making: see Lionel Smith, "Fiduciary relationships: ensuring the loyal exercise of judgement on behalf of another" (2014) 130 LQR 608.) The essential idea is that a person in such a position is not permitted to use their position for their own private advantage but is required to act unselfishly in what they perceive to be the best interests of their principal. This is the core of the obligation of loyalty which Millett LJ in the *Mothew* case [1998] Ch 1 at 18, described as the "distinguishing obligation of a fiduciary". Loyalty in this context means being guided solely by the interests of the principal and not by any consideration of the fiduciary's own interests. To promote such decision-making, fiduciaries are required to act openly and honestly and must not (without the informed consent of their principal) place themselves in a position where their own interests or their duty to another party may conflict with their duty to pursue the interests of their principal. They are also liable to account for any profit obtained for themselves as a result of their position.'

41. An argument that has arisen in some of the authorities is whether there is a fiduciary relationship because there is a high degree of mutual trust and confidence between the parties. However, Leggatt LJ was at pains to point out at [163] that the existence of trust and confidence is not sufficient by itself to give rise to fiduciary obligations. He went on at [165] to emphasise the particular kind of trust and confidence that was characteristic of a fiduciary relationship. He said it was 'founded on the acceptance by one party of a role which requires exercising judgment and making discretionary decisions on behalf of another and constitutes trust and confidence in the loyalty of the decision-maker to put aside his or her own interests and act solely in the interests of the principal.'

42. Although we were referred to a number of other authorities on the question of fiduciary relationships, such as *Glenn v Watson* [2018] EWHC 2016 (Ch) and *Ranson v Customer Systems* [2012] EWCA Civ 841, they did not seem to me to add anything material. I note that this court in *Ranson* at [25] – [26] also stressed the importance of the terms of the contract in identifying whether there is a fiduciary relationship, a point picked up by the learned editors of *Jackson and Powell on Professional Liability*, 8th Edition, at paragraph 2-146."

139. As Mr Toledano submitted, prior to the making of the Commercial Agreement MRL and Bonhams were in negotiations as to whether, and if so upon what terms, Bonhams would act in the sale of the Collection. Their relationship was one of commercial

parties, each acting and entitled to act in its own interests; of course, as is commonly the case, those interests might be mutually compatible. For MRL, Mr Fenwick relied on passages in the authorities indicating that the existence of a contract does not necessarily exclude a fiduciary relationship and that the courts have declined to formulate a test for the existence of such a relationship. Those points are correct, but they do not justify allowing a case to proceed where there is nothing at all to suggest that there is any real prospect of establishing the existence of a fiduciary relationship. As Mr Weekes submitted: "A single-minded obligation of loyalty cannot be imposed on one party (Bonhams) as being owed to another party (MRL), when Bonhams was (1) negotiating a commercial contract with MRL and (2) therefore necessarily acting in Bonhams' own commercial interests" (skeleton argument, paragraph 96).

140. Although APOC alleges that Mr MacLean and Mr Brooks were in breach of fiduciary duty, it does not allege in terms that they owed any such duty or what the grounds of such a duty might be. For these reasons, as Mr Weekes submitted, the allegation stands to be struck out as disclosing no reasonable grounds for making the claim and as being embarrassing in the technical sense of that word. Further, as regards the merits, it is impossible that Mr MacLean and Mr Brooks should have owed fiduciary duties to MRL when Bonhams did not do so; and I can see no basis on which, if Bonhams had done so, Mr MacLean and Mr Brooks would also have done so, when at the material time they were acting solely for and on behalf of Bonhams: any breach of fiduciary duty would have been that of Bonhams, not theirs.

141. Even if Mr Collings' submission mentioned in paragraph 118 above (namely, that Lord Bingham's cautionary principle applied only to causes of action of which fraud or dishonesty was a necessary ingredient) were correct, the point would not have precluded the claims for breach of fiduciary duty, if and insofar as what is alleged is tantamount to a deliberate breach of trust: cf. *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699, *per* Arnold LJ at [21]-[23]. However, insofar as that is what is being alleged, the difficulty of explaining how these matters were not within the reasonable contemplation of the parties and, objectively understood, not intended to be covered by the Settlement Agreement is if anything all the greater.

Duty to negotiate in good faith

142. MRL's pleadings on this point lack clarity. APOC paragraph 28 alleges that Bonhams' insistence on exclusivity (that is, in the 22 May Email) imposed on it "a duty of good faith." APOC paragraph 125 pleads that the change of position by Bonhams between 27 June and 30 June 2014 amounted to "a breach of the duty to negotiate in good faith".

143. In my judgment, it is not reasonably arguable that Bonhams (far less Mr MacLean or Mr Brooks) owed to MRL a duty to negotiate in good faith in respect of the Commercial Agreement. Parties in negotiation concerning a matter yet to be agreed between them owe no duty at law to negotiate in good faith; they simply owe duties not to commit recognised legal wrongs such as misrepresentations: see *Walford v Miles* [1992] 2 AC 128, *per* Lord Ackner at 138; *Morris v Swanton Care & Community Ltd* [2018] EWCA Civ 2763, *per* Dame Elizabeth Gloster at [31].

144. Mr Fenwick's submissions for MRL approached the matter from a different angle, however. He referred to the dicta of Leggatt J in *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB) and to the cases that have applied those dicta,

and he submitted that it was reasonably arguable, and a matter to be determined only at trial, that the 22 May Email and MRL's reliance on it created a contract in which there was an implied term of good faith, requiring that Bonhams not act in bad faith, that is, in a manner that was improper, commercially unacceptable or unconscionable. In my judgment, Mr Toledano was correct to describe MRL's position as incoherent. Bonhams' bad faith is alleged to relate to its negotiation of the Commercial Agreement, which is a contract that MRL itself entered into and which it affirms in these proceedings. MRL's complaint is not that Bonhams failed to negotiate with a view to concluding a contract but rather that Bonhams was in breach of contract towards MRL by concluding a further contract with MRL on the terms of the Commercial Agreement. This makes no sense at all.

145. The position is *a fortiori* in respect of Mr Brooks and Mr MacLean. They are both alleged to have been in breach of the implied obligation to negotiate in good faith, but there is no plea that either of them was under such a duty; nor are any grounds for imposing such a duty alleged in APOC. As neither Mr Brooks nor Mr MacLean was a party to the Exclusivity Agreement, which is relied on as the source of the alleged duty, the case against them is not reasonably arguable.

Dishonest Assistance by Lohomij and/or Mr Louwman

146. The allegation is that, by insisting that the sale take place in California and not in London, Lohomij and/or Mr Louwman dishonestly assisted Bonhams to breach its fiduciary duty that arose in consequence of the Exclusivity Agreement: APOC paragraph 126.

147. The allegation discloses no reasonable grounds and has no real prospect of success.

1) As Bonhams did not owe the alleged fiduciary duty, there can have been no dishonest assistance.

2) The allegation that Lohomij and/or Mr Louwman acted "dishonestly" is entirely unparticularised. Nothing to justify the plea is set out in APOC; all that is said is that Lohomij knew that a sale in London would achieve the highest price. This is no basis on which to permit an allegation of dishonesty to proceed. On this ground, if on no other, it ought to be struck out.

3) The evidence of Ms Volf (statement, paragraph 44) is that Lohomij and Mr Louwman had nothing to do with the choice of venue for the Auction. I can see no evidential basis for gainsaying that statement. The furthest the matter goes is the financial connection between Mr Louwman and Lohomij and Bonhams, taken with Mr Sullivan's claim that it was at all times obvious that Mr Louwman was calling the shots regarding Bonhams' decision-making.

Breach of fiduciary duty by the Bonhams Defendants and Mr Brooks in agreeing to sell Cars at the Auction

148. This allegation appears in APOC paragraph 127:

> "In accepting instructions to sell the cars at auction, Mr Brooks, Bonhams and/or B&B breached its fiduciary duty to MRL by:
>
> PARTICULARS OF BREACH
>
> (1) Acting for MRL despite a conflict between the interests of MRL and its own interests in circumstances where:
>
> a. It was in Bonhams' and/or B&B's interests to auction ten of the cars in the Collection in the USA; but
>
> b. It was in MRL's interests to auction the entire Collection in the UK;
>
> (2) Acting for both MRL and Lohomij in circumstances where MRL's and Lohomij's interests conflicted because:
>
> a. It was in MRL's interest to auction the entire Collection in a single event;
>
> b. It was in Lohomij's interest that as few cars in the Collection as possible be sold at auction to increase the sums due and owing to it under the terms of the Facility Agreement."

149. In my judgment, this allegation has no real prospect of success.

1) It is only by the Commercial Agreement that Bonhams could be said to be "accepting instructions to sell the cars at auction". Bonhams owed no fiduciary duty to MRL before the making of the Commercial Agreement. Therefore entry into the Commercial Agreement and acceptance of instructions could not be a breach of fiduciary duty.

2) B&B had not been involved before the Consignment Agreement. It is only by the Consignment Agreement that B&B could be said to be "accepting instructions to sell the cars at auction". As B&B did not arguably owe a fiduciary duty before then, the acceptance of instructions to sell at auction cannot have been a breach of fiduciary duty.

3) Any acceptance of instructions by the Bonhams Defendants, in respect either of the mode of sale or of the involvement of Lohomij (which was, of course, the holder of security over the Cars) was precisely on terms agreed to by MRL: see clauses 2.1, 2.2 and 2.3 of the Commercial Agreement.

4) The case is *a fortiori* in respect of Mr Brooks. No grounds have been identified for alleging that he owed a fiduciary duty to MRL and I can discern none.

<u>Breach of fiduciary duty by the Bonhams Parties and Mr Brooks in the conduct of the Auction</u>

150. This allegation is set out in APOC paragraph 128:

> "Further, Mr Brooks', Bonhams' and/or B&B's conduct of the auction was deliberately designed to harm MRL and so amounted to a deliberate breach of fiduciary duty in that they:
>
> PARTICULARS OF BREACH
>
> (1) Held the Auction in the USA as opposed to the UK, despite Mr Brooks' and Bonhams' own view that this would likely result in lower prices being obtained;
>
> (2) Did not allocate a reserve price to any of the Cars;
>
> (3) Failed to allow sufficient time to properly promote the sale of the cars;
>
> (4) Failed to contact the parties identified by MRL as having an interest in purchasing the cars, including Mr Williams, Mr Mayr, and Mr Kemper;
>
> (5) Refused to allow MRL to proceed with the sale of the Ferrari 250 GTO to Mr Mayr for €42 million ($57 million), in circumstances where (a) it was Lohomij not Bonhams whose consent was required, (b) Mr Brooks expected that it would sell for approximately $38 million; and (c) Mr Brooks was advising MRL that the car would be sold for $60-80 million when he was telling buyers that the estimate was $30-40 million;
>
> (6) Bonhams had no firm bidders for the Ferrari 250 GTO the day before the Auction (other than Mr Monteverde) but decided to proceed regardless, notwithstanding that the market for such valuable cars is necessarily small and despite having advised MRL to reject a substantial offer for the sale of the 250 GTO the previous day;
>
> (7) The payment plan offered to Mr Monteverde was not offered to any other bidder, and MRL were not informed of it. Bonhams' failure to offer identical terms to all bidders was in breach of Californian law;
>
> (8) The payment plan offered to Mr Labi was offered without the consent of MRL. Further, if it was not offered to all other bidders (about which MRL has no knowledge) this would be a further breach of Californian law;
>
> (9) Bonhams did not inform MRL that Mr Les Wexner and his associates had boycotted auctions conducted by Bonhams. Furthermore, Bonhams did not recommend postponing the sale as a result of Mr Wexner's boycott;

(10) The bidding for the Ferrari 250 GTO was started at $10 million, an incredibly low sum for such an item;

(11) The Ferrari 250 GTO, despite being the prize lot, was not reserved until last and instead was sold as lot 3 out of 10;

(12) The sale took place on a Thursday, with the last-minute nature of the arrangements meaning that several other auctions had already been scheduled in Monterey that weekend."

151. In my judgment, the claim against Bonhams lacks reasonable grounds and has no real prospect of success, because it was not Bonhams but B&B that conducted the Auction.

152. The claim against Mr Brooks also lacks reasonable grounds and has no real prospect of success, because it has not been alleged that Mr Brooks personally owed fiduciary duties to MRL and no grounds for making any such allegation have been pleaded or could, in my view, be made out.

153. As for B&B, which contracted with MRL by the Consignment Agreement and conducted the Auction, the short point is that the claim is barred by limitation of time.

1) The Consignment Agreement incorporated the Seller's Conditions. Condition 18.2 provided that the relationship of the parties should be "governed by the laws of the State of California and U.S. Federal law (as applicable)."

2) Before me, the parties were in agreement that the relevant law is that of the State of California and were substantially agreed as to what that law was; expert evidence was not required. The limitation period for breach of fiduciary duty is at most 4 years from the date of the accrual of the cause of action. As the Auction took place in August 2014 and these proceedings were commenced in May 2020, the claim for breach of fiduciary duty in respect of the conduct of the Auction is prima facie time-barred.

3) There are two potential ways in which the limitation period might be extended: (a) the "delayed discovery principle", by which the limitation period may run from a later date, where the claimant did discover and could not reasonably have discovered relevant facts until that later date; (b) the "fraudulent concealment principle", whereby time does not start running until the claimant has discovered relevant facts which the defendant had concealed from it and which it could not with reasonable diligence have discovered earlier.

4) There is no realistic prospect that MRL will be able to avail itself of either the "delayed discovery principle" or the "fraudulent concealment principle". Of the particulars in APOC paragraph 128, particulars (1), (2), (3), (4), (6), (7), (9) and (12) were mentioned in the Spring Law Letter. Particular (5) was necessarily known to MRL. Particular (8), regarding the payment plan offered to Mr Labi, was information provided to Mr Sullivan no later than November 2014, when he received and read an email setting out the relevant facts. Particulars (10) and (11) were necessarily known to MRL, because Mr Sullivan was present at the Auction.

154. MRL proposes an amendment of its case to make a further allegation against B&B by a new sub-paragraph 121(4A) of APOC as follows:

> "Breach of the Commercial Agreement by B&B in offering payment plans and/or to accept cars in part-exchange to (at least) Mr Monteverde and Mr Labi."

Although APOC paragraph 121 relies on the various matters set out in the sub-paragraphs as elements in the tort of unlawful means conspiracy, paragraph 122 states that MRL relies on them also as freestanding causes of action. In fact, when the freestanding causes of action in respect of the conduct of the Auction are particularised in paragraphs 127 to 130 of APOC, the new allegation in paragraph 121(4A) is not repeated; and, although the allegation that *Bonhams* breached the Commercial Agreement is set out in paragraph 130, paragraph 131 accepts that the alleged breach cannot be relied on as a freestanding cause of action, because it would have been settled under the terms of the Settlement Agreement. I proceed on the basis that MRL does not seek to rely on the allegation in paragraph 121(4A) as a freestanding cause of action. Anyway, the proposed amendment cannot be permitted, because B&B was not a party to the Commercial Agreement and the allegation therefore has no real prospect of success.

Conspiracy

Law

155. Unlawful means conspiracy is committed "where two or more persons combine and take action which is unlawful in itself with the intention of causing damage to a third party who does incur the intended damage. It is not necessary for the injured party to prove that causing him damage was the main or predominant purpose of the combination, but that purpose must be part of the combiners' intentions." See *Clerk & Lindsell on Torts,* 23rd edition at para 23-105; cited, from an earlier edition, with approval by Supperstone J in *Baxendale-Walker v Middleton* [2011] EWHC 998 at [60]. I proceed on the basis that it is at least reasonably arguable that for the purposes of this form of the tort of conspiracy the unlawful means may consist of breach of contract with the claimant or breach of fiduciary duty towards the claimant, although not all of the combiners were privy to the contract or owed the fiduciary duty.

156. In *Kuwait Oil Tanker Co SAK v Al Bader* [2000] EWCA Civ 160, [2000] 2 All ER (Comm) 271, the Court of Appeal (Nourse, Potter and Clarke LJJ) said:

> "111. A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out (at p 124), it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the

> Court of Appeal Criminal Division delivered by O'Connor LJ in *R v Siracusa* (1990) 90 Cr App R 340 at 349 is of assistance in this context:
>
> > 'Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.'
>
> Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. In a criminal case juries are often asked to decide whether the alleged conspirators were 'in it together'. That may be a helpful question to ask, but we agree with Mr Brodie that it should not be used as a method of avoiding detailed consideration of the acts which are said to have been done in pursuance of the conspiracy.
>
> 112. In most cases it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination. It will be the rare case in which there will be evidence of the agreement itself. …"

157. Thus, in *Bird v O'Neal* [1960] AC 907, the Judicial Committee of the Privy Council set aside a finding that the appellants had been party to a combination. The reason for their Lordships decision on that point was that the trial judge and the Court of Appeal had not "examined the position of the individual appellant in order to determine whether and, if so, how he had become a party to the unlawful conspiracy"; and (with reference, of course, to the case before them) they indicated that the proper approach would be "by looking to see what part, if any, each appellant had played in connection with each specific incident when threats or intimidation had been used and then considering whether such part necessarily compelled the inference that the particular appellant was a party to a conspiracy to use unlawful means": see 920-921.

MRL's case

158. APOC paragraph 117 alleges that all of the defendants conspired "from at least May 2014", save only that B&B's involvement in the conspiracy is limited to the decision to sell 10 Cars at the Auction and to the conduct of the Auction. Four purposes of the conspiracy are identified:

> "(1) To auction ten cars in California, in particular the Ferrari 250 GTO, which was expected to sell for a world record price. At that time, Bonhams was seeking to obtain investment from a Chinese private investor (reported to be Poly Culture). The Californian auction was intended to increase Bonhams' American presence and so make the company more desirable to such investors. In support of this, MRL relies, amongst other things, on a subsequent conversation between Mr Sullivan and Maclean on or around 13 November 2017, in which Mr Maclean stated that: (a) Bonhams had always intended to auction some of the cars in the US; (b) they never intended to auction the premium cars in the Collection in the UK; (c) this is why they did not enter into the Commercial Agreement at the time that they entered into the Facility Agreement; and (d) the Auction was conducted illegally;
>
> (2) To prevent MRL from repaying the sums under the Amended Facility Agreement both by refusing to consent to sales and by preventing MRL from refinancing the sums due and owing which increased the sums due and owing to Lohomij;
>
> (3) Following MRL's Letter before Action dated 13 April 2015, to 'destroy' Mr Sullivan (and therefore MRL), as stated by Mr Brooks on multiple occasions;
>
> (4) To facilitate Lohomij directing sales of the remaining cars to its associates at less than the true market price of the cars. This was to be achieved by refusing to allow MRL to sell the remainder of the Collection after the auction so MRL's reputation in the classic car market would suffer such that buyers would be unwilling to deal with MRL, and MRL would be forced into selling the Collection to Lohomij's and/or Bonhams' associates and/or preferred collectors."

159. The only purpose that relates to conduct before the Settlement Agreement is purpose (1). That purpose could in theory concern all of the defendants, though (i) I do not consider that any reasonable grounds have been shown for suggesting that it concerns Mr Knight and (ii) Mr MacLean's email of 26 May 2014 presents great difficulties for any allegation that the Bonhams Defendants and Lohomij were conspiring with that purpose at that time. All of the conduct that is identified in respect of purposes (2) to (4) relates to the period after the Settlement Agreement and is considered below. However, to anticipate, I make the following observations now.

a) Purpose (2) seems to me to be fantasy. Having considered the evidence in some detail, I cannot see the remotest prospect of a finding that there was any such purpose.

b) Purpose (3) is just as unconvincing. There is an issue as to whether Mr Brooks expressed himself in the manner alleged, though he accepts that he expressed himself robustly. But this was in the context of settlement negotiations regarding threatened claims as set out in the Spring Law Letter. MRL's attempt to use such remarks as proof of a conspiracy to ruin Mr Sullivan and MRL involves ignoring the context in which they are alleged to have been made. In the absence of any serious evidence that Bonhams and Mr Brooks did thereafter act in a manner designed to ruin Mr Sullivan and MRL, reliance on Mr Brooks' remarks does not advance matters. (There is a further occasion when Mr Brooks is said to have expressed an intention to ruin MRL and Mr Sullivan, outside the context of the original dispute. This relates to 23 November 2016 and is considered later in the judgment.)

c) Purpose (4) could apply to all defendants except B&B and Mr MacLean. But when set against the objective evidence it lacks credibility.

d) Purposes (2), (3) and (4) can have nothing to do with Mr MacLean.

160. APOC paragraph 119 sets out particulars of combination:

> "(1) Prior to MRL's acquisition of Stelabar, both Bonhams and Mr Louwman made approaches to purchase the Collection in 2013 and 2014 respectively;
>
> (2) Mr Louwman was the controlling mind of Lohomij and part-owner of Bonhams and therefore able to exercise control over both companies;
>
> (3) Bonhams consistently threatened MRL that Lohomij would enforce the onerous terms of the Facility Agreement, Debenture, and Guarantee if MRL did not agree to Bonhams terms. Such threats could not have been made unless Bonhams and Lohomij acted in combination;
>
> (4) Despite the fact that MRL's Letter Before Action pursued a claim against Bonhams only:
>
> > a. Lohomij insisted on being party to the Settlement Agreement. There was no reason for Lohomij to be protected by the Settlement Agreement unless it was also was party to the wrongdoing perpetrated by Bonhams;
> >
> > b. Lohomij agreed to accept a substantial reduction in the sums due and owing under the Facility Finance Agreement to settle Bonhams' and B&B's liabilities under the Settlement Agreement. There would be no reason for Lohomij to do so had it not acted in combination with Bonhams and B&B;
> >
> > c. Lohomij acted to protect Bonhams by compelling MRL to settle its claims despite the fact that any successful claim

against or financial settlement with Bonhams would have allowed MRL to repay the Loan.

(5) Even after the Settlement Agreement was entered into, Mr Knight continued to attend most of the meetings between MRL and Lohomij when he had no reason to do so;

(6) Mr Louwman acted with Mr Knight to prevent MRL from selling the remaining cars in the Collection. Notwithstanding the fact that Bonhams refused to continue to act for MRL after the auction, Mr Knight of Bonhams provided Lohomij with frequent valuations of the remaining cars in the Collection. These valuations fluctuated in accordance with Lohomij's interests. When Lohomij wished to prevent a sale, Mr Knight overvalued the car so as to provide Lohomij with a pretext for withholding its consent. By contrast, when Lohomij wished to purchase a car itself or facilitate a sale to a preferred collector, Mr Knight would undervalue the car so that it could be sold at under value."

161. In respect of those particulars of combination:

a) Particulars (1), (2) and (3) could in theory relate to all of the defendants in respect of the Exclusivity Agreement, the Facility Agreement, the Commercial Agreement and the Auction, though again the case against Mr Knight lacks any proper basis.

b) Particular (4) could relate to the same matters, though as mentioned above it tends to undermine MRL's case as to what was within the reasonable contemplation of the parties when the Settlement Agreement was made.

c) Particular (5) is obviously unmeritorious. Mr Knight cannot possibly have been present at meetings between MRL and Lohomij unless he had a reason to be present. That reason will be that either or both of the parties wanted him to be present. Particular (6) shows that Mr Knight was involved at Lohomij's request.

d) Particular (6) relates to the matters after the Settlement Agreement, which are discussed below. It can have nothing to do with Mr MacLean. (I mention below and dismiss without hesitation the suggestion that Mr MacLean, though purporting to act for MRL at that time, was in fact an agent of Lohomij.) It is notable that Mr MacLean is not mentioned in connection with the combination.

162. APOC paragraph 120 sets out particulars of intention to injure:

"(1) Forcing MRL to accept the terms of the Facility Agreement mere hours before the deadline for completing the SPA. This caused MRL injury because, as a result of the Facility Agreement:

a. The true financial risk of the transaction was passed to MRL, as Lohomij always had the option of acquiring the Collection itself or the unsold balance of it in order to satisfy the Loan;

b. As lender Lohomij had the ability to: (i) put significant commercial pressure on both MRL as borrower and Mr Sullivan personally as guarantor; and (ii) control how the Collection was sold.

(2) Changing the terms of the Commercial Agreement on 30 June 2014 to sell ten of the cars in California, with the threat that if those terms were not agreed to, Lohomij would withdraw financing and repossess the Collection. This caused MRL injury as auctioning the cars in or around London would have achieved a higher price than that achieved in California;

(3) Carrying out the auction in such a manner as was never likely to obtain the highest price for MRL, but which was solely designed to bolster the reputation of Bonhams in the USA including selling the 250 GTO to a pre-selected bidder, and refusing a much higher private offer;

(4) Forcing MRL into abandoning its claims against Bonhams and signing the Settlement Agreement in July 2015 under the threat of Lohomij foreclosing on the Loan;

(5) Sabotaging numerous attempts by MRL to sell the Collection after July 2015, thereby prolonging MRL's indebtedness to Lohomij and the consequent pressure that Lohomij was able to place on and the fees it was able to recoup from MRL;

(6) Sabotaging numerous attempts by MRL to refinance the debt;

(7) Mr Louwman's refusal to return the Abarth 207A."

163. In respect of those particulars of intention to injure:

a) Particulars (1), (2) and (4) do not arguably involve unlawful means, because they all relate to contracts that MRL entered into, has not sought to impeach, and indeed seeks to enforce in these proceedings.

b) Particular (3) relates to the Auction and potentially involves all the defendants, though once again Mr Knight's connection is not shown to be reasonably arguable.

c) Particulars (5) and (6) concern matters after the Settlement Agreement. They cannot relate to Mr MacLean. As explained below, they have no merit anyway.

d) Particular (7) concerns the conversion claim. There is no basis for seeking to implicate other defendants in this matter and it is not reasonably arguable that it represents an intention of parties in combination.

164. The unlawful acts said to have been committed in furtherance of the conspiracy are set out in APOC paragraphs 129 to 136. So far as these acts pre-date the Settlement Agreement and are relied on as freestanding causes of action, they have been discussed above. So far as they post-date the Settlement Agreement, they are considered below;

what is said here is by way of anticipation. In summary, the only allegation of unlawful acts within a conspiracy that is reasonably arguable is that B&B acted in breach of fiduciary duty in respect of the conduct of the Auction. Although that cause of action is statute-barred, I consider it reasonably arguable that it could be relied on as unlawful means employed in furtherance of a conspiracy.

165. It is necessary to consider three further allegations of wrongdoing that are not relied on as freestanding causes of action (because they are admitted to have been released by the Settlement Agreement) but are relied on as unlawful means.

166. First, MRL alleges that there were implied terms of the Commercial Agreement that Bonhams would exercise reasonable care and skill and would act honestly and in good faith (APOC paragraph 45); and it further alleges that the matters complained of in respect of the conduct of the Auction amounted to breaches of those implied terms (APOC paragraph 129). In my judgment, this is not reasonably arguable and has no real prospect of success. Bonhams did not conduct the Auction. It takes matters nowhere to allege, as does APOC paragraph 45, that there was an implied term of the Commercial Agreement that Bonhams would act with reasonable care and skill, or in good faith, unless one identifies what it did or was required to do under the Commercial Agreement. The matters complained of in the conduct of the Auction relate not to matters done by Bonhams under the Commercial Agreement but to matters done by B&B under the Consignment Agreement.

167. Second, APOC paragraph 129 alleges in the alternative that the matters complained of in respect of the conduct of the Auction constituted negligence by Mr Brooks, Bonhams and/or B&B. I do not consider that negligence can be unlawful means in the furtherance of a conspiracy. One can hardly conspire with others to injure a third party by negligence (cf. *TCP Europe Ltd v Perry* [2012] EWHC 1940 (QB), *per* HHJ Seymour QC at [36]); the very notion of a conspiracy to injure by the use of unlawful means requires that there be some deliberate act or omission, not merely some oversight or want of care.

168. Third, APOC paragraph 130 alleges that Bonhams breached the Commercial Agreement by: (1) failing to set a reserve price for Cars valued at over £1 million, contrary to clause 2.6; (2) failing to keep MRL informed about all the offers and expressions of interest it had received, contrary to clause 6; (3) failing to sell 43 of the remaining 60 Cars at Goodwood, contrary to clause 2.3. As to these allegations:

1) There is no real prospect of establishing that Bonhams was in breach of clause 2.6. The 10 Cars sold at the Auction were specifically agreed to be sold without reserve (clause 2.3) and were in any event sold by B&B. APOC makes no relevant allegation concerning the sale of other Cars.

2) There is no real prospect of establishing that Bonhams was in breach of clause 6, because the offers or expressions of interest that have been identified were made to B&B in respect of the Auction, not to Bonhams.

3) It is common ground that Bonhams did not offer for sale at Goodwood some 40 of the Cars. In its Defence, paragraph 105, Bonhams states that this decision was taken "following further discussions and agreement with Mr Sullivan after the Commercial Agreement, in particular in view of the fact that some of the

cars in the Collection were in worse condition than had been anticipated." That averment is not responded to in the Reply, and I have seen no evidence to contradict it, either in MRL's witness statements or in the documents. There is, accordingly, simply a bald assertion that Bonhams did not sell the Cars at Goodwood. It is impossible that Bonhams should simply have refused to sell the Cars, without there being more to it than that: whether the "more" involved an agreement, a complaint by MRL, or a blazing row as to Bonhams' conduct. In the absence of any particulars or evidential response by MRL, I conclude that there are no real prospects of establishing that Bonhams was in breach of contract.

Conclusion on conspiracy

169. It is not reasonably arguable that any of the defendants conspired to use unlawful means in the period after the Settlement Agreement.

170. In respect of the period prior to the Settlement Agreement, it is reasonably arguable (in the sense that it is not fanciful to allege) that all of the defendants except Mr Knight conspired to prefer the interests of Bonhams and its US affiliate by auctioning the 10 Cars at Quail Lodge in a manner that was not to the best advantage of MRL and involved a deliberate breach of B&B's fiduciary duty; though the case that Lohomij and Mr Louwman were involved in such a conspiracy is only barely arguable. That is the full extent of the allegation of unlawful means conspiracy that I should have thought had a realistic prospect of success, were it not for the Settlement Agreement.

H: Post- Settlement Agreement Causes of Action

171. No part of APOC can reasonably be construed as advancing any claim against Mr Brooks or Mr MacLean or Mr Louwman personally in respect of the period after the Settlement Agreement, save in respect of conspiracy (as to which, see above) and the claim against Mr Louwman for conversion (which it is accepted ought to go to trial).

172. The allegations that fall to be considered here relate to sales that were proposed in respect of four Cars (#0818, #0828, #1461 and #2025) and an additional car that was not part of the Collection (#1953). The parties who are concerned with this aspect of the case are Lohomij, Bonhams and Mr Knight. A bare outline of the facts is set out at paragraphs 67 to 73 above and the nature of the pleaded case is summarised at paragraphs 79 to 81 above.

173. I have not conducted a mini trial. However, the issues on this part of the case turn in large measure on the plausibility of MRL's factual case. Therefore a critical appraisal of the evidence is required, and it is necessary to refer to the statements of case and the evidence in considerable detail. This part of the judgment will be structured as follows:

- A summary of the pleaded case: paragraphs 174 to 179;
- A recital of the facts: paragraphs 180 to 301;
- A discussion of the issues: paragraphs 302 to 356.

The pleaded case

Sale 1

174. The facts on which MRL relies in respect of Sale 1 are set out in APOC paragraphs 69 to 77.

> "69. In June 2016, MRL negotiated Sale 1 with FR-G, which would have generated an aggregate sum of €58 million for the sale of the following cars: #0828, #2025, #1461 and #0818.
>
> 70. Had this sale occurred, then MRL would have had revenue to repay the Loan in its entirety, which at that time was approximately €38 million.
>
> 71. However, prior to the finalisation of Sale 1, Lohomij insisted that Mr Pius Schlumpf, a director of Bonhams (Europe) SA and the Louwman Group (the owner of Lohomij) and Mr MacLean meet with Mr Frank Rickert, director of FR-G and his lawyer, Bjorn Schmidt, along with Mr Sullivan and Mr Hilder.
>
> 72. At this meeting, Mr Schlumpf and Mr MacLean told Mr Rickert and Mr Schmidt that: (1) MRL had a loan arrangement with Lohomij, of which €38 million was outstanding; and (2) Lohomij required immediate repayment of the Loan, otherwise it would foreclose.
>
> 73. At one point in the meeting, Mr Schlumpf asked everyone to leave the room, so that he and Mr Sullivan could have a conference call with Mr Louwman. On the call, which was on a speakerphone, the discussion became very heated, and Mr Louwman started shouting and screaming at Mr Sullivan. He told Mr Sullivan that if he did not get his money back immediately, he (i.e. Lohomij) would foreclose. This was overheard by Mr Rickert and Mr Schmidt, who inferred that MRL was in serious financial difficulties (and that they may shortly be able to obtain the cars from Lohomij at a discounted price).
>
> 74. On 29 August 2016, Mr Sullivan emailed Mr Schlumpf, stating that:
>
>> 'since I started dealing with the FR Group their offers have considerably decreased due to the fact that they are being told that the cars will be available at the end of the month direct from [Mr Louwman] for the outstanding loan amount. This of course is totally unacceptable and I would have to legally try and stop any such move. I believe [Mr Louwman], You and I should meet with FR Group and

> confirm to them that the cars will not be sold under a distress sale.'

> 75. Mr Schlumpf subsequently called Mr Sullivan to inform him that Mr Louwman was not prepared to meet.
>
> 76. As a result of Mr Schlumpf's, Mr Louwman's and Lohomij's conduct, FR-G pulled out of Sale 1.
>
> 77. MRL was eventually granted permission by Mr Louwman to sell the cars earmarked for Sale 1, but at substantially reduced prices. For example, in respect of the Ferrari #2025, Mr Louwman consented to its sale on the understanding that it was being purchased on behalf of Mr Loh, a personal friend of Mr Louwman. The Ferrari #2025 was sold to FR-G on Mr Loh's behalf for €12 million, as opposed to the €15.1 million which had previously been agreed."

175. Since the service of Lohomij's Defence, which set out a more detailed chronology, MRL's case has undergone some modification, as appears from Mr Sullivan's first statement, dated 6 April 2021, and from MRL's Reply to the Defence of Lohomij and Mr Louwman. The events pleaded in APOC paragraphs 71 to 73 are now said to have taken place at two distinct meetings, one on 2 June 2016 and one tentatively dated as 6 July 2016. Mr Sullivan's statement says:

> "123. There were approximately four or five meetings between Mr Rickert and I [sic], both before and after FR-G had pulled out of Sale 1. The first substantive meeting took place on 2 June 2016, and was attended by Mr Schlumpf, Mr Rickert, Mr Schmidt, Mr Hilder, Mr MacLean and me. At one point during this meeting, Mr Schlumpf asked everyone besides me to leave the room so that he could call Mr Louwman, who apparently wanted to speak with me. Mr Rickert, Mr Schmidt, Mr MacLean and Mr Hilder left the room and waited outside the door. Mr Schlumpf called Mr Louwman on his mobile phone and conducted the call on speakerphone. During the call, Mr Louwman started to shout at me very aggressively and exclaimed that if he did not get his money back immediately he would foreclose on the loan.
>
> 124. It was clear to me that Mr Rickert and Mr Schmidt, who were standing just outside, would have overheard the conversation. Further, they would clearly have formed the view, given the manner in which Mr Louwman conducted the call, that MRL was in serious financial difficulties. This was not the message that any seller would want to convey to a purchaser.
>
> 125. At another meeting, which I believe took place on 6 July 2016, I recall witnessing Mr Schlumpf and Mr MacLean telling Mr Rickert and Mr Schmidt, in my presence, that MRL owed €38 million to Lohomij under a loan agreement, and that

> Lohomij now required immediate repayment otherwise it would foreclose on the loan and exercise its security by repossessing the four Cars which were the subject of the sale. Mr Hilder and I were shocked that Mr Schlumpf and Mr MacLean would behave in this way, since this would clearly undermine the deal that we were seeking to push through. Mr Hilder and I met with Mr MacLean and Mr Schlumpf after the meeting and made our feelings clear, objecting strongly to their conduct and angrily asking why they would behave in such a way. They responded that they did not mean to upset anyone; this was nonsense – it was a deliberate act to show that Mr Louwman and Lohomij were putting MRL under pressure."

176. APOC paragraphs 132 and 133 allege that Lohomij's refusal to consent to Sale 1 and/or its attempts to interfere with and/or block Sale 1, notwithstanding that it would have enabled MRL to repay the Loan, together with similar breaches in respect of Sale 2 and Sale 3, resulted in MRL being considered an unreliable vendor and suffering reputational damage in the market. These matters are relied on as a breach by Lohomij of clause 6 and clause 8 of the Settlement Agreement. So too are "Mr Schlumpf's attempts to sabotage Sale 1."

177. APOC paragraph 134 alleges that Lohomij's conduct in respect of Sale 1 was a breach of clause 9 of the Amended Facility Agreement and/or the implied duty not to prevent and/or interfere with any prospective sale of the Cars and/or the duty of good faith implied in the contract or at common law. The particulars state of the interference in Sale 1:

> "This was unreasonable conduct and/or was in breach of the implied term and/or a breach of the duty of good faith and/or unlawful at common law because:
>
> a) Had Lohomij not interfered in Sale 1, the Loan would have been fully repaid from the proceeds of Sale 1;
>
> b) The cars were to be sold at market value;
>
> c) Refusing the sale made it more difficult to sell the Collection going forwards, as MRL gained a reputation as an unreliable vendor."

Sale 2

178. MRL's case in this regard is set out at APOC paragraphs 78 to 100 and 132 to 135. In summary, the case is as follows.

    i. Sale 2 was agreed in November 2016 as a sequenced transaction as follows. First, #0828 would be sold to the well-known Ferrari dealer Mr Joe Macari for consideration comprising Ferrari #1953, a Ferrari engine and £4.75 million in cash. Second, Ferrari, who had possession of the cars, would remove the engine of #1953 and install it in #2025, its original chassis, thereby increasing the value of #2025; and the other Ferrari engine would be placed in #1953. Third, #1953

would be sold to Mr Mark Williams and #2025 would be sold to FR-G: those sales had already been agreed (subject to Lohomij's consent) and invoices had been sent to the buyers. Sale 2 would have produced €33.49 million for MRL, which it would have applied to reduce the balance outstanding on the Loan to about €3 million. MRL could easily have refinanced that balance, and anyway Lohomij's remaining security was far in excess of that balance.

ii. At the same time, Mr Sullivan and a business partner, Mr Owens, were arranging a new venture that would involve paying off the balance of the Loan and buying the remaining Cars from MRL and a museum of classic cars in Verona. The venture involved borrowing €65 million from Lombard, who however would lend only if the balance owing to Lohomij were reduced substantially. This required completion of Sale 2.

iii. In early November 2016 Mr Sullivan requested Lohomij's consent to Sale 2 and also informed Lohomij of his proposed new venture. On 5 November 2016 there was a meeting between Mr Sullivan, Mr Louwman and Mr Jakob Greisen of B&B. Mr Greisen was advising Lohomij as to the values of the Cars and had provided a valuation of #0828 and #2025 of $35.5 million, which was less than the price MRL had agreed to sell them for. At the meeting on 5 November:

- Mr Louwman said that he had a customer for #0828 and #2025 in America. Mr Greisen said that one customer was willing to pay €28 million for #0828.

- Mr Louwman said that, as MRL was in default, it should give Lohomij the remainder of the Collection in lieu of payment; and when the Collection was sold Mr Sullivan would be paid a small commission so that he could "buy his wife a new kitchen".

- Mr Sullivan refused that proposal. Mr Louwman refused Mr Sullivan's proposal that B&B sell #0828 on MRL's behalf.

iv. On behalf of Lohomij, Mr Louwman again refused consent to Sale 2 orally on 11 November 2016 and in writing from Ms Volf on 16 November 2016. The only reason given by Ms Volf for the refusal of consent was that Mr Louwman wanted repayment of the Loan as soon as possible and was awaiting confirmation from Lombard that it would provide the necessary finance.

v. By email on 16 November 2016 Mr MacLean, on behalf of MRL, complained to Ms Volf that Lohomij was not entitled to refuse consent to Sale 2, as it was at market value and would provide enough funds to repay the Loan. The email warned that refusal of consent would "irreparably harm the value of the remaining cars, completely destroy MRL's credibility and the future value of the cars and severely reduce Lohomij's prospects of repayment."

vi. On 18 November 2016 Ms Volf replied, justifying the refusal of consent on the ground that the proposed sale was at an undervalue. She did so on the basis of a communication received from Mr Knight, to the effect that Lohomij was entitled to question the fairness of the deal and to have concerns about the value received.

vii. On 23 November 2016 Mr Brooks' lawyer told Mr Sullivan that Bonhams was blocking the deal and passed on a message from Mr Brooks: "We are not going to let you do this deal. We are going to destroy you."

viii. As a result of Lohomij's refusal of consent: (a) Sale 2 collapsed; (b) MRL had no choice but to enter into a significantly less favourable contract to sell #2025 and #1953 to Mr Loh, a friend of Mr Louwman; (c) because this resulted in a balance of €15 million rather than only €3 million on the Loan, Lombard and Mr Owens pulled out of the deal to finance Mr Sullivan's new venture; (d) Mr Macari and Mr Williams threatened to sue MRL, though in the event they did not do so; (e) MRL suffered reputational damage in the market.

ix. Lohomij's refusal to consent to Sale 2 was:

a. a breach of clause 6 and/or clause 8 of the Settlement Agreement (APOC paragraphs 132 and 133(1));

b. a breach of clause 9 of the Amended Facility Agreement (APOC paragraph 134(2));

c. a breach of an implied term not to interfere with or prevent a sale and/or to act in good faith, and/or of a common law duty not to prevent release of security (APOC paragraph 134(2)).

x. By reason of Mr Knight's intentional overvaluation of the Cars, with the intention of providing Lohomij with a pretext for refusing to consent to Sale 2 and of causing MRL economic loss:

a. Bonhams was in breach of clause 6 and/or clause 8 of the Settlement Agreement (APOC paragraphs 132 and 133(2));

b. Bonhams and Mr Knight committed the economic tort of procuring Lohomij's breach of clause 9 of the Amended Facility Agreement (APOC paragraph 135).

xi. By reason of Mr Knight's subsequent intentional undervaluing of the Cars, with the intention of facilitating their sale at an undervalue to Mr Loh, Bonhams was in breach of clause 6 and/or clause 8 of the Settlement Agreement (APOC paragraph 133(3)).

Sale 3

179. MRL's case as to Sale 3 is set out in APOC paragraphs 101–109 and 132-135. The case in summary is as follows:

i. MRL agreed Sale 3 in June 2017: (a) it would sell #0818 and #1461 to JD Classics for £29.5 million, payable as to £2.5 million in cash and as to £26.5 million in cars given in part-exchange; (b) it would thereupon sell two of those part-exchanged cars to FR-G for €5 million and would use the others as security for a refinancing package.

ii. The cash received from the sale of #0818 and #1461 would have reduced the Loan to below €13 million. The sale of the two part-exchanged cars would have further reduced it below €8 million. The remaining balance would have been repaid by way of refinancing.

iii. However, on 8 June 2017 Lohomij refused consent to Sale 3.

iv. Further, Lohomij, through its solicitor Mr Coppel, deliberately interfered with MRL's negotiations and discussions with alternative financers: Reditum, Aldermore, Lombard, Exchange Finance, and Royal Bank of Scotland International.

v. These matters constitute breaches by Lohomij of clauses 6 and 8 of the Settlement Agreement and clause 9 of the Amended Facility Agreement.

vi. Mr Knight intentionally overvalued #0818 and #1461 in order to provide Lohomij with a pretext to refuse consent to Sale 3:

a) In June 2017 Mr Knight advised Lohomij that the proposed price of €22 million for #0818 as part of Sale 3 was an undervalue; but in November 2017 he valued the same Car at only €11 million.

b) Similarly, in June 2017 Mr Knight advised Lohomij that the proposed price of €13.2 million for #1461 was an undervalue; but in November 2016 he had advised that it could not be sold for less than €10 million, and in November 2017 Lohomij offered only €3 million for the Car on the basis of a new valuation by Mr Knight.

vii. Bonhams and/or Mr Knight were thereby liable in economic tort for procuring Lohomij's breach of the Amended Facility Agreement, and Bonhams was in breach of clauses 6 and 8 of the Settlement Agreement.

<u>The facts and evidence</u>

Sale 1: facts

180. On 7 April 2016 Mr Sullivan wrote by email to Ms Volf and Mr Peter Verkuyl of Lohomij:

> "… I have today returned from Germany and can confirm that #0818, #0828, #2025 and #1461 are under offer to a single German buyer (well qualified) and next Friday the 15th I will travel to Stuttgart to finalise the transaction with a deposit being paid and a completion date of circa 4 weeks.
>
> The above proposed transaction will fully pay the debt to Lohomij."

181. The proposed German buyer was a member company of the Frank Rickert Group ("FR-G"); Mr Rickert was a major car dealer, based in Stuttgart. On 28 May 2016 Mr

MacLean ("who had by this point ostensibly resigned from his role at Bonhams and purported to be working in MRL's interests": paragraph 51 of MRL's Reply to the Defence of Lohomij and Mr Louwman; apart from the words "ostensibly" and "purported" this represents Mr MacLean's case) sent an email to Mr Louwman, copied to Mr Sullivan, providing a summary of the proposed transaction:

> "1. Graham Sullivan will arrange a meeting this coming week with Frank Rickert to finalise the terms of the deal between Frank and MRL which I understand have already been agreed in principle. I will go to the meeting in order to clarify all the major commercial terms so that they can be set out in a Heads of Terms to be signed within a few days of the meeting. … The negotiations with Frank have been carried out by Graham and Roy [Hilder]. The meeting next week should make clear how close Frank and MRL are to a detailed and binding agreement.
>
> 2. The key points of the deal with Frank which Graham has explained to me are as follows:
>
> > A. FR to buy the two P cars and 250 SWB (with its correct engine) for a net figure in excess of €40 million - sufficient to enable MRL to repay Lohomij in full.
> >
> > B. FR to buy all the contents of the Verona Museum [where the Collection was housed] and probably also the building. MRL to have the right to buy various items from the Museum at or before completion for a price to be agreed.
> >
> > C. A deposit to be paid by FR on signature of the agreement with MRL. The car element of the transaction (A above) to be completed within the next few weeks and payment in full for the cars to be made on completion of the car element. The Museum element (B above) to be completed as soon as Italian legal formalities can be carried out. MRL has an exclusive mandate from the owners of the Museum to sell the Museum and the terms for the sale of the Museum contents and the building are close to being agreed between MRL and the Museum owners and, in turn, between MRL and FR. The only significant item left to be agreed is the price of the building (valuation due on behalf of the owners). The price should not be an obstacle since the real estate market in Italy, including Verona, is depressed with very few buyers and because the Museum building has no current use or value except as a museum.
>
> I think the meeting this week will establish how real FR's interest is and how close the deal is to being done. If the deal with FR cannot be done, the value of the P cars, 250 SWB and remaining cars should be more than sufficient to repay Lohomij. …"

182. On 2 June 2016 there was a meeting in Stuttgart, which was attended by Mr Pius Schlumpf as a representative of Lohomij, Mr Rickert and his lawyer Mr Bjorn Schmidt, Mr Sullivan, Mr Hilder and Mr MacLean. This is the same cast as is referred to in APOC paragraphs 71 to 73, which describe the meeting at which Mr Schlumpf and (by conference call) Mr Louwman acted in such a manner as to sabotage the proposed transaction. Mr Sullivan and Mr Hilder give evidence in their witness statements to confirm that Mr Louwman behaved in the manner alleged, though both of them place Mr MacLean's and Mr Schlumpf's alleged behaviour at a later meeting. Mr MacLean gives evidence that the conduct alleged did not occur, as does Ms Volf on the basis of information provided to her by Mr Schlumpf.

183. Importantly, however, at the conclusion of the meeting MRL and FR-G reached agreement on non-binding Heads of Agreement. On 4 June 2016 Mr MacLean wrote to Mr Louwman by email:

> "Attached is the draft Heads of Agreement which I sent yesterday afternoon to Bjorn Schmidt, Frank Rickert's lawyer. The draft follows the points which were agreed in principle at the meeting on Thursday which Pius and I had with Frank, Bjorn, Graham and Roy.
>
> You will see that we agreed to have separate completion dates and contracts for the cars and the museum.
>
> The transaction is not as good for MBL [sic] as it looks - they have to pay Frank very substantial commissions, buy the yellow 250 SWB which has the engine of the Viollati SWB, pay the EU taxes on the Violati cars and pay Ferrari and Joe Macari for the rebuilding and certification of the cars. But on any view, there will be more than enough to pay Lohomij in full. Frank has every incentive to get the deal done as soon as possible.
>
> The next stage is to get the HoA signed - provisionally by the end of this coming week, then get the contract signed for the sale of the cars, which should be a short and simple document which I will draft over the weekend.
>
> Graham, Roy and I will go to Verona on Monday and Tuesday to finalise terms for the museum sale."

184. The Heads of Agreement were signed that week (see the email of 12 June 2016, below). Whatever did or did not occur on 2 June 2016, it did not prevent FR-G signing the Heads of Agreement (albeit that they were non-binding) or continuing to negotiate thereafter.

185. The Heads of Agreement related to only three Cars: #0828, #0818 and #2025GT. The last of those Cars was to be sold with its original engine, which at the time was in another car; the proposed deal with FR-G required that MRL buy that other car in order to obtain the engine. However, the draft contract that was drawn up and forwarded to Mr Louwman on the following day related to four Cars, including in addition #1461GT. Mr Sullivan states that the inclusion of the fourth car came after the deal had

"progressed" in "the course of further discussions" between himself and Mr Rickert (first statement, paragraph 121).

186. It is worthy of note that the narrative in APOC moves directly from the meeting on 2 June 2016 (paragraph 73) to 29 August 2016 (paragraph 74). Even the rather different case as modified by MRL's Reply and Mr Sullivan's evidence moves directly from a latest date of 6 July 2016 to 29 August 2016. Nothing of the negotiations with FR-G is narrated between the averment in APOC paragraph 69 that a sale of four Cars was negotiated with FR-G in June 2016 and the reference in APOC paragraph 74 to 29 August 2016.

187. On 12 June 2016 Mr MacLean sent Mr Louwman a "brief progress report", which was copied to Mr Schlumpf:

> "The Heads of Agreement were signed by MRL and Frank Rickert last week. In accordance with the HoA I am now drafting two detailed agreements, one for the ex Violati cars, one for the Verona Museum, which will set out the terms of each transaction in full and replace the HoA. The detailed agreements should be signed at the end of this week - 17th June. The terms of the car deal will provide for a deposit on signature and completion and payment on 30th June 2016. The amount paid will be sufficient to pay Lohomij in full."

188. To similar effect, Mr Sullivan wrote to Ms Volf and Mr Verkuyl on 17 June 2016:

> "I am pleased to say HOT's were signed and draft contracts have been drawn up, we expect to exchange the contract in the next few days with completion on the 30th June."

That date, 30 June 2016, was the date by which repayment of the Loan was due.

189. On 21 June Ms Volf sent an email to Mr Sullivan and Mr MacLean, thanking them for an update and wishing them good luck for "this Friday" (24 June), when a meeting to progress the deal was planned. The email also said: "Please keep us informed about the progress after the coming visit. It would be a shame if we have to make costs for an extension of the loan next week." Late on 27 June Ms Volf wrote to Mr Sullivan: "Due to the termination of the loan this week please update us as soon as convenient." Mr Sullivan replied early the next morning:

> "There has been a delay due to the fact that the purchaser has gastric flu, he hopes to be back at work later this week.
>
> I would ask for a short extension to the loan to enable the transaction to complete in the next three weeks.
>
> For your information I am getting married this Saturday however I have postponed the honeymoon until I close this deal.
>
> I am doing all I can."

190. On 29 June 2016 Mr MacLean sent to Mr Louwman, as an attachment to an email, a copy of the draft contracts that had been circulated earlier that month. Mr MacLean wrote:

> "You will have seen that the meeting between MRL and Frank Rickert, which Bjorn Schmidt and and [sic] I will attend, has now been fixed for Wednesday 6th July in Stuttgart. As we discussed this morning, the closing arrangements will provide for Lohomij to be paid in full at closing. MRL and I will agree the mechanics of the closing with Peter [Verkuyl] and Marlene [Volf].
>
> MRL will have to pay for the original engine of the 250 SWB #2025 (which will involve buying the entire car which the engine is in) and pay restoration and Ferrari certification costs for 3 cars as well as EU VAT/ import duties but there will still be sufficient funds at completion to repay Lohomij in full."

The draft contract, produced in consequence of the meeting on 2 June 2016, contained a price of €60 million less a retention of €2 million and is the source of MRL's allegation that Sale 1 would have generated €58 million.

191. As from 1 July 2016 MRL was in default under the Amended Facility Agreement.

192. There was then a further meeting on 6 July 2016. MRL's Reply to the Defence of Lohomij and Mr Louwman states of this meeting (paragraph 54):

> "At this meeting, Mr Schlumpf and Mr MacLean told Mr Rickert and Mr Schmidt, in the presence of Mr Sullivan and Mr Hilder, that MRL owed €38 million to Lohomij under a loan agreement, and that Lohomij now required immediate repayment otherwise it would foreclose on the loan and exercise its security by repossessing the Four Cars which were the subject of the sale."

(See also Mr Sullivan's first statement, paragraph 125.)

193. The following morning Mr MacLean sent the following email to Mr Louwman (copied to Mr Schlumpf):

> "Graham, Roy and I met Frank Rickert in Stuttgart yesterday - friendly discussions which lasted most of the day. I left Stuttgart last night.
>
> It seems that Frank's clients want a reduction on the proposed price of €80 million for the 4 cars and the Museum or to exclude the 330P and the Interim from the deal - these are the 2 cars which will be the most difficult to re-sell. MRL offered a price reduction from €80 to €75 million or to exclude the 330P and the Interim and reduce the price to €58 million. Either way, MRL has insisted that Frank's clients commit in writing to the deal latest end Monday 11th July, sign a contract for the cars (in the form sent to them some time ago) by 14th July with simultaneous

> payment of a 10% deposit and completion with payment in full by 22nd July.
>
> Frank's clients will meet MRL this evening / tomorrow morning in Stuttgart to try and reach a final agreement. The cars have been inspected and approved and the contract for their sale is simple so it should be only a question of price.
>
> As a fall-back alternative Frank (who is being very helpful) believes he can sell the P2/3 for €20/23 million and the 250 SWB for €15 million to other clients of his who have already shown interest in them. He is asking them for firm written offers in case the overall deal with his other clients does not go ahead."

194. MRL's Reply has this to say about developments:

> "55. Following these meetings, FR-G changed the terms of the deal. It quickly became apparent to MRL that FR-G would not proceed with the deal that had originally been agreed, which is the deal referred to as Sale 1 in the POC.
>
> 56. FR-G's change in stance was the result of the deliberate conduct of Mr Louwman, Mr Schlumpf and Mr MacLean (and therefore also Lohomij and Bonhams):
>
> (1) Given that Mr Rickert and Mr Schmidt had been informed of the outstanding balance of MRL's loan, and given that they had witnessed Mr Louwman's demands for repayment, MRL infers that Mr Rickert and Mr Schmidt formed the view that they would be able to obtain the Cars at a greatly reduced price from Lohomij once it had foreclosed. This inference was reinforced by the subsequent matters addressed in paragraph 58 below; and
>
> (2) While it appeared that Mr MacLean was acting for MRL at this point, MRL now understands that Mr MacLean was in fact acting in Lohomij's interests and, MRL infers, on Lohomij's instructions, in seeking to sabotage the deal. This inference arises most obviously from the fact that there was no need for Mr MacLean to have acted the manner in which he did, with his actions being clearly intended to cause the deal to fail in stark contrast to his ostensible duties as an agent of MRL."

195. Paragraphs 58 to 62 of MRL's Reply make clear that the events that followed, as mentioned below, all occurred after Sale 1 had "fallen through". Paragraph 58 alleges that Mr Rickert was making comments such as "We know what you owe" and "We can get the cars cheaper", and paragraph 59 makes clear that the complaint is that Mr Rickert's unwillingness to proceed with the originally envisaged deal was because of Mr Louwman's conduct on 2 June 2016 and the conduct of Mr Schlumpf and Mr MacLean on (as is now alleged) 6 July 2016.

196. On 10 July 2016 Mr MacLean updated Mr Louwman:

> "Graham called from Stuttgart on Friday after his meetings with Frank. He also called you on your mobile and sent you a text message.
>
> It sounds like good news. In summary -
>
> 1. Frank agreed and will confirm by email to me tomorrow that he will buy the P2/3 (chassis no 0828) and 250 SWB (chassis no 2025) for €38 million, contract to be signed as per my draft (already sent to you and to Marlene) by end 14th July with payment of a 10% deposit, completion and payment of the 90% balance by end 22nd July. There will be a retention / escrow of €2 million as previously agreed to cover the costs of certification of both cars by Ferrari.
>
> 2. Frank will sell the 330P (chassis no 0818) and 250 GT Interim (chassis no 1461) as soon as possible as agent for MRL and is confident that he will be able to return to MRL €17 million, net of all commissions and costs.
>
> 3. Frank will buy the contents of the Verona Museum and confirms that the bishop's Alfa and the Vanderbilt Cup can be retained by MRL. The Verona transaction should be completed by end September but timing is subject to Italian formal requirements.
>
> I think this is all positive although not quite as good as hoped for. €38 million is an excellent price for the P2/3 and 250 SWB and there is every chance that Frank will soon be able to sell the 330P and Interim for the proposed € 17 million net.
>
> There is the complication that MRL as a condition of the deal with Frank will have to buy the yellow SWB - price agreed in principle with the vendor through Joe Macari is €10 million - in order to get the original engine of #2025 and justify the high price being paid for it but MRL will still have the 330P and Interim as well as the yellow SWB which after certification - assumed cost €750,000 - should have a value of between €10 million and €15 million, depending on whether it is reunited with its original engine (owned by a customer of Frank's) or has a new 'continuation' engine supplied by Ferrari.
>
> I suggest that Graham and I come and see you to discuss all this as early as possible next week. Are you available for us to meet you next Wednesday 13th July?"

Accordingly, the proposed transaction had changed, in that FR-G was now stating a willingness to buy only two, not four, Cars; it would act as agent in efforts to sell the other two Cars.

197. Mr Louwman replied the following day, 11 July 2016: "The bottom line is that we need our money back, without retentions or reductions. The amount is EUR 38 million, not EUR 36 million or less." He said that he was travelling and would not be able to meet Mr MacLean and Mr Sullivan.

198. Also on 11 July 2016, a further extension was granted for the repayment of the Loan. The new date for repayment was 31 July 2016.

199. The hoped-for transaction with FR-G did not come to fruition before the Loan fell due for repayment in accordance with the new extension. After 31 July 2016 MRL was in default under the Amended Facility Agreement.

200. On 2 August 2016 MRL executed a Memorandum of Understanding with Frank Rickert's company, Oldtimer Land GmbH ("OL"). The recitals included:

> "(2) … OL has expressed to MRL a strong interest in buying the remaining 4 Ferrari race cars from the former Maranello Rosso Collection as a whole or separately for already defined customers of OL.
>
> (3) Since 4 months the Parties are currently negotiating the terms of this Transaction, and now wish to summarize the results so far and set down their provisional agreements as follows".

The Memorandum of Agreement identified vehicles #0818, #0828, #2025GT, and #1461GT. Clause 3(2) recorded:

> "MRL prefers to sell the MR-Ferraris in one transaction but is also willing to sell the MR-Ferraris directly and separately to the customers defined by OL. It has to be noted that OL is still waiting for the final and binding commitment of its customers regarding all 4 MR-Ferraris due to the current market situation and the upcoming 'Monterey auctions' in Mid-August, 2016."

After some details had been recorded in respect of the four Cars, clause 3(3) read:

> "The Parties agree to finalize the Transaction either with OL or directly with the customers of OL not later than 31 August. 2016."

201. With reference to the Memorandum of Understanding, Mr Sullivan states (first statement, paragraph 131):

> "By this point, the original deal (i.e. Sale 1) had already fallen through; however, Mr Louwman and Lohomij continued to interfere in MRL's further attempts to sell the four Cars. It became obvious to me from what Mr Rickert was telling me, namely that he believed that he was at present the only serious purchaser for the Cars and that he could wait for MRL to default, that Mr Louwman and/or other agents of Lohomij were seeking to jeopardise any sale that MRL could achieve."

The nature of the continued interference during the ensuing four weeks is not explained.

202. The transaction envisaged by the Memorandum of Understanding did not proceed. On 29 August 2016 Mr Sullivan sent an email to Mr Schlumpf, setting out a new proposal:

> "The proposal is as follows:-
>
> #0828. P2/3. Sale to German client through FR Group €21 m. Before end of September. So balance at end of September circa €17.6m.
>
> #2025GT. SWB. Sale to famous German Footballer through FR Group. €14m. We have to purchase another SWB for €10m that has the original engine of 2025. By the middle of October.
>
> So balance at middle of October €13.6m.
>
> Remaining main stock to sell to clear balance before end of December 2016:-
>
> €12.5m. #0818. 330P
>
> €10m. New SWB as above.
>
> €4m. 250 Interim. #1461
>
> €4-5m sale back to Violati family #5039
>
> If the above timescale is acceptable I will get confirmation from FR Group of the above sales and payments.
>
> I hope to do it all in a shorter timescale but do not want to cause myself stress by over promising."

203. Mr Sullivan followed that with a further email on the same day (which he quotes in his witness statement, above):

> "We are prepared to pay a reasonable exit fee at the end of the loan period to encourage the continued Lohomij support.
>
> I also feel I need to explain that since I started dealing with the FR Group their offers have considerably decreased due to the fact that they are being told that the cars will be available at the end of the month direct from Evert for the outstanding loan amount. This of course is totally unacceptable and I would have to legally try and stop any such move.
>
> I believe Evert, You and I should meet with FR Group and confirm to them that the cars will not be sold under a distress sale.

> Further whilst this might not be the correct time to mention this, but I do need to sit with Evert to discuss my Verona project."

It might be noted that the email does not actually accuse Lohomij, Mr Schlumpf or Mr Louwman of having done anything to interfere with a proposed transaction with FR-G and appears to assume that they would not do so.

204. On 31 August 2016 Mr MacLean sent an email to Mr Schlumpf, which he copied to Mr Sullivan:

> "I think the best plan is to have a meeting round the table in Holland as soon as possible with Frank Rickert, Graham and Lohomij to get a deal acceptable to Lohomij, with clear dates and amounts and a deposit, agreed and signed. It is time to establish whether Frank is a genuine buyer or not. If he is genuine, he is the best chance of the getting the cars sold and the debt repaid. If he is not genuine, another solution needs to be found which does not involve Frank."

205. A telephone conference took place on 31 August 2016 between Mr Sullivan, Mr Louwman and Mr Schlumpf. Mr Sullivan's account of the conversation was recorded in an email he sent to Mr Schlumpf the following afternoon:

> "I her[e]by summarise the content and agreement of the telephone conference between Evert, yourself and I of yesterday as follows:-
>
> P 2/3 chassis 0828
>
> This car will be sold direct to German customer of FR Group before the end of September 2016. The net proceeds of €21m will be paid directly to the account of Lohomij no later than the 30/09/16. The gross sale price is €22m with €1m being retained for the cost of restoration at the Classiche Department of Ferrari. The car is currently at the Ferrari factory in Italy.
>
> 250SWB chassis 2025
>
> The mutual arrangements for the sale of this car to the former German footballer Michael Ballack have already been agreed with FR Group. It has been agreed that MB pays the full asking price of €14m knowing the engine needs to be replaced. In order to deliver the car with its original engine we have agreed to purchase the Yellow SWB belonging to Mr Rowan Fernandez with the original engine 2025 for the sum of €10m. This deal will be completed by the 15/10/16 and the net proceeds of €4m will be paid to the account of Lohomij on or before this date. This car is stored at Joe Macari Ltd Kimber Road Wandsworth London.
>
> 330P chassis 0818

> FR Group are currently negotiating the sale of this car to a[n] Italian client for the net sum of €12.5m. We expect to sell this car by the end of October 2016 and immediately on the sale pay the full proceeds to Lohomij. The car is currently stored at Classic Car Storage Limited, Priors Leaze Lane, Chichester.
>
> 250 Interim chassis 1461
>
> This car is to be sold to FR Group for the reduced price of €4m. The reduced price is part of their sales commission. However this sale will only take place once the sale of the above 3 cars has happened and Lohomij have been paid back in full. This car is stored at the Ferrari factory in Italy.
>
> I would like to thank you both for your time and understanding yesterday of this delicate situation.
>
> I look forward to completing the above and continuing our working relationships."

206. On 12 September 2016 Lohomij sent a notice of default to MRL under the Amended Facility Agreement. The notice of default referred to the latest proposal for the sale of the four Cars and requested: "Please provide us with timely updates on the course of such proposed sales."

207. On 16 September 2016 Mr Schmidt, FR-G's lawyer, sent the following email to Mr Sullivan, who in turn forwarded it to Mr Schlumpf:

> "I have spoken to Frank. So far, we can confirm as such:
>
> Unfortunately we have not been able to finally convince one of our investors to finance the whole Maranello Rosso package.
>
> The situation stands where FRG have had customers for 0828 (€21m) as well as 2025 (€15m) in certified condition but both agreements are expired and therefore new negotiation will be necessary.
>
> FRG are negotiating to sell 0818 and further details will be released asap.
>
> FR once the above is in place will purchase 1461 at a discounted price to be agreed."

208. On 29 September 2016 Mr Sullivan updated Mr Schlumpf by email:

> "I confirm Frank Rickert called me this afternoon just before 4pm, frank [sic] told me he has a meeting with his client on this Saturday (1/10) to finalise the arrangement for the sale of 0828. He further told me that Monday (3/10) is a public holiday in Germany and therefore he would confirm the agreement on the

> Tuesday (4/10) and expected to be able to effect payment within a few days.
>
> He also confirmed that by the Tuesday (4/10) Bjorn [Schmidt] expect[s] to have Michael Ballack signed up on the 2025GT.
>
> I believe this all to be good news."

209. Mr Sullivan's optimism—which sits a little uneasily with MRL's current case as to Frank Rickert's attitude after the meetings with Mr Schlumpf and Mr MacLean—was misplaced. In an email on 17 October 2016 Mr Sullivan informed Mr Schlumpf: "I am 95% sure I have now overcome the problems with Frank and expect to sell him 0828 in the coming days." However, no sale to Mr Rickert or FR-G or its clients eventuated. At this point the saga of MRL's efforts in that regard comes to an end.

Sale 2: facts

210. On 21 October 2016 Lombard Finance (CI) Limited ("Lombard") sent to Mr Sullivan, Mr Owens and Mr MacLean an "Indication of terms for the financing of the Museo Nicolls vehicle collection". The borrower was to be a Special Purpose Company incorporated in Jersey or Guernsey, and the loan was to be €65 million, based on a total purchase price of €93 million for "The Museo Nicolls vehicle collection + MRL Ferrari".

211. Meanwhile, in October 2016 Lohomij was in communication with Mr Greisen of B&B regarding the valuation of the four Ferraris. On 26 October Mr Schlumpf sent additional information to Mr Greisen; he wrote: "As you know from Evert we are trying to push things forward as fast as possible, therefore an approximate valuation would be very helpful. … We are planning different options. One of them could be that we take over the cars."

212. On 27 October 2016 Mr Greisen sent to Mr Louwman and Mr Schlumpf valuations of the four Cars; he said he had priced them "conservatively with 'feet-on-the-ground' valuations, that the valuations he had provided "would be easily achievable on a private sale or auction basis", and that they were lower than the valuations he had initially indicated. The valuations were:

- #2025: $8.5 million without the original engine; $10 million with it;
- #0818: $17 million;
- #1461: $4.75 million;
- #0828: $27 million (this is sometimes referred to as "P2/3").

213. For some weeks Mr Sullivan had been in discussion with Mr Macari. On 3 November 2016 Mr Sullivan wrote to Mr Schlumpf by email (which he forwarded to Mr MacLean on the following day) concerning a proposed transaction with Mr Macari:

> "I have agreed a transaction to sell Ferrari #0828 (currently at the Ferrari factory being restored and Classiched). I have accepted the Ferrari #1953 (250 SWB) and a Ferrari SWB

> Competition engine in part exchange plus a cash payment to MRL of £5m (pounds) of which obviously will be forwarded to Lohomij next week. The new owner will also take over the restoration costs past and post the sale of 0828.
>
> The good news is that #1953 has the engine for our car #2025, so we will now take the engine from #1953 and install it into #2025 and this will enable #2025 to be classiched (red book). We will then fit the newly acquired competition engine in #1953 and this again will enable this car to be Classiched. I propose to commence the process on both cars with Ferrari immediately.
>
> I believe the #2025 is now saleable at circa €15m and #1953 at €14m.
>
> Therefore the net sales price of #0828 once #2025 and #1953 are sold will be circa £20m. (For your information Bonhams valued #0828 at €8m).
>
> Please can you get the above agreed and signed off by Lohomij asap as we want to complete the transaction within the next few days."

214. After Mr Sullivan had provided a simplified summary of the proposed transaction to Mr Schlumpf, the latter replied on 4 November: "I like to discuss details with Evert first before I speak to Marlène and Peter, therefore please wait finalizing your proposed deal until I have green lights."

215. On 5 November 2016 a meeting took place in London between Mr Louwman, Mr Sullivan and Mr Greisen. Mr Greisen was ostensibly present because he had a client who was interested in acquiring #0828; he stated that he had a possible offer of €28 million for #0828 from one of his clients. (Mr Sullivan states that he now believes that the real reason for Mr Greisen's presence was probably that Mr Louwman wanted the Cars valued before taking them over. As an explanation of Mr Greisen's presence at the meeting, this makes little sense: the Cars were not present at the meeting and were not valued at the meeting; the evidence of Ms Volf is that Mr Greisen had already inspected them.) According to Mr Sullivan (first statement, paragraphs 145 to 147) he explained the terms and benefits of Sale 2 to Mr Louwman, and then:

> "Mr Louwman said that he had a better idea: MRL should give him/Lohomij the remainder of the Collection in lieu of the debt. Mr Louwman stated that he would then sell the rest of the Cars and pay me a small commission so that I could 'buy my wife a new kitchen'. I have borrowed significant amounts of money from many major lending institutions in my career, and I have never been treated like this before.
>
> I refused this proposal—as Mr Louwman well knew, the remainder of the Collection was worth significantly more than the outstanding debt."

216. On 11 November 2016 Mr Sullivan and Mr Louwman met in the Netherlands. According to Mr Sullivan, he told Mr Louwman that Sale 2 would enable the Loan to be repaid, but Mr Louwman, having at one point in the meeting appeared to give his consent, eventually laughed, refused to give consent, and said that he did not want MRL to do the deal. According to Mr Louwman, Mr Sullivan did not say that the Loan would be repaid from the proceeds of Sale 2; rather it was to be repaid by the refinancing with Lombard (Ms Volf's statement, paragraph 78). Mr Sullivan states that the Loan was indeed to be repaid from the Lombard refinancing, but that Sale 2 was a necessary step to enable that refinancing to proceed (first statement, paragraph 157).

217. There is an invoice dated 15 November 2016 issued by MRL for the sale of #2025, fully restored with a Factory Classiche Certificate, to Oldtimer Land GmbH (i.e. FR-G). The stated price was £12.3 million, payable (subject to a retention of £500,000) by 20 November 2016.

218. On 15 November 2016 Mr Sullivan sent an email to Mr Louwman and Ms Volf. After referring to his meeting the previous week with Mr Louwman and explaining why a planned meeting for that day with Mr Robin Clayton of Lombard had had to be cancelled, Mr Sullivan continued:

> "Robin is rearranging his diary and I will update you asap but will still get the letter.
>
> I have sold 0828 to Joe Macari Ltd and taken in part exchange a 250SWB #1953 and an engine 4129 plus £4.75m. Evert is up to speed on the transaction.
>
> Please can you send Ben Walmsley (copy me) Lohomij sterling bank details and a letter addressed to Ben confirming once the payment is received Lohomij has no further interest in 0828.
>
> Macari will send the funds immediately directly to you."

APOC paragraph 89 describes this email as "confirming that the agreements for Sale 2 had been reached and requesting permission to proceed." However: (1) the email refers only to the first part of Sale 2, namely the sale of #0828; (2) the cash component of the price as stated in this email is different from that which had been stated on 3 November 2016; (3) the email does not seek consent to anything. Further, the contents of the email of 15 November 2016 are plainly inconsistent with APOC paragraph 88, which states that when Mr Sullivan asked Mr Louwman to consent to Sale 2 on 11 November 2016 "Mr Louwman simply laughed at him and refused to consent to the sale." In his first statement, Mr Sullivan states that he nevertheless believed that consent would be forthcoming, both because Mr Schlumpf "kept assuring [him] that it would be" and because Mr MacLean told him that Lohomij could not lawfully refuse consent.

219. Ms Volf replied to Mr Sullivan on 15 November 2016:

> "… I hope you will be able to meet with Mr. Clayton within a short term.

> Regarding the possible sale I really need to discuss this with Mr Louwman as I wasn't aware the P2/3 was offered for sale at the moment.
>
> He is not available at the moment, but I will discuss this matter with him as soon as possible and come back to you.
>
> Please <u>hold</u> all actions until we have given our approval."

Mr Sullivan in turn replied:

> "Please confirm with Evert asap as they want to send you the money tomorrow, also I'm hopeful that I can also then sell 1953 next week."

220. On 16 November 2016 Ms Volf sent an email to Mr Sullivan, copied to Mr Louwman (emphasis in the original):

> "I have spoken briefly over the phone with Mr. Louwman. He is a very clear, it is a definitive NO regarding the sale. Lohomij B.V. **<u>does not give approval</u>** for the sale of the P2/3 or any other car.
>
> You agreed with Mr. Louwman last week that you would refinance the loan with Lombard Bank. Lohomij B.V. still demands repayment as soon as possible.
>
> We are waiting to receive a letter this week of Lombard bank that states it will refinance.
>
> Please keep us informed about the status with Lombard Bank."

221. Ms Volf confirms the tenor of this email in her second statement (paragraph 14):

> "Mr Sullivan had agreed with Mr Louwman in their meeting the previous week on 11 November 2016 that he would refinance the Loan with Lombard. That was Lohomij's priority (as I made clear in my email of 17 November 2016); we wanted cash repayment and had offered to assist MRL to answer any questions from Lombard. So far as we understood, MRL was going to refinance the entirety of the outstanding Loan. From Lohomij's point of view, refinancing of the Loan was far preferable. MRL was in default and refinancing meant that Lohomij could receive full cash repayment and it also avoided any possible compromise of its existing security rights by selling Cars at potential undervalues."

222. Mr Sullivan forwarded Ms Volf's email to Mr MacLean on the same day.

223. On the morning of 17 November 2016 Mr Sullivan sent two relevant emails to Mr Louwman. The first email set out his request for consent to the sale of #0828 to Mr

Macari and the details and justification of the sale; and, as it recites much relevant information, I shall set it out fully:

> "Following my discussions with Pius and the meetings which I had with Jakob Griessen and you in London on 5th November and with you in Holland on 11th November, I would be very grateful if Lohomij will give its formal consent today to the the [sic] sale of the P2/3 [i.e. #0828] to Joe Macari's client in exchange for £4.74m cash, the yellow 250 SWB [i.e #1953] and an additional Ferrari certified 250 SWB engine.
>
> This package values the P2/3 at around €25 million which is an excellent result. It brings in £4.75 [million] of cash immediately today and it makes the red 250 SWB #2025 saleable and certifiable by Ferrari since I will be able to re-unite the original engine of 2025, which is in the yellow car, with its chassis. Ferrari have said that they will not certify 2025 unless it has its original engine. Uncertified and without its original engine 2025 is worth around €8 million; certified and with the original engine it is worth at least €15 million. I have a provisional offer for that amount. I have also found the original engine for the yellow SWB and have begun discussions for sale of the yellow car for €13 / 15 million.
>
> The P2/3 is in pieces at the Ferrari factory and unlikely to be completed and certified for at least 12 months. MRL has had no genuine offer fit the P2/3 over the course of 18 months. The possible offer for the car for around €28 million to a client of Jakob's, which he mentioned when we met in London on 5th November, has turned out not to be of any substance.
>
> Against this background it would be crazy not to go ahead with the part exchange deal with Joe Macari's client as described above. The deal brings in cash, sells the P2/3 'as is' in Italy without any liability for its restoration and certification, makes 2025 saleable for €15 million instead of €8 million and will also give a profit on the yellow SWB.
>
> I have committed to Joe Macari on the part exchange deal which I first mentioned to Pius several weeks ago and again to you and to Jakob on 5th November. Joe is holding £4.75m from his buyer and has been instructed to return the funds to his buyer if the deal is not concluded and approved by Lohomij tomorrow at the latest.
>
> Evert - you and I have a friendly relationship and I am doing my very best to get Lohomij its money back by mid December, as I agreed with you on 11th November. Blocking the part exchange deal would make no sense at all for either Lohomij or MRL and will cause considerable financial damage to MRL which will greatly complicate our relationship and is likely to lead to claims

> by MRL against Lohomij, which is the last thing in the world I want to happen, you have been a wonderful supporter and ally to MRL in the most difficult circumstances for both of us.
>
> Will Lohomij please approve the deal today so that the cash can immediately be paid by Joe Macari to Lohomij and the plans for sale of 2025 with its original engine and of the yellow SWB can get underway?
>
> I am doing my very best to arrange the refinancing with Lombard and am forwarding you an email to me from Lombard, confirming that they hope to conclude the loan arrangements in the first or second week in December but this has nothing at all to do with finalising the part exchange deal for the P2/3, which must be done now, this week, or collapse with the loss of €25 million. And, although I am optimistic about the Lombard re-financing it is impossible at this stage to guarantee that it will succeed. It is vital for MRL, and indirectly for Lohomij, to do the part exchange deal - now.
>
> Thank you very much for your continuing support."

224. It may be noted that this email makes clear that the Lombard refinance was not dependent on the alleged Sale 2. This is consistent with the second email from Mr Sullivan, by which he forwarded an email that he had received on the previous evening from Mr Clayton that read in part: "Regarding the funding of your car collection I can confirm that with the exception of the remaining items on the list of information required, we hope to be in the position to move forward and conclude in the first or second week of December."

225. Later that evening Ms Volf replied to Mr Sullivan:

> "Mr Louwman is out of the country at the moment and asked me to send you an email.
>
> As you know getting a refinance in place is a priority for us and we urgently need to receive full payment of the loan. I kindly remind you of the notice of default Lohomij sent you September 12, 2016. As you can understand Lohomij continues to reserve all rights and remedies in connection with all continuing defaults and events of default under the facility agreement we concluded. Regarding the refinancing, which would be in our mutual interests, we would like to assist because I am sure that Lombard will have questions for us in view of our security interests. Mr Clayton says that certain items on the list of information are still anticipated. Could you send me that list and highlight the items that are still missing so that we can assist with information that no doubt Lombard will need regarding the current structure and otherwise?

> If Lombard says that the transaction can be concluded in the first or second week of December, does this also mean the payment shall take place at that moment? I assume the refinancing still aims at refinancing the whole remaining collection of cars and shall cover the whole outstanding loan balance. We would like Mr. Clayton to confirm this.
>
> To meet the agreed timeframe we shall need to discuss the way of releasing the security rights over the cars very soon so I would suggest and request that you set up a call with Lombard to include us as soon as possible.
>
> Please let me know as soon as you can."

226. There is an invoice dated 17 November 2016, issued by MRL, for the sale of #1953, fully restored with a Factory Classiche Certificate, to MW Automobiles (i.e. Mr Mark Williams). The price was £11.2 million, which, subject to a retention of £500,000, was payable by 25 November 2016. Mr Williams, who describes himself as "a businessman and car enthusiast" and states that Mr Sullivan is "a good friend" of his, says in his witness statement dated 30 March 2021 that in October 2016 he had "agreed in principle" to buy #1953 on behalf of Mr Bernhard Mayr, though Mr Sullivan informed him that MRL required the consent of its lender. He states:

> "On or around 18 November 2016, Mr Sullivan then told me that the lender had refused to provide its consent to the deal, so it fell through. While Mr Sullivan was and is a good friend of mine, I felt seriously let down. Mr Mayr was a big client of mine and this was a high value deal—for the second time [the first related to the Auction], Mr Sullivan had caused me to look foolish in front of my client and lose out on significant commission. I made my anger clear in an email to Mr Sullivan, and informed him that Mr Mayr was considering taking legal action against MRL."

227. On 18 November 2016 Mr MacLean sent an email to Ms Volf, copied to Mr Louwman, Mr Sullivan and others, as follows:

> "I am helping MRL to arrange the sale of its remaining cars and also the prospective refinancing from Lombard. I am doing this because I was involved in the original MRL/Violati deal and because I want to help to achieve a satisfactory result for both MRL, which has very limited resources and manpower, and for the Louwman Group with which I have had an excellent relationship for over 25 years.
>
> Graham has sent me copies of his email to you, EVNL, and colleagues yesterday morning and of your reply last night.
>
> Graham, with help from me, will of course do his best to secure the Lombard financing and I hope that we will all work amicably together to achieve a satisfactory result.

In your email you do not refer at all to MRL's request, which it has been making to Lohomij for over 2 weeks, to approve the P2/3 part exchange transaction with Joe Macari's client, as set out in detail in Graham's email to you yesterday and in previous correspondence between Lohomij, MRL, Pius and myself.

The P2/3 transaction combined with the sale of 2025 and the yellow SWB should produce enough funds fully to repay MRL's debt to Lohomij. The transaction has taken Graham a long time to negotiate. It is the only current realistic chance of generating sufficient funds to repay Lohomij and/or to repay any refinancing.

With respect, I do not think that Lohomij is entitled to refuse MRL permission to carry out this transaction or generally to refuse MRL permission to sell any of the remaining cars for their fair present value. Without going into the legal details, which should not be necessary when there is a friendly relationship between the parties, English law, which is the law of the loan agreement, is very strict in its requirement that a lender must act fairly and do its best to obtain the highest value reasonably available for a borrower's assets and/or not prevent a borrower from realising its assets for the highest value reasonably available.

There is a very small and limited market for the MRL cars, which have been for sale for over 2 years. If you refuse permission to carry out the P2/3 transaction you will irreparably harm the value of the remaining cars, completely destroy MRL's credibility and the future value of the cars and severely reduce Lohomij's prospects of repayment.

It is also very likely that you will destroy the Lombard refinancing since (1) Lombard will require full details of all attempts to date to sell the remaining cars, and (2) Lohomij's refusal to authorise sale of the cars will be all over this small and specialised market, including the valuers whom Lombard is consulting as a key part of the refinancing procedure. In short, the outcome, if you continue to block the sale of the cars and the P2/3 transaction, will be destruction of the value of the cars, failure of the Lombard refinancing and long drawn out and very messy litigation between Lohomij and MRL during which nobody will be able or permitted to sell the cars.

It cannot possibly be right to let this happen and I am sure that Lohomij will not allow it to happen.

I will do everything I can to help and have a long record of successful transactions with and for the Louwman Group. I am happy to talk any time during today that Evert or you wish. If Lohomij does not authorise the P2/3 transaction today, the buyer

will withdraw and his cash payment will be returned today by Joe Macari."

228. Ms Volf forwarded that email to Mr Knight, as did Mr MacLean. Mr Knight responded to Ms Volf later that morning from his iPhone:

> "Both graham and lohomij feel the P2/3 has a value of €25m
>
> The offer is to sell this car and receive:
>
> - £4.74m (c. €5.3m)
> - yellow SWB (that was unsold at RM's villa erba sale in 2015 for c. €9m)
> - an SWB engine (call it €1m max)
>
> This adds up to €15-16m, which is a long way short of €25m .....
>
> Yes, there is a good advantage buying the yellow SWB as the engine in that car is originally from the red SWB (ch[assis] 2025) in the MRL collection. Putting the original engine back into 2025 will certainly make it more valuable.
>
> BUT: they think it will make 2025 worth €15m+, and the most comparable recent result for such a car was Gooding last August at $13.5m.
>
> I think you have every right to question the fairness of this deal and by all means use the content of this email to illustrate your concern that the deal seems fair market value."

A little later, Mr Knight replied separately to Mr MacLean in substantially similar terms:

> "It is this bit
>
> > 'The P2/3 transaction combined with the sale of 2025 and the yellow SWB should produce enough funds fully to repay MRL's debt to Lohomij'
>
> that is difficult to comprehend.
>
> By common consent between evnl [that is, Mr Louwman] and MRL, the P2/3 is worth c. €25m.
>
> The offer is to sell this car and receive:
>
> - £4.74m (c. €5.3m)
> - yellow SWB (that was unsold at RM's villa erba sale in 2015 for c. €9m)

- an SWB engine (call it €1 m max).

This adds up to €15-16m, which is €9-10m short.

Yes, there is a good advantage buying the yellow SWB as the engine in that car is originally from the red SWB (ch. 2025) in the MRL collection. Putting the original engine back into 2025 will certainly make it more valuable.

But I'm not sure it will make 2025 worth €15m+, and the most comparable recent public result for such a car was Gooding last August at $13.5m. And you say we need to factor in a spend of about €1m to get 2025 certified with the original engine.

What is 2025 worth as is? €8-9m?? With certificate I see its value more €12-13m.

So, with the spend of €1m to certify, you're seeing a benefit of €3-5m.

Take €3-5m off that €9-10 shortfall and you're still €5-7m short.

I know there's a possibility of the German selling the engine from his car to make the yellow car matching numbers, but (a) that's not a given to happen, and (b) we don't know what the pricing would be. I suspect the numbers are very unlikely to see you right on that €5-7m delta.

Sorry I cannot make this easy to view on an excel spreadsheet as I'm on a train. If you/MRL want to produce one that provides a compelling argument for evnl to re-think please feel free to do so."

229. Later that day, 18 November, Ms Volf replied to Mr MacLean's email:

"I was surprised reading your email of this morning as Mr. Louwman (and myself) have been in close contact with Graham directly. As you know we are aiming to receive full payment of the default loan as soon as possible.

There is absolutely no requirement on Lohomij to accept any alternative security or to agree to the disposal of a car. Parties have agreed in writing that Lohomij needs to give its consent before any car can be sold. In this case disposal of the secured car will only lead to a small pay down. Besides these contractual agreements please keep in mind that the loan is in default and in Lohomij's considered opinion the proposed acquisition price for the car in question represents an undervalue. Lohomij therefore insists in not authorizing the proposed P2/3 transaction.

With respect, I'm advising Mr. Louwman to continue to contact Graham by email or otherwise directly as in my opinion you have

> a strong conflict of interest and you cannot assist or represent MRL in any way in this matter."

230. At around the same time, Mr MacLean sent a further email to Mr Louwman, copied to Ms Volf:

> "My suggestion at least to keep the door open with the P2/3 deal is for Lohomij to confirm today to Joe Macari that it is prepared in principle to authorise the transaction subject to receiving acceptable details and documentation not later than 25th November 2016."

231. Mr MacLean received no response to that email, and in the evening he replied to Ms Volf:

> "Thank you for your email this afternoon. I am surprised by its contents, which are incorrect in every respect.
>
> 1. So- called "strong conflict of interest". You are completely mistaken.
>
> > (a) I resigned as a director of all Bonhams' companies as of 30th June 2016 and have ceased to represent Bonhams in any way (as a lawyer or otherwise) since that date.
> >
> > (b) Bonhams is not a party to or in any way involved in the present Lohomij/MRL relationship.
> >
> > (c) I do not represent Lohomij or any Louwman Group company.
> >
> > (d) Pius and EVNL [Mr Louwman] have been well aware of and appear to have welcomed my efforts to help MRL sell its remaining cars, maintain a good relationship with Lohomij and assist in the Lombard refinancing.
>
> Please explain why there is any conflict of interest, "strong" or otherwise.
>
> 2. Disposal of cars.
>
> It is of course correct that MRL cannot dispose of cars without Lohomij's consent. It is totally incorrect that Lohomij is entitled arbitrarily and without good reason to refuse to give its consent to the sale by MRL of cars for fair market value. Lenders and mortgagees have very clear duties under English law to act responsibly and reasonably, not to interfere with the legitimate business interests of borrowers and not to prevent asset sales for fair market values.
>
> 3. The P2/3 transaction.

> I think it is most unfortunate that Lohomij has arbitrarily rejected the P2/3 transaction with Joe Macari and that in doing so it has prevented MRL from realising sales which were likely to generate around €35 million and would have enabled MRL to repay nearly all its debt to Lohomij. MRL has repeatedly requested Lohomij's consent to the transaction, has fully explained it and has made Lohomij aware of today's deadline. Lohomij has not bothered to show the slightest interest in the deal, has not asked for any details, has not asked for verification of any aspects and has simply ignored a major transaction which MRL has made great efforts to put together, as much for Lohomij's benefit as for MRL's.
>
> You did not even acknowledge my suggestion this afternoon, made to give you breathing space and time for reflection, that you should approve the deal today in principle, subject to receiving documents and details acceptable to Lohomij by 25th November. This would have given you the opportunity, which you had so far not taken, fully to examine and evaluate the transaction. I believe independent third parties would characterise this behaviour as arbitrary and unreasonable.
>
> 4. Re-financing and the future
>
> I will continue to help MRL with the sale of its remaining cars and with the Lombard re-financing. MRL welcomes this help, which should also benefit Lohomij."

232. Mr Sullivan states (first statement, paragraph 171) that on or around 18 November 2016 he informed Mr Rickert, Mr Williams and Mr Macari that the deal had collapsed. It is far from clear why he should have taken that step with his intended customers at that point, given the ongoing communications that were taking place and his own statement that he and Mr MacLean were trying "to work out how to get the deal through." To the same effect, Ms Volf states: "After Lohomij had withheld its consent, MRL (and Mr MacLean) spent the next few days trying to persuade Lohomij to change its mind" (second statement, paragraph 16).

233. In the late afternoon of 18 November 2016 Mr Sullivan sent an email to Ms Volf with the subject line, "Aborted sale of 0828 – 2025Gt – 1953GT":

> "It is with much regret and with I'm sure very serious consequences that I have now had the PX sale of 0828 terminated by Joe Macari which has meant that MRL has had to cancel the two below sales of 2025GT and 1953GT due to non-performance triggered by the refusal to consent by Lohomij, which in turn has prevented MRL from repaying Lohomij 89% of its due debt as set out below.
>
> > 1. Sale of 0828 to Joe Macari Ltd for £4.75m plus 1953GT plus engine 2149GT, this sale was agreed and as you know

> Macari was holding the funds plus the car 1953GT and the engine 2149GT for the release to MRL/Lohomij.
>
> 2. Sale of 2025GT to FR-G for net £12.3m, sale agreed to German Ex Footballer.
>
> 3. Sale of 1953GT to Mr Williams for net £11.2m this sale was agreed as is with engine 2149GT funds to be transferred next week.

All three parties have now threatened legal action against MRL.

Total lost incoming funds: £28.25m. The Euro equivalent: €34.72m (thirty four million seven hundred and twenty Euro).

If Lohomij had given its agreement to the above deals MRL as requested and pleaded many times over the last weeks, MRL would have now a small outstanding balance with Lohomij of approximately €4.48m. (€39.2 - €34.72 = €4.48m).

You clearly state that it is Lohomij's considered opinion that the above transactions represent an undervalue which was also told to me very clearly by Evert and Jakob Griessen at my meeting with them on the 5th November when they also stated they had a buyer for the cars and wanted to take the cars from me, sell them and pay me a small commission.

The above refusal has seriously damaged mine and MRL's reputation within the market place.

My suggestion to bring this matter to a close is for MRL to sell 0828 and 2025GT to Lohomij for the full amount outstanding by MRL of circa €39.2m. Evert and Jakob can then proceed to sell the cars to their client at their and your expected market value.

Evert, Jakob, Lohomij and Bonhams have all expressed their views that 0828 is worth €25-30m and 2025GT is worth between €10-15m depending certification or not.

On a personal note I find it very sad that MRL was not allowed to sell the cars that would have reduced MRL's debt down to €4.48m and Lohomij would have still had over €30m of security.

Louwman Group Companies have already caused me one heart attack and I feel tonight are certainly trying again …

Not blaming you personally but very very sad."

234. Ms Volf forwarded that email to Mr Knight, who replied to her:

"I'm not even going to respond to this.

> Amazing how Graham has changed from discussing potential deals on yellow SWB and red SWB (2025) to actual cancelled sales. To my knowledge (even when discussing with RAM [Mr MacLean] as of today) this was all concept, not actual …"

235. Mr MacLean also forwarded Mr Sullivan's email to Mr Knight and wrote:

> "Please see MRL's attached email this afternoon to Lohomij which confirms the transaction and sales on as agreed by MRL. £/€ conversion is at the contractual rate agreed between Lohomij and MRL. The agreed prices, which are after deduction of any restoration or other costs agreed between the buyers and MRL, seem to me to be in line with the current market – an alloy 250 SWB was sold in the US two weeks ago for USD 17 million.
>
> I think it is a great pity and a serious mistake that Lohomij decided not even to investigate the deal and its different elements. Ultimately, the question is not whether the value of the P2/3 is slightly plus or minus €25 million but how much money the cash element and the 2 SWBs would have added up to – certainly enough to repay a very large part of MRL's debt to Lohomij and to leave 400 % or more collateral cover for the quite modest remaining debt of around €5 million."

236. An email on 20 November 2016 from Mr Macari threatened legal proceedings against MRL for pulling out of the proposed sale. An email on 21 November 2016 from Mr Williams was to similar effect.

237. Later that day Mr Sullivan sent an email to Mr Louwman, asking for a meeting:

> "You will have seen from the emails last week that I had sales agreed for the 2 x SWB and 0828 that would have produced a net €35m, leaving MRL owing Lohomij circa €4m with them still having security on €30m plus of cars. These are real documented sales. I really do not understand why Lohomij completely failed to ask for details or reply properly to the emails – as a result Lohomij has lost €35m of debt reduction which I will do my best to revive although it will not be easy.
>
> I have finance lined up with Lombard to clear the balance with a facility agreed in principle. I had told Lombard I had done the 0828 (which neither Lombard nor I imagined that Lohomij would conceivably refuse to approve) and therefore the immediate requirement was very small i.e. €4m.
>
> There is now have a massive problem due I am sorry to say entirely to Lohomij refusal to consent to a transaction that was hugely beneficial to Lohomij and to MRL."

238. On 23 November 2016 there was a meeting in London attended by Mr Sullivan, Mr Louwman, Mr MacLean, Ms Volf, Mr Coppel, Mr Knight, Mr Geoffrey Davies ("Mr

Brooks' personal lawyer": Mr Sullivan's first statement, paragraph 172) and, briefly, Mr Macari. At this meeting, Mr Louwman on behalf of Lohomij gave consent to the sale of #0828 to Mr Macari for consideration of £4.75 million in cash and the receipt of #1953 and the engine in part-exchange. Further sales of #2025 to Mr Rickert and #1953 to Mr Williams were anticipated by Mr Sullivan—he states that he made clear he had lost the sales but would try to win them back—and were agreed to by Mr Louwman. There was also agreement that MRL could sell certain additional identified Cars for specified prices without requiring further consent from Lohomij (as set out in Mr Knight's email of the following day, quoted below). At the same meeting oral agreement was reached for an extension of the due date for repayment of the Loan to 2 December 2016 and for a standstill period during which Lohomij would not enforce its rights under the Amended Facility Agreement and Debenture.

239. MRL's case is that on the occasion of this meeting, at a point when only Mr Sullivan, Mr Knight and Mr Davies were present, Mr Davies said to Mr Sullivan: "Message from Robert: We are not going to let you do this deal. We are going to destroy you." In a witness statement produced on behalf of Mr Brooks, his solicitor, Mr Shuttleworth, says that Mr Davies denies having said what is alleged. Whatever may or may not have been said, it remains the case that consent for the sales of both Cars was given at the meeting.

240. For MRL, Mr Sullivan points to the consent given at the meeting on 23 November 2016 as showing that the previous refusal of consent had been unreasonable, because nothing had changed in the meantime. For Lohomij, Ms Volf explains the change of stance as follows (second statement, paragraph 18):

> "Unlike Mr Sullivan's previous repeated promises of proposed sales (which all turned out to be illusions), at the meeting, Mr Macari himself was at the meeting and confirmed his interest and willingness to pay £4.75 million to Lohomij immediately. It had also become clear to Lohomij by this point not only that MRL's suggestions that it was quickly going to be able to refinance the Loan needed to be treated with extreme caution, but also any refinancing from Lombard was not going to be in respect of the full balance of the Loan. Therefore, so far as Lohomij was concerned, it was prepared to accept immediate partial payment for #0828 to recover at least some monetary value. It also hoped that the values agreed with MRL at the meeting would give it some comfort in respect of future sales because we knew that the remaining Cars at those values, together, would pay off the debt. Likewise, the custody letters would give it more control over the remaining Cars."

241. After the meeting, Mr MacLean made telephone calls to Mr Rickert, Mr Macari and Mr Williams to confirm that Lohomij had given its consent, and then he sent emails to Mr Rickert and to Mr Williams. To Mr Rickert he wrote:

> "Further our conversation this afternoon, I confirm that my clients Maranello Rosso Ltd - MRL - are now able to offer you Ferrari 250 SWB chassis no 2025 fitted with its original engine no 2025 for the price of €15 million, restored and Red Book certified by the Ferrari factory, delivery Modena not later than

> 28th February 2018. The price is payable €14 million on signature of contract, to be not later than 2nd December 2016, with the balance of €1 million payable on delivery of the car.
>
> Ferrari 250 SWB chassis no 1953 GT is subject to an option in favour of another buyer open until 2nd December 2016. MRL will give you a first refusal on this car, for a price and on terms to be agreed, if the other buyer decides not to proceed."

Mr MacLean wrote to Mr Williams:

> "Further to our conversation this afternoon, I confirm that my clients Maranello Rosso Ltd ('MRL') have now agreed terms with their lender Lohomij BV to approve their purchase of Ferrari 250 SWB chassis no 1953 GT ('the Car') subject to your confirmation to MRL that you will purchase the Car, fitted with engine no 2149 GT and fully restored with Ferrari factory Classiche Red Book Certificate not later than 1st November 20L7, as set out in MRL's invoice to you dated 16th November 2016, for the price of £11.2 million, payable £10.7 million not later than 2nd December 2016, and the balance of £500,000 on delivery of the Car. Before you make the above payment of £10.7 million, Joe Macari Ltd, authorised Ferrari dealer, who have control of the Car and are responsible for its restoration and certification, will confirm to you that they will hold the Car to your order until its delivery to you.
>
> Will you please confirm that this is agreed and let Graham and me know if you have any queries."

242. On 24 November 2016 Mr MacLean sent an email to Ms Volf, copied to Mr Sullivan, Mr Louwman, Mr Walmsley, Mr Macari and Mr Knight:

> "I think we made good progress yesterday. Joe Macari leaves at midday UK today. He was expecting confirmation yesterday afternoon that Lohomij authorises the P2/3 part-exchange deal. He confirmed to me on the phone yesterday as I repeated to you that he will immediately pay the £4.75m to Lohomij and will hold the yellow SWB, the spare engine and any MRL cars in his possession or control to Lohomij's order. Graham gave you his undertaking yesterday which I now repeat for him to deliver to Park Royal any MRL cars not already in Lohomij's possession.
>
> Will you please immediately send Joe your consent to the P2/3 part-exchange and your bank details for the £4.75 payment? This afternoon will be too late.
>
> Please ask Jones Day to send the draft documents when available to Ben Walmsley who will deal with them promptly and in an orderly way."

243. Ms Volf replied that morning:

> "I'm working very hard to make sure that Graham can sign the relevant documents. Due to the time schedule I'm willing to give approval before the documents are countersigned by other parties if Graham will confirm me by email that he will make sure all relevant parties sign the documents. A signature of Graham as director of MRL, Stelabar (and if necessary as private person) are for me a condition precedent.
>
> I'll be sending shortly:
>
> - letters to third parties;
> - a new debenture (this is equal to the current one, only needs to be refreshed due to the letters being signed today and the new cars (such as the Yellow SWB and the Maserati) which are or become part of the collection;
> - a standstill and amend letter that Lohomij will consent to the P2/3 deal and will standstill until December 2.
>
> Without signature I will not be able to give approval!"

244. On 24 November 2016 Mr Knight sent an email to Mr Sullivan (copied to Ms Volf):

> "At the meeting yesterday, you and EVNL discussed these cars:
>
> - Ferrari 250 GT TdF (chassis 0539) €4m
> - Ferrari 250 GT Interim (chassis 01461) €10m
> - Ferrari 330P (0818) €14m
> - Ferrari 250 GT SWB 'Yellow' (1953) €12m
> - Ferrari 250 GT SWB 'Red', with correct engine (2025) €14m
>
> Marlene: can you give authorisation that Graham can seek to sell the above cars at these levels and, if he does get matching offers, he can proceed to sell without having to seek permission from EVNL/Lohomij.
>
> I can confirm these cars were discussed and these were the figures that both EVNL and Graham agreed upon. If the selling prices were higher, then Graham would confirm this too."

245. On 25 November 2016 Ms Volf replied to Mr Knight and Mr Sullivan:

> "If MRL can sell these cars for at least the prices mentioned in the email of Jamie and the purchase price will be fully in cash (e.g. no part exchange) MRL has approval of Lohomij to do these sales (which need to include payment) within the Standstill Period as agreed in the standstill and amendment letter. We need to be informed immediately if any sale takes place. I reserve all rights on behalf of Lohomij B.V. when the Standstill Period ends."

246. Among several contractual documents that were executed on 25 November 2016, I mention two. First was a "Standstill and Amendment Letter" from Lohomij to MRL, by which (to simplify somewhat) Lohomij (1) agreed not to take enforcement action in respect of the Amended Facility Agreement before 2 December 2016 and (2) consented to the sale of the Ferrari P2/3 Car (#0828) to Mr Macari's company on the terms of a Sale Agreement between MRL and Mr Macari's company. Second was that Sale Agreement, which provided that the consideration for the sale of #0828 should be £4.75 million in cash and the transfer to MRL of (a) a Ferrari F250 car with chassis #1953 and engine #2025 and (b) Ferrari engine #2149.

247. The sale of #0828 to Mr Macari's company was completed on 28 November 2016. Ms Volf acknowledged the receipt of the moneys and asked Mr Sullivan whether there had been any progress in the sales of the yellow 250 SWB [#1953] and the red SWB [#2025].

248. The sale of #1953 did not proceed, however. Mr Williams states in paragraph 15 of his witness statement:

> "On 23 November 2016 I was informed by Anthony MacLean that Lohomij had consented to the deal—he called me and followed up with an email. By this time, however, Mr Mayr was no longer willing to purchase the car as he didn't want to deal with MRL."

In his witness statement dated 31 March 2021, Mr Mayr states:

> "I agreed, through Mr Williams, to purchase Car with chassis number #1953 from MRL. When the deal fell through, I was furious. A few days later I was told by Mr Williams that the deal was back on the table but by that stage I wasn't prepared to deal with MRL anymore."

249. Mr Sullivan states (first statement, paragraphs 178-179) that Mr Williams' refusal to proceed placed him in a very difficult situation, because unless he could achieve sales within a week it was likely that Lohomij would foreclose; but that FR-G then made a new proposal to buy both cars (#2025 and #1953) for its client, Mr Friedhelm Loh, for €22 million. "Under the deal, we would receive a Mercedes in part exchange; Mr Loh provided an interest free loan of €3 million; and Mr Louwman required that he was paid direct (causing a c. €1.85 million exchange-rate loss for MRL)."

250. On the morning of 29 November 2016 Mr Knight and Mr Sullivan had a telephone conference. Immediately afterwards, Mr Knight reported by email to Ms Volf:

"[Graham] said the deal that Mark Williams was trying to do with his German guy (remember that invoice he showed us last week) doesn't look like it is happening. I said what about Frank Rickert who had expressed a interest in doing the deal on the Red car, but also the yellow car as well.

Graham said that Rickert was talking to Friedhelm Loh to see [if] a deal could be done.

Graham also said he was hopeful to have Lombard in place as well.

Graham asked whether, 'Evert will foreclose on me on Friday', and I said I honestly didn't know. I said it was important to keep giving EVNL good news and, at least, an update to Marlene on Wed/Thurs of where he is deal wise.

JK's thoughts/opinion:

1. The Mark Williams yellow car deal, with invoice, was just fantasy—at a fantasy price. ..... I think Graham fabricated this 'follow-on deal' to push through the 1st deal (selling 0828 to Joe Macari's guy). There was a benefit in doing that deal to get the original engine for the yellow car and Graham wanted to give the impression that he 'had it sold' straight away.

2. I'm confident Graham is trying to do a deal with Rickert, but not so confident Rickert wants to do a deal in a timely manner. Rickert knows Graham is getting squeezed by the finance company and is not demonstrating any desire to get a deal done. And, if Rickert does offer a deal, the prices for Red and Yellow car will be lower than what Graham thinks. Graham had said Rickert was interested in the red car at €15m. This is a strong price for the car.

3. I broadly agree with Joe Macari on yellow and red car pricing. Joe said – with yellow and red cars Ferrari Classiche'd – €10m yellow and €12m red.

4. These prices would go a long way to paying down the debt owed to you

5. It would cost c.€1m to get the cars Classiche'd – but it does need to be done.

6. EVNL and Jamie need to keep Joe on friendly relations because, if you do foreclose on Graham, we still need Joe and his connections to the factory.

> 7. With red/yellow cars sold, the outstanding amount is €11-13m??
>
> 8. But you'd have enough stock left to comfortably realise over €11m.
>
> 9. With red and yellow cars not sold, you are still owed €33-35m.
>
> 10. With red and yellow cars not sold, Lombard would have another €22m of security against which to lend. It all depends whether Lombard want to lend 30%, 60%, 90% cash against the value of stock but, if Graham cannot sell cars, he needs to be borrowing €33-35m to get you off his back.
>
> 11. I wonder if Marlene should contact Graham and say she'd heard from Jamie that no deals have as yet been accomplished on red/yellow cars and what contingency plan (i.e. the exact status) does he have in place with Lombard."

251. Later Mr Sullivan requested from Ms Volf the settlement figure due on 2 December. She replied with an approximate figure and continued:

> "I emailed you yesterday regarding the progress of the two other transactions, but I didn't hear from you. I understood today from Jamie [Knight] that no deals have accomplished yet, can you give me an update about the status and what the status is of the Lombard finance? Please keep me fully informed."

252. Mr Sullivan replied that he was close to doing one transaction and that Lombard had confirmed that it would be in a position to complete the refinancing by 16 December. Ms Volf replied, querying whether Lombard was willing to finance the total outstanding amount and, if so, whether it was willing to do so if none of the transactions then being contemplated were to take place. Mr Sullivan replied: "Yes one way or another I will get it done, Mr Louwman made it very clear that he wants his money back and I will get it!!!"

253. MRL's case (APOC paragraph 99) is that, because of the collapse of the proposed sales of #2025 and #1953, it had no choice but to agree when it "was told by Lohomij to sell the Ferrari #2025 and Ferrari #1953 to Mr Loh, a friend of Mr Louwman's, for €22 million", thereby incurring a liability for €1.1 million to FR-G for commission on the sale. The relevant events appear from the subsequent documents.

254. On 1 December 2016 Mr Sullivan wrote to Mr Louwman:

> "I have a transaction MRL can do with Mr Loh (owner of engine 1953) it involves the sale to him of 2025, 1953 and 0818 and taking in part exchange a Mercedes-Benz 700 SS Fernandez & Darrin Torpedo. There are different permutations that can be

> done immediately and I need to discuss them with you face to face. …
>
> The transaction can get approx. €27m in cash now and would make it very easy to finance the balance with Lombard of approx. €6m against my remaining stock of €30m.
>
> I would ask that it's a meeting without 'outside' lawyers as it is a basis (sic) car deal. Mr Loh tried to contact you yesterday ......
>
> It is a deal I want to do as it gets your money back now and we can all move on. However I really would appreciate your advice and assistance on the proposal.
>
> I feel it's very very important that both MRL and Lohomij do not let this transaction slip through our fingers by any delay or not acting promptly as we did before."

This email confirms, as was also clear from Mr Knight's email of 29 November, that it was Mr Sullivan who was seeking to achieve a sale of #2025 and #1953 to Mr Loh; it was not a case of MRL coming under pressure from Lohomij to do a deal that it was reluctant to do.

255. The reply to that proposal came from Mr Knight:

> "I've just spoken to EVNL. I'll spare the puff as time is of the essence. EVNL is inclined to give approval if the deal is as follows:
>
> > Loh offers €27m cash and the Mercedes 700. Loh gets Ferrari 2025, Ferrari 1953 and Ferrari 0818 in return.
> >
> > Headline aspects:
> >
> > - Loh pays the monies within next few days
> > - Loh takes on all subsequent work/certification/any outstanding taxes on the cars he buys (i.e. EVNL doesn't want to bear any of those envisaged costs)
> > - The Mercedes is EU taxes paid.
>
> Marlene reckons the outstanding balance, if the above deal goes through, is c. €6.75m, and agrees that you ought to be able to achieve financing on that amount to clear the balance and see Lohomij clear.
>
> EVNL has asked Loh to speak to me to fully understand the deal on his side. I'm in office and happy to talk."

256. That afternoon, Mr Knight sent an email to Mr Louwman, Mr Sullivan and Ms Volf "for transparency". The subject line was, "JK spoke to Friedhelm Loh – 3.30pm UK

time". The email provides context for the transaction into which Mr Sullivan says MRL was forced after the collapse of Sale 2. The main part of its text was as follows:

> "Loh said first of all that he spoke to EVNL because he had heard EVNL was connected to these cars and did not want to take it further unless EVNL was aware because he regards EVNL as a friend.
>
> … He said his understanding of the deal was €34m for all three cars and the Mercedes was valued (by Rickert) at €6m. €34m less €6m = €28m.
>
> I realised that this was €1m different to what Graham had said and told him that the only way we can all do a deal is if people were transparent with each other. I told Loh that our understanding—from Graham—for the deal was the Mercedes and €27-28m cash in return for the 2 x 250 SWB and 0818.
>
> He asked me if I thought the Mercedes at €6m was fair. I said I think €6m is probably too high but, if Graham wanted to do the deal, EVNL was relaxed. (I worked on the basis that if Loh thinks he's getting a better deal because we think the Mercedes is less than €6m, then great, it might push him towards doing a deal.)
>
> He asked my opinion on the values of the 2 x SWBs and he said he was told €22m for both cars. I said I agreed the yellow at €10m and the red at €12m. He knew the yellow car was unsold at RM. I did not tell him I knew he had a benefit in buying one of the cars (he has the original engine for 2025??).
>
> Loh then said when he heard there was urgency to sell cars, he gets concerned and worried about getting pushed into a deal. I had to think on my feet here. I didn't want to say there's a deadline and disaster if the deadline is passed. So I said Graham owned the cars; Graham does have finance on the cars; and yes, EVNL was connected to the finance. I said that the finance company had been very good with Graham all through 2016 and worked well. Yes, the finance company want to be paid back, but EVNL was relaxed.
>
> He then said he understood there was €800,000 of work to do on both 250 SWBs and that he assumed that cost would be reduced (or paid by EVNL). I said if the deal happened, EVNL was not expecting to be issued with ongoing invoices, and that the buyer takes on all subsequent cost obligations.
>
> This might account for the €1m discrepancy (€27m or €28m) between what Graham told us and what Loh understood. Ultimately, we don't care if EVNL gets €27m cash, but EVNL should not have to cover further works on the cars.

> Loh finished off by saying he needs to think if he wants to do a deal at all; a deal on just the 250 SWBs; or a deal on all three cars – and that he would get back to us/Graham on Monday. I said that there was no problem at all. I know there was a deadline for tomorrow but did not want to spook Loh by thinking we were all desperate."

Mr Knight finished by observing the difficulty that all sides appeared to want to do the deal but that Mr Loh was in danger of being frightened off by the appearance of urgency.

257. On 5 December 2016 Mr Sullivan sent an email to Ms Volf:

> "I am pleased to say that Mr Loh has agreed to buy 2025 and 1953 for €22m. MRL will take in part exchange the SS Mercedes for €6m.
>
> Mr Loh has further agreed to loan MRL €3m against the Mercedes so the net incoming cash to Lohomij will be €19m.
>
> Mr Loh has further requested a two-week option to purchase 0818 for €12m.
>
> Lawyers are instructed and Mr Loh's have requested Lohomij bank details.
>
> The outstanding balance will be funded through Lombard."

258. Ms Volf replied:

> "Lohomij can agree with the sale of the Red SWB 2025 and Yellow SWB 1953 for €16 million in cash and the Mercedes 700 SS in part-exchange, under the condition that Lohomij indeed also receives €3m in cash, so in total Lohomij shall receive an amount of €19 million in cash. If this total amount is transferred to our bank account within one week from today at the latest, we can approve.
>
> …
>
> Please also let me know the status of the refinancing by Lombard bank. I haven't seen anything yet, and it is already the 5th of December."

259. The transaction with Mr Loh went ahead, and on 16 December 2016 Lohomij received €19 million directly from Mr Loh in respect of his purchase of #2025 and #1953. MRL complains (APOC paragraph 99(5)) that, because Lohomij insisted on the purchase price being paid directly to it instead of to MRL, MRL suffered an exchange-rate loss of €1.85 million.

260. MRL also complains that, whereas Sale 2 would have had the effect of reducing the outstanding balance of the Loan to only about €3 million, the transaction with Mr Loh

resulted in the outstanding balance being €15 million; and that, in consequence, Lombard and Mr Owens pulled out of the deal to finance Mr Sullivan's new venture.

Sale 3: facts

261. Since 3 December 2016 MRL had been in default in respect of the Loan. In January 2017 Mr Sullivan continued to express optimism that refinancing with Lombard would shortly be in place; however, no such refinancing materialised. And in the early months of 2017 the sale of #0818 to Mr Loh, which according to Mr Sullivan was either agreed or expected, also came to nothing.

262. On 5 April 2017 Mr Sullivan sent an email to Ms Volf and to Mr Mark Stephen of Reditum Capital ("Reditum"), by way of introducing those two persons to each other. The email said that Reditum had agreed to lend MRL £11 million, secured against #1461 and #0539. It said that the cars had been valued, terms had been agreed, Reditum's legal fees had been paid, and drawdown would be within the next ten working days: "Marlène would you please give Mark clearance to proceed and confirmation that on release of the funds Lohomij will release their security on the 2 above cars."

263. On 11 April 2017 Mr Sullivan wrote to Ms Volf that he still had no news from Mr Rickert; this referred to the proposed sale of #0818 to Mr Loh. He said that he would draw down £11 million from Reditum in the following week and that he was also making arrangements to borrow an amount equivalent to the outstanding balance of the Loan, so that MRL could repay the Loan in full.

264. There is an invoice dated 18 April 2017 from JD Classics for the sale to MRL of 13 vehicles (cars and motorcycles) for £18 million and the receipt of #0818 in "part-exchange" as full payment. (I shall call this "the April Invoice".)

265. On 24 May 2017 Mr Walmsley wrote on behalf of MRL to Ms Volf to explain the delay in finalising refinancing. He said that, because Reditum had refused to agree to terms permitting early repayment of its loan without an interest penalty, MRL was in discussions with RBS International ("RBSI") as an alternative source of re-finance; Reditum remained a back-up option. Part of the email read:

> "In terms of providing you with comfort that Lohomij will be repaid one way or another, Graham has proposed that if the Lohomij loan has not be repaid in full by 30 June 2017, that all of the remaining MRL cars (save for the two being currently restored by Joe Macari) be delivered to Bonhams to be sold at the next available auction which would generate sufficient funds to repay the loan in full. Perhaps we could document something formally to that effect to give you the comfort required?
>
> I am sure that you will appreciate that the negotiations with RBSI are sensitive, so please can you keep the letter strictly confidential between only those at Lohomij who need to know and MRL."

266. On 29 May 2017 Mr Sullivan sent an email to Ms Volf: "Further to Ben's email, I'm pleased to say RBSI have moved to the next level and we are now into providing the final information."

267. On 31 May 2017 Ms Volf invited Mr Sullivan and Mr Walmsley to attend "a meeting about the current status" at Bonhams' offices on 8 June 2017.

268. On 8 June 2017 those present at the meeting were Mr Sullivan, Mr Walmsley, Mr Louwman, Mr Knight, Mr Coppel, Ms Volf and Mr Davies. APOC paragraph 103 pleads the meeting on 8 June 2017 as the occasion when Lohomij refused consent to Sale 3.

269. According to Ms Volf, whose evidence is not contradicted by any other evidence or documents, it was at this meeting that Mr Sullivan first mentioned a proposed sale of Cars to JD Classics.

270. Mr Sullivan's proposal was that #1461 be sold to JD Classics for €2.5 million in cash and 17 vehicles (cars and motorcycles) in part-exchange, and that 15 of the part-exchange vehicles be sold by Bonhams at Goodwood in September 2017. Ms Volf's evidence is that Mr Sullivan said that he was in discussion with JD Classics concerning a proposed sale of #0818 in exchange for 17 vehicles (cars and motorcycles).

271. The proposal made by MRL at the meeting was set out in a document, which I shall call "the Proposal Document", that Mr Sullivan confirms in his first witness statement he had prepared for the purposes of the meeting and produced at the meeting. The first page shows the terms of the proposed sale of #1461:

> "**07/06/2017. Sale of Ferrari 250 Interim. €11m**
>
> Cash €2.5m to be paid direct to Lohomij €2.5m. (£2.1m)
>
> Jaguar XJ220 Lemans €1.7m. Under offer
>
> Jaguar XK 120 alloy. €2.5m. Guaranteed buy back 07/12/2017
>
> Total €6.7m
>
> **Part Exchange Cars to be entered into Bonhams Goodwood Revival Sale 08/09/2017**
>
> Ferrari 599GTO. €750k
>
> Ferrari 599GTO. €550k
>
> Jaguar XJR 15. €400K
>
> Lotus Cortina. €150K
>
> Lotus Cortina. €250K
>
> Lotus Cortina. €300k

Lotus Cortina. €400K

Ferrari 575m. €170K

JaguarXK150S.€230K

JaguarXK140. €230K

Connaught F1 A6. €300K

Lotus S1. €70K

Austin 7. €75k

Midget works. €75K

Range Rover. €75K

Total €4m"

The second page of the Proposal Document sets out a Repayment Proposal: €3 million was to be repaid by 31 July 2017, leaving a balance of €9.8 million; €6 million was to be repaid by 31 August 2017, leaving a balance of €3.8 million; and the balance, with interest, was to be repaid from the proceeds of an auction to take place on 8 September 2017. The third page of the Proposal Document listed MRL's current stock, to which was attributed a value of €42 million, and its current debts, which were said to be €15.8 million. The fourth page listed Ferraris that MRL had sold in the preceding six months; this list included #0818 at a sale price of €16 million.

272. In the course of the meeting Lohomij learned that #0818 had, without its consent and in breach of the terms of the Standstill Agreement, been moved from FR-G's premises in Germany to JD Classics' premises in England. Mr Sullivan acknowledges that he had not obtained the requisite consent to move the Car, but he states that he was frustrated by Lohomij's interference with Sales 1 and 2 and feared further interference with the proposed sale and "wanted to get the deal to an advanced stage so that [he] could present it as a *fait accompli,* which Mr Louwman would have no reason to refuse" (first statement, paragraph 186). He continues:

> "187. I sought to present the terms of the deal to Mr Louwman but I believe that he took the fact that the #0818 had been moved without Lohomij's consent as an excuse not to cooperate. Mr Louwman was visibly angry, banging his hands and arms on the table and shouting at me that he would not agree to anything whatsoever. …
>
> 188. In the second half of the meeting, after Mr Louwman had calmed down, I presented a document I had prepared which set out the details of the vehicles that were to be taken in part-exchange and their approximate values. I informed Mr Louwman that I needed to get them properly inspected and valued, but did not foresee any problems, so asked for his consent. It was clear that Mr Louwman had already made up his

> mind: he refused to consent to the deal and repeatedly said words to the effect of 'we will not consent to anything'."

273. On 9 June 2017, Mr Coppel sent an email to Mr Walmsley in respect of the matter of the discussions of the previous day:

> "Lohomij could extend the standstill and consent to the sale of the Ferrari 250 Interim [#1461] to JC Classics [sic] on the basis set out by you and Graham yesterday (proposal dated 07/06/2017) subject to the following:
>
> 1) The Ferrari 330P [#0818] be immediately collected from Frank Rickert – this needs to happen regardless of whatever else is agreed – and a full inventory of MRL's cars and their locations be immediately provided to Lohomij;
>
> 2) The standstill (and maturity date) be extended to December 21, 2017 provided that (i) not less than EUR2.5 million is paid to Lohomij on or before June 23, 2017; and (ii) the XK120 is sold for not less than EUR2.5 million and such sum paid to Lohomij on or before December 7, 2017;
>
> 3) Interest increases to 9% on the balance due as at and from June 9, 2017;
>
> 4) Part-exchanged cars would be subject to the same security regime as the existing cars;
>
> 5) If for some reason the [Jaguar] XJ 220 is not sold by July 25, 2017, at Lohomij's option, it may be entered at a reserve realistic (in Lohomij's opinion) into the Goodwood sale.
>
> The above is subject to satisfactory diligence checks on the JC Classics cars, including:
>
> - Lohomij being satisfied with the condition and estimated value of the cars;
> - understanding the nature of 'under offer' in relation to the XJ220 and 'guaranteed buy back' in relation to the [Jaguar] XK120;
> - Lohomij being satisfied that remaining Cars are where they understood them to be and will continue to be dealt with in accordance with the agreed letters signed by MRL (which may include being collected and kept by Lohomij at any time).
>
> All of the above is without prejudice to Lohomij's existing rights as secured lender.

> As you know, Lohomij wants its money back not exchanges for other cars. It will be open minded about future proposals on the 330P (and indeed other cars) but at this time does not agree to part-exchange the P330 [#0818] as proposed and does not commit to do so in the future.
>
> Subject to JC Classics indicating agreement by no later than Monday (and please confirm this), Lohomij would expect the above to be put in place by no later than June 23, failing which Lohomij reserves its rights to enforce against the entirety of the security."

274. On 9 June 2017 MRL received confirmation of two offers of finance, subject to contract. Reditum confirmed to MRL that it was willing to make a 6-month loan of £6.5 million, secured on a Jaguar XK120 and a Jaguar D Type (referred to in Mr Coppel's email). Exchange Finance confirmed that it was willing to advance £4.9 million for 24 months, secured on a Ferrari 250GT #0539.

275. There is an invoice dated 9 June 2017 from JD Classics for the sale of 24 vehicles (cars and motorcycles) to MRL for a price of £10,767,000, which was to be paid by the receipt of #1461 in "part-exchange". (I shall call this "the June Invoice".)

276. The April Invoice and the June Invoice were not produced to Lohomij in the course of discussions in 2017.

277. On 12 and 13 June 2017 there were conversations and emails between Mr Coppel and Mr Walmsley, with regard both to the offers of finance and to the proposed transactions with JD Classics in respect of #0818 and #1461. On 13 June Mr Walmsley sought confirmation that Lohomij would not take any steps that might jeopardise the proposed transaction with JD Classics; he explained its merits as follows:

> "Bonhams valuation of the P330 [#0818] was €4.25m worst case to a maximum of €12.5 best case. The best offer received to date for the car was €12m which has not proceeded. The JD Classics transaction values the car at €16m. Further, this is a car that Bonhams has refused to consider for auction, deeming it inappropriate given the history surrounding the car.
>
> Bonhams valuation for the Interim [#1461] was €0.5m worst case and a maximum of €6.25m best case. The car is currently in parts ahead of restoration and is largely unsellable as such. Notwithstanding this fact, the JD Classics offer is €11m."

278. On 14 June 2017 Mr Coppel replied to Mr Walmsley:

> "As discussed last night, the P330 [#0818] will not be collected today and is to be held by JDC [JD Classics] to Lohomij's order, including not making any modifications of any kind. If there is a breach of that understanding, the car will be collected immediately. Failing which, the intention is to allow the 2 sales to JDC you have proposed provided that both finance offers can

> be completed simultaneously with that sale and that Jamie is happy with the JDC cars and we are happy with all terms and conditions. The further understanding is that all happen by June 28, failing which the P330 car can be collected from JDC."

Mr Walmsley replied, confirming his understanding of these terms. (Consent on substantially these terms was intimated by Lohomij to JD Classics on 16 June 2017.)

279. On 15 June 2017 Mr Knight visited JD Classics to inspect #0818 and the vehicles proposed to be given in part-exchange by JD Classics, and he sent his advice by email to Ms Volf and Mr Coppel (I shall omit the schedule comprising the detailed inventory).

> "First of all, the figures I've placed upon the cars are what I would regard as higher than fire sale, and in line with what I would regard as fair reserve prices.
>
> In summary, the 250 Interim inventory [i.e. in respect of #1461] comes to €5,945,000 (they said €8,200,000) and the 330P inventory [i.e. in respect of #0818] at €4,910,000 (they said €16,000,000).
>
> You will find this surprising in relation to the 330P inventory and the main discrepancy on prices are for the D-Type, XK120 Le Mans and Porsche 911 SR. As you will read from my notes (and that attached history) the D-Type is NOT PURE. I value it at €1.5m (they at €6m). The XK120 Le Mans is very historic. We have sold similar (but inferior) period racing XK120s for £700,000. I have valued that at €1,250,000 (they €5m). The Porsche is one I find harder to value. I have guessed at €800,000 (they said €2.5m).
>
> Notwithstanding the above, if they can get the finance they reckon on the D-Type and XK120 at €6.5m – and they give you €6.5m (with you releasing security on the D-type and XK120 Le Mans), the balance of the 330P inventory totals €3,160,000 on my valuation. This would total €9,660,000.
>
> …
>
> It all rests on them getting finance on the D-Type and XK120 Le Mans; and finance on the separate car (Ferrari 0539). If you then get what you're promised in cash; and if the XK120 Alloy (Clark Gable) is a g'tee'd buy-back and you get €2,500,000; and the balance of stock is sold, you should clear the debt.
>
> If they cannot get finance for the D-Type/XK120 you DO NOT want to be holding those cars at their €11m valuation.
>
> The 0539 finance deal is unconnected to the above, and they should pursue getting finance and giving you lots of cash for that car."

Therefore, Mr Knight was expressing the view that the values being attributed by MRL to the part-exchange vehicles to be received as consideration for #0818 and #1461 were substantially in excess of the fair reserve prices for those vehicles.

280. On 16 June 2017 Mr Coppel provided a draft letter to Mr Walmsley for transmission to JD Classics, signifying Lohomij's conditional consent to its continued custody of #0818 and another Ferrari (together referred to in the letter as "the Cars") "pending completion of their proposed sale to JD Classics together with a 1959 Ferrari 250 GT Berlinetta Competizione 'Interim' [i.e. #1461]." The letter said:

> "Lohomij is supportive of the proposed sale of the Cars and the Interim to JD Classics. Nonetheless, if for any reason a sale confirmed by Lohomij has not been agreed by 30 June 2017 (or conditions (i) or (ii) above are breached) we would require that the Cars are immediately delivered up to Lohomij or to such other person as Lohomij may direct."

Mr Walmsley sent the letter to JD Classics on 19 June 2017, with a request that it return a counter-signed copy of the letter. However, it was never counter-signed by JD Classics (or, if it was, the counter-signed version was not provided to Lohomij).

281. On 27 June 2017 Mr Walmsley wrote a "without prejudice" email to Mr Coppel. It read in part:

> "As we had informed Lohomij when we had our meeting on 8 June, JD Classics had agreed terms with MRL to buy both the P330 [#0818] and the Interim [#1461]. At that meeting, Lohomij unreasonably refused to give its consent to the transaction.
>
> I am afraid that JD Classics have now withdrawn from the deal to acquire the Interim as a result of Lohomij's refusal to consent to the terms of both transactions together as had been agreed. As you are aware, the transaction value of the two deals for the Interim and the P330 was almost double the value of the outstanding loan balance owing to Lohomij and the individual transaction values were significantly in excess of the Bonhams valuations for the two cars.
>
> Further, as we had made you aware, the Interim is not a car that can be readily sold given it is being prepared for restoration. The loss of this transaction has caused significant loss to MRL as a result of Lohomij unreasonably withholding its consent.
>
> I understand that JD Classics still wish to procced to acquire the P330 on the terms originally agreed. In order to avoid further loss to MRL, please can you urgently seek the consent of Lohomij to this transaction?
>
> In the absence of Lohomij's consent, MRL will arrange for delivery of the P330 to Bonhams as previously requested as soon as possible. However, the loss of that transaction at a valuation

greatly in excess of the valuation placed on the car by Bonhams will cause MRL further loss.

Obviously, any refinancing arrangements involving the part-exchange cars cannot now progress because both transactions are not proceeding together, although this should not affect the current negotiations with Exchange Finance on the TDF."

282. On 30 June 2017 Mr Coppel responded; his email reads in part as follows:

"1) Exchange Finance

You suggest that the re-finance of the TDF with Exchange Finance remains on the table but despite assurances we have seen no paperwork and have no sense of progress having been made. We need to understand the status and EF's position. …

2) JD Classics

In my email to you on June 14, I indicated that Lohomij would consent to both the P330 [#0818] and Interim [#1461] deals provided that it was satisfied with the part exchanged cars (Jamie inspected them), both the finance deals would complete simultaneously and Lohomij was happy with the terms and conditions (including the buy back on the XK120 alloy and the 'offer' for the XJ220). All of these features were presented by you and Graham as a package at the Bonhams meeting on June 8 in requesting a further extension. I'm not going to explain how 'reasonable' Lohomij's conduct was – that's not relevant. The key point is that that was the deal communicated to you and Graham on June 14.

Please explain how the Interim deal was suddenly withdrawn? We reject as a diversion the wholly unfounded suggestion that anything Lohomij did or didn't do contributed to the withdrawal of the Interim deal.

We note that Graham failed to respond to emails from me 10 days ago requesting his clarification about the buy back on the XK 120 and the XJ 220 offer. To me, this suggests that the deal on the Interim had already been withdrawn or at least modified long before you informed Lohomij. For the record, Lohomij remains willing to consent to both deals as indicated to you in my email on June 14.

You ask if Lohomij is now willing to do the P330 deal on its own. The answer is that we have insufficient information and low confidence. Is the Reditum deal really lined up as we've been assured? Once again, I suggest that you and I call Reditum together so we can understand where the process sits from their perspective and I can report back to Lohomij."

283. Mr Walmsley replied that day:

> "The latest position is that both [Reditum and Exchange Finance] are still moving forwards and have indicated that they should be ready to advance funds towards the end of next week. Hopefully, we can get some more detail on that on Monday when we speak to them.
>
> In addition, as also discussed, Graham has agreed terms for the sale of the Jaguar XK120 Lemans and the Porsche 911 SR for an aggregate consideration of €5m. These cars are two of the cars to be exchanged for the P330, accordingly, these sales can only proceed if Lohomij provide their formal consent to the sale of the P330 in exchange for the cars (I have listed again below for convenience) on the terms agreed with JD Classics.
>
> The proposed sale value is below the market valuations, but Graham understands the requirement to generate funds to repay the Lohomij loan as soon as possible.
>
> To answer the specifics points raised in your email, using your numbering:
>
> 1. As mentioned above, Exchange Finance have agreed to have a call, Graham will organise a call for Monday afternoon with them.
>
> 2. At the moment, I think there is little value in us going backwards and forwards over the reasons for the Interim deal aborting, save to say that is has.
>
> With regards to the P330 [#0818], JD Classics still want to compete that transaction on the terms agreed, although I suspect their patience is wearing thin. The buy-back offer for the XK120 alloy and the offer on the XJ220 are no longer applicable because those two cars were to be exchanged for the Interim [#1461]."

284. On 3 July 2017 there was a telephone conference between Mr Sullivan, Mr Walmsley, Mr Coppel and Mr Charles Dyer of Exchange Finance. After the conference, Mr Dyer sent an email to Mr Sullivan with the subject line "Ferrari TDF":

> "Just to confirm our conference call a few minutes ago re the above vehicle.
>
> Funding has been agreed for 5,000,000 euros against the subject vehicle in the name of Graham Sullivan.
>
> I return from vacation on Thursday evening and will be meeting with You on Friday to sign the relevant documentation.
>
> Funds will then be forwarded to Lohomij within 24/48 hours so would expect completion by Tuesday of next week"

285. On 5 July 2017 there was a telephone conference between Mr Sullivan, Mr Walmsley, Mr Coppel and a representative of Reditum.

286. On 6 July 2017 Mr Walmsley forwarded to Mr Coppel an email from Mr Sullivan, the main part of which read:

> "Coy's will have the valuation done on the D Type by the end of business next Tuesday and I expect to be able to forward it to Reditum on the Wednesday, Mark is working on the loan as we speak.
>
> I need to invoice the XK 120 and Porsche to FR-G and they will send the €5m to Lohomij next week.
>
> Exchange Finance, Charles is back from holiday on Friday and I expect to meet him Monday and again €5m will be paid direct to Lohomij.
>
> I seriously want and believe that within the next 10 working days I will have paid Lohomij in full and can then get my life back."

This relates to the proposed onward sale to FR-G of two of the cars to be taken in part-exchange for the sale of #0818 to JD Classics. Mr Coppel responded on 7 July 2017, in an email copied to Mr Sullivan and Ms Volf. The first part of the email quoted Mr Dyer's email of 3 July 2017 and said: "Charlie Dyer said in his email that he was landing on Thursday night and would be in his office on Friday (today) to sign the contract … Why hasn't this happened?" The second part of Mr Coppel's email said:

> "2) We're concerned at the requests from Frank Rickert for an invoice. As you know, Lohomij has not consented to the sale of the P330 and will not do so until the pieces in the jigsaw line up, so it would be wrong to send Frank an invoice for cars that you can only conditionally promise to sell him. You told me on Monday that Frank would send an email to you to pass on to Lohomij indicating his willingness to buy the XK120 and the 911 SR for EUR5 million.
>
> Currently there is nothing to evidence to Lohomij that the PX cars can be monetised. Please ensure that you don't invoice Frank without explaining that you need Lohomij's consent. We need to see an offer from him (assuming you exchange the P330) not an offer from you."

287. The evidence of Ms Volf is that Lohomij never received any documentation from FR-G confirming its willingness to buy the two part-exchange cars.

288. Mr Sullivan was continuing to make efforts to finalise the refinancing. The evidence of Ms Volf is that Mr Coppel had no further contact with either Exchange Finance or Reditum, beyond the conference calls on 3 July and 5 July 2017. (She also states that Mr Coppel had no contact at all with Aldermore Bank, which is mentioned in APOC.

However, I take it that Aldermore Bank was the finance company with whom Exchange Finance, which is not itself a finance house, was seeking to arrange re-financing.)

289. On 10 July 2017 Mr Walmsley wrote to Mr Coppel and Ms Volf:

> "Further to recent correspondence, Maranello Rosso Limited have instructed me to confirm that the full amount of the outstanding loan together with all accrued interest will be repaid no later than 29 August 2017.
>
> It is anticipated that an initial repayment will be made this week following completion of the loan from Exchange Finance.
>
> There is a further meeting with Exchange Finance at 10am tomorrow morning to conclude matters."

290. However, finance from Exchange Finance / Aldermore Bank did not materialise.

291. On 14 July 2017 Mr Coppel wrote to Mr Walmsley:

> "Ben, sorry, I don't understand the linkage of the TDF with any deal stemming from the P330. If you mean Reditum, we are unable to agree the proposed deals with FR in isolation. As you know, we don't want to be left exposed to cars without near certainty that they can be immediately monetised. We await the Reditum update expected very soon, as you say."

The point being made was that any transaction with any of the Cars involving payment by vehicles given in part-exchange would be acceptable to Lohomij only if the part-exchange vehicles could immediately be converted into cash, either by re-sale or by standing as security for re-financing that would discharge the Loan.

292. On 18 July 2017 Mr Walmsley wrote to Mr Coppel:

> "Quick update from today's meetings:
>
> - Reditum will confirm the larger loan in writing tomorrow. They are progressing with documents too;
> - Exchange have confirmed they will do the €5m and will confirm in writing on Thursday/Friday timing to completion – should be next week.
> - FR will attend JD classics on Thursday.
>
> I will update as soon as I can tomorrow."

293. On 20 July 2017 Mr Coppel reiterated Lohomij's position in a lengthy email to Mr Walmsley. It concluded:

> "Lohomij continues to have no reason to accept or even believe that the Reditum and Exchange Finance deals will happen.

> Previous assurances about both have come to nothing. The papers every day carry stories about the dire state of the car finance industry. No money at all has been received by Lohomij since we met at Bonhams. The undertaking to provide a keepsafe letter from JD Classics that Graham gave at that meeting has been ignored.
>
> Graham's assurances about his overriding priority being to repay MRL even at reduced valuations have come to nothing.
>
> In summary: Lohomij will not consent to the exchange of the P330 unless arrangements satisfactory to it have been made for the monetisation of the cars received in exchange. EUR5 million from Frank Rickert for the 911 and XK120 in isolation is not satisfactory. You have consent for £4.5 million re-fi on the TDF with Exchange Finance - receipt of which is expected.
>
> Lohomij reserves all rights and as I have already informally advised you, will no doubt shortly re-open the question of collection of the P330 for breach of the undertaking received from FR."

294. On 26 July 2017 Mr Coppel wrote to Mr Walmsley:

> "It's more than two weeks since the £4.5 million re-finance with EF on the TDF was supposed to have completed. I'm re-iterating once again that we don't understand why this was not prioritised or if it was why it didn't go through. The only explanation we received was that Graham has been trying to re-fi more cars and so we now have been given to expect a 'master' re-finance from a combination of Reditum and/or Exchange that, together with the funds from FR, would retire the Lohomij loan.
>
> We look forward to your update today after your meeting with Graham. Please provide a clear timeline of what is to happen and when including as to the Mercedes deal you mentioned."

295. On 1 August 2017 Mr Coppel wrote to Mr Walmsley:

> "We're keen to hear from Graham what has happened across all lines of business. To re-cap:
>
> 1) Exchange Finance - latest we had from you was that confirmation of timing was expected yesterday. You were not sure why this had slowed;
>
> 2) Reditum - Mark the CEO was away on an unexpected holiday but was due to return yesterday to update on Reditum's timetable;

> 3) Mercedes - EUR6 million proceeds are expected this week - of which EUR3 million will be applied to reduce the Lohomij loan balance;
>
> 4) Frank Rickert was to provide a letter yesterday confirming his interest in acquiring the 911SR and XK120 for EUR5 million. He understands this is conditional on the PX of the P330 and so subject to Lohomij's approval.
>
> Please update us as soon as possible today"

296. On 8 August 2017 Mr Coppel wrote to Mr Walmsley:

> "Ben, we haven't had the update you were going to provide. Please advise."

297. On 11 August 2017 Mr Walmsley forwarded to Mr Coppel written confirmation from Reditum of its willingness to make a loan of £11,070,000 for 12 months on the security of #0539, #1461 and the Jaguar D Type. Mr Walmsley wrote:

> "We will be progressing with the documentation on Monday and hope to be able to confirm timing for drawdown as soon as possible.
>
> Once we have clarity on timing, and I understand that they are looking to close as soon as possible, we can discuss completion mechanics to co-ordinate matters as required. In conjunction with one of FR, the sale of the Mercedes or the additional loan being discussed, MRL will be able to repay the Lohomij loan in full.
>
> I will update as soon as possible next week."

298. The evidence of Ms Volf is that no further updates were provided in August 2017. She also notes that #0539 was also listed as security for the proposed refinancing with Exchange Finance.

299. By email on 31 August 2017 Mr Walmsley informed Mr Coppel: "Progress had been frustratingly slow with various parties absent on holiday over the last week. I understand that everything will proceed at full speed from Monday [4 September 2017]." On 5 September 2017 Mr Coppel asked: "Would you please update us." On 6 September 2017 Mr Walmsley said that he would give an update as soon as he heard from Mr Sullivan with an update on his conversation with Reditum that day.

300. On 8 September 2017 Mr Coppel wrote to Mr Walmsley and Mr Sullivan:

> "Ben or Graham – without any information it's impossible not to be pessimistic and we can't continue to push off Mr Louwman's requests for a status report. It's been 3 months since we met in London and we are now at the end of a week in which you said everything would proceed at full speed – but once again we've heard nothing at all.

> What please has happened with:
>
> 1) Reditum?
>
> 2) Exchange Finance?
>
> 3) Frank Rickert?
>
> 4) The sale of the Mercedes?
>
> Please confirm that the P330 [is] still at JD Classics. I ask this because I am certain that JD Classics would not wish to continue to tie up the amount of their stock lined up against that car so there must have been discussions about a deadline, or altering the part exchange, but we haven't been informed and have been left to wonder.
>
> Graham, you will take your own advice, but please be reminded that the loan is in default, the lender has been extraordinarily patient, it has long reserved its rights and is entitled in law to call the loan and appoint a receiver or commence one or more of the alternative recovery processes available to it. The lack of information and the disconnect between what we were expecting from you, Reditum, Exchange Finance and Frank Rickert and what we have received is seriously concerning."

301. The Cars #0818 and #1461 had not been sold by the time Lohomij appointed receivers on 20 June 2018. Mr Sullivan states (first statement, paragraph 195) that MRL subsequently sold them "for a substantially lower price than had been offered by JD Classics." In fact, the purchaser was Mr Sullivan himself, as MRL's solicitors confirmed in a letter dated 19 February 2021.

<u>Discussion</u>

302. I shall address in turn the various causes of action advanced by MRL in respect of the period after the Settlement Agreement.

Proposed amendment: APOC paragraph 134

303. In respect of Sale 1, there are obvious problems, discussed below, with any reliance on clause 9 of the Amended Facility Agreement. MRL seeks to circumvent these problems by alleging that Lohomij's interference with the negotiations with FR-G was (a) a breach of an implied term of the Amended Facility Agreement that Lohomij would not prevent or interfere with any proposed sale of the Cars and/or would act in good faith and (b) a breach of a common law duty not to interfere with the release or potential release of its security. I shall refuse permission to amend, because these ways of putting the matter seem to me to have no real prospect of success, either on the facts or in law.

304. First, the case pleaded in APOC, according to which all of the conduct complained of took place on the occasion of a single meeting on 2 June 2016, is inconsistent with Mr Sullivan's own evidence advanced on these applications.

305. Second, what makes sense in the context of an allegation of a single meeting on 2 June 2016 (that is, that the conduct of Mr Louwman, Mr Schlumpf and Mr MacLean on that occasion caused FR-G to change its position) becomes implausible when the conduct is said to have occurred at two meetings some five weeks apart. MRL does not allege that FR-G pulled out of Sale 1 after the first meeting but only after the second meeting—indeed, the Heads of Terms were actually executed by both parties shortly *after* the meeting of 2 June 2016—so the inference that the alleged collapse of Sale 1 was due to Mr Louwman's conduct becomes fanciful.

306. Third, I am entirely satisfied that the revised case is factually incorrect, because Mr Schlumpf was not at the meeting on 6 July 2016. On this point there is a conflict between the evidence of Mr Sullivan and Mr Hilder, who say that he was present, and that of Mr MacLean and Ms Volf, who say that he was not. But MRL's case on this point has been inconsistent, to the extent that it appears to be trying to find a way to salvage an original and untenable case, and the documents show the position clearly enough. On the morning after the meeting, Mr MacLean's email to Mr Louwman, which was copied to Mr Schlumpf, identified those present at the meeting and they did not include Mr Schlumpf. Further, Mr Schlumpf had not intended to be at the meeting, as is shown by an email that he sent to Mr MacLean on Thursday 30 June 2016, expressing "Best wishes and success for next Wednesday's meeting." Therefore, if Mr Schlumpf and Mr MacLean said what they are alleged to have said at the same meeting, that must have been the meeting on 2 June 2016. That is actually consistent with APOC, but it is inconsistent both with Mr Sullivan's evidence and MRL's Reply and with the case being advanced that Sale 1 fell apart in the aftermath of what they are alleged to have said, as the Heads of Terms were signed *after* that meeting.

307. Fourth, MRL's revised case is also factually incorrect in stating that FR-G changed the proposed terms after the meeting on 6 July 2016 (Reply, paragraph 55; Mr Sullivan's first statement, paragraph 128). Mr MacLean's email to Mr Louwman on the morning after the meeting records that it was at the meeting itself that Mr Rickert made it known that FR-G's clients wanted a price reduction or some other alteration of the terms. This also renders it implausible to contend, as MRL does in its Reply and in Mr Sullivan's witness statement, that Sale 1 collapsed after and in consequence of what was said at the meeting on 6 July 2016 and that the ensuing negotiations *followed* the collapse of Sale 1.

308. Fifth, the whole premise of MRL's case concerning interference in Sale 1 is fanciful, not to say absurd. In this regard, I refer to the following passages in which MRL's case is advanced: (1) paragraph 56 of MRL's Reply, set out above, referring to the "deliberate conduct" of Mr Louwman, Mr Schlumpf and Mr MacLean; (2) APOC paragraph 133(4), referring to "Mr Schlumpf's attempts to sabotage Sale 1"; (3) paragraph 56(2) of MRL's Reply, set out above, and to the same effect paragraph 127 of Mr Sullivan's first witness statement, which states:

> "127. I understand that Lohomij and Mr Louwman contend that Mr Maclean was acting for MRL. However, it now seems to me that Mr Maclean was acting in Lohomij's interests and, I believe,

> on Lohomij's instructions, in seeking to sabotage the deal. There was clearly no need for Mr Maclean to have acted the way he did – these were the actions of a man who wanted the deal to fail."

The most obvious problems with this interpretation of events are:

1) Lohomij could easily have called in the Loan and enforced its security. Instead, having already granted extensions of time for repayment, it did so again in July 2016, while negotiations with FR-G were ongoing, and again in November 2016; and even after December 2016, when MRL was in default, it did not call in the Loan or appoint receivers until June 2018 and never made a call on Mr Sullivan's guarantee. Its conduct in that regard is inconsistent with MRL's suggestion that Lohomij was trying to sabotage the deal with FR-G by making embarrassing disclosures about MRL's vulnerable position under the Amended Facility Agreement.

2) MRL's response to that objection is to say that Lohomij wanted to string things along, preventing a transaction with potential buyers but doing nothing itself to enforce its security, so that it could maximise MRL's liability for interest before it eventually engineered forced sales at an undervalue to favoured buyers. Specifically with regard to Sale 1, the allegation that Lohomij was just leaving MRL in limbo for the purpose of increasing the interest on the Loan is a mere assertion that has, so far as I can see, nothing whatsoever to support it. (Sales 2 and 3 are discussed below.) Generally, the most that can be said for the allegation is that it can be stated intelligibly. But it carries not a shred of conviction. The existence of an intention to increase the amount of the debt is unsupported by any objective evidence, sits uneasily with the waiver of the €13.6 million fee due under the Facility Agreement, and is manifestly unsustainable in the light of Lohomij's insistent pressing for repayment through refinancing. And only by mental gymnastics is it consistent with the supposed intention of the alleged conspiracy, which was to ruin Mr Sullivan and MRL. An interpretation for which there are no objective supporting grounds does not become reasonably arguable merely by being asserted. This is one of several imputed motives that strain credulity too far. Another one falls for consideration in this context.

3) The pleaded grounds for suggesting that Mr MacLean was "acting in Lohomij's interests" and "on Lohomij's instructions" are feeble in the extreme. It is common ground that Mr MacLean's role in connection with Sale 1 was on behalf of MRL, not Lohomij, far less Bonhams. Whatever Mr MacLean said at a meeting, whether on 2 June 2016 or on 6 July 2016, it cannot have led Mr Sullivan to infer that he was acting in collusion with Lohomij or that he was attempting to ensure that the deal failed, because MRL continued to engage Mr MacLean after both of those meetings and, indeed, later reached agreement with him as to his remuneration for his efforts. Further, the emails between Mr MacLean and Mr Louwman and Mr Schlumpf show clearly that Mr MacLean was not trying to undermine negotiations with FR-G. Mr Eschwege submitted that the idea that Mr MacLean would do anything to deter FR-G from dealing with MRL was "bizarre"; that seems to me to be a fair comment. An unsubstantiated assertion of inference on Mr Sullivan's part is not a proper basis

on which the allegation in respect of Mr MacLean ought to be permitted to proceed, whether or not it is used to ground a claim against him personally.

309. Sixth, the implied term prohibiting Lohomij from preventing or interfering with a disposition, on which MRL seeks to rely by amendment, is not reasonably arguable.

1) In *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, the Supreme Court confirmed and approved the traditional approach to the implication of terms. A term will be implied into a contract only if it is necessary to give business efficacy to the contract (in the sense that, without the term, the contract would lack commercial or practical coherence) or—which will often amount to the same thing—if the term is so obvious that it "goes without saying". A term will not be implied if it is incapable of clear expression, or if it is unreasonable or inequitable, or if it contradicts an express term of the contract.

2) MRL has not pleaded any matters that are said to justify the implication of the term contended for.

3) The Amended Facility Agreement is a detailed and carefully drafted commercial agreement between sophisticated parties who were both represented by lawyers. Clause 9 of the Amended Facility Agreement makes express provision in respect of dispositions of the Cars as Charged Property. Clauses 7 and 8 made provision regarding the sale of the Cars; I refer in particular to clause 7(c), set out above. The implied term contended for by MRL is neither necessary nor obvious. The contract works perfectly well without it.

4) An implied term that Lohomij would not prevent or interfere with a proposed sale of the Cars is unarguable for three further reasons. First, clause 9 of the Amended Facility Agreement gives Lohomij an express right to prevent or interfere with a sale, that is, by withholding consent to it. The implied term contended for would be inconsistent with the express terms of the contract. Second, an implied term preventing Lohomij from *interfering* with a sale is impossibly vague. By way of example, MRL has not suggested that Mr Schlumpf's mere presence at meetings was an unlawful interference, although he was present only to represent the interests of Lohomij as secured creditor. It is unclear at what point his contribution to meetings would constitute interference. Third, Mr Schlumpf's remarks, if made as alleged, and whether they were helpful or not, did no more than assert Lohomij's rights under the Amended Facility Agreement and the Debenture, because MRL was in default after 30 June 2016. It is impossible, in my view, to see the justification for the implication of a term that would prevent Lohomij, at a meeting at which it was properly represented as secured creditor, from stating its entitlements as secured creditor.

310. Seventh, the implied term, on which MRL seeks to rely by amendment, that Lohomij would act in good faith (APOC paragraph 67A), does not provide any reasonably arguable case.

1) There is no general principle of good faith in English contract law. See *Chitty on Contracts*, 33rd edition, paragraph 1-044 and the cases there cited.

2) No grounds for the implication of a term of good faith in the Amended Facility Agreement have been pleaded and, for reasons already discussed, general principles regarding the implication of terms do not justify such an implication.

3) The relationship between MRL and Lohomij was both debtor-creditor and chargor-chargee. That relationship is sufficiently regulated by the express terms of the contract between them and by the applicable equitable principles. See *Yorkshire Bank Plc v Hall* [1999] 1 WLR 1713, *per* Robert Walker LJ at 1728; *Morley v Royal Bank of Scotland Plc* [2021] EWCA Civ 338, *per* Males LJ at [59]-[64]. The equitable principles applicable to Lohomij's status as chargee include its obligation to exercise its powers as chargee for proper purposes and in good faith. Nothing to do with Sale 1 involved the exercise of powers under the security, although Lohomij could have exercised them once MRL went into default; the equitable principles were not engaged.

311. Eighth, the common law duty not to interfere with the release or potential release of security, on which MRL seeks to rely by amendment, is not reasonably arguable. Indeed, how the alleged duty arises is not explained in APOC. As already mentioned, the relationship between the parties was governed by the terms of their contract and by the equitable principles applying to the exercise of security rights. Lohomij had a contractual right to prevent assets over which it had security from being disposed of; this is a matter of the application of clause 9 of the Amended Facility Agreement.

Against Bonhams: clause 6 of the Settlement Agreement

312. In respect of Sales 2 and 3, MRL alleges that, by virtue of the provision of false valuations by Mr Knight, Bonhams was in breach of clause 6 of the Settlement Agreement. Specifically, the two things said to constitute the breach were (1) Mr Knight's overvaluation of #0828 on 18 November 2016, and (2) Mr Knight's undervaluation of #2025 and #1953 on 1 December 2016. (I should say that APOC does not make clear which Cars Mr Knight is said to have undervalued or when he is said to have undervalued them. But I think I have identified the correct Cars and date.)

313. In my judgment, this allegation has no real prospect of success.

1) MRL misconstrues the scope of clause 6. It was in a Settlement Agreement, which compromised disputes arising out of past dealings. The clause is most naturally to be read as relating to the matters within the scope of the Settlement Agreement, namely matters up to 31 July 2015. To construe it as meaning that none of them will ever act in a manner that is adverse to the interests of any of the others is to interpret the clause without regard to its context; it also leads quickly to absurdity, when Lohomij's rights and interests as secured creditor necessarily entailed the capacity to act in a manner that would be harmful to MRL's reputation and its dealings with third parties.

2) Further, the provision of an overvaluation to Lohomij would not anyway engage clause 6 of the Settlement Agreement. Although the headings of the clauses are not a guide to the construction of the Settlement Agreement (clause 1.2(C)), the heading "Non-disparagement" to clause 6 is apt. Put colloquially, the clause has to do with words or actions that might cause third parties to give MRL (in this case) a wide berth. A valuation given to Lohomij has nothing to do with

clause 6. It does not damage MRL's reputation and it does not tend to lead others to cease to deal with MRL. What it could do is lead Lohomij to refuse to consent to MRL completing a transaction with a third party. That is a different matter, as is any question of reputational harm to MRL on account of the manner in which it has conducted itself vis-à-vis third parties regarding proposed transactions for which it has not received any requisite consent.

3) The alleged overvaluation is unarguable. Mr Knight did not purport to value #0828 on 18 November 2016. He simply took the parties' own shared valuation and considered whether the consideration being offered for the Car was equal to that valuation.

4) The allegation would also fail in respect of causation. MRL's case is that Lohomij refused consent to Sale 2 on three occasions before Mr Knight said anything at all about it: at meetings on 5 November and 11 November and by email on 16 November 2016. When on 18 November 2016 Ms Volf repeated the refusal by email, she referred not only to Lohomij's desire to have full, not partial, repayment of a Loan that was already in default but also to the belief that the proposed transaction was at an undervalue. However, that was a reason additional to the reason for refusal that had been given already, notably in the email on 16 November 2016. And no reference was made to Mr Knight at all. Indeed, it was only after Mr Knight became involved that Lohomij finally gave consent to Sale 2. MRL's case, of course, is that Mr Knight's valuations were for no other purpose than for use by Lohomij as pretexts for decisions taken on other grounds.

5) The provision of an undervaluation so as to justify a transaction with Mr Loh would not engage clause 6. The point is even more obvious than it was in respect of overvaluations, because the effect of an undervaluation would (according to MRL's case) be positively to facilitate dealings with third parties.

Against Lohomij: clause 6 of the Settlement Agreement

314. MRL alleges that Lohomij was in breach of clause 6 of the Settlement Agreement in two respects:

1) By its refusal to consent to Sales 1, 2 and 3 "and/or its attempts to interfere with and/or block Sales 1, 2 and 3" (APOC paragraph 133). The contention is that Lohomij's conduct resulted in the collapse of the Sales, the loss of funding from Lombard as a result of the collapse of Sale 2, threats of legal action in respect of Sale 2, and MRL being considered unreliable vendors and suffering reputational damage in the market;

2) By disparagement of MRL to finance companies that were considering lending to MRL. APOC paragraph 133(4) complains of:

> "Lohomij's attempts to prevent MRL refinancing by calling potential refinancers and discouraging them from dealing with MRL. Such attempts included but are not limited to:
>
> a. Mr Schlumpf's attempts to sabotage Sale 1;

b. The telephone calls made by Mr Coppel to Aldemore, Reditum and others attempting to dissuade them from providing financing to MRL."

I shall deal with these two matters in turn.

315. As regards the Sales, the allegation has no real prospect of success and, in respect at least of Sales 2 and 3, it adds nothing at all to the allegation of breach of clause 9 of the Amended Facility Agreement.

316. The purpose served by the allegation in respect of Sale 1 is that no refusal of consent has been identified, so clause 9 of the Amended Facility Agreement cannot be engaged. However, reliance on clause 6 of the Settlement Agreement is not reasonably arguable.

1) For reasons already stated, MRL's construction of clause 6 is wrong. Regardless of this overarching point, the allegation is unsustainable on the facts.

2) The chronology shows that Mr Louwman's alleged remarks to Mr Sullivan on the telephone on 2 June 2016 cannot have caused the collapse of so-called Sale 1.

3) Further, Mr Louwman's alleged remarks were made to MRL's representative, not to third parties. It is not reasonably arguable that, after Mr Schlumpf has asked the third parties to leave so that a private telephone conversation could be held, Lohomij was in breach of contract because the third parties might have been eavesdropping at the door. (It is Lohomij's case that Mr Rickert had left the meeting well before the telephone conversation and that the conversation was not held on speakerphone. But those are issues of fact that cannot be resolved now.)

4) As Mr Schlumpf was present only on 2 June 2016, not on 6 July 2016, nothing he said, any more than anything Mr Louwman said, can have had anything to do with the *collapse* of Sale 1, which had not even been formulated before the meeting.

5) Nothing that is alleged to have been said or done by Lohomij amounted to anything more than an assertion of its rights as secured creditor; and as at 6 July 2016 MRL was in default. It is not reasonably arguable that an assertion of its rights could amount to a breach of clause 6.

317. In respect of Sales 2 and 3, the matters relied on are the refusals of consent. But clause 9 of the Amended Facility Agreement gave Lohomij the right to withhold consent reasonably. It is impossible to contend that clause 6 of the Settlement Agreement meant that Lohomij was obligated to give consent to all and any sales, regardless of their terms, or to construe clause 6 of the Settlement Agreement in a manner that conflicts with or derogates from clause 9 of the Amended Facility Agreement. Those two contracts were executed at the same time and as part of the same comprehensive transaction, and the principle of construction applies that was stated by Sir George Jessel MR in *Smith v Chadwick* (1882) 20 Ch.D. 27 at 62:

> "[W]hen documents are actually contemporaneous, that is two deeds executed at the same moment, … or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are treated as one deed; and of course one deed between the same parties may be read to show the meaning of a sentence and may be equally read, although not contained in one deed but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose."

(See generally Lewison, *The Interpretation of Contracts,* 7th edition, at paragraphs 3.06 – 3.08.)

318. Turning to MRL's allegation that Lohomij was in breach of clause 6 by reason of communications with prospective lenders, I have already discussed Mr Schlumpf's involvement; in my view it does not engage clause 6, however one looks at the matter.

319. As for Mr Coppel, the facts relied on are set out in APOC paragraphs 105 and 106:

> "105. Furthermore, Mr Coppel, Lohomij's lawyer, on the instructions of Lohomij and/or Mr Louwman, interfered with MRL's negotiations with Reditum and Aldemore [sic] by telephoning them to assert Lohomij's right to be paid. In addition, Mr Coppel also interfered with MRL's attempts to refinance with other financers including: (1) Lombard; (2) Exchange Finance Limited; (3) The Royal Bank of Scotland International Limited.
>
> 106. For the avoidance of doubt, it is not alleged that Mr Coppel acted dishonestly or as part of any conspiracy. He was at all times acting on the instructions of Bonhams, Mr Brooks, Mr Maclean, Lohomij and/or Mr Louwman."

320. The allegation that Mr Coppel's conduct placed Lohomij in breach of clause 6 of the Settlement Agreement is not reasonably arguable.

321. First, for reasons stated above, MRL's construction of clause 6 is incorrect. Further, even if it related to matters arising after July 2015, the facts alleged do not engage clause 6. Although the allegation of breach is put in terms of "discouraging [potential financers] from dealing with MRL", the pleaded facts are that Mr Coppel "assert[ed] Lohomij's right to be paid". That right was indisputable. It was also the reason why MRL was seeking finance from other lenders.

322. Second, the allegation that Mr Coppel tried to discourage third parties from providing refinance to MRL is inherently implausible. The documentation, much of which has been recited at length above, shows clearly that Lohomij was pressing MRL to secure refinancing. Just to say that this was a charade will not do. No basis has been shown for such a claim.

323. Third, the pleaded allegation is wholly lacking in specificity and, bluntly, bears the hallmarks of an attempt to reinterpret history through a distorting lens—if need be, I am afraid, by MRL making things up as it goes along. Although Mr Coppel is exonerated from misconduct, he is at the same time alleged to have taken his instructions from any or all of the alleged conspirators; this shows that there is no proper basis for the identification of anyone except Lohomij as the party giving instructions to Mr Coppel. It would have been improper of him, as acting for Lohomij in respect of these matters, to take instructions from any third party to interfere with refinancing proposals. The defendants all affirm that Mr Coppel took instructions from Lohomij alone.

324. Fourth, the only evidence adduced by MRL of what Mr Coppel said to prospective lenders relates to the telephone conferences with Exchange Finance on 3 July 2017 and Reditum on 5 July 2017. In paragraph 76 of the Reply to Lohomij's Defence, MRL alleges:

> "(1) While MRL was in the course of negotiating a finance deal with Reditum and Exchange Finance, Mr Coppel insisted that Mr Sullivan set up a conference call with both of these companies. Mr Sullivan arranged for these calls to take place, which were also attended by Mr Walmsley;
>
> (2) During these calls, Mr Coppel aggressively and inappropriately asserted Lohomij's right to be repaid and challenged the lenders as to why they could not simply advance funds immediately".

As MRL was in default and Lohomij was entitled to be repaid and (as is clear from the emails set out above) had a natural interest in ascertaining the prospects of repayment through refinancing, neither the request for a conference call nor the assertion of an immediate right to repayment and an enquiry as to the reasons why moneys could not be advanced immediately can arguably constitute a breach of clause 6. Characterising Mr Coppel's conduct as inappropriate and aggressive takes matters nowhere. (I note, incidentally, that no complaint was made in that regard at the time.)

325. Fifth, the furthest any other allegation goes is in the final part of paragraph 76 of MRL's Reply to Lohomij's Defence:

> "(3) Further, in an exchange of text messages between Mr Coppel and Mr Hilder, Mr Coppel acknowledged that he had made contact with Royal Bank of Scotland, Exchange Finance, Reditum, Lombard and RBSI. Mr Coppel had no authority to do so; and
>
> (4) In the premises, MRL infers that the object of Mr Coppel's interference was to prevent MRL from being able to complete a refinancing deal."

There is an issue of fact in that regard. But, taking MRL's case as it stands, there is no evidence that Mr Coppel disparaged MRL, and the inference that he was trying to prevent a refinancing deal is speculative, fanciful and thoroughly implausible. The

obvious position is that Lohomij wanted to get its money through refinancing and wanted to know what the prospects were of that happening. MRL's supposed inference is no basis on which to allow this allegation to proceed to trial.

Against Lohomij and Bonhams: clause 8 of the Settlement Agreement

326. MRL alleges that, in respect of Sales 1, 2 and 3, Lohomij was in breach of the obligation "at all times to act in good faith" in clause 8 of the Settlement Agreement. The matters relied on are the withholding of consent to the Sales and attempts to prevent MRL from refinancing.

327. MRL also alleges that, by reason of Mr Knight's provision of false valuations in respect of Sales 2 and 3, Bonhams too was in breach of clause 8 of the Settlement Agreement.

328. The case based on clause 8 is not reasonably arguable. APOC paragraph 132 quotes partially and misleadingly from clause 8.2. The clause relates specifically to the exercise of rights and performance of obligations under the Settlement Agreement. MRL does not identify any rights or obligations that might be engaged, and I have been unable to do so either. As for Lohomij, the giving or withholding of consent to proposed sales was an exercise of rights and obligations under the Debenture and the Amended Facility Agreement. Disparagement of MRL to prospective lenders falls for consideration under clause 6 of the Settlement Agreement; see below. As for Bonhams, the provision of an overvaluation to Lohomij would not engage clause 8, because it does not relate to the exercise of a right or performance of an obligation arising under the Settlement Agreement. The same is true of the provision of an undervaluation so as to justify a transaction with Mr Loh.

Against Lohomij: clause 9 of the Amended Facility Agreement

329. In respect of Sales 1, 2 and 3, MRL alleges that Lohomij was in breach of clause 9 of the Amended Facility Agreement. The principles concerning contractual consent provisions have been considered in many cases, including the following: *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59, [2001] 1 WLR 2180; *Barclays Bank Plc v UniCredit Bank AG* [2012] EWHC 3655 (Comm), on appeal [2014] EWCA Civ 302; *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718, [2020] QB 418; *Sequent Nominees Ltd v Hautford Ltd* [2019] UKSC 47, [2020] AC 28; and, for a recent survey, *Apache North Sea v Ineos FPS* [2020] EWHC 2081 (Comm). For present purposes I refer in particular to the following points that emerge from the authorities.

1) The burden of proof rests on the party who alleges that consent was unreasonably withheld.

2) Whether the withholding of consent was reasonable or unreasonable is a question of fact.

3) The withholding of consent does not have to have been justified; it suffices that it was reasonable, in the sense that it was a decision that a reasonable person could have made in the circumstances.

4) The decision-maker "is entitled to take into account his own commercial interests, in preference to those of the other party, and normally to their exclusion" (*per* Popplewell J in *Barclays Bank v UniCredit Bank*, first instance, at [64]).

5) However, the reason for the decision to withhold consent must not be something wholly extraneous and completely dissociated from the subject matter of the contract.

6) "[J]ust as it is important for the court not to trespass on issues which are properly part of the evaluative exercise for the consent-provider under the guise of construing the contract, it is legitimate for the court to consider to what extent the parties can have intended that one party would be subject to the risk of an adverse decision by its counterparty on a particular matter 'with the protection only of a requirement of good faith and rationality' (as Hildyard J put it in *Lehman's Waterfall; Re Lehman Brothers International (Europe) (In Administration)* [2017] Bus LR 1475, [130])" (*per* Foxton J in *Apache North Sea v Ineos FPS* at [41]). In the words of Leggatt LJ (in the context of an implied term not to withhold consent unreasonably) in the *Equitas Insurance* case at [151]: "What is honest and reasonable is judged by reference to the purpose(s) which the contract requires or permits the party exercising the relevant power to pursue."

330. For Lohomij, Mr Eschwege rightly submitted, further, that clause 9 of the Amended Facility Agreement is only engaged where there is an actual or proposed disposition capable of being the subject of Lohomij's consent. In my view, this is obvious from a plain reading of clause 9. It also makes sense in the context of the other provisions of the Amended Facility Agreement, in particular clause 7(c), which provided that

> "the Borrower shall, as soon as reasonably practicable and in any event no later than 3 Business Days after receiving an offer to purchase a Car, notify both the Lender and Bonhams of the offer received including the proposed sale price and the terms of the offer".

331. As regards Sale 1, MRL's reliance on clause 9 of the Amended Facility Agreement does not get off the ground.

1) There was never an actual or proposed disposition to which Lohomij could have consented. There were ongoing negotiations, with variations of the proposed terms of purchase, which continued well after the date on which MRL says that Sale 1 was ended and which themselves came to nothing in the circumstances set out in the email of 16 September 2016. MRL and Mr Sullivan refer repeatedly to "agreed" terms, but the documents show that the position was quite different. There was certainly never an offer from FR-G capable of acceptance by MRL. The draft contract relating to the sale of the four Cars was never executed, even conditionally, and on 6 July 2016 FR-G made it clear that its clients would not agree to it.

2) There was never a refusal or withholding of consent to a disposition; indeed, none is pleaded. What MRL alleges is that certain conduct of Mr Louwman,

Mr Schlumpf and Mr MacLean "interfer[ed]" with Sale 1. The substance of what is alleged is that, when MRL and FR-G were moving towards reaching terms, Lohomij took the ground from under MRL and weakened its bargaining position by revealing its vulnerability in respect of the Loan. That is different from withholding consent to a disposition: it is an allegation that Lohomij prevented there from being anything to consent to.

3) MRL has not pleaded that consent was unreasonably withheld or any basis for contending that withholding consent was unreasonable.

332. As regards Sale 2, the case against Lohomij under clause 9 of the Amended Facility Agreement is not reasonably arguable, for the following reasons.

333. First, as at 18 November 2016 MRL was not seeking consent to Sale 2. Sale 2 is pleaded as a composite transaction involving #0828, #2025 and #1953 (APOC paragraph 78), and consent is said to have been refused by Lohomij on 5, 11, 16 and 18 November 2016 (APOC paragraphs 87–94). However, Mr Sullivan's email of 17 November 2016 to Mr Louwman makes clear that at that date he had only a "provisional offer" for #2025 (and then only subject to it being restored with its original engine and certified) and had only "begun discussions" for the sale of #1953. Consideration of the emails on 17 and 18 November 2016, which have been set out extensively above, makes clear that at that stage MRL did not seek consent to Sale 2 in its composite form; what it sought approval for was the sale of #0825 on specific terms, with a view to realising funds from anticipated further sales of the vehicles taken in part-exchange. Whether or not MRL had actually reached agreements with Mr Rickert and Mr Williams for those onward sales, the premise that MRL sought consent on 18 November 2016 for Sale 2 is demonstrably false.

334. After consent to the sale of #0828 had been refused on 18 November 2016, Mr Sullivan complained to Ms Volf that both that sale and "the two below sales" had been cancelled in consequence of the withholding of consent. However, even this part of the case lacks credibility. In his email, Mr Sullivan alleged that Mr Macari, Mr Williams and Mr Rickert had all (already!) threatened legal action for breach of contract. And Mr Sullivan and Mr Williams have both given evidence that Mr Williams threatened legal action over the cancellation of the sale of #1953. But as at 17 November 2016 Mr Sullivan was not in a position to seek consent to onward sales of the part-exchange vehicles, and it is obviously incredible that within 24 hours he should not only have reached terms for sale of those vehicles but even have concluded unconditional contracts, especially when consent to the sale of #0828 had been firmly and repeatedly refused. Indeed, both Mr Williams' statement and Mr Sullivan's first statement state expressly that Mr Williams refused to make any formal agreement until Lohomij's consent had been obtained. Any threats of legal action by him were therefore a sham, just as Mr Knight had supposed.

335. Second, refusal of consent to the proposed transaction was clearly not unreasonable in the sense of that word already explained, whether or not it was justified and whether or not it would have been reasonable to give consent. MRL was in default under the Loan. Lohomij had security over, among other things, #0828. The proposed sale of #0828 did not involve cash payment of its full value. Instead, it involved (a) the receipt in part-exchange of a new car, #1953, over which Lohomij would take a security interest, (b) potentially lengthy work on #2025—there was information available to Lohomij to

suggest that the work might take up to two years—and (c) reliance on future sales of those two cars. Mr Sullivan purported to be confident of achieving a refinancing package with Lombard. Whether or not it would have been in MRL's interests to achieve Sale 2, Lohomij was obviously entitled to take the view that its own interests were better served by keeping its existing security intact and releasing it only to the extent that it obtained full cash value. As Mr Eschwege succinctly submitted: "Lohomij was entitled to act in its commercial interests in a way which protected and/or did not dilute its existing security rights" (skeleton argument, paragraph 67). Mr Fenwick pointed to matters suggesting that in the classic car market it is common to accept payment in part or in whole in the form of vehicles given in exchange. While I accept that, I do not think it addresses the question whether a secured lender, whose borrower is in default, is reasonably entitled in its own interests to look for cash payment.

336. Third, at the point of the refusal of consent on 18 November 2016 Lohomij had received expert advice from Mr Knight, as set out in his email of that morning to Ms Volf. That provided an additional reason for refusal of consent, namely that the total consideration being received for #0828 fell significantly short of its accepted value. The following points may be noted concerning Mr Knight's advice in respect of Sale 2.

1) Mr Knight did not purport to give a valuation of #0828. What he did was to assess the value of the consideration being received in exchange for #0828 and compare it with the valuation that both Mr Sullivan and Mr Louwman attributed to that Car.

2) *Prima facie* it was reasonable of Lohomij to rely on Mr Knight's advice, because he was a leading expert in the field. If Lohomij reasonably relied on Mr Knight's advice, it could not have been acting unreasonably (in the relevant sense) in withholding consent. (See further paragraph 349, below, regarding the logic of MRL's case.)

3) MRL's argument that Lohomij did not reasonably rely on Mr Knight's advice misses the mark. First, it is said that he overvalued #0828; but that is false, because he did not value #0828 at all. Second, it is not alleged that he deliberately *undervalued* the consideration; therefore the actual exercise he performed is not alleged to involve falsehood. Third, it is said that Mr Knight's valuation was provided as a pretext for Lohomij's refusal; but in fact it was not referred to by Lohomij as a reason for refusal and was therefore not a pretext.

4) Whatever its merits or demerits, Mr Knight's advice does not affect the basic point that Lohomij was entitled, having regard to its own interests, to refuse consent on the ground that Sale 2 would result in the cash receipt of only a small part of the value of #0828 and would leave Lohomij dependent on (a) a further proposed sale after works had been carried out and (b) the value of alternative security.

337. Fourth, on 23 November 2016 Lohomij did give consent orally to the various transactions that comprised the alleged Sale 2. Mr Sullivan states that this indicates that the earlier refusal of consent was unreasonable, but it does not. For one thing, a change of decision does not show that the earlier decision was irrational. For another, circumstances had changed in two material respects: (a) it was now apparent that Lombard's refinancing would not provide full repayment of the Loan as Lohomij had

previously hoped; (b) Mr Macari attended the meeting on 23 November 2016 and confirmed his willingness to make immediate payment for #0828.

338. Written consent to the sale of #0828 to Mr Macari was duly provided on 25 November 2016 and that sale proceeded to completion. The proposed sales of #2025 to Mr Rickert and of #1953 to Mr Williams did not proceed. I cannot see any evidence that an earlier refusal of consent by Lohomij had anything to do with Mr Rickert's decision not to proceed. Mr Williams does give evidence that his client, Mr Mayr, would not proceed because he was annoyed that the deal had fallen through on 18 November 2016 and no longer wanted to do business with MRL. That seems to me to be fairly implausible, though of itself it could not be determined without a trial. But, for reasons already stated, the matter lacks all plausibility when the chronology is considered: a non-binding agreement cannot have been reached with Mr Williams before 18 November 2016, yet it is said that Mr Sullivan informed Mr Williams as soon as consent had been refused, even though he immediately engaged in efforts to get Lohomij to change its mind. That is simply incredible, especially when taken together with the pretence of a threat of legal proceedings. MRL's case carries no conviction.

339. As for Sale 3, this is pleaded as a composite transaction: a sale of both #1461 and #0818 to JD Classics for £29.5 million, payable as to £2.5 million in cash and as to £26.5 million as vehicles taken in part-exchange, followed by an onwards sale of two of those part-exchange vehicles to FR-G for €5 million. However, this is not the transaction proposed at the meeting on 8 June 2017, which is when consent is alleged to have been unreasonably refused.

1) The only proposed transaction set out in the Proposal Document was in respect of #1461.

2) In respect of that transaction, the Proposal Document did not show a cash component of £2.5 million but only of €2.5 million (shown in the document as representing £2.1 million).

3) In respect of that transaction, the Proposal Document did not show onward sale of the two part-exchange Jaguars to FR-G for €5 million. It showed onward sale ("under offer") of one Jaguar for €1.7 million and "Guaranteed buy back" of the other for €2.5 million after six months.

4) No putative transaction in respect of #0818 was shown in the Proposal Document, but a completed sale within the preceding six months was shown on the final page, for a stated price of €16 million. No such sale had taken place. Further, the price shown for that putative transaction was different from that shown in the April Invoice; according to the April Invoice the price was to be paid entirely by part-exchanged vehicles, in no part by cash; and the total prices of both transactions shown in the two invoices was less than is pleaded as being the price under Sale 3.

340. Accordingly, it is not reasonably arguable that Lohomij breached clause 9 of the Amended Facility Agreement by refusing to agree to Sale 3 on 8 June 2017, because it was not asked for consent to Sale 3.

341. In any event, there is, in my judgment, not the remotest possibility of a finding that Lohomij was in breach of clause 9 by failing to give consent to the sale of #1461 on 8 June 2017. One only has to look at the contents of Mr Coppel's email of the following day, when Lohomij intimated conditional consent to that transaction, to see the nature of the considerations that would not only justify but practically compel a decision not to give consent forthwith on the presentation of the proposal. And all that is necessary is that Lohomij's decision should have been one that a reasonable chargee could have made.

342. It is also not reasonably arguable that a refusal of consent on 8 June 2017 to the sale of #1818 was a breach of contract. The first that Lohomij heard of the proposed sale was at the meeting. At the same time, it was presented with a document that showed the sale as a past sale, not a proposed sale, and it learned that the Car had been moved from Germany to England without the consent that MRL perfectly well knew was required for such a move, which involved an interference with the single most valuable Car over which Lohomij retained security. The proposed transaction did not involve any cash receipt, merely the substitution of other vehicles for #0818. And Mr Sullivan acknowledges in his witness statement that even he was yet to be satisfied as to the value of the vehicles to be received in payment.

Against Bonhams and Mr Knight: procuring breach of contract

343. "Knowingly and intentionally to procure or, as it is often put, to induce a third party to break his contract to the damage of the other contracting party without reasonable justification or excuse is a tort": *Clerk & Lindsell on Torts,* 23rd edition, paragraph 23-16.

344. It is a necessary ingredient of the tort that the contracting party (here, Lohomij) has committed a breach of contract: see *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, *per* Lord Hoffmann at [3]-[5]; see also at [44]. To the same effect, at [172] Lord Nicholls of Birkenhead said:

> "[T]he rationale and the ingredients of the 'inducement' tort differ from those of the 'unlawful interference' tort. With the inducement tort the defendant is responsible for the third party's breach of contract which he procured. In that circumstance this tort provides a claimant with an additional cause of action. The third party who breached his contract is liable for breach of contract. The person who persuaded him to break his contract is also liable, in his case in tort. Hence this tort is an example of civil liability which is secondary in the sense that it is secondary, or supplemental, to that of the third party who committed a breach of his contract. It is a form of accessory liability."

345. "[I]t is of the essence of conduct by A which can amount to inducement that it should have some causative effect on B breaking the contract": *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33, *per* Popplewell LJ (with whose judgment David Richards and Henderson LJJ agreed) at [22]. It is necessary that the defendant's conduct "operated on the will of the contracting party"; it is not enough that it merely facilitated the breach of contract: see the same judgment at [28] and [26] respectively.

346. The tort of procuring breach of contract involves a mental element. In *OBG v Allan,* Lord Hoffmann said at [32]:

> "To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."

And Lord Nicholls of Birkenhead said at [192]:

> "The additional, necessary factor is the defendant's intent. He is liable if he intended to persuade the contracting party to breach the contract. Intentional interference presupposes knowledge of the contract. With that knowledge the defendant proceeded to induce the other contracting party to act in a way the defendant knew was a breach of that party's obligations under the contract. If the defendant deliberately turned a blind-eye and proceeded regardless he may be treated as having intended the consequence he brought about. A desire to injure the claimant is not an essential ingredient of this tort."

347. In the present case, the breach of contract relied on by MRL is Lohomij's alleged breach of the Amended Facility Agreement. APOC paragraph 135, which sets out the allegation of procuring breach of contract, does not in terms specify the particular breach of contract alleged to have been committed by Lohomij. However, the only contractual term referred to in paragraph 135, the only one of which Mr Knight is averred to have had knowledge, and the only one alleged in the original—and current—Particulars of Claim is clause 9. Further, that is the only contractual term that could be relevant even against Lohomij, for reasons already stated. Therefore the tort alleged to have been committed by Bonhams and Mr Knight is procuring Lohomij to breach clause 9 of the Amended Facility Agreement by the wrongful withholding of consent to Sale 2 and Sale 3. (Mr Knight is not alleged to have provided a valuation in respect of Sale 1.)

348. The matters said to constitute the commission of the tort are listed in APOC paragraph 135:

> "(1) Mr Knight was aware of Clause 9 of the Facility Agreement, as evidenced by his receipt of Mr MacLean's email dated 18 November 2016;
>
> (2) Mr Knight intentionally overvalued the cars in the Collection;
>
> (3) The purpose of these overvaluations was to provide Lohomij with a pretext to refuse to consent to MRL's proposed sales;

(4) Lohomij's refusals were unreasonable as MRL's proposed sales were in fact at market value;

(5) In overvaluing the cars, Mr Knight intended to cause MRL economic loss by blocking the sale of the cars;

(6) In undervaluing the cars, Mr Knight intended to cause MRL economic loss by forcing the sale of the cars at an undervalue."

349. Undervaluation of Cars could, perhaps, indicate the presence of a malign motive, but it could not itself be part of the commission of the tort in this case. The relevant breach of contract by Lohomij is wrongful refusal of consent to proposed sales on the false basis that the sales were at an undervalue. So only the provision of overvaluations can be part of the procurement of breach of contract. Precisely what overvaluations are being relied on is very unclear; I shall do my best to make of the pleading what I can.

350. MRL's case on procurement of breach of contract is incoherent. MRL alleges that the overvaluations were provided to give Lohomij a "pretext" for refusal to consent to the sales: that is, in order that Lohomij could claim to be refusing consent in reliance on the valuations, when in fact its true reason for withholding consent was different (such as a desire to ruin MRL or Mr Sullivan, or to cause interest to accrue on the Loan, or whatever). This necessarily involves an allegation of collusion between Lohomij and Bonhams / Mr Knight. Indeed, MRL relies on all of these matters as part of the alleged ongoing conspiracy. Further, the allegation that Lohomij was in breach of clause 9 of the Amended Facility Agreement by refusing consent on the basis that the proposed sales were at an undervalue could only work if Lohomij knew that the valuations were false: if it received and acted in reliance upon what it understood to be a *bona fide* valuation from an acknowledged expert in motor valuations, its actions in refusing consent could not arguably be unreasonable in the relevant sense. However, the resulting argument makes no sense. First, on neither Sale 2 nor Sale 3 did Lohomij refer to Mr Knight's opinion as a justification for withholding consent. His valuations were not used as a pretext; and the basis for inferring that they were provided in order to provide a pretext disappears. Second, if valuations were provided so that Lohomij could use them as a pretext—that is, as a false reason for a breach decided on for other reasons—it makes no sense to say that the provision of the valuations procured, or induced, the breaches of contract: Bonhams and Mr Knight did not persuade Lohomij to breach its contract; at most, they facilitated the breach by providing a fig leaf for a breach decided on for other reasons. This, indeed, is how the matter was put in MRL's letter before action, dated 19 February 2020, which, with reference to Lohomij's alleged breach of the Amended Facility Agreement, said: "In order to provide ostensible justification for its refusal, Lohomij instructed Mr Knight to provide valuations of the Cars in question. Such valuations were self-serving and cannot have been honestly created."

351. Quite apart from these points, the allegation of procuring breach of contract is unarguable on the facts.

352. First, it is not reasonably arguable that Lohomij was in breach of clause 9 at all.

353. Second, the case against Mr Knight in respect of Sale 2, namely of "intentionally overvaluing the cars, and so providing Lohomij with a pretext to refuse consent" to Sale 2, has no real prospect of success.

1) Mr Knight did not purport to value #0828 at all. Both in his email to Ms Volf and in his email to Mr MacLean, he took as his starting point the value that Mr Sullivan and Mr Louwman both attributed to that Car. The exercise he then performed was to value the consideration that was to be received in exchange for #0828; and he expressed the view that this consideration was of insufficient value. No question of overvaluation of anything arises.

2) The allegation is yet another example of MRL purporting to draw utterly implausible inferences. (Other examples include Mr MacLean surreptitiously acting for Lohomij in 2016, and Lohomij seeking to thwart refinancing plans in 2017.) It is alleged that Mr Knight's supposed overvaluation was intended to provide a pretext for Lohomij's refusal of consent to Sale 2. But (a) Lohomij had already refused consent several times and (b) on 18 November 2018 Lohomij did not mention Mr Knight's views as a justification for its refusal. The fact that Mr Knight expressly permitted Lohomij to use the contents of his email to illustrate its concerns that it was not getting fair market value does not take the matter anywhere.

354. Third, the case against Bonhams and Mr Knight in respect of Sale 3 is not clearly spelled out and I am not sure whether such a case is intended. APOC paragraph 103 alleges that Lohomij refused consent on 8 June 2017; paragraph 134(3) alleges that the refusal of consent to Sale 3 was unreasonable and in breach of contract; paragraph 108 alleges that on 9 June 2017 Mr Knight told Lohomij that the proposed sales of #0818 for €22 million and of #1461 for €13.2 million were at undervalues, but this averment is not included in APOC's narrative concerning Sale 3 and its collapse; and paragraph 135 alleges that Bonhams and Mr Knight procured breach of the Amended Facility Agreement by intentional overvaluation of Cars in the Collection, though no further particulars are given.

355. The case, if there is one, in respect of Sale 3 is unarguable on its face. The pleaded breach of contract by Lohomij preceded the allegedly false valuation by Mr Knight, and it is Mr Sullivan's own evidence that Mr Louwman refused consent at a meeting on 8 June 2017 without any reference to anything said by Mr Knight (who, of course, is not alleged to have said anything by that point). APOC simply does not show any case that Mr Knight's conduct procured a breach of the Amended Facility Agreement.

356. In the circumstances, I do not propose to make an already prolix judgment even longer by analysing the details of valuations given, or said to have been given, at various times by Mr Knight.

I. Conclusions

357. With the exception of the claim against Mr Louwman for conversion, which he accepts must be determined at trial, the claims advanced by MRL are not reasonably arguable

(to adopt the useful terminology of Marcus Smith J in *Allsop v Banner Jones Ltd* [2021] EWCA Civ 7).

358. I do not consider that there is any other compelling reason why any of those unarguable claims should proceed to trial. The fact that a modest and circumscribed claim concerning the rights to a single Car may have to be tried is no reason for permitting other claims against Mr Louwman or any other party to go to trial.

359. Accordingly, there will be judgment for the defendants on all claims except the claim for conversion. Some of the claims fall more naturally to be disposed of under CPR Part 3, others under Part 24; for reasons already indicated, however, it seems to me to be largely a matter of indifference which Part be invoked.

360. All of the defendants, with the exception of Mr Brooks, have served counterclaims seeking an indemnity under clause 3.2(A) of the Settlement Agreement. In the circumstances, they are entitled to that relief.

361. I shall ask counsel to seek to agree appropriate terms of order and, if consequential matters fall to be dealt with, to let me have their proposals as to the most convenient way of proceeding.