Neutral Citation Number: [2023] EWHC 2658 (Ch)

Case No: BL-2020-001611

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

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 25 October 2023

**Before** :

**Richard Farnhill**
**(sitting as a Deputy Judge of the Chancery Division)**

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**Between :**

**DECISIVE CAPITAL MANAGEMENT SA**

**Claimant**

**- and -**

**(1) LES GEONNAIS LIMITED**
**(2) SEVENTY EIGHT ST JAMES STREET LONDON LIMITED**
**(3) DR ABDULLAH ABDULJABBAR ABDULLAH ALANIZI**

**Defendants**

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**Mr Giles Wheeler KC** (instructed by **Withers LLP**) for the **Claimant**
**Mr Daniel Lewis** (instructed by **Spector, Constant & Williams Limited**) for the **Third Defendant**

Hearing dates: 21-27 September 2023

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# JUDGMENT

**Richard Farnhill (sitting as Deputy High Court Judge for the Chancery Division):**

## Introduction

1. This claim arises out of a failed refinancing of sums owed by the First Defendant (**LGL**) and Second Defendant (**Seventy Eight**, and collectively with LGL, the **Borrowers**). As part of that process the Borrowers took out a loan initially of £2 million (the **Original Loan**) and ultimately of £2.5 million (the **Amended Loan**) from the Claimant (**Decisive**). The Third Defendant (**Dr Alanizi**) gave personal guarantees in favour of Decisive in respect of both the Original Loan (the **Original Guarantee**) and the Amended Loan (the **Amended Guarantee**, and collectively with the Original Guarantee, the **Guarantees**). The Borrowers are indirectly owned or controlled by the Yousfan Trust, of which Dr Alanizi is a beneficiary. Royal Bank of Canada (**RBC**) acted both as the corporate director of the Borrowers and as trustee of the Yousfan Trust.

2. Decisive has obtained judgment against the Borrowers. Accordingly, the claim now proceeds only against Dr Alanizi.

3. Broadly, Dr Alanizi's Defence is that he was induced to enter into those guarantees by misrepresentations made by Decisive's representatives. One of the difficulties in this case is that once one seeks to move beyond such broad outlines the Defence, as Mr Lewis accepted during closing, is at best difficult to work with. I should emphasise that Mr Lewis and his instructing solicitors did not settle that Defence, and they have been granted only limited scope to amend it.

4. This is not a point of pleading pedantry or even pleading best practice. Dr Alanizi asserts a defence of misrepresentation on the part of Decisive. To assess it one must understand who said what to whom and when. While the Defence was clear that the representations, if made at all, were made to Dr Alanizi, it is not clear from the Defence when they were made, by whom or even what they were said to be. Nor was the Defence always consistent with the witness statement of Dr Alanizi.

5. Making the best that one can of the Defence, the alleged representations take six pleaded forms:

    i) Decisive would not seek to and would not need to enforce the Guarantees (the **No Risk Representation**).

    ii) Decisive honestly believed that the chance of enforcing the Guarantees was low (the **Low Risk Representation**).

    iii) The refinancing was a "done deal" (the **Done Deal Representation**). That was said to support the first two representations, but Mr Lewis made clear that those representations were advanced regardless of whether I found that the Done Deal Representation was made or, if made, regardless of whether it was actionable.

iv) There was an implied representation that the first three representations had a reasonable basis (the **Reasonable Basis Representation**).

v) An email sent by Decisive to Dr Alanizi on 26 February 2020 (which I address below) carried with it an implied representation that (i) Yunak Corporation Ltd (**Yunak**) was a shareholder and major investor of Decisive; (ii) it had available cash balances of £89,179,722.34 in its client account at Fladgate LLC; and (iii) it had committed or agreed to lend part of that sum to refinance the Longbow Loan (the **Yunak Representation**).

vi) A more limited refinancing being contemplated in July 2020 was a "done deal" (the **July Done Deal Representation**).

6. The July Done Deal Representation is relevant only to the Amended Guarantee; the other alleged representations are relevant to both the Guarantees.

7. The Defence is founded on, and only on, pre-contractual misrepresentation (whether under the Misrepresentation Act 1967 or at common law). It is not suggested that any of the alleged representations gave rise to a collateral contract or some form of estoppel.

**The witness evidence**

8. Three witnesses gave evidence at trial, and one non-witness merits mention.

9. Mr Chamat is a director and the CEO of Decisive. He was the principal decision-maker at Decisive in this transaction and was involved in most but not all of the key exchanges with Dr Alanizi.

10. Mr Chamat recognised in his witness statement that he did not remember meetings or discussions in great detail and did not recall precisely what was said by him or by Dr Alanizi with the exception of certain phrases he believes were used. That is far from a surprising acknowledgment. There is a growing line of English cases recognising that most if not all witnesses will have equally imperfect recollection. I was referred, in particular, to *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm). There, Leggatt J concluded at [22]:

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

> or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

11. I note also the observations of Michael Green J in *Wrangle v Brunt* [2021] EWHC 368 (Ch) regarding the need to have regard to objectively ascertainable facts where the documentary record is limited or incomplete. Again, I felt that Mr Chamat's witness statement fairly recognised the importance of such an approach.

12. Mr Chamat's oral evidence was a very different manner of beast, however. When he came to give evidence Mr Chamat was suffering from ill health, and I make allowance for that in assessing his evidence at trial. Even making such allowance, he was an unconvincing witness on a number of levels.

13. He often gave long, discursive answers in response to straightforward questions. Those answers bore no obvious relation to the question asked. In light of this Mr Lewis invited me to find that Mr Chamat was an evasive witness. On balance I think that goes too far. Mr Chamat is obviously most comfortable when he is selling to or working with clients. As he put it in cross-examination, "*this is my way, I'm here to support the clients, and this is my DNA*". I do not believe that he focusses on detail, preferring to delegate that to others. Again, to quote Mr Chamat:

> In this whole case, if I may, I really left it most of the time to the team that we had. I didn't get involved a lot in the whole transaction, so I really relied on John Nacos in the beginning and till April/May, and I would be involved when needed, really, yes.

14. His approach to giving evidence was similar. He did not pay attention to the details, or in some cases even the terms, of questions in giving his answer. Even on re-examination, which was short, he had to be urged to focus on the question. He was not evasive as such, but he defaults to broad statements of principle rather than precise matters of detail. For better or worse, that is also his DNA.

15. A greater problem was that Mr Chamat obviously had points he wanted to get across as to the responsibility for the breakdown of the relationship. At times he used questions simply as a vehicle to expand upon Decisive's case. His proffered answers were speeches, and he repeatedly observed that he would come back to points or make points later. Given what he said about his recollection in his witness statement, which I accept, I had little or no confidence in those aspects of his oral evidence. To the extent they were proper evidence for these proceedings at all, they should have taken the form of evidence in chief. Most certainly they did not address the questions he was asked.

16. Throughout, he exuded supreme confidence, even where he was contradicting Decisive's pleaded case, his witness statement or his earlier answers. In saying that I do not question Mr Chamat's honesty. On the contrary, he passionately believed in Decisive's case. The difficulty is that his belief has consumed his recollection, such that even where he gave an answer to a question I often had limited confidence in the detail of it.

17. I accept that Mr Chamat was very committed to the refinancing, at least in its early stages. He believed that other parties, notably Attestor, were also committed. In my view, he likely would have been comfortable giving Dr Alanizi significant reassurance about the way that the transaction would work. At the same time he is a sophisticated operator with considerable experience and was keen to ensure that Decisive and its investors and co-lenders were not bound in prematurely. That would inevitably have qualified any reassurance he gave.

18. Dr Alanizi is, as I have noted, the remaining defendant in these proceedings, judgment having been given against the Borrowers. He was an honest witness, obviously trying to assist the court. He gave clear answers which sometimes contained considerable background but always aimed to address the question asked.

19. Dr Alanizi had a strong grasp of the detail of the Property (which I define below) and the project for its refurbishment. He made precise, but not pedantic, distinctions in giving his answers. Where he was less strong was on the detail on what was said to him about the Guarantees and when it was said. That is no criticism of Dr Alanizi, whose first language is Arabic and who was giving evidence about multiple calls now over three years ago. These were central issues, however, and it is only right to say that his evidence on them was less strong.

20. Moreover, like Mr Chamat, although to a lesser degree, he has come to believe strongly in his case, and that has affected his recollection, an issue to which Leggatt J drew attention in *Gestmin* at [20]-[21]. I was particularly concerned that the process has clouded the distinction, in Dr Alanizi's mind, between what he was told and what he understood that to mean.

21. Mr Salnikoff worked on the transaction on behalf of Decisive. Initially his role arose because he was based in London and could more easily meet Dr Alanizi in person. However, his involvement was more on the structuring and project management side. He had some dealings with Dr Alanizi but was not responsible for, or really involved in, the relationship with him. That was the job of Mr Chamat and Mr Nacos. Equally, he was not involved in the discussions with those parties responsible for providing funds; again, that was down to Mr Chamat and Mr Nacos.

22. Mr Salnikoff was a clear and helpful witness. He was plainly capable and intelligent and had a good recollection of those parts of the transaction with which he was involved. However, while Mr Salnikoff was important to the transaction team he was significantly more peripheral to the issues which, as it has transpired, form the core of this dispute. Critically, he was not involved in the discussions in which the relevant representations were said to have been made, nor was he involved in the discussions with lenders. As such, he was not in a position to give evidence on what was said to Dr Alanizi, nor could he really comment on whether representations that were made were accurate.

23. I did not hear from Mr Nacos, the other key member of the Decisive team. Very shortly before trial Dr Alanizi sought to adduce a witness statement from Mr

Nacos. That was well outside the deadline for service of witness statements and no satisfactory explanation was provided for the scale of the delay. Moreover, the witness statement was not compliant with the CPR meaning that it would have added significantly to the prejudice to Decisive had it been admitted at so late a stage. I refused relief from sanctions, therefore, and the statement was not admitted in evidence. Immediately before trial Dr Alanizi sought to add to the trial bundle a letter from Mr Nacos which stated, among other things, that he remained willing to give evidence before me. Mr Lewis confirmed that the only purpose for which that letter was adduced was to confirm that Mr Nacos could have been called to give evidence for Dr Alanizi, and Decisive did not object to its inclusion for those purposes. Mr Lewis then invited me to draw inferences from the fact that Mr Nacos was not called by Decisive, for whom he worked at the relevant time, and referred to the recent guidance from the Supreme Court in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33 at [41].

24. I accept that Mr Nacos would have been prepared to give evidence in support of Dr Alanizi's case. Given his role, it is logical to infer that his evidence would have involved support for Dr Alanizi's case that representations (i)-(v) set out above were made. Mr Nacos had left Decisive well before the time of the Amended Guarantee, so his evidence could not, sensibly, have addressed that later period.

25. As with Mr Chamat and Dr Alanizi I would have viewed Mr Nacos' evidence with the caution that Leggatt J encouraged in *Gestmin*. The starting point remains the documentary record and known or probable facts. The inferences I draw are informed by that caution.

## Factual Background

26. The Borrowers are special purpose vehicles incorporated for the purpose of holding and developing the Stamford Hospital in Ravenscourt Park, London (the **Property**). That development was at least in part financed by a loan facility of £110 million (the **Longbow Loan**) which had been advanced by ICG-Longbow Debt Investments No.4 S.a.r.l. (**Longbow**) and part drawn-down. LGL was the borrower and Seventy Eight was the guarantor in respect of the Longbow Loan.

27. The original interest rate on the Longbow Loan was 8.75% p.a. but, following service of a Demand Notice by Longbow on LGL in July 2019, that increased to a default rate of 13.75% p.a.. From at least that point the Borrowers approached potential lenders with a view to refinancing the Longbow Loan on more favourable terms. Dr Alanizi had authority to represent the Borrowers in negotiations relating to the refinancing. Although there was more dispute about his authority to bind the Borrowers to any agreement in connection with the claim against the Borrowers, that was not an issue before me. On 29 July 2019 the Borrowers were offered indicative terms by DRC Capital (the **DRC Term Sheet**) but for whatever reason that refinancing did not proceed.

28. On 15 January 2020 Dr Alanizi received a call from Mr Chamat, who stated that he had been told by Hakim Berhoune, a business associate of Dr Alanizi, that the Borrowers were seeking refinancing and that Decisive could assist in that

process. On 17 January 2020 Decisive flew Dr Alanizi and Mr Berhoune in Mr Chamat's private plane, a gesture Dr Alanizi said left him feeling "*overwhelmed*", to a meeting at its offices in Geneva attended by shareholders and investors in and employees of Decisive. These included Mr Nacos, who was introduced as the head of Decisive's credit committee. According to the Defence, this was the first occasion on which Mr Chamat and possibly Mr Nacos are said to have told Dr Alanizi that the refinancing was a "*done deal*". Dr Alanizi's witness statement arguably puts the first use of the term as being a few days later, although it is not wholly clear on the point.

29. On 24 January 2020 Mr Nacos sent to Dr Alanizi a draft Attestor letter of interest, apparently with a view to preparing something that could be shown to "*the trustees*", presumably of the Yousfan Trust. Under the heading "*Our Proposal*" this stated:

> From the information we received we understand that your client is currently looking for a refinancing of the existing £55mm senior facility as well as for an additional £15mm to start the works on the refurbishment and modernisation of [the Property]. Subject to satisfactory due diligence and agreement on mutually beneficial terms, we consider it possible to lend such amounts secured by [the Property] and the claim against the NHS.
>
> Given we only had access to very limited set [sic] of information we do not feel comfortable to extend a full term-sheet. In order to underline our seriousness, we can however indicate some benchmarks of a potential transaction:

30. Mr Chamat was asked whether the draft letter came from Attestor or whether it was produced by Decisive. It was put to him that the disclosure in this case had not contained any email showing Attestor's involvement in the drafting. Mr Chamat gave a very lengthy answer to that question, the core of which was that he did not know who prepared the first draft of the letter. He thought that it could well have been drafted by Mr Nacos after a discussion with Attestor, but that Attestor's practice was normally to send a draft term sheet rather than a letter in this form.

31. Dr Alanizi responded less than an hour later, noting: "*I believe that it is a very high line early draft which need to be addressed in details with them when we meet them next week*".

32. Whatever the genesis of the first draft, Attestor was clearly comfortable with its terms as a final letter in substantially identical form was issued by Attestor on 27 January 2020.

33. During this period Mr Salnikoff was meeting Dr Alanizi to gather more information on the Property. That is consistent with the reference in the Attestor letter to the "*very limited set* [of] *information*" that had been provided by the Borrowers up to that point.

34. On 7 February 2020 at around 4:15pm Mr Chamat emailed Mr McMahon of RBC stating, "*Please expect a commitment letter from Decisive Wealth S.A. to*

> [LGL] *related to* [the Property] *on Monday, February 10, 2020, affirming that we will be providing an unconditional commitment to refinance the existing loan amount, plus accrued interest to the date of refinancing and ancillary costs.*"

35. Mr Chamat felt strongly that the email had been drafted by Dr Alanizi:

> Can I tell you -- I'm being asked, I sweared on the Bible, who wrote this email is Dr Alanizi. He called me in a distress, and he said: I need to get Longbow to really stop the pressure and I need your support, and I talk to John Nacos, and I said: John, this is what he needs, we have Attestor, I'm comfortable at the time still Attestor was here, and Attestor was going to give the loan. I had an alternative of basically finding the amount, okay, because we had some cash extra under discretionary from one of the companies that we managed called Yunak, and I felt comfortable to say that, I don't know if it shows in the WhatsApps, the guy was completely distressed, Dr Alanizi, he said: Elie, I need you, please, I need to send that, Longbow is putting pressure. We started to see actually the reality what's going on.

36. Accordingly, Mr Chamat's evidence was that while he knew the email was intended for Longbow he did not believe they would be misled by it, because he did not believe the contents were in any way misleading.

37. Ultimately, I do not believe that a great deal turns on the 7 February email as such because it was quickly superseded by the Decisive commitment letter, addressed below. However, it is the first exchange to raise a number of points that are significant in this case.

38. The first is the degree of pressure that Dr Alanizi was feeling from Longbow, which Decisive says is relevant to causation.

39. I do not accept Mr Chamat's suggestion that the letter was written by Dr Alanizi. There is nothing in the documentary record, including the WhatsApp messages, to suggest that was the case. I do accept that Dr Alanizi drove the process, however and that his motivation for doing so was the pressure he felt at the time from Longbow. Also on 7 February 2020, at 9:58am, Longbow had served a demand notice on Seventy Eight as guarantor of the Longbow Loan. Dr Alanizi would have known of that; Decisive would not. Decisive had no reason, in the absence of pressure from Dr Alanizi, to send the 7 February email; it made little sense to send such a communication late on a Friday when the commitment letter to which it referred would go on the Monday. I also believe Dr Alanizi had some input in the drafting. At 2:41pm he sent an email to, amongst others, Mr McMahon of RBC, saying "*I am now with Decisive and they want to have urgent conference call to assist with the situation and they need to talk to Jon and the trustees urgently.*" Around an hour later, in an email to Mr Chamat copied to Dr Alanizi, Mr Nacos described the language as having been "*signed off with David at RBC*". The 7 February email marked the start of a pattern of conduct, with Decisive responding to Dr Alanizi's need to deliver reassurance to Longbow.

40. The second is the extent to which Decisive was a potential alternative lender to Attestor. This exchange illustrates that at this stage Mr Chamat believed in Dr Alanizi and the project more broadly and he thought that Attestor would back it. However, he also appeared to see a loan from Decisive backed by funds from Yunak as an alternative. I say "appeared" because the actual position with Yunak is obscured by the way in which Mr Chamat's evidence fluctuated so significantly. I have quoted above what Mr Chamat said about his control of the Yunak funds. He delivered that evidence with considerable assurance. However, he delivered different versions of events, with equal confidence, slightly later:

> Q. So your evidence, your evidence, is that you were free to use the money in the Fladgate client account –
>
> A. Not the whole amount. We had the authority, okay, because we are signers on Yunak, it's double signatures, we are signers, Decisive, okay, and we had the authority to invest -- 89 was not the full amount, there was another 20 due to come later. So there was at least 40 million and the idea was to invest it into multiple assets or one asset, in order to generate some revenue for those seven -- six, seven, brothers and sisters.
>
> Q. So Decisive, under your control, holds money –
>
> A. Yes.
>
> Q. -- for the Yunak Corporation –
>
> A. Yes.
>
> Q. -- of, if you add 20, of over £100 million; yes?
>
> A. We had approximately, I would say, 115, 116 million, yes. We had more than that for Yunak, yes.

41. Up to this point, Mr Chamat's answers suggested that Decisive had a discretionary mandate over the Yunak funds, and so were consistent with his earlier evidence.

> Q. And the [beneficial owners of Yunak], they weren't required to be consulted on the use to which you put the money?
>
> A. It's only one person who takes the decision.
>
> Q. And who's that?
>
> A. It's the patriarch of the family...

42. He clarified that he dealt with the family office, rather than any specific member of the family. Either way, it was not Mr Chamat's decision and, on proper reflection, he knew it was not. His evidence shifted dramatically in a matter of seconds; his self-assurance remained undisturbed.

43. I do not accept that Mr Chamat or anyone else at Decisive had true control over the Yunak funds. Had such a mandate existed, documents relating to it should have been provided by Decisive on disclosure. None were. It is inconceivable that such a mandate would have been granted orally, even assuming Swiss law permits that, such that the only sensible conclusion is that Mr Chamat needed permission from someone else.

44. What is of more significance here is that Mr Chamat delivered all of the answers that I have quoted above with the same, total conviction. He seemed unaware that there is a critical difference between having authority and needing permission. It seems to me very likely that at this stage he would have assured Dr Alanizi of the availability of the Yunak funds regardless of whether he had secured the necessary authority to use them for the refinancing.

45. Thirdly, there is the question of whether Yunak and Attestor were true alternatives, or whether Yunak was simply to form part of a bridging loan until Attestor could step in. Again, Mr Chamat was unclear. As I have noted above, he initially described Yunak as an alternative to Attestor: "*I had an alternative of basically finding the amount, okay, because we had some cash extra under discretionary from one of the companies that we managed called Yunak, and I felt comfortable to say that…*". However, when addressing an email sent on 20 February 2020 his position changed: "*Actually, actually, yes and no, because at the end of the day it confirms what I always said: Attestor is going to be the lender ultimately, and if we come in, even if, for example, Yunak would put the funds to support, it would be for a short period of time.*"

46. Again, it seemed to me that Mr Chamat did not focus on this point with anything like the attention to detail that it merited. In my view, that was not a recent development: he never focussed on it. He was confident at this stage of the refinancing that he could manage the situation such that a deal could be done. The details of that deal were much less important to him.

47. Fourthly, what was important to Mr Chamat was that he was not committed at this stage. Again, he recognised this:

> Q. So you were prepared to make the commitment in writing as long as that commitment gave you a way out?
>
> A. Yes, yes. Yes. Yes.

48. The following day Mr Chamat sent an email to Mr McMahon and Dr Alanizi saying: "*Now we need to be able to get in touch with loanbow* [sic] *to phase out the exit and refinancing takeover*." When asked about this email Mr Chamat initially suggested it was sent following receipt of the term sheet from Attestor. When it was pointed out to him that the first draft of that term sheet did not come until 20 February 2020 he said it was "*most probably*" based on conversations he or Mr Nacos had with Attestor. Ultimately, it was obvious to me that he had no clear recollection of what he knew when he sent this email. It was also clear that it was not something drafted or requested by Mr McMahon or Dr Alanizi. Mr Chamat had real enthusiasm for the project.

49. On 10 February 2020 Decisive issued a Commitment Letter to the Borrowers, which provided:

> Decisive has conducted substantial due diligence on [the Property], including but not limited to:
>
> - We are aware of the Savills valuation dated 25th September 2019;
> - Review of the operational business plan;
> - Review of the capital expenditure plans;
> - Review of the dilapidations claims against the NHS;
> - Meetings with various third-party consultants regarding the operational business plan;
> - Site visits; and
> - Review of [Dr Alanizi's] liquidity and wealth.
>
> Subject to the due diligence above, there are no further internal/credit committee approvals that need to be completed.

50. The final sentence was an addition requested by Mr McMahon. As a matter of logic it is difficult to follow, however. If the due diligence had been done, Decisive already knew if it was or was not satisfactory. Mr Lewis accepted that but invited me to read it as meaning "By reason of". The difficulty with that submission is that it inverts the natural meaning of the language. In my view the better reading of it is to stress that the due diligence process was not complete, such that the introductory paragraph states that it has been started but the "subject to" language shows that it is ongoing. That is also more consistent with the language that follows.

51. The letter went on:

> Decisive and funds managed by Decisive (the "Lenders") are pleased to provide a commitment to the Borrowers in an amount to refinance the existing principal, accrued interest and associated ancillary costs secured on the Property, subject to terms and conditions set out in this letter.

52. It then set out the conditions to which the commitment was to be subject. These included:

> - Completion of legal due diligence on the title of the property satisfactory to Decisive;
> - Completion of satisfactory legal documentation;
> - all final legal, tax and technical due diligence and valuation reports:

…iii) not differing in any material respect from the initial reports disclosed to us.

53. Dr Alanizi accepted that the conditions precedent had not been satisfied at the time that the commitment letter was sent. He further accepted that the target audience for the commitment letter was Longbow. As he recognised in his cross-examination:

> For Decisive, it's a good deal for them, and the mutual benefit met there and Decisive were willing to go ahead with that. But for us to delay the action taken by Longbow is important, is crucial actually, is crucial.

54. The commitment letter was said to be open for acceptance until 5:00pm London time on 11 February 2020. It was signed and returned by Mr McMahon ahead of that deadline.

55. The parties started work on a term sheet. Again, it was apparent from the exchanges between Decisive and Dr Alanizi that this was something that Longbow wanted to see. In a WhatsApp message from Mr Nacos on 18 February 2020 he confirmed: "*We are going to send you the amended term sheet which we think it will do the job with long Bow*". Similarly, on 19 February 2020 Dr Alanizi was chasing for Decisive to "*send me the signed term sheet ASAP as I am on my way to meet LongBow*".

56. It is also apparent that the draft terms from Decisive were based on the DRC Term Sheet, which Dr Alanizi had provided to Decisive on 7 February 2020. The DRC Term Sheet contained comments in red, which Dr Alanizi agreed came from him or possibly RBC. It contained further comments in blue, which Dr Alanizi thought might also have come from him or RBC. It seemed to me more probable that they were responses from either the lender, DRC, or from the broker engaged on that attempted refinancing. In any event, Dr Alanizi was plainly aware of them.

57. The DRC Term Sheet contained 22 conditions precedent. A red comment described this as "*far in excess of what we are being asked to prepare in our other discussions.*" The blue comment below states "*I have highlighted above in green all the standard CPs you would see in any transaction of this nature.*" Of the 22 conditions precedent, 19 were highlighted. It continued, "*With full commitment from the Sponsor the CPs should be achievable with* [sic] *4 weeks.*"

58. Dr Alanizi accepted that he was aware, from this exchange, that the highlighted conditions precedent were standard conditions for a transaction of this nature, and also that he had a good idea of the extent of due diligence that any lender was likely to require.

59. Although the signed term sheet from Decisive (the **Decisive Term Sheet**) is dated 17 February 2020, the email traffic suggests it was in fact sent on 19 February by Mr Nacos to Dr Alanizi. It provided for a term loan for an initial amount, described as Tranche A, of the lower of £52 million or 40% of the market value of the Property. The stated purpose was to refinance the Longbow Loan and develop the Property. There was provision for a second tranche of the

loan for an unspecified amount to permit for capital expenditures that would in turn "*assist in releasing*" a dilapidations claim against the previous tenant. Maturity was 24 months from first drawdown. The term sheet was signed by Mr Chamat and Mr Xie. It was said to have been "*approved by the Decisive Investment Committee*" but the commitment remained "*subject to completion of legal due diligence and of satisfactory legal documentation as well as other conditions contained in the Term Sheet*". The conditions precedent largely mirrored those in the DRC Term Sheet and included a report and valuation of the property by Savills; a review of the capital expenditure plan; written clarification of the dilapidations claim; and assignment of due diligence reports.

60. Apparently critical details remained open in the Decisive Term Sheet. That is significant in terms of assessing how likely it is that the various representations were made. Two points, in particular, seem to me relevant.

61. The lender was not specified. Rather, it was described as "*Decisive and/or an investment fund advised by Decisive*". Dr Alanizi's evidence was that while he preferred the Attestor deal, he ultimately viewed Decisive as the "*spearhead*": it would secure funding that would allow the refinancing to proceed and it was Decisive's decision as to precisely where the money came from.

62. Again, Mr Chamat's evidence was striking:

> Q. So when you look at facility amount and uses, the £52 million under tranche A that was to come from Decisive and/or an investment fund advised by Decisive, your evidence is that was to come from where?
>
> A. So this would come from Yunak and from Decisive and the partners. I mean, myself.
>
> Q. Mr Chamat, that's simply not true, is it?
>
> A. … I repeat, okay, at that point in time we had this exceptional amount that came from basically, you know, the sale of a big asset in London and we had discretion. Then it was used for something else later on by the family, okay? Now, we had that amount at that point in time, and I was quite comfortable that Attestor would come in and would take us -- would take back basically the loan at one point, so it wouldn't be a long term, doing that just to support Dr Alanizi, so we had the money. But it's not something that we usually do.

63. I have already noted the inconsistency in Mr Chamat's evidence regarding whether Attestor on the one hand and some combination of Decisive and Yunak on the other were true alternatives. One sees it again here. Tranche A would have been a loan of the full amount needed to refinance the Property for a term of 24 months. The first answer therefore contemplates an alternative lender (or lenders) to Attestor. The second answer, by contrast, deals with a solution that complements Attestor. This simply reinforces the sense that Mr Chamat did not clearly distinguish those alternative structures in his own mind. Certainly he treated them as interchangeable concepts when giving his evidence. Given that failure to distinguish between the two concepts, it seems to me that Dr Alanizi's

evidence on this point is much more reliable: in my view, in discussing the Decisive Term Sheet with Dr Alanizi Mr Chamat would have referred to there being an alternative lender for the refinancing, not simply for some form of bridge loan to Attestor.

64. The amount of the loan was also uncertain, being the lower of £52 million and 40% of market value. This, it seems to me, created much greater uncertainty. It is apparent from the conditions precedent that the valuation had not been obtained, but without it, it was impossible to understand the scale of the commitment. An earlier valuation of the Property, described as a Final Draft, prepared by Savills for Reuben Brothers Limited (another potential lender) in September 2019 had been obtained by Decisive. That report was done on what is known as a Red Book basis, essentially an assessment of what a willing buyer would pay to a willing seller on a specified valuation date. For reasons I shall come to, on 3 April 2020 Mr Nacos spoke to Savills and they confirmed that they stood by their valuation of September 2019. At the time that the Decisive Term Sheet was issued in February 2020, that would not have been known. Accordingly, while the loan amount may well have been ascertainable, it had not been ascertained. Any reference to the Decisive Term Sheet representing a "done deal", were it to have been made, would therefore have to have been understood against a backdrop where the conditions precedent had not been satisfied and the loan amount had not been ascertained.

65. A draft term sheet followed from Attestor on 20 February 2020. This differed from the Decisive Term Sheet in that it provided for a £55 million facility for a term of 36 months. It was also subject to conditions precedent, including a satisfactory valuation of the Property, a review of the loan and security documents between LGL and Longbow, financial due diligence, due diligence on the dilapidations claim and due diligence on whether the Property was lettable as a hospital. Unsurprisingly, given what Dr Alanizi said about the standard form nature of certain conditions precedent in such refinancings, these address similar points to the conditions precedent in the Decisive Term Sheet.

66. The draft Attestor term sheet provided for the parties to work together in good faith with a view to achieving financial close within 30 days of signature of the term sheet. For the avoidance of any doubt it provided that "*Any such commitment is subject to contract, Board approval and satisfactory due diligence and documentation.*" The interest rate was still subject to negotiation.

67. Later that day Dr Alanizi updated RBC and Charles Russell Speechlys (**CRS**, who acted for the Borrowers) on his discussions with Decisive.

> They believe that five weeks is a bit short and to produce draft loan agreement before next Wednesday is bit tight for them so they want us to draft a brief 20 pages agreement for discussion they believe a lot of the items won't be needed as the only default they think is meaningful is if we don't pay back by the end of the two years. PC will be minimised, no rental covanance , calculations are to minimised etc., they will be sending me bullet points to be included in the agreement which I will circulate as soon as I get it.

> They stated that they are ready to put a quick bridge loan of 55/57 m very quickly should the Attestor are delayed more than the five weeks period .
>
> They are available Wednesday to meet LonGBow.

68. It was put to Dr Alanizi that this showed that Attestor was the only lender under consideration at this time. I do not accept that. The draft Attestor term sheet provided for a 36 month term, but Dr Alanizi's email refers to an obligation to pay back after two years, the maturity under the Decisive Term Sheet. Moreover, the references to "*they*" and "*them*" are far more sensibly references to Decisive. Certainly, the emails show that it was Decisive who were to meet Longbow the following Wednesday. Mr Wheeler suggested that the references to Decisive were limited to the possibility of it providing bridging finance to allow more time for Attestor to finalise its work. That is possible, and would be consistent with some of the emails that followed, but it would not explain the reference to default after two years because the discussion on bridging finance was for a loan of two or three months.

69. It therefore seems to me that the bulk of that email refers to the Decisive proposal, which was different to and seen as running in parallel with the Attestor proposal. That would mean that Dr Alanizi, at least, understood the Attestor and Decisive proposals to be true alternatives at this stage. For the reasons I have given above, it seems to me that Mr Chamat would have encouraged that belief.

70. The following day, Mr Nacos wrote Dr Alanizi copied to Mr Chamat expanding on the bridge loan concept, which he proposed should have a maturity of two to three months. He stressed:

> I think it's highly unlikely that the bridge loan would ever be drawn. While the conditions precedent are in the process of being fulfilled, I would expect for us to be able to properly document a term loan agreement with a senior lender, a preferred equity / mezzanine loan with Decisive and a proper inter-creditor agreement if required.

71. Mr Nacos made no mention of Attestor as the lender; he specifically referenced Decisive but as the mezzanine and not the senior lender. Ultimately the idea went nowhere. However, this indicates Mr Nacos' confidence in the refinancing, and the comfort he was prepared to give to Dr Alaniz concerning it.

72. On 26 February Mr Nacos wrote to Dr Alanizi enclosing a statement of account said to show funds held by a London law firm, Fladgate LLC, of somewhat over £89 million. Mr Nacos described Fladgate as "*one of our legal counsels* [sic]" but the ledger showed the client to be (and therefore the funds to be the property of) Yunak. Mr Nacos stated:

> On behalf of one of our shareholders and large clients, please find attached a statement of account dated today from Fladgate LLC, one of our legal counsels in London, showing a balance of GBP 89,179,772.34 (highlighted in yellow) in its Client Account. The monies will be partially utilized to

> refinance the existing loan facility secured on Ravenscourt Park Hospital [the Property].

73. This email is the basis for the Yunak Representation.

74. As I have noted above, Mr Chamat's evidence recognised that he would consult the family office of Yunak's beneficial owners before deploying the funds. There is nothing to suggest that he had done so at this stage. As such, Mr Nacos' email went further than was entirely accurate by saying that "*the monies will be partially utilized to refinance the existing loan facility*". Dr Alanizi was unaware of this, however. While he in fact knew the ultimate beneficial owners of Yunak, he did not know that Yunak was one of their assets and so never asked them if Mr Nacos' statement was true. He therefore quite reasonably understood from this statement that Decisive had the resources available, should it choose to deploy them. That would have been wholly consistent with what I believe he had been told by Mr Chamat.

75. Mr Nacos told Dr Alanizi: "*Please feel free to forward the below message and the attachment to ICG-Longbow.*" In his evidence to me, Dr Alanizi did not dispute that the purpose of exchange was to provide Longbow with proof of funds. He was also clear, however, that this gave additional credibility to Decisive and its ability to refinance the Longbow Loan.

76. On 27 February 2020 Mr Nacos updated Dr Alanizi on what he described as a "*productive conversation*" with Attestor. The pressure continued to build from Longbow, however, who on 27 February 2020 appointed a receiver. Dr Alanizi well understood that this could lead to the loss of the Property, an outcome that he accepted, when asked on cross-examination, was "*very unsatisfactory*" from his perspective. In fact I think that Dr Alanizi was nowhere near so sanguine, although I do not accept Mr Wheeler's point that it was the worst possible outcome for Dr Alanizi. The current situation, where further interest has been paid and the Property has still been sold, is worse than that which confronted Dr Alanizi in February 2020. Certainly, however, the prospect of losing the Property was a considerable pressure point for Dr Alanizi at the time.

77. In his email to Longbow on 27 February 2020, Dr Alanizi asked for "*a small leeway enabling us to get what you want to be done*". Longbow responded later that day indicating that they were open to discussions. Dr Alanizi separately wrote to Mr Chamat and Mr Nacos attaching a draft agreement for the bridging loan. The amount was specified as £52 / £57 million; the repayment date was not defined.

78. At 5:20pm Ms Young-Herries, of CRS, wrote to Dr Alanizi, Mr Nacos, Mr Chamat and RBC recording a call that those parties had that afternoon and a separate call that Dr Alanizi had had with Longbow. She noted:

> Further to our call this afternoon, the Dr has spoken to Kevin Cooper of ICG-Longbow who has confirmed that a payment of £2 million would delay the sale process by 3 weeks (if possible, we could ask for 4 weeks). Our understanding is that the receiver would remain appointed. Therefore the next steps are as follows:

1. Dr Alanizi / the Trustees to confirm with ICG-Longbow that:

    a. the £2 million would be provided in exchange for the signed standstill agreement and that a signed standstill will be provided early next week; and

    b. the further amount of debt that would be due at the end of the standstill.

2. Please could Decisive confirm that:

    a. they would fund the £2 million amount on (a) an unsecured or (b) a second ranking secured basis;

    b. that the Bridging loan document we have prepared would document this; and

    c. the timeframe for providing the £2 million

3. Please could Decisive confirm that the remainder of the debt could be provided within 3 weeks (without fail).

79. It appears from this that the concept of a personal guarantee had not at that stage emerged: the £2 million that would ultimately form the Original Loan was to be lent on an unsecured basis or security was to be by way of a second ranking charge. It is also apparent that CRS at least did not consider that Decisive had committed (whether on its own behalf or on behalf of anyone else) to provide the remainder of the debt; it was accepted by Dr Alanizi during cross-examination that they equally did not respond to the invitation to do so in Ms Young-Herries' email.

80. At 12:27am on 28 February Dr Alanizi forwarded to Mr Cooper, of Longbow, the email from Mr Nacos regarding the Yunak funds. It appears from Dr Alanizi's email that this was something either requested by Longbow or, at the very least, raised in a discussion with them. Dr Alanizi then referred to "*finalising the agreement according to the term sheet that* [sic] *signed and approved by their credit/investment committee, which was submitted to your team*". That must be a reference to the Decisive Term Sheet since there was no signed Attestor term sheet at this stage. He went on, "*I had a lengthy discussion with them after our phone call today and they assured me of their commitment.*" Given the time of the email, that must be a reference to the call on 27 February. It was not suggested to Dr Alanizi that his reference to an assurance of a commitment was in any way inaccurate. He then agreed to the payment of £2 million in return for a standstill, asked about the possibility of a second ranking charge in favour of Decisive and further requested four weeks additional time rather than three.

81. The situation with Attestor continued to move forward; Mr Nacos received their responses to comments on the term sheet on 28 February and forwarded them to Dr Alanizi, who responded the same afternoon. Mr Nacos, in turn, responded to Attestor.

82. Work was also moving ahead with the £2 million loan. Ms Young-Herries wrote to Mr Freedman of Freedman + Hilmi LLP, who were instructed by Decisive, at 4:52pm on 28 February 2020 noting "*your clients have agreed to the concept of them providing £2,000,000 to Les Geonnais on an unsecured basis*". She attached a draft of the bridging loan agreement "*to reflect this*". Consistent with Ms Young-Herries' reference to the loan being unsecured, the draft contained no reference to a personal guarantee.

83. Critically, for current purposes, that had changed by the morning of 1 March 2020. On the evening of 27 February 2020 Dr Alanizi and Mr Nacos were discussing a second charge over the Property or possibly over "*the adjacent land*", a reference to the site of the hospital's boiler house, which became increasingly prominent in the following months; Dr Alanizi noted that "*We have few options to secure your loan*". By 9:52am on 1 March 2020 Mr Nacos was asking Dr Alanizi by WhatsApp, "*Can your lawyers prepare the guarantee as well.*" Dr Alanizi responded "*I sm taking a very big keep* [sic] *of faith with personal guarantee but I have full trust in you guys*". He confirmed by email at 10:24am, "*I will ask CRS to address the personal guarantee issue ASAP*". That evening, Mr Freedman sent to Ms Young-Herries an updated loan agreement, this time incorporating provisions referring to a personal guarantee.

84. Dr Alanizi remained in contact with Longbow, chasing them on 2 March 2020: "*I left you three messages on your WhatsApp which seems they you* [sic] *didn't read them beside I called you twice to understand fully your suggestion before I go back to funders.*" It is apparent from this frequency of contact that he was anxious to resolve the situation.

85. On 4 March 2020 Dr Alanizi wrote to Mr Nacos proposing a form of personal guarantee:

> I refer to our phone call this morning. Please find the PG which I can sign as CP whenever been asked.
>
> It is different to the standard one sent by Danny as I have to sign it or urgent basis. I hope it will satisfy your needs , please do not hesitate to call me for any clarifications.
>
> I consider it as a document that we will not use in our long prosperous relationship in this project.

86. It was put to Dr Alanizi that his final paragraph referred only to what he thought would happen; it made no suggestion that Mr Nacos or Mr Chamat had ever shared that view. As Dr Alanizi pointed out in response, this is a short email and English is not his first language. Moreover, neither Mr Nacos nor Mr Chamat ever contradicted him, which one might expect if this came as a surprise to them. Ultimately, I do not think either point goes very far. What is clear is that this reflected Dr Alanizi's belief shortly before executing the Original Guarantee.

87. It was also put to him that the draft of the guarantee attached to his email stated, on its face:

> IMPORTANT – YOU SHOULD READ THIS CAREFULLY:
>
> BY GIVING THIS GUARANTEE YOU MAY BECOME LIABLE INSTEAD OF OR AS WELL AS THE PRINCIPAL DEBTOR
>
> FAILURE TO COMPLY WITH THIS GUARANTEE COULD RESULT IN SEIZURE OF YOUR ASSETS AND/OR YOUR PERSONAL BANKRUPTCY

88. As Dr Alanizi made clear during cross-examination, however, his understanding was not that the Original Guarantee is not a legally enforceable agreement; he accepted that it is. His understanding was, rather, that it would not be enforced. That is conceptually quite different.

89. Later that day, Mr Nacos sent to Dr Alanizi a signed Attestor term sheet, this time for £57 million, the addition of £2 million from the earlier draft presumably being there to discharge the Decisive loan.

90. That evening Mr Freedman sent to Dr Alanizi an amended version of the guarantee incorporating two changes requested by Dr Alanizi. First, it expressly carved out from the scope of enforcement Dr Alanizi's private residence in Saudi Arabia. It was put to Dr Alanizi that his request was only consistent with a concern that the Original Guarantee would be enforced against him. Dr Alanizi explained that he wanted that clause to reflect the position under Saudi Arabian law to the effect that a judgment creditor cannot enforce against a judgment debtor's private residence. I accept that was, at the very least, Dr Alanizi's understanding of Saudi Arabian law and that he wanted the provision inserted for clarity as he suggested. Secondly, it made clear that Dr Alanizi's liability could not exceed the principal amount of the loan at the time of execution even if the loan was subsequently increased and that the cap would reduce in line with any repayments. That, it seems to me, is more consistent with a concern on Dr Alanizi's part that the Original Guarantee would be enforced against him.

91. Mr Freedman's email also attached a draft certificate of independent legal advice. On 5 March 2020 Dr Alanizi saw Mr Constant, whose firm is now instructed in these proceedings by Dr Alanizi. It is Dr Alanizi's evidence that he told Mr Constant about the assurances he had received from Mr Chamat and Mr Nacos and Mr Constant advised him that he should be "*careful*".

92. It was put to Dr Alanizi that the exchange could not have happened because the certificate contains a confirmation from Dr Alanizi that he had not been influenced by anyone to enter into the guarantee and Mr Constant could not properly have signed the certificate in that form if he knew of the alleged assurances from Mr Chamat and Mr Nacos. That, it seems to me, stretches the reference to "influence" well beyond its normal meaning. People are influenced by a variety of factors all the time: borrowers seek to influence lenders; advertisers seek to influence buyers; counsel seek to influence judges. In this case, it would have been obvious to Mr Constant that Dr Alanizi must have been "influenced" in some sense by Decisive to give the guarantee because there would be no other logical reason for him to do so: it was highly unlikely to be

an act of spontaneous generosity on Dr Alanizi's part. None of that is problematic. The language is targeted at abusive influence. There would be no issue with Mr Constant signing the certificate in that form while being aware of assurances being given by Mr Nacos and Mr Chamat regarding the prospects of enforcement; it would depend on the form that they took.

93. Also on 5 March 2020 Dr Alanizi forwarded to Mr Nacos comments he had received from "*the trustees*" on the Attestor term sheet. Specifically, they noted:

> 6. Clause 16 refers to them accepting latest valuation report prepared by Savills I'm not sure how we can get the valuation to be reissued to Attestor, does anyone have any suggestions.
>
> 7. Conditions precedent 7 and 8 refer to due diligence on the dilapidation claim and the extent to which the property is lettable as a hospital. I am not clear how this is achievable and what exactly this will entail. Is this something that has been discussed and agreed with Attestor.

94. These were points that continued to present an issue and ultimately contributed to the collapse of the Attestor refinancing. It is apparent that even at this stage, before he provided the Original Guarantee, they had been identified to Dr Alanizi as something that needed to be addressed.

95. On 6 March 2020, the Borrowers entered into a standstill agreement with Longbow to the effect that default interest would not be payable if the Longbow Loan was refinanced within 25 days (the **Longbow Standstill**). It was a condition precedent to the Longbow Standstill that the Borrowers make what was described as the "*initial payment*" of £2 million and provide evidence to Longbow that the sum had been borrowed from Decisive.

96. Accordingly, also on 6 March 2020 the Borrowers entered into the Original Loan with Decisive, under the terms of which the Borrowers were obliged to repay the facility in full, with all accrued interest, by no later than the Repayment Date, defined in the Original Loan as being the date 6 months after the date of "*this Agreement*". The Original Loan was secured by the Original Guarantee.

97. By agreement with the Borrowers, Decisive advanced the sum of £2 million to Longbow on 6 March 2020.

*Withdrawal of Attestor*

98. The Longbow Standstill only provided a brief respite, such that it remained important to the Borrowers that the refinancing proceed quickly. By 20 March it was apparent there were problems. Dr Alanizi sent a WhatsApp to Mr Nacos and Mr Chamat regarding the delays and stressing, "*We seriously now need to discuss plan B.*" He followed up with a further WhatsApp on 23 March saying, "*We are very concerned that Attestor lawyers didn't have any contact with us as promised during the weekend.*" Later that day Mr Chamat wrote to Attestor complaining:

> Trustees and lawyers are concerned about the lack of progress on the above matter. You have promised some progress and nothing happened.
>
> Friedrich, I have personally put my faith in you and have looked at Attestor as a partner. This silence mode is not the right ethical and institutional behaviour we would expect.
>
> Please get revert urgently.

99. Attestor did revert, and in strong terms:

> This is a gross misstatement of what is actually happening. S&S [Attestor's lawyers] has been working throughout last week on the facility agreement and we have a call with them this afternoon. They have as well been engaging with the borrowers [sic] solicitors.
>
> Unfortunately we did see absolutely nothing from the borrower side as none of our outstanding queries has been answered:
>
> - Revised term sheet signature: NOT RECEIVED
> - We asked the doctor for KYC information last Tuesday (you were copied on the email): NO ANSWER RECEIVED
> - We asked the doctor for access to Colliers [who were to provide details on the dilapidations claim] last Tuesday: NO ANSWER RECEIVED
> - We asked whether the Savills report can be re-issued to us: STILL UNCLEAR
> - We asked the doctors [sic] lawyers whether we can have the original lease with NHS to instruct a lawyer to do our due diligence: THE DOCTORS [sic] LAWYERS <u>REFUSED</u> TO PROVIDE IT TO US. WE COULD NOT INSTRUCT A LAWYER WITHOUT IT AND CAN'T DO DUE DILIGENCE THIS WAY
> - Your term sheet on the prefs: ONLY CAME ON FRIDAY. WE IMMEDIATELY RAISED TO JOHN AND YOURSELD [sic] THAT THERE WILL BE AN ISSUE AS THE BAHAMAS ARE IN LOCKDOWN AND ALL NON-ESSENTIAL BUSINESSES INCLUDING LAWYERS HAVE STOPPED WORKING. NO ANSWER RECEIVED (SEE ATTACHED). I DOUBT YOUR PREF WILL WORK UNDER THESE CIRCUMSTANCES
>
> Pushing so much for speed and then actively refusing to provide information and/or not answer to matter leaves me very puzzled and concerned.

100. Mr Chamat forwarded Attestor's email to Dr Alanizi requesting a call.

101. On 24 March, following a call with Colliers to consider the dilapidations claim, Attestor raised further concerns, stressing, "*To be honest, we are pretty surprised by this*". They concluded:

> In any case, with the information above this is a very different investment case as we would need to underwrite and value an operating business. We can look into that but would need a proper business plan which is shared by a reputable operator. Otherwise, don't see how we can get comfortable. Terms might or might not change as a consequence, normally we only lend against an operating business with an upside share. But it will certainly take a lot more to look into, depending on the work which has already been done.

102. On 26 March 2020 Dr Alanizi spoke to Mr Cooper at Longbow and discussed options, including securing immediate investment in the Property with a view to securing a tenant for the refurbished part of the hospital, which would have allowed a dilapidations claim to proceed against the previous tenant. Dr Alanizi forwarded this to RBC, who described it as "*a viable plan B*".

103. On the same day Mr Nacos provided a point-by-point response, agreed with Dr Alanizi, to Attestor. They came back the following day noting that they needed the business plan to consider the position and to ask when they could expect it. Mr Nacos seems to have requested the plan from Dr Alanizi, who sent a financial model, noting:

> please find the financial model of the business plan which is self explanatory.
>
> this plan was done for internal purposes and not for lenders or funders.
>
> it is currently under revision and refining with the new development of the market and the management agreement.

104. By this time the Longbow Standstill was about to expire. On 27 March Dr Alanizi complained to Mr Nacos and Mr Chamat that, "*By hind sight we should not have given long bow the 2 millions as it seems now that there is no valid plan B*". It was put to Dr Alanizi that he would not have sent that message had he thought that the alternative Plan B to a loan from Attestor was a loan from Decisive. His reply was lengthy and in places not especially clear. He sought to explain that he was writing this message with hindsight but that did not really address the point being put to him: that if Dr Alanizi thought on 27 March that Decisive had agreed to lend he would have written a very different message, to the effect that it was now time for Decisive to honour its commitment. He would not have been concerned about the £2 million because it would not have been wasted and he would not have complained about the lack of a Plan B because he would have had one – a commitment from Decisive.

105. I am conscious that around this time the term Plan B had been used by RBC specifically to refer to the idea of a partial refurbishment of the Property and the pursuit of a dilapidations claim against the NHS. Unquestionably there was no Plan B in that form, since both the Decisive and Attestor Term Sheets were

aimed at a full refinancing. It is possible that this is what Dr Alanizi meant in his message to Mr Nacos and Mr Chamat. Even that, however, would not explain why he did not specifically refer to Decisive stepping in as lender on a full refinancing. In concluding his answer to this point, Dr Alanizi stated: "*At this particular moment, that's what I felt, that's what I write down to John, but I always believe that Decisive will come up with an answer*." That seemed to me somewhat telling. What he thought he had from Decisive was not so much a firm commitment to lend as reassurance that they would find a solution to the refinancing issue, possibly using Attestor, possibly using Yunak and their own funds.

106. Later that day Dr Alanizi wrote to Mr Cooper making a formal proposal along the lines that they had discussed the day before. He blamed the delay in securing refinancing on "*the extenuating circumstances (particularly on the Bahamas and BVI registries*", a reference to the jurisdictions in which the Borrowers were incorporated and the issues arising out of the developing Covid 19 pandemic in those jurisdictions. He made no reference to the issues being raised by Attestor on the commercial or due diligence aspects of the refinancing.

107. On 30 March Mr Cooper agreed to consider the proposal but asked if there was a Decisive term sheet for the proposed £15 million loan for the refurbishment. Dr Alanizi forwarded that email to Mr Nacos and Mr Chamat at 4:02pm; Mr Nacos provided a draft term sheet for a loan of £20 million at 5:30pm; Dr Alanizi forwarded it to Longbow at around 8pm.

108. At the same time work had been proceeding on the financial model, principally between Dr Alanizi, Mr Nacos and Mr Salnikoff. The model was sent to Attestor late on 31 March 2020. It did not achieve the desired result. On 3 April 2020 Attestor responded with their comments. They concluded:

> The analysis we ran is fairly crude and please feel free to challenge parameters. However, I doubt the substance will change a lot: the hospital as per today is worth significantly less than the Savills report suggests, our senior is not covered if you include accrued and your mezz could be a total loss. Additionally, I don't think any funding would be available for the additional construction.

109. Mr Nacos wrote to Mr Chamat and Mr Salnikoff saying, "*Attestor's whole analysis is flawed*". He noted that he had spoken to Savills who stood by their valuation. However, Mr Nacos recognised that, "*knowing Friedrich I don't think we'll be able to change his mind.*" As I have noted, the Decisive Term Sheet provided for a loan to be the lower of £52 million and 40% of market value. It is obvious from the email from Attestor and Mr Nacos' comments on it that between the date of the Decisive Term Sheet and 3 April 2020 nobody had finalised the valuation, such that the amount of any proposed Decisive loan remained unascertained.

110. The position with Longbow was more positive: on the afternoon of 3 April Mr Cooper broadly accepted the structure that had been proposed by Dr Alanizi, under which Decisive would provide funding of £20 million and be granted a second charge. As Dr Alanizi recognised in an email to Mr Chamat and Mr

Nacos at 7:40pm that day, "*We need to finalise Decisive facility ASAP.*" That can only be a reference to the £20 million facility; it cannot sensibly be read as a reference to the earlier Decisive Term Sheet.

111. On 9 April 2020 Mr Nacos sent Dr Alanizi a term sheet designed to work alongside the proposed Longbow extension. He emphasised:

> I would ask again, in the interests of transparency, for the existing loan documentation from Longbow.
>
> This term is subject [sic] investment committee approval, legal documentation and other conditions.

112. Later that day Decisive received a further email from Mr Friedrich at Attestor. They had sought to persuade him that his analysis was wrong; he responded to their points and noted, "*this is a completely different business case to our discussions.*" He suggested the parties reflect and discuss after Easter; in fact, this marked the end of Attestor's involvement.

*Discussions Over Refinancing and the Further Advance*

113. Following the withdrawal of Attestor a variety of funding alternatives were considered and discarded. These included structures where Decisive or funds managed by it would take a preferred equity position, offer mezzanine finance falling in behind Longbow and some structure where there would, in the future, be a debt-equity swap. What does not seem to have been discussed is Decisive, or funds managed by it, refinancing the Longbow Loan in full. Dr Alanizi continued to seek extensions to the standstill with Longbow.

114. During this period Dr Alanizi started to feel that Mr Chamat was avoiding him. In a WhatsApp on 20 April 2020 he told Mr Chamat, "*I hope you are not avoiding my calls, is there any difficulties I should know about?*" Mr Chamat arranged a call, but by 1 May 2020 Dr Alanizi was expressing further concern: "*It is long since we spoke … having no communication at this critical stage is odd.*" That was followed by another WhatsApp on 4 May: "*this is never your habit to be totally not reachable*". Mr Chamat promised to call but apparently did not do so. This prompted Dr Alanizi to become frustrated: "*I owe you two million which I would never have given to long bow without your promise and confirmation that the deal is a done deal*".

115. This exchange is the first, and apparently only, reference in the documentary record to the use of the term "done deal"; it comes from Dr Alanizi, not Mr Chamat. It also appears to demonstrate the breakdown of the relationship between Dr Alanizi and Mr Chamat. When this exchange was put to him during cross-examination, Mr Chamat initially maintained that: "*we were super transparent, he was working with John Nacos all the time, and we were transparent all the way, every time we had a problem we told him.*" However, when he was challenged his evidence changed:

> Q. That's not true, Mr Chamat.

> A. Of course, of course.
>
> Q. If we look from the bottom of page 39, then, from the end of May onwards what we see is Dr Alanizi repeatedly trying to get in contact with you, with you saying that you'd call him in due course and then not doing so. The truth is by that stage you were just ignoring Dr Alanizi, weren't you?
>
> A. Again, as I told you I lost confidence at that time and basically there was a lot of lies and technically, you know, we were not -- but I talked to him, it's impossible that I did not talk, yes. June, I'm pretty sure, you know, I talked to him.

116. The question of when Mr Chamat lost confidence in the refinancing is significant. No allegation of fraud is advanced by Dr Alanizi, meaning that any representations made by Mr Chamat as to his confidence in the refinancing must have reflected his honestly held beliefs. If Mr Chamat lost confidence in the deal, he would not hold such beliefs and so would, at the very least, be significantly less likely to make such representations. The loss of confidence could not sensibly have happened before Mr Chamat wrote to Attestor on 23 March; he would not have written in such strong terms had he lost faith in Dr Alanizi at that stage. That places Mr Chamat's loss of confidence at some time in early to mid-April 2020. Most likely it was an evolving process over that period.

117. Contrary to his evidence Mr Chamat was not "*super transparent*" or even just "*transparent*" about this; as Dr Alanizi's messages show, Mr Chamat was evasive. For the avoidance of doubt, I do not accept Mr Chamat's assertion that Dr Alanizi lied. That is not part of Decisive's case, and appeared simply to be another attempt by Mr Chamat to create prejudice or to expand Decisive's case through his cross-examination.

118. By late May 2020 the refinancing of the Longbow loan had still not happened. Longbow offered a 12-month standstill agreement to be effective from 1 April 2020 (when the previous standstill had lapsed). That offer was premised on Longbow's understanding of the Borrowers' business plan, which was said to include obtaining £20 million in mezzanine finance from Decisive as lender. Although the condition precedent to Longbow's offer was less specific, simply requiring £20 million in mezzanine finance to be available by the defined Longstop Date of 15 June 2020, other terms of the offer contemplated the loan coming from Decisive. Of the £20 million, £3.71 million was to be paid to Longbow and the balance to be spent on refurbishments of the Property. Longbow would waive its right to default interest and reduce the non-default interest rate to 7% p.a..

119. Progress on finalising heads of terms was again slow, and by 11 May 2020 Dr Alanizi was again seeking more time from Longbow. The matter was now being handled for Longbow by Ms Patel, who confirmed on 12 May 2020 that she would agree to a standstill on enforcement through to July 2020 in return for the payment of one quarter's interest, totalling £927,500.

120. At around the same time Mr Nacos and Mr Chamat approached Mr Wade-Jones of Enness to assist in sourcing financing. Mr Wade-Jones proposed a two stage process, with short term finance to allow the Borrowers to "*tidy up the financial position*" and finance the development works followed by long term refinancing of the Longbow Loan. This was, of course, wholly consistent with the negotiations on the Longbow standstill; it was not consistent with Decisive or funds it managed immediately refinancing the Longbow Loan. Yet on 18 May 2020 when Longbow asked if Decisive was still "*at the table to refinance £53m*" Dr Alanizi responded, "*Yes they are with their affiliates*." Given where the process with Decisive was at that point, it is wholly unclear how Dr Alanizi had formed that conclusion.

121. Mr Nacos left Decisive on 8 June 2020. A few days later, on 11 June, Mr Salnikoff wrote to Dr Alanizi explaining, "*We have reviewed the project internally and would need to agree on the following points with you to make progress.*" These included "*consistency and quality of information to avoid misleading expectations and questions from counterparties*"; "*to avoid multiple conversations between brokers / advisors – communication needs to be centralised*"; "*to have a proper Leadership Team in place to manage the information*"; and "*full and complete data room for Lenders/investors*".

122. Mr Salnikoff's email was discussed on a call with Dr Alanizi the following day, after which he sent an email to the team at Decisive but not to Dr Alanizi. In that email he noted that potential lenders and preferred equity investors were "*To be discussed*". Certainly, from Decisive's perspective that demonstrates that it was looking at external funding. However, Mr Salnikoff described that email as a "*call report and outstanding points from our discussion with Dr Alanizi today*". It is not clear which points formed part of the discussion and which, if any, were internal notes for follow-up. That is no criticism of Mr Salnikoff, who was writing for an internal audience for whom the distinction was irrelevant, but I am cautious about concluding from that document what was said to Dr Alanizi about the identity of any lender or investor.

123. Certainly, it seems that Dr Alanizi still saw Decisive as a potential lender, since he wrote to Mr Salnikoff on 22 June 2020 noting: "*Long bow lawyers wants to have a call with your lawyers to discuss with them the inter creditor agreement with Decisive and the second charge agreement*". He asked for a contact at Decisive's lawyers. He followed up on 24 June 2020 in an email to RBC, Mr Salnikoff and Mr Chamat, noting that, "*I understood from Decisive that they are using the same lawyers been used before for the standstill agreement*". He also noted that Mr Nacos had left Decisive.

124. Later that day Mr Wade-Jones wrote to Dr Alanizi informing him that heads of terms had been provided by a lender, Pluto, for a loan secured on a site adjacent to the Property (the **Boiler House**). The Boiler House was owned by Kirklees Limited, an entity in turn owned by the Yousfan Trust which, as I have noted, also owned the Borrowers and of which Dr Alanizi was a beneficiary. The idea was to borrow against that security as a means of short-term funding, including repayment of the Original Loan. Mr Wade-Jones noted that further security (in addition to a charge over the Boiler House) would be required in the form of a guarantee from "*any connected person with visible assets*". When Dr Alanizi

said this would not be possible "*for legal and tax purposes*", Mr Wade-Jones emphasised to him, "*I find it hard to see how this deal gets done on a non-recourse basis*."

125. That concern was reflected by the terms of a further offer obtained by Mr Wade-Jones on 10 July 2020 to borrow using the Boiler House as security, this time from Brydg. They also required a guarantee but sought it from Mr Chamat or Decisive. Mr Wheeler put to Dr Alanizi, and submitted to me, that Mr Chamat and Decisive had no reason to offer such a guarantee in circumstances where the loan on the Boiler House was intended both to fund the interest payment to Longbow and to repay the £2 million owed to Decisive. Dr Alanizi struggled to explain what benefit such an arrangement would have to Decisive other than to say that Mr Chamat was now interested in developing the Boiler House site into residences. But if Mr Chamat or Decisive wanted that they could lend on or invest in the Boiler House redevelopment themselves; to have Brydg lend and to guarantee that loan simply added complexity without any obvious benefit to Decisive.

126. Dr Alanizi started to look at paying the quarter's interest to Longbow through some extension of the Original Loan. It appears that Mr Chamat had indicated that such an increase would be possible on a call with Dr Alanizi and Ms Patel on 9 July 2020. By 17 July 2020, Mr Chamat had reservations as to even that amount. In a WhatsApp to Dr Alanizi, he requested:

> Dr. Please manage it. I can only send 500k

127. Dr Alanizi seemed confident that he could manage things, since he replied:

> Send her the 500k now and she [agreed] to to end till 25 September as she said that she trusts you for the further 500k next week as long as you do it now and I will expand RBC facility by 500 and further 500 next week and same to my personal guarantee

128. There followed an email exchange in which Dr Alanizi proposed this to Ms Patel; she then spoke to Mr Chamat and, following that call, agreed to payment of the quarter's interest in two instalments.

129. Also that day Dr Alanizi had a further meeting with Mr Constant regarding the proposed guarantee. Mr Constant provided a certificate of independent legal advice in substantially identical form to that which he had provided on the Original Guarantee.

130. On 20 July 2020 Dr Alanizi chased Mr Freedman, Decisive's lawyer:

> In light of the very tight time restraint we have today I Am still waiting for the new [guarantee] to mirror image the previous one and the 2m is replaced by 2.5m beside acknowledging that with such New guarantee in place then The old one is not valid any more

131. On 20 July 2020, Decisive and the Borrowers entered into the Amended Loan, which amended and restated the Original Loan providing a facility of

£2,500,000, comprising the £2 million already advanced and a further £500,000. Also on 20 July 2020, Dr Alanizi granted Decisive the Amended Guarantee.

132. Pursuant to its obligations under the Amended Loan, on 21 July 2020 Decisive advanced the sum of £500,000 to the Borrowers by the payment of that sum to Longbow on the Borrowers' instruction.

*Subsequent Discussions and Demand*

133. Decisive did not transfer the further £500,000 as required by Ms Patel. In the background further discussions had been ongoing regarding the loan secured on the Boiler House. Mr Chamat raised concerns about progress on that front when he wrote to Dr Alanizi on 5 August 2020:

> Dr. we need to see progress on the boiler loan to release this amount. Not from me, but my board.

134. The Brydg loan collapsed on 7 August 2020 because Decisive would not provide a guarantee. Mr Wade-Jones was able to secure a replacement loan offer that would not have required a guarantee but, as he explained to RBC, only at a "*significantly higher*" rate. Subsequent attempts to secure a loan on the Boiler House proved unsuccessful and by 11 August that approach, and with it the relationship between Dr Alanizi and Decisive, had collapsed.

135. On 26 August 2020, Decisive, through its then solicitors, demanded repayment of the sums due under the Amended Loan by no later than 6 September 2020. No payment was made, and on 21 September 2020 Decisive's solicitors wrote to Dr Alanizi demanding payment under the Amended Guarantee.

136. On 22 September 2021 (and in respect of Dr Alanizi, again on 6 October 2021), Decisive's solicitors wrote to the Borrowers and Dr Alanizi demanding repayment on the premise that the "*Repayment Date*" for the purposes of the Amended Loan was 20 January 2021.

137. None of the sums due under the Amended Loan were repaid by 6 September 2020 or 20 January 2021, and nothing has been subsequently repaid by the Borrowers or paid by Dr Alanizi.

*Decisive's Claims*

138. Decisive claims the sums due under the Amended Loan and Amended Guarantee as a debt, alternatively as damages, together with interest as provided for in the relevant contracts or pursuant to statute.

139. Decisive previously advanced claims on the basis that, as a matter of construction of the Amended Loan, repayment of all sums advanced was due on 6 September 2020 (with an alternative claim for rectification to that effect, and a further alternative claim on the basis that repayment was due on 20 January 2021). The Borrowers and Dr Alanizi disputed that the date for repayment was 6 September 2020. Decisive now seeks judgment on the basis that repayment was due on 20 January 2021.

*Judgment Against the Borrowers*

140. The Borrowers failed to give Extended Disclosure as ordered by 22 April 2022. Decisive obtained an unless order dated 14 July 2022, providing that the Borrowers' Defence would be struck out if Extended Disclosure was not given within 14 days. No such disclosure was given and Decisive accordingly obtained judgment against the Borrowers in the sum of £3,063,130.57 (inclusive of interest up to the date of judgment in the sum of £538,613.29) by order of Deputy Master Scher dated 24 November 2022.

*Dr Alanizi's Defence*

141. As I have noted above, Dr Alanizi's Defence is based on the alleged misrepresentations set out in paragraph 5 above. Dr Alanizi claims to be entitled to rescind the Guarantees either on the ground that the alleged representations were false and were made negligently or pursuant to the Misrepresentation Act 1967. Alternatively he claims damages for misrepresentation in lieu of rescission under section 2(2) of the 1967 Act. No claim for damages is pursued under section 2(1) of the 1967 Act.

142. Decisive's case is that no representations of the kind alleged were made and, further or alternatively:

    i) that in any event they were not continuing representations or representations as to the future;

    ii) Dr Alanizi did not rely on them in entering into the Amended Guarantee; and

    iii) Dr Alanizi is prevented from raising a defence of set-off by Clause 9.1, which is not unfair pursuant to UCTA or otherwise.

**The Legal Test**

143. The parties agree that Dr Alanizi is required to show:

    i) A representative of Decisive made a statement of fact;

    ii) The statement of fact was untrue;

    iii) It was reasonable for Dr Alanizi to rely upon the statement of fact;

    iv) Dr Alanizi in fact relied upon it in entering into one or both of the Guarantees.

144. They further agree that a statement of fact is distinct from a statement of intention or opinion. However, where the intention is not held the statement of intention may itself be a misrepresentation (see *Chitty on Contracts 34th Ed.*, [9-008]).

145. In the context of the representations alleged by Dr Alanizi, a number of further issues arise.

146. First, as Mr Wheeler observed, certain of the alleged representations were, on their face, representations as to the future. As Professor Cartwright notes in Misrepresentation, Mistake and Non-Disclosure (6th Ed, Sweet & Maxwell 2022) at 3-44:

> When it is said that a statement, to be actionable, must be one of fact, it means that the statement must be of present fact: not "future fact", that is, not a statement of what will happen in the future, nor a statement of what the speaker will do in the future. A statement of what will happen in the future is a representation of the speaker's *present* belief about *future* events. A statement of intention is a representation of the speaker's *present* plan for his *future* conduct.

147. Mr Wheeler further referred me to the distinction drawn between statements of intent and promises in Civil Fraud (1st Ed, Sweet & Maxwell 2018) at 1-046:

> …even if a false representation as to the representor's state of mind can be made out, it will still be necessary to establish that it was upon this representations as to intent, and not just upon the promise of future fulfilment of it, that the representee relied and was intended to rely. Where the intended reliance is in fact only upon the promise, then, unless the representation has been fortified by incorporation into a contract, the law of tort cannot assist.

148. I accept that distinction. As I have noted, no claim is brought on the basis of estoppel or collateral contract.

149. Finally, Mr Wheeler noted that there was no allegation that Decisive made any statement as to its intent fraudulently and it was difficult to see how a statement of intent could be innocently or negligently false. He referred to *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd.* [2013] EWHC 1414 (Ch) at [197]. Certainly, in that decision, David Richards J, as he then was, dismissed the attempt to show that a false statement as to intention could be made negligently, and described that attempt as a brave one. At the same time, his dismissal of that claim was on its facts; he accepted at [207] that in principle such a claim could succeed:

> I can see, theoretically at least, a basis for a claim for negligent misrepresentation where a party states that his intention is to invest for a short term and, while that is indeed his intention at the time the statement was made, he has nonetheless given consideration to a longer term strategy and has it in mind that he will revisit the issue and may well change the strategy to a long term investment. The failure to qualify the statement of intention by reference to the active consideration of the prospect of a subsequent change of policy may render the unqualified statement misleading. The failure to qualify the statement could arise as a result of negligence, rather than a deliberate intention to deceive.

150. Similarly, here, it is possible in principle that Decisive could have stated it had no present intention to enforce the personal guarantees and that such a statement was true in so far as it went but failed to reflect that Decisive reserved the right

to change its mind in the future. On the basis of *Abbar*, that could in principle form the basis of a negligent misrepresentation as to future intention.

151. The Done Deal Representation gives rise to a further issue. Mr Wheeler submitted, and I accept, that the term "*done deal*", if it was used, could have two meanings: that the deal had, literally, already been done; or that it was so likely to happen that the parties could proceed on that basis. I further accept, as I think did Mr Lewis, that any such representation could not, even on Dr Alanizi's best case, have been literal or understood to have been literal. At no stage was there a done deal in the sense of a binding obligation on any party to refinance the Longbow Loan; that is the entire reason why this case has arisen.

152. As Dr Alanizi accepts, to be actionable the representation must be as to fact or law, not a statement of opinion. For the reasons set out in Professor Cartwright's book referred to above, fact is not the same as prediction. So once one accepts, as I think one must, that the Done Deal Representation, if made, was of the nature of a prediction or opinion it is not, of itself, actionable. The same is true of the No Risk and Low Risk Representations.

153. The analysis does not end there. Decisive accepts that a statement as to the future or as to opinion may carry with it an implied representation that the express statement has a reasonable basis. A statement of opinion may found the basis for a claim where it carries with it an implied representation that the opinion has a reasonable basis. That will not always be the case. For such a representation to be implied there must be an imbalance of knowledge between the maker and the recipient of the express representation. Mr Wheeler referred to the observation of Bowen LJ in *Smith v Land and House Property Corp* (1884) 28 Ch D 7 at 15:

> In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

154. By contrast, where there is no imbalance of knowledge there would be no need to imply such a term. Mr Wheeler referred to Mistake, Misrepresentation and Non-Disclosure at 3-19 for a summary of the position: "*Where, however, the representee has no reason to believe that a statement, couched in the language of belief or opinion, is made with any special basis of information or skill, the statement will be characterised as simply belief or opinion, and so will not be actionable.*"

155. I did not understand Mr Lewis to contest the point of principle that an imbalance of knowledge needed to be shown; his point was that such an imbalance indeed existed on the fact of this case. In any event, I accept Professor Cartwright's summary of the law.

**Were the alleged representations made to Dr Alanizi before he executed the Original Guarantee?**

*The Yunak Representation*

156. Plainly, the Yunak Representation was made to Dr Alanizi in the form of Mr Nacos' email of 26 February 2020. Mr Lewis made clear in closing that Dr Alanizi did not advance an independent case on the Yunak Representation, however. Rather, it is said to be evidence going to show that the Done Deal Representation was made.

*The Done Deal Representation*

157. It makes sense to tackle this alleged representation next, since it underpins the two variants of the representation around the risk of the Guarantees being enforced.

158. Dr Alanizi's evidence was that Mr Chamat talked about the refinancing as a done deal from the outset, including at or immediately after the initial meeting in Geneva in January 2020. I do not accept that evidence.

159. First, it would be remarkable if two experienced finance professionals, Mr Chamat and Mr Nacos, would make such an unqualified assertion at so early a stage. The position is even more remarkable because initially all that they had, according to Dr Alanizi's witness statement, was an explanation from Dr Alanizi and "*information about the property on the internet*" provided in the course of the introductory meeting in Geneva.

160. Secondly, the language of "*done deal*" was Dr Alanizi's, from his 4 May 2020 WhatsApp message to Mr Chamat. That was obviously a reference to earlier events, but it seems it was at best an attempt to paraphrase in a short message the gist of what Dr Alanizi had understood he had been told. There is nothing to suggest that Mr Chamat ever used it.

161. Thirdly, it is notable that when Mr Chamat spoke with Mr Nacos regarding the term sheet his evidence was that he was not overly concerned with the contents provided the commitment was conditional. He was not challenged on that evidence, and it seems to me an accurate reflection of Mr Chamat and his way of doing business. He exudes caveated confidence. He may hope that the client will focus on the confidence, but to Mr Chamat, the caveats are important. It seems to me that an unconditional assertion that the refinancing was a done deal or anything similar would run wholly counter to that approach.

162. Fourthly, Dr Alanizi's evidence has shifted over time. Those discrepancies call into question the strength of Dr Alanizi's recollection. Most strikingly, Dr Alanizi's witness statement recounts a meeting with Mr Chamat at his home on 18 February 2020. That replicates, in substance if not quite in form, significant parts of a statement Dr Alanizi gave earlier in these proceedings when he attempted to set aside service of proceedings on him. Critically, Dr Alanizi's trial witness statement adds the following towards the beginning of the paragraph:

> [Mr Chamat] came to assure me once again that Decisive was the right firm for this project and he reiterated that it was all a done deal. He talked again about how he managed the Saudi Royal Family's wealth.

163. Both statements went on to describe how Mr Chamat described the refinancing as a "*very controllable situation*".

164. Dr Alanizi described the omission in his earlier statement as, "*Oversight.*" I reject that. The Done Deal Representation is central to his case; it is not a detail that he might overlook. Moreover, there is a significant difference between describing something as a done deal and describing it as controllable – one is certain, one is not. In saying that I make allowance for the fact that English is not Dr Alanizi's native language, but in giving his evidence he was able to make precise and nuanced distinctions, so I doubt that was an issue. Moreover, if such distinctions were not clear to Dr Alanizi that would equally call into doubt how clearly he understood Mr Chamat at the time. In any event, his explanation for the omission was not that "done deal" and "very controllable situation" were synonyms; it was that the omission of the former was an accident.

165. Fifthly, as the chronology shows, this deal was a long way from being done. As far as the Decisive Term Sheet was concerned, throughout the period leading up to the Original Guarantee even the amount was uncertain because there was no up to date valuation. Mr Lewis submitted that subsequent events showed that Savills would have stood by their valuation such that the issue could have been addressed. That, though, is a hindsight argument: at the time the Done Deal Representation is said to have been made, the amount of the "done deal" in question was not ascertained. In saying that, I recognise, of course that the fact the deal was not literally done would not have precluded Mr Chamat from using such language. Moreover, I have found that Mr Chamat was extremely confident about the transaction in late February and early March, and very relaxed about the precise identity of the lender. It does, though, make it less likely.

166. Sixthly, it is difficult to fit the Done Deal Representation with Dr Alanizi's complaint on 27 March that there was no Plan B. If the Done Deal Representation had been made, it must have been made by the time of the Original Guarantee on 6 March. If Dr Alanizi had been told and had believed at that time that he had a "done deal" because either Attestor would lend or Decisive would simply find someone else, it is hard to understand why he would refer to a Plan B at all; since Plan A was a "done deal", it simply needed to be executed, if not through Attestor then through Decisive. I found Dr Alanizi's attempts to explain this exchange unconvincing.

167. Seventhly, Dr Alanizi's evidence was that when he told Mr Constant about the representations made to him, including the Done Deal Representation, his advice to Dr Alanizi was simply to be "*careful*". Mr Constant is a partner in his firm and as such presumably an experienced solicitor. It would seem to me odd that if Dr Alanizi had told him that Decisive had said there was a done deal his advice was limited to telling Dr Alanizi to be careful. I would expect him, at least, to want more details as to what had been said and what was meant by that term. It seems he asked for nothing of the sort.

168. Finally, it was striking to me what Dr Alanizi said when asked about the amount of work that remained to be done:

> Q. Well, you must have appreciated at this stage that there were still a few more weeks' work to be done?
>
> A. Well, I personally, and I'm telling you sincerely, your Honour, I was thousand per cent sure that Decisive and what Elie have told me, with all the things they have done, a multibillion company, Mr Chamat sending his plane, he was very interested, he knows that I was the golden boy of HSBC, he knows what all these things. I was -- if I had the same information today, I wouldn't be, but anyway, this is -- all of us with 20/20 hindsight, but I was 100% sure that Elie will honour his word. That is my belief.

169. As I have already noted, Dr Alanizi elsewhere explained that he was "*overwhelmed*" when Mr Chamat sent his private plane to bring Dr Alanizi to the meetings in Geneva. That high level of attention and the fact that Mr Chamat knew Dr Alanizi from the time when Mr Chamat worked at HSBC and Dr Alanizi was a client gave Dr Alanizi considerable confidence. He had belief in Decisive, in its ability to source funding, in the efforts it would make to do so and in the Property itself. In Dr Alanizi's mind, the deal was done, or as good as done. But I believe that was a conclusion he drew, not something he was told.

170. Even if Mr Chamat had used the term "done deal" or something similar from the outset, it does not help Dr Alanizi. If, as Dr Alanizi says, Mr Chamat was talking about the refinancing being a done deal from the first meeting on the basis of a short explanation and internet searches, such talk was worthless. Mr Wheeler referred to the cases on advertising, but in truth it hardly even reaches that level; it would simply have been a phrase that Mr Chamat used without, and very obviously without, any serious reflection regarding the facts of the particular transaction. Having heard it used so frequently, Dr Alanizi could not have regarded it as having any literal basis.

171. Moreover, it would have to be understood in its context. Dr Alanizi's evidence is that the term done deal was used from the outset. Yet the draft Attestor letter on 27 January 2020 referred to Attestor's access to a "*very limited set [sic] of information*" meaning "*we do not feel comfortable to extend a full term-sheet.*" The furthest they would go was to outline "*some benchmarks of a potential transaction*". Dr Alanizi described this in his email to Mr Nacos as a "*high line early draft which need to be addressed in details*". Similarly, while Dr Alanizi placed particular reliance on documents like Mr Chamat's email of 7 February stating that Decisive "*will be providing an unconditional commitment to refinance*", that was followed by a letter and term sheets that were, on their respective faces, plainly conditional. If that is what the parties understood by done deal – high line early drafts lacking in detail and conditional offers – then it was using the term in the loosest possible sense; certainly, it was far from risk-free.

172. In my view the Done Deal Representation was not made. I turn below to what I think was said, but it was nothing like so categorical. Over the course of time Dr Alanizi has, very understandably, latched onto the phrase "*done deal*" as having been used at the time, which it was, but imputed it increasingly to Mr Chamat rather than to himself. Even had it been made, it could not safely have been understood to equate to the refinancing being certain or in any way risk-free, given the picture that Dr Alanizi had. His deal was conditional at best, many of the conditions depended on him rather than Attestor or Decisive and they were not being satisfied.

*The Mere Formality Representation*

173. Unlike the Done Deal Representation, the Mere Formality Representation must have been made, if at all, in a narrow timeframe. It could not sensibly have been raised before the concept of a personal guarantee was first mooted; it must have been made before the Original Guarantee was executed and, most likely, before 1 March when the parties had agreed on the idea of a guarantee in principle.

174. An immediate difficulty with this alleged representation is to pin down what form it could have taken. In essence the representation seems simple: the personal guarantee was something required by Decisive's investment committee to speed up their processes in making the £2 million available but would never be enforced. Once probed in a little more detail, however, that fails as a matter of logic and on the evidence.

175. As a matter of logic, it is difficult to understand why the investment committee, which Dr Alanizi was aware was the ultimate decision maker for the Original Loan, would ask for a guarantee unless it saw circumstances in which it would be enforced. In closing Mr Lewis suggested that Mr Chamat really embodied Decisive. The difficulty with that is that Dr Alanizi's case is that Mr Chamat was telling him that he needed the investment committee onside if this decision were to be made quickly. Mr Chamat might have had significant influence, but the investment committee had the final say. It makes no sense to say that the investment committee would want something to satisfy a procedural requirement if that something were to have no effect. What would be the point of such a procedure? And if the Original Guarantee (and in turn the Amended Guarantee) were to have some effect, they were not mere formalities.

176. Mr Lewis further submitted that Dr Alanizi could have no way of knowing Decisive's internal requirements or the degree to which Mr Chamat could influence the investment committee, whether legally or practically. I accept that point, but it takes matters no further. It is not suggested that Mr Chamat was mistaken or lying when he told Dr Alanizi that a guarantee was required by the investment committee. It is implausible that such a requirement would be satisfied if the guarantee were for some reason unenforceable. It therefore seems to me unlikely that Dr Alanizi would have been told that the guarantee being sought could not be enforced, since simply as a matter of principle it is hard to see how that could have any value for an investment committee.

177. The Mere Formality Representation is further undermined by Dr Alanizi's evidence. He repeatedly made the point that he was legally exposed if Mr Nacos and Mr Chamat left decisive:

> Q. And you knew from [Mr Constant's 5 March 2020] advice that Decisive could enforce the guarantee against you?
>
> A. Theoretically, yes.
>
> Q. And you also appreciated that they would do so if the circumstances arose in which it was necessary to do so?
>
> A. No. Only I just have -- the only worry in my mind, if Elie was not there and John -- Elie and John are gone. That is my only worry is they will -- Elie will go and somebody else come and Decisive nag(?) on it, and that was my caution point, really. I never thought that Elie will do this to me, but anyway.

178. He made the same point soon after:

> Q. So you appreciated that there were circumstances in which the guarantee could be enforced against you?
>
> A. The worst case circumstances is if Elie goes away and somebody else come in and said: I have this guarantee, I'm going to enforce it against you. That is my worst case scenario. I trusted him but anyway --
>
> Q. You realised there was no bar then to enforcement of the guarantee in those circumstances?
>
> …
>
> A. Legally, nothing stopping them.

179. This is consistent with what Dr Alanizi said in his 1 March 2020 WhatsApp message about taking "*a very big* [leap] *of faith*" with the Original Guarantee but having full trust in Mr Chamat and Mr Nacos. He knew he was legally exposed; he trusted Mr Chamat and Mr Nacos to ensure that exposure never amounted to anything in practice. The difficulty for Dr Alanizi is that this suggests some form of personal assurance from Mr Chamat (and possibly Mr Nacos) that they viewed the guarantee as a mere formality. But they are not parties to this action. Decisive is, but its position was that taken by the investment committee. Even on Dr Alanizi's evidence, what Decisive sought was no mere formality; it wanted an enforceable guarantee.

180. I also come back to the advice of Mr Constant. If Dr Alanizi had told him that the Original Guarantee was a mere formality, I cannot believe that Mr Constant would have acted in the way that he did. First, it is hard to see how the Certificate of Independent Legal Advice could have given the unqualified statements that Mr Constant explained "*the practical implications of the Guarantee including the responsibilities, obligations, liabilities and risk*" that Dr Alanizi assumed and that Dr Alanizi "*confirmed and agreed that my*

*explanations and advice were understood*". Had Mr Constant explained the operation of the Original Guarantee and Dr Alanizi said to him words to the effect that, "Yes, but not to worry – I am assured it is a mere formality", Mr Constant could not properly have concluded that Dr Alanizi had understood Mr Constant's explanations and advice. Secondly, if Mr Constant had thought that Dr Alanizi was entering the Original Guarantee thinking it a mere formality, the advice to be "*careful*" would fall some considerable way short of proper advice on the risk. Such a scenario seems to me improbable. An experienced solicitor is unlikely to have given the advice that Mr Constant did had he thought his client believed the Original Guarantee to be a "mere formality".

181. Dr Alanizi knew that what Decisive was seeking, and what he was giving, was an enforceable obligation. Mr Constant had advised as much, and he had fully understood that advice. Moreover, he knew that there were circumstances in which Decisive would enforce the Original Guarantee. That does not sit with the suggestion that the Original Guarantee was a formality in any normal sense of the word. As all concerned were fully aware, it was a valuable asset for Decisive. Accordingly, it seems to me that it was never represented that Decisive would treat the Original Guarantee as a formality.

*The No Risk and Low Risk Representations*

182. Like the Mere Formality Representation, and for the same reasons, these representations are likely to have been made, if at all, between 28 February and 1 March and must have been made before the Original Guarantee was executed.

183. Mr Wheeler submitted that these representations were mutually exclusive and so could not both have been made. Certainly I see the logic of the submission that they are inconsistent, but having seen Mr Chamat in action I am of the view that he could well have given two conflicting representations on the same point without apparently noticing. I do accept that both could not simultaneously have been relied upon, however, and that if the two were made interchangeably it would be harder to show reliance on a no risk representation was reasonable since the possibility of a higher level of risk (albeit still a low level overall) was being mooted.

184. Mr Lewis recognised that these representations were more likely to have been made if the Done Deal Representation had been made. He submitted, however, that they were free standing representations that could have been made even in the absence of the done deal representation. I agree with that submission up to a point. The fact that Mr Chamat did not make the Done Deal Representation, as I have found, does not of itself mean that he did not make the No Risk or Low Risk Representations. However, one of the reasons for my finding that Mr Chamat did not make the Done Deal Representation is his desire to leave himself room to manoeuvre. The same desire would suggest that he did not make the No Risk Representation.

185. That suggestion is reinforced by Dr Alanizi's WhatsApp message to Mr Chamat and Mr Nacos on 1 March, in which he says, "*I sm taking a very big keep of faith with personal guarantee but I have full trust in you guys*". A reference to a leap of faith is not the language of someone who feels there is no risk at all.

Similarly, his evidence that Decisive might enforce if Mr Chamat and Mr Nacos were to leave, the "*worry in my mind*" as Dr Alanizi put it, was inconsistent with there being no risk.

186. Moreover, having rejected the Done Deal and Mere Formality Representations it is difficult to see how one could properly say there was no risk in the refinancing, since those are the two ways in which risk to Dr Alanizi could be entirely addressed. If the refinancing was not concluded and the Original Guarantee was more than a formality, there had to be some risk. Of course, it is possible in theory that Mr Chamat and Mr Nacos both failed to identify that there was a remaining risk, but that seems to me implausible in practice: both were highly experienced financial professionals. Fraud is not alleged, so there is no suggestion that they deliberately concealed the existence of a risk of which they were aware. All of this goes to suggest that the No Risk Representation was not made.

187. It also seems to me notable that when discussing the idea of a bridging loan in late February, Mr Nacos considered it "*highly unlikely*" that it would ever be needed. The bridging loan was a different structure and the circumstances in which it might be needed were not identical, but he spoke in measured terms, not in absolute ones.

188. Finally, I come back to the advice of Mr Constant. He explicitly stated that he had advised Dr Alanizi on the risk that he assumed under the Original Guarantee. He could not have done so and concluded that Dr Alanizi had understood his advice if Dr Alanizi was telling him that he considered there to be no risk.

189. For all these reasons, in my view the No Risk Representation was not made.

190. The same logic does not apply to the Low Risk Representation. On the contrary, it seems to me very likely that Mr Chamat did say something along those lines to Dr Alanizi.

191. First, I have found that Mr Chamat did not start to have doubts about the project until after the issues first arose with the Attestor deal in late March. The irritation he felt immediately before Attestor raised its concerns was obvious:

> Friedrich, I have personally put my faith in you and have looked at Attestor as a partner. This silence mode is not the right ethical and institutional behaviour we would expect.

192. At the time that the Original Guarantee was sought, several weeks before that email, I have little doubt that he was very confident that Attestor would refinance such that the chances of the Original Guarantee being enforced were, indeed, low.

193. Secondly, Mr Chamat was extremely confident that in the absence of Attestor he had access to the Yunak funds. As I have noted, he was not focussed on the detail. Even before me he moved fluidly from the idea of Decisive / Yunak as a bridge to Attestor and as the lender instead of Attestor then back to the original

structure. I do not believe that he was focussed on the fact that the two structures were quite distinct, and that a bridging loan was not a true alternative to a full Attestor refinancing. What was clear to him was that a solution existed, and I believe he communicated that confidence to Dr Alanizi.

194. Thirdly, it seems to me very likely that Mr Chamat's lack of attention to the detail, which as I have noted he accepted, applied equally to certain of the conditions in the Attestor Term Sheet and those in the Decisive Term Sheet being substantively identical. Again, this meant that the two were not true alternatives, since the same factors could simultaneously undermine both deals. Again, I do not believe that would have dented Mr Chamat's confidence.

195. Fourthly, Mr Nacos also believed strongly in the refinancing. His basis was somewhat different to Mr Chamat's; he had a firm grasp of the detail and he believed it worked. Attestor's concerns seemed to him baseless when they were ultimately raised. As he bluntly put it: "*Attestor's whole analysis is flawed*". Had he considered such issues in advance of Dr Alanizi giving the Original Guarantee I believe he would equally have dismissed them. He believed the refinancing worked, would therefore have believed that the risk associated with the Original Guarantee was low and would, in my view, have communicated that to Dr Alanizi.

196. I also come back to what Mr Nacos said to Dr Alanizi in late February regarding the need for the bridge loan. That would have been drawn on in the event of a delay in Attestor refinancing; Mr Nacos considered that "*highly unlikely*". If a delay was unlikely a complete withdrawal was, if anything, less likely (albeit still possible). If Mr Nacos would communicate his confidence about the limited risk of the bridging loan being necessary, he would equally communicate such confidence about the Original Guarantee being low risk.

197. Fifthly, Dr Alanizi expressed his "*full trust in you guys*". That message is, it seems to me, more consistent with something having been said to Dr Alanizi to inspire that trust by Mr Chamat and Mr Nacos. That, in turn, is consistent with Dr Alanizi's evidence before me that his only worry was if Mr Chamat and Mr Nacos left Decisive. Again, that suggests some personal comfort was given by one or, more likely given the language used, both of them that the chances of the Original Guarantee being relied on were low.

198. While the representation was made, I do not believe it is actionable, however, because it was not a statement of present fact. Without more, the statement that there was a low risk that the Original Guarantee would be called upon represented Mr Nacos' and Mr Chamat's present belief about future events. There is no suggestion that they deliberately misrepresented their belief (which would require an allegation of fraud). Had such an allegation been made it would have been unsupported by the evidence: as I have noted, right up to the point that he emailed Attestor on 23 March 2020, Mr Chamat was clearly committed to the project. Equally, there is no suggestion that they had undisclosed concerns about what might happen in the future that might have founded a claim in negligence on the basis of the observations by David Richards J in *Abbar*, quoted above.

199. To be actionable, the Low Risk Representation is, in my view, necessarily tied to the Reasonable Basis Representation

*The Reasonable Basis Representation*

200. I did not understand Mr Lewis strongly to contest the point, as a matter of law, that in order to show that there was an implied representation that an express statement had a reasonable basis, Dr Alanizi needed to show that there was a relevant imbalance of knowledge as between him and Decisive. Nor, as regards the prospects of an Attestor refinancing, did I understand Mr Lewis to suggest that there was any such imbalance of knowledge. On both those fronts, I think that is right. For the reasons I have explained in relation to the Done Deal and No Risk Representations, Dr Alanizi was aware throughout how things stood with Attestor.

201. Mr Lewis submissions focussed on the Decisive position. There, he submitted, Dr Alanizi was almost completely dependent on Mr Chamat and Mr Nacos for information. When they expressed confidence that the guarantee was unlikely to be called on, that carried with it an implied representation that the Original Loan would be refinanced. Because there was no imbalance so far as Attestor was concerned, the implied representation could not relate to that source of refinancing. By contrast, Dr Alanizi had no visibility regarding Decisive's funding; he had simply received assurances which, it transpired, had no basis.

202. To my mind that submission does not address two points. First, the imbalance must go to the likelihood of refinancing. Attestor's decision to withdraw was down to the failure by the Borrowers to satisfy the conditions precedent in the term sheet. The conditions precedent in the Decisive Term Sheet were similar. Indeed, in a sense the position under the Decisive Term Sheet was more difficult because in the absence of a valuation, the loan amount could not be calculated. Dr Alanizi had full visibility of the Decisive Term Sheet, which was based on the DRC Term Sheet that Dr Alanizi, himself, had provided to Decisive. He had previously questioned the need for the conditions precedent and was aware, as a result, that they were standard and likely to be required for any refinancing. It was obvious that if the conditions precedent were not satisfied, the risk of the refinancing not happening, and the Original Guarantee being called upon, was higher. All of this was known to Dr Alanizi; none of it could therefore be the necessary imbalance of knowledge.

203. That moves the focus to why the conditions precedent were not satisfied. The emails with Attestor around its withdrawal suggest that Dr Alanizi was at least as well aware as Decisive of the reasons for that. Indeed, Dr Alanizi's 23 March WhatsApp to Mr Chamat suggested the delay was being caused by Attestor's lawyers and Mr Chamat must have believed him to write to Attestor in the terms that he did, criticising their unethical behaviour. In fact, the delays were with information being provided by the Borrowers. Mr Chamat obviously was not aware of that; Dr Alanizi very probably was. Again, the necessary imbalance of knowledge was lacking.

204. Was there an imbalance of knowledge around the efforts that Decisive was making elsewhere to secure funding? That, it seems to me, is still more tenuous.

There was no suggestion that Decisive looked further than Attestor and, as a fallback, some combination of Yunak and its own funds. Nor, however, was there any evidence that a party in Decisive's position acting reasonably would have done more than that. Moreover, the DRC Term Sheet had similar conditions precedent to the Attestor and Decisive Term Sheets and Dr Alanizi accepted that such conditions would be standard, suggesting that other lenders would have imposed similar conditions themselves. In the circumstances, having further potential lenders would not have changed the risk.

205. Some suggestion was made that Dr Alanizi was not aware of Mr Chamat's reservations regarding the refinancing at the time he executed the Original Guarantee. Having heard Mr Chamat give evidence, I am not persuaded that he can now recall when those reservations formed. The documentary evidence is quite clear, however: when Dr Alanizi raised concerns with Attestor's progress in late March 2020 Mr Chamat was firmly on his side and wrote to Attestor with a tone of moral outrage. There is nothing in his language that suggests doubt; quite the contrary. If he believed that Attestor should lend but they failed to do so for reasons unconnected with the transaction, for example if Attestor had encountered issues of liquidity, I accept that Mr Chamat would have been comfortable lending provided only that the conditions precedent to the Decisive Term Sheet were satisfied.

206. In any event, even were the Reasonable Basis Representation made it would not have been actionable because at the time the Low Risk Representation, to which it attaches, was made there was a reasonable basis for it, in that the Attestor position was positive. The Attestor Term Sheet had been issued and all parties recognised that while the timing for satisfying the conditions precedent was tight, it was achievable. It was only later that Attestor expressed reservations.

207. The fact that Dr Alanizi's position might have been more secure had there been further sources of funds does not mean that it was unreasonable for Decisive to believe there was a low risk of the Original Guarantee being called. I also come back to the point that the Attestor refinancing collapsed because of failure to satisfy conditions precedent and those conditions were substantively similar to conditions in the DRC and Decisive Term Sheets, and quite possibly standard terms. On that basis Dr Alanizi's position would have been no more secure had Decisive identified 20 other lenders, since they also would have required that those conditions be satisfied before they would lend.

208. Finally, it seems that Attestor's concerns stemmed from what they perceived to be a refusal to provide information on the part of Dr Alanizi. Decisive were unaware of what was happening until Attestor's email on 23 March 2020, after the Original Guarantee was executed. It was not suggested, and I think could not properly have been suggested, that Decisive ought reasonably to have been aware of the true position. As is obvious from the WhatsApps sent by Dr Alanizi on 20 and 23 March and Mr Chamat's email to Attestor, Dr Alanizi was presenting to Decisive the impression that any delay was due to Attestor moving slowly. Where its client was telling it that Attestor was receiving cooperation, Decisive had good reasons for believing that the conditions precedent would be satisfied and that Attestor would lend or, if it did not, that Decisive could source alternative finance.

## Reliance

209. I have found that the Yunak Representation and the Low Risk Representation were both made to Dr Alanizi, the former in the email from Mr Nacos on 26 February 2020, the latter at some time between 28 February and 1 March 2020. Dr Alanizi places no reliance on the Yunak Representation as such; it is part of his broader case on the Done Deal Representation, which I have rejected. I have found that the Low Risk Representation is not independently actionable, both because it was a statement of opinion and because Mr Chamat and Mr Nacos had reasonable bases for making it.

210. In case I am wrong on those final points it seems to me important to address reliance.

211. The Yunak Representation is a clear example of Dr Alanizi receiving a representation that he wanted to receive for the purposes of his discussions with Longbow. Mr Lewis submitted that this was irrelevant: the fact that Dr Alanizi wanted something said or the tone or language of a communication altered to improve his prospects of securing some concession from Longbow made no difference: if Decisive ultimately chose to make the representation, Dr Alanizi was entitled to rely on it.

212. With respect to Mr Lewis, that risks oversimplifying the position. It is certainly the case that a party is not prevented from relying on a representation simply because that party first suggested that the representation be made. However, if Dr Alanizi suggested that Decisive send an email knowing it would be sent on to Longbow and that email, to Dr Alanizi's knowledge, simplified the true position in a way that rendered the email incomplete, Dr Alanizi would struggle, as a factual matter, to show he relied on the strict terms of the email when he knew the nuance and detail of the full position.

213. In the case of the Yunak Representation I believe he was aware that what was presented to Longbow was a summary of the position. To the extent it was inaccurate, Dr Alanizi was aware of the detail and could not rely on the Yunak Representation in isolation. The Yunak Representation was followed almost immediately by the Decisive Term Sheet. That document was significantly caveated and subject to a number of conditions precedent. Even if he had believed the simplified picture regarding Yunak that was presented to Longbow, he knew within a matter of days, and well before he executed either of the Guarantees, that he was operating in a much more complex world.

214. By contrast I believe that he did rely on the Low Risk Representation. It is certainly the case that he was under significant pressure from Longbow, considered them to be "*ruthless*" and wanted to protect the Property against enforcement. He did not want to protect it at all costs, however. As he noted in his cross-examination in respect of the Amended Loan:

> I really –– when they said the 23 million is available, I really believed them, honestly, and I thought everybody was working to get –– because there is no point, if there is no 23 million available, there is no point of borrowing any money. Now the hospital has been sold. There is no commercial value

> of sending good money after bad money. There is no commercial point in it. If I knew that there is no deal, that Decisive were not coming on this deal 23, I swear I wouldn't have gone in any further because it doesn't make any sense at all.

215. That referred to the position in July, but it equally reflected the point he had made in his 27 March 2020 WhatsApp message to Mr Nacos and Mr Chamat when the issues with an Attestor refinancing started to emerge: he regretted giving the £2 million to Longbow. Put another way, the loss of the Property was not the worst case scenario for him; the worst case scenario was the loss of the Property and a personal exposure for millions of pounds under the Guarantees.

216. I accept that evidence. Had Dr Alanizi regarded the latter scenario as a realistic possibility, he would have accepted the former. Undoubtedly, the pressure from Longbow was significant, but it was not such as to cloud Dr Alanizi's commercial judgment. He was not simply stalling for time in the hope that something would turn up; the Original Loan was part of a wider strategy to refinance the Longbow Loan. Had he not believed in that strategy, he would, I am sure reluctantly, have let Longbow enforce against the Property. He guaranteed the Original Loan to ensure that Longbow was paid because he believed the refinancing would succeed on the basis of the comfort he received from Decisive in the form of the Low Risk Representation.

**Were the alleged representations made to Dr Alanizi before he executed the Amended Guarantee?**

217. The case here is put in three ways: that Mr Chamat repeated the representations in July 2020; in any event, the original representations were continuing representations; and Mr Chamat made the more limited July Done Deal Representation.

218. I reject the first suggestion entirely, both because the evidence in support of it is weak and contradictory and because it is inherently implausible given the changed circumstances.

219. Dr Alanizi's evidence on this has changed significantly over time. The Defence asserts that:

> The issuing by Dr Alanizi of an Amended Guarantee in respect of the [Amended Loan] was discussed on several phone, WhatsApp, and Zoom calls between Mr Chamat (acting on behalf of [Decisive]) and Dr Alanizi.
>
> On those calls, each of Mr Chamat [sic] repeated the representations that [Decisive] had made in respect of the Original Guarantee … because the wider refinancing (in full, alternatively in the sum of £20 million required under the Revised Standstill Agreement) was in the process of being arranged…

220. That case (or rather those cases, since they are advanced in the alternative) involves the representations being expressly made by Mr Chamat over a series

of calls either by reference to the original proposal of a full refinancing, or by reference to the shorter term partial refinancing that was being considered in July 2020 but had not been considered in March 2020.

221. By contrast, in his witness statement Dr Alanizi said that:

> When I signed this second guarantee, I still had in mind what John Nacos had said to me about decisive never needing to enforce the guarantee against me and that it was just a formality. I thought it continued to apply.

222. That is a very different case: that nothing was expressly stated, but that Dr Alanizi had in mind what Mr Nacos had said by reference only to the earlier transaction.

223. On cross-examination, Dr Alanizi referred to a conversation he had with Mr Chamat on 17 July 2020, his recollection of which he described as "*vivid*".

> A. This is what −− that's what we used for and because −− the other 500, and Elie make it very clear to me on the phone that he will −− he is not −− he will not look to my personal guarantee, he is −− my personal guarantee is unenforceable and he won't charge on the property.
>
> Q. You say Mr Chamat made that clear to you over the phone?
>
> A. Yes.
>
> Q. When do you say that happened?
>
> A. On the −− when we spoke during this −− during 17 July.
>
> Q. On 17 July?
>
> A. I think so, 17 July, maybe before. It's on that period, most probably 17 July.

224. That is a further case – one that Dr Alanizi had come to recall "*vividly*" – a single instance when the Restated Guarantee was discussed and it was in connection with the proposed loan on the Boiler House.

225. In the circumstances I found it impossible to accept that Dr Alanizi had an accurate recollection of anything being said to him. I fully accept that at the time he gave them he believed each of the three versions; but they cannot all be right, such that the strength of his belief does not help.

226. The likelihood of the various scenarios advanced by Dr Alanizi must be assessed by reference to the changed situation by July 2020. Attestor had pulled out and the deal had changed, such that Longbow would stay in place and the loan would be used to "*tidy up the financial position*", to use Mr Wade-Jones' words, with a view to securing a full refinancing in the future. Mr Chamat's confidence in the deal had fallen, partly in light of Attestor's expressed concerns, and he had started to avoid Dr Alanizi. Mr Salnikoff's work had

highlighted significant issues with the management of the refinancing. Mr Nacos, who seemed from the Decisive team to have had the most faith in the project, had departed.

227. I have already found that the No Risk, Done Deal and Mere Formality Representations were not made even when matters appeared to be progressing well in March 2020. In that sense they could not be repeated, and it seems to me even less likely that they were made against the bleaker backdrop of July 2020. There is no suggestion that the Yunak Representation was repeated.

228. It also seems to me much less likely that Mr Chamat would have repeated the Low Risk Representation because by this stage his sense of the risk was quite different. He had received negative signals from Attestor and Mr Salnikoff, both of whom he trusted. Mr Wade Jones, whom he also trusted, was talking about the need to "*tidy up the financial position*". Fresh security, in the form of the Boiler House, was being sought to unlock funding on the project. Things, plainly, were not running smoothly. It seems to me improbable that he would have encouraged Dr Alanizi in the same way that he had done in March. Indeed, he was actively avoiding him.

229. As such, I broadly accept the evidence in Dr Alanizi's witness statement: that he had in mind what Mr Nacos had said in March and this gave him comfort. Nothing was said directly to contradict the Low Risk Representation; but nor was it repeated.

230. That leads the question of whether any of the representations were continuing representations. Mr Lewis referred to the decision in *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15 where the Court of Appeal summarised the law at paragraph [51]:

> So if made for the purpose of an intended transaction it will continue until the transaction is completed or abandoned or the representation ceases to be operative on the mind of the representee. *With v. O'Flanagan* [1936] 1 Ch. 575, at 585; Spencer Bower, Turner and Handley (4th Ed.), paragraphs 61 and 62. Third, if at a time when it is continuing the representor discovers that the representation was false when made or has become false since he should correct it. The principle is most clearly expounded in the judgment of Romer L.J. in *With v. O'Flanagan* [1936] 1 Ch. 575, at 586 where he said:
>
> > If A with a view to inducing B to enter into a contract makes a representation as to a material fact, then if at a later date and before the contract is actually entered into, owing to a change of circum- stances, the representation then made would to the knowledge of A be untrue and B subsequently enters into the contract in ignorance of that change of circumstances and relying upon that representation, A cannot hold B to the bargain. There is ample authority for that statement and, indeed, I doubt myself whether any authority is necessary, it being, it seems to me, so obviously consistent with the plainest principles of equity.

> An alternative formulation, with which Romer L.J. agreed, appears in the judgment of Lord Wright M.R. at page 583. After citing with approval the judgment of Turner L.J. in *Traill v. Baring* 4 De G.J. & S. 318, at 329 he said that "the position is based on a duty to communicate the change of circumstances".

231. Both parties took a broader view of "the transaction" than simply the guarantee element, and I think they were right to do so. It would be odd in the extreme if representations that related to the refinancing as a whole were assessed only by reference to one aspect of it.

232. To my mind the transaction had substantially changed by July 2020. In particular:

    i) Attestor was no longer a viable lender.

    ii) It was no longer a complete refinancing of the Longbow loan but, rather, a more limited exercise involving a smaller amount and a shorter time period.

    iii) The purpose was not a full refinancing but a "tidying up" to allow for a refinancing.

    iv) Financing was being sought on the Boiler House.

233. In the circumstances, I find it impossible to accept that the transaction countenanced in July 2020 was the same as that being contemplated in March 2020.

234. Moreover, all of the changes were known to Dr Alanizi. He must therefore also have known that the risks had changed. In particular, he knew from Mr Wade-Jones that the prospects of financing even a smaller amount were not straightforward; he found it "*hard to see how this deal gets done on a non-recourse basis*."

235. Even if I am wrong on that, the only representation that could have been continuing was the Low Risk representation. For the reasons I have given, that was a statement of opinion and not actionable in itself. It carried with it no implied representation as to reasonable basis in July for the same reasons that it carried no such implied representation in March: Dr Alanizi knew the issues that the Borrowers faced.

236. That leaves the July Done Deal Representation. Again, I do not accept that any such representation was made for much the same reasons I have given above. I have already noted that Dr Alanizi's recollection as to what he was told has shifted over time and is unreliable. That is equally relevant to the July Done Deal Representation. By this stage Mr Chamat had lost confidence in the transaction and was seeking to minimise Decisive's financial exposure, first by lending the requested £1 million in instalments, then by not lending the full amount at all. Dr Alanizi was finding Mr Chamat much harder to reach, I believe because Mr Chamat was deliberately avoiding him. Mr Nacos was no

longer there to support the project. All of these factors make the July Done Deal Representation in my view unlikely.

237. Even were the words alleged used, they would suffer from the same issues that affect the original Done Deal Representation. Any such representation must be assessed in context, and the context was, as Dr Alanizi well knew, a highly contingent and increasingly difficult transaction. As such even if I am wrong, and such language was used, it changed nothing.

## Reliance

238. I accept that Dr Alanizi continued to draw comfort from what he had been told in March. I do not consider that it was reasonable for him to do so, however. The landscape had changed significantly for the reasons I set out above; he could not safely assume that the prospects of a refinancing, or therefore the risk that the Amended Guarantee would be called on, remained as before.

## Conclusion

239. This is a long judgment the effects of which can be shortly summarised.

240. In March 2020, Dr Alanizi executed the Original Guarantee in reliance on representations made to him by Mr Nacos and Mr Chamat, on behalf of Decisive, that the risk of it ever being called on was low. Mr Nacos and Mr Chamat said that on the basis that refinancing from Attestor was likely to follow, albeit there remained uncertainty while the conditions precedent to that transaction were unsatisfied. Mr Chamat also had confidence that he could secure alternate funding on similar terms should Attestor pull out for reasons unconnected with the specifics of the transaction.

241. Dr Alanizi may well have believed that he could draw further comfort from the strength of his relationship with Mr Nacos and Mr Chamat. He recognised that the Original Guarantee was enforceable, but thought that Mr Nacos and Mr Chamat would ensure it would not be enforced, even if technically sums were due under it. That was a commercial, not a legal, comfort; he knew he faced a potential liability and that the Original Guarantee was not some mere formality.

242. While Dr Alanizi relied on what he was told by Mr Chamat and Mr Nacos, those statements were statements of opinion and predictions as to the future. Dr Alanizi was equally well placed to make his own predictions on these questions; indeed, arguably he was better placed because the prospect of the Original Guarantee being called upon was tied to the prospects of refinancing, which in turn depended on conditions precedent being satisfied. Dr Alanizi knew far more than Decisive about the Property and the work being done (or rather, not done) to satisfy the conditions precedent. For those reasons no claim arises in respect of those statements.

243. By July 2020 the transaction and the risks associated with it had changed. Again, Dr Alanizi knew this. No comfort, commercial or otherwise, was given to him this time by Mr Chamat. He relied on what he had been told in March. That was a mistake; the changing terrain meant he could not safely do so. He

had at his disposal the fuller picture but chose not to look at it. He cannot now turn to the law of negligence or the 1967 Act to correct that choice.

244. The Original Guarantee and the Restated Guarantee were not induced by any form of actionable misrepresentation. Accordingly, they were and are valid obligations of Dr Alanizi and, in the absence of payment of the sums due under the Amended Loan by the Borrowers, he can be called on by Decisive to honour them.