Neutral Citation Number: [2022] EWHC 3085 (Comm)

Case No: CC-2020-MAN-000086

IN THE HIGH COURT OF JUSTICE.
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (QBD)

Date: 2 December 2022

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court at Manchester

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Between :

(1) ELENDRA RAJA
(2) PIRAL RAJA
(3) PETER JONATHAN THOMPSON
(4) ALISON THOMPSON

Claimants

- and –

(1) IAN HOLDEN
(2) SPARKLE DEVELOPMENTS LIMITED
(3) ROBERT JACKSON
(4) ROSEHELM LIMITED

Defendants

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Mr David Uff (instructed by **Direct Access**) for the **Claimants**
Ms Lesley Anderson KC (instructed by **Clarke Willmott LLP**) for the **Third and Fourth Defendants**

Hearing dates: 13,14,15,16 September, 11 October 2022

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APPROVED JUDGMENT

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to the National Archives. The time and date for hand-down is deemed to be 10 am on 2 December 2022.

His Honour Judge Halliwell

(1) Introduction

1. This claim arises from an aborted development on a site ("**the Site**") encompassing five houses at Grundy Fold Farm, Horwich near Bolton. Once the houses had reached an advanced stage of construction, the local planning authority – Bolton Council (**"the Council**") – served an enforcement notice requiring demolition. After an unsuccessful appeal, the houses were demolished.

2. The Defendants were each involved in the acquisition, development and disposal of development plots although the role of each Defendant was different. The First and Third Defendants ("**Mr Holden**" and "**Mr Jackson**") are individuals. The Second and Fourth Defendants ("**Sparkle**" and "**Rosehelm**") are private limited companies. At all material times, Mr Holden was and is a director and shareholder of Sparkle, and Mr Jackson was and is a director and shareholder of Rosehelm.

3. The Claimants are the purchasers of two plots on the development. They claim damages for breach of contract, fraudulent misrepresentation and negligence. Their claims against Mr Jackson and Rosehelm were compromised shortly before trial.

4. Mr Holden and Sparkle dispute the claim. Each cause of action is in issue.

5. At the trial before me, Mr David Uff, of counsel, appeared on behalf of the Claimants and Ms Lesley Anderson KC appeared on behalf of Mr Holden and Sparkle. Having compromised the claim, there was no reason for Mr Jackson and Rosehelm to participate further in these proceedings; they did not attend and were not represented at trial.

(2) Background

6. Grundy Fold Farm was historically in the ownership of Mr and Mrs Andrew Robert Pendlebury. On 29 August 2014, Bolton Council granted Mr Pendlebury planning permission ("**the Planning Approval**") to develop the Site by extending an existing farmhouse, demolishing some outbuildings and erecting four new houses. This was subject to conditions providing for the development to be carried out in complete accordance with separate plans for each residential unit ("**the Approved Plans**"). There was also a condition prohibiting "extensions, porches, garages, outbuildings, sheds, decking, hardstandings, fences, gates, walks, dormers or…other alterations to the roof…"

7. The Defendants entered into negotiations to purchase the Site and instructed KBL Solicitors ("**KBL**") as their solicitors in connection with the acquisition of the Site and disposal of plots.

8. On 20 August 2015, Mr and Mrs Pendlebury contracted to sell to the Defendants their freehold title to the whole of the Site. The Defendants were jointly identified, in the contract, as buyer. However, it was provided that, at the Defendants' direction, Mr and Mrs Pendlebury could be required to transfer the title, whether in whole or part, to one or more of the Defendants themselves or their nominees. The purchase price was £1,300,000 and the contractual completion date was defined so as to be no later than 31st October 2015.

9. The Defendants divided the Site into five building plots. Messrs Holden and Jackson then formed a company, Grundy Hall Farm Limited ("**Grundy Hall**"), to act as a vehicle for ownership of the access road and common parts ("**the Common Areas**"). They also earmarked separate plots for themselves and marketed the remaining plots.

10. On 19 October 2015, Mr and Mrs Pendlebury transferred Plot 1 to Sparkle, Plot 2 to Mr Jackson and Plot 4 to Mr Holden. On the same day, Plot 3 was transferred to Rosehelm, then re-transferred to Mr and Mrs Wayne Heaton. Plot 5 comprised the original farmhouse. On 20 November 2015, it was transferred to Sparkle and Rosehelm.

11. Some, but not all, of the registered transfers were admitted in evidence. However, it appears the original purchase price of £1,300,000 was apportioned as to £200,000 each for Plots 1- 4 and £500,000 for Plot 5. Having paid £200,000 for Plot 3, Rosehelm received £500,000 from Mr and Mrs Heaton for the same plot.

12. On 4 December 2015, Grundy Hall was registered as freehold owner of the Common Areas under Title MAN 62978. In all likelihood, the land was initially transferred to Rosehelm and Sparkle, then re-transferred to Grundy Hall. However, the route of devolution is obscure.

13. Before the Defendants acquired the Site as a whole, the First Claimant ("**Mr Raja**") had already entered into discussions with Messrs Jackson and Holden with a view to the purchase of a plot and construction of a new house.

    13.1. By email dated 19 May 2015, Mr Holden advised Mr Raja that there would be "two elements", namely the purchase of a building plot and "a building contract with *ourselves* [to] be signed prior to the land purchase". He stated that "the building

contract will be to construct a wind and watertight "shell" and that "the design of the house will be similar to the proposed house" on plot 4 of their "scheme as discussed (planning authorities permitting)". The price would be £500,000 "based on the current drawings" and "a reservation deposit of £50,000" would be required to be held by" Sparkle…as stakeholder".

13.2. By letter dated 5 October 2015 to Mr Raja, Mr Holden confirmed that the Defendants were prepared to sell Plot 1 to him for £500,000 as part of a "package" to include all professional fees, utilities connections, drainage, landscaping and roads.

13.3. Mr and Mrs Raja instructed Betesh Middleton Law ("**BML**") to act as their solicitors. By letter dated 7 October 2015, BML advised KBL that, "before signing any contract for the purchase of the land, there needs to be a contemporaneous building contract between him and the builder…"

13.4. On 16 October 2015, KBL emailed BML, in reply, to confirm that Mr Holden was the developer and would be dealing with the construction contract himself, not through a solicitor. They attached a form of JCT contract for the building works, bearing Mr Holden's signature, in which Sparkle was named as contractor and advised BML to contact Mr Holden direct.

14. Contrary to the stance initially taken in BML's letter dated 7 October 2015, contracts for the purchase of Plot 1 were not signed at the same time as the building contract. Moreover, Mr Holden and Sparkle were never named as parties to a building contract. They are not building contractors. Any suggestion to the contrary is plainly unsustainable.

15. However, Mr Jackson is a building contractor with upwards of 40 years' experience as such. Mr and Mrs Raja duly entered into a JCT contract ("**the Plot 1 Building Contract**") for the construction of a new house on Plot 1. They did so with Mr Jackson, not Mr Holden nor Sparkle, and they signed the same, on 30 March 2016, prior to exchange of contracts for the purchase of the plot. It was based on the form of a contract previously made available by Mr Holden and provided that the house was to be constructed "up to wind and watertight stage in accordance with" the Planning Approval, itself incorrectly denoted as "planning permission no. 91673/4", rather than 91673/14. Drawings were attached. No doubt, these included the approved plans in respect of Plot 1 including separate ground, first and second floor plans and elevation plans.

16. Mr and Mrs Raja did not themselves purchase the freehold title to Plot 1. The freehold title was conveyed to PKR Properties Limited ("**PKR**"), a company controlled by Mr Raja's uncle, which granted a long lease to Mr and Mrs Raja.

17. On 22 April 2016, PKR entered into a contract with Sparkle for the purchase of Plot 1 at a price of £500,000. Completion appears to have taken place on the same day. By a lease dated 8 September 2016, PKR then demised the property to Mr and Mrs Raja for a term of 200 years at a premium of £40,000 and annual rent of £5000.

18. By this stage, the Third and Fourth Claimants ("**Mr and Mrs Thompson**") had decided to buy Plot 5.

    18.1. Mr and Mrs Thompson only became aware of the proposed development in late 2015. In January 2016, they met Mr Holden at the Site and advised him they were interested in purchasing Plot 5. They were advised that Mr Pendlebury was still resident in the farmhouse and would be entitled to stay there until April but they could purchase the plot for £500,000. By an email dated 28 January 2016, Mr Holden advised Mr and Mrs Thompson he was aware they "would prefer a slightly smaller [house] than the one that currently has planning consent" and invited them to work with the Defendants' architects "to design [their] own house" on the basis that "the price for the construction of a wind and watertight shell [would] be calculated at £100 per square foot and stage payments as the construction progresses". Again, they were advised that this would include works of landscaping and the "widening of the access road".

    18.2. Mr and Mrs Thompson then paid Mr Holden a reservation deposit and, when confirming receipt, Mr Holden confirmed, in an email dated 1 February 2016, that "the construction of a double garage in the same materials as your new house is… included in the land and construction package".

    18.3. Mr and Mrs Thompson instructed Mr Tom Hollingsworth of Forbes solicitor to act on their behalf in connection with the intended transaction.

    18.4. On 27 May 2016, they exchanged contracts with Rosehelm and Sparkle for the purchase of Plot 5 at a price of £500,000. They completed on the same day. Three days later, on 30 May 2016, they signed a JCT contract ("**the Plot 5 Building Contract**") with Mr Jackson. Again, this was for the "construction of new house"

notwithstanding that the Planning Approval was for "extension of existing farmhouse…" on Plot 5.

19. By this stage, Mr Jackson had already commenced works on the Site. This included the works on Plot 1. At the latest, the works on Plot 5 are likely to have commenced shortly afterwards. It is apparent from Mr Holden's evidence that these works initially involved the construction of a new house alongside the old farmhouse. A substantial amount of progress had been made by the middle of August 2016. The farmhouse was subsequently demolished but the demolition works cannot have commenced before September 2016.

20. Mr Jackson instructed Mr Russell Woods ("**Mr Woods**") of Good and Tillotson Ltd ("**GT**") to act as architect. This included the preparation of building regulations drawings for construction purposes and site inspections. However, at least some of Mr Woods' invoices were addressed to Sparkle. Mr Woods was not called as a witness but it appears from an email dated 5 September 2018 from Mr Woods to Mr Raja that Mr Woods' initial instructions did not encompass the planning applications.

21. As the works progressed, the Claimants made a series of stage payments. Although Rosehelm was not named as a party to either Building Contract, Rosehelm invoiced the Claimants and was paid on that basis. Mr and Mrs Raja took out a loan from Svenska Handelsbanken AB ("**SHB**") in the sum of £992,000 to fund the development costs in respect of Plot 1 and borrowed the additional sum of £58,000 to repay sums advanced by Yorkshire Bank. SHB then appointed the Vinden Partnership as surveyors to monitor the works. Funds were released once each stage of the works was certified as complete. Mr and Mrs Thompson made stage payments on 27 September, 8 November, 12 December and 28 December 2016.

22. However, officers of the Council became aware the Site was not being developed in accordance with the Planning Approval. Mr Jackson had demolished the Farmhouse in its entirety and the new houses, under construction, were substantially larger, in footprint and volume, than the permitted development. They also transgressed the lawful baseline of development.

23. In early January 2017, Messrs Holden and Jackson attended a Site meeting with Ms Helen Williams, the Council's Principal Development Officer (Planning Control) at which Ms Williams advised them that they would need to submit a new planning

application if the new houses were to be retained as built. This was confirmed in an email message dated 10 January 2017.

24. By then, Mr Holden had decided to dispose of the house originally earmarked for him on Plot 4. On 13 January 2017, he transferred the plot to Mr and Mrs Hassan Ayirgan ("**Mr and Mrs Ayirgan**") for a purchase price of £450,000 and, on 7 February 2017, they were registered as proprietors.

25. On 8 March 2017, Mr Holden submitted an application for retrospective planning permission in respect of the new development. On 30 June 2017, this was refused.

26. Meanwhile, on 27 June 2018, the Council served an enforcement notice requiring demolition of each house on the Site. This was appealed and, following an inquiry on 15-18 March 2021, the appeal was dismissed on 19 May 2021.

27. On 3 October 2020, the Council issued a certificate of existing lawful development for the commencement of works under the Planning Approval itself. On this basis, the construction of new houses is permitted in respect of Plots 1-4 if completed in accordance with the Planning Approval. Following the demolition of the farmhouse, this does not apply to Plot 5 although this is currently subject to review.

28. As it happens, all five houses have been demolished.

29. On 8 December 2020, the Claimants commenced proceedings against all four Defendants for damages for breach of contract, misrepresentation and breach of an assumed duty of care.

30. On 25 August 2022, the claims against Mr Jackson and Rosehelm were compromised. This was achieved by a Tomlin order under which the relevant claims were stayed subject to their scheduled obligations to pay the Claimants some £712,500 by instalment supported by a charge over Plot 2. It was provided, in the schedule, that the terms of settlement were confidential subject to the order of a court of competent jurisdiction. During the trial, I made an order admitting the schedule as evidence.

(3) The Witnesses

31. All four Claimants each gave evidence. Mr Holden also gave evidence. There were no other witnesses. Mr Jackson's witness statement dated 14 July 2022 was admitted but, the proceedings against him having been compromised, he did not attend to give

evidence. I have read and considered Mr Jackson's witness statement. However, in view of the fact that his evidence was not tested in court, I have accorded it minimal weight.

32. Mr Raja gave evidence, at some length, about his discussions with Messrs Holden and Jackson, his contractual commitments and the evolution of the planning issues. He was an excitable witness who is understandably aggrieved about the position in which he and his family now find themselves following the demolition of their intended home. He believes Messrs Holden and Jackson are personally responsible for this having encouraged him to enter into contractual commitments under the impression that he could freely build the house according to his own specification. This is not without reason. However, he frequently sought to argue his case rather than addressing the factual questions addressed to him and some of his evidence was exaggerated. Where his evidence was based on a factual account of the less contentious issues, I am satisfied it was reliable. Moreover, in general terms, I accept Mr Raja's evidence that Mr Holden gave him the impression, at an early stage, that Messrs Holden and Jackson were collaborating as developers and thus dealt with Mr Raja's enquiries on this understanding. On this particular issue, I prefer Mr Raja's evidence to the evidence given of Mr Holden. However, where uncorroborated, I have generally exercised substantial caution when considering Mr Raja's evidence on the more contentious issues.

33. Mrs Raja's evidence was at much shorter length than her husband since he was more heavily involved in the discussions with Messrs Holden and Jackson and the subsequent evolution of the project. It emerged that her personal knowledge of the contractual discussions with Messrs Holden and Jackson was only limited and, at times, her evidence was muddled and confused, for example on the chronological sequence. However, she was able to give helpful evidence about the evolution of the planning issues and the stance taken by the Council.

34. Mr Thompson gave evidence about the Thompsons' initial discussions with Mr Holden and Mr Jackson and, subsequently, the purchase of Plot 5, the Plot 5 Building Contract, the progress of the development works and the assurances they were given about planning matters. However, his evidence was at times confused and his recollection of detail was often imprecise and unreliable. Where clear and plausible or reasonably corroborated by his wife's evidence, I have accepted his account. On this basis, I accept his account in relation to the box entry on the Plot 5 Building Contract in relation to responsibility for planning applications and his evidence about Mr Holden's pre-contractual assurances on

planning matters. However, I have otherwise exercised a substantial degree of caution when considering Mr Thompson's evidence.

35. Mrs Thompson's evidence substantially overlapped with the evidence of her husband. She had a better recollection of the detail and her testimony was generally clearer and more reliable than his. She was mistaken about two significant aspects. Firstly, her initial recollection was that the farmhouse was demolished prior to the end of May 2016 when she bought the land and entered into the Plot 5 Building Contract. She now accepts this is incorrect. Secondly, she has continuously maintained that the building work was carried out by or on behalf of Mr Holden and appeared surprisingly reluctant to concede otherwise when challenged on the point in cross examination. These are significant errors of recollection and perception. However, I am satisfied that she was generally an honest and reliable witness, and I can rely on her evidence about Mr Holden's assurances that everything was in place in terms of planning approval.

36. Mr Holden was examined at length about his role in connection with the development, his written and oral communication with the Rajas and Thompsons, the progress of the development and the evolving planning issues. He was an intelligent and forceful witness. However, his account was of mixed quality. Whilst he has substantial experience as a property developer, he is not a builder and I accept his evidence that it was never envisaged that he or his company, Sparkle, would carry out the building works. There was never any good commercial reason for Mr Jackson to carry out the building works on his behalf and he never contemplated that Mr Jackson would do so. Following this, I accept his evidence that the building works were carried out by Mr Jackson, not Mr Holden. There is also substance in his case that, once the Rajas and the Thompsons entered into the Building Contracts with Mr Jackson, it was Mr Jackson's responsibility, not his, to make all necessary applications to the planning authority.

37. However, in cross examination, Mr Holden continually sought to understate his role in the project. From the outset, it is plain that the development was conceived as a joint collaboration between Messrs Holden and Jackson and their respective companies. Mr Holden had an important role in determining the structure of the scheme for acquiring and disposing of properties, and attending to matters such as access and marketing. Most importantly, he attended the discussions and meetings with Mr Raja and Mr and Mrs Thompson and personally entered into much of the written communication which have given rise to the claim. Throughout this period, he was aware of the conditions of the

Planning Approval. In the light of this, he was willing to discuss the project with the buyers and give them the impression they would be able to design their own houses or at least be consulted by the Defendants' architects in connection with such designs.

(4) The Claim and the rival contentions of Mr Holden and Sparkle

38. The Claim is for damages for breach of contract, misrepresentation and breach of an assumed duty of care.

39. The contractual claim is based on the proposition that the contracts of sale and the Plot 1 and Plot 5 Building Contracts ("**the Building Contracts**") formed part of a "development package" incorporating a separate overarching "development contract" between the parties in respect of each plot. It is alleged that it was an express or implied term of each such contract that houses on each plot "would be constructed in accordance with planning controls" and that, in breach of contract, the houses on each plot were "constructed in wholesale disregard of planning controls".

40. If the Building Contracts did not form part of an overarching development contract, the Claimants contend that Mr Holden or Sparkle are parties to each Building Contract. On this basis, it is contended they committed breaches of the contractual prohibition on commencement of work without planning permission.

41. By reason of the Defendants' breaches of the overarching development contract or the Building Contracts, the Claimants seek damages in respect of the costs incurred by them in seeking to mitigate their losses and/or with a view to putting them in the position in which they would have been had they not entered into the contracts. Originally, they sought damages based on their expectation loss. However, they have deleted this part of their claim by amendment so as to focus on their reliance loss contending that "the contractual measure of loss should mirror the tortious measure".

42. The misrepresentation claim encompasses "representations", on the part of Messrs Holden and Jackson, that the Claimants "could design their own dwelling…", "everything was in place in terms of planning controls" and "the [building] contractor would not start work before any planning permission that was needed had been received". If these qualify as representations of fact, it is alleged that they were false and made fraudulently or negligently. Having thus induced the Claimants to enter their contractual commitments, it is alleged that Messrs Holden and Jackson were liable to the Claimants

in damages calculated so as to restore them to the position in which they would have been had it not been for the misrepresentations.

43. The assumed duty of care is pleaded as a duty to provide accurate information. Messrs Holden and Jackson are each alleged to be in breach of duty by providing inaccurate information. The inaccurate information is not identified in the Claimants' statement of case but it is alleged to pertain to their rights to have a house constructed to their own design and the Defendants' disregard of planning controls. In the Claimants' Amended Particulars of Claim, no distinction is drawn between their losses owing to this breach and their losses owing to the putative misrepresentations.

44. Of course, the claim against Mr Jackson and Rosehelm has now been compromised. However, Mr Holden and Sparkle have put in issue each of the essential elements of the Claimants' case. They deny that they entered into an overarching development contract with the Claimants. They deny that they were party to the JCT contracts. They also deny that Mr Holden made the putative misrepresentations and, on the hypothesis he did so, they deny that the Claimants relied on them. The assumed duty of care is denied. Having taken the point that the inaccurate information is not identified in the Claimants' Amended Particulars of Claim, Mr Holden and Sparkle deny that they can be held liable for information provided only by the other parties.

(5) The Claimants' contractual claims

(a) The putative development contract

45. The Claimants maintain that Messrs Holden and Jackson acquired the Site with their companies, Sparkle and Rosehelm, as a joint venture. Their claim to an overarching development contract is founded on the following allegations in Paragraphs 13-17 of the Amended Particulars of Claim.

> "13. The object of the joint venture was the sale of a development package to residential purchasers of Plots 1-5 and a division of the spoils between the Defendants.
>
> 14. Each development package was to include the land comprised in the plot, the construction of a dwelling to the stage of a wind and watertight shall, landscaping, the provision of access roads, the installation of utilities and other infrastructure to complete the common parts of the development.

15. The Defendants are each party to a "development contract" made by Ian Holden and Robert Jackson with the Rajas in respect of Plot 1 and with the Thompsons in respect of Plot 5.

16. The development contracts were part oral and part written and part evidenced by writing as set out below.

17. The development contracts each included the following components-

    (1) the sale of the Plot;

    (2) the construction of a new dwelling (to a wind and watertight stage);

    (3) the construction of driveway and garage;

    (4) the works of landscaping which were a condition of the planning permission 91673/14;

    (5) the completion of the common parts in accordance with an agreed specification which included the provision of access roads, the installation of utilities and other infrastructure."

46. It is implicit that the written provisions of the putative development contract are partly incorporated in the written contracts for the sale of the plots and the Building Contracts. In addition, the Claimants specifically rely, in the Amended Particulars of Claim itself, on the following written exchanges, namely email messages dated 19 May, 6 October 2015, 28 January, 1 February, 3 March, 23 May 2016 and a letter dated 6 October 2015 respectively between Mr Holden and Mr Raja, Mr Jackson and Mr Raja, Mr Holden and Mr Thompson, again Mr Holden and Mr Thompson, Mr Holden and Mr Raja, and Mr Holden and Mr Raja.

47. In the Amended Particulars of Claim, the Claimants also refer to discussions at various times between Messrs Holden and Jackson, separately and together, with Mr Raja and Mr and Mrs Thompson. It is implicit that, with the contemporaneous documentation, these discussions somehow gave rise to the development contract.

48. In Paragraph 77 of the Amended Particulars of Claim, it is pleaded that "it was a[n express] term of each development contract that the dwellings (and the development) would be constructed in accordance with planning controls", relying in particular on the email dated 19 May 2015 from Mr Holden to Mr Raja, the Building Contracts and the email dated 6 October 2015 from Mr Jackson to Mr Thompson. They also rely on the

words and conduct of Mr Holden and Mr Jackson. By way of alternative, it is pleaded in Paragraph 79 that "the term is implied as both obvious and necessary to the development contract".

49. Finally, it is pleaded – in Paragraph 84 – that "in breach of each development contract plots 1 and 5 were constructed without any planning approval and the development was constructed in wholesale disregard of planning controls".

50. In a wide sense, a joint venture is a commercial agreement or understanding between two or more parties to collaborate with a view to achieving a particular outcome or objective. It does not necessarily require them to form a specific legal vehicle, such as a company, nor does it require them to enter into a partnership. Contrary to Mr Holden's evidence, it is overwhelmingly clear that the relevant land at Grundy Fold Farm was, indeed, purchased by Messrs Holden, Jackson and their respective companies, Sparkle and Rosehelm, pursuant to a joint venture in the wider sense. They purchased the land with a view to dividing it into development plots, acquiring two plots for themselves and disposing of the remaining plots to third parties. As part of the overall scheme, they formed Grundy Hall as a vehicle for the acquisition of the access road and the common parts. It was apparently Mr Holden's intention that shares in Grundy Hall would then be allocated to the plot owners. At least, Mr Holden indicated as much in answer to a question from me. Had the matter been dealt with properly, Grundy Hall could then have been expected to grant rights of way to the plot owners and their successors in title.

51. No doubt Mr Holden also advised the parties, in broad terms, about the overall scheme including the sale and purchase of the plots, the building contracts and the construction of the access road. They were also advised of the projected time scale for development. The parties were already aware that planning permission had been obtained. However, they could work alongside the development architects to design their own houses. No doubt, this was an attractive feature of the whole project. Nevertheless, under each Building Contract, the builder would be under an obligation to apply for all necessary planning and building regulations approval. This is apparent from the written exchanges above dated 19 May, 6 October 2015, 28 January, 1 February, 3 March, 23 May 2016 and 6 October 2015. It was also consistent with the impression Mr Holden gave in his discussions with the parties throughout this period. To the extent Mr Holden sought to suggest otherwise, I reject his account.

52. However, it does not follow that Mr Holden or Sparkle entered into an overarching development contract with the Claimants. I am satisfied that they did not do so and, in the hypothetical event that such a contract somehow came into existence, there was no evidential basis for it to have incorporated a term providing – in parallel with the Building Contracts - for the houses to be constructed in accordance with planning control. This is for the following reasons.

53. Firstly, there are serious conceptual defects in the Claimants' case as advanced. If the parties entered into an overarching agreement, as pleaded, this encompassed an executory contract for the disposition of an interest in land and a set of entirely separate contractual undertakings for development. This is precluded by an "entire agreement" clause in the written contracts for sale and the provisions of *Section 2* of the *Law of Property (Miscellaneous Provisions) Act 1989.*

54. The entire agreement clause was in the following terms.

> "This Contract contains the entire agreement between the parties and incorporates all the terms agreed between them for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 Section 2 and there are no other terms or provisions agreed prior to the date of this Contract which have not been incorporated into this Contract. The Buyer acknowledges and agrees that in entering into this Contract, it does not rely on and shall have no remedy in respect of any statement, representation, warranty, collateral agreement or other assurances (whether negligently or innocently made) of any person (whether party to this Contract or not) other than as expressly set out in this Contract…or in any written replies which the Seller's Conveyancer has given to any written enquiries raised by the Buyer's Conveyancer before the date of this Contract. Nothing in this clause shall, however, operate to limit or exclude liability for fraud".

55. In *Inntrepreneur Pub Co v East Crown Ltd [2000] 3 E.G.L.R. 31 at [7]*, Lightman J stated that "…such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document." This is a well-established principle of law precluding the

formation of an overarching contract in the terms alleged. The written contracts of sale plainly didn't include development obligations and it is no part of the Claimants' case that the Defendants entered into collateral contractual warranties for the development.

56. Moreover, the putative development agreements cannot have complied with the provisions of *Section 2* of the *Law of Property (Miscellaneous Provisions) Act 1989* if they incorporated contracts for the disposition of an interest in land. In each case, completion took place on the same day as exchange of contracts. The Claimants' case is obscure as to whether the putative development agreements took effect on exchange of contracts, completion or, indeed, at some other time such as when the parties signed the Building Contracts. In answer to questions from me, Mr Uff left each possibility open. Mr Raja signed the JCT contract for Plot 1 upwards of three weeks before PKR contracted to purchase the plot itself. Conversely, Mr and Mrs Thompson signed their JCT contract some three days after the purchase of Plot 5. In any event, there was no declaration against merger in the contracts for the sale of land. If the putative development agreements were executory only, they were subject to *Section 2* of the *Law of Property (Miscellaneous Provisions) Act 1989* and the entire agreement clauses applied. If they took effect *after* exchange of contracts, the entire agreement clauses would have merged in the transfers on completion. However, completion took place immediately after exchange of contracts. There would thus have been no room for the incorporation of additional terms between exchange of contracts and completion. In any event, the transfers were subject to the statutory formalities in *Section 53* of the *Law of Property Act 1925* and they were in simple terms providing for transfer of the registered title with full guarantee. They did not contain development conditions nor could they have been expected to do so.

57. Secondly, the parties cannot, together, have been subject to a single overarching development agreement comprehensively dealing with the acquisition and development of each plot. Mr and Mrs Raja did not contract with the Defendants for the purchase of an interest in land. Plot 1 was sold to a third party, PKR, which is not named as a party to the agreement. Conversely, Mr Holden was not named as a party to either Building Contract nor, indeed, was Sparkle or Rosehelm. Nor, indeed, were they signatories. In each case, "R Jackson Construction" was named as Contractor and Mr Jackson, not Mr Holden, was the signatory. This is not surprising since Mr Jackson was and is an experienced builder. Mr Holden has experience as a property developer but not as a

builder. Sparkle and Rosehelm are in the business of owning and letting property. However, they are not in business as building contractors.

58. In his submissions before me, Mr Uff submitted that Mr Jackson entered into the Building Contracts as agent for himself and Mr Holden. However, there was and is no evidential foundation for this submission. It is true that, in September 2015 or thereabouts, Mr Holden provided Mr Raja with a copy of a pro forma JCT agreement with Sparkle named as contractor. This agreement was signed personally by Mr Holden himself. However, it is inherently unlikely Mr Holden ever contemplated doing the works himself or engaging Mr Jackson as an employee. I am satisfied it was always envisaged Mr Jackson would do the works in his personal capacity. The agreement was provided to Mr Raja in September 2015 so as to provide him with particulars of the intended project and a template to assist him in understanding his potential commitments and obtaining finance.

59. Thirdly, in my judgment there is no evidential basis for the proposition that the putative development agreement contained terms or conditions pertaining to planning distinct from the conditions of the Building Contract. The parties engaged solicitors to act on their behalf but their retainer appears not to have encompassed the negotiation of comprehensive contractual commitments, including commitments in relation to matters such as access rights and cross easements. Ultimately, the parties chose to proceed by purchasing or procuring the purchase of plots and entering into a separate building contract. They did so on the basis that each transaction was separate, not part of a single composite bargain. The Building Contracts imposed specific obligations on Mr Jackson in relation to the quality and specification of the works and provided, in terms, that Mr Jackson would apply for any necessary planning permission and building regulation approval and would not start works until planning permission was obtained. However, there is no good reason to treat each transaction as a constituent part of a single overarching agreement. Moreover, in view of the range of Mr Jackson's contractual obligations in the Building Contracts, there is no room for the implication of a term, in any overarching agreement, that the houses would be built in accordance with planning control. Such a term would plainly not satisfy the business necessity test identified by the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72.*

60. Since the Claimants' case that the parties entered into an overarching development contract is without evidential foundation and, in the hypothetical event that they had

purported to enter into such an agreement, the same would not have contained planning duties or obligations beyond Mr Jackson's contractual obligations in the Building Contracts, this part of the Claimants' case fails.

(b) The Building Contracts

61. The Claimants' Particulars of Claim has been amended so as to rely on the Building Contracts as a separate contractual agreement if, "contrary to the primary claim, the [Building Contract] was not a component or subsidiary part of the development contract" (Paras 80 and 83). Although initially pleaded simply as contracts signed by Mr Jackson, as "contractor", and Mr Raja (Para 36) and the Thompsons (Para 56), as "customer", claims on both contracts are now advanced against Mr Holden in addition to Mr Jackson. It emerges, later in the amended statement of case, that this is on the basis Mr Jackson "made the [Building Contracts] as principal and as agent on behalf of [Mr Holden] and/or Sparkle and/or Rosehelm…" (Para 87).

62. In Paragraphs 78(3) and 81(3), the Claimants contend that there were terms of each Building Contract that "the contractor [would] apply for any planning permission, building regulations approval and party consents that may be needed…" and would "not start work…before any planning permission and party wall consents…needed [were] received…". These parts of the pleading essentially incorporate Paragraphs B1 and B2 of the Building Contracts subject to a qualification in respect of Paragraph B1 where the customer indicates otherwise by ticking a box.

63. In Paragraph 85, it is alleged that "in breach of each [Building Contract], Plots 1 and 5 were constructed without any planning approval". This can be treated as a general reference to the works of construction on the plots and implicitly encompassed the site clearance and demolition works. To her credit, Ms Anderson did not take any point to the contrary.

64. It is to be emphasised that, following compromise of the claims against Mr Jackson and Rosehelm, the Claimants' extant case is limited to the claims against Mr Holden and Sparkle only. On this basis, the claims under the Building Contracts fail. The Building Contracts were signed by Mr Jackson only. He did so as contractor in the name of R Jackson Construction. Mr Holden and Sparkle were not named as contractors nor was there anything in the contracts to suggest Mr Jackson had purported to sign the document on their behalf. There is no evidence they authorised Mr Jackson to act as their agent nor

is there convincing evidence they represented that he would have their authority to do so. Whilst Mr Holden has experience as a property developer, he is not a builder and there could have been no good commercial reason for Mr Holden or Sparkle to contract as a builder nor is there any contemporaneous documentation to suggest that they did so. It is true that, prior to the contract, Mr Holden provided Mr Raja with a signed pro forma document in which Sparkle was named as contractor. However, the obvious explanation for this is the one provided by Mr Holden himself, namely that it was provided as a template for Mr Raja and a point of reference when seeking to obtaining finance.

65. It is also a feature of the transaction that the Claimants were invoiced for the works by Mr Jackson or his company, Rosehelm, not by Mr Holden or Sparkle. There is no suggestion it was ever contemplated Mr Holden would invoice the Claimants for the works.

66. For the avoidance of doubt, however, I am satisfied that the Claimants never ticked the box on either Building Contract to indicate they would apply for planning permission or assume responsibility for doing so. If, as appears to have happened, a box on at least one of the contracts has been ticked to suggest otherwise, I am satisfied this was added after the parties entered into the Building Contracts and has no bearing on the Claimants' contractual obligations.

67. For the sake of completeness, in the hypothetical event Mr Jackson had somehow entered into the Building Contracts on behalf of Mr Holden or Sparkle, there could be no room for doubt that, by failing at the outset to apply for or obtain planning approval to demolish the farmhouse and build new houses in accordance with the revised plans for Plots 1 and 5, they would have committed breaches of their planning obligations in the JCT Contracts.

68. However, I am thus satisfied that neither Mr Holden nor Sparkle were party to the Building Contracts and, on this basis alone, this part of the claim against them fails.

(6) Misrepresentation

69. The Claimants all make a claim against Mr Holden based on misrepresentation. The essential factual basis for this part of their claim is set out in Paragraphs 64-74 and 88-101 of their Amended Particulars of Claim although it overlaps with their claim, in Paragraphs 75-76 and 102-104, founded on the assumption of a duty of care.

70. Since *CPR 16.4(1)(a)* provides that a party's particulars of claim must include a statement of the facts on which he relies – albeit a concise statement – this is the document to which

I must turn for the factual parameters of the Claimants' claim. There is, of course, an important distinction between the facts on which a claimant relies and the evidence by which they are to be proved, *Hague Plant v Hague [2014] EWCA Civ 1609* at *[76]*. However, a misrepresentation must be specifically pleaded and *Paragraph 8.2(1)* of the PD to *Part 16* of the *CPR* requires any allegation of fraud to be specifically set out. A claimant who alleges fraud must also give particulars, in his statement of case, of such facts, matters and circumstances as are sufficient to identify the fraud, *Three Rivers DC v Bank of England [2001] UKHL 16, Paras 183-187.*

71. As pleaded, the putative misrepresentations are each in essentially the same terms although the origins for Mr Raja's claim – in particular the documentation and discussions on which it is based – are generally distinct from the origins of Mr and Mrs Thompson's claim.

72. There are three putative misrepresentations, namely "representations" that:

    72.1. they "could design their own dwelling including in terms of the build, siting, footprint, volume and orientation" (the "**First Representation**") (Para 64);

    72.2. "everything was in place in terms of planning control" (the "**Second Representation**") (Para 69); and

    72.3. "the contractor will not start work before any planning permission that is needed has been received…" (the "**Third Representation**")(Para 74).

73. It is implicit in Paragraphs 64, 69, 74, 88 and 99 of the Amended Particulars of Claim that each representation is confined to Plots 1 and 5.

74. The First Representation was made to Mr Raja only in relation to Plot 1. However, it was made to Mr and Mrs Thompson jointly in relation to Plot 5. It amounts to a representation that they could "could design their own dwelling including in terms of the build, siting, footprint, volume and orientation". In relation to Mr Raja, it is based on or contained in emails from Mr Holden to Mr Raja dated 5.10.15, 15.2.16 and 3.3.16 and "discussions between Mr Holden, Mr Jackson and Mr Raja "about the build, siting, footprint, volume and orientation of the building" (Paras 65(1)-(4)). In relation to Mr and Mrs Thompson, it is based on or contained in emails from Mr Holden to Mr Raja dated 28.1.16 and 1.2.16 and discussions at a meeting on 6 April 2016 between Mr Holden, Mr Jackson and the Thompsons and on other occasions at which they discussed the build, siting, footprint, volume and orientation of the dwelling.

75. In the Amended Particulars of Claim, the Second Representation is not defined with reference to the purchasers' specific plots. In this sense it is distinct from the First Representation. Again, however, it is alleged to have been made to Mr Raja, not Mrs Raja, and separately to Mr and Mrs Thompson. The Second Representation to Mr Raja is based on emails to him from Mr Holden (19.5.15) and Mr Jackson (6.10.15), with Mr Holden copied in, and the delivery of the draft JCT Contract (Paras 70(1)-(3)). The Second Representation to Mr and Mrs Thompson is based on a signed letter dated 6.10.15, the delivery of a draft JCT contract and their discussions on "numerous occasions" (Para 71(1)-(3)). This contrasts with the Second Representation to Mr Raja which was essentially contained in written documentation.

76. The First and Second Misrepresentations are alleged to be "false and misleading" (Paras 88 and 89). There are no particulars of falsity in these paragraphs. However, it is asserted, in Paragraph 90, that "there was not (and is not) any planning approval for the dwellings which are part constructed on Plots 1 and 5" and it is thus implicit that, at least in part, the First Representation was false on this basis. Of course, the Planning Approval applied collectively to the whole of the Site. This included the planning conditions. However, there was an important distinction between Plots 1 and 5 which is obscured by the way which Paragraph 90 has been pleaded, namely that the Planning Approval encompassed the construction of an entirely new dwelling on Plot 1 but the construction of an extension only to the existing farmhouse on Plot 5.

77. Although Paragraph 97(2) is apparently deployed in support of the contentions that Messrs Holden and Jackson "knew the representations were false" (Para 95) or "acted without an honest belief that they were true or recklessly, careless whether any such representations…were true or false" (Para 96), it implicitly provides particulars of falsity on the basis that, contrary to their representations, "(a) [Mr Raja and the Thompsons] could not (without more) design their own dwelling including in terms of the build, siting, footprint, volume and orientation; (b)…the dwelling on Plot 1 was to be constructed in wholesale disregard of planning controls including in terms of its siting, footprint, volume and orientation; (c)…the dwelling on plot 5 was to be constructed without any planning approval for a new dwelling on that Plot; (d) nothing was in place in terms of satisfying planning controls (no application for approval of the development as built even being made before 8 March 2017…)".

78. The Third Representation is alleged to have been contained in the draft JCT Contracts which were provided to Mr Raja and, separately, to Mr and Mrs Thompson prior to their transactions. In Paragraph 99, the representation is asserted to be false, albeit without particulars, and, in Paragraph 100, it is alleged that "at the date of that representation, [Messrs Holden and Jackson] held no honest belief that the building works would not be started before planning permission was granted for the new dwellings to be constructed on Plots 1 and 5".

79. It is alleged that the Representations induced Mr Raja and the Thompsons "to make and complete the development contracts and/or the JCT Contracts and to make…the stipulated payments" and "they each acted in reliance on [these] representations" (Para 93). It is also alleged that the Representations "induced the Rajas to procure the purchase of Plot 1 by PKR and to take the long leasehold from PKR" (Para 94). Whilst Mr and Mrs Raja are alleged to have been induced, by misrepresentation, to enter into the long lease of Plot 1 (Para 94), there is no corresponding allegation in respect of Mr and Mrs Thompson and the purchase of Plot 5.

80. With good reason, Ms Anderson was critical of the way in which the claim was presented in the Amended Particulars of Claim. She emphasised that her clients had attended court to meet the Claimants' case as currently pleaded. Her clients' own case is itself geared to the pleaded issues and she has examined the witnesses on that basis.

81. Mindful of the requirements of *CPR 16.4* and the established practice of the Courts in relation to claims of fraud (see above), I have exercised caution when considering this part of the claim. The Overriding Objective requires cases to be dealt with justly and fairly. Consistently with this, the parties must each know the issues on which their respective cases can be tested. Notwithstanding the obscurities in the Amended Particulars of Claim, I am satisfied it would not be procedurally unfair to permit the Claimants to rely on infelicitously pleaded allegations if, once construed together, they clearly furnish the Claimants with an identifiable cause of action. In places, this would include permitting the Claimants to rely on separately pleaded allegations to complete an inchoate cause of action, for example where particulars of falsity are inherent in the Claimants' particulars of Mr Holden's knowledge or belief in support of their case based on fraud. With some reluctance, I have also reached the view that, since the putative misrepresentations are alleged to have induced the Thompsons to enter into the "development contract" (Para 93), this can be deemed to include an allegation that the

Thompsons were thus induced to enter into its putative "components", including the contract of sale (Para 17). However, the Claimants shall not be permitted to transcend the parameters of the pleaded facts and allegations by modifying or extending the putative representations or the pleaded facts on which they are allegedly based. To provide otherwise would be fundamentally unfair to Mr Holden and Sparkle since their own case has been advanced within the factual parameters of the Claimants' pleaded case and Ms Anderson made it clear, during the trial, that her examination of witnesses was being conducted on this basis.

(a) Mr and Mrs Raja

82. In my judgment, Mr and Mrs Raja's misrepresentation claim is fundamentally flawed.

83. The First Representation was simply that Mr Raja could design their house so as to encompass "the build, siting, volume and orientation" of the house. To give rise to an actionable misrepresentation, it must have amounted to a statement of fact rather than a promise or a statement of opinion.

84. No doubt, it could be treated as a statement of fact if it amounted to a statement about Mr Raja's rights in the event he proceeded with the intended transactions. This is so regardless of whether it could also be described as a statement of law, see *Chitty on Contracts (34th edn) Vol 1, Para 9-020*.

85. In reality, however, the statement on which Mr Raja seeks to rely is more in the nature of a promise than a statement of fact. Moreover, if it is Mr Raja's case that the pleaded allegation implicitly encompasses a statement about his legal rights, it is incomplete since it does not refer to the ambit of such rights. It forms no part of the Rajas' case that he was advised the works could be done regardless of planning control or that the Planning Approval was sufficiently wide to encompass any development. When giving his evidence, Mr Raja accepted he was aware planning approval is necessary for works of development. He was also aware of the Planning Approval itself and it would have been obvious to him that the Planning Approval was not without limit. This is consistent with the transcript of an early telephone conversation, on 18 May 2015, between Mr Raja and Mr Holden from which it appears Mr Raja contacted Mr Holden, after – in his words - doing some research online, finding the Bolton Council website and looking "at the planning".

86. It is not pleaded nor, indeed, is there any evidential basis to suggest there was ever a time, prior to the purchase of Plot 1, when Mr Holden advised Mr Raja that work on Plot 1 would *necessarily* fall within the scope of the Planning Approval itself. In answer to a question from me, it emerged that a substantial part of Mr Raja's grievance is that Mr Holden assumed responsibility for making any necessary application for planning permission to accommodate a material planning variation but failed to discharge his duties to do so or, indeed, his wider responsibilities to the purchasers. However, it forms no part of Mr Raja's pleaded case that Mr Holden represented to him that it was his intention to make such applications or advise Mr Raja about them. To qualify as an actionable representation of intention, this would have had to be pleaded in specific terms. For this purpose, a promise or warranty would not, in itself, suffice. In any event, this aspect was comprehensively covered by the Plot 1 Building Contract which imposed on Mr Jackson, as contractor, an obligation to apply for any required planning permission, building regulation and party consents together with a condition precluding work before such planning permission was received.

87. Since, at its highest, the pleaded representation was inchoate as a statement about Mr Raja's rights, it cannot have given rise to an actionable misrepresentation about such rights. However, on the hypothesis that it did contain a statement about Mr Raja's rights, Mr Raja could not have relied on it as an unqualified statement about his rights since he was well aware there would at least have to be some reasonable restrictions on the building specification based on the planning and regulatory controls and the nature and location of the development itself. This is significant because, once the First Representation is qualified so as to accommodate limitations of this kind, Mr and Mrs Raja have not identified, in their Amended Particulars of Claim, the basis on which the First Representation is false. It is alleged in Paragraph 97(2)(a) that Mr Raja "…could not (without more) design [his] own dwelling…". However, the expression in parenthesis begs the question. It is sufficiently wide to encompass the qualification necessary for the First Representation itself to be realistically pleaded. It is alleged in Paragraph 97(2)(b) that "the dwelling on Plot 1 was to be constructed in wholesale disregard of planning controls" and, in Paragraph 97(2)(d) that "nothing was in place in terms of satisfying planning controls…". However, these allegations do not, on their face, amount to particulars of falsity if the First Representation is itself qualified in relation to planning controls. Again, in this respect Mr Raja's real grievance is that he was never properly

advised about the ambit and effect of the restrictions so as to inform his decision making, not that he was told he would be free to design his house without any limitation or restriction at all.

88. I am thus satisfied Mr and Mrs Raja do not have a cause of action in respect of the First Representation. I am satisfied that, during their pre-contract negotiations and discussions – in writing and orally - Mr Holden did, indeed, give Mr Raja the impression that he would be consulted in connection with the designs for the house on Plot 5 if the transaction went ahead and the builder would seek to accommodate Mr Raja's requirements. However, if they were to be accommodated in this way, it would have been implicit that these requirements were reasonable and fell within the Planning Approval or planning permission could reasonably be obtained following an application for planning permission. Whilst Mr Holden is certainly open to criticism on the basis he did not sufficiently warn Mr Raja about the limitations of the Planning Approval and the risk Mr Raja's requirements could not be properly accommodated, this does not in itself furnish Mr and Mrs Raja with a claim against Mr Holden based on the First Representation.

89. The Second Representation was a statement that "everything was in place in terms of planning controls". This can be taken to mean planning approval had been obtained or, at least, that obtaining it was a formality for the intended development on Plot 1. There was allegedly an identical representation to the Thompsons in respect of Plot 5. However, whilst overlapping, the origins of the representation to Mr Raja are different from the representation to the Thompsons.

90. In Paragraph 70 of the Particulars of Claim, the Second Representation is alleged to have been made to Mr Raja in three separate documents but, in Paragraphs 72 and 73, it is stated "further or alternatively" that it is "to be *implied* from the words and *conduct* of [Mr Holden and Mr Jackson] *as set out above*". This can only reasonably be construed as a reference to the documents identified in Paragraph 70 or the delivery of such documents. There is no separate reference to Mr Holden's "conduct" in relation to Mr Raja or Mrs Raja other than his conduct in sending an email on 19 May 2015 and "present[ing]" the draft JCT agreement. Elsewhere, in Paragraph 73, it is stated that the representations are to be implied from "the *silence* of [Mr Holden and Mr Jackson] about the want of any planning controls".

91. In my judgment, Mr and Mrs Raja's claim under the Second Representation fails at the outset on the grounds that the written passages on which it is based do not bear the meaning assigned to them in the Second Representation itself and, if it is open to Mr and Mrs Raja to rely on a representation based on unspecified "conduct" on the part of Mr Holden or Mr Jackson to found a claim against Mr Holden based on this misrepresentation, they have not adduced a sound evidential basis for doing so. In view of the fact that Mr Raja was aware of the Planning Approval, I am also of the view that there is no room for him to rely on "the silence" of Mr Holden and Mr Jackson "about the want of any planning approvals" as a representation that "everything was in place in terms of planning controls".

92. The written passages are contained in the above email from Mr Holden to Mr Raja on 19 May 2015, a letter signed by Mr Jackson dated 6 October 2015 "to which [Mr] Holden was privy" and the draft JCT Contract. They are as follows.

    92.1. "The design of the house will be similar to the proposed house that currently occupies Plot 4 on our scheme as discussed (Planning authorities permitting)" (19 May 2015 email).

    92.2. "We can confirm that your purchase of the building plot will include the following items: All professional fees, Architects, building regulations, warranties, structural engineers, local authority, etc, are included". (6 October 2015 letter).

    92.3. "The contractor will apply for any planning permission, building regulations approval and party consents that may be needed…" (Draft JCT Contract).

93. None of these passages contain a statement that "everything was in place in terms of planning controls" nor, indeed, is it necessarily implicit in the passages that this was the case. The passage drawn from the 19 May 2015 email did not state or suggest that everything was in place for planning purposes or that planning permission had been or would be obtained for the intended design. However, the passage was expressly qualified, in parenthesis, to state that the design was subject to the permission of the planning authorities. The second passage made provision for the payment of professional fees which would be sufficiently wide to encompass the fees of a planning consultant. However, it did not provide or suggest that planning permission for any intended development had been obtained or that it was a formality. The third passage contained

the contractor's obligation, in the draft JCT Contract, to "apply for any planning permission, building regulations approval and party consents that may be needed". This showed that, once the parties entered into the JCT Contract, it would be for the building contractor, to obtain the necessary consents. However, it was not implicit that planning permission had already been obtained or that obtaining it would be a formality. In any event, the contractual obligation related to an evolving set of plans and drawings.

94. The Third Representation, in Paragraph 74, was that the building contractor "would not start work before any planning permission that was needed had been received". This is alleged to have been made in the draft JCT Contract and precisely reflects the contractual prohibition, in clause B2, on the commencement of work before planning permission was received.

95. Again, in my judgment, Mr and Mrs Raja's claim under the Third Representation fails, at the outset, on the basis that it is based on a contractual promise in relation to the future performance of the contract, not a representation of fact. It is not pleaded as a statement of intention. However, on the hypothesis that it had been pleaded as a statement of intention, it would not have sufficed to found a claim based on misrepresentation. Mr Holden initially sent a draft JCT Contract to Mr Raja as a template and to assist him in obtaining finance for the intended transaction. Although Mr Holden was named as contractor, it was never envisaged he would do the works. By sending the draft document to Mr Raja, Mr Holden was not making a representation to Mr Raja about his intentions in connection with the project. In due course, Mr and Mrs Raja were sent a copy of the contract for their approval and signature in which Mr Jackson was named as contractor. They signed the contract on 30 March 2016. There is no sound basis for Mr and Mrs Raja to state that this contract – to which Mr Holden was not a party – somehow embodied a representation from him about his intentions in connection with the commencement of the works. Nor, indeed, did it amount to a statement about Mr Jackson's intentions. If, by contract, Mr Jackson undertook not to start work before planning permission for the intended development was obtained, Mr and Mrs Raja would be entitled to hold him to his contractual obligations. They entered into the Plot 1 Building Contract on that basis, not in reliance upon putative representations from Mr Holden about Mr Jackson's intentions.

96. If, as I have found, Mr Holden did not make the Representations to Mr or Mr and Mrs Raja, the question does not arise as to whether they were made fraudulently.

97. On the hypothesis Mr Holden made the Representations to Mr Raja or Mr and Mrs Raja, Ms Anderson submits that they have not properly pleaded their case on the issue of reliance. Again, this issue no longer arises. However, in my judgment, Ms Anderson's submissions on this aspect are incorrect. In Paragraphs 93 of the Amended Particulars of Claim, it is specifically stated that "the [Representations] induced [Mr Raja] and the Thompsons" to enter into "the [putative development contract] and/or the JCT contracts and to make…the stipulated payments and they each acted in reliance on the [Representations]". In Paragraph 94, it is stated that "the [Representations] induced the Rajas to procure the purchase of Plot 1 and to take the long leasehold from PKR".

98. However, there are conceptual difficulties with aspects of this part of the Rajas' case. For reasons I have already given, the parties did not enter into an overarching development contract at all. Although they contend they were thereby induced to procure PKR to purchase Plot 1, Mr and Mrs Raja do not contend that they thus exposed themselves to a liability to PKR for which they should be compensated distinct from their liabilities under the long lease itself. They contend that they entered into their commitments under the long lease in reliance upon the Misrepresentations rather than their decision to procure PKR to buy Plot 1. It is also notable that a substantial amount of time elapsed between 30 March 2016, when they signed the JCT Contract with Mr Jackson, and 8 September 2016, when they entered into the long lease from PKR. During this period, a substantial part of the building project was carried out.

99. In any event, Mr and Mrs Raja's misrepresentation case fails.

(b) Mr and Mrs Thompson

100. Mr and Mrs Thompson's misrepresentation claim must be viewed differently from Mr and Mrs Raja's claim since the Thompsons contracted to buy the site of the farmhouse itself, not an area of open land. The Planning Approval provided for the farmhouse to be extended. It did not provide for the wholesale demolition of the farmhouse and replacement with a new house. Following demolition of the new houses on Plots 1- 4, the Council has issued a certificate of existing lawful development and it would be open to the owners of these plots to build a new house on their land. At the time of trial, this course was not open to Mr and Mrs Thompson as owners of Plot 5 although the matter is currently under review. It is also notable that the Thompsons' case on the Second Representation is partly based on oral representations. This contrasts with Mr and Mrs

Raja's pleaded case which is limited to the email from Mr Holden on 19 May 2015, the letter dated from Mr Jackson and 6 October 2015 and the draft JCT Contract together with the conduct of Mr Holden and Mr Jackson themselves.

101. In the present case, the Thompsons' case in relation to the First Representation, as pleaded, bears the same conceptual difficulties as the Rajas. It was at least implicit in the correspondence on which they rely in support of the First Representation, together with their supporting discussions in relation to the position of the new house, that the Planning Approval comprehended the demolition of the farmhouse and the construction of an entirely new house on Plot 5. However, this does not precisely reflect the First Representation in its current form and it is un-necessary for me to determine whether, based on the current pleadings, the Thompsons should be permitted to rely on such a case in view of my conclusions below about the Second Representation.

102. The merits of the Thompsons' case on the Second Representation are relatively straightforward. Mr Holden's Second Representation was that "everything was in place in terms of planning controls". This can be taken to mean that planning approval had been obtained for the intended development on Plot 5 or that it would be a formality to obtain it. Having heard and considered the evidence of the witnesses, I am satisfied that, on more than one occasion prior to exchange of contracts, Mr Holden advised the Thompsons that this was so. At his meetings with Mr and Mrs Thompson on 27 and 28 January 2016, Mr Holden confirmed that the planning permission had been given for the development of the Site and, when advising them that they would be invited to prepare full working drawings and design their own house with the project architects once Mr Pendlebury had moved from the existing farmhouse, he knowingly gave them the impression that this could be achieved to the satisfaction of the planning and regulatory authorities. He did so in the knowledge that Mr and Mrs Thompson understood that the existing farmhouse would be demolished and a new house built on the site. The Second Representation was thus made on this basis. Between 28 January and 27 May 2016, when Mr and Mrs Thompson exchanged contracts with Rosehelm and Sparkle for the purchase of Plot 5, the Thompsons repeatedly met Mr Holden and Mr Jackson on the site. Throughout this period, Mr Holden continued to give Mr and Mrs Thompson the impression that, following the demolition of the farmhouse, their new house could be constructed on the site without a breach of planning control. In doing so, I am satisfied he represented to them that everything was in place for planning purposes in the sense that the demolition

and intended redevelopment could be achieved without a breach of planning control. This representation was of continuing effect until after 30 May 2016 or thereabouts, when Mr and Mrs Thompson entered into the Second Building Contract with Mr Jackson.

103. Of course, Mr Holden was not a party to the contract for the sale of Plot 5 or the Second Building Contract. However, in my judgment Mr and Mrs Thompson were entitled to rely on the Second Representation as a continuing representation on the part of Mr Holden notwithstanding that he was not a party to either contract. In the light of Arden LJ's judgment in *Inter Export LLC v Townley (supra),* it matters not whether Mr Holden was aware that the Second Representation was of continuing effect or, indeed, whether the Thompsons would rely on it. However, as it happens, I am satisfied that, at all times, Mr Holden was fully aware and continued to be aware that he had given the Thompsons the impression that the demolition and intended redevelopment could be achieved without a breach of planning control, that this continued until the time they entered into the relevant contracts.

104. The Second Representation was false since, if and once the farmhouse was demolished, it would no longer be possible to extend the building in accordance with the Planning Approval. Since the Planning Approval did not authorise demolition or replacement, the intended development could not be achieved without a breach of planning control. By stating that everything was in place for planning purposes, Mr Holden made a false representation to the Thompsons. The Planning Approval did not comprehend demolition and, following demolition, it would no longer be possible to comply with it. Nor, indeed, did the Planning Approval comprehend the construction of a new house on Plot 5.

105. I am also satisfied that, if it was not made with knowledge of falsity or without belief in its truth, Mr Holden at least made the Second Representation recklessly, careless as to whether it was true or false, within the sense envisaged by Lord Herschell in *Derry v Peak (1889) 14 App. Cas 337*. His original decision to purchase the Site was informed by the Planning Approval; he was fully acquainted with the conditions of the Planning Approval and was content to give the buyers, including the Rajas and the Thompsons, the impression that this was the case. However, it was expressly recorded in the Planning Approval itself that the approved application was for "*extension of existing farmhouse* along with demolition of existing outbuildings and erection of *4…dwellings*". By Condition 20, it was expressly provided that the permitted development was to be "carried out in complete accordance with the following approved plans". These plans

included specific plans in relation to the farmhouse. Mr Holden could never have been in any reasonable doubt that the Planning Approval was for works of extension to the existing farm house on Plot 5. It did not include the wholesale demolition of the farmhouse and construction of a new residential unit on the site.

106. Miss Anderson submitted that, if Mr Holden made the Second Representation, he should not be adjudged personally liable in tort since he can be taken to have made the Second Representation in his capacity as a director of Sparkle. However, if he made the Second Representation on behalf of Sparkle, I am satisfied that he did not do so exclusively in this capacity. Unlike Sparkle, he was not a party to the contract for the sale of Plot 5. However, from the outset he had a personal interest in the acquisition, sale and development of the sale which transcended his office as a director of Sparkle, not least as one of the original purchasers and developers of the Site as a whole. By this stage, he had also acquired Plot 4 personally. It would be unrealistic, and contrary to the evidence, to suggest that his discussions with the Thompsons were conducted by him exclusively in his capacity as a director. This is not the case. For the avoidance of doubt, I am also fully satisfied that Mr Holden made the First and Second Representations with the intention that the Thompsons would act in reliance upon them and, having done so, with the knowledge that they were doing so.

107. Inducement or reliance is an essential factual requirement of the tort. It must thus be specifically pleaded. However, contrary to Ms Anderson's submissions, I am satisfied that the Thompsons have sufficiently pleaded that they acted in reliance upon the Second Representation in exchanging contracts for the purchase of Plot 5 and entering into the Plot 5 Building Contract. In Paragraph 93 of the Amended Particulars of Claim, it is stated, on their behalf, that "the representations did induce…the Thompsons to make and complete the development contracts and/or the JCT contract…and to make each of the stipulated payments and they each acted in reliance on the representations". There can thus be no issue about the Thompsons' plea about the Plot 5 Building Contract. The Thompsons' case is not pleaded with the same clarity in relation to the contract of sale since their case is that they relied on the misrepresentations by entering into the overarching development contract rather than the contract of sale. However, in Paragraph 17 of the Amended Particulars of Claim, the contract of sale is described as a component of the development contract. In her closing submissions, Ms Anderson emphasised that her clients' case has been tailored to meet the Thompsons' pleaded claim. She has

examined and cross examined the witnesses on this basis. On balance, however, the subtle difference between the Thompsons' pleaded case, based on the putative development contract, and their underlying case based on the contract of sale itself could not reasonably have had a material bearing on this aspect of her cross examination of witnesses. In my judgment, it would not be unfair to Mr Holden and Sparkle for me to permit the Thompsons to contend that they relied upon the alleged Representations in exchanging contracts for the purchase of Plot 5.

108. Paragraph 93 also contains a specific allegation that the Thompsons made the "stipulated payments" in reliance upon the putative representations, including the Second Representation. Whilst the "stipulated payments" are undefined, this can be construed as a reference to any contractual payments under the Plot 5 Building Contract or the putative development contract, including the contract of sale.

109. Having pleaded their case on this basis, I am satisfied, that the Thompsons have successfully established, on the evidence, that they exchanged contracts for the purchase of Plot 5 and entered into the Plot 5 Building Contract in reliance upon the Second Representation. It was obviously crucial to Mr and Mrs Thompson that they were entitled to demolish the farmhouse in its entirety and build a new house on Plot 5 without committing a breach of planning control. Owing to Mr Holden's assurances, in particular the Second Representation, they were satisfied this was so. Had it not been for the Second Representation, they would not have exchanged contracts for the purchase of Plot 5 or entered into the Plot 5 Building Contract. This was particularly clear from the testimony of Mrs Thompson. Having confirmed in her witness statement that, had it not been for the Second Representation, they would not have purchased the plot or entered into the building plot, she did not say anything to suggest the contrary when her evidence was tested in cross examination. This is not in the least surprising.

110. It follows that Mr and Mrs Thompson have successfully established that they have a case against Mr Holden in deceit based on the Second Representation.

111. However, Mr and Mrs Thompson's case against Mr Holden on the Third Representation fails for the same reason as the case advanced by Mr and Mrs Raja above, namely that it is based on a contractual promise in relation to the future performance of the Plot 5 Building Contract, not a representation of fact.

(7) Negligence

112. All four Claimants advance an identical case against Mr Holden based on the assumption of a duty of care to provide accurate information. Again, their case is infelicitously pleaded. It consists of an allegation, in Paragraph 75 of the Amended Particulars of Claim, that Messrs Holden and Jackson "assumed responsibility to the Claimants for the accuracy of the *information* which was provided to them". Their case is thus based on responsibility for information, not advice. It is based on "a legal inference to be drawn from their conduct against the background of all the circumstances of the case – *Customs and Excise Commissioners v Barclays Bank plc [2007 1 AC 181 at paras 35-36*".

113. It is at least implicit in the Amended Particulars of Claim that Mr Holden provided information to the Claimants. The information itself is not identified or defined. However, it is alleged, in Paragraph 102 of the Amended Particulars of Claim, that Mr Holden and Mr Jackson "acted in breach of duty to the Claimants in that they (at least) negligently provided them with inaccurate, incomplete, false and misleading information -

(1) about [the Claimants'] rights to have dwelling constructed to their own design…

(2) about [Messrs Holden and Jackson's] "complete disregard of planning controls and their failure to take any steps in terms of satisfying those controls before 8 March 2017…

(3) by their repeated assurances that each could design their own dwelling and that everything else was in place in terms of planning control".

114. The absence of any description of the putative information is unfortunate given that, as a legal concept, information is itself not always straightforward to define at least when evaluating the distinction between information and advice. Following Lord Hoffman's judgment in *South Australia Asset Management Corp v York Montague Ltd [1997] AC 191* ("SAAMCO"), the distinction became important when assessing claims in damages for professional negligence. However, in the light of Lord Sumption's judgment in *Hughes-Holland v BPE Solicitors [2017] UKSC 21* and Lords Hodge and Sales in *Manchester Building Society v Grant Thornton UK LLP [2021] UKSC 20,* the distinction is not straightforward. Information and advice cannot be taken to be mutually exclusive.

115. In the present case, I shall construe the Claimant's references to information widely so as to include information pertaining to each of the matters listed in Paragraph 102 (1)-(3), including information pertaining to the ambit of the Planning Approval and the steps

taken to comply with it. However, if sufficiently wide to comprehend advice, it does not appear to be based on an omission or omissions to provide such advice. On that basis, although capable of comprehending information that was misleading because it was incomplete, it would not be wide enough to encompass an omission to provide advice.

116. It is then pleaded, in Paragraph 103 of the Amended Particulars of Claim that "it was reasonable for [Mr] Raja and the Thompsons to rely on the information provided by [Mr Holden and Mr Jackson] and they each did rely on that information". It is not specifically pleaded what they did in reliance upon the information. However, if this part of their case mirrors Paragraphs 93 and 94 in relation to their case based on misrepresentation, they relied on the relevant information by entering into the "development contracts and/or the JCT Contracts", making "the stipulated payments" and, as concerns Mr and Mrs Raja, contracting to purchase plot 1 from PKR and take a long lease.

117. If the Claimants are entitled to advance a claim against Mr Holden for negligent mis-statement, it must necessarily be based on the assumption of responsibility coupled with reliance, *Henderson v Merrett Syndicates Ltd [1995] 2 AC 145.* The legal origins for the tort can be traced back to *Hedley Byrne v Heller [1964] AC 465* in which Lord Reid suggested, at *486*, a duty of care is owed in "all these relationships where is it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care in the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him". However, it remains critically important to establish, in such a case, that the other party assumed responsibility for the accuracy of the information and the party seeking the information *relied* upon this (ie the other party's assumption of responsibility) so as to give rise to the putative loss, *Williams v Natural Life [1998] 1 WLR 830*. If, as Lord Steyn put it, "reliance is not proved, it is not established that the *assumption of personal responsibility* had causative effect".

118. In the present case, it is pleaded, in Paragraph 103 of the Amended Particulars of Claim, that the Rajas and the Thompsons each relied on the information. However, if it is their case that Mr Holden assumed personal responsibility, it is not pleaded that they relied upon his assumption of personal responsibility when entering into the relevant transactions.

119. In my judgment, the Rajas' and Thompsons' breach of duty claim fails.

120. Substantial factual elements of their case have been made out. In a wide sense, the whole project was a joint venture between Messrs Holden, Jackson and their respective companies and Mr Holden knowingly allowed the Rajas and Thompsons to form the impression that they were the developers. They repeatedly discussed the project with Mr Holden before deciding whether to proceed. He advised them of the Planning Approval. Whilst there were already plans and drawings for the development of the Site, he advised them that, if they proceeded with the purchase of plots, they would be able to have a significant input in relation to the design of the houses albeit this was subject to any planning and regulatory requirements. It is correct, as alleged, that he gave the Thompsons the impression that everything was in place in terms of planning and did nothing to suggest otherwise until after they entered into the Building Contract. Again, he did not advise the Rajas that there had been any breach of planning control until well after they entered into the Plot 1 Building Contract and committed themselves to their transaction with PKR.

121. However, the Rajas and Thompsons each instructed solicitors to act for them in connection with the transactions. Viewed from the perspective of Mr Holden, he could reasonably have expected them to obtain advice about their legal rights and commitments. Equally importantly, whilst Mr Holden could reasonably have expected them to take into account the information he provided to them, evidence was not specifically adduced to show they considered him to have assumed personal responsibility nor, indeed, that they were relying on his assumption of personal responsibility in entering into the relevant transactions. In any event, I am not satisfied it has been shown they specifically relied on Mr Holden's assumption of personal responsibility and, in my judgment, this is fatal, in itself, to this part of the claim.

122. It is true that, in the case of the Thompsons, Mr Holden knowingly created the impression that everything was in place in terms of planning approval before they entered into the transactions. He did so with the intention that they would act on it. For reasons I have already given, I am satisfied that, having acted in reliance upon Mr Holden's misrepresentations, the Thompsons have a separate cause of action against him for deceit. However, this is not so in the case of the Rajas. At its highest, the Rajas' case against Mr Holden is that he *omitted* to advise them expressly that any material changes to the plans and drawings for their house would require an application for planning approval and that

the demolition of the farmhouse was itself contrary to the Planning Approval. This does not amount to the provision of inaccurate information.

123. The claim based on breach of duty shall thus be dismissed.

(8) Disposal

124. The Rajas' claim against Mr Holden and Sparkle fails in its entirety and the Thompsons' claim fails in each respect save for their claim against Mr Holden based on deceit.

125. However, having contracted to purchase Plot 5 and entered into the Plot 5 Building Contract in reliance upon Mr Holden's fraudulent misrepresentations, the Thompsons are entitled to be put into the position in which they would have been had they not done so. On this basis, they are entitled to recover all losses directly flowing from the transaction itself, *Smith New Court Securities Ltd v Citibank [1997] AC 254.* This is likely to include their wasted costs and professional fees in relation to the aborted building project.

126. The Thompsons seek damages for their attendant inconvenience and distress. Such a claim is open to them following the observations of Winn LJ in *Doyle v Olby (Ironmongers) [1969] 2QB 158, 170.* On this basis, an award of general damages for deceit for the claimant's disappointment and inconvenience in respect of the purchase of a hairdressing business was left undisturbed in *East v Maurer [1991] 1 WLR 461.*

127. I shall thus give judgment for the Thompsons on their claim against Mr Holden for damages to be assessed. However, Mr and Mrs Raja's claim against Mr Holden and Sparkle shall be dismissed.

128. I shall hear from counsel in relation to further directions and costs.