Neutral Citation Number: [2019] EWHC 1977 (QB)

Case No: QB/2018/0270
CLAIM NO: 3LS90680

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2019

Before:

MR JUSTICE FREEDMAN

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Between:

(1) MR MATTHEW NUTTAL **(2) MR WAYNE LOCHNER**	**Applicants**
- and -	
(1) MS LORRAINE KERR **(2) MR BRUCE SINCLAIR**	**Defendant**

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Mr Mark Trafford QC (instructed by **Pinder Reaux & Associates**) for the **Applicant**
Mr Sibbel (instructed by **Warners Solicitors**) for the **Defendant**

Hearing date: 10 July 2019

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Judgment Approved

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

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MR JUSTICE FREEDMAN

Mr Justice Freedman:

I Introduction

1. This is an appeal against the judgment of HH Judge Hand QC who conducted a hearing on various dates between 13 June 2016 and 20 July 2016 and who received written submissions thereafter up to September 2016. Judgment was given 18 months later on 14 March 2018. At paragraph 9 of the judgment, the Judge apologised for the very long delay in producing the judgment *"essentially due to personal difficulties, which I prefer not to give detail of here."* This is a rolled-up hearing for permission to appeal, and, subject to permission, for the matter to be remitted for a retrial. The appeal is based upon the delay in the handing down of the case and a submission that the Judge's recollection of the evidence on a material point was at fault such that the whole judgment is said to be tainted. In the interests of consistency and intended clarity, I shall refer to the Defendants as the Applicants (since they are Applicants for permission) and to the Claimants as such rather than as the Respondents.

2. In the case of *Bond v Dunster Properties Ltd and others* [2011] EWCA Civ 455 *("Bond"),* Lady Justice Arden started her judgment as follows:

> "'*Everyone is entitled to a hearing…within a reasonable time*'
>
> 1. *The thrust of the appeal is against the judge's findings of fact. A major cause of complaint is that the judge did not hand down judgment until some 22 months after the conclusion of the hearing and that as one result his findings of fact are against the weight of the evidence. This extraordinary delay clearly called for an apology and, if any existed, an explanation of the mitigating circumstances. However, so far as we are aware, there was none. Litigation is stressful for the parties, sometimes because they are members of the same family and sometimes because the transactions are commercial in nature and their outcome has implications for other transactions that the parties or others need to carry out. Life has to go on before, during and after litigation. In some cases, a delay in producing a judgment may prevent the parties from reaping any benefit from the litigation at all. Unfortunately, this case involves both the elements of close family relations and of commercial transactions. Irrespective of the respective merits of the appeal, this court has no reservation in expressing its sympathies for the parties as a result of the length of time they had to wait for this judgment. We would include others involved in the litigation such as the witnesses and the professional advisers. Delays of this order are lamentable and unacceptable.*
>
> 2. *The matter goes further than just the effect on the parties. An unreasonable delay of this kind reflects adversely on the reputation and credibility of the civil justice system as a*

> *whole, and reinforces the negative images which the public can have of the way judges and lawyers perform their roles. If there were regular delays of this order, the rule of law would be undermined…"*

3. Arden LJ went on to consider the standard of review on appeal against findings of fact in a seriously delayed judgment. At (7) she said the following:

> *"The function, however, of the court on hearing this appeal is not to impose sanctions or to investigate the reasons why the delay occurred. The function of this court on this appeal, which is principally brought against the judge's findings of fact, is to consider whether any of those findings of fact should be set aside and a retrial ordered. Findings of fact are not automatically to be set aside because a judgment was seriously delayed. As in any appeal on fact, the court has to ask whether the judge was plainly wrong. This high test takes account of the fact that trial judges normally have a special advantage in fact-finding, derived from their having seen the witnesses give their evidence. However there is an additional test in the case of a seriously delayed judgment. If the reviewing court finds that the judge's recollection of the evidence is at fault on any material point, then (unless the error could not be due to the delay in the delivery of judgment) it will order a retrial if, having regard to the diminished importance in those circumstances of the special advantage of the trial judge in the interpretation of evidence, it cannot be satisfied that the judge came to the right conclusion. This is the keystone of the additional standard of review on appeal against findings of fact in this situation. To go further would be likely to be unfair to the winning party. That party might have been the winning party even if judgment had not been delayed."*

4. Arden LJ referred to a judgment of Peter Gibson LJ in Goose v Wilson Sandiford [1998] TLR 85 at 113 who said the following:

> *"Because of the delay in giving judgment, it has been incumbent on us to look with especial care at any finding of fact which is now challenged. In ordinary circumstances where there is a conflict of evidence a judge who has seen and heard the witnesses has an advantage, denied to an appellate court, which is likely to prove decisive on an appeal unless it can be shown that he failed to use, or misused, this advantage. We do not lose sight of the fact that the judge had transcripts of the evidence, as well as very extensive written submissions from counsel. But the very fact of the huge delay in itself weakened the judge's advantage, and this consideration had to be taken into account when we reviewed the material which was before the judge..."*

5. At the end of her judgment at paragraph (92), Arden LJ said the following:

> *"…a delay of 22 months in the delivery of judgment was lamentable and unacceptable. That point must be made, and if necessary, repeated, loud and clear. It should not happen again."*

6. Both Longmore LJ and the Master of the Rolls associated themselves with the analysis of Arden LJ at (104) and (116). At (119), the Master of the Rolls said *"…as a matter of good sense and authority, even a long delay such as has occurred in this case will not automatically invalidate or even undermine the judgment when it is eventually produced, although it must cause an appellate court to look very critically at the judgment."*

7. Reference was also made to the Privy Council case of *Tex Services Ltd v Shibani Knitting Co Ltd (in Receivership)* [2016] UKPC 31 (*"Tex"*). Lord Mance at (7) set out, apparently with approval, a submission by Counsel for Shibani, as follows, namely *"the advantage which a trial judge enjoys in relation to matters of fact may be weakened by such a delay and that such delay calls for special care when reviewing the evidence which was before and the findings of fact which were made by the judge. But it is still for an appellant to pinpoint any particular findings of fact which may in the light of that review be open to question by reason of the delay"*. In *Tex*, the case turned upon the construction of a contract and the case could be determined on the evidence and material before the Court without any need to consider a remission, of which neither party contended. In that sense *Tex* is different from the instant case where the essence of the submission of the Appellant is that the case does require remission.

II The instant case

8. The case concerns alleged fraudulent misrepresentations made to the Claimants to induce them to enter into an agreement to acquire a 10% equity stake in a company known as Sports Management Group Ltd ("SMG"). The amount of the investment to acquire the 10% stake was £500,000. In a series on negotiations and discussions during March and April 2012, it is alleged that in order to induce the Claimants to invest in SMG, the Applicants made a series of oral representations concerning SMG. There were also written representations made on 22 March 2012 and in May 2012. It is alleged that reliance on oral and written representations made by the Applicant's, the Claimants entered into an agreement on 02 May 2012 with the Applicant's. Pursuant to the agreement, the Claimants were to invest £500,000 in exchange for a 10% equity stake in SMG. On 23 May 2012, the First Claimant provided an initial payment of £50,000 towards the investment which was paid direct to SMG's bank account and was said to be in accordance with the agreement and in reliance on the oral and written representations.

9. In the judgment dated 14 March 2018, the Court made a number of findings including:

   (1) The Applicants fraudulently misrepresented that SMG had been valued at £10 million by two independent financial institutions and that both had offered to pay £1 million for a 10% share in the company (**J/169**).
   (2) The Applicant's fraudulently misrepresented the scale of the distribution of SMG's *"In the Game"* magazine (**J/178**).

(3) The Applicants fraudulently misrepresented that SMG owed no more than £100,000 to HMRC (**J/182**).
(4) The Applicants made further false representations as to the number of SMG's clients (**J/170-172 & J/177**), the scale of SMG's contacts (**J/173**), that SMG had paid its business rates (**J/180-181**), and that the First Applicant was on the board of the Damilola Taylor Trust and the Rio Ferdinand Foundation (two charities) (**J/183**).
(5) Two further sets of misrepresentations (concerning the relationship between SMG and two other agents, and concerning celebrity events in Cannes and Monaco) were not made out (**J/179** and **J/184**).

10. It follows that the Claimants did not establish each of the alleged fraudulent misrepresentations: some representations were not proven at all. Others were proven as representations, but the fraud was not proven, and others were proven fraudulent misrepresentations.

11. The Court found that each of the fraudulent misrepresentations induced the Agreement, and were the '*major factors*' in the Claimants entering that Agreement (**J/188-191**). The non-fraudulent misrepresentations were '*also significant'* and *'each was likely to have been an inducing factor*' in the Claimants signing the Agreement (**J/191**).

12. The Claimants were accordingly entitled to, and did, rescind the Agreement (either on 17 or 25 July 2012), and the Applicants were liable to pay back the sum of £50,000 with interest thereon (**J/192**). It followed from the rescission of the Agreement that the Counterclaim fell to be dismissed (**J/194**).

13. The Judge highlighted the relevant law as to what a fraudulent misrepresentation was: see *Derry v Peek* [1889] 14 App Cas 337 (at **J/81**). The Judge referred also to the need to prove that the misrepresentation induced the contract and also stated that (a) the inducement did not need to be the sole reason why the Claimants contracted, so long it was one of the reasons, (b) if it can be said that it was likely to have induced the contract then an evidential burden passes the maker of the statement to show that it did not induce the contract, (c) in the case of a fraudulent misrepresentation, it will be sufficient if it can be shown to have been "actively present" in the mind of the Claimants when they entered into the agreement: see *Edgington v Fitzmaurice* (1885) 29 Ch 459 and **J/82**). The Judge also referred to the remedy of rescission at (**J/83**).

14. In the light of the foregoing, the Judge held that the Claimants were entitled to, and did, rescind the agreement either on 17 July 2012 or 25 July 2012. The Judge found that the Applicants were liable to pay the sum of £50,000, with interest thereon (**J/192**). It followed from the rescission of the agreement that the counterclaim fell to be dismissed (**J/194**).

III The nature of the appeal

15. The appeal notice was filed on 2 October 2018. At paras. 9.1 – 9.7 of the grounds of appeal, seven errors of fact were advanced. On the basis of those grounds, the Applicants obtained a stay of enforcement. All but one of those alleged errors have now been abandoned. The alleged error is para. 9.2, and insofar as para. 9.7 is related,

it affects para. 9.7 (i.e. as regard the evidence given by Ms Kerr in respect of instant access to £500,000 cash). No explanation has been given as to why the other matters were raised and subsequently abandoned. However, the thrust of the submission made on behalf of the Applicants is that they are able to make out their case by reference to in effect a single ground, and that it is therefore unnecessary to pursue their case by reference to any other allegations.

16. Having issued the judgment in March 2018, there was a hearing of consequential matters in September 2018. At that hearing, the Judge set out in an emotional address over the course of 5-10 minutes some personal difficulties which had beset him, one of which was extremely serious illness to an immediate member of his family. He said that the earliest draft that he had of the judgment was in March 2017. He said that for the purpose of the judgment he had access to his notebook. On 1 July 2019, he informed Mr Wilson of the Claimants' solicitors that it had proved impossible to make anything of the recording of the hearing due to a transcription problem in Court 2 at the Mayors and City of London Court. The earliest draft that he could find saved of his judgment was on 8 March 2017, and that was simply the last date that it was saved. A complaint was made to the judicial complaints office. By this stage the Judge had retired. Formal advice was given to the Judge on 17 October 2018 due to this delay.

IV The case of the Applicants

17. Mr Trafford QC, Counsel on behalf of the Applicants, submitted that in this case the demeanour of Ms Kerr was important to all findings of fact. She was a high net worth investor: see paragraph 1 of the Particulars of Claim which was admitted in paragraph 1 of the Amended Defence and Counterclaim. Apparently, a high net worth investor is understood to mean that somebody who earns at least £100,000 per annum or has access to liquid funds of at least £250,000, not including the value of their primary residence. There were questions asked in cross examination about whether it was accurate that she was a high net worth investor. A question arose in respect of the early negotiations as to whether she held herself out as having access to having liquid funds. She said that she did have liquid funds to be able to pay the amounts required, being £500,000. She said that she had funds in accounts at National Westminster Bank and Lloyds Bank.

18. The Judge said that disclosure would be of assistance in respect of these accounts. Ms Kerr then procured various statements of her bank accounts of those banks. There were six bank accounts and the total sum of money in those accounts was about £36-37,000. That showed that the information provided to the Court was false. In a third witness statement of 8 July 2016, served in the course of the trial, Ms Kerr apologised to the Court for the fact that she did not have access to liquid funds of £450,000 or £500,000 stating that her previous recollection whilst giving evidence had been mistaken. In addition to the bank account, she had access to further liquid funds comprising the "Cazenove Fund". This showed available funds as at 18 July 2012 of £250,830 together with the monies in the bank accounts, she therefore had access to liquid funds of £288,652.19 as at 30 June 2012. She had previously had a further £200,000 but had withdrawn those funds in about February or March 2012 to buy carbon credits from the Applicants.

19. Ms Kerr now accepted that in addition to liquid funds, she would need to obtain mortgage finance using one or more of her properties. Two of her properties were unencumbered comprising her home in Cranbrook, Kent which had been acquired on 14 April 2008 for a sum of £895,000 and had been valued in 2010 at £1,000,000. She also had a property in Brighton, which had been purchased 3 December 2010 for a sum of £500,000. There was a portfolio of other properties which were incumbered which were geared at approximately 60% and comprised six named properties.

20. Mr Trafford QC pointed out that in respect the Cazenove Funds, that was not immediately liquid in that there had to be 14-21 days' notice. Further, Ms Kerr had given evidence had been that the money was all in the bank accounts, and it was not.

21. Mr Trafford QC drew attention to the fact that the Judge had stated how the Court ought to deal with matters relating to the reliability and credibility of witnesses. At paragraphs 88-91, the Court considered various authorities in that regard, in particular in the OFT cited case of *Armagas Ltd v Mundogas S.A. ("the Ocean Frost")* [1985] 1 Lloyd's Rep 1, Robert Goff LJ described his own experience in the context of allegations of fraud when considering the credibility of witnesses and that it was essential *"…always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and the overall probabilities."* (page 57 col.1). In *Onassis and other v Vergottis* [1968] 2 Lloyds Rep 403 at 431, Lord Pearce stated *"Credibility involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversations correctly and, if so, has his memory correctly retained them. Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over much discussion of it with others?..."*

22. The criticism advanced on behalf of the Applicants is that although the Judge reminded himself of the appropriate authorities, he failed to apply these to the case in his appraisal of the evidence of Ms Kerr.

23. The essential findings in relation to Ms Kerr were set out in the judgment as follows:

> *107. In general terms I did not find any party in this case to be entirely impressive as a witness. The first Claimant was less than accurate about her access to liquid or easily liquidated funds and both she and the second Claimant accepted without question or further investigation the Defendants' explanation that a significant part of SMG's revenue was not shown in its accounts and went offshore. The former, which I will return to in a little more detail later, showed a tendency towards exaggeration and, at best, demonstrated that her recollection could be vague. The latter was, at best, an easy acceptance of the legality of the arrangement described by the first Defendant, in particular, which did not reflect any credit on either*

Claimant. But otherwise their evidence was consistent and supported by the documents.

108. Both the First and Second Defendants from time to time showed flashes of the kind of charm, which is very likely necessary for the world of celebrity, but their evidence was both internally inconsistent, on occasion inconsistent as between them and inconsistent with the contemporary documents. They both displayed a very casual attitude to the disclosure of documents and the way in which, in a piecemeal and partial fashion, material appeared during the course of the trial for the first time when it should have been disclosed at a much earlier stage diminished my confidence in the extent to which I was receiving a full picture, documentary or otherwise, from them. Notwithstanding the reservations expressed above about the Claimants, on matters of conflict I generally preferred the evidence of the Claimants to that of the Defendants.

...

162. The Claimants paid £50,000.00 into the SMG bank account on 20 May 2012, about three weeks after signing the Agreement. Nothing is said in the Agreement about a part payment and nothing is said about when the sum of £500,000.00 should be paid. There is a conflict of evidence as to whether it was made clear to the Defendants that the Claimants would need financial support before they could make the payment. This is what the transcripts of the meetings on 15 June 2012 and 9 July 2012 record the Claimants as saying was understood by all parties to be the position but as I said before I think a degree of caution is called for in relation to what, from the Claimants' point of view, are the more obviously self serving parts of those conversations.

163. Under cross examination the first Claimant asserted to Mr Trafford that she always had the ability to obtain the whole sum from liquid funds or funds that could easily be liquidated and she made a number of assertions about her investments that led to a request for further disclosure. She then made a supplemental witness statement and it was clear from that and her further oral evidence that she had exaggerated her ability in May 2012 to provide that the investment sum without obtaining credit from a financial institution against the security of other assets.

164. As I said earlier in this judgment I did not find that an attractive aspect of her evidence but it really goes to the issue as to why the Claimants did not proceed with the investment and I am not at all

> *clear that the Defendants were led to believe that she had the money immediately to hand.*
>
> *…*
>
> *187. In any event I have found that it was not the difficulty in obtaining finance that led to the Claimants seeking to withdraw but the realisation that they had been misled about the value of SMG. As to obtaining finance, the Claimant could have raised the necessary money. She had a portfolio of properties, which could have been offered a security, and discussions about this were ongoing. The evidence of Mr Kerridge did not establish that she could not get a loan, only that by July no offer had been forthcoming. As to her developing "cold feet" because she believed she had made a bad investment, this seems to me to be no more than a description of the process by which both Claimants arrived at the conclusion that the state of SMG in terms of finances and assets was not as it had been represented to them. In other words if she got "cold feet" it was because she had realised that the financial status of SMG had been misrepresented to her."*

24. Mr Trafford QC submitted that whereas Ms Kerr had sought to say that she had access to liquid or easily liquidated funds, this was proven as a result of the disclosure of the bank accounts to be untrue. She had not said that she would be able easily to obtain a loan and there was no evidence to suggest that that was the case. There was some evidence that she was trying to obtain a loan. It followed that she was not being honest with the Court or with the Applicants. The submission of the Defendant's was that the words used by the Judge about her evidence were wrong, namely at (**J/107**) that she "*showed a tendency towards exaggeration*" and that at (**J/163**) "*she had exaggerated her ability*" to provide the investment sum. Exaggeration meant putting a gloss on the truth where there was a kernel of accuracy. However, in this case, it was submitted, either the Claimant did have the ability to provide the finance or she did not. It was a binary formulation. The Judge therefore was wrong because he should have found that she had lied about her ability to provide finances.

25. Mr Trafford QC submits that the importance of this evidence is that it goes to the credibility of Ms Kerr's to the events that gave rise, not only to the discussions at around the time of the agreement and immediately thereafter. It goes as to what, if any, oral representations were made to the Claimants such as to give rise to the findings of fraudulent misrepresentation. Further it goes as to whether the Claimants were induced to rely upon the representations. It is said that the Claimants were mesmerised by the celebrity status of the clients and wanted to be a part of this and so the representations, to the extent that they were made, did not induce them to enter into the agreement. This explains the absence of due diligence before entering into the agreement (**J/139**). So mesmeric was the desire to be part of this celebrity culture that the representations were irrelevant. Then, without ready finance, the Claimants wished to avoid their commitments under the agreement, and they lied about the availability of money to conceal the true reasons why they were seeking to get out of the agreement. Whilst it may be the case that a party can rescind an agreement entered into as a result of fraud because of some ulterior motive e.g. wanting to get out of an

improvident agreement, here the suggestion is that the Claimants did not enter into the agreement due to misrepresentations, fraudulent or otherwise, but were seeking to create such a case in order to escape from obligations to pay the large sums which they were obliged to pay.

26. On this basis, the submission of the Applicants is that the Judge erred in failing to characterise the evidence of Ms Kerr as a lie. The consequence of that was that he erred in failing to appraise the remainder of her evidence as that of an untruthful witness. That was material to the issues as to whether the misrepresentations were made, whether fraudulently or otherwise, and whether inducement, relies on causation could be more established. Critically, Mr Trafford QC submits that there was a failure of recollection by the Judge of the evidence which led to the error in failing to appreciate that Ms Kerr had lied and in failing thereafter to go on to test the rest of her evidence against the fact that she had lied.

27. The Applicants submit that this error went to the heart of the case, it contaminated the whole of the exercise of appraisal of the evidence because on each of the issues the mendacity of Ms Kerr should have been taken into account. Thus, the whole trial process was defective. It does not matter that there are not specific errors which are identified e.g. the ones abandoned from paragraph 9 of the grounds of appeal. Further, the Applicants say that it cannot be shown that this error is not due to the delay in the delivery of the judgment. The Court in those circumstances should order a retrial, if having regard to the diminished importance in those circumstances of the special advantage of the trial Judge in the interpretation of the evidence, cannot be satisfied that the Judge came to the right conclusion.

V The Claimants' submissions

28. Mr Sibbel on behalf of the Claimants submits that it is common ground that delay is bad but emphasises that the Applicants must still show that the Judge did go wrong. He submitted that it was entirely open to the Judge to characterise Ms Kerr's evidence on her liquidity in the way that he did. A perversity challenge to the Judge's findings is hopeless. Since the rest of the appeal is contingent upon that error being made out, the appeal failed at the first hurdle.

29. The Claimants submitted that the alleged error was one of characterisation, not recollection. It is not in dispute that the Judge accurately recorded what Ms Kerr's evidence was and how it had changed: see (**J/163**). Delay cannot have impacted upon how the Judge chose to characterise that evidence.

30. The Claimants submitted that there was no material difference between the wording used by the Judge and the wording that the Applicants would wish him to have used as regards Ms Kerr's evidence. The language of *"less than accurate"* (**J/107**), that she had *"exaggerated"* (**J/163**) and that this was not "an attractive aspect" of her evidence was no different from saying that Ms Kerr had lied. The difference is one of judicial style rather than substance. (Insofar as there was reference at paragraph 28 of the Judgment to the Judge treating Ms Kerr's original evidence as an *"understandable mistake"*, that was simply a recitation of the submission of the Claimants and was not something which had been found by the Judge.)

31. Mr Sibbel submitted that any error of characterisation cannot in any event have affected the Judge's overall analysis of credibility. The Judge took into account the unsatisfactory nature of the Claimants' evidence on this point. However, at (**J/107**) the Judge found that *"otherwise"* the evidence of Ms Kerr was *"consistent and supported by the documents."* That formed the basis for the Judge preferring the evidence of Mr Kerr over the evidence over the Defendants' evidence (see **J/108**).

32. Further, Mr Sibbel submitted that the Court showed caution throughout the judgment in basing any conclusions upon uncorroborated oral evidence and therefore did apply the authorities cited at (**J/88 – J/91**) in making the assessment which it did as regards the matters raised in paragraph 31 of the Applicants' skeleton. They are the only two findings which are specifically identified in the skeleton argument which may have been different had the Court assessed Ms Kerr's credibility differently. To this the Claimants answer that the reference to the visits to the office and the impressions therein only go to background matters and are immaterial and in any event are largely corroborated by Mr Sinclair's evidence and the documents.

33. The second matter about due diligence rested not on Ms Kerr's uncorroborated oral evidence but on the absence of documentation to enable a proper due diligence exercise and that the Claimants did not take the care which prudent people would have done in assessing what they were provided with: see (**J/138**). In any event, Mr Sibbel submitted that the Judge did consider carefully the impact of the evidence relating to whether Ms Kerr had sufficient liquid funds between April and July 2012. He recited the submission of Mr Sibbel at (**J/28**) to the effect that this was *"an understandable mistake and, in any event, an insignificant one"*, but he said that he would consider that submission later in his judgment. He recited the submission of Mr Trafford QC at paragraph 56 that the Claimants had been *"led into an agreement to invest a sum of money that they did not have in terms of liquid funds and in respect of which Ms Kerr had given untruthful evidence at the start of the hearing, which she had to retract later. It was not the Defendants but the Claimants who had fabricated a narrative in order to disguise their breach of contract."* At (**J/103**), the Judge referred to how *"as the hearing proceeded a factual issue developed as the extent to which Ms Kerr has sufficient liquid funds or assets that could be easily liquidated, which may come to the same thing, to raise the sum of £500,000 required by the agreement"*. In making the findings which the Judge did at **(J/107, J/108, J/163 and J/164)**, the Judge clearly did not accept the submission that there was an *"understandable mistake"*. However at (**J/187**), as noted above, the Judge made a finding, no doubt based upon the evidence admitted during the course of the trial as to the Ms Kerr's resources that *"as to obtaining finance, the Claimant could have raised the necessary money."*

34. Mr Sibbel had three alternative cases in respect of the case. First, he said that the language of being *"less than accurate"* and *"a tendency towards exaggeration"*, and this not being an attractive aspect of her evidence was a way of describing in judicially restrained language that she was lying. Secondly, it meant what it said, that is to say something short of down and out dishonesty, but nonetheless opprobrious conduct which affected the reliability of Ms Kerr's evidence. The Judge was entitled to find this. Thirdly, even if the Judge erred in this regard, it had no material effect on the result of the case.

VI Discussion

35. I have concluded that the delay was indeed inordinate and very regrettable. In this case, the delay is due to no fault at all of either party. The period of delay of 18 months is not appreciably shorter than in cases where there was judicial disapproval about the delay e.g. *Bond v Dunster Properties Ltd* (22 months) and *Gardiner Fire Ltd v Jones* (also 22 months). Whilst the reasons for the delay may mitigate the extent to which it is an affront to justice, the precise reasons do not affect the function of the Court on hearing the appeal. In that regard, I must apply paragraph 7 of the judgment of the Court in *Bond v Dunster Properties* referred to above. The Court must be uninfluenced by submissions about the difficulties facing one or other of the parties if there is to be a retrial about justice and cost. The Court will order a retrial if it cannot be satisfied that the Judge came to the right conclusion.

36. Whilst the availability of a transcript might have alleviated the situation, this was not such a case. Whilst the Judge had his notebooks, the Court has not seen the notebooks. It must approach the matter on the basis that they would have assisted in jogging recollection, but it is not the same as a consideration within a conventional period of the conclusion of the trial. Whilst the Judge did some of his writing within 6 months of the conclusion of the trial, and that is more than beneficial than writing for the first time 18 months after the conclusion of the trial, it does not substantially alleviate the matter because the fact is that the judgment was not ready to be sent out until 18 months after receipt of the closing arguments. Further, the Court has not seen the contents of the drafts. In view of the dangers inherent in delay, the approach of the Court is to assume that large parts of the judgment were not written until many months after the receipt of the closings.

37. For the purpose of this appeal, I shall approach the matter on the basis that this was a very serious delay which calls for special care when reviewing evidence which was before the Judge and the finding of facts which he made. The fact that Mr Trafford QC has honed in one ground does not detract from the need for special care, since if he establishes that ground, he is able to move on to seek a retrial. If he pinpoints a particular finding of fact which may in the light of the review be open to question by reason of the delay (see *Tex* above), the questions which arise are as per paragraph 7 of *Bond* above. The question is whether there has been identified (i) a material point where the Judge's recollection was at fault (unless the error was not due to the delay in the delivery of the judgment), and (ii) if so, whether the Court can still be satisfied that the Judge came to the right conclusion in the case.

38. In my judgment, the ground of challenge about the characterisation of the evidence of Ms Kerr is not an error. My primary reason for reaching this conclusion is that the characterisation of the exaggerated nature of the evidence of Ms Kerr was a finding available to the Judge. There is an imprecision in the term "exaggerated" or "exaggeration", but assume at this stage that it falls somewhere short of dishonest lying. Nonetheless, it affected the Judge's view of the witness. It made her evidence unattractive because it affected her reliability. The Judge clearly had that in mind and was critical of her evidence at (**J/107**) quoted in full above. However, there was a kernel of truth about the evidence because the Judge found on the basis of the evidence contained in Ms Kerr's second witness statement that she had the resources

to raise the necessary money (**J/187**). If this is how the Judge regarded the evidence, then it cannot to be faulted.

39. Another possibility is that the Judge used these expressions as a way of saying that Ms Kerr was lying: on this basis, there is no distinction between the kind of exaggeration referred to and a lie about the bank accounts. This falsity was an important matter to take into account about the reliability or otherwise of the evidence of Ms Kerr. The Judge took that into account. However, it was not decisive as regards being able to raise the money required to make the investment, because in fact Ms Kerr was able to satisfy the Court about her ability to do that by reference to her other assets. As regards matters of credibility generally, if the Judge regarded exaggeration as the same as lying, then he did take it into account generally as is apparent from the references in paragraph 38 above.

40. Whether it was a lie or an exaggeration falling short of a lie, this was a matter which affected significantly the weight which the Judge was able to give to the evidence of Ms Kerr. It was to her discredit (**J/107**). Further, even if there is a distinction between a lie and an exaggeration in the sense intended by the Judge, the distinction is not so sharp as to have made a tangible difference in the circumstances of this case.

41. Further, it does not even follow from one lie that the rest of the evidence of a witness must be rejected, particularly in circumstances here where the existence of representations was corroborated by contemporaneous documents, and where inducement was logically to be inferred from the nature of the representation. .

42. The reason why Ms Kerr's evidence prevailed over the Applicants was because it was largely supported by contemporaneous documentary evidence and in part because her case did not depend on her oral evidence at all. For example, the fraudulent representation as to the value of the business and the 10% share which two institutions had offered to acquire for £1 million. The Defence statement at paragraph 5 effectively repeated the alleged misrepresentation, saying that *"SMG had many offers/proposals that the Defendants were privy to where institutions, financial and otherwise, wished to have privileged access to the Celebrity Clients contacts of SMG. There were proposals which included valuations of £10 million and therefore equity positions in SMG of 10% for £1 million…£10 million was proposed to the Claimants and they accepted the price based on their 3 months of due diligence and working in the offices of SMG."* This was heavily diluted in the Amended Defence and Counterclaim at paragraph 5(a) to *"discussions with a financial institution in January/February 2012 as to a possible payment of £1m for 10% of SMG (implying a company valuation of £10m) and also separate discussions with another potential merger partner with a valuation of £10m was raised."*

43. In the Judgment at **(J/155-160)**, the Judge treated the evidence of the Applicants as *"riddled with inconsistency"* starting with the initial pleadings and ending with the oral evidence. They said there that no actual offers had been received which was at odds not only with the original defence, but with a recorded conversation at a meeting on 15 June 2012 in which Mr Nuttall answered a suggestion that a valuation was plucked out of the air, by referring to *"An offer of £1 million for 10 per cent which we had already received"*, and at a meeting on 9 July 2012, Mr Nuttall said *"We said we had been offered a million for 10 per cent."* The Judge contrasted this with such documents as were disclosed which showed at best a valuation of £2.25 million and

no offers of the kind described. More generally, the Judge commented on the absence of what would be a precursor of any such valuation, namely documents evidencing requests for financial information and generated documentary material. In the circumstances, this critical fraudulent misrepresentation did not depend upon the evidence of the Claimants. None of this analysis is the subject of specific criticism on the part of the Applicants.

44. This then leaves the Applicants to have to resort to the argument that since the Judge should have rejected in its entirety the evidence of Ms Kerr, that the evidence on inducement should have been rejected. This is utterly unrealistic bearing in mind the following. I raised in the course of argument the case of *Dadourian Group International Ltd v Simms and others* [2009] EWCA Civ 157 in which the Arden LJ referred to the directions of the Judge below (Warren J) which did not contain any errors of law, namely:

"99 ...the judge directed himself in law, at J(1) 543 - 546, as follows: (1) it is a question of fact whether a representee has been induced to enter into a transaction by a material misrepresentation intended by the representor to be relied upon by the representee; (2) if the misrepresentation is of such a nature that it would be likely to play a part in the decision of a reasonable person to enter into a transaction it will be presumed that it did so unless the representor satisfies the court to the contrary (see Morritt LJ in Barton v County NatWest Limited [1999] Lloyd's Rep Banking 408 at 421, paragraph 58); (3) the misrepresentation does not have to be the sole inducement for the representee to be able to rely on it: it is enough if the misrepresentation plays a real and substantial part, albeit not a decisive part, in inducing the representee to act; (4) the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee's decision to enter into the transaction; the representor does not have to go so far as to show that the misrepresentation played no part at all; and (5) the issue is to be decided by the court on a balance of probabilities on the whole of the evidence before it.

....

101. We are unable to detect any error of law on the part of the judge in the way in which he approached this issue and did not understand the appellants to suggest otherwise."

45. This statement of the law is entirely consistent with the law as referred to by the Judge: see paragraph 13 above. As in Dadourian, there was no error of law on the part of the judge, and the Applicants do not suggest otherwise.

46. A representation of the above kind as to valuation would be likely to play a part in inducing a reasonable person to purchase a 10% interest, and so on the basis of the finding of fraud, the presumption of inducement must apply. In order to rebut it, it would be necessary for the Applicants to show that the representation did not even play any real or substantial part in the decision of the Claimants to proceed. One only has to state the propositions to see how fanciful the proposition would be. Even a person who lied about resources would be likely to have placed some weight on the representations. The highest that it is put is that the Claimants became carried away

with the access to celebrities, but even if that were true, it would not negate the operation of the representations on them to a real and substantial degree.

47. The Judge regarded the impact of this representation and indeed others as obvious. I shall cite from his judgment insofar as concerned the valuation of the business at (**J/188-J/189**):

"188. But I regard it as obvious that some statements were likely to have induced the Claimants to sign the Agreement….they signed the Agreement because they believed that two financial institutions had been prepared to invest £1 million pounds on the basis that SMG should be valued at £10 million pounds, the true value lying in its business contacts and connections, most, if not all, of which depended on the first Defendant….

189. But more importantly the statement gave the Claimants confidence to believe that they could safely enter into the Agreement in that SMG was a successful enterprise highly prized by respectable commercial entities, who had put a value on it much greater than that arrived at by conventional accounting. Nothing I have heard from the Defendants establishes that the Claimants were not induced by the statements to enter into the Agreement. Both of these were not only false but also fraudulent misrepresentations which, in my judgment were not only likely to have induced the Claimants to enter into the Agreement but also obviously did so. In any event, because I have found them to be fraudulent the Claimants only needed to prove that they were actively present in their minds at the time they signed the Agreement and I have no hesitation in finding that to be the case."

48. In the circumstances, the representation relating to the valuation was made out, and so was reliance. It is important to note that **(J/188)**, the Judge reminded himself as to the dangers of looking at the representations cumulatively, and hence has found about two of the alleged misrepresentations that the relevant statements were not made. The Judge was applying correctly in (**J/188-J/190**) the law as set out in the Dadourian case above. By itself, and without the other representations, it entitled the Claimants to claim rescission. Thus, on the basis of this representation alone (even without the other representations), the Court is entirely satisfied that the Judge came to the right conclusion.

49. At **(J/188)**, the Judge found equally obvious the notion that the Claimants must have relied on the representations relating to the size of the liabilities of SMG generally and to HMRC. It is unnecessary to rehearse the findings here, but they can be seen at (**J/149-154**, **J/180-J/182** and at **J/188-190**). As regards the representations relating to liabilities, in **(J/188)**, the Judge stated that it was unthinkable that the Claimants would have made the investment if in fact they had known that SMG had greater debts than those represented.

50. It is not necessary to prolong this judgment by rehearsing how he came to the conclusions which he did in respect of the other representations. In the course of preparation for the hearing, and the hearing itself and in the review for the purpose of writing this judgment, each of the findings have been considered including the reasoning of the Judge on which they are based. In particular, in the hearing, I sought and obtained assistance by being addressed by both Counsel as to the findings

underlying each representation. The review has been carried out with especial care in view of the serious delay.

51. The following points are to be noted. This is not a case where there is any specific criticism or challenge regarding any of the findings about such of the representations which were found to have been made and reliance on them. The reason why Ms Kerr's evidence prevailed over the Defendants was because, despite the reservations which the Judge entertained, it was largely supported by contemporaneous documentary evidence and was consistent with them. This contrasted with the inconsistencies of the Defendants' evidence and the casual approach of the Defendants to disclosure which undermined the Judge's confidence in them **(J/108)**. These are not demeanour points, but the heavy emphasis on documents and testing the evidence against documents makes the impact less serious than in the case of a Judge who is deciding cases more on demeanour of witnesses and the like.

52. In the end, not only has the ambit of the challenge been very narrow, and this has been rejected, there is an overall feel about the judgment which perhaps explains the confined nature of the appeal. It is that without detracting from the serious concerns about the delay, the judgment is thorough and well-reasoned. This is evidenced particularly by the way in which the evidence relating to each of the alleged representations was set out and then the subject of detailed analysis. That analysis led in part to accepting that there had been fraudulent misrepresentations, but in respect of some misrepresentations rejecting the allegations of fraud and in some not accepting that there had been a misrepresentation at all: see paragraph 9 above. The Judge set out the facts clearly. He applied the advice of Robert Goff LJ in the *Ocean Frost* and of other judges about the approach to evidence, particularly testing the evidence against the documents, the motives of the parties and the overall probabilities. The Judge stated and applied the law well in respect of the law of fraudulent misrepresentation and generally. This is important as part of the assessment as to whether the judgment can stand following the delay in question.

VII Conclusion

53. It is very regrettable that there was such serious delay. For this reason alone, permission is granted for the appeal because it seems to me to be have necessary for the appellate court to have subjected the case to scrutiny. It is to be noted in *Bond* at (**J/118**) that permission was granted to appeal and the Court of Appeal doubted whether permission would have been given without the delay.

54. I am entirely satisfied from all of the above that despite the very serious delay and the especial care and scrutiny to which I have subjected the Judge's findings that

(1) There is no evidence of fault of the Judge at any or any material point other than the delay itself;

(2) The Applicant has been unable to pinpoint any particular findings of fact which may be open to question whether by reason of the delay or at all;

(3) There is no reason to believe that the Judge did not reach the right conclusion on all of the findings and in the decision that the Claimants were entitled to rescind the Agreement and the relief which he ordered.

55. For all these reasons, there is no reason for a retrial. In all the circumstances, I am entirely satisfied that the Court came to the right conclusion. Accordingly, the appeal is dismissed.