Neutral Citation Number: [2017] EWHC 3392 (QB)

Case No: HQ15X04687

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2017

Before :

MR JUSTICE GREEN

- -

Between :

DARIUS KHAKSHOURI	**Claimant**
- and -	
(1) ANTHONY JIMENEZ	
(2) KEVIN CASH	**Defendants**

- -
- -

Siward Atkins (instructed by **PGB Gitlin Baker Solicitiors**) for the **Claimant**
Tom Leech QC (instructed by **Herbert Smith Freehills LLP**) for the **First Defendant**
Stephen Kenny QC (instructed by **Quinn Emanuel**) for the **Second Defendant**

Hearing dates: 5th, 6th, 9th, 11th and 12th of October

- -

Approved Judgment

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

.....

MR JUSTICE GREEN

MR JUSTICE GREEN :

A. Introduction: Overview of case and conclusion

(i) The First Claim: The alleged deceitful representations

1. This is a claim for damages in deceit.

2. In Autumn 2013 Charlton Athletic Football Club ("the Club") was in dire financial straits. Throughout 2012 and 2013 its debts had been mounting and it was losing millions each year. It had more or less exhausted its normal lines of credit. The risk of administration was real. The directors concluded that a sale of the Club was necessary. But in its present financial situation it did not look a very attractive proposition. The stadium owned by the Club, "the Valley", is however situated very close to the Greenwich Peninsula in London's docklands. At this time the local authority, Royal Greenwich Borough Council, was considering a large-scale development of the area ("the Greenwich Peninsula development") and as part of its overall plan it favoured the idea of constructing a new sporting and/or entertainment stadium within the development area.

3. For the Club's directors this opened up the possibility that they could use the Valley stadium as leverage in order to obtain a seat at the Greenwich Peninsula development negotiating table. One possibility was that, as part of the local authority's desire to see a major sporting or entertainment venue located on the site, the Club would relocate its stadium into the development area and the Valley would then be redeveloped as housing, possibly including social housing. The underlying premise was that the involvement of the Club could add positively to the pool of options open to the developers.

4. The Greenwich Peninsula development was, by its very nature, a long-term scheme. It could easily take 8 or 9 years or longer to come to fruition. And such was the state of the Club's finances that the directors did not have the luxury of time. To overcome this the directors conceived of an idea whereby they would sell the Club but with a linked deal whereby they (or some of them) would retain some sort of an interest in the stadium following the sale which, as it was put, would leave them with "*skin in the game*". This linked deal became known as the "Land Deal". They would do this by ensuring that the Club was not sold <u>unless</u> the new owner also concluded a Land Deal which enabled the Defendants to retain some sort of an interest post-sale. A Land Deal, if entered into, would achieve no more than give the parties *locus <u>following</u>* the sale to participate in some as yet undefined way in the future Greenwich Peninsula development. It was by no means a promise of riches because the Greenwich Peninsula development would be very long term and very complex. Nonetheless *if* the directors of the Club could pull off a Land Deal they would at least remain potential "*players*".

5. Some analysis performed by the Defendants and their corporate team in early 2013 suggested that there were a number of different options for future participation in the Greenwich Peninsula development and that they could be very profitable. But all of these plans would fall away if the Club went into administration, in which case the Defendants would lose the chance to be personally involved in any such future scheme.

6. Throughout 2013 prospective buyers of the Club came and went. As the year progressed the position was looking increasingly uncertain and the Club's financial position was precarious. In September 2013 the First Defendant, Mr Tony Jimenez, went to Los Angeles and there he spoke to an old personal friend, Mr Darius Khakshouri. During the course of meetings held between 15th-17th September he endeavoured to persuade Mr Khakshouri to advance a short-term loan to the Club. Mr Khakshouri was at first unenthusiastic. He is a property developer and he had tied up his spare capital in a particular development project in West Los Angeles ("the LA Deal") in which he had a 55% share, and he therefore did not have spare cash to advance to the Club as a loan. Mr Jimenez showed Mr Khakshouri the internal analysis prepared by the Club of the potential options arising out of the Greenwich Peninsula development. He offered to bring Mr Khakshouri into that scheme, <u>if</u> he advanced short-term funds to the Club.

7. This is the context to the present litigation. Mr Khakshouri argues that to induce him to make a loan Mr Jimenez represented to him two things:

   i) First, that he and the Second Defendant, Mr Kevin Cash, were the majority shareholders and controllers of the Club.

   ii) Second, that in their capacity as such they would <u>*ensure*</u> that the Club was not sold without a Land Deal being in place. If Mr Khakshouri advanced the loan he would be given a 30% interest in the Defendants' share of the Land Deal.

8. Mr Khakshouri was persuaded. An important part of this rationale was that he was dealing with two very close personal friends of long standing, namely the First and Second Defendants. But to raise the finance to make the loan he had to free up capital by diluting his 55% interest in the LA Deal. He did this in part by selling a 30% interest in the LA Deal to his brother in law (thereby reducing his stake to 25%). With these funds he then lent £1.8m to the Club ("the Loan"). He did so initially upon a wholly undocumented basis relying upon the fact that Messrs Jimenez and Cash were very close personal friends. The documentation was in fact drawn up later.

9. In November 2013, after the Loan had been made, all the prospective buyers for the Club had melted away. But then Mr Roland Duchatelet came onto the scene. He was the owner of a number of European football clubs. He was prepared to do a very quick deal to buy the Club and he wanted completion before the end of the 2014 transfer window, which was at the end of January. He expressed interest in the Land Deal but, ultimately, he persuaded the directors to sell the Club without any Land Deal. Completion occurred on 2nd January 2014, but the details put in place to effect the change of ownership were to take some time and the final consideration to be paid was also contingent upon whether the Club was relegated, which would not be known until May 2014.

10. These facts form the basis of the first part of this litigation (the "First Claim"). Mr Khakshouri argues that the Defendants were not shareholders (majority or otherwise) in the Club and in truth they never intended to condition the sale of the Club upon the Land deal. He was induced to withdraw from the very profitable LA Deal by the two false representations (see paragraph [7] above) and, had those representations not been made, he would have remained with a 55% stake in the LA Deal and he would have benefited from the very substantial profits that in due course it generated. That is the measure of his loss from the deceit practised upon him.

(ii) The Second Claim

11. The second claim made in this litigation ("the Second Claim") is, in relative terms, a very minor issue. It arises because in January 2014 the directors of the Club were seeking to reschedule the repayment of debts owed to the Club, and this included the debt to Mr Khakshouri. He was in the event persuaded to defer a portion of the repayment until May 2014. He says that he did this because he was assured that the Land Deal was still a reality. The true position, namely that there was no Land Deal, did not become apparent to Mr Khakshouri until July 2014 when he was given the news by Mr Jimenez. Had he known in January 2014 that there was in fact no Land Deal in place, he would not have agreed to vary the terms of the Loan to defer repayment. He suffered forex losses in the interim. This forms the starting point for the claim for damages under this Second Claim.

(iii) Conclusions

12. On the evidence I find in favour of Mr Khakshouri. In relation to the First Claim I am satisfied to the relevant standard that Mr Jimenez did make the two representations referred to and that he did so on his own behalf and that of Mr Cash. He made these representations knowing that they were untrue and to induce Mr Khakshouri to make the Loan. Mr Jimenez is liable in deceit; Mr Cash is vicariously liable for the deceit of Mr Jimenez. The Second Claim, relating to the deferment of the Loan, is very minor in comparison. But as to this I find in favour of Mr Khakshouri in relation to Mr Jimenez but not, on this point, Mr Cash.

B. The law of deceit: Relevant principles

13. In this section I summarise the relevant law. There is no material dispute between the parties as to this.

14. The starting point concerns the standard of proof. Although the tort is given the nomenclature "*deceit*" it is in fact based upon fraud: *Derry v Peek* (1889) 14 App Cas 337 at page [376] per Lord Herschell. The civil standard of proof is the balance of probabilities but, the more serious the allegation or consequences of such an allegation being true, the more cogent must be the evidence to discharge the standard. Lord Nicholls articulated the proposition in Re *H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at 586D-F:

> "'The balance of probability standard means that the court is satisfied that an event occurred if a court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent it is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence…Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.'"

See also per Lord Steyn in *Smith New Court Securities Ltd v Citibank N.A.* [1997] AC 254 at 274C-D: *"...the very gravity of an allegation of fraud...has to be weighed in the scale in deciding as to the balance of probabilities*."

15. The second point concerns the relevance of documentary evidence and the overall logic of a case in the context of potentially inconsistent oral evidence. The credibility of witness evidence should be evaluated against the contemporary documentation and overall probabilities: see eg per Robert Goff LJ in *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1 at pages [56] - [57]:

> "… I have found it essential in cases of fraud, when considering the credibility of witnesses, 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 to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth."

16. Mr Justice Leggatt emphasised the centrality of documentary evidence, in cases involving facts of some vintage, in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) at paragraphs [15] - [22].

17. The third issue concerns the components of the tort of deceit. These are well established and can be expressed as a series of five questions:

(a) Did the defendant make the representation as alleged?
(b) If so, was the representation true or false?
(c) If it was false, did the defendant know that the representation was false or was the defendant reckless as to whether it was true or false?
(d) If the defendant knew it was false did the defendant intend the claimant to act in reliance upon the representation?
(e) If so, did the claimant act in reliance on the representation and in consequence suffer damage?

See e.g. *Eco 3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413 at [77].

18. In cases where it is alleged that the defendant gave assurances or promises reflected in an intention to do something, the following principles are relevant:

(a) A statement or prediction by A to B about his or her future conduct is not actionable unless it is either (i) contractually binding or (ii) a statement of present intention: see *FoodCo UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) at paragraphs [193] to [197] ("*FoodCo*").
(b) A statement of intention is only false if the person making the statement does not honestly hold the intention being expressed at the time: see *Wales v Wadham* [1997] 2 All ER 125 at page 136.
(c) The fact that the intention is not fulfilled is not, in itself, proof that it did not exist when the representation was made: *Beattie v Lord Ebury* (1872) 7 Ch App 777 at page 804.

(d) There is a distinction between a statement of present intention to act in a certain manner, and a promise to do so: *British Airways Board v Taylor* [1976] 1 WLR 13 at page [17].

19. In *FoodCo* (above) Lewison J (as he then was) explained, in relation to a prediction about the future in the context of contractual negotiations, that the Court was considering whether what was said incorporated a representation about fact (at paragraph [198]):

> "It would not, I think, be difficult to say that in most cases a prediction about the future (particularly in the context of contractual negotiations) would necessarily be understood as implicitly representing that the maker of the prediction had an honest belief in it. The existence (or otherwise) of a belief is a present fact at the moment that the prediction is uttered. If, therefore, the maker of the prediction does not have an honest belief in the prediction at the time when he makes it, he will have made a false representation of fact. In other cases, further implications may be appropriate. It may be that the representation would necessarily be understood as meaning that the prediction is based on reasonable grounds; or that the maker of the prediction has the present intention to do what he can to make it come true."

20. Established authority also provides guidance about reliance and causality:

(a) The representation must be intended to be acted upon by the representee: *Peek v Gurney* (1873) L.R. 6 H.L at pages [411] – [413].
(b) If a fraudulent misrepresentation is found to have been made it, will give rise to a rebuttable presumption of fact that the representor intended the representee to act in reliance on it: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co. Ltd* [1995] 1 AC 501 at pages [541A] and [551D].
(c) The representee must in fact have acted in reliance upon the misrepresentation. There is no reliance if he would have done the same thing even in the absence of the representation: see *Nash v Calthorpe* [1905] 2 Ch 237 at page [245].
(d) The misrepresentation need not be the sole cause, provided it contributes substantially to deceiving the representee: see *Parabola Investments Ltd v Browallia CAL Ltd* [2009] EWHC 901 (Comm) at paragraph [97].

C The facts

(i) Dramatis personae

21. The parties to the present proceedings are property developers. At one time they were all firm friends of long standing but, in consequence of the events arising in this litigation, they have regrettably fallen out. The principal characters in this case are as follows.

22. Mr Darius Khakshouri: The Claimant, Mr Darius Khakshouri, has for the past 30 years been a professional property developer in Los Angeles. He specialises in commercial and residential development. He has, in the past, developed condominium projects but more recently he has invested in apartment buildings, including mixed use

commercial/residential units which he will hold and manage. Frequently his investments may take a number of years in coming to fruition. He will be engaged, along the way, in all aspects of financing, construction, leasing and managing developments post-construction. In his witness statement, and in his oral evidence, he explained how he had over the course of many years developed a close personal and business relationship with the Defendants. This personal relationship is an important factor in the events which have led to this litigation.

23. Mr Tony Jimenez: The First Defendant, Mr Tony Jimenez, started his professional life working in local government. Subsequently he was engaged in a variety of business enterprises with a focus upon property. He moved to Cyprus in 2003, living there until 2013 when he moved to Dubai. On behalf of a number of investors and his family trust, he became involved in property developments in Cyprus and Dubai. Between January and October 2008, he was Vice President at Newcastle United Football Club. He became acquainted with the Second Defendant, Mr Kevin Cash, in around 2007 and they became friends shortly thereafter. He was introduced to Mr Khakshouri in late 2009 and was informed that Mr Khakshouri and the Second Defendant had been firm friends and business associates for over 20 years. Mr Jimenez became a personal friend to Mr Khakshouri. The family trust referred to was the Cavansa Trust. Mr Jimenez was a beneficiary under the trust. He had no formal authority or power of attorney to act for it. He did recommend projects and ventures that the trust might invest in. The Cavansa Trust was a significant minority shareholder in the corporate vehicles that, indirectly, owned the Club.

24. Kevin Cash: The Second Defendant, Mr Kevin Cash, is also a property developer. He also acts as an informal adviser to the Rose Trust, which is a trust representing the Cash family. He is a beneficiary under the trust. He has no formal powers to act for the trust but from time to time he identities potential investments, principally in property, that he recommends to the trustees. The Rose Trust was a lender to the club pursuant to a credit facility entered into in 2011. In his evidence he explained that neither he nor the Rose Trust had an interest in lending to the Club *per se*. The Rose Trust became interested only because of the potential to become involved at a later point in the Greenwich Peninsula development. He was a very long and close friend of the Claimant.

25. Michael Slater: Mr Michael Slater was closely involved in the running of the Club. He was a shareholder of CAFC Holdings Limited, the company which ultimately owned the assets of the Club (see paragraph [28] below). He sat on the Board of Directors. He was also chairman of the Club from the point in time when it was acquired on 31st December 2010 until completion of the sale to Mr Roland Duchatelet and Staprix NV on 2nd January 2014. Together with his colleague, Mr Max Deeley, he was responsible for the negotiation of the sale of the Club. As part of his management responsibility with the Club he was responsible for its financial affairs. This included negotiations with the banks for the Club, namely RBS and HSBC in relation to the debts the Club held with them. He also regularly negotiated and reviewed commercial contracts that the Club was party to.

26. Max Deeley: Mr Max Deeley was a chartered accountant employed in-house at the Rose Trust. He had worked there since approximately 2005. During that period he worked closely with Mr Kevin Cash and Mr Michael Slater as the accountant to the trust. He was closely involved in the negotiations relating to the sale of the Club. He explained in evidence that he and Mr Michael Slater took the lead in such negotiations.

This was because it enabled the actual Finance Director of the Club to focus on the running of the Club and to avoid being diverted from this by the substantial amount of work required to negotiate a sale. As part of his role in the sale of the Club he had a number of conversations with Mr Roland Duchatelet. He was in addition responsible for keeping Mr Tony Jimenez and Mr Kevin Cash updated about progress in negotiations. He was also involved with Mr Michael Slater in the discussions with the creditors of the Club concerning the deferment of repayments in early 2014.

27. Isaac Cohanzad: Mr Isaac Cohanzad is the brother-in-law of the Claimant. He is a professional real estate developer. In the past he has undertaken a number of joint venture developments with the Claimant in the west of Los Angeles. He has a 30% share in the LA Deal.

(ii) Charlton Athletic Football Club: Corporate structure

28. The Club has a somewhat complex ownership structure. Various organograms were provided during the trial. I set out below that which most accurately reflects the corporate structure, prepared by solicitors for the First Defendant.

Ownership Structure of the Club

Staisse Bay SA (BVI)

which owned:

AGN Trustees Limited (Nevis)

Staisse Bay SA holds the shares in CAFC (BVI) Limited as nominee and trustee for AGN Trustees Limited as trustees of the Cavansa Trust.

CAFC (BVI) Limited (BVI)

Which owned as to 47.6%:

CAFC Holdings Limited (BVI)

Directors (2013)
Tony Jimenez
Michael Slater
Maryla Shingler

Shareholders
47.6% **CAFC (BVI) Limited** (BVI)
23% Michael Slater
9.8% Merlin Equities Corp
9.8% Taywell Corp
9.8% AGN Trustees Limited

Which owned, as to 90%:

Baton 2010 Limited (UK)

Directors (2013)
Tony Jimenez Michael Slater Richard Murray Martin Protheroe

Shareholders

90% **CAFC Holdings Limited** (BVI)
10% Richard Murray (subject to "drag-along" obligations **[E1/1]**)

Which owned:

These two companies between them owned all the assets of the Club (including The Valley stadium).

"**The Club**" ie

Charlton Athletic Holdings Limited (UK)

Directors (2013)
Tony Jimenez Michael Slater Richard Murray Martin Protheroe

Charlton Athletic Holdings Limited (UK)

Directors (2013)
Tony Jimenez
Michael Slater
Richard Murray
Martin Protheroe

(iii) The Greenwich Peninsula development

(a) The Masterplan: April 2012

29. The Land Deal concerned the possibility of the parties participating in some aspect of the Greenwich Peninsula development. During 2010/2011 Greenwich Borough Council ("Greenwich" or "the Council") began work on a Masterplan ("the Masterplan") for the development of industrial land on the west side of the Greenwich Peninsula close to the O2 entertainment venue.

30. In April 2012 the Council published a Masterplan for the development. This envisaged the construction of a mixed-use area including leisure, education, employment and housing. The Masterplan constituted a "Supplementary Planning Document" ("SPD"). The status of the Masterplan as an SPD meant that, whilst not amounting to adopted Council policy, it nonetheless could be used as a material consideration when assessing planning applications. It amounted to a development framework which was, as stated in the Masterplan, intended "… *to steer development in this part of the Royal Borough for years to come."* The Masterplan described the area to the west side of the Greenwich Peninsula as a relatively underdeveloped area that had been held back by two century old factors: the remnants of its industrial history and the southern approach to the Blackwell Tunnel. The site was described as having "*huge potential*". Implementation of the Masterplan would create a new "*world class district for London*". The Masterplan set out the relevant "*Objectives*". The first objective was in the following terms:

> "To transform the contribution of the area to the Royal Borough and the sub-region by focusing development and regeneration around a new multi-purpose sports/entertainment/education facility that links with, and complements the offer at the O2 Arena."

31. Later in the Masterplan under the heading "*Sports/Leisure/Education complex*" the following was stated:

> "A multi-use facility is to be centrally positioned within the Masterplan. A key role for it would be to provide outdoor entertainment linking with and complementing the offer at the O2 Arena. The complex could also be integrated with an elite sports facility or university. At ground level the complex could contain retail and hospitality uses creating an active edge when not in use.
>
> The western edge of the complex could be quite low lying, perhaps initially simply a land form. Lowering the western edge allows for views out towards Canary Wharf, and access by pedestrians along the river walk.
>
> Any development of the complex will be dependent on the release of the safeguarded Tunnel Wharf."

(b) The Lisney advice: February 2013

32. Mr Michael Slater (Chairman of the Club and significant minority shareholder) sought professional advice on the potential for the Club to relocate from its existing stadium at the

Valley to a new facility potentially to be built on the Greenwich Peninsula. Advice was given by Lisney, Chartered Surveyors, ("Lisney"), in a letter dated 13th February 2013. The advice was said to be preliminary to the carrying out of a more detailed report. The advice was based upon the Masterplan but also upon attendance at a meeting with the Leader of the Council and its head of regeneration in January 2013, during which the Council apparently emphasised the desirability of a stadium to be constructed on part of the site. The purpose and function of the stadium from a planning perspective was to provide a buffer between the safeguarded Victoria Deep Water Terminal to the north of the site and development land to the south.

33. A complication in any redevelopment of the site lay in the fact that a part of the land was owned by Morden College. The college is a Christian-founded charity established in the early 18th century, its purpose being to assist elderly people by the provision of homes for independent and supported living and residential care facilities. The freehold owned by Morden College extended to 34.7 acres. Lisney, on behalf of the club, met with representatives of Morden College and the Council in January 2013. During this meeting the Council explained their intentions for the site and their hope that a stadium would be constructed on part of the site. They hoped that the Club would commence a dialogue with Morden College to see if there was a way to advance the development with the construction of a stadium as an early step. Of relevance was the fact that Morden College had leased the majority of the site to Cathedral Properties ("Cathedral") on a 50-year lease from 1994 and a further part of the site to Hays Chemical Distribution Limited on a lease expiring in 2037.

34. One advantage of the construction of a stadium on the site would be to release approximately 10 acres of land at the south of the stadium which the Council had identified as suitable for a high-density river-front residential development. The existing Valley site could also be brought into the deal and be used for social and affordable housing. The summary to the advice given to the Club was in the following terms:

> "There is a very strong relationship between CAFC and the Royal Borough of Greenwich and in my view it is clear that the local Authority would like to see proposals brought forward showing a relocation of CAFC's ground to the site they have identified in their master plan.
>
> The local authority have made it clear that if economically viable proposals are brought forward which show the provision of a stadium that they are prepared to robustly defend their master plan and may use other powers available to them including compulsory purchase powers to ensure that their vision for the Peninsula becomes a reality."

(c) Documents prepared for prospective buyers: February 2013

35. At around the time when the sale of the Club was being contemplated (late 2012/early2013) various documents were prepared to provide information to prospective purchasers. These included information about the possible development on the Greenwich Peninsula. For instance in one document providing general information about the Club, there is a description of the Council's plan to develop the Greenwich Peninsula site. It is stated that within the Peninsula there was the "Syral Site" and that the Council had made it clear that only if CAFC was involved and the development included a new football stadium would the Council support a change in planning status from the current low value industrial status to the more valuable mixed residential/commercial/ leisure status. The document stated:

> "CAFC hopes to be able to leverage this opportunity to get a new stadium built for the club free of charge and then develop the land the existing stadium and training ground sit on. The existing owners of CAFC would like to become involved at an early stage of further developments of Greenwich Peninsula."

36. A more detailed document relating to the proposed development was produced in about February 2013. One significance of this document is that it was provided to the Claimant by the First Defendant during the meetings in Los Angeles in September 2013 and therefore stands as a fair reflection of the Land Deal that was being discussed. The document described the position of Morden College as freeholder and the long leases that it had entered into. There is a general description of the development potential of neighbouring sites. The document described the Masterplan. In relation to the possibility of a new stadium being located within the site the following is stated:

> "The area of the proposed stadium site is c.12 acres. Stadiums are difficult buildings to make work, the most obvious fit for the stadium is as a football stadium with additional use for concerts. The only club that could realistically use the stadium is CAFC as it is in the heart of the core Charlton area and it would be political suicide for the local council to build a ground to host another team. The Materplan proposes a 40,000 seater stadium with the ability to increase the capacity."

37. The document later proceeds to set out three potential options. The first would involve the Club acquiring the site from Morden College. This option contemplated, in substance, the wholesale taking over of the entire development at a cost of approximately £2 billion. The option postulates that on such cost a profit of c£0.8 billion could be available. The second option entailed the Club obtaining a stadium constructed for free and the mortgage on the existing stadium being repaid. It is stated that the Club maintained a close relationship with the Council and supported the Council in its belief that a stadium as part of the overall development was viable. It is stated that the Council could insist that Cathedral develop the site in line with the Master Plan. The following is then stated:

> "CAFC can make this more palatable to Cathedral by offering its Existing Stadium to site a large proportion of the social housing requirement. This would free up an additional 1.3 m sq ft of residential development for sale on the river, adding an addition £245m profit to the development."

The third option was that CAFC would obtain a substantial fee to drop its interest in the site.

38. It can be seen that a commitment to relocate into the Greenwich Peninsula site could have unlocked a substantial development potential. However, the realisation of this potential was contingent upon the Club and/or London Borough of Greenwich agreeing terms with the freeholder and long-leaseholders. In addition, detailed and complicated planning permissions would be required. And, at least if option 1 was pursued, a total development finance of approximately £2 billion would have had to be secured. If such a development was to come to fruition it would have taken a considerable period of time.

(iv) The financial crisis at the Club: 2012/2013

39. As of 2012/2013 the Club had more or less exhausted its usual lines of credit. A major obstacle to those involved in the Club, including in particular the Defendants, becoming involved in the

Greenwich Peninsula development arose from the fact that in 2012 the Club's finances were weak. The additional revenue which the Club expected from promotion did not materialise and players' wages had escalated. The Club was trading at a loss of approximately £5.5m per annum. The Rose Trust declined to offer additional funding. It became clear to the directors of the Club that it was in the best interest of the Club for it to be sold. This meant that any future involvement in the Greenwich Peninsula development would not be undertaken by the present owners of the Club but would, if there was to be involvement *at all*, have to be undertaken by a new owner. Whether or not the Defendants were able to retain an interest in the development would therefore become a matter of negotiation *during* the course of the sale process.

40. As I explain below, the Defendants formed the intention to use the sale of the Club as a lever to secure their continued interest in the Greenwich Peninsula development post-sale. But of course, if the Club went into administration, their ability to achieve this goal was severely prejudiced and in all probability, fatally so.

(***v) Potential buyers of the club. The importance of "skin in the game"***

41. Michael Slater, a qualified lawyer and the Club's Chairman, always had at the back of his mind the prospect of the Club being put into administration. Indeed, the documents reflecting the position at the end of 2013 indicate that it was only the imminence of the sale to Mr Duchatelet in December 2013 that held administration at bay (see eg the email at paragraph [62](vii) below). The need for a quick sale was pressing. As 2013 progressed, potential buyers came and went. In Summer/ early Autumn it appeared as if a sale of the Club coupled to a Land Deal would be signed with the US investors Blackstone. However, in mid-September 2013 a team from Blackstone came to the UK to conduct due diligence. It became apparent then that the Blackstone team were divided as to the merits of the transaction. And in fact they did in due course withdraw.

42. What is evident from the documentation is that the possibility of being involved in the Greenwich Peninsula development was of interest to the prospective purchasers. Mr Slater explained that the way that the team would approach the buyer was to offer an equity stake in any future development deal. It is his view that this was a "*big selling point*". In his evidence he explained how one Kuwaiti investor informed him that this would be a "*very attractive plus*". Another potential purchaser engaged in discussions with Council. Mr Slater also referred in his evidence to the approach made, via an agent, by one anonymous property developer who appeared more interested in the development than the football club.

43. The Defendants fully understood that it was their ability to leverage their ownership of the Valley stadium that was the key to their being able in the long term to have a seat at the negotiating table in any major development on the Greenwich Peninsula. They therefore had to devise a vehicle which enabled them to sell the Club but retain an interest in the stadium upon completion. If they failed to do this then they handed all of their leverage over to the new Club buyer.

44. The basic model devised for the sale of the Club would leave the Defendants "*with skin in the game*" following the sale of the Club to the new owner. The sale would be implemented through a "Special Project Vehicle" ("the SPV Ltd"). A draft SPV agreement was before the Court. The drafting of the model was relatively straightforward. Boiled down to essentials the SPV agreement with the new owner would commit that new owner (i) to a stadium relocation and (ii) to dealing only with the Defendants in relation to the implementation of the stadium relocation.

45. Of course, to have a chance of retaining "*skin in the game*" following the sale of the Club, the Defendants had to be in a position to sell the Club as a going concern. And therein lay a major problem. As Autumn 2013 progressed, the club's finances were deteriorating and a financial crisis loomed. The need for short term finance was critical.

(vi) The September 2013 meetings between the Claimant and First Defendant

46. This is the context to the meetings that occurred between the Claimant and the First Defendant, Mr Jimenez, in Los Angeles on the 15th- 17th September 2013. This case turns in large part on what was or was not said during these meetings. During cross-examination, the course of these three days was explored and included such issues as the time spent in hotel lobbies engaged in discussing the deal, which restaurants the parties went to for dinner, what they ate, who they sat next to, whether Mr Khakshouri took notes during the dinner, whether they visited the site of a project the Claimant was interested in, etc. The subtext to this was to either establish or undermine the credibility of the competing versions of Mr Khakshouri and Mr Jimenez as to what was said (or not said). I must come to a decision about what was said. I have set out my conclusions on the evidence in Sections D and E (paragraphs [75]-[117]) below. For present purposes it suffices to set out the competing contentions as to what transpired as between Mr Khakshouri, and Mr Jimenez. Both individuals gave detailed oral evidence in the course of this trial. Their respective positions may be summarised as follows.

47. Mr Khakshouri said that during these meetings he was persuaded to make a loan of £1.8m to the Club because Mr Jimenez told him that he and Mr Cash were the majority shareholders in and controllers of the club, that they were endeavouring to sell the Club and that the Club needed a short-term loan to ease urgent cash flow problems. Mr Khakshouri was however reluctant to advance the loan because such cash as he had available was tied up in the LA Deal that was imminently, on 18th September 2013, to complete and which was expected to be highly profitable because he had acquired the development property at what he considered to be an extremely good price indeed. In order to induce Mr Khakshouri to advance the loan, Mr Jimenez explained that he and Mr Cash, as the majority controllers of the Club, had put together a project for the construction of a new stadium and adjacent mixed residential accommodation and commercial premises on the Greenwich Peninsula. They would give to Mr Khakshouri a share of their interest in the deal (i.e. the Land Deal) if he advanced the Loan.

48. Mr Khakshouri was ultimately persuaded to make the Loan because Mr Jimenez promised and assured him that it was the Defendants' intention, as majority controllers of the Club, to make the Land Deal *a certainty* by ensuring that the Club would not be sold without a property development agreement being into place with a new purchaser. Mr Khakshouri knew that what was being promised was no more than an agreement to secure a seat at the table after the sale of the Club had been completed. But the potential upside of the Greenwich Peninsula development project was very high indeed, as the documents provided to him by Tony Jimenez during the discussions demonstrated. Option 1 (see paragraph [37] above) contemplated a profit of £0.8b. A slice of that pie- even small slithers- might be very lucrative indeed. He knew however that for such a project to come to fruition could take 8 or 9 years.

49. Mr Khakshouri is adamant that it was the express statements and representations that Messrs Jimenez and Cash were the majority shareholders and the fact that those two men, with whom he held a relationship of complete trust, intended to *ensure* that the Club would not be sold without a linked Land Deal that made him relent and agree to advance the Loan. The key fact for him was that his two very close friends were controllers of the Club and could ensure and guarantee that it would not be sold without the Land Deal being put into place.

50. Mr Khakshouri says that in direct consequence of, and reliance upon, the representations being made to him he then sold part of his interest in the LA Deal to his brother-in-law (Mr Isaac Cohanzad) and he used the proceeds to make up £1m of the loan. The balance of 0.8m was then borrowed from his other brother-in-law, Mr Fred Nayssan, and by drawing upon his other lines of credit.

51. It is not disputed that on 16th September 2013 Mr Jimenez sent, by email, to Mr Khakshouri three documents which set out the details of the Greenwich Peninsula development and described the options open to the Defendants (see paragraphs [35] – [38] above). At a meeting on 17th September Mr Jimenez took him through the proposed Land Deal. Mr Khakshouri made detailed notes (which were disclosed and were in Court). That meeting lasted about two and a half hours.

52. For his part Mr Jimenez explained that in mid-September 2013 he happened (perchance) to be visiting Las Vegas with his son and brother-in-law to see a boxing match. He took the opportunity to invite Mr Khakshouri to invest and as part of the investment to advance the required short-term loan. He says that the three meetings that he had with Mr Khakshouri between 15th- 17th September 2013 were essentially social occasions. In total the business discussions lasted only about 30 minutes. It was all very simple. The Club's finances were in crisis. Mr Khakshouri was a very close and dear friend and he wished to help out. Mr Jimenez stated that he could not recollect all of the details but he was clear in his own mind about a number of matters. He says that he explained to Mr Khakshouri that there might be a real estate opportunity in relation to the Club and that the Council was keen to regenerate the Greenwich Peninsula and would support a move by the Club to relocate its stadium to the Peninsula. This was notwithstanding that the Club did not currently own land in that area and there was no extant planning application or permission. Mr Jimenez recalls that he described the deal in terms of its potential and that, although it would be difficult to implement, if it could be "*pulled off*" it could be very lucrative. He explained that he emphasised that it might not materialize but that he would nonetheless be happy to include Mr Khakshouri in the potential deal as a bonus for making the Loan to the Club. In his witness statement Mr Jimenez stated as follows:

> "67. I explained that it was our intention to try and secure agreement from the purchaser of the Club that they would in principle take part in the Potential Land Deal if it proceeded, which was entirely true and is what we tried to do. I did not say that no sale of the Club would take place unless the Potential Land Deal was in some way part of the sale, since we could not foresee what would happen.
>
> 68. I recall that Darius was keen on the 12% return but did not show any particular interest exploring the details of the Potential Land Deal. He did not ask me to provide further information about it, did not say he would need to do any due diligence before making the loan (and indeed never showed any interest in doing so afterwards) and did not ask to visit the site of the Potential Land Deal, either at the time or on subsequent visits to London. Darius came to the UK on at least two occasions after having made the loan. During these visits he never expressed a wish to visit the site and never did so. My view at the time was that he understood the speculative nature of the Potential Land Deal and therefore feels the need to waste time looking at loads of detail, conducting any due diligence, insisting the deal took centre stage in the loan documentation or indeed even visiting the site.

> 69. I did not explain exactly what role and interest Darius would have in the Potential Land Deal because the project was still at such an early stage. However, I remember that I made it abundantly clear to Darius that it was merely a potential project, with no certainty whatsoever.
>
> 70. Although, as I have said, it was my intention at the time that we would sell the Club to a buyer who would be committed to the Potential Land Deal (financially and/or in respect of moving the stadium in due course), and I explained that to Darius. I did not say to Darius that the Potential Land Deal was certain to proceed because the Club would not be sold without it. That would have been a ridiculous thing to say, particularly to an experienced property developer, because it would have been obvious to him that even if the buyer of the Club was committed (either financially and in respect of moving stadium, or just in respect of moving stadium) the project would remain very far from being a certainty. As an experienced property developer, Darius was well aware that the Potential Land Deal was in its infancy and would remain very far from being a certainty even if the buyer of the club was supportive. The Summary Document which I had sent him on 16 September 2013 also made this very clear.
>
> 71. In addition, I did not say that a lot of progress had been made in the months since the Summary Document had been produced or that we were certain that the Potential Land Deal would proceed. We were not, and nothing I could have said could have given Darius, an experienced property developer, any such impression. I did not provide Darius with any details suggesting that any progress had been made beyond that. I do not believe that in those discussions I said that [the Second Defendant] and I were the controllers of the Club (and certainly did not go into details or suggest our control was through direct or indirect shareholdings), although as I have explained Darius had been aware for some time that we effectively controlled the club. I did say that [the Second Defendant] was aware of and supported the proposal that I had made to Darius."

53. On 20th September 2013 the Claimant advanced £1m to Charlton Athletic Football Company Limited, the operating company of the Club, and on 23rd October 2013 he advanced a further sum of £0.8m to the same company. The Loan was subsequently documented by a written agreement dated 4th November 2013 ("the Side Letter"- see paragraphs [57]- [59] below). The borrower upon this occasion was specified as Charlton Athletic Holdings Limited, the owner of the Valley. It is said that this company was, in fact, a more secure counter-party for the Claimant.

54. It is an obvious point, but nonetheless relevant to the analysis, that the Second Defendant, Mr Kevin Cash, was not physically present at these meetings in LA, though he was in regular telephone contact with Mr Jimenez. The Claimant's case against the Second Defendant relies upon the proposition that the First Defendant was acting as the Second Defendant's agent when he made the impugned representations with actual authority.

(vii) The McGlynn Restructuring Agreement

55. I need at this stage to refer briefly to an unrelated transaction. The Defendants relied upon an agreement concluded with Mr Neil McGlynn which was also designed to assist to alleviate the Club's cash flow difficulties. It is relied upon because it is said that this was essentially the

same arrangement that the Defendants concluded with the Claimant and reflects how much of a "*long shot*" the Greenwich Peninsula development was considered to be.

56. Mr McGlynn had, pursuant to an earlier loan agreement, provided the Club with a term loan facility of £3m in September 2012. As part of that arrangement the parties granted to Mr Glynn 10% of such interest as the Defendants held in the proposed Greenwich Peninsula development. The net effect of the new agreement was to defer repayments of the loan. Under a heading "Development", at clause 4.1, the parties acknowledged that the "Development Parties" (i.e. in substance the Defendants) were involved in "*discussions with various individuals and companies in relation to the Development but no terms have been agreed or finalised at the date of this agreement*." In consideration for the deferment of the repayments that Mr McGlynn was *"… entitled to an equity interest equal to 10% of whatever interest the Development Parties have in the Development…*" The clause goes on to make it clear that the interest being conferred upon Mr McGlynn was contingent upon the development being carried out. In his witness statement Mr Jimenez states the following in relation to this transaction:

> "79. The agreement specifically provided that Neil would not have to pay for his shares or provide any finance for the development if the Potential Land Deal progressed. Although we did not go into that detail with Darius, this was essentially the same arrangement that was envisaged with Darius and reflects how much of a long-shot the Potential land Deal was considered to be, given that in return for relatively modest short-term loans paying a generous return we were prepared to give away a potentially valuable interest in the Potential Land Deal for nothing. If Neil or Darius had become a shareholder in any development company then, as is normal, each would have been expected to stand as a party to any guarantee or indemnity required from shareholders as part of the financing that would be required for the Potential Land Deal, but we were not expecting them to put up their own financing."

(viii) The Side Letter: 4th November 2013

57. As explained above Mr Khakshouri advanced the Loan prior to completion of relevant documentation. Draft documentation was prepared by Mr Graeme Muir, a colleague of the Defendants. He had not been involved in the negotiations between the Claimant and First Defendant. He therefore necessarily prepared documentation upon instructions from the First Defendant.

58. The draft was sent to all of the parties, including the Claimant, for comment. It is apparent and not disputed that Mr Khakshouri reviewed the documentation and sent comments back to the Defendants about its drafting. The documentation included terms for the Loan, and the Side Letter. The Side Letter is an important document. Its terms, in full, are as follows:

> "Dear Darius
>
> CAFC Property Agreement
>
> We refer to the recent loan of £1,800,000 (the "Loan") that you have provided to Charlton Athletic Holdings Limited of which we are the majority shareholders.
>
> As discussed and in consideration for you providing the Loan, we have agreed to grant to you (or any other entity that you may nominate) 30% of the Residual

> Property (as defined below) that we hold in Charlton Athletic following the disposal of Charlton Athletic to a third party purchaser (your "Interest").
>
> For the purpose of this Agreement, the "Residual Property" shall mean any interest whatsoever that we hold in the proposed property development deal for the construction and delivery of a new football stadium for Charlton Athletic Football Club and other residential property development at the Syral site on the Greenwich Peninsula in London.
>
> We hereby undertake to hold your Interest for you (or any other entity that you may nominate) on trust and to provide to you with all and any profit (after the deduction of reasonable expenses and government taxes, if any) whatsoever that derives from your interest from time to time.
>
> As trustees of your Interest, you agree to allow us to decide how to deal with your Interest (provided always that we deal with your Interest in exactly the same manner in which we deal with our own 73% interest). Therefore, and for the avoidance of doubt, you hereby provide us with permission to utilize and, if thought prudent by us, dispose of your Interest in any way that we see fit. Our ultimate aim for your Interest (as it is for our own interest is to maximise profit.
>
> We trust that this letter Agreement incorporates all the elements of our discussions. If you agree to the above, please sign each copy and return one to us thereby making the contents legally binding on all of us.
>
> This letter Agreement shall be governed by English law and the signatories hereto agree to submit to the exclusive jurisdiction of the English Courts in case of any dispute."

59. It was signed by the Claimant and both Defendants. There is no indication that the parties were acting other than in their personal capacities.

(ix) Sale of the Club

60. An approach was made to the Defendants in November 2013 by Mr Roland Duchatelet with an expression of interest in purchasing the Club. Mr Duchatelet is a Belgian national who already owned a number of European football Clubs. Negotiations were handled by Michael Slater and Max Deeley and progressed with rapidity. On the 17th December 2013 a Share Purchase Agreement relating to the acquisition of shares in Baton 2010 Limited was agreed (see the corporate ownership and control diagram at paragraph [28] above). There was an intended completion date by 2nd January 2014. It is apparent from the documentation before the court that, whilst Mr Duchatelet was interested in the potential Greenwich Peninsula development, it was <u>not</u> an imperative for him. As Mr Deeley put it in his witness statement, Mr Duchatelet "*was not fixated on it*".

61. It is also clear from the written and oral evidence that there was a divergence of view between the Defendants and others acting for the Club as to the extent to which they could pressurise Mr Duchatelet into acquiring some form of an interest in the Greenwich Peninsula development <u>as part of an</u> agreement to sell the Club (i.e. a Land Deal). The view of those negotiating directly with Mr Duchatelet, and in particular Michael Slater, was that this would be counter-productive. So far as Mr Duchatelet was concerned, the Valley was the stadium that the Club owned and

would, on any view, be using for a number of years, even assuming the construction of a new structure within the Greenwich Peninsula development site. Mr Duchatelet was clear that acquisition of the Club had to occur prior to the conclusion of the January 2014 transfer window. There was therefore no time to consider complex property deals. To the extent that there was any serious value in the Greenwich Peninsula development project, it was something which could be addressed in the fullness of time. The view was that Mr Duchatelet might respond to additional pressure to conclude a side agreement i.e. (the Land Deal) by walking away completely.

62. An exchange of emails between Tony Jimenez and Michael Slater shows just how fractious their relationship became over this issue. Mr Slater was, manifestly, not an enthusiast of a strategy of selling the Club only with a Land Deal. The exchange provides context to the possible reasons why, in the Side Letter, the Defendants represented (falsely) that they were majority shareholders. Had Mr Slater been identified as a significant shareholder then the picture presented to Mr Khakshouri would have been very different. It was not suggested to Mr Khakshouri during the trial that, had it been presented to him that Mr Slater was a substantial minority shareholder, and had Mr Khakshouri then contacted Mr Slater, the Claimant would have obtained from him any reassurance that a Land Deal could be guaranteed. The exchange is also significant because it highlights an important factual reality, namely that, if the Club was sold without a Land Deal, then the prospect of the Defendants being able to retain locus after the sale "*skin in the game*" was remote. It also highlights just how serious and acute the Club's finances were at the time:-

i) Email 27/12/2013 (23:21:06) Kevin Cash to Max Deeley and Tony Jimenez: *"Gents, Tony and I had a chat this evening regarding the Greenwich peninsula deal. We are worried that if we leave the agreement of this to after completion there is a chance that it might not fall our way. He will be totally in the driving seat and could dismiss any of our proposals. We need to address this now and we need to decide who and how this conversation takes place. Michael Max you have the dialogue with Roland so I think you're best placed to suggest the approach. Ideas thoughts please."*

ii) 28/12/2013 (14:20:01): Michael Slater to Kevin Cash and Tony Jimenez with Max Deeley cc'd: *"Given that Tony is denying that I had a conversation with him in the hotel bar on Tuesday 17th to the effect that we would deal with the Peninsula after completion because Roland wasn't interested in dealing with it that day, I feel compelled to give advice in writing so there are no misunderstandings. If Roland walks away because we side track him regarding the Peninsula, nobody is going to point their finger at me. Roland isn't interested in the Peninsula. He wouldn't want to move. He made that clear on 17th. He's perfectly happy with the Valley and showed much more interest in the previous planning consents to develop the ground. Max tells me he said the same thing during an earlier telephone conversation. So we took the view that the best thing to do was to exchange and get the deposit. I am 100% sure that we did the right thing. How else would we have put money into the club and Les Bordes this month. Having met and spoken to Roland many times now I have a decent idea as to what he's like. He will do a deal with us in relation to the Peninsula on 31st January just as easily as 31st December. Raising it now distracts him and us from the main challenge- RBS. In any event, nobody but Max should try to deal with him regarding the Peninsula. I think it would be a big mistake to push this before completion. We've already lost at least one (much bigger) deal because of things being said to buyers. We can't afford to lose this one.*

iii) 28/12/2013 (14:40); Tony Jimenez to Michael Slater: *"I have no such recollection as to the conversation you say happened and neither does Kevin. It's somewhat odd that if I did, I would call you having already texted you yesterday and specifically ask you to make sure it featured in the deal on completion. My recollection was that it would be dealt with between exchange and completion. You also both received an email from Graeme where this featured and you have yet to reply to him on any of the matters raised. I immediately called Kevin straight after our chat given that I didn't agree with the approach you were suggesting. I would have done that last week, let's put it down to lost in translation, but I feel very strongly that we should push for this now. For the record, I believe we are in a much better position to agree this property deal before Thursday when we have leverage and still in control than once we have sold out and Roland has Richard Murray, The Community Trust and potentially others suggesting other advice to him. If you don't feel like this should be raised by you or Max, as you clearly don't, then we will need to consider who else should. Thank you for the advice you've set out but we are at liberty to take it or not, or try ourselves given that we are not prepared to leave this to chance. This is a massive aspect of the deal for us and we don't believe it should be left for a discussion down the road. He may not even agree to meet after completion. If he's not at all bothered about it why would he care now or in Jan about agreeing to entering into this? Your line earlier to me is he won't agree to anything on the peninsula now- well why would he later? Far more chance now. So please let us have your comments as to how we achieve out objectives and who should go into bat on that front."*

iv) 28/12/2013 (14:59:48) Michael Slater to Tony Jimenez, (Kevin Cash, Max Deeley and Graeme Muir cc'd): *"Tony, Your recollection (as you explained it to me earlier) is that we did have this conversation but it was over the phone yesterday. We didn't. You don't have a recollection. I do and mine couldn't be clearer. You haven't met or spoken to Roland. Max and I have. It's the middle of the night in Sydney, so I don't expect to have Max's input for a few hours but I would be amazed if his view was radically different to mine. You seem to be assuming that we haven't tried to put this onto the table. We have. He said "no". Anyone other than Max dealing with this now would be madness. Any deal we tried to put in place now would (a) in effect be an agreement with ourselves and (b) would most likely be so vague as to be unenforceable. Think back to the WMG deal. To pursue in a meaningful way Max would have to persuade him to vary the SPA to require him to grant us an option on the Valley. It will never happen before 2nd January. We're trying to remove hurdles not put up new ones."*

v) 28/12/2013 (14:47) Tony Jimenez to Michael Slater: *"Michael, Ben Kensall issued an email earlier this morning about the press release in The Daily Mail and the speculation I specifically replied to that saying we shouldn't respond until the deal was completed. You were copied into this email and yet you have done this without consulting me. In future DO NOT issue any press releases without running them past me !!!"*

vi) 28/12/013 (14:57:35) Michael Slater to Max Deeley and Kevin Cash: *"Kev, You're the only one he'll listen to. Have a word asap please because he really won't like the next thing I say to him. We're in a china shop. We don't want to let a bull in."*

vii) 28/12/2013 (15:01:24): Michael Slater to Tony Jimenez (Max Deeley and Kevin Cash, Graeme Muir cc'd): *"Tony, I don't act for you"*

viii) 28/12/2013 (15:45:42): Tony Jimenez to Michael Slater, Max Deeley and Kevin Cash, Graeme Muir cc'd): *"Michael, Do not issue anything without my agreement at the football club again. You didn't have any permission from Kevin or I in this regard. You are behaving like a method actor who has believed the role he is playing. If you don't act for me then supply those who do with what we've asked for immediately otherwise I shall be dealing with this by instructing lawyers on Monday."*

ix) 30/12/2013 09:00: Michael Slater to Graeme Muir: *"Graeme, The reason you haven't heard from us is because we've been very busy. I won't bore you with the details. I attach the SPA. After the celebratory drinks and backslapping on 17th I'm puzzled by the implication that Tony may not be satisfied and may scupper this deal by refusing to complete. Let's not forget that the only reason we avoided admin this month (and were able to provide essential funds to Les Bordes) was because we exchanged and were able to use the buyer's deposit. Also let's not forget that loads of people have tried to sell the club but until now all attempts have failed. Incidentally the fact that Tony isn't personally guaranteeing the warranties in the SPA (as he agreed to do on the WMG deal) isn't a mistake. It's the deal Max and I negotiated. Warranty claims can only be made against the seller, a BVI SPV. Also, there was no requirement for the deposit to be held by the solicitors until completion. Hard to believe isn't it? That's how good this deal is for the seller. There will be adjustments between the seller and RM over the proceeds because he is owed £600k, although I'm pretty sure he will write off £250k and only require a £100k adjustment on completion. Again, another really good deal. I trust you'll forgive me but I now need to focus on negotiating with RBS which will probably then involve Max and me re-negotiating with the buyer. This is of paramount importance."*

x) 30/12/2013 10:31: Graeme Muir to Michael Slater: *"As far as completion is concerned, Tony is as keen to complete as anyone. If you note my words, I state that completion will not take place until Tony is satisfied with the documentation- it is not unreasonable that Tony (as a major shareholder) is happy with what is being entered into. Had he been provided with all the documents earlier and been kept informed on a regular basis by you, we would not be discussing this. I cannot see why there is any reluctance on your part for disclosure. As you are aware, there are a number of issues that need to be dealt with prior to completion. These also affect you- including ensuring that all principals are protected in terms of their tax position regardless of their jurisdiction. I have also been informed that there is an outstanding issue regarding the Dutch tax authorities, which Tony wrote to you about on 23rd December regarding a player at the Club. He has not had a reply. Please confirm that this is a matter for the previous owner- Richard Murray- as it relates to a time before Tony and Kevin bought the Club (2008). You will agree that $129,000 is not an insignificant amount and needs to be dealt with. What is the status on this? Was this taken into account when discussing what RM is owed? Well done on the negotiations regarding the deposit and warranties, although these are matters that Tony should have been informed about at the time, if not before. Please ensure that all matters and correspondence from now on is copied to Tony and I. Please advice Teacher Stearn to do the same. On that note (and given the work you have been doing over the last few days), please can we have an update when you can on where we are with RBS, etc. I would like to speak to you later this afternoon when you have had your negotiations with RBS."*

(x) ***Post-Sale discussions about the stadium relocation***

63. The sale to Mr Duchatelet completed on 3rd January 2014. The sale was not linked to a Land Deal. Following completion discussions continued with Mr Duchatelet to see if he remained interested in the "stadium swap". A meeting occurred between Mr Deeley, Mr Slater and Mr Duchatelet on 23rd January 2014. For whatever reason, interest on the part of Mr Duchatelet petered out. It had become clear by March 2014 that matters were not progressing, and were unlikely to in the future. Standing back, and as a matter of commercial common sense, it is hard to see why Mr Duchatelet would ever have been interested in bringing the Defendants back into the fold after the Club had been sold to him without a Land Deal. If there was to be some future benefit in the Club participating in the Greenwich Peninsula development, then Mr Duchatelet was capable of exploiting that opportunity for himself and without the Defendants. Indeed Mr Cash and Mr Jimenez well understood this to be the case as the email exchange set out at paragraph [62] above demonstrates.

(xi) Post-sale discussion between the Claimant and the Defendants

64. Mr Khakshouri states that on 7th January 2014 he received a text message from Mr Jimenez that informed him that "*the deal has been signed, completed and announced but the football authorities haven't rubber stamped it yet*…" The monies were due to "*drop in*" tomorrow. Mr Jimenez explained that Roland Duchatelet was "*completely straight and professional and when he says we are done then we really are. It has been so refreshing having someone like him at the end after all these time wasters*." The text message from Mr Jimenez did not explain that no Land Deal had been completed. Mr Khakshouri assumed that the sale of the Club had included a Land Deal, just as Mr Jimenez had promised it would.

65. Mr Khakshouri spoke with Mr Jimenez on the phone on 19th January 2014, during which Mr Jimenez informed him that he planned to repay only $2m of the Loan, even though the terms of the Loan provided the Loan would be paid on the earlier of 31st December 2013 and the sale of the Club. Mr Jimenez explained that he could only repay $2m as 40% of the proceeds of the sale of the Club were deferred until May 2014 and a significant portion of the residual 60% had to be allocated to redemption of the mortgage. He added that the deferred payment in May 2014 would be further reduced if the Club was relegated. He asked Mr Khakshouri to agree to the variation of the terms of the Loan.

66. In paragraph 63 of his witness statement Mr Khakshouri stated the following about this conversation. His oral evidence was to the same effect:

> "63. Tony then said that Mr Duchatelet was not interested in "participating" in the Land Deal so that we had effectively "inherited" 100% of the Land Deal to use his words. All we needed to do was to provide the Club with a new stadium via the land deal. Tony made out that this was an incredible coup. I of course was delighted. The clear implication in what he was telling me was that the Land Deal was proceeding following the sale of the Club and that the only thing which had changed was that we stood to take a 100% interest in the Land Deal rather than the 50% previously indicated (with Blackstone). What he did not tell me was (as I now know) that the sale of the Club had made no provision for the Land Deal at all, as Mr Duchatelet was not at that time (or indeed thereafter) interested in moving from the club's current ground at the Valley Stadium to the Greenwich Peninsula. I had no idea that the

> defendants had decided not to make the Land Deal any part of the sale of the club, as Tony had promised me they would, and he was in this call content to give me the clear impression that the Land Deal had been part of the sale of the club and so was very much on foot."

67. On 20th January 2014, the Claimant sent an email to Mr Jimenez stating:

> "Needless to say, I'm very happy that you were successful in the timely sale of Charlton Athletic FC and that you are in a position to be repaying me. I am also very appreciative and thankful that you and Kevin included me in the "property deal" which you both believe to have tremendous potential."

68. The £2m part repayment of the Loan was transferred into the Claimant's account on 22nd January 2014.

69. On 5th February 2014 the Claimant signed a letter amending the terms of the Loan.

70. Subsequently there was a break in email communication between the Claimant and First Defendant. Mr Khakshouri's evidence was that there was no need for communication because his approach was to permit the Defendants to "*get on with it*" ie continue to work on their collective participation in the Greenwich Peninsula development project.

71. On 5th June 2014 the sum of $1,057,121.41 was paid to the Claimant comprising the balance of the principal on the Loan and the accrued interest to 2nd June 2014.

72. On 21st June 2014 Tony Jimenez visited Los Angeles. On 24th June 2014, he informed Mr Khakshouri that the Land Deal had not been secured upon the sale of the Club. According to Mr Khakshouri Mr Jimenez explained that the sale of the Club had happened extremely rapidly, the new owner was intent on doing a deal "*on the spot*" and there was insufficient time for the Land Deal to be concluded. Mr Khakshouri says that Mr Jimenez told him that the Land Deal had been discussed and agreed. However, for a variety of reasons, no Land Deal had been concluded and, although the deal was not "*dead*", there was no such deal "*for the time being*". Mr Khakshouri explained this was a "*complete shock*" to him. He asked Mr Jimenez how this had come about. It was explained to him that the sale had been negotiated by Kevin Cash's professional team but that they had mishandled and mismanaged this important part of the transaction. Mr Jimenez said Mr Khakshouri had no reason to be upset or angry since his main objective and motive for lending the money to the Club had been to help him and Kevin Cash out, because they were friends. The transaction was "*friendship based*" and not "*deal based*".

73. According to Mr Khakshouri, Mr Jimenez suggested he speak to Kevin Cash. A telephone conversation ensued on 17th July 2014. Mr Khakshouri says that during that call Mr Cash acknowledged that, in order to be fair to him, they needed to compensate him to take account of his lost opportunity. He was asked to calculate the loss that he had suffered by pulling out of the LA Deal in order to lend money to the Club. On 19th August 2014 the Claimant informed Mr Cash that his losses were in the region of $2m and rising. Mr Cash was "*taken aback*" by the figure. Mr Cash then explained to Mr Khakshouri that, according to Mr Jimenez, the transaction was based essentially upon the attractive interest rate attached to the Loan. The Land Deal was nothing more than an "*upside*" for the Loan but had never been assured, promised or guaranteed.

74. There followed a series of increasingly acrimonious exchanges between the Claimant and Defendants. In a text message exchange between Mr Jimenez and the Claimant on 24th September 2014 Mr Khakshouri posed the clear and unequivocal question to Mr Jimenez: "*did you or did you not promise me a land deal in exchange for the £3m that I gave you? That's a yes or no answer*". Mr Jimenez reply was "*yes*." The full details of this exchange are set out at paragraph [111] below.

D Deceit- First Representation: The Defendants had majority control

75. As set out in paragraph [7] above the Claimant alleges that 2 deceitful representations were made. Mr Atkins for the Claimant stated that both had to be established for Mr Khakshouri's case to succeed. In the text below I consider each representation separately.

(i) Did the First Defendant represent that he and the Second Defendant were the majority shareholders in and controllers of the Club?

76. The first question concerns the allegation that the First Defendant represented that he and the Second defendant were majority shareholders in and controllers of the Club.

77. In my judgment, the First Defendant, Mr Tony Jimenez, did represent to the Claimant during the September 2013 meetings that he, along with Mr Cash, were the majority shareholders in the Club. I thus find as a fact that the representation was made. I make this finding upon the basis of the high standard of proof required in fraud cases.

78. Mr Leech QC (for the First Defendant) argued that I should pay attention to the way in which the representation was pleaded by the Claimant. I do: Mr Khakshouri pleaded that:

> "Mr Jimenez said that he and Mr Cash were controllers of the Club. Mr Jimenez said that he and Mr Cash controlled the Club by holding indirect majority shareholdings in the companies which owned the business and assets of the Club. Mr Jimenez also said that Mr Cash was able to keep his interest in the Club opaque by holding his shares through a web of nominee companies, each of which held less than 10% of the shares in the companies which owned the business and assets of the Club."
>
> (APOC, paragraph [4])
>
> "The Defendants thus represented to the Claimant that (i) they were the controllers of the Club and that, as such (ii)(a) it was their intention to make the Land Deal a certainty (b) by ensuring that the Club was not sold without it."
>
> (APOC paragraph [7])

79. The nub of the averment was, hence, that control over the Club was vested in Tony Jimenez and Kevin Cash by virtue of their "*holding indirect majority shareholdings*".

80. Mr Khakshouri's evidence in Court was consistent with his pleaded case. I set out below some illustrations from the answers he gave during cross examination which reflected the clarity of his recollection:

(1) "Yes, he told me that they were the legal owners, him and Kevin were the legal owners, and that's how he assured me, or absolutely convinced me that the land deal would be included in the sale."

(2) "He categorically stated that he was the legal owner, with Kevin, of the club. This is my word, "control", yes, I used that word, but clearly what he stated to me on those days in September was that he and Kevin were the legal owners of the club."

(3) "There were two key elements: one, that he and Kevin owned the football club, and two, that he was not going to sell the football club unless it included the land deal. So I'm very clear about that and he very much promised and in no uncertain terms absolutely told me that the sale would not be made unless it included the land deal."

(4) "I remember this detail is because Tony took the time to explain how Kevin was actually holding his interest in the club through a series of, you know, majority shareholdings, and, you know, indirect majority shareholdings in the club, all less than 10 per cent."

(5) "We were talking about who the owners were and who controlled the club and who the owners were, and the legal owners, the way he explained it to me was he and Kevin were the legal owners, and that Kevin's shares were somehow in these less than 10 per cent shareholdings and in the club."

(6) "Q. So that's the expression he used? He said that he and Kevin were the legal owners of the club and controllers of the club?

A. "Yes. And the majority shareholders.

Q. "Well it's not the same thing, is it, to be the majority shareholders? You don't say "majority shareholders" in this paragraph, do you?

A. "Well, I recall that he did tell me that they were the majority shareholders and that was reflected in the side letter which confirmed it to me."

(7) "When I asked him if Kevin knew about the conversations that we were having, he again repeated that they were the majority shareholders of the club."

(8) "I recall that he did say they were the owners, that was for sure. As far as majority shareholders, I -- I'm sure that that was also told to me and it was certainly stated in the side letter, but to me it -- yes, that's -- you know, I took them to be the owners of the football club, the legal owners of the football club."

(9) "It was critical because, like I say, I had two things to work on: that they did have the control of the club and that they were not going to sell the club unless it included the land deal. Those were the two pivotal, absolutely key elements to why I loaned the money."

(10) "And Tony had assured me, as owner, and he and Kevin being the owners, they would be able to ensure that the club wasn't sold without the land deal in place."

81. In oral evidence Mr Jimenez (in contrast to Mr Khakshouri) said the following, about his recollection of events:

> "I don't remember speaking to him about … you see, this is when it clouds for me. Darius's recollection of what was said at specific times, my memory isn't that good. I can't remember whether I spoke to him on 15th, the 16th or the 17th about which items, because I saw a lot of him. So for me to be specific, I would have to sort of embrace it across a number of days rather than say I just spoke about that during that dinner, and something else the next day. Unfortunately I haven't got such a clear memory of what happened four years ago."

He accepted that in answering questions he was trying to work out what he *would* have said, but he did not recall what he had *actually* said at the time. In response to a question from the Court to Mr Jimenez asking him whether he was: "…*trying to work out now what probably happened*," he responded "*yes*". It is an obvious point to make but any judge tasked with evaluating the weight to be attached to oral evidence will be astute to the possibility that a witness, in the pressured crucible of a court, will fashion his answers to fit his legal case, consciously or unconsciously. And that risk is all the greater when the witness acknowledges that in giving his evidence he is trying to work out and reconstruct – some years later - what he would have said, and not simply recollecting from memory what he did say.

82. I am bound to accept Mr Khakshouri's account. I find that the First Defendant did make the representation alleged. There are six reasons for this.

83. First, in choosing between the competing versions of the Los Angeles discussions between 15th - 17th September 2013 I must accept the account of Mr Khakshouri. He was cross-examined for just short of two court days. He was a calm and thoughtful witness throughout. He gave an unwaveringly consistent account of events. He had a detailed recollection and memory of what occurred during the meetings. He was described by other witnesses (for the Defendants) as "*meticulous*" in his attention to detail, a fact which was evident from many documents before the Court. He demonstrated a command of the details of the documents. He did not seek to argue around difficult points but accepted several propositions put to him which were not entirely in his favour. His account was balanced. His version of events, moreover, was consistent with both the documentary evidence and the essential logic and commercial realities behind the case. To use the vernacular his case "*stacked up*". So far as Mr Jimenez was concerned, he accepted, as set out above, that his memory of the details of the September meetings was hazy. He had no clear recollection of who said what, where and when. His answers to questions were, as he acknowledged, his attempt, some years later, to work out what he would have said and his ability to answer questions about specific documents or aspects of the financing of the sale of the Club was often imprecise. In a number of critical respects (as I explain in below), I also found his answers to be most unsatisfactory.

84. Second, the account of Mr Jimenez changed significantly over the course of the proceedings, and in particular from the early days of the litigation when he denied making any representation at all about control (when his memory should have been sharpest) to the later stages of the litigation when he suddenly accepted that he did in fact make a representation about control (but when on his own account his memory was at its least reliable). In paragraph 11(5) of his Amended Defence Mr Jimenez explained that he had no beneficial interest or direct or indirect shareholding in the Club (paragraph [3]) and he denied representing "…*he and Mr Cash controlled the club or that … Mr Cash had an interest in the club*". Following disclosure, the

Claimant sought further and better particulars of the First Defendant's averment in the light of both the Side Letter and a letter from his solicitors which implied that prior to the sale of the Club Mr Jimenez did exercise control (see paragraph [89] below). Mr Jimenez responded (29th July 2016) saying that the Side Letter was incorrect and the solicitor's letter was "*imprecise and informal*". In his witness statement (4th August 2017) Mr Jimenez again denied having told Mr Khakshouri that he and Kevin Cash were the controllers of the Club, though he does state that he believed that Mr Khakshouri would have been aware that "*we effectively controlled the Club*".

85. Under cross-examination Mr Jimenez changed his position. He now accepted that the question of control was "*for sure*" material to Mr Khakshouri's decision to make the Loan. He was interested in control because "*…Darius would have wanted to know that he was going to get his money back*". He accepts that he gave that assurance by reference to control. Mr Khakshouri says that the need for clarity over legal ownership was because he needed certainty that a linked Land Deal could be secured on sale of the Club. He did not accept that the need for certainty over control was related to the repayment of the Loan. But it suffices, for present purposes, that Mr Jimenez accepted that there was a powerful reason for him to satisfy Mr Khakshouri about the control structure and it follows that for *both* parties legal control / ownership *was* an issue. Mr Jimenez's evidence has thus been inconsistent on this key issue throughout the litigation. By contrast Mr Khakshouri's evidence has been wholly consistent, to the point whereby Mr Leech QC accused him of having a "*mantra*" which he kept repeating. If it was a mantra then it was because he was asked, repeatedly, more or less the same question, to which he gave the same reply. A mantra can simply be the truth consistently reiterated.

86. Third, compelling corroborative evidence is found in the Side Letter (see paragraph [28] above). This was drafted for the Defendants by their own employees and colleagues upon the express basis that it accurately reflected the discussions which had occurred between Mr Khakshouri and Mr Jimenez during the September 2013 meetings. In it both Mr Jimenez and Mr Cash represent, *as fact*, that they were the majority shareholders in the Club. These express representations are consistent with the evidence of Mr Khakshouri. For Mr Jimenez's alternative version of events to be accepted: (a) I must find that four senior executives on the Defendant's side of the Court room (Messrs Muir, Deeley, Cash and Jimenez), all of whom knew better, made a simple yet glaring error when they (variously) drafted, approved and signed the Side Letter; (b) once I have discounted and ignored the Side Letter I must then proceed to prefer the account of a witness who on his own acknowledgement has a serious difficulty in recalling what he actually said and what was said to him; (c) I should then accept Mr Jimenez's version of what he thinks he said even though his account from the witness box was at variance with his position in pleadings and in his witness statement, all signed by him; and (d), I must also reject the consistently advanced account of a witness (Mr Khakshouri) whose evidence was cogent and consistent with the underlying logic of the case and with the documents. Viewed thus I do not find the First Defendant's evidence remotely convincing.

87. Fourth, Mr Khakshouri's evidence makes commercial sense. The Side Letter makes it expressly clear that the Loan was in consideration for the Land Deal. If the Land Deal was to be delivered, it is entirely credible that Mr Khakshouri would have asked Tony Jimenez to guarantee to him *how* he was to bring it about. If the answer had been merely "*I will do my best but no promises …*" then that is a very far cry from "*I promise to you that I will ensure the coming into being of the Land Deal by refusing to sell the Club without a Land Deal being in place*". Counsel for the Defendants argued that there was very little between the parties and it was a question of "*nuances*" only. I disagree. Even on the Defendant's own best endeavours

only case, they were seeking to secure a sale of the Club simultaneous with securing participation in a Land Deal which would survive the sale. They proposed to do this through the joint SPV structure described at paragraph [44] above. I have also set out above (paragraph [62]) the email exchange during which Kevin Cash and Tony Jimenez both expressed the view that without a linked sale (the Land Deal) they had no leverage at all. And they were right. For the Defendants to remain "*with skin in the game*" (as it was put) they simply had to have an agreement in place which outlived the sale of the Club. And they could only do this through a linked Land Deal. There is also evidence before the court which shows that as of September 2013 the Defendants were extremely confident that they *would* secure a linked sale, i.e. a Land Deal (see eg the duration of the evidence of Michael Slater set out at paragraph [114] below). It stands to reason that Tony Jimenez would have been confident in putting to Darius Khakshouri that he (and Kevin Cash) had the legal power to ensure that the Club would not be sold absent a linked Land Deal. There was a sound commercial reason why the first representation would be made, even on the Defendant's own case.

88. Fifth, the identification of Messrs Jimenez and Cash as the majority shareholders, *and not anyone else*, was also critical. The short point is that a representation that it was Messrs Jimenez and Cash who jointly legally controlled the Club was, in my judgment, the sole permutation of legal ownership that would have satisfied the Claimant and induced him to make the Loan. Had the representation been that *other* natural or legal persons or entities (for example Mr Slater and/or the Cavansa Trust and/or a slew of unknown Spanish minority shareholders) were in legal control of the Club then the all-important personal dynamic would have evaporated from the equation. There is a plethora of evidence to support this proposition. Mr Jimenez in his witness statement said: "… *our discussion about the loan was informal and relaxed, it was a discussion between close friends, with Darius eager to help and support. It was not like a business negotiation – Darius's attitude was that he was happy to provide whatever we needed, as he trusted Kevin and me totally*". He repeated as much in oral evidence, as did Mr Cash. Mr Khakshouri also considered trust to be pivotal. He was being invited to raise funds and lend them on (more or less) 48 hours notice, with no documentation, and he did so because of his personal relationship with the Defendants and their stated ability to control the Club via their joint majority shareholdings. Mr Khakshouri made this clear on multiple occasions in his evidence. For instance:

> (1) "I was committed to this project, the project being the land deal, the land deal being that, you know, originating from the fact that the club wouldn't be sold without it, and the people that could make that possible were the owners. The owners were Tony and Kevin. So everything was, in my mind, lined up the way it should have been, and so now we're generating paperwork and it's after the fact and I still don't bring in an attorney and try to change anything because I trusted and believed that we were all working towards that same goal."
>
> (2) "Yes, I asked him "Who is the owner of -- how is the club owned?" and he was very specific in telling me that, you know, he and Kevin owned the football club. There wasn't anybody else involved in this. I needed to know that I was loaning this money to Kevin and Tony, and that there was nobody else involved and that it was -- that had to be very clear in my mind because there was very little time. Very little time and no documentation."

> (3) "That was part of it, but also I wanted to make sure that, you know, Tony was telling me exactly -- when he was telling me that they were the owners I was sure that that would be the same thing that I would hear back from Kevin Cash if I needed to confirm that."

I accept the evidence of Mr Khakshouri.

89. Sixth, it is also relevant that the Defendants repeated or made, or at the least authorised the making or repetition of, similar representations, including to third parties. The representations were that either they collectively or Tony Jimenez on his own were majority shareholders or owners. The following are contemporaneous illustrations:

i. In July 2013 both Defendants were copied in on an email drafted by Mr Deeley to a prospective purchaser of the Club which said that the First Defendant *"…owns 90% of Charlton Athletic*" as he is "*…the majority Shareholder at Charlton Athletic controlling 90% of the share capital."* The representation as to ownership was quite plainly false. This was just two months prior to the meetings in September 2013 in Los Angeles.

ii. In addition, there is an email from Mr Cash to Mr Jimenez and to Mr Deeley in December 2013 which contains suggested answers to questions from a potential purchaser of the Club which also states, again inaccurately, that the First Defendant is the 90% controller of the Club.

iii. In addition there is an email from the Defendant's solicitor to the Claimant sent on 30th January 2014 (after the sale of the Club) explaining that the reason for switching the borrower on the Loan was that the Defendants (i.e. Mr Jimenez and Mr Cash) "*…no longer control"* the Club. The clear implication intended to be drawn was that Mr Jimenez and Mr Cash had been the controllers, but were no longer.

iv. This position was repeated subsequently in a letter from the Defendants themselves to the Claimant's solicitors dated 31st July 2015 where the Defendants explained that the switch in the borrower was again because "*we no longer controlled"* the Club.

(ii) Was the representation false?

90. I turn now to the second question: Was the representation about majority control false? The answer is that the representation was false. This is now common ground between the parties. Neither Mr Jimenez nor Mr Cash are shareholders *at all*. This is clear from the diagram at paragraph [28]. The true position can be summarised very shortly.

91. Mr Jimenez is one of more than 20 beneficiaries in the Cavansa Trust. He is not employed by the trust and nor does he have any formal power of attorney or other authority to act for the trust or bind it in any way. He did not personally hold any shares in any company which directly or indirectly owned shares in the Club. Mr Jimenez does have a position of informal influence in the Cavansa Trust. He can bring projects to the attention of the trustees. They might or might not proceed with such a recommendation.

92. Mr Cash does not hold, nor has ever held, shares in the Club or in any entity or company which directly or indirectly holds shares in the Club. He is a beneficiary under a Letter of Wishes which governs distribution to beneficiaries under the Rose Trust. The Rose Trust did not hold

any shares in the Club, directly or indirectly. It provided a loan facility of up to £8.5m to CAFC Holdings (BVI). As of September 2013, that facility had been exhausted.

(iii) Did the First Defendant know that the representation was false or was he reckless as to whether it was true or false?

93. The First Defendant knew that the representation was false. In cross-examination both Defendants accepted that the representation was false.

94. In advancing any sort of justification for this conduct the Defendants are in the obvious difficulty that it was their case throughout that no such representation had been made at all so to articulate any sort of a good faith justification is problematic. What do the Defendants therefore say?

95. First, they argue that the Side Letter of November 2013 is irrelevant because it post-dates both the date upon which the representation was alleged to have been made (September 2013) and the date of the making of the Loan (September/October 2013). But this argument does not withstand scrutiny since it was drafted and signed by them and their team upon the express basis that it was a fair and accurate reflection of the discussions between Mr Jimenez and Mr Khakshouri in September 2013.

96. Second, they argue that the representation made in the Side Letter was an unfortunate mistake. What they intended to say was that they were "*stakeholders*". This is untenable. If it was merely an honest mistake it was one made by four individuals all of whom knew better. The argument that this is a coincidence also does not stand up to serious scrutiny. Mr Graeme Muir had the responsibility for preparing the initial draft of the Side Letter. He necessarily drafted it upon the basis of instructions given to him by Mr Jimenez. It was intended to reflect the substance of the meetings between the Claimant and First Defendant in September 2013. Mr Muir did not give evidence. But the other witnesses accepted that he was aware that Mr Cash and Mr Jimenez were not shareholders, direct or indirect, in the Club. Mr Muir sent a draft of the letter of agreement to Mr Max Deeley. He is a chartered accountant. He was, and remains the in-house accountant to the Rose Trust. He has worked closely with Mr Cash. He knew that Mr Cash was not a shareholder. He knew that Tony Jimenez was not a shareholder. In evidence he explained that Mr Muir sent to him a draft in order to provide wording to describe the potential Land Deal. Mr Deeley reviewed the draft agreement and plainly knew that it represented that Mr Cash and Mr Jimenez were shareholders. Mr Deeley is silent about this in his Witness Statement. He does not explain whether he raised the error with the two Defendants. And the Defendants of course signed the Side Letter.

97. Third, the Side Letter was an important document not to be signed lightly or without due care and attention. Mr Jimenez described the Land Deal as "*massive*". This is not the sort of document that four immensely experienced businessmen would make a silly error about. It affected the involvement of both Defendants in a potentially important venture and it also affected the sale, and saleability, of the Club which was an issue of urgent concern to both Defendants. Both Defendants reviewed the draft of the Side Letter. The document is short and a review would have taken minimal time and effort. The error in question is stark and is contained in the first sentence thereof.

98. I therefore conclude on the evidence before the Court that the First Defendant made the representation untruthfully, knowing that it was false i.e. it was a deliberate lie. I deal with the position of the Second Defendant at paragraphs [199 ff].

(iv) Did the First Defendant intend the Claimant to act in reliance upon the representation?

99. If a false representation is deliberately made then there is a strong presumption that it is intended to be relied upon (see paragraph [20] above). In the present case I am sure that Mr Jimenez made the representation because it was necessary to induce Mr Khakshouri to make the Loan. Mr Khakshouri was a property developer, not a lender. He would not have agreed to lend the money had it not been represented to him by two men he trusted that they, collectively, could guarantee that they controlled the Club so that, in due course, they could ensure that the Land Deal was brought into effect. This was Mr Khakshouri's clear, and oft-repeated, position in evidence.

100. Although it is not strictly relevant to the analysis, I should add (for the sake of completeness) that it was not put to Mr Khakshouri that he would have adopted the same position had he known that Mr Slater was a significant minority shareholder in the Club. Mr Khakshouri did not have a personal relationship with Mr Slater. Moreover, as I set out in greater detail above, there was no inevitable community of thinking between Mr Jimenez and Mr Slater as to the mechanics or modalities of the sale of the Club. In particular, they disagreed fundamentally as to the necessity of linking the sale of the Club to the Land Deal. Had Mr Jimenez represented to Mr Khakshouri that the Chairman, Mr Slater, was a shareholder and had Mr Khakshouri then contacted Mr Slater to obtain comfort, then there is no guarantee at all that Mr Slater would have conveyed the same message to Mr Khakshouri as had Mr Jimenez.

(v) Arguments advanced by the Defendants.

101. I should, for the sake of completeness, set out the main submissions of the Defendants. During the course of the trial a variety of points were advanced. I will refer briefly to three such points.

102. First, it was argued that the sole motivation for the Claimant to advance the Loan was the high interest rate payable thereupon and the Land Deal was, for the Claimant, very much a secondary "*bonus*". This argument was not supported by the evidence. For Mr Khakshouri the possibility of entering the Land Deal was pivotal; and the Defendants' argument is expressly contradicted by the Side Letter, which was drafted by the Defendants and their team, and which expressly states that the Loan is in consideration for the Land Deal i.e. the two were inextricably linked.

103. Second, it was argued that the Claimant had been largely responsible for drafting the Loan and the Side Letter documentation and that the absence of any express reference to a conditional Land Deal in either was deliberate (because it did not exist) and this undermined the Claimant's case. As to this, as the evidence plainly shows: (i) it was the Defendants and their colleagues who were responsible for preparing the documentation relating to the Loan and the Side Letter; and (ii) the Side Letter is not inconsistent with the Claimant's case since the second paragraph thereof is drafted in a way which contemplates and presupposes that the Defendants would still have an interest in the Greenwich Peninsula development plan "*following*" the sale of the Club to a third party purchaser, which is the gravamen of the Land Deal.

104. Third, it is said that a draft letter that had been prepared by Mr Khakshouri with the intention of it being sent to the Defendants setting out, in emotional terms, why he felt so badly let down by them and why they should compensate him, did not refer to the conditional Land Deal or any statement that the Defendants controlled the Club through a majority shareholding. Mr Leech QC invited the Court to conclude that from this omission I should draw the inference that if such a conditional deal had been agreed it would have been referred to in this letter. He argued that this draft letter was more probative than the Side Letter. The draft was in fact never sent to

the Defendants. It was composed circa October - December 2014, following the revelation to Mr Khakshouri by Mr Jimenez in June 2014 that in fact there was no Land Deal and in the light of some and bad-tempered conversations occurring subsequent to that revelation during which the Defendants had roundly and personally criticised the Claimant. The letter was, quite obviously judging by its terms, drafted by Mr Khakshouri in a fit of anger and indignation. It only came to light when Mr Khakshouri referred to in cross-examination. It was then disclosed and Mr Khakshouri was questioned about it. He explained that instead of sending it to the Defendants he had sent it to his lawyers to act as a form of briefing paper when he sought advice about a possible claim. The letter comprises 22 pages of single spaced text. On a number of occasions it refers to the Land Deal and makes plain that it was the *quid pro quo* for the Loan. For instance, on page 12, Mr Khakshouri wrote: "*You had convinced me that you would successfully sell CAFC and be in a position to repay me all my money (plus interest) before the end of the year (2013). You also guaranteed, assured and promised me that there would be a land deal opportunity attached to the sale of the CAFC of which I would be allotted a 30% share. You made it very clear to me that you were in control of the land deal and that you would make sure that you were assigned and granted the interest you were seeking in the land deal through the sale of the club*". I can find no support for the Defendants' position in this document. It is consistent with the Claimant's interpretation of the Side Letter. In so far as documentary evidence significantly post-dating the actual events in issue is relevant, this document supports the Claimant's case.

(vi) Did the Claimants suffer loss in consequence of the representation?

105. I address the issue of loss and damage at section G below.

E Deceit- Second Representation: The Club would not be sold without a Land Deal

(i) Did the First defendant make the representation?

106. I turn next to the second alleged representation. The second representation concerns whether the First Defendant promised to *ensure* that the Club would not be sold without a linked Land Deal. Mr Khakshouri is certain that such a promise was made to him about the intention of the Defendants. Mr Jimenez says that, whilst he was very keen on securing a linked Land Deal, his representation to Mr Khakshouri was no more than that he would use best or reasonable endeavours. He had no intention of ever *ensuring* that such a Land Deal would come about and he made no such promise.

107. I should start by saying a word about "*intentions*". It is not in dispute that in law an intention to do something may be actionable in deceit because it is capable, in principle, of incorporating a representation about a fact, namely the state of the representor's mind. It is common sense that intentions may come in many shapes and sizes. A "*present*" intention may be ephemeral and change overnight. A firm intention to do "*all that one reasonably can*" is not an intention to guarantee or ensure a particular outcome. Nor is an intention to use "*reasonable* "or "*best*" endeavours. In this case the Claimant's case is that the intention expressed by Mr Jimenez was firm and unequivocal. The Defendants would ensure that the Club would not be sold absent a Land Deal. That was the representation which induced the Loan. On the facts of this case, however, the evidential dispute between the parties is not about the Mr Jimenez's intention. This is because his case is that he only ever promised to use best endeavours and this necessarily meant that he never had any intention of "*ensuring*" linkage.

108. It follows however that if I find as a fact that Tony Jimenez did make the representation that is alleged that he made he does not, indeed cannot, argue that he did make the representation alleged but it was only a *present* intention, or one to which only reasonable or best endeavours attached and that he (a) (quite legitimately) changed his mind or (b) did use reasonable or best endeavours.

109. In my judgment I accept the Claimant's account. I find as a fact that the First Defendant represented that he and Mr Cash, (*qua* majority shareholders), would ensure that the Club would not be sold without "*a*" Land Deal of some description. My reasons for this conclusion are as follows.

110. First, I simply accept Mr Khakshouri's evidence. I have set out various portions of Mr Khakshouri's evidence at paragraph [80] above in which he states that this representation was made. I set out below a selection of further answers he gave to questions put to him in cross-examination about this matter:

> (1) "A. He did tell me that he wasn't going to sell the club unless it included the land deal.
>
> Q. That's not quite the question I asked you, Mr Khakshouri.
>
> A. Sorry.
>
> Q. The question I asked you was whether Mr Jimenez actually used those words. (Pause).
>
> A. Yes, pretty much those words. Yes.
>
> Q. Well -- A. I mean, not word-for-word -- yes, those words. Q. He did use those words?
>
> A. Yes.
>
> Q. And you can remember him using those words even though it's four years ago now?
>
> A. I had to be pretty certain that what he was saying was that, yes. I mean, I was -- I am certain that that's what he said, yes.
>
> Q. On that occasion?
>
> A. On that occasion.
>
> (2) "The land deal was a key part of the transaction because there was no reason for me to actually lend the money unless there was going to be a land deal, and the land deal had to be for sure, and I needed to be sure about that and that's -- you know, I proceeded on that premise."
>
> (3) "I -- like I said before, Tony stated to me in no uncertain terms that the sale of the club would include the land deal."

(4) “Yes, obviously for the fact that they owned the club they would be able to ensure that when the sale takes place it would or would not include the land deal, and of course they promised me that it would include the land deal, and so that's how they would ensure, or it says here, secure our interest.”

(5) “There were two key elements: one, that he and Kevin owned the football club, and two, that he was not going to sell the football club unless it included the land deal. So I'm very clear about that and he very much promised and in no uncertain terms absolutely told me that the sale would not be made unless it included the land deal.”

(6) “No, at that stage we weren't talking about a joint venture. He simply stated that when he sells the club we would have an interest in the land deal. In the -- you know, in the land deal because the sale of the club would include the land deal. He didn't detail the joint venture or anything like that.”

(7) “No. No. No, not persuade the club, because whoever was going to be the buyer was going to agree to the sale -- to purchase the club with the land deal intact so that, yes, they would be agreeable to moving the stadium, so that had to be in place.”

(8) “No, there were going to be obstacles, but there was going to be a land deal at the end of it all, meaning that at the time of the sale there was going to be the prospect of a land deal.”

(9) “My risk was -- yes, this was the risk of the project, but what I wasn't risking is the fact that Tony had told me that he wouldn't sell the club without including the land deal.”

(10) “As I stated before in my witness statement, there were going to be obstacles, but there had to be a land deal. When the club was to be sold, there had to be a land deal for us to proceed with.”

(11) “Well, this document may be saying that. As I understood it, Tony was giving me the most up-to-date and most current information, and the information he provided me with was, like I say, I mean, in the notes that I took on 17 September, so those notes were more relevant to me and very compelling, very -- I was very -- I was somewhat convinced - well, not somewhat; I was very convinced that there was a land deal and that this project was going to proceed.”

(12) “But my goal, again, was always to trust in Tony and Kevin, and when Tony told me that this was a wonderful opportunity, a great opportunity, and that he could for sure include the land deal when he sells the club, that convinced me, that was what I needed to know and needed to understand.”

(13) “He gave me this document on 16 September and then talked to me on 17 December. We had a long discussion, lengthy discussion, and at

that point it was already understood that the land deal was going to be a certainty, it the only reason we were discussing the land deal."

(14) "Q. Do you suggest that he said that to you again on 16 or 17 September?

A. I know that he said that definitely on the 16th, because by that point I had to -- you know, it was a very short time, and I had to start making a decision, and I needed to have known that in order to proceed."

(15) "I had left that to Tony and Kevin. I didn't know exactly the mechanism of the -- I didn't know exactly what they were going to incorporate with the new owner in terms of the mechanism or structure, but I -- I believed that they were going to protect our interest and enable us to proceed with the land deal."

(16) "Well, there was two things. Like I say, he absolutely assured me that there was going to be a land deal when the club was sold. So now there's no land deal, so yes, I was upset, very upset. I didn't know exactly the terms and conditions of the land deal, in other words, how they had been agreed, but I understood that there was a land deal, in other words, the new owner was agreeable to moving Charlton Athletic to a new stadium and that we would be able to proceed with working on the land deal and providing for that situation."

(17) "He told me that the club would not be sold unless there was a land deal. There was a clear indication to me that there was going to be a land deal regardless, no matter what, and that was the only way that he was going to sell the club, and that was -- that's what satisfied me."

(18) "I didn't really consider that that was an option because that's not what we were talking about. At the time that we talked, well, Tony was explaining he was very select and very careful in telling me that the club would not be sold without the land deal in place and that we would be able to proceed with the project. That was really the plan and that's what we were discussing throughout the time that he was in Los Angeles."

(19 "I was only going to give that up knowing two things: that one, Tony and Kevin owned the football club, and; two, that they would only sell the football club with the land deal to be included. I was very clear on those two items. There would be no way, as an experienced developer, that I would give up something on the off-chance that there might, or somebody might try to make a deal that might happen. I mean, it's just -- that's just not the way I do business."

(20) "Q. So when he said to you, "I will not ..." assuming he used words, or something like these words, "We will not sell the club unless the new owners of the club enter into the land deal", "the sale of the club will include the land deal", let's focus on that, let's use that formulation, if we can agree, because it's one you've used a number of times, "the sale of the

club will include the land deal". First of all, do you accept that that's a fair way of describing what Tony told you?

A. The club would not be sold.

Q. Without including the land deal?

A. If the land deal was not included, yes.

Q. If the land deal was not included. Okay, so when he said that, you took that to mean that he would under no circumstances sell the club unless the land deal was included?

A. Yes.

Q. And if the new purchaser simply said: no, I will not sell -- will not enter into the land deal, whatever that was, but I will buy your club, he was bound to refuse to sell the club altogether?

A. That's what he presented to me, because for him also, and for Kevin, the land deal was all-important and they weren't going to sell the club unless it included the land deal.

Q. So in your mind it was an absolute assurance that the club would simply not be sold unless the land deal was included?

A. Yes.

Q. And even if it involved you -- him being unable to repay your loan?

A. Well, at the time they had -- they were actively trying to sell the club. Tony didn't present to me that there was any major difficulties in selling the club; he had a very strong buyer for the club that had a very good understanding or appreciation for the land deal. Yes, I -- and the fact that Tony was asking for a very short term loan gave me the idea that this was just a matter of time, and that's what he said to me. He said: I just need this money to hold me over while I sell the club.

Q. You knew at the time that there had been no -- there was no identified purchaser and no agreement with the purchaser when you were speaking to him on 15 September, didn't you? You knew that he had Blackstone in mind but that Blackstone had not signed up. That's the position?

A. Yes, he did not present to me that he had a signed agreement with Blackstone."

111. Second, in a text message exchange between the Claimant and First Defendant on 24th September 2014 Mr Jimenez described the Claimant as being "*like a broken record*". The exchange is of some significance. Mr Khakshouri invited Mr Jimenez to confirm whether he had "*promised*" him a Land Deal in exchange for the Loan. Mr Jimenez said "*yes*".

> "9/24/14, 7:05:51 AM: Tony Jimenez: Darius, you are like a broken record. You were promised to be in a specific property deal with no downside but you knew we were intent in selling the football club. You also knew we had several prospective buyers for the club and that the property deal would need to be negotiated. What we gave you, and by the way you drafted a great deal of the documentation was a personal guarantee of all your money back with a 12% coupon. That was your downside and your upside could have been huge. I would love you to offer me that deal every time you need money. Now if you've been so hard done by, why were you complaining that Kohler wouldn't let you in his fund at 8%. You were devastated at the time. Also Darius you told Kevin and me that the buildings you did in Sawtelle generated a 5% return. Every investment is a gamble yet you had no gamble. A total guarantee. You don't stop complaining on a perceived deal that hasn't generated a single dollar yet. You don't like to use other examples that didn't go so well. How about losing the architectural plot, how about losing the YMCA building, how about having to sell Pico. Every single deal you do there are recriminations Darius. You really don't need to stop this behaviour. You are right, it is humiliating and you should be far better than what you are presenting here.
>
> 9/24/14, 8:22:26AM: Dar: Tony just answer the question. Did you or did you not promise me a land deal in exchange for the $3m. that I gave you? That's a yes or no answer.
>
> 9/24/14. 8:30:00AM: Yes. Now answer my questions Darius. What I've said above. Point by point please."

112. The Claimant was indeed like a "*broken record*" but the consistency of an account over an extended period of time is one indication that the author feels strongly that his version is the true version of events. Such a person may, of course, be genuinely mistaken but the genuineness of a belief is nonetheless some proof that it is true.

113. The affirmative answer from Mr Jimenez, namely that he had promised a Land Deal, is consistent with the first part of the text in which Mr Jimenez, again, acknowledged that the Claimant was promised to be in a specific property deal with no downside. In my judgment this exchange reflects the First Defendant's frustration with the Claimant taking a legalistic view of life as opposed to a more pragmatic, commercial, win some/lose some, approach. Whilst I understand Mr Jimenez's frustration, his answers confirm the Claimant's account that the First Defendant had *promised* him that he would be in a "*specific deal*" i.e. the Land Deal.

114. Third, the linkage of the sale of the Club and the Land Deal was, at all times, a very real possibility. It is entirely credible that the Defendants would offer this linkage. Mr Slater, who was intimately involved in negotiations over the sale of the Club, felt able to say in his Statement:

> "*…we never doubted that we would find a buyer who would not, at the very least, agree to move the Club to a newly designed stadium.*"

The evidence before the Court supports the proposition that the possibility of being involved in the erection of a new stadium on the Greenwich Peninsula was a major selling point for the Club which otherwise presented as an escalating financial problem.

115. Fourth, Mr Khakshouri's evidence is consistent (and certainly not inconsistent) with the Side Letter, which proceeds upon the premise that following sale of the Club the parties will still have "*skin in the game*". This could only be ensured through a Land Deal.

(ii) Was the representation untruthful?

116. I can deal with this point briefly. The Claimant says that, since at the time the representation was made, the First Defendant had no intention of granting linkage his representation was therefore false. Mr Jimenez has never said that he ever intended to ensure or guarantee a Land Deal. Since I find however that he did make such a representation or promise, I am bound to find that the promise was false and untruthful when made and, obviously, deliberately so. In any event all of the evidence points in this direction.

(iii) Did the First Defendant intend the Claimant to act in reliance upon the representation?

117. There is no doubt that Mr Jimenez made the representations intending them to induce Mr Khakshouri to rely upon them and make the Loan and that they were in fact relied upon by Mr Khakshouri. I rely upon the facts and matters referred to at paragraphs [80] and [110] above.

F Conclusion

118. In conclusion the First Defendant is liable to the Claimant for deceit.

G Vicarious liability of the Second Defendant

(i) The issue

119. The case of the Claimant is that Mr Cash, the Second Defendant, is vicariously liable for the conduct of the First Defendant. The case is put upon the basis of actual (not ostensible) authority. Mr Cash was not present during the September 2013 meetings but he had given Mr Jimenez actual authority to negotiate on his behalf. The Second Defendant however denies that he gave actual authority to the First Defendant, who he says was acting on behalf of the Club, but not him. Alternatively, he argues that his involvement in the transaction was in any event on behalf of the Rose Trust, which is therefore the proper Defendant, and (once again) not him personally.

(ii) The Claimant's case

120. The Claimant's case is that Mr Cash was aware that Mr Jimenez was going to the US and would meet or speak to Mr Khakshouri about making a loan and that in consideration for the Loan Mr Khakshouri was to be offered the Land Deal. Mr Cash left it to Mr Jimenez to agree the terms of the Land Deal, whatever it might be. He also authorised Mr Jimenez to offer to Mr Khakshouri a percentage of the Land Deal (be that an equity stake in a SPV or in some other appropriate form). Mr Cash knew that, in conferring authority upon Mr Jimenez to agree terms with Mr Khakshouri, any interest that he personally would otherwise have in the Land Deal could be diluted materially. Subsequently, Mr Cash signed the Side Letter confirming that he had given express authority to Mr Jimenez to negotiate the deal with Mr Khakshouri. The representations made by Mr Jimenez were squarely within the authority conferred by Mr Cash.

They were necessary to persuade Mr Khakshouri to enter into the Loan which kept the Club afloat and enabled him and Mr Jimenez to pursue the Land Deal which was for their personal benefits.

121. Mr Atkins questioned Mr Cash about this. There was – as it turned out- no significant dispute between them over the position:

> "Q. Can you put away file E1. I just want to talk to you briefly about Tony's visit to see Darius in LA. I know you weren't there, but I think I'm right in thinking the following: firstly, you knew that Tony was going over to LA to try and persuade Darius to make a loan to the club; correct?
>
> A. I knew that – I knew that Tony was going to talk to Darius. I didn't know he was going to LA to see him.
>
> Q. Right, I see. But you knew that he was going to talk to Darius about getting a loan for the club; correct?
>
> A. Yes
>
> Q. And you knew that Tony was going to offer Darius a share of your interest in the property deal if you could make it happen?
>
> A. Yes.
>
> Q. In order to get the loan?
>
> A. Yes.
>
> Q. Yes. And you knew that there was likely to be some negotiation between them about that; yes?
>
> A. No.
>
> Q. You didn't know that?
>
> A. No. I had – I had a simple call with Tony who – the club clearly needed money.
>
> Q. Yes.
>
> A. He mentioned that he was going to talk to Darius and others regarding this, and he asked me if we were okay if we offered Darius part of the potential property deal—
>
> Q. Yes.
>
> A. – as part of him making a loan to the club.
>
> Q. Right. So Tony asked you that before he went?
>
> A. Yes.

Q. Right. And so you knew he was going to offer you part of the interest you and Tony would take in the land deal if it happened, as an inducement for the loan?

A. I knew he was going to ask Darius if he wanted to get involved in the potential property deal.

Q. Land deal, right. But you didn't discuss with Tony the amount of the interest you were willing to share with him?

A. No. Tony called me afterwards and said it's probably going to be 30 per cent.

Q. 30 per cent.

A. And we were fine with that.

Q. But you left that up to him?

A. Yes. I should just add that – one thing, my Lord, if I may.

MR JUSTICE GREEN: Of course.

A. Everybody's talking about this potential property deal and who's got what shares as if that's how its going to end up, the reality of it is, the best position we were ever going to be in would be promoters of that deal with a shareholding with the club, or whoever, to promote that deal. The eventual shareholding of a project of such a size would have changed dramatically from what we were talking about, and what we were really offering here was whatever share we ended up with, the Rose Trust and Cavansa Trust, we were willing to share that with Darius, but that did mean that there would be, in order to stay in at sort of pari passu, as that moved up the line of the cost curve, everybody would have to either pay into that situation or be diluted by funds as they came in through the capital structure.

So its – I know earlier you sort of made a point that it was such a big inducement. Its actually – it was the opportunity to have an opportunity, is what I'm trying to say.

Q. I accept that. I know what the letter says. We'll look at it in a moment, actually, but the point is that you knew when – that Tony was going over to LA to try and persuade Darius to make a loan to the club and you knew that to persuade him to do so he was going to offering Darius a share of the interest, whatever it would be in the end, that you and Tony would take in the deal; yes?

A. Yes.

Q. And you didn't discuss with Tony how much he was going to offer him; you left that up to him to negotiate?

> A. Yes.
>
> Q. Right
>
> A. He came back to us and said: we've offered Darius 30 per cent, are you okay with it? And I said: we're okay with it.
>
> Q. You're okay with it, right. Did the trustees of the Rose Trust know that Tony was going over to LA to share the interest - -?
>
> A. No, but I did talk to them thereafter for the decision on the 30 per cent"

122. This exchange shows: that Mr Cash knew that Mr Jimenez was going to meet with Mr Khakshouri with a view to securing a loan to the Club; that the Club needed funding; that the Land Deal would be part of the discussion; that a portion of the interest that Mr Cash and Mr Jimenez would otherwise hold would be offered to Mr Khakshouri as part of the inducement to secure the Loan; that Mr Cash did not know what share would be offered by Mr Jimenez but he left that up to Mr Jimenez; that at the time the Rose Trust was unaware of this discussion or the offer by Messrs Jimenez and Cash to cede a part of the Land Deal to Mr Khakshouri. In that exchange Mr Case refers to the use of the collective pronoun "*we*" when referring to both the discussion and the offer: "… *what we were talking about, and what we were really offering here…*" (emphasis added).

(iii) The Second Defendant's case

123. Mr Kenny QC, for Mr Cash, accepted that Mr Cash, in signing the Side Letter, was acknowledging that he had authorised Mr Jimenez to conclude the Land Deal with Mr Khakshouri. But he nonetheless advanced two principal arguments to refute the Claimant's case. First, that when Mr Jimenez went to Los Angeles to negotiate with Mr Khakshouri he was acting *on behalf of the Club* to negotiate a loan, and not Mr Cash, and the extent to which Mr Cash was involved in the negotiation was therefore extremely limited if not non-existent. Second, and in any event, any involvement by Mr Cash was on behalf of the Rose Trust and that, in consequence, it was the trust and not Mr Cash who was the proper Defendant. I can summarise the nub of Mr Kenny's arguments as follows:

i) The authority conferred by Mr Cash was no more than to "*convey to DK agreement to his being cut in for a share of the "residual interest" in the [Land Deal]*". Such was the extremely limited actual authority conferred it is artificial to consider its "*scope*"; there is no penumbra of apparent authority to consider. Mr Jimenez was authorised to do one thing: there was really no scope to the doing of that thing. It is almost exaggeration to call this "*authority*": no further "*acting on behalf of*" him or it was necessary. The task of Mr Jimenez as "*agent*" was simply communication of that conditional offer. Any representation made by Mr Jimenez which was as to the likelihood of a Land Deal coming about or as to the benefits of any such deal or how it was to come about were outside of the (limited) authority conferred.

ii) The basis on which a principal becomes responsible for the statements of an agent (who is neither an employee or partner *stricto sensu*) is, as Bowstead & Reynolds on Agency 20th ed) observes at paragraph 8-182, "*somewhat limited*" and is confined to cases where: "… *the function entrusted is that of representing the person who requests his*

performance in a transaction with others, so that the very service to be performed consists in standing in his place and assuming to act in his right and not in an independent capacity.": cf *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Cooperative Co of Australia Ltd* (1931) 46 CLR. 41 per Dixon J at pages. [48] – [49]; *Kwei Tek Chao v British Traders* [1954] 2 QB 459 at page [470] (Devlin J); *The Litsion Pride* [1985] 1 Lloyd's Rep. 437 at pages [513] – [514].

iii) Mr Kenny QC encapsulated the argument on the issue of authority in the following way tying together the law with his analysis of the evidence:

> "To render a principal liable for the representations of his agent, therefore, the agent must, when making the relevant statements, have been "standing in his place and assuming to act in his right" i.e. representing the principal in the performance of the very act that he was authorised to perform. But that does not describe TJ in the course of negotiating for a loan to the Club. He was not then representing KC/ the Rose Trust: he was representing the Club. He was not then assuming to act "in right of" KC/ the Rose Trust: he was acting in right of the Club. He was not then performing "the very service to be performed" for KC/ the Rose Trust, namely communicating its conditional offer. Rather he was acting in a capacity independent of KC/ the Rose Trust, namely as a director of the Club."

iv) In relation to the argument that the Rose Trust was the proper Defendant it was argued that, on the assumption that liability would otherwise accrue, the real principal of the First Defendant was the Rose Trust and not Mr Cash. This arose even if (as the evidence indicated) Mr Khakshouri was clear in his own mind that the persons with whom he agreed were Messrs Jimenez and Cash, and not the Rose Trust. The correct analysis is not to be determined by the Claimant's perception, but by analysing where true authority lay. On the facts, in authorising the making of a conditional offer Mr Cash was acting not in his personal capacity, but on behalf of the Rose Trust and his actions in authorising the making of that offer, even if not authorised by the Trust in advance, were ratified and adopted by its trustees subsequently. He was thus, properly analysed, to be regarded merely as an intermediary in the authorisation of Mr Jimenez. Therefore, upon the hypothesis that liability accrued Mr Cash was not the relevant principal, and could not be liable to the Claimant.

(iv) Analysis / Actual authority

124. I start by considering the question of actual authority. In my judgment, on the evidence Mr Cash quite plainly authorised Mr Jimenez to negotiate a Land Deal with Mr Khakshouri and this included <u>all</u> of the representations made by Mr Jimenez. The suggestion that the interest of Mr Cash in the negotiation was strictly limited flies in the face of the evidence and the commercial reality: (i) Mr Cash was not interested in football; his interest in the Club was because of the potential link to the Greenwich Peninsula development; (ii) the Club urgently needed bridging finance and, absent such support, administration was a possibility; (iii) if administration occurred then the prospect of any Land Deal evaporated; (iv) the need for a loan from the Claimant was therefore urgent and was necessary to enable the Defendants, *personally*, to have the chance to exploit opportunities arising out of the Greenwich Peninsula development; (v) in an ideal world (ie but for the financial crisis at the Club) Mr Cash and Mr Jimenez would have exploited the Land Deal by themselves, but they both knew that, to secure the Loan from Mr Khakshouri, the *quid pro quo* was his participation in the Land Deal; (vi) to secure the Land

Deal Mr Cash thus had to confer upon Mr Jimenez authority to negotiate whatever he (Mr Jimenez) considered appropriate to secure the Loan; (vii) the representations made by Mr Jimenez in furtherance of that joint objective or enterprise were four- square in the middle of the authority so conferred by Mr Cash and were essential to the Defendants being able, *on their own account,* to participate in the Greenwich Peninsula development.

125. Ultimately this issue boils down to findings of fact, not points of law. In my judgment Mr Jimenez was wearing Mr Cash's boots and standing "*in his place*" when he was in negotiation with Mr Khakshouri and more particularly when he made the representations that I have found were in fact made and which found the claim for liability.

(v) Analysis: Proper defendant

126. I turn now to the question of the proper defendant. I reject the argument that Mr Cash is not a proper defendant.

127. The starting point is that the Rose Trust point was not pleaded by way of Defence on behalf of the Second Defendant. The Defence, in its initial and amended form, was drafted upon the basis that Mr Cash was the proper Defendant and that the claim against him was personal and stood or fell upon its merits. In the Defence Mr Cash does address the relationship between Mr Jimenez and the Cavansa Trust. He is however silent as to his own relationship with the Rose Trust. In the Amended Defence Mr Cash denied that Mr Jimenez acted as agent for him but he did not plead in the alternative that if authority had been conferred that it was the Rose Trust on whose behalf Mr Jimenez acted. Subsequently, when in a request for further and better particulars he was asked about the issue of control, and the apparent inconsistency between Mr Cash's pleaded denial that any representation of control had been made by Mr Jimenez and the Side Letter, again no reference was made to the Rose Trust. In his witness statement dated 4th August 2017, signed very shortly prior to trial, Mr Cash does for the first time introduce the Rose Trust as a "*stakeholder*" in the Club by virtue of the loans provided by it to the Club. Here he explains that he "*acts as an informal advisor to the Rose Trust and from time to time I recommend certain investments to the Trustees*". He says that a loan facility was made available to the Club by the Rose Trust because the Land Deal could amount to a potentially lucrative opportunity, if achieved. He also says that he does not "*believe the Rose Trust's loan was repaid in full*". Nowhere in his witness statement however does he say that he joins issue with the Claimant upon his status as a Defendant. In that part of the statement in which the Loan from the Claimant is discussed no mention is made at all of the Rose Trust. Moreover, it transpired in cross-examination that Mr Cash did not go to the Rose Trust in advance of his conferring authority upon Mr Jimenez to negotiate and conclude the Land Deal with Mr Khakshouri; though he said that he obtained ratification afterwards, no disclosure has been given of this. Indeed there is a gaping hole in the disclosure in so far as the Rose Trust is concerned.

128. Elementary fairness demands that this point should have been raised at the outset. It was, if it had forensic legs, an obvious point for Mr Cash to take. But he did not. It was never pleaded. The existence of the Rose Trust came into view only weeks before the trial started upon service of witness statement but even then the point of law now said to arise was not brought into play. And even as the point was being advanced in the course of the trial it was not accompanied by any application to amend the pleading. No doubt had such an application been made it would (a) have risked the Claimant seeking consequential disclosure and (b) risked the trial being adjourned with the Second Defendant being exposed to the possibility of costs thrown away. I am bound to try this case according to the overriding objective which is to do justice to all

parties. It would in my judgment run counter to that objective if I now allowed such an elementary point to be argued.

129. In any event, I am not satisfied on the evidence as it stands that the point is arguable. There are a number of points to make.

130. The first point is that Mr Cash has business interests of his own that he pursues independently of the Rose Trust. It is not therefore the case that all of Mr Cash's interests are wrapped up in the Trust. Much of the gist of the evidence given was that once the Club was sold, Mr Cash and Mr Jimenez would then be at the Greenwich Peninsula development project table, in essence as individuals with personal skills and knowledge, which they could bring to that table. Mr Cash did not seek the approval of the Rose Trust in advance when he authorised Mr Jimenez to negotiate the Land Deal with Mr Khakshouri. Though he says that he obtained ratification afterwards, the terms of that ratification are not before the Court. The 30% interest that he and Mr Jimenez ceded to Mr Khakshouri was not an interest that the Rose Trust owned or held by virtue of its status as a creditor and the Rose Trust had declined to advance further funds to the Club, so what it was that was supposedly ratified is opaque. And even if the Rose Trust had approved Mr Cash's position, there is nothing to suggest that this was other than a quite separate agreement between Mr Cash and the Rose Trust which did not alter Mr Cash's relationship with the Claimant. No disclosure has been given to establish the true facts. The evidence adduced throughout the trial has focused upon the interests of the Defendants as individuals and not as representatives of their trusts. If the converse were the true position I would have expected evidence to have been tendered to establish this.

131. The second point is that, on its face, the Side Letter was signed by Mr Cash in his personal capacity. This is supported by the fact that in signing he personally agreed to stand as trustee in relation to the Claimant's interests under the Land Deal: See text at paragraph [58] above. This was acceptable to Mr Khakshouri because of the strong personal relationship between the parties and no one has suggested that Mr Khakshouri would have taken the same stance had he been told that it was not Mr Cash, but the Rose Trust, that was to act as trustee for his interest. In my view this supports the conclusion that Mr Cash was acting for himself.

132. Third, it was put to Mr Khakshouri in cross-examination by Mr Kenny QC that in fact it was known to Mr Khakshouri that Mr Jimenez was negotiating on behalf of the Rose Trust and the same would have been understood by him when the Defendants signed the Side Letter. Mr Khakshouri was incredulous at the suggestion; he had no knowledge of the Defendants' family trusts. I accept his evidence on this. Subsequently, when Mr Cash was cross-examined he did not materially quarrel with the proposition that Tony Jimenez negotiated the agreement on his behalf (see paragraphs [121] and [122] above) but he nonetheless repeated that he entered into the Side Letter on behalf of the Rose Trust. He was challenged on this during questioning. He said that the way in which the agreement was drafted was a (yet further) mistake. The Side Letter was really only an informal "*comfort*" letter and when "*finally*" the "*deal*" was to be drawn up, which would involve lawyers, then it would have been drafted with "*the relative holdings and trusts represented*". On analysis, if Mr Cash's intention had been that in due course the Side Letter was to be replaced with a new fuller form agreement which introduced new parties, then the new agreement itself could only have replaced the Side Letter with Mr Khakshouri's consent since it would have amounted to an amendment of the Side Letter which, otherwise, had full legal force and effect. The introduction of specific new replacement parties (the trusts) would clearly have needed Mr Khakshouri's consent because it would amount to a variation to the agreement. The necessary implication of Mr Cash's evidence is that, pending

such new agreement, the Rose Trust was not a party and had no rights in relation to the Side Letter.

133. Fourth, there were inconsistencies in Mr Cash's account which undermine its credibility. In relation to the point in time when Mr Cash first raised the Side Letter with the Rose Trust, at one point he said that he "*already*" had agreement from the Trust to cede 30% to the Claimant. But later when pushed in cross-examination, he said that he only sought agreement *afterwards* so that, as Mr Kenny QC put it, the Side Letter was ratified by the Trust after the event (see quotation from cross-examination set out at paragraph [121] above). This inconsistency is a matter I take (negatively) into consideration in my conclusion on the reliability of this evidence.

(vi) Conclusion

134. I reject the submissions advanced by way of defence. Mr Cash, the Second Defendant, is vicariously liable for the deceit of the First Defendant.

G Damages

(i) Basic principles: the purpose behind an award of damages

135. Having found that both Defendants are liable to the Claimant I must turn next to consider damages. This is a case where it is helpful to start with a reminder of first principles. This is because the Claimant resorts to the basic tenets of compensation when he argues that the position prior to the deceit was that he had a 55% interest in the LA Deal. He was induced to move away from this *status quo ante* by the deceitful representations which he relied upon. But for the tort he would have left his money in the LA Deal and he would, in the fullness of time, have realised a return on that investment of approaching 400%. This defines the computation of his loss.

136. The Defendants, however, argue that this mis-states the point in time at which damages should be calculated. They say that the relevant date for assessment is not the maturity of the LA Deal but the date upon which the Claimant was repaid the Loan and thereby extricated himself from the adverse consequences of the deceit. The Claimant's retort to this is that the date of extrication is irrelevant because, on the particular facts of the case, the repayment of the Loan did not enable him to recover losses due to the dilution of his holding in the LA Deal.

137. The object of an award of damages is to compensate a claimant for losses, pecuniary and non-pecuniary, sustained in consequence of the tort. The general principle is that the Court should award "… *that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensational reparation.*" (*Livingstone v Rawyards Coal Company* (1880) 5 App. Cas. 25 at page [39]).

138. The tort of deceit is not actionable *per se* and proof of damage is a necessary component of the action. It is for a claimant, in the ordinary way, to prove his loss. Authority indicates that where a claimant proves that he has been deceived into spending money, the burden shifts to a defendant who wishes to contend that the expenditure did not in fact amount to a loss to the Claimant. The measure of damages in deceit is the loss directly flowing from a claimant's reliance on the defendant's statement. This is, generally speaking, the sum that will put the claimant in the same position as if he had not relied upon the deceitful representation. Credit must be given for any gains made by the claimant.

139. The position that would arise had the representation been true is irrelevant. The claimant's right is to be put in the position he would have been in, had he not relied upon the defendant's representation, and it follows that no account is taken of what the (hypothetical) position would have been had the representation been correct.

140. In Clerk & Lindsell on Torts (21st Edition) at paragraph 18-43 (page [1334]) the authors state the following in relation to "*claims for would-be profits*":

> "Although the "reliance measure" outlined above precludes the recovery of stated profits as such, this does not necessarily mean that the claimant is limited to out-of-pocket losses, or that all claims for lost profits are precluded. Suppose a claimant is deceived into entering into a transaction by a fraudulent statement as to the profits to be made, and can show in addition that if he had not relied on the defendant's statement he would have made some other gainful investment (or for that matter would have laid his money out at interest). In such a case it is clear he can recover the would-be profits or interest, as the case may be, that he would have made from that other investment. Indeed, an action may lie for deceit even in respect of a transaction which turned out highly gainful for the claimant, if by reason of the deceit he was prevented from investing his money elsewhere so as to turn an even greater profit."

(ii) Time for assessment

141. As explained above, there is a dispute about the point in time that damages are to be calculated. *Prima facie*, in cases of deceit, damages are reckoned as at the time of reliance on the representation (Clerk & Lindsell (ibid) paragraph 18-44 page [135]). The Claimant's position is that the investment in the LA Deal was to realise the value of the project *upon maturity*. The date of reliance is not an appropriate starting point on the facts of this case. The correct date is value of the project upon completion, which was in August 2017.

142. Case law makes clear that rigidity and inflexibility are to be eschewed. Depending upon the facts it might well be necessary to compute damages by reference to a date considerably later than the date of reliance or even the date upon which extrication was first possible. The parties agree that the judgment of the House of Lords in *Smith New Court Securities Limited v Citibank NA* [1997] AC 254 accurately sets out the broad principles governing the payment of damages arising from a fraudulent misrepresentation. Reference is made to the judgment of Lord Browne-Wilkinson at pages [265] – [266]. There his Lordship rejected the old "*inflexible rule*" which had been established by the Court of Appeal in the 19th century which was that the asset acquired had to be valued at the transaction date. The old rule was "*both wrong in principle and capable of producing manifest injustice*". Lord Browne-Wilkinson emphasised that a defendant's fraud: "*may have an effect continuing after the transaction is completed, e.g. if a sale of gold shares was induced by a misrepresentation that a new find had been made which was to be announced later it would plainly be wrong to assume that the plaintiff should have sold the shares before the announcement should have been made".* He gave another example: the acquisition of an asset may lock a purchaser into continuing to hold the asset until he can affect a resale. In such a case to contend that the claimant had obtained the value of the asset at the transaction date: "…*flies in the face of common sense: how can he be said to have received such a value if, despite his efforts, he has been unable to sell*". It is apparent that at the heart of the objection of Lord Browne-Wilkinson to any inflexible rule was that it failed, very simply, to do justice. At page [265H]- [266A], he observed:

> "Turning for a moment away from damages for deceit, the general rule in other areas of the law has been that damages are to be assessed as at the date the wrong was committed. But recent decisions have emphasised that this is only a general rule: where it is necessary in order adequately to compensate the plaintiff for the damage suffered by reason of the defendants wrong a different date of assessment can be selected. Thus in the law of contract, the date of breach rule is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix other date as may be appropriate in the circumstances…"

143. Elsewhere he reiterated that the governing approach was to "…*give adequate compensation for the wrong done to the plaintiff*." The law is sufficiently flexible to take account of different circumstances. He wove together the various threads into a series of seven basic principles (ibid page [267]):

> "(1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefit received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensibly stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property; (6) in addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

144. Subsequently, Lord Steyn, in his judgment (at p. 282D-E), emphasised that damages in a case of deceit were not tied to any process of valuation as of the date of the transaction but were "*squarely based on the overriding compensatory principle, widened in view of the fraud to cover all direct consequences.*" He emphasised that the legal measure of compensation was "*to compare the position of the plaintiff as it was before the fraudulent statement was made to him with his position as it became as a result of his reliance on the fraudulent statement.*"

145. The Defendants place reliance on a statement of Mr Justice David Richards (as he then was) in *4 Eng Limited v Harper* [2009] Ch 91 at paragraph [55]. In that case the defendant sold the share capital of E Limited, a company they owned and managed, to the claimant. The claimant brought proceedings for deceit arising out of their alleged knowledge of the falsity of a number of express representations contained in the sale agreement on which the claimant alleged it had relied. The claimant sought damages for loss of the chance to earn income and profits from T Limited which, the claimant argued, it would have acquired had it not been induced by the defendants' deceit to buy E Limited. Summary judgment was entered upon their behalf with damages to be assessed. Upon the quantification of damages, the judge stated as follows:

> "55. The date on which the claimant is or could be extricated from the transaction induced by the deceit is important in a case where it relates to readily marketable asset. The usual rule would be that the loss is fixed as at the date of transaction because the claimant could immedaitely have sold the asset and any deferment in a sale is his own choice. This will not be the case, even with readily marketable asset, where the claimant is in effect locked into the transaction. In such a case, the appropriate date for assessment of the loss is the date on which he could extricate himself from the transaction."

146. In the event the Judge rejected the date of extrication as relevant. As of that date the claimant was "*…no more able then to make an alternative acquisition than it had been in the past or would be in the future.*" The "*consequences of the defendant's deceit did not stop then but continued until trial.*" He rejected the earlier date upon the basis that it would be "*arbitrary and unconnected with [the claimant's] loss.*"

(iii) The Claimant's evidence on loss

147. It is necessary now to set out the facts relevant to damages.

148. The time elapsing from the first request made by Mr Jimenez to Mr Khakshouri to make a loan until the transmission of the first tranche of the Loan by the Claimant was four days (16th-20th September 2013). As Mr Khakshouri explained in his witness statement and in oral evidence, during those four days, and in reliance upon the representations made to him by Mr Jimenez, he managed to obtain funds by reducing his stake in the LA Deal in relation to property at 11628-11650 W. Pico Blvd in Los Angeles ("the Property"). Mr Khakshouri disclosed documents relating to the acquisition of the Property, including the Title Company Settlement statement, the Hampstead Heath Bank Register ("the Register"), relevant bank statements, and the cheque signed by the Claimant's brother-in-law pursuant to which he acquired his stake in the LA Deal.

149. The vehicle used for the acquisition of the Property was a company called Hampstead Heath LLC ("Hampstead Heath"). The participants in the LA Deal were to hold their interests in the Property indirectly through Hampstead Heath.

150. As at 13th August 2013 the Claimant was set to acquire 35% of the LA Deal through Hampstead Heath. He and his wife (Mrs Mehrnaz Khakshouri) held a joint interest of 35% therein. On 27th August 2013 the Claimant and his wife acquired an additional 20% of Hampstead Heath from Peter Wilson and Alison Wilson. As at 17th September 2013 the Claimant had an expectation to acquire 55% of the LA Deal via Hampstead Heath.

151. On the 17th September 2013, in the midst of the Claimant's discussions with Mr Jimenez, the Claimant deposited a sum of $1,525,000 in an escrow account prior to completion in order for Hampstead Heath to complete the LA Deal. Upon completion on 18th September 2013 the Claimant held a 55% share. However, on that same day the Clamant disposed of 30% of his interest in Hampstead Heath. The sale was to his brother-in-law (Isaac Cohanzad). This disposal occurred upon the payment by Mr Cohanzad of $1,650,000, being 30% of the purchase price of $5,350,000 amounting to $1,605,000 plus a float contribution of $45000. This float was intended to cover unforeseen or additional expenses paid by each Hampstead Heath partner in the same proportion as their shareholding.

152. Put shortly, on the 18th September the Claimant first acquired a 55% share in the LA Deal but that was subsequently, on the same day, reduced to 25%.

153. The deposit of $1,525,000 in the Hampstead Heath account to enable the LA Deal to be closed was described in the Register as a "*temporary loan"* because, as Mr Khakshouri explained in oral evidence, he hoped that Mr Cohanzad would transfer the money the next day; but he did not wish to rely upon that expectation given his obligations to his partners in Hampstead Heath. He was conscious of the possibility that Mr Cohanzad might, at the last moment, change his mind. In fact, Mr Cohanzad effected the payment and upon payment Mr Khakshouri repaid himself the "*temporary loan"* of $1,525,000. He then took another temporary loan for $100,000 against the float in the Hampstead Heath account as it was not required for closing. This was subsequently repaid to Hampstead Heath in November 2013. These transactions are shown on the Register. The further temporary loan was, as Mr Khakshouri explained, to supplement the monies that he required to provide the full £1m that Mr Jimenez required.

154. I should, briefly, refer to the way in which interests in Hampstead Heath were acquired. The Property was first acquired by Hampstead Heath. Thereafter the company transferred the Property to six Californian limited liability companies ("LLC's"), each one owned by the six individual participants in the LA Deal. The limited liability companies own the Property under a Tenancy in Common agreement dated 13th December 2013. Copies of these agreements were before the Court. The company relevant to the Claimant was HH8 LLC. HH8 LLC owns 25% of the Property (via Hampstead Heath). The members of HH8 LLC were the Claimant and his wife. They hold their interest under an Operating Agreement dated 22nd November 2013. This agreement was drafted on the Claimant's behalf by his accountant and he explained in evidence that its purpose was to ensure that he and his wife jointly owned 100% of the LLC and in the event of the death of one of them the interest therein would pass automatically to the survivor.

155. The project which was the subject of the LA Deal commenced in the summer of 2015 and was completed on 24th August 2017. The Notice of Completion and Certificate of Occupancy both dated 24th August 2017 were before the Court. There was also before the Court a schedule entitled "*cost breakdown at completion of construction*" dated 7th June 2017. This schedule was produced in the report of an expert instructed by the Claimant shortly prior to completion. It was at this point that the Claimant was able to anticipate with certainty what the final development costs would be. These were estimated at $21m. The contributions made by the participants in the LA Deal to the acquisition cost of the Property and its development were $5,866,322. The balance was funded by means of construction loan finance provided by East West Bank (in excess of $15m). The bank loan was secured by way of a charge over the Property. It was explained that the loan was to be converted into a permanent financing loan to secure a more favourable rate of interest which would be serviced by the rental stream from the Property in due course.

156. Also before the court was a letter from East West Bank dated 1st September 2017 enclosing the final (i.e. closing), the "Construction Budget Disbursement Schedule" dated 15th August 2017. This spreadsheet indicated that the total cost for the project, including acquisition, was $20,908,973.83. The loan money dispersed to contractors for construction amounted to $15,042,651.83. This, when combined with the participants' contribution of $5,866,322 gave "Total Project Costs" of $20,908,973.83. An dispute arose as to the actual costs used to calculate the profits on the LA Deal which are the basis of the First Claim. The Claimant disclosed the spreadsheet as a reasonable and fair statement of those costs. The Defendants argued however that it was unreliable. I propose to set out here my conclusions on this point of evidence. It is of course conceivable that there are some items in the spreadsheet which are not

exact. It is quite impossible to know. But it remains the best evidence that there is before the Court and it certainly meets the threshold of reasonable reliability. There is no reason to doubt its overall accuracy or that it reflects in a sufficiently fair way the costs which are the basis of the Claimant's claim:

(i) Mr Kenny QC accepted that the spreadsheet was an "*independent"* document *and* that it was "*likely to have captured most of the hard costs … with reasonable accuracy*". He did not suggest it was a "*made up*" document. His argument was simply that it was unreliable. His case on this was fleshed out for the first time in closing submissions. It was not set out in his skeleton argument where it was said only that this was a point to be explored in cross examination.

(ii) Mr Kenny QC argued that whilst it was agreed that the August 2017 valuation of the Property lay in the range $35.2m to $35.5m there was nonetheless uncertainty as to the costs incurred by investors to bring the Property to its present state. He argued that the total costs of construction could be higher than those advanced and that the resultant profits therefore much lower and the damages claim consequentially inflated.

(iii) In closing Mr Kenny QC suggested that the Defendants could have no "*confidence*" that the spreadsheet captured all "*Borrower Equity Funds*" ie the investors' own expenditure prior to the bank loan coming into operation on 17th July 2015. This expenditure was put at $5,866,322 in the spreadsheet. Mr Kenny QC argued that the figure might not be accurate because the Bank had no interest in verifying that all such expenditure had been incurred. This was because it was not itself funding that expenditure. The cross examination on this point was brief. Mr Khakshouri disagreed and said that the Bank had an interest in ascertaining that the sums represented had in fact been spent. For instance, when it was put to him that various land taxes might not have been paid Mr Khakshouri responded by saying that the Bank had in fact reviewed the documents and that was why the items were included. The spreadsheet did reflect the results of a verification exercise.

(iv) Mr Kenny QC also questioned whether the "*soft*" construction costs were properly accounted for. He argued that there was a significant undershoot on budgeted expenditure, and it was suggested to Mr Khakshouri that this was because some expenses were paid for by the investors other than through the loan. Mr Khakshouri accepted that some of the costs would have been paid for at the outset and not by means of the loan. Mr Kenny took this as an indication of unreliability of the spreadsheet. He did not however suggest that the expenditure would nonetheless not have been incurred and was not a cost and there was no evidence to suggest that as a matter of practice the costs reflected in the spreadsheet were out of kilter with what would reasonably be expected on a project such as this.

(v) Mr Kenny also raised a point about tenant's improvements which were budgeted at $150,000. They would not yet have been incurred but would have to be, to bring the Property into a tenantable condition. The Property had been valued upon the basis of income capitalisation so that it had to be tenantable to generate the assumed revenue. This again was suggested as a reason why the spreadsheet was not reliable. Mr Khakshouri accepted that it was a cost that would in principle have to be paid and therefore a cost *to be* incurred. He said it was "*a*

very marginal cost". There is no suggestion that this is not a valid cost to be incurred or that the scale of the cost is inaccurate.

(vi) At the end of the day the spreadsheet is accepted as having been prepared by an independent party and it is also accepted as a fair reflection of (at least) one major portion of the costs. It is not said to be a sham or a fabrication. There is also evidence that the figures do in fact reflect a process of verification by the Bank. It is the best evidence available. The Defendants whilst generally seeking to suggest that it was unreliable in certain respects have not sought disclosure of the matters that they now seek to cast doubt upon and nor have they sought to adduce their own substantive evidence to counter the facts set out in the spreadsheet. The cross examination on unreliability was brief and light touch. Mr Khakshouri did not accept that the spreadsheet was inaccurate or unreflective of the costs incurred or to be incurred to bring the Property to the point where it was income generating.

157. As to the valuation of the Property upon completion the parties, for the purpose of this litigation, instructed valuation experts. The valuers arrived at almost identical figures. The Claimant's expert valued the Property at $35.2m. The Defendant's expert valued the Property at $35.5m. The parties agreed to put before the Court a range between the two figures in order to save the costs of attendance of the experts at trial. The Claimant suggests that the pragmatic approach is to simply split the difference leading to a figure for valuation of the Property at $35.35m. There is no material opposition to this approach and I adopt it.

158. The loss claimed by the Claimant is calculated as 30% of the profit on the now finished LA Deal being the Claimant's net loss on the 30% that he transferred to his brother-in-law in order to make the Loan.

159. The loss on the first part of the claim is, accordingly, calculated as follows.

	US$
Value of the Property	35, 350,000.00
Less total project costs	20,908,973.83
Net profit on project	14,441,026.17
x 30%	4,332,307.85

Less interest on loan	151,681.41
Total claimed	4,180,626.44

(iv) The Claimant's inability to buy back into the LA Deal: The evidence of Mr Cohanzad

160. I should also address the evidence given by Mr Cohanzad, the Claimant's brother-in-law. He produced a witness statement dated 26th July 2017. His evidence is consistent with the evidence given by Mr Khakshouri. Mr Cohanzad did not appear to give evidence at trial. There was however no objection to the admissibility per se of the statement. The Defendants made clear however that they reserved the right to criticise the evidence. I accepted their position on this. Mr Cohanzad gave evidence as to the circumstances in which he came to acquire his interest in the LA Deal. He is a professional real estate developer. He had, in the past, undertaken several joint venture developments with the Claimant. He purchased his 30% share in the LA Deal in September 2013. His evidence as to the way the investment came about may be summarised as follows. He was called by the Claimant on 16th September 2013 who put a business proposition to him. The Claimant had been offered the chance to acquire an interest in a property development in London. He said it was an "*outstanding opportunity*". He did not tell Mr Cohanzad of the details though he said that he needed to raise funds urgently, within a matter of days, and that the only way this could be achieved was by diluting his share in Hampstead Heath. Mr Cohanzad was asked whether he was interested in becoming a partner in Hampstead Heath by buying a portion of the Claimant's share therein. Mr Cohanzad expressed interest but said that given the extreme short notice, and to make it worth his while, the Claimant would need to transfer a "*substantial share*" in the project to him. There followed a number of telephone conversations that day and on 17th September during which it was agreed that Mr Cohanzad would acquire 30%. This was subject to a site inspection which occurred that same day.

161. On 18th September 2013 Mr Cohanzad met with Mr Khakshouri. He was aware that the Claimant was closing the LA Deal that same day. He provided him with a cheque for $1,650,000 made out to Hampstead Heath. A copy of the cheque was before the court. The agreement was completed and Mr Cohanzad acquired the 30% share.

162. Subsequently in October 2013, the Claimant asked Mr Cohanzad if he could provide him with a short-term loan of $1m. Mr Cohanzad agreed. A copy of the cheque dated 21st October 2013 was before the court. Mr Cohanzad explained that this was connected with the "*property deal in London*" that the Claimant was engaged in. He was informed that he would be repaid within a couple of months.

163. In or about mid-August 2014 the Property had been, what was described as, "*entitled for development*", i.e. it had requisite planning consents. The local real estate market was buoyant and the Property appreciated in value substantially. Mr Cohanzad expressed himself "*delighted with the deal I had made with Darius*". In August 2014 Mr Cohanzad was therefore "*surprised*"

when the Claimant approached him to see whether he could re-acquire his 30% interest. Mr Cohanzad stated in his witness statement as follows:

> "I had put myself out for him at short notice and was now sitting on a considerable upside and profit. Things had gone exactly how Darius had outlined the projects potential when he had told me about it and taken me to the site in September 2013. This put me in an embarrassing and awkward situation. Family is one thing but we are both professional developers and this was business. I had taken a considerable risk buying into Hampstead Heath the previous year. As a result, I said, somewhat reluctantly, I would sell him back my 30% share but in view of the appreciation of the property I could not do so simply for the acquisition price; I would want a realistic profit on top of the $1,650,000 purchase price I paid. I told him I would want my acquisition price plus $2,000,000 ("Two Million $) profit which was a realistic and fair price at that time. Darius informed me that he was not in a financial position to do that. He never mentioned buying me out again and we remain on good terms and partners in the Hampstead Heath project which, so far as I am aware, has continued to greatly appreciate in value."

(v) Conclusion on probative weight to be attached to Claimant's evidence

164. I turn now to set out my conclusion on the Claimant's evidence. I accept this evidence. I have no reason to doubt the veracity of Mr Khakshouri's account as to how he raised the funds for the Loan by diluting his interest in the LA Deal. It is consistent with the documentary evidence which I have no hesitation in treating as genuine. The sequence of events described by Mr Khakshouri is also consistent with the financing arrangements in question having been arranged within an extremely short period of time. When Mr Jimenez first broached the question of Mr Khakshouri advancing the Loan on 15th September 2013, the LA Deal was scheduled for completion just three days later on 17 September 2013. Mr Khakshouri agreed to help his close friends out of their crisis but to do this he had to engage in rapid financial juggling to release the necessary funds from other sources. In 48 hours he was never realistically going to be able to raise funds through more traditional means such as a bank or through the sale of assets. At such short notice Mr Khakshouri needed to turn to close friends or family to do him a favour. And that is what he did in approaching his brother in law, Mr Cohanzad.

165. I am also satisfied that, as Mr Khakshouri explained in evidence, he relayed to Mr Jimenez in the course of their conversations between the 15th - 17th September 2013 that he would have to speak to his brother in law, Mr Cohanzad, to see if he would be prepared to acquire part of his holding in the LA Deal in order to release funds. This finding of fact undermines the suggestion (which I address below) that the deal with Mr Cohanzad was a sham or fiction dreamt up to engineer an inflated claim for damages. If in fact Mr Khakshouri mentioned to Mr Jimenez during his discussions 15th – 17th September 2013 that he was going to have to turn to his family to unlock funds, this strongly militates against that being some later-fabricated invention. Although it was put to Mr Khakshouri in cross-examination that no such conversation had occurred, when Mr Jimenez gave evidence he: repeatedly stated that his recollection was very vague and unclear; did recall however that Mr Khakshouri referred to approaches he would have to make to his brother in law (though Mr Jimenez could not recall which brother in law); accepted that Mr Khakshouri explained that he would need to engage in financial juggling in order to raise funds to make the loan; and, accepted that Mr Khakshouri could well have had the conversation with him that Mr Khakshouri described in his evidence. Mr Jimenez thus recalled

the bare bones of the conversation which Mr Khakshouri says that he had with Mr Jimenez. It was also apparent to me during the trial that Mr Khakshouri's recollection was far superior to that of Mr Jimenez.

166. I also accept on the evidence that upon repayment of the Loan in 2014 Mr Khakshouri was, in a normal commercial sense, locked out of the LA Deal and it was not sensibly open to him to use the repaid funds to buy his way back in. He could not, therefore, restore the *status quo ante* and his losses directly flowing from the deceit continued. I accept that the date of completion in 2017 is the appropriate date for calculation (and as to this the experts have largely agreed the calculation) – see paragraph [157] above. This is the date upon which the loss crystallised.

(vi) Defendant's case on the probative value of the Claimant's quantum evidence: A fraudulent sham

167. I now turn to consider the Defendant's arguments. In closing submissions the Defendants described the Claimant's quantum case as a "*fraudulent sham"*. This was not a pleaded position, nor was it advanced in witness statement evidence, nor was it used as a basis for seeking specific disclosure of those aspects of the transaction which it was (later) alleged showed the sham and nor was it put to Mr Khakshouri in these terms in questions by counsel for either Defendant. The precise nature of this alleged fraud or sham remained unclear as at the end of the trial. On one basis the alleged fraud involves Mr Khakshouri and Mr Cohanzad engineering the alterations in the shareholding in Hampstead Heath to convey the false impression that the Claimant always wanted a 55% shareholding, whereas in truth he only ever wanted a 25% shareholding. In other words, the 55% figure was a fiction and could not in law properly stand as a basis for the quantification of loss. Although not specifically articulated this analysis assumes that at some point between 15th - 17th September 2013 the Claimant and Mr Cohanzad created a sham transactional trail because they knew that, at some unspecified and undetermined point in time in the future, the Claimant would wish to rely upon this sham to pursue a fraud claim against the Defendants, his close friends, with whom he had yet to fall out. And it also assumes that upon this basis Mr Khakshouri persuaded a family member, his brother-in-law, to collude in this plan. The premise behind this hypothesis is in my judgment, far-fetched and I reject it; Mr Khakshouri had no notion that he would wish to sue the Defendants when he reduced his shareholding in the LA Deal in September 2013. It is evident from the documents in the case that for many months afterwards he remained friends with the Defendants and continued to trust them and the advice they gave to him. There is no credible basis upon which it could ever have been in Mr Khakshouri's mind in September 2013 that he would in the future need to bring a claim for damages. And if this is so there is no basis upon which he would have been motivated to create a false financial trail to support litigation that was not on his radar nor seek a co-conspirator in his brother-in-law.

168. The only alternative is that the Claimant and Mr Cohanzad constructed the sham transaction much later, at or about the time the Claimant decided to bring proceedings against the Defendants (late 2014 / early 2015). But for this to be so the Claimant and Mr Cohanzad must necessarily have forged documents relating to the shareholding in Hampstead Heath at some stage in late 2014 or 2015, and backdated them to 2013. Again, in my judgment, this is fanciful and not consistent with the evidence and was not a proposition put squarely to the Claimant in questioning.

169. The approach that the Defendants adopted to advance this argument was to cross-examine the Claimant upon the disclosed documents relating to the LA Deal. They focused upon the financial records of the transaction. The thrust of the questioning was to establish a series of

propositions including that the Claimant had ample spare funds to make the Loan and his explanation given in court that he was, as of September 2013, illiquid and needed to approach third parties such as Mr Cohanzad, was an after the event invention. The Defendants also attempted to establish that the record of payments in and out of his bank accounts and as recorded in various company documents and registers was illogical or only consistent with the manipulation of funds to create a false impression of a liquidity shortage. It is argued that in truth Mr Khakshouri had ample alternative funds available to him which he could have called upon at any point in time to fund the Loan to the Club. His explanation to the contrary was designed to support the sham and fraud that he was perpetrating to the effect that he was forced to dilute his holding in the LA Deal to fund the Loan.

170. In closing submissions Mr Kenny QC submitted that: "*The Court should not find as a fact that DK sold a 30% interest in the LA Deal in order to fund the initial tranche of the loan to the Club. The evidence in support of that assertion is unsatisfactory*". As already observed, Mr Kenny QC did not specifically allege fraud but nonetheless invited the Court to reject the Claimant's version and, by implication, the genuineness of his account and of the supporting documents. There was a strong element of "*willing to wound and yet afraid to strike*[1]" about this stance. Mr Kenny QC took responsibility for the damages side of the case on behalf of the Defendants but it was Mr Leech QC who was prepared to concede in the course of his closing submissions, in response to my question, that the Defendant's case necessarily *was*, in substance, that the Claimant was guilty of a "*fraudulent sham*".

171. I next summarise the arguments advanced in support of the contention that Mr Khakshouri and Mr Cohanzad colluded to fabricate a story intended to mislead the court:

(i) It was not Mr Khakshouri's practice to take stakes as high as 55% in any development project. The LA Deal was one among several projects the Claimant had been pursuing in 2013. Three had already closed and in none had he taken a stake exceeding a 50% stake. The LA Deal was originally structured for the Claimant to have a 35% interest. If the Claimant had genuinely wished to obtain a stake exceeding a 35% interest, he could and would have structured it accordingly.

(ii) A 55% holding involved a greater commitment of funds than originally anticipated, and a greater exposure to risk than Mr Khakshouri had accepted on any other deal in which he was involved. The absorption of funds involved would have imposed a restriction on investment in later opportunities.

(iii) Ignoring the benefit of hindsight, there was no intrinsic reason why the LA Deal was bound to be either less risky or more profitable (and therefore more attractive) than any of the other deals that the Claimant has been involved in.

(iv) The evidence given by Mr Khakshouri that he had held a 55% share in the LA Deal only since 23rd August 2013 (or whenever Peter Wilson's 20% was transferred to him) rather than from the original establishment of Hampstead Heath was to be rejected since it had not been mentioned in evidence by Mr Khakshouri before and only surfaced in a response to an RFI on 14th September 2017. Previously the Claimant had referred only to his 55% interest, giving the impression that this interest was the interest he had originally held and had

[1] "*Portrait of Addison*", Alexander Pope (1688-1744)

always been intended to hold. This important detail was "*therefore very late to emerge*".

(v) There was evidence before the Court that Mr Khakshouri would not have wished to be over-exposed, as he was with a 55% holding. Reference was made to other investments made by the Claimant which had not been successful. The Claimant himself in evidence accepted that nothing could therefore be guaranteed: "*I do developments. You know, there's a chance that I don't make any money on a four or five-year development. That's the risk that I run. When I buy a property in Los Angeles and I do all the work and, like I say, the project could take four to five years, there's no surety that at the end of it I'm going to make money*." And according to Mr Cohanzad, the investment he had made in September 2013 had involved a "*considerable risk*".

(vi) There were therefore good reasons why Mr Khakshouri would not have wished to be over-exposed to the LA Deal, and would have been looking to reduce his share/commitment in that Deal, from the end of August 2013 or earlier.

(vii) Mr Cohanzad did take a 30% share; but when precisely he committed to that share is not the subject of any documentary confirmation. There are no emails or text exchanges produced to support the story that Mr Cohanzad had only been introduced to the Property on 16 September 2013. Mr Cohanzad had partnered-up with the Claimant on other projects. He was therefore always a likely partner to replace Mr Wilson, not a lender of last resort, *in extremis*. The Claimant's evidence as to how many times previously he had partnered with Mr Cohanzad was not satisfactory.

(viii) The fact that Mr Cohanzad had committed, at least by 10th September 2013, to taking a 30% interest is suggested by the second entry on the Register. There were many oddities and unexplained circumstances surrounding the chronology of events as explained by the Claimant. The Claimant's explanation of how moneys in an out were recorded in the company records and the Register and as to why the dates might not have been accurately recorded was not creditable.

(ix) The explanation that Mr Khakshouri had to turn to Mr Cohanzad on 16th September 2016 because he did not have funds of his own to take both a 55% share in the LA Deal and to fund the first tranche of the Loan to the Club is belied by the clear fact that the Claimant had substantial funds coming into his personal account throughout September 2013 ($5,838,465.85 by 18th September 2013). This sufficed to cover: the $1,650,000 needed for an additional 30% interest in the LA Deal; the $1,608,000 required to buy £1m to lend to the Club; and, the $1,337,500 needed for the Claimant's own 25% contribution.

(x) The conclusion to be drawn was that the Claimant did not need to turn to Mr Cohanzad for funds. He had the necessary funds himself, but chose not to commit so much money to the LA Deal (and assume the corresponding risk). Sharing the load with Mr Cohanzad was part of a plan that long predated 16th September 2013. The Court should be very sceptical of the suggestion that the Claimant did not have the funds to acquire a 55% share in the LA Deal and make the Loan to the Club, in the absence of proper disclosure of his financial position. The documents show that in all sorts of ways the Claimant had access to funds which he could have used to fund the Loan. The suggestion that he had to juggle finances to raise the moneys is to be rejected.

(xi) The Court should also accept Mr Jimenez's evidence which was that, although they may have been reference to a brother-in- law in the September 2013 discussions, he had no recollection of the Claimant telling him that he needed to

sell an interest in a deal to his brother-in-law in order to fund the Loan to the Club. The Court should accept Mr Jimenez's evidence that he that he did not believe that Mr Khakshouri had come out of the LA Deal to fund the loan. Mr Kenny QC referred to the following exchange which the Court was invited to treat as "*compelling*":

> "Q … can you think of any reason why he would have been happy to take his money out of this deal in LA that we can all see has been extremely profitable to make this loan for the sake of just a few months' interest. It doesn't make any commercial sense, does it?
> A. No, he shouldn't have taken his money out of the thing. He should have bridged it. He should have easily had an agreement with his - he's a very smart property developer.
>
> Q. Yes.
> A. I actually don't believe he came out of that property deal
> Q. You don't believe he came out of that property deal?
> A. No. Nobody would -- no one would exit a deal you've been working on for six or seven months on the basis of two months on a bridge of 12 per cent and forego that whole deal."

(xii) The Court should not place any reliance on the evidence of Mr Cohanzad. He was asked to attend to be cross-examined and has not done so. No explanation for his absence has been given. His evidence should not be treated as corroboration of the Claimant's evidence and jointly their accounts "*invite scepticism*". The suggestion that the Claimant approached Mr Cohanzad to re-acquire his 30% interest only after planning consents had been given, and not at any time before, was highly implausible. Mr Khakshouri expected co-investors to sit silently by, and let him manage his projects, and approaching a co-investor to sell his interest only after he had advised of planning consent would inevitably be counter-effective. The suggestion that Mr Cohanzad required a premium of US$2m to re-transfer his 30% share because "*family is one thing but … this was business*" is extortion of man who had brought the whole deal "*to the table*" in the first place. In any event the premium (over the original US$1.65 payment) valued the LA Deal as of August/ September 2014 at above US$12m, which figure gains no support from the expert valuers (who have valued the property in June 2014 at no more than US$6.3m). Yet both the Claimant and Mr Cohanzad agreed that a value of US$3.65m for Mr Cohanzad's 30% share was, in August/ September 2017 realistic. The Court should reject the Claimant's evidence that this conversation ever took place.

172. Mr Atkins attacked the Defendants' case as innuendo coupled to an invitation to the Court to treat odd inconsistencies here and there and occasional gaps and lacuna in the evidence as a basis for rejection of the Claimant's case as a sham. There were, Mr Atkins argued, no proper grounds upon which to advance such an argument "*and it should never have been made":*

(i) The Claimant's consistent evidence was that the LA Deal was a rare chance to acquire a property with considerable potential at a very good price. There is no evidence, at any time before he was able to increase his share from 35% to 55%, that he was looking to reduce it or hold it at 35%. Mr Khakshouri's evidence was to the contrary. As he said when the point was put to him:

"*…when you have a good opportunity, especially in development, you try to take that opportunity as big as you can".* Both the Claimant and Mr Cohanzad were proceeding upon the basis that this was a unique opportunity which was likely to get planning permission. Their conduct is entirely explicable upon that basis.

(ii) Mr Cohanzad was clear that he was introduced to the LA Deal on 16th September 2013 and not beforehand and there is no reason to doubt that evidence and no need for him to have produced any documents to support it. No positive case was ever advanced by the Defendants that Mr Khakshouri contacted Mr Cohanzad about the LA Deal before that date. The evidence was that the Claimant first contacted Mr Cohanzad about the LA Deal by telephone which explains why there was no documentary record to disclose. The Defendant's case on disclosure is that Mr Khakshouri should have given disclosure to prove a negative. The suggestion seems to be that the Claimant should have disclosed all his written communications with Mr Cohanzad in 2013 to prove that he had not contacted him about the LA Deal until he telephoned him on 16th September 2013. Such would have been neither necessary nor proportionate.

(iii) As to the intricacies of the various book entries and how they fitted together and inconsistencies in the manuscript Register, the Claimant's evidence was that entries were often made days or a week after the relevant payment and they were made long before he knew that the ledger was being challenged. His book keeper most likely made all these entries after the LA Deal had closed which explains the entries that the Defendants challenge. The book-keeper's primary concern was to record the <u>final</u> percentage contributions from each of the participants by reference to the dates of the deposits in each case. Moreover, if it was clear as early as 10th September 2013 that the Claimant was taking just a 25% interest, this would not explain why Mr Cohanzad did not come until 18th September 2013. As a result of his coming in late, the Claimant had to make the provisional payment of $1.525m to cover the possibility that he may not come in at all. None of this would have been necessary, had it been clear that he was taking over the 30% as early as 10th September 2013. But anyhow the disparate points made about the consistency of the book entries came nowhere close to showing any sort of wrong-doing or fraud and Mr Khakshouri's explanations were detailed, entirely credible and should be accepted.

(iv) As to the suggestion that the Claimant was so wealthy that he could and would have obtained funds from elsewhere to fund the Loan, the theory made no sense. It was not disputed that prior to the events in dispute the Claimant had engaged in a disastrous loan to a family member, and that this had impacted very negatively upon his overall liquidity. If Mr Khakshouri was as wealthy as portrayed, he would not have wished to divest 30% of his interest in the LA Deal to Mr Cohanzad. But the theory was not in any event supported by the evidence. When the financial details were examined properly, the accounts established that Mr Khakshouri had $2,000 at the beginning of September 2013 and $7,630 at the end of that month. There were credits of $5,980,465.85 and debits of $5,974,835.85 in the meantime. These include the payments of $1,525,000 and the $1,077,500 made by the Claimant toward the LA Deal, as

was confirmed in evidence. The Claimant's evidence that he called in more than $2m of family loans and drew on lines of credit in order to make the payments accorded with the relevant bank documents. When cross-examined on this he gave accurate and credible explanations.

(v) The allegation of inadequate disclosure is misconceived. No positive case was ever advanced to dispute the Claimant's position here. He was simply put to proof of his loss.

(vi) The hazy recollection and unsubstantiated conjecture of Mr Jimenez could not trump the Claimant's clear first-hand evidence.

173. I have no hesitation is accepting Mr Khakshouri's evidence. The Defendants contrary case, that the claim is a fraudulent sham, comes nowhere close to being established.

(vii) The Defendant's case on the point in time for calculating damages

174. If I did not reject outright the Claimant's damages case as a sham the Defendants then argued, in the alternative, that the fair and proper date for the calculation of any loss, bearing in mind that the Claimant was only out of his money for a few months, was 22nd January 2014 when he received back US$2m.

175. Mr Kenny QC argued (for both Defendants) that when a wronged party was in a position reasonably to mitigate the consequences of the wrong, e.g. by selling or re-investing in an available market, then the law invariably selected that date as at least the *prima facie* date for the assessment of loss. He relied upon by way of example upon sections 50(3), 51(3), 53(3) of the Sale of Goods Act 1979. The "*reasonable mitigation date*" was also supported by *Johnson v Agnew* [1980] AC 367 at 400-401; and by *The Elena D'Amico* [1980] 1 Lloyd's Rep. 76 where, at page [89], Robert Goff J said:

> "… generally speaking, the decision not to take advantage of the available market is the independent decision of the innocent party, independent of the wrongdoing which has taken place. It takes place in the context of a pre-existing wrong but it does not, to use Viscount Haldane's expression, "arise out of the transaction"."

176. In a case of diversion of investable funds, any other approach would, it was argued, require the Court to investigate what had been done, and what could have been done, with the diverted funds after they or their value had been restored to the victim: "*Otherwise, the Claimant will both have his cake and eat it*". Where returned funds are readily capable of reinvestment, that course should be avoided as a matter of legal principle, by assessing loss at the reasonable mitigation date: here 22nd January 2014. In any event, the Court was in no position in this case to form a fair view as to what was in fact done with the funds returned on 22 January 2014; and it should not do so. It should assess loss as at 22 January 2014 *in any event*. Any other approach would mean that damages could only be assessed when the alternative investment(s) (from which the funds were diverted) could be valued upon "*maturity*", a valuation which might depend on the fortuitous state of the market at that time (or if trial came first, the predicted the value of the alternative investments at maturity).

177. I do not accept this analysis. In my judgment *on the facts* the correct time for assessing compensation is the date upon which the LA Deal matured i.e. 2017. There are a number of points I would make in this regard.

178. First, that was the first point in time in which the full value of the opportunity lost by the Claimant could be assessed. It just so happens that the development has proven to be successful. Of course, it could have failed and been loss making in which case there would be no loss to compensate for.

179. Second, I have accepted the evidence of the Claimant that upon repayment of the Loan he was not able to use this to re-acquire his interest in the LA Deal. He was "*locked out*" of that deal: see paragraphs [160]–[163] above. Mr Cohanzad made clear that he would re-sell the interest but only at a substantial premium which Mr Khakshouri did not have nor would (rationally) have wished to pay (even the Defendant's accept that the premium demanded by Mr Cohanzad was over the odds: see paragraph [171 (xii)] above. Mr Khakshouri was not under any legal obligation to leverage himself back into a 55% holding in the LA by succumbing to terms that were, on any sensible view, unrealistic. I accept that the Claimant acted reasonably in not accepting or exploiting this re-acquisition offer.

180. Third, cases such as *4 Eng Ltd*, (ibid), upon which the Defendant's lay great weight, do not assist. The facts of that case were different. The case refers to the "*usual rule [which] would be that the loss is fixed as at the date of the transaction because the claimant could immediately have sold the asset and any deferment in a sale is his own choice*" (ibid paragraph [55]). The case is not authority for a return to the Victorian penchant for inflexible rules (see paragraph [142] above). The judge in that case accepted that the "*usual"* rule did not apply where the claimant was in effect locked into a transaction. In the present case the Claimant is locked *out* of the transaction that he would otherwise have been in. To obviate his loss he needed to be able to return to *that* transaction at neutral or reasonable cost. But that was not possible. David Richards J stated in *4 Eng Ltd* that case:

> "I could follow the defendants' submission if on 6 January 2006 4 Eng recovered substantial funds which it could then invest in an alternative acquisition. In fact, of course, Excel was insolvent and 4 Eng recovered nothing. It was no more able then to make an alternative acquisition than it had been in the past or would be in the future. The consequences of the defendants' deceit did not stop then but continued until trial. The choice of 6 January 2006 would be arbitrary and unconnected with 4 Eng's loss."

181. I accept that upon return of the funds the Claimant could, in principle, then have used those funds to invest elsewhere such that, ultimately, he might not have suffered any overall loss at all. This goes to mitigation, which I address below

(viii) Mitigation

182. I turn now to mitigation. There is no material dispute about the principles governing mitigation. The parties have relied upon as accurate, the account in Clerk & Lindsell. It is worth restating some basic points.

183. A claimant is under a duty to mitigate his loss. Damages are not recoverable for losses which a claimant could reasonably avoid by taking action subsequent to the commission of the tortious act. It is a question of fact and evidence in each case whether a benefit which has accrued to a

claimant as a consequence of his action is sufficiently closely related to a particular head of damage so as to warrant and justify a reduction: See Clerk & Lindsell paragraph [28-09] and footnote [52]. Not all steps taken to offset loss will invariably count to reduce the damages. The taking out of an insurance policy prior to the loss which would offset it, for instance, may be treated as collateral to the defendant's liability and will not affect it (ibid).

184. The onus is on the defendant to show that the claimant failed to mitigate: Clerk & Lindsell (ibid) paragraph [28-09] page [2012].

185. Much will depend upon *"…what the court regards, in the circumstances, as being reasonable. Judges are reluctant to impose excessive demands on claimants*" (ibid). Court do not, for instance, require a claimant to *"…risk capital in a speculative venture*" (citing *Jewelowski v Propp* [1944] KB 510).

186. The Claimant's evidence was as follows. There was no possibility to mitigate by buying back into the LA Deal. There were no other similar deals to be done at the time: "*The LA Deal was unique*". Such deals: "*do not grow on trees*". The Claimant managed to secure that deal by purchasing the Property in a run down and derelict condition: "*at the right price. The property never even came to market*".

187. He was at the time short of cash. He had no apartment buildings at that time which were generating revenues. He had substantial outstanding debts at the time, including to Mr Cohanzad and to others. The repaid funds were therefore used to repay some higher interest loans and to advance money to his brother who was bankrupt and going through a divorce. He disclosed a schedule of the loans. He did not charge interest.

188. The Defendant's case was again largely advanced by Mr Kenny QC on behalf of both Defendants'. As set out above, the thrust of the argument was that the Court should choose to measure quantum as of the date of extrication / repayment of the Loan because this would do away with any need to consider mitigation which, it was argued, was an overly complex and uncertain task. Other than this there was no sustained challenge to Mr Khakshouri's evidence as to the disposition of the repaid funds. The Claimant's case on mitigation was (relatively briefly) explored in cross examination. The following reflects the questioning with regard to the use of the repaid funds:

> Q.I put the point in relation to the 2 million that came in in January. The rest comes in June, by which time you've got $3 million. You now have 2 million coming in in January and just over 1 million coming in from the club in June. You now have $3 million. Why don't you go then to Mr Cohanzad and say: look, I really like this deal. He says in his own evidence that he regarded it as having taken a considerable risk in investing, why don't you say to him, "I'll buy you out"?
>
> A. Okay, maybe you are having a math problem, but I did state already that I owed a tremendous amount of money in January, and starting January, I did start loaning money to my brother –

Q.Yes.

A. -- who was going through a divorce, as well as a bankruptcy. But you're not making any attention to the fact that I had borrowed $1 million from Mr Cohanzad already.

Q. But presumably you were in a position to pay him back immediately

A. But that wouldn't have left me with $3 million, would it?

Q. No, it would have left you with 2.

A. It wouldn't have left me with 3, and then there's also my brother-in-law, there's also my lines of credit, there's also my living expenses, there's also my brother.

Q. Are you saying you had no other sources of income at all over this period?

A. At that point I didn't have apartment buildings that generated income.

Q. Well, we will have to take your word for that. Now, what you say you did is -- well, let me put this to you: once you've got this $3 million back, you wouldn't have let it sit idle, would you? I mean, you would have paid back who you had to pay money back to, but you would then have got it to work.

A. If there was a deal, possibly, but yes, I mean it's -- you know –

Q.Well, we've seen that these deals come along two or three in a year that you can do. In a good year it may be four.

A.That –

Q. Would you not have invested this money into one of those deals as soon as you could?

> A.No, not necessarily. 2013 was an exceptional year where I was very active.
>
> Q. And, what, 2014 was an absolutely duff year in which there were no opportunities?
>
> A. Well, I didn't have the money, and the opportunities like the ones that I had in 2013, they just don't grow on trees. These are properties -- I mean, two or three of the sites that I -- well, three of the four sites that I acquired didn't even come to the market. So these are properties that, you know, come available or come to me from time to time. It's not like they're just -- you just go back to the market and buy another property.

189. No dent was made in the Claimant's account. As Mr Kenny QC conceded, the Defendants "… would have to take *his* word" on this. Mr Kenny QC also questioned Mr Khakshouri as to whether he had provided proper disclosure of documents relevant to mitigation. Mr Khakshouri stated that there were no other documents of relevance that had not been disclosed and that in effect he was being asked to identify document which did not exist. There was no challenge to this explanation:

> "Q. Now, with the exception of that press document we were just looking at, the documents we have been looking at in relation to your supposed lost opportunity to invest in the LA deal, they are all documents disclosed by you and I think they are all, almost all, documents referred to in your witness statement, and I therefore imagine that these are documents on which you wish to rely; you disclosed them because you wish to rely upon them in support of your case.
>
> Mr Khakshouri, you must know that your obligation of disclosure is not simply to search for and disclose documents that you wish to rely on, but also to search for and disclose documents that harm your case or that may support the defendants' case. I just wonder to what extent you have undertaken any search for documents that undermine your case on loss. For example, documents that tend to show other sources of funds, where your monies came from, what your wealth consisted of in September and October 2013. Documents that tend to show what you did with the money that came back in January and June 2014. Where did that money go. Have you looked for documents that show what you did with it, and have you considered searching for and disclosing documents that might indicate what other

business you did and have been involved with since 2014, and including 2014? I mean, what's happened? Where are all these documents?

A. I -- there's -- I mean, you're asking me to provide documents about September, that there's other monies or that I had more wealth. I tried to explain to you that I was borrowing from my lines of credit, so how would I -- I mean, you want me to produce documents about accounts that ...

Q. Yes. Where are all these documents? Where are all the documents that would tend to show what your wealth was, your combined total wealth was in September/October 2014 -- sorry, 2013, and what you had been doing with the money that was returned to you?

A. Okay. I thought -- well, first of all there are no other documents. I mean, the documents are pointing to the fact that I'm actually borrowing money from my lines of credit. If I have money in other accounts available to me, I would have used that money. So you're asking me to find documents that don't exist.

Q. Right. I'm grateful.

Q. Now, with the exception of that press document we were just looking at, the documents we have been looking at in relation to your supposed lost opportunity to invest in the LA deal, they are all documents disclosed by you and I think they are all, almost all, documents referred to in your witness statement, and I therefore imagine that these are documents on which you wish to rely; you disclosed them because you wish to rely upon them in support of your case.

Mr Khakshouri, you must know that your obligation of disclosure is not simply to search for and disclose documents that you wish to rely on, but also to search for and disclose documents that harm your case or that may support the defendants' case. I just wonder to what extent you have undertaken any search for documents that undermine your case on loss. For example, documents that tend to show other sources of funds, where your monies came from, what your wealth consisted of in September and October 2013. Documents that tend to show what you did with the money that came back

> in January and June 2014. Where did that money go. Have you looked for documents that show what you did with it, and have you considered searching for and disclosing documents that might indicate what other business you did and have been involved with since 2014, and including 2014? I mean, what's happened? Where are all these documents?
>
> A. I -- there's -- I mean, you're asking me to provide documents about September, that there's other monies or that I had more wealth. I tried to explain to you that I was borrowing from my lines of credit, so how would I -- I mean, you want me to produce documents about accounts that ...
>
> Q. Yes. Where are all these documents? Where are all the documents that would tend to show what your wealth was, your combined total wealth was in September/October 2014 -- sorry, 2013, and what you had been doing with the money that was returned to you?
>
> A. Okay. I thought -- well, first of all there are no other documents. I mean, the documents are pointing to the fact that I'm actually borrowing money from my lines of credit. If I have money in other accounts available to me, I would have used that money. So you're asking me to find documents that don't exist.
>
> Q. Right. I'm grateful."

190. I accept Mr Khakshouri's explanations as to what he did with the repaid funds. The Defendants have not dented, undermined or thrown into doubt the explanations provided, which are credible and backed up with documentary evidence.

191. It follows that on the evidence I find that the sum to be paid by way of compensation is not to be discounted to take account of any failure on the part of the Claimant to mitigate

(ix) The share of the LA Deal held by the Claimant's wife.

192. An issue arose during trial whether, if he prevailed, Mr Khakshouri had the right to recover 100% of the loss attributed to dilution of the interest in the LA Deal; or, alternatively, only 51% of the loss by virtue of his joint agreement with his wife, who would be the person who had *locus to* sue for the remaining 49% and not the Claimant (see paragraphs [150] - [154] above). Mr Atkins argued that the instrument in question was governed by US (Californian) law and served to confer upon the Claimant the right to sue for 100% of the loss. The Defendants have not accepted that this is necessarily so. Given that the issue arose very late on, they have reserved their positions. The agreed position at the end of the trial was that I would decide as much as I could and if I arrived (as I have) at the position that the Claimant wins, then I should

reserve the issue of Mrs Khakshouri's interest to be resolved either by agreement or, failing that, by me in accordance with such procedure as I laid down to ensure a quick resolution of the point.

193. The award of damages that I therefore make, in the first instance, is as to 51% of the sum claimed by Mr Khakshouri. If the issue of the 49% is not agreed as between the parties I will then resolve the issue of the remaining 49%.

H The Second claim for damages: The Loan variation

(i) The issue

194. The Second Claim for damages (referred to in paragraph [11] above) is, in relative terms, very minor. Mr Khakshouri contends that in early 2014 he agreed to vary the terms of the Loan (by deferring repayment) because the Defendants lied to him that the Club had been sold *with* the Land Deal in place. The representation in issue was pleaded in the following terms, in the APOC: "*The Defendants thus represented to the Claimant that the Land Deal had been part of the sale of the Club and was therefore proceeding*".

195. Mr Khakshouri says that he would not have agreed to vary the terms of the Loan had he understood the true position. He agreed because he believed that he stood to make more profit on the Land Deal than he might lose on a variation of the Loan. *Prima facie*, he claims damages in the sum of £65,298.59 for the loss suffered as a result. This loss arose when the currency of the loan was switched from US Dollars to UK Sterling as part of the variation agreed. The *prima facie* sum is however reduced because it is accepted by the Claimant that any award in his favour based upon forex losses must be offset against the extra interest earned on the Loan by reason of its deferment. The total quantum figure is in the region of £30,000.

196. The Defendant's deny that they ever told Mr Khakshouri that the Club had been sold with the Land Deal in place. They reiterate that it had never been the case that they guaranteed that the sale of the Club would be inextricably linked to the Land Deal (i.e. the First Claim). They argue that the reasons for the Claimant agreeing to vary the terms of the Loan therefore, and in any event, had nothing to do with the Land Deal. Mr Khakshouri was content to vary the Loan (and in particular to extend its term) because he knew that the Loan would be repaid shortly (as it was) and he would continue to earn the high contractual rate of interest *pro tem*.

(ii) *Analysis: Position of the First Defendant*

197. I propose to deal with this relatively briefly. The answer flows from the chronology. The basic facts are set out in paragraphs [64]- [74] above. The key points in that chronology are as follows.

198. As of the start of 2014 discussions were ongoing with creditors of the Club to persuade them to agree to defer repayment of their debts until May 2014. Four particular creditors were identified: (i) Mr McGlynn; (ii) Mr Khakshouri; (iii) AtPledge; and (iv) "Jesus".

199. AtPledge and Jesus apparently agreed to defer. A debate occurred as between Messrs Jimenez, Cash, Deeley and Slater as to who out of Mr Khakshouri and Mr McGlynn could be most easily persuaded to vary the terms of their loans by deferring repayment. Michael Slater in an email of 15th January 2014 set out the pros and cons. These included: (a) Khakshouri's interest rate was

lower (12%) than McGlynn's (20%); (b) McGlynn had a lawyer; (c) McGlynn's money had been out longer; (d) McGlynn had more security; (e) "*Darius is a mate*".

200. In this context Tony Jimenez sent an email on 15th January 2014 to Messrs Slater, Deeley and Cash stating that any discussion with the Claimant would be "…*a very tough conversation*". Mr Jimenez explained that Mr Khakshouri was short of cash and was "*banking on getting this money".* He said: *"Darius is expecting to get paid back in full. He is a close friend and I'm sure Kevin and I would hate to in anyway risk that friendship. I would sooner piss off McGlynn although I take the point about interest*"

201. Then he said this: "*The part that could help either case is the property deal at the Peninsular given that each of them (McGlynn and Darius) expect to be in that deal. We could use that in the bargaining but we would need to know we have it*".

202. This shows Mr Jimenez's state of mind immediately prior to his discussion with Mr Khakshouri during which the Claimant was persuaded to vary the Loan. As of 15th January 2014, Mr Jimenez knew (obviously) that there was no linked Land Deal. Yet he still observed that both (Khakshouri/McGlynn) "*expect to be in that deal*", which presupposes that neither had been told that there was no such deal for them to be "*in"*. He then stated that this expectation (of being "*in*" a deal) could be used in the bargaining process albeit that he qualified this with the recognition that "*we would need to know we have it*". He is plainly, when he says "*it*", referring to the Land Deal.

203. In this connection it is clear from other evidence, for instance pre-xmas 2013 email traffic between the Defendants and the senior management of the Club, that Mr Jimenez *fully* understood that *if* the Club was sold without a linked Land Deal, that they (i.e. the Defendants) then lost *all* their negotiating leverage. And it therefore follows that there could have been no serious or rational expectation that any Land Deal was going to emerge or that Mr Roland Duchatelet was, having acquired the Club, going to return to the Defendants and allow them back into some deal whereby they re-acquired a degree of influence over the future disposition of the stadium that they had just sold. The brute truth was that with the sale of the Club having gone through without a Land Deal there was no way in which *any* representation could honestly have been made to creditors that such a Land Deal was *still* in the offing and was therefore a valid reason why those creditors should defer receipt of that which they were otherwise owed.

204. Despite all of this, when, on 19th January 2015, Mr Jimenez had what he originally believed would be a "*very tough*" call with Mr Khakshouri, he knew that he had no Land Deal either in place nor on the horizon which he could properly use as a bargaining counter.

205. This is the context to the call on 19th January 2014. And that context leads to the conclusion that (a) Mr Jimenez knew that he had to perpetuate the fake belief in Mr Khakshouri's mind that he had a genuine expectation of being "*in*" the Land Deal and (b) he also knew that to *justify* perpetuating that belief he had actually to have a Land Deal in place. Yet, of course, he did not have such a deal in place and there was no real expectation or belief that any such deal would fall into his lap, then or indeed ever.

206. The Claimant and Mr Jimenez spoke on the phone on 19th January 2014 and the Claimant agreed to defer repayment of the Loan. It is common ground that Mr Jimenez did not explain that no Land Deal had been concluded as part of the sale of the Club.

207. How did Mr Jimenez square this circle and avoid the "*tough conversation*"? Mr Jimenez said to Mr Khakshouri during this discussion that the new owner was not interested in the Land Deal, but he also represented that this meant that the benefit of that Land Deal now inured 100% to the Claimant and Defendants. The clear inference conveyed, and intended to be conveyed, was that there was still a Land Deal on the table and it was now more valuable than before the sale of the Club.

208. In view of the earlier email exchange it is in my judgment clear that Mr Jimenez was less than candid. He deliberately perpetuated in the Claimant's mind the false idea that there was a Land Deal in place that the Claimant would be "*in*". This was the "*expectation*" that he had referred to in the email of 15th January and that expectation was not disappointed during the conversation. That much is evident from the response of Mr Khakshouri following the conversation. On 20th January 2014, Mr Khakshouri emailed Mr Jimenez saying: "*Needless to say, I'm very happy that you were successful in the timely sale of Charlton Athletic FC and that you are in a position to be repaying me. I'm also very appreciative and thankful that you and Kevin included me in the 'property deal' which you both believe to have tremendous potential*" (emphasis added). Mr Khakshouri believed that the Land Deal was *still* a live project. The use of the definite article "*the*" as in "*the property deal*" supports the conclusion. He did not know that in fact the Land Deal was effectively dead. The representation made by Mr Jimenez that the Land Deal now inured 100% to the benefit of the Defendants and the Claimant was falsely made, and knowingly so. And Mr Jimenez (nor anyone else connected with him) did not put Mr Khakshouri straight until June 2014 (see paragraphs [72] – [74] above) .

209. There can be no doubt but that what was said during that telephone call was said with the specific intent of inducing the Claimant to agree to vary the terms of the Loan. The Claimant has suffered some (modest) loss by virtue of this deceit.

210. For these reasons the First Defendant is liable to the Claimant the Second Claim.

(iii) ***Position of Second Defendant***

211. As to the Second Defendant, Mr Cash, the position is less clear. He was not party to the conversation on 19th January 2014. He was however copied in on the emails which preceded it. However, those emails do not spell out precisely how Mr Jimenez was intending to engage with Mr Khakshouri to persuade him to vary the Loan, so it would not be right to infer from that earlier email exchange that Mr Cash necessarily knew what Mr Jimenez was going to say or that it involved the making of a false representation. I suspect that Mr Jimenez reported back to each of Messrs Cash, Slater and Deeley on his successful conversation with Mr Khakshouri. Certainly, Mr Cash did not disabuse Mr Khakshouri of his misconceptions. But I cannot be confident about this to the requisite degree. I therefore do not find Mr Cash liable on this aspect of the case, either as principal or upon the basis of vicarious lability. There is not enough evidence to support such a conclusion.

(iv) ***Conclusion***

212. In conclusion the First Defendant is liable to the Claimant on the Second Claim. The Second Defendant is not liable. The Claimant and First Defendant will seek to agree the relevant figures, failing which the Court will resolve any outstanding dispute.

I Overall conclusion

213. The First and Second Defendants are liable to the Claimant on the First Claim. The First Defendant is liable to the Claimant on the Second Claim. The parties will seek to agree an order to reflect this outcome which will include proposals for resolving the outstanding matters relating to damages.