Neutral Citation Number: [2025] EWHC 265 (Ch)

Case No: PT-2021-001078

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

Royal Courts of Justice
The Rolls Building
Fetter Lane
LONDON
EC4A 1NL

Monday, 10 February 2025

Before :

MR JUSTICE FANCOURT

- -

BETWEEN:

(1) IYA PATARKATSISHVILI
(2) YEVHEN HUNYAK

Claimants

- and –

WILLIAM WOODWARD-FISHER

Defendant

- -
- -

John McGhee KC and James McCreath (instructed by **Squire Patton Boggs**) for the **Claimants**
Jonathan Seitler KC and Francesca Mitchell (instructed by **Mishcon de Reya**) for the **Defendant**

Hearing dates: 4, 5 November (pre-reading), 6, 7, 8, 11, 12, 13, 14, 18, 19 November, 4 December 2024

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APPROVED JUDGMENT

(the draft judgment was emailed to the parties on 31 January 2025)

Contents

Mr Justice Fancourt:

Introduction

1. This is a claim for rescission and damages for fraudulent misrepresentation. The Claimants claim that they were induced by misrepresentations made by the Defendant in his replies to pre-contract enquiries to buy a large house for £32,500,000 in May 2019. They claim that they would not have bought it if the misrepresentations had not been made. They allege that the Defendant knew that his replies to three enquiries were untrue.

2. On discovering in September 2020 evidence that suggested that the Defendant knew of the untruthfulness of the 3 replies, the Claimants considered their position and then, by a letter dated 10 May 2021, elected to rescind the contract of sale and purchase dated 7 March 2019, and with it the transfer of title to the house dated 2 May 2019.

3. The Claimants accordingly seek repayment of £32,500,000 and interest, and damages for losses that were allegedly caused by the untruthful replies. Alternatively, if rescission is unavailable or refused, they seek additional damages reflecting the difference between the value of the house in its current condition and the price paid for it.

4. The Defendant disputes that the 3 replies were misrepresentations, denies that he knew or suspected that they were false, denies that the Claimants knew about or relied on the replies, asserts that any right that the Claimants had to rescind the contract was lost, or alternatively that the Court should decline to grant rescission, and disputes the quantum of many of the losses claimed.

5. If rescission is not granted, there is a large dispute about the measure of the further loss. The parties agreed at a late stage of the trial that the correct measure of such further loss is the cost of doing such works as are needed to bring the property up to the appropriate standard plus an additional allowance on top; but they disagree fundamentally about what works are needed, and by over £7,000,000 as to the cost of such works.

6. The principal issues that I have to decide are the following:

   i) Were the statements made in the 3 replies false?

   ii) Did the Claimants know of and rely upon the replies in contracting to buy the house?

   iii) Did the Defendant know or suspect that the 3 replies were untrue?

   iv) Are the Claimants entitled to rescission in principle?

   v) Does the Defendant have a defence to the claim for rescission?

   vi) Does the Court have a discretion to refuse rescission and, if so, should it do so?

   vii) What damages are recoverable if rescission is granted?

   viii) What further damages are recoverable if rescission is refused?

   Before turning to each of those matters, I will set out the undisputed background facts and say something about the witnesses who gave evidence from the witness box. For convenience, and meaning no disrespect, I generally use the abbreviation "WWF" hereafter when referring to the Defendant personally.

Factual background

7. The house in question, Horbury Villa, Ladbroke Road, London W11 ("the house"), is an early Victorian property that was substantially extended and renovated by WWF and his wife between 2012, the year after he bought the house for £10,400,000, and 2013. About £10,000,000 was spent on the project. The house was purchased in his sole name, with the benefit of a large mortgage.

8. The internal size of the original house was increased by more than 200%, making it a very large detached dwelling. Obtaining planning permission was not straightforward – the extension involved creating a double basement – and in order to gain some environmental points with the planning authority, WWF decided to use types of insultation that contained a large proportion of natural wool. There were two types of insulation used: Thermafleece Ecoroll ("Thermafleece"), which by and large was used in the internal (but not external) walls, and Soundblocker, which was mainly used in the floor voids. Thermafleece contained 75% and Soundblocker about 30% wool content.

9. The finished house is an unusually large and attractive property, in a sought-after residential area between Notting Hill and Notting Hill Gate, in West London. WWF and his wife lived in it for more than 3 years, in its finished state, before they started to think about selling it and moving on. They had previously undertaken similar projects on other houses. Mrs Woodward-Fisher herself designs the interiors and fittings of the properties that her husband develops.

10. In very early 2018, Mrs Woodward-Fisher noticed a problem with clothes moths (*Tineola bisselliella*) in the house, which had caused damage to expensive clothing. As a result, the Woodward-Fishers obtained two quotations from pest control companies, Rentokil and Environ, to deal with the problem. Both visited the house before quoting. Rentokil said in their quotation of 30 January 2018 that it had been confirmed to them "via the builders/architect" that there was lamb's wool insulation in most ceiling voids, which may have been partially infected prior to installation, with the moths multiplying in the voids since then, and that the only way completely to solve the issue was to remove all the lamb's wool. Environ's technician said, when first inspecting the house, that he did not think that woollen insulation was likely to be the cause, and Environ provided a quotation for treatments dated 13 February 2018.

11. Each company's quotation for a treatment plan was at a price of about £10,000, and WWF, to whom Mrs Woodward-Fisher forwarded both quotations, decided to go forward with Environ. Environ visited a number of times, starting on 5 March 2018, and did various treatments, including spray treatment of the internal surfaces and space, and heat pod treatment of susceptible clothing. But the problem did not go away at the end of the initial treatment plan. So Environ came back to do more spray treatments. They produced and emailed to Mrs Woodward-Fisher a report on each of their visits, recording what they had done and what they saw, and advising what else should be done. Mrs Woodward-Fisher forwarded some of these emails to WWF.

12. Eventually, Environ produced a report dated 16 May 2018 in which they opined that the cause of the moth problem was an infestation of moths in the natural insulation in the house. They recommended further treatment but said that the problem with clothes moths would not go away unless all the insulation was removed and replaced with synthetic insulation. A further report dated 25 June 2018 confirmed their conclusion. This was sent to WWF by email on 3 July 2018, if not before. The Woodward-Fishers negotiated for a further spray treatment to be done, but did not remove the insulation.

13. By this time, the house was being discreetly marketed by Knight Frank.

14. WWF contacted his construction manager shortly after receiving the 3 July email and said:

> "We have got a high incidence of moth activity in the house and the specialist firm we are using to spray the house believe it may be coming from the woollen insulation throughout the floor / ceiling voids"

The manager later sent WWF an email response from the supplier of Soundblocker (but not Thermafleece), which said that it was treated and not at risk of moth or beetle infestation.

15. The Claimants viewed the house 6 or 7 times between the Spring of 2018 and November 2018. The Claimants enjoy considerable family wealth and have a wealth management company that looks after their and the First Claimant's family's financial and business interests ("BILI"). BILI instructed Farrer & Co ("Farrer") to act on behalf of the Claimants. Farrer made Knight Frank an offer to buy the house for £31,500,000. The price was not what WWF had been hoping to achieve, but in February 2019 a sale of the house for £32,500,000 was agreed, subject to contract.

16. On 18 February 2019, Farrer on behalf of the Claimants sent pre-contract enquiries to WWF's solicitor, Adam Perry, whom WWF had used as his solicitor on several previous occasions. On 19 February 2019, Mr Perry drafted replies to the enquiries and sent them to WWF, asking for his input. On 20 February 2019, WWF sent his comments on the draft replies to Mr Perry.

17. The relevant enquiries, draft replies and WWF's comments (in red) appeared as follows in WWF's document sent back to Mr Perry (the bold text is Mr Perry's suggested reply; the comments in red are those of WWF):

> "2.1 Has the property ever been affected by woodworm, dry rot or other timber infestation or decay; defects in drainage, water pipes, gas pipes or electrical wiring; damp; Subsidence, landslip or heave; any structural building or drainage defect; vermin infestation; asbestos. Adam I am happy with your suggested reply.
>
> **The Seller is not aware of any such matters affecting the property since the renovation and extension works were undertaken and completed but has not had the property surveyed for such matters so no warranty can be given in this regard and the buyer must rely on the results of its own survey, inspection and professional advice.**"
>
> 2.2 Please supply a copy of any report concerning any matter referred to in 2.1 above or otherwise concerning the fabric of the property. As above.
>
> **[Save as may have been disclosed, there are none]**.
>
> 2.3 Is the seller aware of any defects in the property which are not apparent on inspection (due to the presence of furniture, carpets, cupboards etc?) As above.
>
> **The seller is not aware of any such defects but has not had the property surveyed for such defects so no warranty can be given in this regard and the buyer must rely on the results of its own survey, inspection and professional advice.**"

18. WWF met Mr Perry later the same day, in person, to go through the draft replies. As a result, on 21 February 2019, the final version of the replies was sent by Mr Perry to Farrer ("the Replies"), with a copy being forwarded to WWF. The final version of the reply to enquiry 2.1 was the same as in the draft reply above. The final version of the reply to enquiry 2.2 was "**Save as may have been disclosed in the documentation provided, there are none**". The final version of the reply to enquiry 2.3 was only slightly, and insignificantly, different from the draft: it used the words "but has not had the property

surveyed for any" in place of the words "but has not had the property surveyed for any such defects" in the draft.

19. On the following day, Farrer produced their Report ("the Report"), which appended a copy of the Replies as Appendix 13. In the Report, Farrer highlighted nine particular points that emerged from the Replies, none of which related to replies 2.1, 2.2 or 2.3. The Report concluded: "On the basis of our review of the documents, there is no reason why you should not proceed with your acquisition of the Property".

20. Following this, the Claimants went to view the house again on a number of occasions, accompanied on one occasion by Mr Ershikov, the CEO of BILI. They were concerned about noise, in particular from the Central Line and from a nearby public house, but eventually they were satisfied on this issue.

21. Contracts were exchanged on 7 March 2019. The Claimants visited again on at least 2 further occasions before completion of the sale and purchase took place on 2 May 2019. They saw no moths on any of their visits.

22. Within days of moving in, however, the Claimants noticed moths in the house. They engaged Fantastic Pest Control ("Fantastic") to carry out a spray treatment, on 10 May 2019. The treatment report recorded a "carpet moths infestation" (another colloquial name for *Tineola bisselliella*) and proposed a further visit after 14-18 days.

23. On 18 June, in an email principally about WWF's mail not being redirected satisfactorily, an employee of BILI asked WWF whether he had used any moth treatments that had been effective. WWF did not respond to that question.

24. A further pest control company, West London Pest Control Ltd inspected the house on 27 June 2019 and provided a quotation of £5,040 for treatment.

25. As a result of continuing problems with moths, in about October 2019 a BILI contractor opened up part of a ceiling area in one of the bathrooms in the newly built part of the house and discovered the woollen insulation. A company called VGB Construction Ltd ("VGB") was later engaged by BILI to investigate further. Infestation of the insulation in a wall in the new part of the house was discovered in early 2020 by removing a light switch plate.

26. The Claimants also commissioned works of improvement to the interior of the house from ACT Developments Ltd ("ACT") and these works were started in February 2020. The Claimants and their children moved out of the house in February 2020. At about the same time, a company called Combat Pest Control ("Combat") provided a first report on what it described as a severe moth infestation, identifying the insulation as the cause of the problem.

27. In March 2020, VGB started to carry out works to locate and remove woollen insulation and replace it with synthetic insulation. Combat reported on 21 April 2020 that the infestation was an "extremely severe situation" that had "been a problem over years rather than months". Their report attached photographs showing a severe infestation of moths, moth workings, pupa cases and frass (moth excreta) in samples of insultation.

28. The nature and precise extent of the VGB work is undocumented, save in photographs taken by Dr Hunyak at the time of the works. The works, which were extensive, were completed by the summer of 2020. The cost exceeded £270,000 because the work involved removing all the plasterboard in the internal walls and suspended ceilings in areas where Thermafleece was found. The Claimants moved back into the house at the beginning of September 2020, having spent August on holiday in France. Some of the samples of infested insultation were bagged and kept by the Claimants in a cellar or outhouse.

29. Although the position with moths in the space was much better after VGB's works, the Claimants were not satisfied. Combat were retained to do a pest prevention programme of monitoring and work, directed at mice as well as moths. The Claimants had started to consider in June 2020 what recourse they may have against others in relation to their losses.

30. In September 2020, as a result of enquiries made of local pest control companies by BILI, the Claimants discovered that Environ had carried out moth treatment work for WWF in 2018. Environ provided BILI with copies of the reports they had made to Mrs Woodward-Fisher, including the May and June 2018 reports that identified the source of the problem as an infestation of the insulation of the house.

31. After September 2020, there were no communications between the Claimants and WWF before 10 May 2021, when the Claimants' then solicitors wrote a letter of claim to WWF, alleging fraudulent misrepresentation. In that letter, the Claimants said that they sought rescission of the contract and return of the purchase price, and claimed damages including £3,715,728 in stamp duty, £383,828.89 for the costs of remedial works to the house, £2,350 for damage to clothes, and £891,000 for loss of enjoyment of the house for a period of 6 months and 1 week, while the works were being done.

32. Combat continued to visit and assess the house for mice and moths until about February 2022. Their reports recorded the continuing presence of moths at times, up to a level that they assessed as being 4 on a scale of 0-10. Thereafter, no further treatment was carried out by the Claimants other than their own use from time to time of pheromone traps, insect spray and smoke bombs. The Claimants say that the problem with moths has not gone away.

33. The claim form was issued in December 2021.

The witnesses

34. The Claimants' witnesses of fact were Dr Hunyak himself and Mr Ershikov, and they called Dr Andrew Whittington PhD FRES MCSFS as an expert witness on entomology and, more specifically, moths; and Mr Daly FRICS as an expert quantity surveyor. WWF and his wife both gave evidence as witnesses of fact, and they called Mr Justin Sullivan FRICS as an expert quantity surveyor. The evidence of WWF's conveyancing solicitor, Mr Perry, was in the event not challenged by the Claimants and so he was not called to be cross-examined. His witness statement was therefore taken as read. Both parties had intended to call evidence from an expert valuer, but ultimately the valuers were able to reach agreement on the only issues that were material.

35. Dr Hunyak was a very careful witness. His first language is Ukrainian and he also speaks fluent Russian and English. At the pre-trial review, the Claimants had applied for him to be able to give evidence in Ukrainian, through an interpreter, out of an abundance of caution, perhaps, but I refused that application on the basis that his witness statements demonstrated that his English was easily good enough for him to give evidence in English and that appropriate allowances could and would be made during the trial process, as necessary. The parties sensibly made arrangements for someone to be available to help in case Dr Hunyak struggled with a particular word or phrase, though in the event that help was not needed. His command of quite sophisticated English was impressive: there were no more than a handful of occasions on which he had to ask Mr Seitler about the meaning of a word, or where he expressed doubt about whether he had found the right word himself.

36. It is right therefore to bear in mind, when Dr Hunyak often took considerable time to read documents or formulate his answers, that he was being careful to understand what was being shown or said to him and to express his answers correctly in his third language. I attribute the sometimes lengthy pauses to his personality (meticulous and careful) and his reservations about his command of English, rather than his being evasive. Beyond the time taken to answer questions, Dr Hunyak was very fastidious about answering questions exactly in the terms that they were asked. He would sometimes disagree with a question on a literal basis, and (perfectly properly) only answer the specific question asked, not the implication behind the question. I did not consider that in doing so Dr Hunyak was being evasive or unwilling to answer questions, save in relation to a sequence of questions relating to his activities during the Covid lockdown in the Spring of 2020, where he became cautious about giving a straightforward answer that might incriminate him.

37. On the whole, Dr Hunyak struck me as being essentially truthful in the evidence that he gave, in the sense that he believed what he was saying to be true. However, that does not mean that I accept all the evidence that he gave as accurate (I am, for example, satisfied that he was wrong about the extent to which changes to the interior of the house designed by Studio Indigo and carried out in early 2020 by ACT were consequential on the moth problem.). There were some occasions on which I felt that Dr Hunyak was (consciously or unconsciously) exaggerating what he described, particularly relating to the extent of continuing problems with moths in the house in the last two years.

38. On one occasion, Dr Hunyak appeared to be asserting a fact that was untrue, which (if it were true) would have assisted the Claimants' case. He appeared to say that Mr Ershikov had said something to him specifically about the content of the Replies. Having considered it carefully in the transcript, I absolve him from deliberate dishonesty in that regard, principally because I consider that the nuance of the questioning about what Mr Ershikov had told him about the Replies may have eluded him at the time, when he was under significant pressure of questioning. I also consider that it is inevitable, in this kind of case, that a witness in his own interest comes to believe the truth of other things that assist his case, because he can no longer differentiate his original recollection from what he has reconstructed as a result of going over the events in question a thousand times in his head. However, for the avoidance of doubt, I consider what is said in Dr Hunyak's first witness statement to be more reliable than the somewhat embellished account he gave of his exchanges with Mr Ershikov in the witness box. In other respects, however, Dr Hunyak was in my view truthful in the evidence that he gave, relating to who read or

heard about the content of the Replies, and the discovery of the infested insulation, in the Autumn of 2019, first in a floor void and then in an internal partition wall.

39. Mr Ershikov was a cautious and somewhat reluctant witness, in that he appeared to be unwilling to divulge any information about the activities of BILI and the Patarkatsishvili family and was careful about what he did say. His first language is Russian but his English is of an extremely high standard and there were no issues of linguistic misunderstanding. Mr Ershikov did not fall into the trap of trying to embellish the evidence in his witness statement, and ultimately the Defendant was content to leave his evidence about his separate exchanges with Farrer & Co and Dr Hunyak on the basis of what he said in his statement, viz that Farrer told him that there were no "red flags" and he told Dr Hunyak that there were no red flags (generally) revealed by Farrer, though nothing specific was said by him to Dr Hunyak about the content of the Replies. I did not find any reason to distrust what Mr Ershikov told me, nor was any reason suggested by the Defendant.

40. Dr Whittington was a thoughtful, conspicuously honest and helpful witness. He was clearly expert in his field of entomology, which he accepted did not extend to methods of treatment or eradication of moth infestation, but which clearly did extend to the behaviour, lifespan, preferred conditions and diet of the common clothes moth and other moths. He carefully examined the evidence of the presence of moths in the house, both physical samples of insulation removed by VGB in 2020 and what he saw on his own visits to the house in 2022 and 2024, photographic and video evidence, and the descriptions of others who had seen moths or signs of the presence of moths. At one stage in his cross-examination, Mr Seitler suggested to Dr Whittington that he was giving answers in an attempt to bolster his client's case. I unhesitatingly reject that suggestion, for which there was no proper foundation. I accept as truthful and correct the evidence that Dr Whittington gave that was within his field of expertise, or which was factual.

41. What Dr Whittington explained was that a single gravid female moth can lay between 50 and 200 eggs, which will develop through larvae and pupa stages into adults in as little as 50 days during warm weather conditions. This meant March to September. For a colony of moths to develop and become an infestation, there must be a source of sufficient nourishment. The colony will then expand into the food resource and expand and persist until the source runs out. The primary source of food was the woollen insulation, with clothes, carpets and furniture being secondary sources. The bulk of the infestation was secluded behind walls and the problem would not necessarily have been evident to visitors to the house. Clothes moths are small and photophobic, and are often only visible in space when there is significant ultra violet lighting, for example from the use of televisions and computer monitors. It is easy to miss them.

42. The presence of moths flying is not necessarily indicative of an infestation, although significant numbers may provide a clue: what is indicative is the presence of larvae and larval workings. Dr Whittington said that it was impossible for there to have been a moth infestation in the insulation in 2018 and for this to have resolved itself over the winter of 2018/2019, only to come into full force again once the Claimants had moved in and then be of the extent noted by Combat in April 2020. Environ's treatments would have provided a surface-level reduction in the appearance of moths in the living space without remedying the underlying infestation.

43. WWF was from the outset (perhaps understandably) ill-at-ease in the witness box. He did not, for the most part, answer questions in a direct or helpful way but often answered a different question, with a view to stating and repeating some principal pillars of his defence case, which he clearly had in mind at all times. These were: that he did not consider that there was a problem with moths in the house; that his wife was troubled by moth holes in clothing; that he went along with the moth treatments and recommendations of Environ (including throwing out furniture) to humour her; that he did not at any stage read any of the reports on moth infestation that were produced; that these were not reports properly so-called in any event; that he and his wife had no confidence in Environ or their reports, so did not accept what they said; and that the moth problem, such as it was, disappeared after the last Environ treatment in June 2018. When being asked about his finances, he gave answers that were sometimes calculated to obscure his true financial position or minimise his assets. I found some of his answers about his assets implausible, in particular the value of the assets of one of his companies, 38 Havelock Terrace Ltd.

44. WWF was by training a general practice surveyor, but he has made a very successful living by carrying out individual residential property developments and making other investments in real property. One part of his business model was to buy upmarket houses with scope for significant expansion and improvement, carry out the works, and then live in the house for a few years before selling at a large profit and moving on to another such opportunity. WWF worked using limited companies on occasions as vehicles for the developments. He had an office in West London and employed a personal assistant there. Mrs Woodward-Fisher worked for the business too and was closely involved in designing and fitting out the interiors of the properties that WWF redeveloped.

45. The Ladbroke Road house was one of the largest, if not the largest, individual development project that WWF had carried out. The redevelopment increased the net internal area by more than 200%. By 2018, WWF had considerable experience of construction and development of houses, the planning system, how the residential property market worked, and of buying and selling residential property and demand for top end homes, as a result of years of experience.

46. Under skilful cross-examination from Mr McGhee, WWF often found himself with nowhere to go in terms of a credible explanation of what he and his wife were doing to attempt to deal with a moth problem that he did not accept existed, and how it was that, having not read any of the Environ reports, as he said, he was able to form the view that they were not reports concerning the fabric of the house that needed to be disclosed. Faced with an unanswerable question, WWF tended to abandon one shaky pillar of his defence and reach for another. Inevitably, at times, he was forced into making admissions, including that if what Environ's reports were saying was true he had a serious problem in terms of selling the house because the infestation would have to be disclosed to a purchaser. Apparent salvation was then found in his assertion that Environ were not a credible company in light of the experience that he and his wife had had, so they did not believe Environ were right.

47. While feeling a degree of sympathy for WWF in his predicament, I found a substantial part of his evidence unpersuasive. I will address the most pertinent parts in detail when considering the issue of his knowledge that the important 3 replies were or might have been untrue. In general terms, I did not feel that I could safely rely on much of the evidence that he gave me. Some of it was incredible, for reasons that I will explain.

48. Mrs Woodward-Fisher gave evidence following her husband and, unsurprisingly, followed his case in defence of the claim against him. She was a more composed and self-possessed witness than WWF and displayed considerable sang-froid under testing cross-examination. However, at times she declined to accept the obvious (such as that she must have told her husband, or discussed with him, the rather alarming views expressed in the Rentokil quotation, or that her husband must have read the May 2018 Environ report and discussed it with her) and, ultimately, was giving evidence in support of his defences. I felt that Mrs Woodward-Fisher said what was required to be said to maintain the lines of defence, which had been carefully mapped in advance.

49. These required her to maintain: that her husband had no interest in Rentokil's or Environ's observations, even when it required very significant expenditure, required moving out of the house into an hotel for each treatment session, and required the throwing out of cherished furniture; that she was only interested in damage to her clothes, despite the fact that she and her husband had decided to sell the house; that she did not mention the content of most of the reports to her husband and he did not read them; and, when it became impossible to say that they had not understood the implications of Environ's May and June 2018 reports, that she and her husband had no confidence in Environ and did not believe what they said. This last assertion was particularly surprising given that: the Woodward-Fishers continued to retain Environ and act according to their recommendations; Mrs Woodward-Fisher said that she had confidence in their new technician, Chris; and, by carrying out fewer treatments than they had recommended, Environ seemed to have solved the problem with moths by July 2018, according to the Woodward-Fishers.

50. There was no suggestion that Mrs Woodward-Fisher was involved in any way in the process of answering the pre-contract enquiries. As was evident from WWF's evidence that he gifted his wife some of the proceeds of sale of the house in 2019, the house was owned by WWF as a development project, not shared with her as a long-term matrimonial home. The Woodward-Fishers made use of their separate identities in terms of ownership of interests in different properties, according to what was advantageous financially.

51. Mrs Woodward-Fisher's evidence, despite its assured presentation, ultimately suffered from the same underlying demerits as WWF's evidence, namely that it maintained a line in relation to their knowledge of the serious moth infestation that was not really credible or reliable.

52. I will address the relative merits (or otherwise) of the evidence of Mr Daly and Mr Sullivan when dealing in the final section of this judgment with the question of what damages should be awarded to the Claimants if a culpable misrepresentation is proved but rescission is refused.

Issue (1): Were the 3 replies misrepresentations?

Enquiry 2.1

53. The Claimants contend that the Reply to Enquiry 2.1 was false because the house was at the time of the reply, or had been as recently as June 2018, affected by vermin infestation,

namely an infestation of clothes moths, and that WWF was aware of that matter. This raises a number of discrete issues, which were variously relied on by WWF as a defence to the claim.

54. The first is that *Tineola bisselliella* are not vermin. In considering whether the reply was false, as distinct from whether WWF knew that it was false, this is an objective question.

55. The Defendant relied on the first definition of *vermin* in the Complete Oxford English Dictionary, which appears to suggest that only in Australian and American English usage is the word "vermin" applied to insects as well as mammals or birds. This part of the definition reads:

> "1. *Collective.* Animals of a noxious or objectionable kind
> 1.a. Originally applies to reptiles, stealthy or slinking animals, and various wild beasts; now, except in *U.S.* and *Australian* usage (see sense 1b), almost entirely restricted to those animals or birds which prey upon preserved game, crops, etc.
> 1.b. Applied to creeping or wingless insects (and other minute animals) of a loathsome or offensive appearance or character, esp. those which infest or are parasitic on living beings and plants; also occasionally applied to winged insects of a troublesome nature."

56. However, further definitions within the Complete OED and definitions in other dictionaries on which the Claimants rely all include insects as well as mammals. The second definition in the OED is "2.a. In generic or collective sense: A kind or class of obnoxious animals. 2.b. A single animal or insect of this kind." The Shorter OED definition is:

> "1 *collect.* Orig., reptiles, snakes or other animals regarded as harmful or objectionable. Now *spec.* (**a**) mammals or birds harmful to game, crops, etc.; (**b**) harmful insects, worms, etc., *esp* those which infest or are parasitic on people, animals or plants.
> 2. **a** A kind or class of animals or insects regarded as verminous…**b** An animal or insect of this kind."

57. The Cambridge English Dictionary gives as the primary meaning of vermin "small animals and insects that can be harmful and are difficult to control when they appear in large numbers", and adds that "flies, lice and cockroaches can all be described as vermin". The Collins English Dictionary gives as the primary meaning: "small animals collectively, esp. insects and rodents, that are troublesome to man, domestic animals, etc."

58. The dictionaries therefore show that insects can be vermin, though none of those cited to me specifically mention moths. There are two points to make about this. First, while a moth is probably not the example of vermin that anyone asked would give as their first example, or possibly name at all, it is clear that insects are capable of being regarded as vermin. Cockroaches or beetles are perhaps more obvious examples of insects that are described as vermin, but the definitions say that flies and lice can be so described. Second, the answer to whether the Reply was false is not to be found solely in a selected dictionary, or based on a preponderance of definitions in various dictionaries. This is no more than a starting point, and context is everything.

59. The context here is whether something harmful amounts to an infestation in a residential house, i.e. something that may cause damage or harm to the occupier because it was or is an established presence. *Vermin* here are therefore animals or insects that are capable of infesting a residential house and causing a problem to the occupier or the house. The purpose of the enquiry was clearly to discover whether there had at any time been, or there is, a problem with an infestation of creatures that had damaged or might damage the property, could affect adversely enjoyment of the property, or give rise to expense to eradicate them. In that context, it is easy to see that an infestation of clothes moths could damage the property, adversely affect enjoyment of it and require expense to eradicate it. In my judgment, an infestation of moths is an infestation of vermin in this context.

60. The second issue that arises is whether there was an infestation. While there was no concession that this was the case, and WWF disputed throughout that he (as opposed to his wife) had been at all troubled by visible moths before June 2018 or had seen any between July 2018 and early May 2019, it was ultimately not seriously disputed that there was an infestation in the insulation in the house, as identified first by Environ in May 2018 ("high level of moth infestation") and then by Fantastic in May 2019, confirmed subsequently by Combat in April 2020 and seen by Dr Hunyak when the insulation was removed by VGB in 2020. The photographs show the extent of the infestation. Both Combat and Dr Whittington opined that the infestation was severe and had been established for some years prior to the removal of the insulation.

61. The third issue relates to the knowledge of WWF. The reply was not that there was no moth infestation but that WWF was not aware of any such matter. The reply is therefore not, objectively, false unless WWF was aware that there was a moth infestation, or at least that there might be one. If WWF was aware that there might well be an infestation of moths, even though it had not been proved, the answer "the Seller is not aware of any such matters" would have been false. For the reasons that I will give in more detail when discussing the issue of whether WWF knew that the Replies were untrue (see below at [120] and following), it is clear that WWF did suspect, even if he did not know for sure, that there was or had been an infestation of moths in the insulation. That was because he had read, or had had read to him, at least the May 2018 report of Environ, which described an infestation of moths in the insulation in the house, and he knew that it was or might be true.

62. For these reasons, the Reply to Enquiry 2.1 was a misrepresentation: the answer given was false.

Enquiry 2.2

63. The Reply in this case was not a statement of WWF's knowledge but an assertion that there were no reports concerning (1) any matter referred to in Enquiry 2.1 *or* (2) otherwise concerning the fabric of the house, save for those that WWF had provided. None of the reports that were provided concerned the infestation of moths. Neither the Rentokil quotation nor the Environ Reports were provided.

64. On the basis of my conclusion about the meaning of Enquiry 2.1, unless these pest control reports were not "reports" within the meaning of Enquiry 2.2, the reply to this enquiry was also false. The May and June 2018 reports of Environ clearly did concern a moth infestation, even if the previous reports did not.

65. The Rentokil quotation dated 30 January 2018 identified the premises surveyed – Horbury Villa – and set out survey findings, under the heading "Survey Findings", namely evidence of a well-established common clothes moth issue throughout the house, which indicated that there was a potential food source. It referred to the information that lamb's wool insulation had been used in most ceiling voids, opined that this *may have been* partially infected with moths prior to installation over 3 years previously, and said that *if so* the moths would have been multiplying within the voids over the last few years. The only way completely to solve the problem was to remove all the lamb's wool, it stated. Moth activity to clothing was also noted. Detailed information about proposed treatment (not including removal of the insulation) was given. The cost was £10,366.80.

66. Although in the form of a quotation for providing services in future (though not called a "Quotation"), this document was also a report of findings and an expression of opinion by the technician. The covering email sending it to Mrs Woodward-Fisher described it as a report. If, as I have held, there was a vermin infestation, then this quotation was a report that concerned vermin infestation, and also concerned the fabric of the property, namely the woollen insulation in the floor voids. I will deal with this point further after having dealt with the Environ reports.

67. The first of these was sent to Mrs Woodward-Fisher by email on 13 February 2018. She forwarded the email to WWF. The email stated "Following our survey of at 85 Ladbroke Road On 12/02/2018 [sic], we've put together a report on the current level of infestation, our recommended treatment plan and how much it will cost." It said that the quotation was based on the current level of infestation, which would continue to increase rapidly if action was not taken. The email contained links to a number of different documents, one of which was headed "Clothes Moth Treatment Report and Estimate". The report stated that:

> "On todays visit to the site i have carried out a full inspection to all areas of the property and for this time of the year for the problem to be as bad as it was this needs to be started asap as once it starts to warm up the moth will be breading and the infestation will be out of control" [sic]

68. Further reports, headed "Pest Control Report" were sent by Environ in the same way after each visit to the house – there were originally scheduled to be three sprayings of the house – and were forwarded by Mrs Woodward-Fisher to WWF. These were shorter than the first report, but recorded what the operative had seen and done. The second report said that the operative had "identified a high level moth infestation".

69. In the event, Environ attended on more occasions than scheduled: twice because their technician had failed to do something that should have been done, and after that on further occasions because the treatment had not been effective and WWF wanted further spray treatments.

70. The Environ report dated 22 March 2018 was sent by email to Mrs Woodward-Fisher headed "Your Post Control Report". It said that Environ had created "your report for our visit" and provided a link. Mrs Woodward-Fisher forwarded this to WWF the same day, saying "Here is the latest report".

71. Environ came back to the house to do a complimentary further spray treatment on 16 May 2018. The technician this time was Chris Dudman. WWF and Mrs Woodward-

Fisher both said in evidence that they regarded him as competent and had confidence in him, unlike one of the previous technicians who kept forgetting to do things. His report, headed "Pest Control Report", said that he had identified a high level of moth infestation. It was this report that identified that the woollen insultation in the floor voids was the primary source of the infestation of moths. The next and final Environ report, dated 25 June 2018, was to similar effect, reiterating that it was the woollen insulation that was sustaining the infestation of moths.

72. WWF's defence to the suggestion that Reply 2.2 was false is that neither the Rentokil quotation nor the Environ reports were "reports". He also maintained the case that the insultation in the internal walls and floor voids in the house was not part of the fabric of the house.

73. A report may be oral or written, but in the context of Enquiry 2.2 it is clearly only a written report that is required to be provided. A report is no more (in this context) than a document that reports on a vermin infestation, or on the fabric of the house. That is what each of the Rentokil quotation and Environ reports did, though the Rentokil and first Environ reports also quoted for treatment of the house. WWF considered that a report was a formal document of a type that was obtained or provided on sale of a property, such as a survey or a formal condition report, and that the Environ reports were no more than "updates on their failed attempts to treat the property", which he did not read at the time.

74. There is no basis, however, to limit the word "report" to the type of formal documents described by WWF. What the Enquiry is directed at is any report that the Seller has (not that the Buyer obtains) that concerns either of the matters stated. Mr Seitler argued that a "report" is the product of someone being instructed to give an opinion, which neither Rentokil nor Environ were; and that any opinion proffered by Rentokil or Environ on the moth infestation was peripheral to what they were doing, not the purpose of their engagement. I disagree: this argument was, it seemed to me, belatedly constructed to meet the exigencies of the case in relation to this Enquiry. In any event, Rentokil and Environ were instructed to opine – on what was the necessary treatment. In so doing, they had to give their opinion on what the problem was, in order to opine on the appropriate treatment.

75. As for the suggestion that the insulation was not part of the fabric of the property, this was not the view that WWF expressed in the witness box:

> Q. Now, you regarded the insulation, did you not, as part of the fabric of the property?
> A. Yes, I do.

However, Mr Seitler argued that it was not. In his skeleton argument, he argued that only two Environ reports made any reference to the insulation, and that the technician did not know what kind of insulation it was or whether it had been treated, or about its condition. In closing, he advanced a new argument that the "fabric" of the property was just what could be seen, not what was concealed.

76. For that proposition, he relied on a "Constructional Fabric and Planning History Report" prepared by Webster Hart LLP for the Claimants in February 2019, as part of their investigation into the condition and planning status of Horbury Villa. An executive

summary states: "The basic fabric of the property presents very well … the majority of the fabric exhibits a good state of repair." This was the only basis on which Mr Seitler argued that fabric is only "fabric" if it is visible. I reject the argument. How Webster Hart summarise the condition of the property and use the term "fabric" has nothing to say about the meaning of the word in Enquiry 2.2. Why the fabric of the property should be limited to what is visible is not easy to understand. The purpose of the Enquiry was to require the Seller to pass on any report that they had concerning the condition of the property: the word "fabric" is just a general, non-specific term to describe the physical make-up of the house. It would include, but not be limited to, the structure of the property, and is clearly not a reference to fabrics in the property, in the sense of soft furnishings, which is a different meaning of the word. Nor does it exclude what cannot be seen. The fact that enquiry 2.3 is about knowledge of concealed defects does not make enquiry 2.2 limited to reports that exist on visible parts of the property. The plasterboard on the internal walls of the house would be part of its fabric, as would the floors and ceilings. There is in my view no basis for saying that the insulation between the plasterboard faces of the walls, and between the floor and the ceilings, was not part of the fabric of the property.

77. The May and June 2018 Environ reports, at least, were reports concerning the fabric of the property, as well as concerning a vermin infestation. The reports describe how the technician had inspected and extracted small amounts of insulation in places where they were accessible in the house (to a trained person) and seen that they were infested. They described how the insultation was the food source that was sustaining (and would continue to sustain) the colony of moths in the house. Photographs of some of the insulation and the locations where it could be seen were appended to the 16 May 2018 report. The reports recommended removal of the insulation. They concerned part of the fabric of the house.

78. The Reply to Enquiry 2.2 was therefore false and it was a misrepresentation.

Enquiry 2.3

79. The enquiry was whether WWF was aware of any defects in the property of a particular type, namely those that were not apparent on inspection, i.e. latent defects. The Claimants say that the answer "not aware of any such defects" was a misrepresentation, because there was a latent defect, namely the infestation of the insultation in the property that required its removal, and because WWF was aware of this defect.

80. WWF's case, as argued by Mr Seitler, is that there was no latent defect of the type described, for two reasons. First, the infestation is not a defect in the property itself: only defects in the structure of the property, such as a crack, structural issue or such like (that could not be seen) are within the scope of this enquiry, by contrast with the fabric of the property that could be seen. Second, the genus of defects covered by this enquiry are those that are concealed by chattels, which is not the case in relation to the infested insulation, which was concealed by fixed plasterboard.

81. WWF himself did not quibble with the proposition that the condition of the insultation, if what Environ said was true, was a defect in the property. His explanation was that he believed that Environ's reports were untrue and so was not aware of a defect in the property. Moreover, he had only "glanced" at the Environ May and June 2018 reports.

82. I reject both arguments of interpretation of the words of the enquiry. There is no warrant for restricting "defects in the property" to structural defects: that is not implicit in the word "defect" or in the word "property". Enquiries 2.2 and 2.3 are not intended to be (nor are they) mutually exclusive in the way suggested. Enquiry 2.2 is about the existence of reports concerning the fabric of the property, whether the subject-matter of the report is visible or not; and enquiry 2.3 is about the Seller's awareness of latent defects. It is impossible to think of a good reason why enquiry 2.3 would relate to defects that were hidden by chattels and not by fixtures or parts of the structure. That distinction would mean that the Seller would have to disclose a known defect in (say) the plaster of a wall if it was hidden by a free-standing cupboard but not if it was hidden by a fitted wardrobe. In my judgment, the words in parenthesis in enquiry 2.3 are not limiting words, but only examples of why a defect may be hidden from view. The insultation in the internal walls and floor voids was a part of the structure of the house, and certainly was a part of the property that was not apparent on inspection.

83. I therefore conclude that the infestation of the insulation was a defect in the property that was not apparent on inspection.

84. As for WWF's knowledge, when considering whether the reply was a misrepresentation (as compared with the separate question of whether it was given knowing it to be untrue), the relevant question is whether WWF was aware of facts that, objectively, meant that the reply was false. Environ's 16 May 2018 report specifically identified the defect in the insulation and its serious implications. So did their June 2018 report. The defect was not apparent on inspection because it was concealed in the floor voids and between the plasterboard faces of internal walls. What was said in the report was enough for anyone who read it to appreciate the existence of the defect. I am persuaded that WWF did read the May and June 2018 reports of Environ, for reasons that I will explain later in this judgment (see under **Issue 3**, below).

85. Accordingly, I find that the reply to enquiry 2.3 was false and was a misrepresentation.

Issue (2): Did the Claimants know of and rely on the replies?

86. The Claimants do not dispute that, for a misrepresentation to be operative, the representee must have had some knowledge of it. Once knowledge is established, if the misrepresentation was made with the intention that it be acted upon and there was action following it, inducement will be presumed (though can be rebutted by evidence).

87. The Defendant's case is that each of the Claimants was in fact unaware of the content of the Replies and so was not induced by them; and that it is insufficient that they may have *assumed* – because they were not told otherwise – that the Replies did not raise any matter of concern and proceeded to buy the house on that basis. He argues that there is no evidence of anyone telling either Claimant what any of the Replies said, and that in those circumstances there can, as a matter of law, be no reliance sufficient to make the misrepresentations actionable, even if fraudulently made.

88. Mr Seitler went further than that, and argued that it was necessary not only for the Claimants to have been aware of the Replies but also that there had to be evidence that they understood the replies in the particular meaning that it is now alleged that they have, namely that a "report" includes documents such as the Environ reports (which WWF

characterised as invoices, or updates on treatments), and that "vermin" had an extended meaning that includes moths.

89. The Defendant accepts that Farrer were obviously the Claimants' agents but does not accept that BILI (or Mr Ershikov specifically) was the Claimants' agent. There was no pleaded case that Mr Ershikov or BILI were agents for the Claimants, and so Mr Seitler argues that the Claimants cannot rely on receipt and reading of the Replies by Mr Ershikov, if that is proved. Although Farrer were agents, Mr Seitler says that, in the absence of evidence that Farrer read and relied on the Replies as the Claimants' agent, inducement by any misrepresentation cannot be proved.

90. In law, to entitle a claimant to succeed in an action in deceit, they must show that they acted in reliance on the defendant's misrepresentation. If they would have done the same thing even in the absence of it, they will fail: *Clerk and Lindsell on Torts* (24th ed.) para 17-36. The first step is therefore to prove knowledge of the misrepresentation; the second is to establish inducement, by acting with that knowledge; and the third step is to consider whether there was in fact no inducement because the claimant would have acted in the same way regardless.

91. It is not in dispute that a claimant may know of a misrepresentation and act on it by his agent, as well as by himself personally, though any loss suffered has to be the loss of the claimant himself.

92. In Edwards v Ashik [2014] EWHC 2454 (Ch), I held that a solicitor's knowledge of the content of replies to pre-contract enquiries was to be treated as their client's knowledge, based on a decision called Strover v Harrington [1988] Ch 390, in which Sir Nicolas Browne-Wilkinson V-C held that a purchaser could not assert that he was unaware of information that had been provided to his solicitors. I also held that, as a matter of fact, the solicitor had communicated the effect of the replies to the purchaser by telling them, in light of the information gleaned from the pre-contract process, that it was "okay to proceed". That was sufficient: the actual words of the replies did not need to be shown or communicated to the purchaser.

93. In Leeds City Council v Barclays Bank plc [2021] QB 1027 ("*Leeds City Council*"), Cockerill J had to decide whether, in a claim based on an implied fraudulent misrepresentation, the claimant had to prove awareness of the implied misrepresentation, given the presumption of inducement. The Judge held that the presumption only applied where awareness of the misrepresentation was proved; and that the awareness requirement, viz an understanding that the representation was being made, could not be satisfied by a mere assumption on the part of the claimant as to the facts misrepresented. Since awareness or understanding of the implied misrepresentation – which was a necessary bridge between the misrepresentation and inducement – had not been pleaded, the claims were struck out.

94. That was an unusual case because the misrepresentation in issue (essentially, that the LIBOR rate was not to the defendant's knowledge being manipulated) was not expressed but implied. Consequently, the treatment of the requirement of awareness in the judgment focuses on the distinction between a person having the implied representation actively present to their mind and their merely assuming the state of affairs in the representation.

95. There is a fine line, in terms of awareness of an implied representation, between a borrower reading a term sheet and thinking to themselves "of course, the bank is dealing with me honestly, as regards the interest rate proposed" and assuming that to be the case. But the question does not arise in the same way in this case, where the Replies are expressly stated and the question is whether awareness of their content on the part of the Claimants' agents suffices, and if not, whether communication to the Claimants of their effect, but not the words themselves, suffices.

96. The facts that are agreed, or were established by the evidence, are the following.

    i) Mr Perry, WWF's solicitor and agent, sent the Replies to Farrer, the Claimants' solicitors and agents, on 21 February 2018.

    ii) The Claimants did not liaise directly with Farrer: BILI, in the person of Mr Ershikov or Mr Demidov, did.

    iii) Farrer produced the Report on 22 February 2018. It states that as part of their review of the property, replies to standard enquiries and replies to additional enquiries (which were the relevant Replies) were produced by the seller. The additional enquiries and Replies were appended to the Report, at appendix 13. At para 3.1.3 of the Report, Farrer draw attention to certain statements contained in the Replies, but there is no reference to replies 2.1, 2.2 or 2.3. The Report concludes that Farrer consider that the house had good and marketable title and "On the basis of our review of the documents, there is no reason why you should not proceed with your acquisition of the Property".

    iv) The conveyancing file was not disclosed and there is no documentary evidence that demonstrates that the Report, or the Replies, were sent to BILI. However, this is inherently likely, given that BILI instructed Farrer on behalf of the Claimants (as the Defendant accepts) and that the Report was not sent to the Claimants themselves.

    v) There is no evidence that the Claimants personally read the Report or the Replies. Dr Hunyak accepted that he did not do so.

    vi) Mr Ershikov's evidence was that Mr Demidov and he acted as the primary points of contact with Farrer and other professional advisors, and that:

> "[t]hese advisors would communicate with [Demidov] and I rather than [the Claimants]. I or [Demidov] would review documentation or advice from these advisors about the purchase and then update [the Claimants] on what was going on."
>
> He said that he would communicate with Dr Hunyak rather than Ms Patarkatsishvili, and Dr Hunyak would then instruct BILI as to what should be done. He said that that was how BILI generally acted when advising the Patarkatsishvili family. He said that the focus of his conversations with Dr Hunyak about buying the house was whether there were any "red flags" over the property: if there were not, provided the Claimants liked the property, they would be comfortable about buying it.

vii) Specifically, Mr Ershikov said:

> "I remember during the purchase process seeing and reviewing a document called "Replies to Additional Pre-Contract Enquiries" dated 20 February 2019 … I recall that nothing in the Replies gave me any cause for concern or suggested that there were any red flags I needed to raise with [Dr Hunyak]. Equally, I do not remember Farrer bringing any red flags to my attention from the Replies.
>
> I also remember seeing and reviewing a document called "Report on Title", produced by Farrer on 22 February 2019…..I understood that this report represented Farrer's advice on the property, following their consideration of all of the relevant documentation, including the Replies. Again, I recall that I did not identify any red flags with the acquisition of the property from Farrer's report that I needed to raise with [Dr Hunyak].
>
> …..
>
> As a result of all this, I reported to [Dr Hunyak] that there were no red flags with the property and that as long as he was comfortable with the price and the issues around the noise … he could proceed with the transaction."

viii) Mr Ershikov was challenged about this in cross-examination. He said that all documents came to him by email. He confirmed that he received and read the Replies and checked with Farrer that they were happy with them, and they said that "they were totally comfortable with the way the responses to the enquiries were put, were formulated by the defendant". He confirmed that he told Dr Hunyak that there were no issues with different aspects of the transaction – he would tell him that there were no issues with the survey, the title or with the replies. He confirmed that he did not discuss any particular reply with Dr Hunyak.

ix) Dr Hunyak's evidence was that Mr Ershikov gave him updates on the transaction but that he did not recall reading the Replies or Report and that Ms Patarkatsishvili would not have read them, but that he was certain that Mr Ershikov and Mr Demidov would have read them, because they were dealing with the transaction on their behalf, and that they would report to him if there was any problem with the documentation. He said that he relied on the assurance of BILI and Farrer that "everything was okay with the property and the contract terms".

x) Dr Hunyak did not say in his witness statement that Mr Ershikov had said anything specific to him about the Replies, or any particular reply, or indeed about the Report. In cross-examination, however, Dr Hunyak said that he became aware of the content of the Replies after they were made. Pressed about that, he explained that he meant that he and Mr Ershikov had discussed that everything was okay, but later confirmed that Mr Ershikov told him that everything was okay with the Replies:

> "Q. What did he say about the replies?
> A. He said that there is no problem and that there is no red flags.
> Q. No red flags?
> A. Yes, everything okay.

> Q. About the Replies?
> A. What.
> Q. with the replies?
> A. About the replies, yes.
> Q. No red flags, everything is okay; yes?
> A. Yes.
> Q. Did you mention that to your solicitor during the preparation of this statement? Did you tell your solicitor that Sergey said to you: no red flags, everything OK, about the replies?
> A. I didn't ask to describe what is relevant for –
> Q. Did you tell your solicitor that Sergey said to you, about the replies: no red flags, everything OK? Did you tell him or her; Yes or no?
> A. I don't remember, it is not yes or no."

Dr Hunyak said that this evidence was not in his witness statement because he did not think it was so important to describe that conversation with Mr Ershikov. He denied that he was adding this evidence about Mr Ershikov telling him specifically that there were no red flags with the Replies, which was not in his witness statement, because he wanted to win the case.

97. I find that Mr Ershikov received and read the Report and the Replies. He said that he did and it is inherently likely that he did. It was his job to look after the interests of the family, as head of BILI, and this was a large transaction, even for a company with the amounts of assets that it had under its charge. It was also important for the Claimants personally, whose interests Mr Ershikov was protecting. It is inherently likely that Mr Ershikov would have read the documents sent to him, and the notion that Farrer sent the Report to no one is fanciful, and I reject it. It is also fanciful that solicitors at Farrer did not read the Replies; indeed, it is self-evident from the Report that they did. I reject as fanciful the idea that they failed to read replies 2.1, 2.2 and 2.3.

98. I find that Mr Ershikov did not tell Dr Hunyak specifically with reference to the Replies that they were "Okay; no red flags" but that he did keep Dr Hunyak updated as the transaction progressed, and did tell him more generally (on more than one occasion) that there were no red flags with the property (or words to that effect), that there were no significant problems (other than two relatively minor ones identified by Dr Hunyak) arising from the documents, and that it was okay to proceed if the Claimants wished to buy. The Claimants obviously did not interest themselves personally in the technicalities, and BILI took charge of these matters on their behalf, giving a very general update from time to time, and ultimately giving the go-ahead.

99. I also find, because it would self-evidently have happened, that Farrer satisfied themselves that there was nothing adverse in the Replies and told Mr Ershikov so. In any event, the Report, which Mr Ershikov read, effectively says so in writing. I accept Mr Ershikov's evidence that the conversation with a solicitor at Farrer took place: it is inherently probable, on such a valuable transaction, that conversations about the Report would have taken place.

100. In light of those findings, Farrer's awareness of the Replies is, in law, the awareness of their clients, the Claimants. Had Farrer not reported on title or sent the Replies to the Claimants but simply told them directly that they had considered all the documents, that

there were no red flags and that it was safe to proceed, and the Claimants then did so following that advice, reliance on the Replies would clearly be established (and in any event would be presumed, unless disproved).

101. It does not make any difference in principle that, instead, Farrer sent the Report and Replies to Mr Ershikov, who also read them, and who then told the Claimants (having discussed it with Farrer) that there were no red flags with the property and that it was safe to proceed. It cannot be right that a buyer, who engages a team of experts to act on their behalf in assessing the appropriateness of a transaction and making a recommendation, cannot rely on misrepresentations made by the seller that were read by the team and fed into the advice given, just because the buyer did not read the misrepresentations personally. There may be a question as to whether a particular misrepresentation was read by a member of the team and was fed into the advice given, but that it is a different question. The answer to it in this case is that Farrer and Mr Ershikov read the Replies, including the replies to enquiries 2.1, 2.2 and 2.3, and that the negative responses to these enquiries did feed into the advice that was given by Mr Ershikov to Dr Hunyak, based in part on what Farrer had told Mr Ershikov about the Replies.

102. Further, since the three relevant replies were in general and negative form (the seller has no knowledge of any of these matters), the substance of the replies was sufficiently communicated to the Claimants by the summary that Mr Ershikov gave them: no red flags with the property and safe to proceed. The Claimants did not assume that there was nothing to concern them; they were told that nothing had emerged from the investigation process that made it inadvisable to buy the house. The Claimants relied on that advice in deciding to buy.

103. I therefore find that there was awareness of the three replies in issue in this case, and that Mr Ershikov's summary of the effect of those and other replies and other disclosure (that there were no red flags with the property and that it was safe to proceed), was given to the Claimants. Subject to one further argument of Mr Seitler, that means that the Claimants were induced by the misrepresentations.

104. That further argument is this: it is not sufficient that the Claimants were aware of the content of the three replies; there has to be evidence that they were aware of each reply carrying the particular meaning that the Court has given it.

105. To construct this argument, Mr Seitler started with *dicta* of Cotton LJ in Arkwright v Newbold (1881) 17 Ch D 301. In that case, shareholders complained that they had been misled by a statement in a company prospectus saying that the directors' remuneration would be fixed by the shareholders and paid only by commission on the company's profits. The defendants contended and the Court of Appeal agreed that there was no misrepresentation, on the true meaning of the prospectus. Cotton LJ pointed out that the plaintiffs had not alleged that they understood the prospectus as precluding any other payment to the directors by anyone and stated, at p.324:

> "In my opinion it would not be right in an action for deceit to give a plaintiff relief on the ground that a particular statement, according to the construction put on it by the Court, is false, when the plaintiff does not venture to swear that he understood the statement in the sense which the Court puts on it. If he did not, then, even if that construction may have been falsified by the facts,

> he was not deceived. Therefore, on that ground alone I should have been prepared to dispose of this action, but I thought it better to go through the statements in the prospectus, and to shew that, in my opinion, there was no ground for the construction put upon them by the learned Judge in the Court below."

106. The point being made here was that even if Fry J had been correct at first instance to construe the prospectus as precluding any other payment to the directors by anyone, the plaintiffs had not alleged that they subscribed to the company with that understanding of the prospectus, and so could not say that they were deceived. However, their claim failed because there was no misrepresentation on the true meaning of the prospectus.

107. Mr Seitler then relied on Cockerill J's review of authorities in *Leeds City Council*, noting the need for a witness to satisfy the "understanding" requirement by showing that they did understand that a representation had been made (para 58), and citing several decisions of Hamblen J to the effect that a claimant must show that he understood the representation as having been made, and in one case as having been made with the meaning that the court ascribes to it (para 62).

108. On this basis, Mr Seitler suggested that it was essential, in this case, for the Claimants to prove not just that they were aware of the content of the replies but that they understood them as being representations that there were no "reports" in a particular sense (i.e. not just formal statements of opinion but also including pest control companies' reports on treatments carried out; and that reports on insulation were within the description of reports concerning the fabric of the house), or that there had been no vermin infestation in a sense that included an infestation of moths, or that there were no defects concealed by things other than chattels. Without proving that understanding of the replies, he said, there was no basis on which the Claimants could prove that they were deceived by the replies.

109. In my judgment, there is no need for a claimant in a misrepresentation claim to plead or prove that they understood a statement in a particular sense when the natural meaning of the words is being relied upon. If, on the other hand, the statement is clearly ambiguous, and on one meaning the statement would be true and on the other meaning it would be false, the claimant will need to establish that they understood it in the sense that made it false and then prove that meaning at trial. The rival meanings in such a case are likely to emerge from pre-action correspondence, or at least from the statements of case.

110. Further, when the statement is a negative response of the kind that is in issue in this case, viz that the seller has no knowledge of any of the matters asked about in the enquiry, it cannot be necessary for a claimant to establish that they understood such a statement as extending to the very thing that was not disclosed, of which they necessarily had no knowledge. So, in this case, it cannot be necessary for the Claimants to prove that they understood the reply to enquiry 2.1 as including an infestation of moths specifically, when they had no idea that the house was infested with moths because WWF did not disclose it, nor any reason to consider moths in particular, rather than rats, pigeons or cockroaches. And it cannot be necessary for the Claimants to prove that they understood the reply to enquiry 2.2 as saying that there were no pest control treatment reports, for the same reason. The position may well be different if the statement in question is a positive statement about a specific matter and the claimant understood it in a particular sense.

111. The replies to enquiries 2.1, 2.2 and 2.3 naturally bear the meanings that I have identified in Section 1 above, namely that the house had never been affected by any of the matters described, including infestation by what may reasonably be called vermin, and that there were no documents in the nature of a report to disclose in that regard, nor any reports reasonably so described that concerned the fabric of the property. These enquiries are (as they are intended to be) written in plain English and have an obvious meaning, not an obscure or technical meaning. It was therefore not necessary for the Claimants to plead specifically the sense in which they understood the replies, or give evidence that they understood them to cover moth infestation and pest control reports.

112. The remaining question on inducement is whether the Claimants would have acted in the same way if the misrepresentations had not been made. This is the relevant comparator, not whether they would have acted in the same way if they had been told the truth (though that may have some evidential value): *Leeds City Council* at [72], [73].

113. Mr Ershikov said that if WWF had not answered enquiries 2.1, 2.2 or 2.3, he would have first discussed it with Farrer and then told Dr Hunyak, and that it would have been a clear red flag to him. If the questions had been put again to WWF and not answered then he would have identified it as a red flag to the Claimants. Dr Hunyak said that if issues with moths had been reported to him, he would not have bought the house, but he did not say what he would have done if the enquiries had not been answered.

114. I accept the evidence of Mr Ershikov on this point. A failure to answer would obviously have been met with a request by Farrer to provide replies, and if refused or ignored Farrer would have reported the matter to BILI. A failure to answer these questions would have been suspicious in itself, because the enquiries were about important matters relating to the condition of the house. It is highly likely that Mr Ershikov would not just have reported the failure to Dr Hunyak but would have told him that this was a red flag matter. Dr Hunyak is a fastidious person and not a risk taker. He was clearly in two minds whether to buy the house or not, and made a last minute decision to buy. I have little doubt that if there had been a serious issue of this kind with WWF, the Claimants would have walked away from the proposed purchase.

115. For these reasons, my conclusion is that the Claimants did rely on the misrepresentations in buying the house.

Issue (3): Did the Defendant know or suspect that the replies were untrue?

116. The requirements for a finding of fraud are exacting. The starting point is the exposition of Lord Herschell in Derry v Peek (1889) 14 App Cas 337 at 374:

> "First, in order to sustain an action in deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. … Third, if fraud be proved, the motive of the person guilty

> of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

117. It has since been recognised in many cases that, although motive is irrelevant to liability, the absence or presence of a motive may be highly relevant on the question of whether a defendant knowingly made a false statement.

118. The Defendant relied on the warning against watering down the requirement of dishonesty given by Rix LJ in AIC Ltd v ITS Testing Services (UK) Ltd ("*The Kriti Palm*") [2006] EWCA Civ 1601 at [256]-[257]:

> "As for the element of dishonesty, the leading cases are replete with statements of its vital importance and warnings against watering down this ingredient into something akin to negligence, however gross …
>
> In effect, recklessness is a species of dishonest knowledge, for in both cases there is an absence of belief in truth. It is for that reason that there is proof of fraud in the cases of both knowledge and recklessness. This was stressed by Bowen LJ in *Angus v Clifford* [1891] 2 Ch 449 where he said (at 471):
>
> > 'not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity of which consists in a wilful disregard of the importance of truth, and unless you keep it clear that that is the true meaning of the term, you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind is to be drawn - evidence which consists in a great many cases of gross want of caution - with the inference of fraud, or of dishonesty itself, which has to be drawn after you have weighed all the evidence.'"

119. The relevant questions are accordingly whether, in giving false answers to the replies in question, WWF either knew that they were false or did not honestly believe in the truth of them. As Lord Herschell explained, an answer given recklessly as to its truth is one in which there was no honest belief in its truth. This category will be relevant where the maker did not know whether the statement was true or false and did not care, or where they deliberately took the risk that it could be false. In either such case, the maker will have been reckless as to the truth of the statement and so did not honestly believe what was stated.

Reply to enquiry 2.1

120. In relation to the reply to enquiry 2.1 (vermin infestation), WWF's case is that he believed that moths were not vermin, and so honestly believed the reply was true: he was not aware of any vermin infestation even if he was aware of a moth infestation.

121. But, further, he argued that he honestly believed that there was no infestation, because he and Mrs Woodward-Fisher had lost confidence in Environ and so did not believe that what was stated in the May and June 2018 reports of Environ was true. On the contrary, he believed that the problem with moths, such as it was (which he says was insignificant) had been eradicated, a fact underlined by the absence of moth sightings from July 2018 to May 2019. He also relies on the fact that enquiries of the retailer of Soundblocker resulted in a reply to the effect that Soundblocker was treated so that it was moth-proof.

122. It is necessary to take these points sequentially, and then consider overall what evidence supports the claimed honest belief in the statement that WWF was unaware that there had ever been a vermin infestation in the house.

123. WWF's evidence in chief was that moths would be referred to as pests or insects, not vermin; but that he wanted to be thorough and so he asked Mr Perry about it:

> "I told Mr. Perry that we had not had any issues with any of the items listed, though we had had some moths at the property… I have a clear recollection that Mr Perry told me that moths were not vermin and therefore not relevant to this inquiry. We discussed this inquiry for not more than a moment before moving on to the next question. I had no reason to doubt Mr Perry's legal advice and did not consider the question further."

124. WWF's evidence is accordingly that he said, first, that they had had no issues of the kind listed in enquiry 2.1, and second, that they had had "some moths". He did not say that there was, according to Environ (and Rentokil), an infestation of moths, or that he asked Mr Perry whether moths were vermin. According to him, Mr Perry volunteered, immediately and in unqualified terms, that moths were not vermin and so were irrelevant to this enquiry, and they quickly moved on.

125. A witness statement for Mr Perry was also exchanged by the Defendant. Mr Perry's statement does not support WWF's account in terms. He says that:

> "Whilst I do not remember exactly what he told me, I do recall that William mentioned they'd experienced a problem with moths, presumably in the context of whether this needed to be disclosed by him.
>
> I took his comment to mean he was referring to moths eating into jumpers and clothing and recall commenting along the lines that everyone in London seemed to have been having a problem with moths. I had previously had issues with moths at home, as had friends."

At the trial, following the evidence of WWF, the Claimants indicated that they did not challenge Mr Perry's evidence and so did not seek to cross-examine him. Unless his evidence is objectively disproved, therefore, or I believe WWF to be more reliable than Mr Perry, I should accept it as true.

126. Mr Perry did not say that he was asked whether moths were vermin, or that he advised that they were not. It is clear that Mr Perry took WWF's comment about "some moths" to be an allusion to low-level inconvenience caused by moths, consistent with what many property owners in London generally suffer. The issue was therefore presented to Mr Perry in a way that would not have caused him to think that there had been an infestation of moths, which is what the enquiry was asking about, as compared with a few moths causing some damage to clothing. This is consistent with what WWF says: he says only that he told Mr Perry that they had had "some moths".

127. It is, I consider, inherently unlikely that, in response to a comment of that kind, Mr Perry would immediately have given a categoric answer that moths were not vermin and were irrelevant, and moved on without pause. It is inherently likely that, if a question had arisen as to whether moths were vermin and so could amount to a vermin infestation, Mr

Perry would have given a considered answer, perhaps expressed an element of doubt or looked the matter up online or in a dictionary, and made a note of the advice he gave. Instead, it appears that Mr Perry assumed, as WWF had implied, that there was no infestation, just a few moths.

128. Although I accept that, in general, WWF would be likely to have a better recollection of the discussion of the replies to pre-contract enquiries (being an out of the ordinary occasion for him) than Mr Perry (who presumably dealt with many such matters in the course of his work), I am unable to accept that WWF remembers correctly that Mr Perry told him that moths were not vermin and so were irrelevant to the enquiry. Further, Mr Perry obviously does have some recollection of the conversation: he does not say that he cannot remember it, and he gives some detail about the conversation. I prefer Mr Perry's evidence to WWF's.

129. It is perfectly possible that WWF thought that moths were not vermin – they are not as obviously verminous as other animals or insects. His evidence in chief was to the effect that he did not think they were vermin. But if WWF had been confident that moths were not vermin, he would not have mentioned them at all in relation to enquiry 2.1, or at least would have sought specific confirmation of his view from Mr Perry. It is therefore probable (and I find) that WWF entertained some doubt about whether moths were vermin. Whether intentionally or otherwise, WWF alluded to moths in such a way as to imply that this was a minor matter. He did not disclose that he knew that there was, or might be, an infestation of moths in the insulation in the house. Had WWF said that the previous year they had been advised that the insulation in the house was infested with moths and larvae, and that the only solution was to remove and replace all the insulation, Mr Perry would self-evidently have said something very different from the comment that he did make.

130. Mr Perry's answer provided some comfort to WWF that he did not need to concern himself further with moths. I accept that WWF mentioned that he had had a problem with moths and that Mr Perry's response in fact gave him some comfort, though that was only because WWF had understated the extent of the problem.

131. WWF's next argument was that because he had lost confidence in Environ, he did not believe the content of their May and June 2018 reports, and so was not aware that there was an infestation of moths.

132. I do not accept this evidence. It is true that WWF and Mrs Woodward-Fisher had become frustrated by Environ's first technician's failure to do what they said they would do, by the incomplete report of the early May 2018 treatment, and by the need for further treatments (for which they expected WWF to pay) after the initial three sprayings. WWF accepted, however, that they had confidence in a new technician, Chris Dudman, who replaced the previous technicians and attended the house to do further treatments. Mrs Woodward-Fisher reluctantly (as it seemed to me) agreed that he was competent, unlike the previous technicians. When Chris identified the true cause of the moth problem, viz the infestation of the insulation, WWF did not deny or disbelieve it, but instead criticised Environ for not realising it sooner (email 13.7.18).

133. Mrs Woodward-Fisher (email 12.7.18) was very cross that Environ were disputing that she had told their first technician that they had woollen insulation, and pointed out that once a competent technician came to the house "he managed to find it without any

problems and without having to do more than lift a radiator grill in the floor …They simply failed to do a proper inspection." The "it" referred to is the woollen insulation, and the premise of this comment is that Environ's May and June reports were correct in identifying the true cause of the problem, not wrong. As Mrs Woodward-Fisher said later in the same email, "They basically made an inaccurate assessment of the property which led to the wrong advice – but they still took thousands of pounds from us for treatment that ultimately will not remove the issue." This clearly shows that Mrs Woodward-Fisher and WWF were disposed to accept Chris Dudman's conclusion.

134. It is manifestly untrue that the Woodward-Fishers had lost confidence in Environ and so did not believe their reports. The Woodward-Fishers sought to negotiate a price for Environ to attend to do three more treatments, pointing out that this was during the guarantee period for the previous treatment. On 23 July 2018 (i.e. after all the Environ reports had been provided to Mrs Woodward-Fisher) WWF offered to pay Environ £850 plus VAT per visit for three more visits. When Environ replied that they required £1,250 plus VAT per visit, WWF responded on 24 July 2018, offering £1,000 plus VAT for one more spraying. This is inconsistent with the assertion that the Woodward-Fishers had lost faith in Environ and did not believe what they said.

135. Further, in response to the May and June 2018 Environ reports, which identified the infestation in the insulation, WWF contacted his builder to enquire about the quality of Soundblocker insultation. On being told that it was treated against moth infestation, his reaction was not to deny to Environ that there could be an infestation in the house, but to ask the builder for advice about whether there was a guarantee that it was moth resistant. The builder was doubtful, but pointed out that if there are moths hatching, it could be argued that the product was not fit for purpose. What was being contemplated by WWF was a claim in relation to the condition of the Soundblocker – the premise being that there was an infestation in it – not a claim against Environ for wasting the Woodward-Fishers' time (though WWF did later threaten Environ with litigation if they did not accept that they were liable to provide further treatments to make up for their earlier failings). WWF said that he thought he saw the specification of Thermafleece on the internet but could not say when he saw it. In any event, I do not accept that he believed Environ were wrong about the cause of the moth problem because he had read that the insulation was supposed to be insect-proof.

136. It is WWF's case that the problem (such as it was) with moths disappeared in July 2018 (presumably as a result of the spray treatments carried out by Environ – another reason why WWF could not have lost confidence in them) and had not reappeared by 2 May 2019, when the sale of the house completed. This is relied on to support WWF's evidence that he believed in February 2019 that there was no infestation. It does not matter whether the infestation had gone in February 2019 if he knew that there had been one at an earlier time, but the absence of a current problem might logically suggest that there was no earlier problem.

137. By 10 May 2019, however, a different pest control firm (Fantastic) engaged by the Claimants was advising that there was a carpet moths infestation. The Claimants had immediately noticed the presence of moths in the rooms once they had moved in. Accordingly, if WWF is being truthful, the problem with moths flying in the house disappeared, only immediately to recur once the house was sold. There is, of course, a difference between the problem of the infestation of the insulation disappearing (which it could not have done, as Dr Whittington explained) and the problem of moths flying in

the space and eating clothes disappearing. Dr Whittington was clear that moth activity would definitely slow during the colder months of the year, and would increase in warmer months. However, July, August and September are warm months, and May is the usual start of warm weather. It may well be that fewer moths were seen over the winter, which encouraged WWF to think that there was no longer a problem with moths flying in the space. However, he must have known that the infestation of the insultation had not gone away, because he understood what the Environ reports were saying, as evidenced by the July 2018 emails to which I have already referred. These explained that although other regular treatments could be offered, the only way to resolve the issue finally was to remove all the affected insulation and replace it. The Rentokil survey findings had also said the same thing.

138. WWF accordingly knew of the likelihood of a moth infestation. I find that he did not *know* that moths were vermin and his instinct was that they were not; but he was (understandably) not sure about this. There was nothing in Mr Perry's response, objectively, that could have reassured him that moths were not vermin. However, I find that WWF was reassured. At that point, he was either grossly negligent in the reply, by failing to give Mr Perry the true picture and to check expressly whether a moth infestation was a vermin infestation in this context, or he was dishonest in concealing the true picture, on the basis that he knew or suspected that it might have to be disclosed. As Bowen LJ explained in Angus v Clifford (see at [118] above), the distinction is between a person who wilfully disregards the importance of truth and a person who exhibits only a gross lack of caution.

139. Had this been the only such issue for determination, I might have been inclined to conclude that what WWF did and said was as consistent with a very serious lack of care as it was with dishonesty. However, the failure to provide his solicitor with the true picture in relation to enquiry 2.1 is closely linked to the false replies to enquiries 2.2 and 2.3, in that the existence of a severe infestation of the insulation in the house and reports describing the extent of that infestation were not disclosed by WWF in those replies. It is necessary and appropriate to weigh my conclusion on his knowledge of the falsity of reply 2.1 in the light of the evidence relating to those other replies. If WWF did not honestly believe the truth of replies 2.2 or 2.3, that may well be relevant to my assessment of his state of mind when approving reply 2.1. I will therefore return to it after considering the evidence relating to those other replies.

Reply to enquiry 2.2

140. The Claimants contend that this reply was dishonest because WWF knew that he had obtained reports from Environ about moth infestation of the insulation of the house and did not disclose them. WWF's case is that he did not appreciate that the Environ reports or the Rentokil quotation were "reports", and that he had not read them. "Reports" were what was produced when a person was paid to give a formal opinion: Rentokil were not paid to give an opinion, they simply visited the house to give a quotation; and Environ was paid to do work, not to give an opinion; the opinions that they gave were peripheral to the works, so the reports were not "reports".

141. What WWF said in evidence was that he did not give the first part of the enquiry a second thought because he had been advised that moths were not vermin. In light of my previous conclusions, I cannot accept that WWF disregarded the first part of the enquiry for that reason. He said that, at the time when he met Mr Perry:

> "I had not read the documents which Environ entitled 'reports' and did not think of or consider those documents to be reports of the type that are usually requested and supplied on the sale of a property, nor did I consider them to be concerned with the fabric of the Property. I had also not considered those documents to be 'reports' in the traditional meaning despite how Environ labelled them. I had assumed that they were estimates. I was a general practice surveyor, and in my mind a report in the context of a property transaction is something more formal, akin to a survey. The documents produced by Environ started with a quote, and to the extent that I gave them any further thought, I would have considered them to be simple update notes on the treatments - particularly where any such document was produced after Environ had to return to do work that they failed to do when originally instructed."

142. The distinction between reports in the sense that WWF describes them and the Environ "estimates" is not as sharp as he seeks to make it. WWF was not in the position of a purchaser of a property commissioning "reports" on title and the quality of the property, or planning issues, but, rather, a vendor who discloses documents relating to the property to the purchaser, to the extent that they are asked to do so. Nor is it remotely fair to describe any but the first of the Environ reports as an "estimate" or any as being update notes. Each of the reports other than the first one reported on the treatment that had been applied to the house on the recent visit and on the condition of the property and the extent of the moth problem as seen on that visit. The relevant question is whether these were reports concerning a vermin infestation or the fabric of the house.

143. Under persistent cross-examination from Mr McGhee, WWF sought to maintain his position that he had not read the Environ reports, and said that maybe he had "glanced at" some, but did not notice that they were titled "Report". He said that he first noticed this in Mr Seitler KC's chambers. He would not answer the question whether he considered whether any of the Environ reports were "reports", and was evasive at that point in his evidence. Asked to explain how he could have formed the view that the Environ reports were not "reports" in his understanding of the term when he had not read them, he said that he considered both statements to be true and that there was no inconsistency there.

144. WWF's evidence that he did not read any of the Environ reports, despite the fact that Mrs Woodward-Fisher forwarded them to him, with questions or comment in all but one case, was very unpersuasive. His position was that he was uninterested in the question of the moth treatment that Mrs Woodward-Fisher wanted to have done, and that he was going along with it, spending over £10,000 in the process, moving out of the house and staying in an hotel on several occasions while the treatments were done, and throwing out cherished items of furniture on Environ's advice, to humour her. Despite that, Mrs Woodward-Fisher forwarded the reports to him by email and asked for his views – not just about the cost, as WWF suggested. He said that he only read his wife's email to him, not the email from Environ or the report for which there was a link in the email. He could not remember if he thought that there was a moth problem at that time, but said that perhaps he did at the point when he was asked to dispose of furniture in the house.

145. I can accept as truthful that Mrs Woodward-Fisher was more exercised by the presence of moths than WWF was, and that initially he was not drawn into the detail of the findings or treatments that Rentokil or Environ proposed. However, there came a time (17 May

2018) when Environ were giving some alarming advice, and a short time later (6 June 2018) Mrs Woodward-Fisher was unhappy at continuing to deal with Environ and asked WWF to take over, to get the follow up treatment that they wanted at Environ's expense. By these times, WWF was not uninterested or unconcerned by moth issues.

146. On 17 May 2018, Environ had sent Mrs Woodward-Fisher their latest report. It was this report that first identified in some detail the infested insulation as the cause of the moth problem. The email was forwarded by Mrs Woodward-Fisher to WWF at 8.34 pm on the same day, this time in a blank email. WWF accepted that it was possible that this email was forwarded as they were both sitting together in the evening, so that they could both read it. I conclude that this is likely, given the difference from the other emails forwarded, which all had some commentary or question written by Mrs Woodward-Fisher to her husband (for example, on 22 March 2018, forwarding the report on the 21 March 2018 visit: "Here is the latest report. The technician did say to Paul that the wool covered sofa bed in the spare bedroom is so infested that they would recommend getting rid of it. What do you think?"). There was no other explanation from either WWF or Mrs Woodward-Fisher as to why the May 2018 report would have been forwarded to WWF in that way.

147. The technician, Chris Dudman, reported on 16 May 2018 that he had discovered a high level clothes moth infestation, explained how and where he had found it, the likely extent of it, and why it was the insulation that was the main source of the moth activity in all areas, and concluded:

> "This unfortunately means that unless all of the woollen insultation is completely removed from this property, the moth activity will persist following today's visit and into the future, therefore presenting the risk that other items such as some furniture pieces, clothing and the floor carpet throughout the property will be vulnerable to being damaged."

The report attached many photographs illustrating the infested insulation and the areas in which it had been able to be located. It recommended that an antique leather armchair with horsehair upholstery be thrown out.

148. By this time, WWF was discreetly marketing the house for sale. The report, if correct, gave rise to a serious problem for him.

149. On the same day, Environ sent Mrs Woodward-Fisher a further email explaining that she had two options to manage the moth issue: one, the removal of all the woollen insulation, to be replaced with a synthetic option; two, regular seasonal treatment to ensure that the moths are controlled all year round.

150. WWF said that he did not recall reading the 16 May 2018 Environ report but accepted that Mrs Woodward-Fisher told him what Environ were saying. Accepting that Mrs Woodward-Fisher had sent him Environ's further email on 6 June 2018, asking him to take over, WWF agreed that he would have read the email at that stage. In light of what Environ were saying, he accepted in cross-examination that there was potentially a problem for him. In this sequence of questions and answers, WWF was being asked about the 16 May 2018 Environ report:

> "Q. … Do you recall reading the rest, which identifies the insulation, the woollen insulation, as the primary source of the infestation and saying that

the moth activity will persist unless all of that insulation is completely removed from the property?

A. It was approximately around this time that we had come to the end of our tether with Environ. I think this was the seventh different element that they had said might be causing moth activity. We had complied with all six up to this date, this is now yet another one and, as I say, I think we were reaching the end of our tether with Environ and their level of competence and we're now beginning to disbelieve, really, anything they said.

Q. I'm not sure that quite answers my question. Do you recall reading this Environ report and noting that it referred to the infestation of the insulation and the need to remove it?

A. No, I do not.

Q. Is it something that your wife mentioned to you at about this time? That this is what Environ were saying?

A. Yes, I believe it was.

Q. Presumably that was pretty alarming?

A. Yes.

Q. You would have realised, having developed the property, that removing the insulation was likely to be a lengthy, expensive and messy process wouldn't you?

A. Yes.

Q. And you would have been alarmed at the thought that the development that you had carried out had used insulation which was unsuitable or was, if not unsuitable, had become infested and had become the source of the problem, yes?

A. Sorry, is the question whether or not I would be alarmed by that?

Q. Yes.

A. I would say irritated is probably a better word.

Q. Yes. At this time, we are now at 16 May 2018 - we will come on to this - but you were already contemplating selling the property? Yes?

A. No, we were contemplating selling the property in the end of the summer 2017, so this was way in advance of that.

Q. No, this is 16 May 2018.

A. Yes.

…..

Q. So you had in mind at this point in time the future sale of the property?

A. Yes.

Q. If what Environ said was correct, you would need to solve this problem, would you not, before selling the property?

A. If what they said was correct, yes.

Q. Because, if what they said was correct, you would need to reveal to a purchaser on such a sale that there was a moth infestation; Yes?

A. Erm, if it was - yes, if it was correct.

…..

Q. … So if this problem was as Environ said it was, then you would need to solve it before selling the property, because, otherwise, the problem would need to be disclosed on the sale; yes?

A. With a big "if". If what Environ was saying was correct.

Q. Yes, I have been very careful with the way I am putting the questions, I hope. You would also have realised, wouldn't you, that a prospective purchaser - if the problem wasn't solved in advance of a sale, that a prospective purchaser, if it became aware of the problem, might either not proceed with the sale or would seek to reduce the price?

A. Yes."

151. What is significant about this passage of questioning and WWF's answers is that, while seeking to maintain the line that he did not read the reports and that he had lost confidence in Environ, he admits that he knew about the content of the Environ report and agreed that it was alarming; and that if what it said was right, it meant that they would have to solve the problem before selling, as otherwise they would have to disclose the infestation to a purchaser. A good deal therefore depends on whether WWF believed that what Environ said was or might be true, or believed it to be untrue.

152. Despite the admissions in the passage set out above, WWF then went on to confirm, as his witness statement said, that he was not concerned about what Environ said. He was never concerned about the moths, it was Mrs Woodward-Fisher who was, and it was not an issue, though it was correct that there was a problem with the sale of the house.

153. WWF asserted that, despite his wife asking him on 6 June 2018 to take over dealing with Environ and forwarding him the email from Environ that described possible solutions, he still did not read the May 2018 report. I asked him at the end of his evidence to clarify

whether, having read the email from Environ of 17 May 2018, which his wife forwarded to him on 6 June 2018 and which urged the recipient to take time to read the report, he would not then have read the May 2018 report (which his wife had previously forwarded to him). He confirmed that he remembered reading the email of 17 May 2018 but that it was "extremely unlikely" that he would have read the report. That was because it was sent as an attachment, he explained, and he often did not notice the attachments at that time. He said that another reason for not reading it was that time had passed between the date of the email (17 May) and his wife's forwarding the email to him again (6 June); but he accepted that he would have had a full update from his wife on what Environ were saying.

154. Mrs Woodward-Fisher accepted that she read the 16 May 2018 report, and said that she wondered why Environ had not shown her evidence of what they said, and thought that they were being "disingenuous". She was concerned about Environ rather than about their report, and could not see much of the insulation. She felt that Environ were trying to make excuses, because all the time the insulation was there to see. Everything Environ had said previously had been nonsense and this report was more of the same, she said.

155. She accordingly did not believe that the insulation was the cause of the problem, but accepted that she probably told her husband about the contents of the report and accepted that she sent him on 17 May 2018 the email from Environ with the link to the report, as "maybe he would be interested to read it". She said that although he should have been interested in it, he was not interested in "this whole moth fiasco". She accepted that she probably said that Environ had attached some photographs relating to the insulation, but that she could not recall his reaction. She was as sure as she could be, at the time, that the problem could not be the insulation, as they had used good builders.

156. When Mrs Woodward-Fisher saw a moth in her bathroom, she sought to chivvy up her husband to do something about it and asked him to contact Environ. She accepted that, in doing so, she was giving Environ the benefit of the doubt and wanted them to come to do another treatment. On reading the 25 June 2018 Environ report, which she accepted that she probably did, she considered that the conclusions expressed about the insulation being the source of the moth problem was just repetition of what Environ had said previously, and that the warnings given about damage were "ludicrous". She repeated that she had no confidence in them.

157. I entirely reject the evidence of WWF and Mrs Woodward-Fisher that they had lost confidence in Environ. In my judgment, this is a pretence, built upon some initial dissatisfaction with the service levels of Environ, to justify their not taking Environ's reports at face value. They were both satisfied with the work and attitude of Chris Dudman, and his 16 May 2018 report was an impressively evidenced document. In an email to Environ, WWF said "certainly your last visit by your senior technician was the most thorough to date" and requested a further visit from him. The Woodward-Fishers were willing to continue to use Environ for so long as they could negotiate a discounted rate for further treatments (though in fact Environ did not accede to WWF's requests for a further cheap deal). The Woodward-Fishers did not reject Environ's conclusions in the May and June 2018 reports but acted on the basis that they were, or might well be, correct. The criticism of Environ, apart from forgetfulness of the first technicians in the early visits and the wording of the March 2018 report, was that they had failed to find the true cause of the problem at the outset, sc. the infested insulation, despite being alerted to the possibility, and not that the evidenced conclusion that they reached was wrong.

158. The suggestion that WWF did not at any stage before the Replies read the May or June 2018 reports, for any of the reasons he gave, is in my judgment incredible. He knew that Environ were saying that there was a very serious infestation in the insulation in the house, because he accepts that his wife told him this. She sent him the email so that he could see for himself. Three weeks later she asked him to take over dealing with Environ sending him the email that said that either all the insulation needed to be removed, or there needed to be a regular treatment programme to keep the moths under control. The notion that in those circumstances a property developer, who knew that an infestation of moths would present him with a problem in selling the house, and who was going to deal with Environ going forwards, did not read carefully their reports strains credibility too far. The suggestion that he could not access it because it was an attachment was both wrong in fact and fanciful. The report was a link in the email that Mrs Woodward-Fisher had forwarded to him on the evening of 17 May 2018, when they probably both looked at it. He could access it with one click. In any event, he only had to ask his wife to provide it, if he could not find it.

159. In my judgment, WWF would obviously also have read the June 2018 Environ report, following the further visit from Chris that he had requested. It is wholly implausible that he would not have done so, as he was by this time in charge of relations with Environ and knew about the problem. He would have wanted to see whether Environ reported any improvement, or suggested a different approach, or even whether there was a reason not to accept their conclusions. Accordingly, WWF knew that these reports concerned the defective condition of part of the fabric of the house..

160. I have considered whether WWF is simply misremembering what happened, or that he has subconsciously reconstructed events by going over them many times in his head during the course of this litigation and now genuinely believes what he said in this regard. I reject that possible explanation for his implausible account. Given what WWF said in the passage of cross-examination quoted above, he knew what the implications of Environ's findings were for the sale of the property, and he accepted that Mrs Woodward-Fisher told him what the May 2018 report said. The twin pillars of his defence, not reading the reports and having lost confidence in Environ and so not believing what they said, could not have been misremembered by accident or be based on re-reading the documents. They are a case that WWF has consciously built, on shallow foundations, for saying that there was no report that he needed to disclose. The fact that Mrs Woodward-Fisher was initially more concerned with the matter than WWF was, and so the reports from Environ were sent to her rather than him, and the dissatisfaction with the initial performance of Environ in forgetting to do things that they were supposed to do, or specifying the spraying of an outdoor area that, on Dr Whittington's evidence was a waste of time, are being used as the foundations of an argument that Environ were useless, not to be believed, and in any event did not deal with WWF, who was unconcerned by all such matters. None of this is true.

161. In my judgment, the reason why WWF gave this persistently untruthful account was because he needs to distance himself from the reports themselves, as much as from his knowledge of the content of them. He said that he did not see that the Environ reports were headed "Report" until after this litigation started, and did not consider them to be "reports". I do not believe that either, though I have no doubt that Mr Seitler would have pointed out to WWF in consultation that the reports were headed "Report". WWF knew at the time that these were reports and were entitled "Report". Apart from the fact that

the Environ reports were obviously what would be described as reports, because they report on what the technicians found on their visits to the property, they were referred to in that way in Environ's emails to Mrs Woodward-Fisher, and Mrs Woodward-Fisher referred to them as "reports" in her emails to her husband.

162. Accordingly, I find that WWF had no honest belief in his reply that there were no reports concerning the fabric of the property or concerning any of the matters identified in enquiry 2.1. Although he said in cross-examination that he considered "fabric" to be what was visible, there is no rational basis for that understanding and I do not accept that he had it. He did not say that in his witness statement, only that he did not consider the Environ documents to be reports concerned with the fabric of the property. What WWF told himself at the time of the meeting with Mr Perry was that these were not documents that needed to be mentioned. In that respect, he was not being honest with himself. I find that WWF knew that the May and June 2018 Environ reports at least were reports concerning the fabric of the house, and which raised a very significant problem with it.

163. What motive did WWF have for failing honestly to disclose the serious infestation and the Environ reports? I do not find that he was consciously trying to deceive the Claimants. He simply wanted to sell the house and move on. As he admitted in cross-examination, disclosure of the infestation would likely have caused the sale to go off, and he would have been left needing to move out of the house and do expensive works (which later took the Claimants' contractors nearly 6 months in total to complete) to remove all the woollen insulation. In my judgment, WWF was hoping that the problem might have gone away and he was willing to take the risk that he was wrong about that.

164. Mr Seitler suggested that it was not credible that WWF did not disclose the infestation or the reports for that reason, as he could hardly have expected to get away with it. If there was a known severe infestation, the problem would inevitably come to light, he said. WWF also knew by May 2019, if not February 2019, that Dr Hunyak was a cautious person as regards matters that might spoil his enjoyment of the house, and so he was likely to detect the problem.

165. There was certainly a significant risk that WWF would be caught out, but it was not inevitable that that would happen. It is unclear whether – whatever Dr Hunyak's suspicions – a claim would have been brought against WWF until, by chance, Environ told BILI that they had produced reports for WWF previously and then provided copies of them. WWF would not have expected that to happen. It was, perhaps, not wholly rational for WWF not to follow Environ's advice in May 2018, but the Woodward-Fishers must have hoped that the visible problem would go away, following Environ's spray treatments, and the later decline in moth activity over the winter might have encouraged him to hope that matters had improved. Whatever the reason, I find that WWF knowingly took the risk. Moreover, he knew that there were reports concerning the fabric of the property that he had not provided to the Claimants, namely the 16 May and 25 June 2018 Environ reports.

Reply to enquiry 2.3

166. WWF stated that he was unaware of any defect in the property that was not apparent on inspection. For reasons that I have already given, that was false, because the infested condition of the insulation in the floor voids and internal walls of the house was such a defect.

167. He could only honestly have believed that reply, in view of my findings of his knowledge of the infestation, if he genuinely believed that infested insulation was not a concealed defect in the property, or believed that - because it was concealed by plasterboard rather than by items of furniture - it did not fall within the terms of the enquiry. To be fair to WWF, he did not personally advance the second argument, only the first. His evidence in chief was that the presence of moths was not a "defect" in the property: a defect was a crack, structural issue or something similar to that. In cross-examination, he again explained that he felt that defects were the sorts of things that appeared in formal documents such as surveys or condition reports, not pest control company "updates".

168. I do not accept that WWF honestly believed that what Environ's May and June 2018 reports described was not a defect in the property. Environ advised that the only way properly to deal with the problem was to remove all the affected insulation. As a practising surveyor and an experienced property developer, WWF would have known, and in my judgment did know, the implications of that. He knew that it would involve doing the kind of work that VGB did in 2020, removing plasterboard to access all the voids and ensuring that no woollen insulation was left behind anywhere in the house, before reinstating the walls and ceilings, repairing any consequential damage, and then redecorating all affected rooms. It would have required the Woodward-Fishers to move out and manage a project of works lasting in the region of 4-6 months in total. That work was needed to eradicate a defect, namely the presence of contaminated insulation that would cause a continuing problem for any occupier of the house. WWF did not at the time think that that was not a defect in the property. He knew that, if Environ were right, there was a serious defect in the property that was hidden from the Claimants as would-be purchasers of the house. And he did not disbelieve Environ.

Conclusions on knowledge of falsity

169. It follows from [138] to [168] above that I have found that WWF did not honestly believe his replies to enquiries 2.2 or 2.3. In relation to enquiry 2.2, WWF knew that his reply to the second part of the enquiry was false, because he was aware that there were reports concerning the fabric of the property, namely (at least) the May and June 2018 Environ reports, which were not disclosed. In relation to enquiry 2.3, WWF knew that there was a hidden defect in the property. He therefore made a false reply knowingly in both cases, within the first category in *Derry v Peek*.

170. In light of my conclusion that WWF knowingly made false statements in the replies, I consider on balance that he was reckless about the truth of reply 2.1. That is because he did recognise the possibility that moths were vermin but did not tell Mr Perry what Environ had reported. As I have said, the fact that WWF mentioned a moths problem to Mr Perry at all indicates that he did not confidently believe that moths were irrelevant or that there was no infestation. Given that, the failure to tell Mr Perry that Environ had reported that there was an infestation of moths indicates a wish to conceal the extent of the problem, not a careless approach to the correct answering of the enquiries. WWF himself asserted that he was very concerned to ensure that he gave correct answers to the enquiries, and his visit to Mr Perry's offices for that purpose underscores his careful approach in general. I do not accept that WWF, through gross carelessness, failed to seek appropriate confirmation from Mr Perry before endorsing his draft answer to enquiry 2.1. In my judgment, he knowingly did not give Mr Perry the full picture and was accordingly reckless about (that is to say, did not care) whether the reply to enquiry 2.1 was true or false.

Issue (4): Are the Claimants entitled in principle to rescission?

Issue (6): Does the Court have a discretion to refuse rescission?

171. It is convenient to deal with these two issues together.

172. The Claimants having established their case in fraudulent misrepresentation, the principal remedy claimed is rescission of the contract of sale and purchase, and with it the transfer of the house into the names of the Claimants. It is not disputed that rescission of a contract induced by a fraudulent misrepresentation is the usual and appropriate remedy in such cases. No statutory provision in the Misrepresentation Act 1967 gives the Court a discretion to award damages instead of rescission where fraud is established.

173. The Claimants accept, however, that rescission is available only in equity, given that the title to the house is registered and the court's assistance is required to revest the house in the Defendant. The Defendant did not dispute that analysis, and in consequence submitted that the Court has a discretion about the equitable relief to be granted to the Claimants. It was argued that a court of equity is concerned to ensure that practical justice is achieved by any order for rescission and that, accordingly, if practical justice cannot be achieved, an order for rescission can and should be withheld and the Claimants left to their remedy in damages for the tort of deceit instead.

174. The Defendant submitted that practical justice could not be achieved, principally because WWF does not have £32.5 million plus interest to pay to the Claimants (even apart from the damages payable for losses flowing from the deceit) in order to effect restitution and recover the house. As a result of the examination of WWF's finances conducted at the trial, it is now common ground that, subject to a then unknown amount of tax (principally capital gains tax) payable in January 2025, WWF has total assets of between £15 and £20 million (the latter figure on the basis that the equity in the Woodward-Fishers' home in Chelsea belongs to him and is not shared with Mrs Woodward-Fisher). WWF therefore could not first pay the sum due by way of restitution in order to recover the house by way of counter restitution, and conversely cannot sell the house to realise further money until he has title to sell it.

175. It was also argued that, since the Claimants have lived in the house since May 2019 and have carried out significant works of alteration to it, restitution of the property sold and transferred cannot be made. A similar, weaker, argument was made in reliance on the decline in the condition of the property since the purchase in 2019, some aspects of which were not pleaded and I decided could not be pursued by the Defendant as a discrete factual basis for contending that counter restitution was impossible.

176. The Claimants' position is that since they are entitled to repayment of the purchase price with interest, and are willing and able to make counter restitution by returning the legal and beneficial ownership of the house to WWF, there is no impediment to an order for rescission taking effect. While, in other circumstances, a claimant might be unwilling to seek rescission if the seller could not repay the purchase price, the Claimants are willing to accept a judgment for the monies due to them with a lien over the house to secure their entitlement.

177. None of this raises a question about discretionary refusal of rescission in equity but rather is concerned with a different question, namely whether WWF has a defence to rescission on the basis that *restitutio in integrum* cannot be given by the Claimants. An inability to give counter restitution in a way that ensures practical justice for a defendant is a defence to a claim for rescission, at common law and in equity. I will deal with that and other defences raised by the Defendant in the following section of this judgment, but first I must address the Defendant's argument that, even if there is no defence as such to a claim for rescission, the Court retains a discretion to refuse it where an order for rescission would be unjust or, as WWF put it, would deny practical justice to both parties.

178. Mr Seitler and Ms Mitchell relied in this regard upon dicta in Spence v Crawford [1939] 3 All ER 271 ("*Spence's case*"), Cheese v Thomas [1994] 1 WLR 129 and Salt v Stratstone Specialist Ltd [2015] 2 CLC 269 ("*Salt v Stratstone*") as the basis of their argument.

179. In *Spence's case*, Lord Wright said, at p. 288:

> "The court must fix its eyes on the goal of doing 'what is practically just'. How that goal may be reached must depend on the circumstances of the case, but the court will be more drastic in exercising its discretionary powers in a case of fraud than in a case of innocent misrepresentation."

In that case, the court was concerned with the question of whether the inability of the pursuer to restore the defender to the exact position he was in prior to the fraud was a bar to the remedy of rescission, not with the question of whether rescission should be withheld on broader discretionary grounds. The argument of the defender was that since the sale and purchase of the shares, he had acted to change the capital structure of the company and its business arrangements and had incurred other losses, so that it was no longer possible, by repaying the purchase monies, to put him back in exactly the same position. The House of Lords held that *restitutio in integrum* did not need to be precise and that, in view of a voluntary payment offered by the pursuer to the defender on account of his other losses, rescission could be awarded because sufficient restitution would be given. This case therefore provides no support for an argument that, where restitution can be effected, the court retains a discretion to refuse it.

180. In *Cheese v Thomas*, the claim was to set aside for undue influence a property transaction to which both parties had contributed purchase money. The defendant was acquitted of any morally reprehensible behaviour but the transaction was still set aside. Apart from the question of whether undue influence was correctly found, the issue was whether the judge had been right to say that the losses resulting from a fall in the value of the property should be borne equally by the parties. It was in that context that Sir Donald Nicholls V-C was concerned with whether both parties could be restored to their original positions:

> "It is axiomatic that, when reversing this transaction, the court is concerned to achieve practical justice for both parties, not the plaintiff alone. The plaintiff is seeking the assistance of a court of equity, and he who seeks equity must do equity. Mr Thomas parted with money, albeit borrowed, as well as Mr Cheese.
> …..
> The basis objective of the court is to restore the parties to their original positions, as nearly as may be, consequent upon cancelling a transaction

> which the law will not permit to stand. That is the basic objective. Achieving a practically just outcome in that regard requires the court to look at all the circumstances, while keeping the basic objective firmly in mind. In carrying out this exercise, the court is, of necessity, exercising a measure of discretion in the sense that it is determining what are the requirements of practical justice in the particular case."

181. Two observations need to be made about this case. First, it was not a case of fraud where one party was induced to pay money to acquire a property asset: it was a case where an asset was honestly but wrongly acquired using the money of both parties. Unwinding the transaction was not as simple as returning the asset and the price. Second, the particular concern of the court was how to achieve restitution given the contributions that both parties had made and the shortage of funds available for the purpose. The issue of practical justice was how the unwinding should be carried out, given that the transaction was set aside in equity, not whether the transaction should be allowed to stand in the exercise of the court's discretion.

182. *Salt v Stratstone* was a sale of goods case, but the claim was brought only for damages and rescission for negligent misrepresentation. The central question was whether the Circuit Judge had been right to conclude that the purchaser was in a position to give restitution by returning a used and registered car in return for the purchase price. Longmore LJ, giving the leading judgment of the Court of Appeal, held that as equity was able to make adjustments as necessary for diminution in value of the asset, or to compensate the seller for the purchaser's use of it, there was no bar to rescission being ordered. Rescission was held to be the right remedy in principle, particularly as the seller had not sought to establish that it had reasonable grounds to believe the truth of the representation that the car was brand new.

183. The Defendant relies in particular on dicta of Longmore LJ, who referred to a House of Lords decision, Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218 ("*Erlanger*"), and a decision of the Court of Appeal, Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch 392 ("*Lagunas Nitrate*"). *Erlanger* was a case where rescission was sought for breach of a promoter's fiduciary duties to a subscriber of shares. Lord Blackburn referred to a court of equity being able to grant rescission and take account of profits and make allowance for deterioration:

> "And I think that the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract"

184. *Lagunas Nitrate* was a claim in misrepresentation, misfeasance and breach of trust brought by a company in relation to the purchase of assets from a syndicate. The claim was for rescission and damages, though fraud was not alleged. One of the issues was whether rescission was no longer possible because the assets had been worked to such an extent that the parties' positions could no longer be restored. Rigby LJ said at p.457:

> "The obligation of the vendors to take back the property in a deteriorated condition is not imposed by way of punishment for wrongdoing, whether fraudulent or not, but because on equitable principles is thought more fair that they should be compelled to accept compensation than that they should

> go off with the full profit of their wrongdoing. Properly speaking, it is not now in the discretion of the court to say whether compensation ought to be taken or not. If substantially compensation can be made, rescission with compensation is *ex debito justitiae*".

This passage was cited with approval by the House of Lords in *Spence's case* at p.279-280.

185. Having cited that and other decisions, Longmore LJ said that:

> "Rescission is prima facie available if 'practical justice' can be done. If 'practical justice' requires a representor to be compensated for deterioration, it is for the representor so to assert and prove; likewise if the representor asserts that use of the car is to be taken into account ….."

186. But the context in which "practical justice" is being invoked here is whether adjustments can be made that would enable appropriate counter restitution to be given by the plaintiff. The issue is not, at a higher level, whether some other relief would be more practically just than granting rescission. That is clear from Rigby LJ's concluding words, and Longmore LJ himself said that:

> "The normal remedy for misrepresentation is rescission, see Chitty, *Contracts* para 6-108 and *British and Commonwealth Holdings v Quadrex* [1995] CLC 1169, 1199-1200. This remedy should be awarded if possible, particularly perhaps in a case in which a defendant makes no attempt to prove that he had reasonable grounds to believe its representation was true."

Longmore LJ would obviously have considered that the remedy was even more appropriate in a case of fraudulent misrepresentation, had that been in issue in *Salt v Stratstone*.

187. I therefore reject the Defendant's argument that, where fraud is established, the court retains a discretion to refuse rescission in equity. The authorities establish that there may be bars to a claim for rescission, which include inability of a claimant to make counter restitution; but if counter restitution can be given and there is no bar, there is no residual discretion that the Court can exercise on the basis that it appears fairer to leave a claimant to recover damages at law.

188. It seems to me that the Defendant is mistaken in taking references in the cases on counter restitution to "practical justice" as establishing an overriding yardstick, by which the Court will measure whether rescission or some other remedy is more just to the parties. The question is rather whether, although the parties cannot be restored to their precise positions prior to the contract, restitution can be achieved in a practically just way by making adjustments and allowances. Longmore LJ's summary rejection in *Salt v Stratstone* of the ground of appeal that damages were a sufficient remedy underlines this:

> "If I am right that rescission should (still) be the normal remedy for misrepresentation, unless restitution is truly impossible, Mr Salt should be able to recover the price which he paid of £21,895. Damages of £3,250 are not a sufficient compensation for the wrong which he has suffered."

189. This conclusion is supported by the leading textbooks. Snell's *Equity*, at para 14-002 states:

> "To illustrate, while the decision to rescind a contract is said to be discretionary, the principles according to which that discretion must be exercised have been settled over the years through the articulation of the bars. If rescission has become barred, the court will exercise its discretion to refuse rescission. But it is well established that if restitutio in integrum is possible, and if rescission is not otherwise barred, the claimant is entitled to have the contract rescinded as of right."

Lagunas Nitrate is cited in support of this conclusion. A passage in very similar terms appears in O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission* (3rd ed.), at 13-09, 13-10.

190. Accordingly, in view of my findings of fraud, the relevant question is whether there is any bar to rescission being awarded in this case.

Issue (5): Does the Defendant have a defence to rescission?

191. The Defendant advances three defences: delay, affirmation, and impossibility of restitution. He contends that the Claimants knew from June 2020 (or possibly earlier) that they had a claim for misrepresentation but did not elect to rescind until May 2021, and in the meantime affirmed the purchase of the house by carrying out substantial works of improvement to it and continuing to live in it. Restitution is said to be impossible both because WWF is no longer able to repay the purchase price and because the Claimants carried out alterations to the house (and otherwise allowed it to deteriorate) such that it is no longer possible to give back the thing that he sold them.

192. These defences in turn raise three critical questions on the facts of this case:

    i) Is delay, for this purpose, to be equated to a failure to act within a reasonable time, or is it akin to laches, requiring blameworthy conduct, prejudice or change of position?

    ii) Can there be affirmation without effective communication to WWF of the Claimants' unequivocal election to affirm?

    iii) Is the requirement of *restitutio in integrum* concerned at all with the ability of the defendant to make effective restitution, or only with the ability of the claimant to make counter restitution?

193. The answers to these three questions will, in very large part, determine the question of whether there is a bar to rescission.

Factual findings

194. I find the relevant facts as follows:

    i) Dr Hunyak was slightly suspicious of WWF's failure to reply to BILI's email dated 18 June 2019 asking whether he had used any moth treatments that had been effective. This email explained that despite having had three professional pest

control treatments carried out, the Claimants still had moths flying in the house. But he did not at that stage know that he had any claim against WWF. He did not know anything about the content of the Replies, only that he had not been alerted to a moth problem.

ii) Although the prevalence of moths despite the pest control treatments was a puzzle to Dr Hunyak, he did not know that there was a severe infestation of moths in the woollen insultation until February 2020, when Combat Pest Control quoted for spray treatments. He did not know the full extent of the infestation problem until March 2020, when VGB started to open up internal walls and discovered infested insulation throughout the new part of the house. Much smaller openings had been made in November 2019 and February 2020, which showed that there was woollen insulation, but that did not lead Dr Hunyak to consider that he had any claim against WWF.

iii) By April 2020, the Claimants knew that there was a serious problem with moth infested insulation. Combat advised that the infestation was so severe that it must have been there for years. Dr Hunyak was personally closely involved with the works that VGB carried out from March to September 2020 and saw for himself the scale of the infestation and the nature of the works that were done to remove all infested insulation. At this stage, Dr Hunyak said that he had a very strong suspicion that WWF knew and deliberately failed to disclose the problem, and had removed the plans relating to the insulation from the boxes of documents handed over on completion. I find that his thinking did not go beyond suspicion at this stage, and that the Claimants cannot be said to have known this early that they had a claim for misrepresentation. There is, after all, no general duty of disclosure on a seller of real property. It is improbable that either of the Claimants looked at the pre-contract enquiries or the Replies at this stage: they would not have known where to find them, did not ask BILI to provide them, and were otherwise preoccupied with the works to the house.

iv) It is unclear when the Claimants first received legal advice on their rights against WWF, but they were receiving legal advice by June 2020 because emails disclosed from that month were redacted for litigation privilege. This fact does not demonstrate that legal proceedings against WWF, rather than against the builders or the manufacturers or suppliers of Thermafleece, were in contemplation then, much less that the Claimants were then aware that they had a right to rescind the contract for misrepresentation. It is however probable that the Claimants, or BILI on their behalf, were considering at that stage whether they might have a remedy against WWF, though the principal focus would have been damages – for the loss of enjoyment and the cost of remedy – rather than rescission.

v) BILI managed to obtain copies of the Environ reports in September 2020. Dr Hunyak confirmed that it was in that month. Ultimately, the date was not challenged by the Defendant, who had no factual basis to suggest that it was some other date. I accept that it was in September 2020 that BILI obtained the reports. This disclosure was achieved as a result of their asking local pest control companies whether they had had any involvement in relation to the house previously. That is likely, in my view, to have been a strategy put in place following consultation with lawyers, to try to find evidence to support Dr Hunyak's suspicion that WWF knew of the infestation and had concealed it.

vi) The discovery of this evidence of full knowledge on the part of WWF made a very substantial difference to the Claimants. Whatever their suspicions, they could not have known and did not know before September 2020 facts that gave them a realistic argument for rescission based on a misrepresentation (viz that the infestation, amounting to a concealed defect in the property, was known about by WWF when he approved the Replies), and they could not have known until then that they had a right in equity to rescind. WWF's knowledge was critical to the case in misrepresentation based on enquiries 2.1 and 2.3, given the terms in which the Replies were made, and the Environ reports were critical to the case on enquiry 2.2.

vii) The Claimants would probably have known all those matters by early October 2020. It is highly likely that the Claimants would have sought further legal advice shortly after BILI obtained the Environ reports. They would have known at about that time of their right to elect to rescind the contract.

viii) By late September 2020, the works to the house had finished. ACT's work probably concluded in mid-May 2020, apart from installing fitted furniture following VGB's works. VGB's work was not finished until about the end of August 2020, though there may well have been some final cleaning, snagging or redecoration works not yet finished by the start of September 2020. Dr Hunyak said that, having moved out of the house in February 2020, they did not move back in until the weekend immediately before return to school at the start of September 2020. VGB's final invoice was sent on 19 November 2020.

ix) It is not therefore the case that the Claimants carried out extensive works of improvement to the house in the knowledge that they were entitled to rescind the contract. I find that at most they did no more than allow access to VGB or ACT to do the final matters to complete the project that had been substantially completed by the end of August 2020.

x) What the Claimants did do was re-engage Combat to carry out a pest management programme, which was directed at mice initially, then at mice and moths. The programme started on 17 September 2020 and it was not until March 2021 that the Combat treatment reports record moth activity that needed to be monitored. By May 2021, there were moths noted in various locations, assessed as being at level 4 (on a scale of 1 to 10, where 10 is the most severe). The Combat reports for 2021 indicate that there was a residual moth problem throughout 2021, which in fact reduced over the summer months but was still persisting at level 4 in November and December 2021. The report dated 24 February 2022 records the customer reporting that moths were at abnormal levels throughout the property.

xi) There was no evidence that the Claimants carried out other works of improvement between September 2020 and May 2021. According to Dr Hunyak, they were still living with a problem of moths, though much reduced in seriousness following the VGB works.

xii) There was no communication between the Claimants and the Woodward-Fishers or their agents between June 2019 and May 2021. The Woodward-Fishers did not say that they came to the house at any stage or noticed anything about the nature of the occupation of the house after they had sold it. The inferential conclusion is that

they knew nothing about works to the house: neither the Claimants nor BILI had contacted them at any stage after June 2019 about the moths or the house. Anyone who had stood outside the house between about February and August 2020 would have seen extensive works being carried out, but the Woodward-Fishers did not do so. Nothing that the Claimants were doing in relation to the house was communicated to them at any stage before the claim was issued.

xiii) The claim was issued on 10 May 2021. The Claimants' then solicitors wrote to WWF electing to rescind the contract, and required repayment of the purchase price and damages.

xiv) Following sale of the house, WWF used the net proceeds to pay off the mortgage (which they stood at £17,667,285.51) and some other substantial debts, gifted about £1 million to Mrs Woodward-Fisher, and then used most of the remaining equity to buy their current home in Chelsea (purchase price with all costs: just under £17 million), with the aid of a smaller mortgage (just under £7.6 million).

xv) WWF has various assets, the details of which do not matter. If he liquidated them all, including his share of a family pension fund, his share of a second home in France and his house in Chelsea, he might realise up to £20 million, less whatever was payable to HMRC on 31 January 2025. Mrs Woodward-Fisher has significant assets in her own right, amounting to a few million pounds in value.

xvi) On any view, WWF does not have sufficient assets to raise £32.5 million plus interest (less whatever adjustments to that sum are appropriate for the Claimants' use of the house since May 2019 and to reflect alterations or damage done to it). I accept his evidence that, given his age and health profile, he would be unable to obtain a large secured loan now with which to pay that sum. In any event, any such loan would not exceed the net value of his two current homes, which themselves are far short of the total sum required. The sale of the house itself might realise a net sum approaching the original purchase price, but only if sold in good condition. That would require work to be done first, to remove any remaining cause of moth problems, and it would have to be sufficient to reassure the market that all such causes have been removed. WWF would be able to raise several million pounds, if needed, to carry out those works.

Delay

195. It follows that the Claimants delayed from early October 2020 until May 2021 before they elected to rescind the contract. This is somewhat longer than might have been expected, given the material that the Claimants had available to them by October 2020. There was no explanation of a particular reason for the delay.

196. The Defendant contends that the delay is evidence that the Claimants decided to affirm the contract, and beyond that is a free-standing bar to rescission. He relies on Leaf v International Galleries [1950] 2 KB 86, a case of sale of a painting represented to have been painted by J Constable. The claim was brought for rescission only, not damages. The Court of Appeal expressed doubt about whether rescission was available, as the statement was arguably a warranty; but if it was a condition, rescission was no longer available because the remedy had not been exercised within a reasonable time. Denning LJ said that:

> "…the right to reject for breach of condition has always been limited by the rule that, once the buyer has accepted, or is deemed to have accepted, the goods in performance of the contract, then he cannot thereafter reject, but is relegated to his claim for damages: see s.11, sub-s.1(*c)*, of the Sale of Goods Act 1893; *Son & Wells v. Pratt & Haynes* [1910] 2 K.B. 1003; [1911] A.C. 394".

Denning LJ explained that after the lapse of a reasonable time, a buyer is deemed to have accepted the goods. If there was no right to reject the goods for breach of condition, there could not be a right to rescind for innocent misrepresentation either.

197. Jenkins LJ said that:

> "… contracts such as this cannot be kept open and subject to the possibility of rescission indefinitely. Assuming that completion is not fatal to his claim, I think that, at all events, it behoves the purchaser either to verify or, as the case may be, to disprove the representation within a reasonable time, or else stand or fall by it. If he is allowed to wait five, ten, or twenty years and then reopen the bargain, there can be no finality at all. I, for my part, do not think that equity will intervene in such a case, more especially as in the present case it cannot be said that, apart from rescission, the plaintiff would have been without remedy.

198. Lord Evershed MR agreed with the reasons given by Denning and Jenkins LJJ for dismissing the appeal.

199. The decision therefore turned on the fact that, assuming the representation was a condition, a purchaser of a chattel subject to the Sale of Goods Act 1893 had only a reasonable time within which to reject the goods. A claim in innocent misrepresentation could not put the purchaser in any better position. That reasoning therefore does not apply to a contract for the sale and purchase of land.

200. In *Salt v Stratstone*, Longmore LJ expressed doubt whether the reasoning in *Leaf* still applied, following the Misrepresentation Act 1967 and the Sale of Goods Act 1979, but explained that the question of delay had not been a live issue at trial in *Salt v Stratstone* in any event. In his judgment in the Court of Appeal, Roth J said that since rescission is an equitable remedy, the question is not whether there has been delay but whether the remedy is barred by laches: there needs to be something that makes the grant of rescission inequitable.

201. For the remedy of rescission to be barred in equity, there would therefore need to be either culpably excessive delay, or a particular benefit thereby obtained by the representee that cannot be restored, or prejudice to the representor arising from the delay, as a consequence of any of which the grant of rescission was inequitable. No particular prejudice is pleaded or asserted in this case relating to the delay from October 2020 to May 2021. Though the Claimants did continue to live in the house during that period, that is not the kind of benefit that would make it unconscionable to grant rescission: the Court can make an adjustment for the use of the house in the meantime, when settling the terms of the order for rescission.

202. The Defendant is therefore left only with the 7½ months that elapsed from the time when the Claimants probably knew of their right to rescind until their solicitors' letter electing to do so. That is not, in my judgment, the kind of long delay that could, of itself, make it inequitable to grant rescission for fraudulent misrepresentation. My reasons are:

    i) First, the delay is not of itself very long or excessive, merely somewhat longer than one might have expected. It would not have been remotely surprising if the Claimants had considered their position and taken further advice for a period of up to 4 months before making their election, possibly longer.

    ii) Second, the length of the delay had no particular consequences, either adversely to WWF or in favour of the Claimants.

    iii) Third, it is not suggested that the Claimants delayed in order to gain some advantage, or to make WWF's position worse, nor does WWF say that in fact the delay did worsen his position.

    iv) Fourth, it is understandable that the Claimants would have wished to consider carefully their rights and their options before electing to rescind and bring a claim for fraudulent misrepresentation, both because it is a serious claim to bring and because it would have consequences for the Claimants' family's living arrangements. Electing to rescind would preclude the Claimants from changing their minds and could require them to remove from their family home at short notice, if the rescission were accepted.

    v) Fifth, the process of deciding what to do would have involved seeking specialist legal advice, perhaps from more than one source, before making an irrevocable election.

    vi) Sixth, it would also have involved discussions between each of the Claimants and Mr Ershikov or others at BILI. Mr Seitler, noting that the First Claimant, Ms Patarkatsishvili was not an active participant in the litigation, suggested to Dr Hunyak that she did not support the claim that was brought. Although Dr Hunyak disputed the suggestion, it is easy to see in a case like this that differences of view between the Claimants and their advisers may have needed to be addressed.

    vii) Seventh, and in summary, although the Claimants took a substantial time to make up their minds, there is nothing in the length of time taken alone that makes it inequitable for them to choose in May 2021 to rescind the contract.

203. I therefore reject the defence that rescission is barred by delay.

Affirmation

204. Linked to that defence is the separate defence of affirmation. What this amounts to, in law, is that the Claimants are taken to have made an irrevocable choice to treat the contract of sale (and consequential transfer of title to the house) as remaining in place. The Defendant does not dispute that this is a question of election. He contends that the Claimants did elect not to set aside the contract, by remaining in the house after they had knowledge of their right to rescind, and by saying nothing to WWF about rescission prior to 10 May 2021.

205. Lord Blackburn said in Scarf v Jardine (1882) 7 App Cas 345 at p.361:

> "I may also refer to the case of *Jones v Carter* (1846) 15 M. & W. 718 as most neatly stating the point. The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act - I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way - the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

206. The law of election was restated in Motor Oil Hellas (Corinth) Refineries S.A. v Shipping Corporation of India ("The Kanchenjunga") [1990] 1 Lloyd's Rep 391, where it was held that the owners of a vessel had elected not to challenge the charterers' nomination of a safe port for loading, and were therefore precluded from complaining that the charterers were in default of the charterparty for failing to nominate.

207. Lord Goff said that a right to elect could arise under the terms of a contract, or the general law, where a contractual right for the benefit of one party arises, or where an innocent party becomes entitled to rescind the contract, for example because it was induced by a misrepresentation. His Lordship explained:

> "….. where with knowledge of the relevant facts a party has acted in a manner which is consistent only with his having chosen one of the two alternative and inconsistent courses of action then open to him - for example, to determine a contract or alternatively to affirm it - he is held to have made his election accordingly, just as a buyer may be deemed to have accepted uncontractual goods in the circumstances specified in s.35 of the 1979 Act. This is the aspect of election referred to by Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850 at p.883. But of course an election need not be made in this way. It can be communicated to the other party by words or conduct; though, perhaps because a party who elects not to exercise a right which has become available to him is abandoning that right, he will only be held to have done so if he has so communicated his election to the other party in clear and unequivocal terms (see *Scarf v Jardine*, …, per Lord Blackburn, and *China National Foreign Trade Transportation Corporation v Evlogia Shipping Co S.A. of Panama (The Mihalios Xilas)*, [1979] 1 W.L.R. 1018 at p.1024, per Lord Diplock)."

208. Communication of the decision by unequivocal act or statement is therefore required before a party will be treated as having made their election. This was re-affirmed by the judgments in the Court of Appeal in Peyman v Lanjani [1985] Ch 457. May LJ said at p.494:

> "The next feature of the doctrine of election in these cases which in my opinion is important is that when the person entitled to make the choice does so one way or the other, and this has been communicated to the other party to the contract, then the choice becomes irrevocable even though, if and when the first person seeks to change his mind, the second cannot show that he has altered his position in any way."

209. Slade LJ said at p.501:

> "Even if I am wrong in thinking that knowledge of the relevant legal right is a pre-condition to an effective election, the result on the facts of the present case is, in my opinion, still the same for these reasons. Whatever knowledge may be requisite, the passages which I have cited above from the judgments in *Clough v. London and North Western Railway Co., L.R. 7 Ex. 26* , 34; *Scarf v. Jardine, 7 App.Cas. 345* , 360-361, and *China National Foreign Trade Transportation Corporation v. Evlogia Shipping Co.* S.A. of *Panama [1979] 1 W.L.R. 1018 , 1024, 1034-1035*, in my opinion make it quite clear that a person who has the right to rescind a contract cannot be treated as having elected to affirm it unless and until he has done an unequivocal act, or made an unequivocal statement, which demonstrates to the other party to the contract that he still intends to proceed with it, notwithstanding the relevant breach. An unequivocal act or unequivocal statement on the part of the plaintiff is no less necessary if the first defendant is to rely on an estoppel by conduct.

210. In Insurance Corporation of the Channel Islands v The Royal Hotel Ltd [1998] Lloyd's Rep IR 151 at 161-162, Mance J said:

> "In summary, the type of affirmation here in issue involves an informed choice (to treat the contract as continuing) made with knowledge of the facts giving rise to the right to avoid it. Provided that the party knows sufficient of the facts to know that he has that right, it is unnecessary that he should know all aspects or incidents of those facts … the party must generally also know that he has that right. The making of his choice must be communicated unequivocally to the other party before there can be a binding affirmation."

211. What the Defendant must establish, therefore, is an unequivocal act or statement of the Claimants after the start of October 2020, which was communicated to WWF, that is consistent only with electing to affirm the contract and transfer of the house, and which is inconsistent with retaining the right to rescind.

212. The only act on which WWF can rely, given my findings about the Claimants' knowledge of their right to rescind, is their continuing to live in the house. But, first, that act was equivocal. It was consistent with the Claimants not having made up their minds whether to elect one way or the other. The Claimants were already living in the house at the time when they came to know of their right to rescind. They were not obliged to move out in order to preserve their right to decide to rescind. The house was not a chattel that the Claimants could simply hand back to the seller if they were rejecting it.

213. Second, the Claimants' continuing to live in the house after early October 2020 was not communicated to WWF, who knew nothing about what was happening in it. The fact that

someone who wished to find out whether the Claimants and their children were still living in the house could have discovered the truth, by standing in the road outside, observing the comings and goings, is not to be equated with communication to WWF of an election to affirm the contract. Communication is essential (regardless of whether the representor actually understood what was being said). Conduct may suffice, but it still needs to be conduct that is perceived by the representor. The case of *Edwards v Ashik* was such a case because the landlord was aware of the occupation of the restaurant by the claimant would-be tenant (though even that was not an unequivocal act in the circumstances). Here, however, there was no communication of the continuing residence to WWF.

214. Accordingly, the defence of affirmation of the contract is not established.

Impossibility of restitutio in integrum

215. The next bar sought to be established was that *restitutio in integrum* is impossible. It was said by Mr Seitler and Ms Mitchell to be "truly impossible", using the expression of Longmore LJ, first and principally because WWF was in no position to repay £32.5 million with interest. I have made findings in this regard, at para 193 (xiv) and (xv) above.

216. The point was made in cross-examination of WWF that he could sell the house and raise money by those means. That of course depends on title to the house being returned to him. WWF said that he would not be able to buy the house back (i.e. repay the purchase price) so that title to the property could be re-transferred to him. However, this is not what the Claimants are proposing. They are not selling the house back to WWF upon payment of the purchase price but returning title to the house, by rectification of the registered title or a declaration of trust or transfer, as appropriate, to make WWF once again the legal and beneficial owner. However, his title will be subject to a lien or equitable charge in favour of the Claimants. The result would be, as with a legal mortgage, that the net proceeds of sale by WWF in due course would be paid to the Claimants, in partial discharge of their liability to repay the price.

217. The Defendant submitted, nevertheless, that because he was practically unable to repay the price within a reasonable time of the court ordering rescission, *restitutio in integrum* for both parties was impossible: although the house could be given back to him, he could not repay the purchase price, at least not for the considerable period during which the house would need first to be prepared for sale, then a sale negotiated and completed and such other assets realised as were necessary to make up the sum due to the Claimants.

218. The Defendant's argument about the impossibility of restitution started with reliance on the *dicta* of Lord Thankerton in *Spence's case*, but in my judgment those dicta do not support the argument that *restitutio in integrum* requires restitution to be made both by and in favour of the claimant as a condition of rescission. *Restitutio in integrum* is concerned with the claimant making effective counter restitution to the defendant. Thus, in the common case where the party seeking rescission is the purchaser of an asset, it is the purchaser's ability to return the asset that is in question, not the seller's ability to repay the price. Conversely, if it were the seller claiming restitution, recovery of the goods sold would be conditional on the seller being able to repay in full the price received from the defendant. But rescission is not barred because the defendant is unwilling or unable to comply.

219. In many cases, a claimant will elect not to pursue rescission if the defendant will be unable to comply. It is, perhaps, only in unusual circumstances that a claimant will give back possession and title to a valuable property in return for an order to pay back money. But whether to seek rescission or not is a matter for the claimant, not the court, to decide. As stated in Snell's *Equity* (34th ed.), at 15-014:

> "The concern of the bar [to rescission] is to protect the defendant from unjustified prejudice; that circumstances have changed such that it is no longer possible fully to restore the claimant will not preclude rescission. In making their election, it is for the claimant to decide whether they are content to get back less than they gave."

The claimant will be required to offer counter-restitution as the price of the order that it seeks, if rescission is granted. If restitution cannot immediately be made by the defendant, the claimant may be offered protection in the form of a lien (whether a common law lien or an equitable lien) for outstanding monies.

220. The nature of the condition of counter restitution, or *restitutio in integrum*, was indeed explained in *Spence's case*. Lord Thankerton cited Lord Cranworth in Western Bank of Scotland v Addie (1867) L.R. 1 Sc. & Div. 145, where he said, at pp. 164-5:

> "Relief under the first head, which is what in Scotland is designated *restitutio in integrum*, can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. Indeed, this is necessarily to be inferred from the very expression, *restitutio in integrum*; and the same doctrine is well understood and constantly acted on in England."

Lord Thankerton then added:

> "…it is to be noted that the condition of the relief is the restoration of the defender to his pre-contract position, and that no stress is placed on whether the pursuer is so restored."

221. *Restitutio in integrum* is, in modern parlance, counter restitution: see per Millett LJ in Dunbar Bank plc v Nadeem [1998] EWCA Civ 1027 at [84]:

> "The remedy of rescission is an equitable remedy. It is well established that it is a condition of relief that the party obtaining rescission should make *restitutio in integrum* or, in modern terminology, counter restitution to the other party. If counter restitution cannot be made the claim to rescission fails: see *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218. I reject Mr Price's submission that, had the cross-appeal not succeeded, Mrs Nadeem would have had an unqualified, unconditional right to rescission. She never had any such right. Her right to rescission was conditional on her making a counter restitution."

222. The same points were made by Popplewell LJ in School Facility Management Ltd v Governing Body of Christ The King College [2021] EWCA Civ 1053, a case concerned with a restitutionary remedy for benefits conferred under a void contract, at [25]:

> "It was common ground that there is a principle by which in certain circumstances a party seeking a restitutionary remedy for unjust enrichment must give credit for benefits received from the other party. This is now commonly referred to as a principle of counter restitution, reflecting the concept previously referred to in the authorities as *restitutio in integrum*."

Popplewell LJ set out the historical background to that concept and said, at [39]:

> "Historically, restitution at common law was conditional on the claimant giving precise counter restitution in specie of the benefits received by him pursuant to the transaction. If such restitutio in integrum were impossible, it was treated as a complete defence to a claim for rescission and restitution of benefits conferred. Equity took a different approach by permitting a valuation of the exchange benefits to be taken into account. The development of the law involved an assimilation of the common law with equity in treating valuation of benefits as a method for ensuring that counter restitution could be given effect to, to such an extent that Lord Burrows, then Professor Burrows, suggested in the 3rd edition of his book *The Law of Restitution* (2010) at p.250 that it is now a nonsense to talk of counter restitution being impossible because it is always possible to value in money terms the benefit received by the claimant."

223. It is therefore the impossibility of counter restitution to the defendant that amounts to a defence to rescission, not difficulty for the claimant in recovering the benefits conferred on the defendant. It should be remembered that, in the nature of contested litigation, many defendants will not assist the court to restore claimants to their previous position, and claimants may have to enforce orders for repayment or restoration of assets. In a case where it is truly impossible for a claimant to recover its property, for example if indefeasible third party rights over the asset have intervened, or if the asset has been destroyed, the claimant might of necessity be left to enforce a judgment for the monetary value of the asset, rather than obtaining an order for delivery up; but that is not this case. The claim is for repayment of a sum of money as an equitable obligation arising from the rescission. It is not, in my judgment, a defence to rescission of the contract for the Defendant to say that he is unable to repay the purchase price in full, or unable to pay before he has been able to market and sell the house and liquidate other assets.

224. In order to ensure that counter restitution is given by the Claimants, the Court must assess the countervailing benefit to them of the contract, while it had effect. The kind of valuation identified by Popplewell LJ will be necessary to ensure that the Claimants are not unjustly enriched and, correspondingly, that the Defendant is given effective counter restitution. That will involve, among other things, the Claimants giving credit for the use value of the house during the period from May 2019 to date.

225. The further aspects of the Defendant's argument that *restitutio in integrum* is impossible relate to the change in the condition of the house since 2019. He argues that he cannot have the house in its then condition restored to him, for essentially two reasons. First, the Claimants carried out voluntary changes to the interior of the house, in addition to the VGB works of removal of the infested insulation, which mean that the house is not the same house that it was, indeed it is "fundamentally different", the Defendant says. Second, owing to alleged neglect of maintenance, the house is in poorer repair and

condition than it was, "substantially degraded", including some rising and penetrating damp at lower levels.

226. I refused to allow the Defendant to rely on the more serious of these disrepair matters, as free-standing arguments why counter restitution could not be effected, because they had not been pleaded. No detailed evidence had therefore been directed to them. Apart from those matters, I find that the Claimants had in mind some changes to the fit out and décor of the house from an early stage, no later than around August 2019. They retained Studio Indigo, a well-known, top end interior designer, and ACT to carry out the works. The changes included replacing some carpets in bedrooms on the first floor with wooden flooring; introducing two items of new fitted furniture in the cloakroom and library on the ground floor; and some new wall coverings and joinery on the first floor. The contract value of these alterations was in the region of £121,000 exclusive of VAT. The contract was entered into before the Claimants knew the extent of the works that would be required to be done by VGB. Contemporaneous documents show that ACT were unaware of the problem with the infestation of the insulation when they started work at the house. The condition of the house generally is now a little dated (in terms of the tastes of super prime level of the market for large, luxury houses) and tired, with some elements of wear and tear.

227. I have no difficulty in rejecting the arguments that either the voluntary works or the deterioration in the pristine condition of the house over 6 years mean that counter restitution is impossible. I am somewhat surprised that the argument was pursued in closing submissions, given that the valuation experts ultimately agreed that the capital value and rental value of the house are unchanged over the period since the completion of the sale, and have at all times been £32,500,000 and £21,000 per week respectively. It was not agreed that the current value is lower than it would otherwise be on this account.

228. So far as the changes in fit out and décor are concerned, there was no evidence that these reduced the value of the house (the wooden floors are likely if anything to have increased its appeal). The valuers were agreed that any incoming purchaser would be likely in any event to refurbish the interiors according to their own tastes, and modernise the fit out, so the exact style of the fit out is irrelevant. It is also material that there is no question of the Woodward-Fishers resuming occupation of the house. They cannot afford to do so and they live in Chelsea: the house will have to be sold to enable WWF to repay the Claimants' purchase price. The fact that the décor may not be to their tastes is therefore irrelevant.

229. Disrepair, if going beyond fair wear and tear, might require an adjustment on account of additional expense that WWF would be put to, but there is no evidence that significant expenditure beyond routine maintenance is required in relation to the matters that are pleaded. If it were the case that changes in the condition of the property adversely affect its value, that would be a matter for a financial adjustment and is in no sense a bar to giving counter restitution.

230. Accordingly, the steps required to effect rescission should be ordered unless, based on the evidence, practical justice cannot be done by the terms of the order and any financial adjustments that are appropriate.

231. As stated above, the inevitable result of an order for rescission will be that WWF will decide what further works are realistically necessary to allay any reasonable concern

about moth infestations and carry them out, possibly with other works at the same time calculated to improve the marketability and value of the house. Following that, the house will be put on the market and sold. The Claimants will have the benefit of an obligation on WWF to repay the purchase price and interest, less the appropriate allowance for the benefits that the contract conferred. Their rights in this regard will be protected by a lien over the house. The net proceeds of sale of the house will very likely discharge the majority of the sum payable.

232. There is no reason to think that, if appropriate works are done, documented and audited by professionals, there will be any significant, lasting impact on the value of the house, though a sale at full value may take longer than usual to achieve. WWF will have to liquidate other assets to pay any balance outstanding, and the damages for which judgment will be entered.

233. The Defendant nevertheless submitted that granting rescission on this basis was unprecedented, wrong in principle, and practically unjust to him. This was a submission that developed from my challenge, during the Claimants' closing submissions, to the practicality of the order for rescission that they sought. In the course of that, Mr McGhee explained that there was no proposal for a re-sale of the house to WWF but he would have title and possession returned to him directly, subject to a lien for the money owed.

234. Mr Seitler argued that it was impossible by order to place the parties in positions sufficiently equivalent to their original positions that no injustice is suffered, and so practical justice cannot be done in effecting counter restitution. Since the whole purpose of the order is to unwind the transaction and restore the previous position, there cannot be a scheme that creates a different relationship, he argued. The purpose of rescission was defeated because the Claimants cannot get their money back straightaway. A lien was only appropriate to secure the return of a property asset, not the return of the purchase price, and there was no case in which a lien had been imposed on the grant of rescission to secure repayment of the price.

235. Mr Seitler submitted that a different relationship would be created because instead of WWF having a free asset with significant equity, which he could realise over time, there was a relationship in which WWF was a debtor subject to exigencies of enforcement and uncertainty as a result, and he would have no equity in the house. Mr Seitler also raised uncertainty about when the Claimants would move out of the house; how much of the debt WWF should pay immediately; what the duty of WWF was to do work to the house, or to sell it, and at what price; what the terms of the lien were; what happened if no buyer came forward; and what constraint if any there was on the Claimants seeking to enforce the money judgment in the meantime. All these uncertainties were said to place the court in "dangerous territory" on which it should not trespass.

236. Well though these points were made forensically by Mr Seitler, they do not in my judgment add up to a sustainable argument that practical justice cannot be done by an order for rescission. The principal flaw in his approach was to disregard the fact that the counterpart of the requirement to return the house to WWF will be that he is bound to repay the purchase price. WWF cannot therefore be put back into the same position that he was and continue to enjoy the benefit of the price paid. The loss of equity in the house and the lien are consequences of the liability to make repayment, not a failure of counter restitution.

237. Mr Seitler was wrong in any event to suggest that a lien had never been recognised in favour of a rescinding purchaser. In Imperial Ottoman Bank v Trustees, Executors and Securities Investment Corp [1895] WN 23 ("*Imperial Ottoman Bank*"), the plaintiff bank sought to rescind its purchase from the defendant of debentures in a company. The main issue was whether by defending other proceedings brought by other debenture holders the bank had affirmed its title to the debentures or affected their value. Romer J held that there was no affirmation: since the bank had a lien over the debentures pending an order for rescission and repayment of the price, and was not bound to hand them over, it was entitled to act to preserve their value. This is therefore a case in which the court has recognised the existence of a common law lien to protect a rescinding purchaser's rights, even before exercise of them. Such a lien was also contemplated by Rigby LJ in *Lagunas Nitrate* at p.461, though in the event, by a majority, rescission was not ordered in that case.

238. It is true, therefore, that there appears to be no case in which a court has ordered restitution subject to an equitable lien. But I am unable to see why, if (on the basis of *Imperial Ottoman Bank*) the Claimants could assert a common law lien and retain possession of the house until full repayment of the price, it is inequitable to allow the immediate return of the house subject to an equitable lien for repayment. To reverse the familiar equitable maxim, the Claimants are thereby doing equity to WWF, giving him a better opportunity to repay the price without suffering financial ruin, and so may come to equity and seek rescission on those terms.

239. That is a practically just means of granting restitution and effecting counter restitution in this case. Counter restitution subject to an equitable lien is also just in this case because it should be the Defendant rather than the Claimants on whom lies the risk of deciding what further works need to be done to the house, to deal with any residual moth problem, and thereby remove any stigma or blight. Instead of the Court having to decide what works are appropriate and assess their cost, or alternatively determine the diminution in value if the house is sold without the works being first done – in which case the risk of error falls on the Claimants – the Defendant will assess what works are appropriate to seek to maximise the net proceeds of sale of the house.

240. The Defendant will be subject to an order to repay the purchase price, which in principle the Claimants could take steps to enforce in the same way as with an equitable charge. However, since the Claimants accept that it is practically just that the house be returned to the Defendant first, so that he can sell it to fund repayment, the Court would be unlikely to allow enforcement of that obligation by other means, save, perhaps, to the extent that it is proved that the sum due clearly exceeds the likely net proceeds of sale of the house (I should not be taken as deciding that question). The net proceeds of sale and other assets held by WWF, or that may be available to him, will on any view (as the Claimants acknowledged) be sufficient to fund the repayment and still leave him with substantial assets, by ordinary standards. In this context, a reasonable time to raise the necessary funds to discharge the liability will be a significant time, owing to the need to carry out works and sell the house, but the Claimants will be protected against delay by an award of interest. The liability to pay damages is a separate matter, of course: that will be enforceable as a judgment debt.

241. In these circumstances, I am unable to accept that the order sought by the Claimants will be unjust or inappropriate. It gives the Defendant a clear path, and the necessary time, to

restore the purchase money to the Claimants, or so much of it as is properly payable after adjustment for the benefits of the contract enjoyed by the Claimants.

Adjustments to the purchase price and interest

242. As for the adjustments that are needed, the principal one is an allowance for the value of the property that the Claimants have enjoyed pursuant to the contract, from 2 May 2019 to date. It is the benefit conferred by the contract that has to be valued, which is ownership and the ability to use the house during that time. The expert valuers agree that the value of that benefit has been £21,000 per week (£1,092,000 per year) during the entire period of the Claimants' occupation of the house.

243. Although the infestation of the house meant that the enjoyment of it was adversely impacted, particularly during the period when the VGB works were carried out, that should be compensated by damages for loss of enjoyment, as claimed by the Claimants, and not as an adjustment of the sum otherwise to be deducted from the purchase price for the countervailing benefits of the contract. Accordingly, from £32,500,000 repayable by WWF there will be deducted a sum calculated at the rate of £1,092,000 per year for the entirety of the period from 2 May 2019 until the order of the court giving effect to this judgment.

244. In the absence of evidence that works carried out by the Claimants to the house or their mode of use of it have impacted adversely its value in the hands of the Defendant, no further adjustment is appropriate, save for interest. The Claimants seek interest from 2 May 2019.

245. In principle, interest is payable as a necessary part of the process of putting the parties back into their previous positions: In re Metropolitan Coal Consumers' Association, Karberg's case [1892] 3 Ch 1 at p. 17. The interest will be payable on the net restitution sum (calculated in accordance with para 242 above).

246. The Claimants seek compound interest on the basis of dicta in President of India v La Pintada Compania Navigacion S.A. [1985] A.C. 104 at 116, per Lord Brandon of Oakbrook, and Westdeutsche Landesbank Girozentrale v Islington L.B.C. [1996] AC 669 at 701-702, per Lord Browne-Wilkinson to the effect that compound interest may be appropriate in claims against a fiduciary or for fraud or breach of trust. Lord Brandon referred to the case of money being obtained and retained by fraud.

247. I do not consider that this is a case where compound interest is justified. Although, as I have found, there were fraudulent misrepresentations that induced the Claimants to buy the house, they were not defrauded of £32,500,000. As it has turned out, they were induced to part with £32,500,000 in return for use of a house that may have been worth less than that, in view of its concealed condition, and they lived in the house before electing to return the house and recover their money. That is not the sort of case in which there should automatically be a liability to account for lost interest on interest. Nor was there any evidence that BILI would have used the money in such a way as to generate compounded returns. Indeed, the inherent likelihood is that BILI would have laid out the money on behalf of the Claimants on another house. Simple interest is appropriate.

248. As to the rate, this is not a case in which the Claimants are to be compensated for not having been paid money when they should have been paid it, i.e. for having been kept

out of their money. Interest is payable in order to enable the Claimants to be put back into an equivalent position today to the position that they were in in May 2019. A larger sum of money is needed today, in view of inflation in the intervening years, to restore the Claimants' position. I do not regard investments growth rates over the period as a suitable proxy. I would incline to use aggregate RPI increase over the period, which can be calculated from published official statistics from May 2019 until the date of the final order giving effect to this judgment. But I will allow the parties to make representations at the consequentials hearing about the appropriate basis of indexation.

Issue (7): What damages are recoverable if rescission is granted?

249. The Claimants seek the following damages for the tort of deceit in addition to repayment of the purchase monies and interest on them:

    i) The stamp duty land tax assessed on the purchase of the house: £3,715,728

    ii) Legal costs of the purchase: £37,723.85

    iii) Cost of works carried out by VGB in 2020: £272,248

    iv) Further costs of various kinds associated with the VGB works: £73,957.40

    v) Cost of parts of the ACT works: £42,956.39

    vi) Removal costs: £4,343.33

    vii) Cost of pest control treatments: £18,653.44

    viii) Estimated value of damages clothes: £50,000.

    ix) Compensation for distress, inconvenience and loss of use and enjoyment of the house: a percentage reduction in the rental value of the house, at differential rates, over the entire period of occupation by the Claimants.

250. For claims in deceit, a claimant is entitled to recover for all such damage as flows directly from the transaction, including consequential losses, without any limit on the basis of foreseeability of loss. However, the loss must be causally connected with the deceit.

251. Dr Hunyak was very clear that the Claimants had been looking for an ideal house that they could move into directly, without the need to expend time and effort making substantial improvements or carrying out works of repair. They had been looking for the right property for years. He said that if there had been no misrepresentation, and the enquiries were not answered fully, a red flag would have been called on the proposed purchase, and in those circumstances they would not have proceeded without an answer to the enquiries. I accept that evidence, as it is inherently likely that Farrer & Co would have advised BILI that they should nor proceed without obtaining proper replies to those enquiries, and BILI would (as Mr Ershikov stated) have repeated that advice to Dr Hunyak. As a fastidious purchaser, this would in my judgment have deterred him from proceeding further. It would self-evidently have been suspicious if, despite a further request, WWF had not answered.

252. Although it is not the relevant test, I am satisfied that the Claimants would not have bought the house if the May and June Environ reports had been provided to them. These revealed a potentially serious problem with infestation, and any limited pre-contract investigation would have shown it to be very serious. Although the Claimants were willing to engage in limited, mainly cosmetic improvements on buying the house, including replacing thick carpets with wooden floors and installing some new fitted furniture, they would not have been willing to take on the project of works that VGB did, as this was exactly the kind of protracted and messy works that they wanted to avoid.

253. The stamp duty land tax, removal costs and legal costs clearly flowed directly from a transaction that would not otherwise have been entered into. Although the Claimants might well have incurred all such costs on a different purchase, had they not bought the house, that is not necessarily the case. In any event, the Claimants were intent on buying a suitable house in London and they will have to incur a further set of stamp duty land tax, legal costs and removal costs hereafter in order to acquire one. In those circumstances, with the exception of the costs claimed for cleaning and checking out of the rental property, which would have been incurred in any event at some stage and will not be incurred again, I am satisfied that these costs were sufficiently caused by the deceit and are recoverable.

254. The next group of costs is those relating to the works carried out in the house in 2020. The ACT works were, for the most part, unconnected with the moth infestation. They were attributable to the Claimants' desire to make some changes to the appearance of the house, to suit their personal preferences and tastes. Although these costs would not have been incurred but for the purchase of the house, they were not caused in law by the misrepresentations, and the Claimants do not seek to claim them. The Claimants do assert, however, that some of the work done by ACT was causally connected with the moth infestation, either because things to counteract the moths were being installed or changes were being made for that reason, or because ACT replaced fitted furniture that was damaged in the course of removal to facilitate the VGB works.

255. In re-examination, Dr Hunyak clarified, by reference to ACT's amended quotation, that the amounts claimed as damages were the installation of a new cupboard in the ground floor cloakroom and works to install wooden floors in the bedrooms and dressing rooms on the first floor, and consequential redecoration. As previously explained, I am not persuaded that the removal of carpets in the bedrooms and installation of wooden flooring was a response to the perceived moths problem. As for the new cloakroom furniture, Dr Hunyak tried to explain why the wardrobe was of a moth-proof design, but it was clear from the documents put to him in cross-examination that Ms Patarkatsishvili in fact required certain features of the cupboard – which Dr Hunyak had said were anti-moth measures – to be removed. In the light of this, I cannot accept that the cost of an additional wardrobe was caused by the purchase of a house with a moth infestation. I therefore reject the ACT works elements of the damages claimed.

256. As for the VGB costs claimed, these amount to £272,248 and were charged in 5 invoices dated from April to November 2020. The only challenge to the quantum of these invoices raised by the Defendant was that the works done by VGB included some work to the external balcony, which it was suggested was not part of the works to remove insulation. However, when challenged with this, Dr Hunyak explained that it was in fact the case that the detailing of the balcony and the wall included some insulation that was removed. There was no reason identified why VGB, having been retained to remove infested

insulation, were dealing with some discrete matter relating to the balcony, and the invoices do not differentiate any such separate works. Accordingly, I reject the challenge to the VGB invoiced amounts and accept these in full as damages that must be paid by WWF.

257. There are then the further costs said to be associated with the VGB works, principally £40,600 which is said to be the cost of new walk-in wardrobes in Dr Hunyak's dressing room, set out in a quotation from Neatsmith dated September 2020, and £26,347.40 for electrical works carried out by VP Electrical during the months that VGB were working at the house.

258. The wardrobe cost was disputed by the Defendant on the basis that these were changes being made to suit Dr Hunyak's personal tastes, not works necessitated by the VGB works or otherwise caused by the moths problem. I accept Dr Hunyak's evidence that the previously installed walk-in wardrobe was damaged during the course of VGB's dismantling of the internal walls and ceilings and could not be reinstated. It was suggested to him that the fact that (at least most of) the wardrobe units were open fronted showed that there was no perception of problems with moths, but I do not accept that. First, Dr Hunyak said, and I have no reason to disbelieve, that there were glass-fronted parts to the wardrobe, for keeping woollen and cashmere clothing, that could not be seen in the photographs. Second, even if that were not the case, if the replacement wardrobe was being ordered at the time when the extensive works to remove the perceived cause of the moths problem were reaching completion, it is understandable that new furniture was not designed to guarantee complete protection against moths. I find that the cost of the new wardrobe units was sufficiently caused by the infestation and the misrepresentations because the existing units were damaged in the course of removal of walls and ceilings and needed to be replaced.

259. As for the electrical works, the Defendant disputes these on the basis that it is not explained how the lighting was affected. The two main invoices, which were only found and added to the bundle at a late stage, are dated 16 July 2020 (for work done from 2 June 2020 to 4 July 2020) and 20 July 2020 (for work done from 6 July 2020 to 19 July 2020). The work description is "working on lighting issues, testing circuits, adding light fittings". It seems to me to be inherently likely, in view of photographs of the works that were in evidence, that significant work needed to be done to replace and reconnect the lighting in all the suspended ceilings where work was undertaken. The majority of these charges are for labour, with about 20% being for materials. I am satisfied that these expenses were incurred by BILI on behalf of the Claimants in connection with the VGB works. There are two invoices for lesser sums date May and June 2020, for supplying Lutron dimming modules to replace faulty ones, and to supply a new processor and power supply. It is not clear to me that the faulty modules were caused by the VGB works and I therefore disallow these items. The total damages in respect of the VP Electrical invoices is therefore £21,555.05.

260. The other minor items are waste removal at £6,014 and £996 for wallpaper. There are two different sets of waste removal invoices, neither of which specify what is being removed. The first set is from Recycling Squad (ZRV UK) Ltd from 20 April 2020 to 2 May 2020, and the second set from JP Rubbish Removal from 8 May 2020 to 27 July 2020. While it is possible that the first set may relate to some of the ACT works, this is very unlikely for the second set, given the dates of the invoices and the quantity of material removed. On balance, I consider that both sets of invoices are likely to be in

respect of the works addressing the moth infestation rather than the voluntary works of improvement. The wallpaper invoice was paid on 26 February 2020 and is therefore likely to be in relation to voluntary improvements. I disallow this invoice.

261. The next element of the claim is the cost of pest control measures, such as moth traps, pheromone pads, moth spray, fly papers, moth bombs, storage bags and freezers, as well as payments made to pest control companies for treatments at the house. Various objections to some of these items were raised by the Defendant, including that they were not properly before the court (though I indicated that, unless WWF could establish prejudice, I would permit the Claimants to amend to rely on the latest schedule of expenditure), and that traps were bought by the Claimants in an attempt to prove their claim rather than to eradicate moths. Some of the purchases were said to be (and are on some invoices described as) flea bombs, not in terms moth bombs; however, the invoices relate to a product containing Permethrin, which is described thus on the container: "kills all biting, flying and crawling insects". It seems to me likely that these products are indeed the "smoke bombs" that Dr Hunyak referred to as being regular treatments carried out by them on up to 5 occasions each year since 2021.

262. I consider that the claim for all these items is sufficiently proved as being expenditure in relation to the problem of infestation of moths in the house and I will allow this item of claim in full.

263. The amount claimed for damaged clothes was originally pleaded as £7,500 but increased to £50,000 in July 2024 amendments. In his first witness statement dated October 2023, Dr Hunyak said that, at a rough estimate, he considered that about £30,000 of clothes had been damaged; in his second witness statement, dated June 2024, he said that on more careful consideration, the true figure was likely to be £50,000. There were, as Mr Seitler frequently reminded me, only photographs of 4 items of clothing damaged by moths. Given that the claim was notified in May 2021, it is surprising that the Claimants have not taken photographs to support certain aspects of their claim, including the alleged losses of clothing. While I accept that some losses will have occurred that are attributable to the serious infestation that existed prior to September 2020, damage after that time is likely to be reduced, on account of the reduction of moths and the precautions that the Claimants were taking. There is insufficient evidence to justify an award of £50,000 and I will allow £15,000 only for this head of damages, which is double the amount that the Claimants originally stated that they had lost. More loss than that in respect of damaged clothing has not been proved.

264. The final element of the claim for damages is loss of enjoyment of the property. The Claimants have to account to WWF for the benefit of the right to use the house from May 2019, to make effective counter restitution, but the value of the house was reduced on account of the moth problems. It is not disputed by the Defendant that the appropriate method of quantifying such loss is to take a proportion of the rental value of the house over the period when enjoyment was adversely affected. What is disputed is the Claimants' claim for 50% for the period May 2019 to September 2020 and 25% for the entire period after September 2020. This aspect of the damages claim requires me to make findings about the extent of the moth problem in the house, before and after the VGB works.

265. For the period from April 2020 to July 2020 (inclusive) I am satisfied that there should be damages reflecting 100% of the rental value. That is because the infestation was so

serious and the works required to deal with it were so extensive and unpleasant that it was practically impossible for anyone to live in or make other beneficial use of the house while the works were being done. The Claimants and their family had in fact moved out at the end of February 2020, possibly because the ACT works started at that time or because it was known that extensive works to treat the moth problems would follow. VGB carried out a preliminary exploration in March 2020, but the main project did not start until the end of March 2020. This is evidenced by the final VGB invoice, which specifies the period of the works as April to July 2020 (120 days), and is consistent with the dates of collections shown on the waste removal invoices. Although the Claimants probably could have returned to the house in August 2020, they did not do so because they were holidaying in the South of France.

266. For the period from May 2019 to March 2020 (inclusive), I consider that there should be damages for loss of enjoyment equivalent to 25% of the rental value. There clearly was a significant presence of moths from the date of purchase: the Claimants noticed it within days and engaged a pest control company within 8 days of moving in. They approached WWF in June 2019 for information about moth control measures. Dr Hunyak's description of the conditions and his daily routine of killing moths from September 2019 is, I find, not significantly exaggerated. Moths would fly around at night, especially in low or UV lighting conditions, and sometimes fly into their faces; clothes had to be kept packed away; moths were found in glasses and elsewhere; and some clothes were ruined and had to be thrown away. Given the extent of the infestation later seen, during the VGB works, this evidence is credible. Even though most of the moth infestation was concealed in the wall and ceiling voids, a substantial number of the millions of moths likely to have hatched in the insulation came out into the space in the house, particularly at night. Dr Hunyak described it as a constant battle to kill and control moths, which put the Claimants to considerable inconvenience and would have caused them frustration and stress. I am satisfied that their enjoyment of their property was substantially affected by this. I am also satisfied that the market rent for a house known to have a significant problem with moths would have to be reduced to that extent in order to induce a tenant to take it.

267. The Claimants accept that the conditions in the house were significantly improved following the VGB works. The object of the VGB works was to remove all infested insulation. This included all the Thermafleece. What was believed to be Soundblocker and appeared uncontaminated was left in place. For a few weeks, Dr Hunyak said, they thought that the problem was solved. They attributed the presence of a few moths to a residual symptom only of the huge infestation that had been removed. Then they started to notice moths in parts of the house where the works had been carried out, including rooms that were entirely surrounded by walls that had been stripped, such as the master suite bathroom, the cinema and the wine room. Then moths started to appear in the old parts of the house.

268. I find that the presence of *Tineola bisselliella* in the house has reduced significantly since the start of 2021, although there are times (as evidenced by the Combat reports in 2021) when there is more than a "normal" number of moths present and visible (to a trained eye, at least). Since that time, the Claimants have carried out regular smoke bomb treatments (though no professional chemical spraying) and they maintain more than 400 pheromone traps around the house to catch moths. Photographs show that some of these traps are filled with dead moths. It was not established over what period of time the moths

in any given trap accumulated, though Dr Hunyak said that he changed the traps every 3 months. He said that, following the VGB works, they still find moths on towels or on toothbrushes, and he considers that he personally kills between 10 and 35 moths each day, and his family and cleaners do the same. Dr Whittington confirmed that this number of moths is well in excess of any "normal" number for London houses, which may be a few visible moths per month.

269. In his second witness statement, Dr Hunyak said that his family continue to be careful storing clothes; occasionally, a moth is found in a glass of wine; and damage to clothes occurs relatively frequently. This evidence seemed to me to be a significant downgrading of the impact previously described. This statement did not say that he still kills between 10 and 35 moths a day. The purchases of anti-moth products have continued over the period from 2020 to 2024, though the Claimants now appear to buy on fewer occasions but in larger quantities.

270. The Defendant contends that Dr Hunyak's evidence that the problems with moths continue unabated is grossly exaggerated, and unproven. There are no photographs, for example, of moths in wine glasses, or more recent photographs of damaged clothing. It is true that evidence to back up what Dr Hunyak says is lacking: no family or friends have given evidence and there are no photographs. It would be difficult to obtain a photograph of a flying moth, but a moth in a wine glass could easily have been captured, as could a moth on a toothbrush or on a bathroom mirror.

271. I consider that, as a result of the experience of serious infestation in 2019 and seeing the extent of the infestation in 2020, combined with the knowledge from September 2020 that WWF was aware of the infestation before he sold the house, Dr Hunyak has become sensitised to the presence of moths. He does therefore tend to overstate the extent and significance of the continuing problem. I do not accept that between 10 and 35 moths are killed by Dr Hunyak each day on a continuing basis. I also accept (as did Dr Whittington) that many house owners in London experience problems to a moderate extent with moths causing damage to clothing at certain times of the year, and that it would be abnormal to have a totally clothes moth-free environment in an old house. I have therefore considered carefully whether the evidence taken as a whole is sufficient to prove that there is a continuing problem with moths that needs addressing, and if so, how.

272. There is, in my judgment, sufficient cogent evidence of a continuing problem at the house with a greater than average number of moths, which requires regular treatment to keep it under control. Dr Hunyak is not inventing the problem, even if his account may be exaggerated; the pheromone moth traps are good evidence of a substantial number of (male) moths being caught on a continuing basis, throughout the house. The numbers caught are coming from somewhere – these moths do not simply fly in from outside, as Dr Whittington confirmed. I accept Dr Hunyak's evidence that the Claimants carry out several smoke bomb treatments each year in order to keep down the numbers of moths. I reject the suggestion that Dr Hunyak carried out smoke bomb treatments and purchased large numbers of traps to try to lend colour to his claim.

273. Although Dr Whittington was largely dependent on the facts as presented to him by Dr Hunyak, he was able to observe for himself whether those facts were credible, and he gave evidence of occasions on which he saw what he identified as clothes moths in the house. So did Mr Daly, on one of his visits; and on another visit, shortly before trial, he saw a trap with 10 or 11 dead moths behind a fireplace. Given that (as Dr Whittington

explained) clothes moths are not readily seen during daylight hours, the fact of sightings of live moths is not insignificant. The Combat reports from November 2020 to February 2022 support the conclusion that there was a continuing problem, and Dr Whittington's opinion largely supports the Claimants' case that there is evidence of a continuing problem.

274. It is quite likely that, as a result of the VGB works, moths or moth larvae were displaced and not fully removed from the house. Significantly, there was no thorough spraying carried out by a pest control company following the VGB works, which Combat advised in order to stand a better chance of eradicating the presence of moth larvae. As a result, to a limited extent, it is likely that active moths will have transferred to other areas of the house, in search of other food sources, upon their principal source of nourishment having been removed. This may explain the continuing impact on clothing. As Dr Whittington explained, a gravid moth will be extremely assiduous to find a food source on which to lay her eggs. Given the extent of the infestation of the insulation that was removed, it is also likely that some eggs or larvae were dropped or transferred during the removal process, and precautions to prevent this that a professional pest control company would have taken were not taken by VGB.

275. It is impossible to rule out the following possibilities. First, that some small wisps of Thermafleece remained hidden in the house, following completion of the works, and that these have continued, for a significant time, to sustain a much smaller colony of moths. Second, that Thermafleece was installed in unexpected areas and was not found by the investigations that VGB carried out. Third, that some Soundblocker that was left in the house by VGB had been colonised, or has since been colonised. There can be no clear answer without further exploratory works, which have not yet been done. However, it is probable that the continuing issue with the presence of moths is attributable in some way to the residue of the original infestation, not a new cause. Dr Whittington said that on his 22 August 2022 visit, he saw frass in a piece of Soundblocker, and that the likely explanation for the still increased level of moths was insulation, not a pile of clothing. He considered that some moths could have transferred to the Soundblocker that was left in place.

276. The Defendant suggested that Dr Hunyak accepted that all woollen insulation was removed, whether Thermafleece or Soundblocker, and that the problem must therefore have gone away. I disagree with that. Taking his evidence as a whole, Dr Hunyak said that VGB left Soundblocker in place if it appeared to be clean (i.e. not infested). He said that all the Thermafleece was in fact infested, so all Thermafleece was removed. The hearsay notice dated 31 July 2024, putting in a statement on behalf of VGB Construction Ltd, supports that understanding. So, properly understood in context, do paragraphs 8-13 of the letter from the Claimants' solicitors dated 11 January 2024, which describe a process of sampling and removal of infested Thermafleece. I find that VGB were instructed to and did remove all infested or apparently infested internal insulation in the house, whether in the new part of the house or the old part. Such evidence as there is suggests that they did a thorough job when they opened up fully the walls and ceilings. But they left Soundblocker that they found that appeared to be clean. Further, they only removed walls and ceilings if the exploratory holes that they opened up showed evidence of infested insulation. They did not have any plans of the location of insulation to work with.

277. In short, I accept that the problem has not entirely gone away; that moth activity persists at a higher level than would be accepted as normal in a London house, even after the treatments that the Claimants continue to apply; and that all this has had a continuing impact on enjoyment of the house, though not as seriously as Dr Hunyak describes. I do not, however, consider that damages at a level of more than 7.5% of the rental value are appropriate for the period from August 2020 to date, on average. 10% across the whole period would in my judgment be excessive; and 5% - though probably right for current conditions – would be too low for the times when the manifestation of the residual problem was worse, between late 2020 and 2022, and for the days each year when the Claimants were required to stay away from the house following treatments.

278. On the basis that I have indicated, I will therefore award the Claimants these damages in addition to the remedy of rescission with financial adjustments.

Issue (8): What damages would be recoverable if rescission were refused?

279. Given that rescission will be ordered, the Claimants will not suffer further loss in the form of diminution in the value of the house. The house will be returned to WWF, who must decide what work to do to deal with the continuing moth problem. As I have heard, at some length, evidence relating to the scheme of works that would be appropriate to deal with the problem, I shall make findings on the amount of damages that would have been appropriate if rescission had been refused however, in case it becomes material at any later time.

280. It was ultimately agreed that the right measure of additional damages is the difference between the price paid for the house and its value in its current condition, and further that the right starting point in assessing this is the cost of works that are appropriate to remedy the moth problem. The parties agree that the value of the house in its deficient condition is the price paid less the sum of (a) the cost of the appropriate works and (b) an additional amount, presumably for the time and inconvenience to the owner of having to carry out the work, and any residual element of risk. The additional amount was agreed by the valuers, but is variable, depending on what scheme of works is determined to be the appropriate scheme. On Mr Daly's scheme, £1.35 million is added; on Mr Sullivan's scheme, 25% is added to the cost.

281. There was a very marked difference between the parties as to the appropriate works to deal with residual moth problem. At the furthest extreme was the Defendant's case that the problem has been solved by the VGB works, and that no further works are required, except perhaps a chemical spraying of the whole house; but I have rejected the assertion that there is no further problem beyond a "normal" London level of clothes moths in a period property.

282. At the other extreme was a specification for works prepared by Mr David Daly FRICS, who is an expert quantity surveyor. His instructions were to devise and cost a programme of works that would "eradicate" any continuing moth infestation in the house. He was not instructed to make assumptions about the location of either of the types of insulation, but rather to cost works that would eradicate any moth infestation. Mr Daly originally produced a valuation of £8,407,919 exclusive of VAT for his scope of works.

283. The Defendant's alternative case is that a limited scheme of works is all that is necessary to remove the natural insulation in the house. This was based on the assumption that the

location of Thermafleece and Soundblocker is correctly recorded on a set of drawings that were prepared by WWF during the course of the litigation. (Critically, these were not "as built" drawings recording the installation of insulation in 2012-13.) The specification for the works was to open up the walls and ceilings to check that Thermafleece had been removed from these locations. An alternative costing was prepared on the basis that all the Soundblocker insulation should also be removed. The cost of these schemes of works was priced by Mr Justin Sullivan FRICS, an expert quantity surveyor. Mr Sullivan's original cost of removal of Thermafleece and Soundblocker was £163,652.41 plus £2,500 for fumigation, all exclusive of VAT.

284. A difficulty faced by both experts was that VGB either made or provided no record of where they carried out their work of removal of Thermafleece, or where they located Soundblocker and left it in situ on the basis that there appeared to be no infestation of it. This difficulty does not, however, explain the huge difference between the schemes that each expert costed.

285. As for the drawings produced by WWF, there was no evidence about the basis on which these were prepared, and therefore nothing to support their reliability. It was unclear whether they were prepared by WWF, his builder or his architect, and what the marking up of the base drawings was taken from. Further, the evidence suggested that the drawings were inaccurate in some respects. Dr Whittington identified twice, from photographs, a sample of the other type of insulation from that which the drawings indicate was installed in particular locations (the floor beneath the attic in the old part of the house and the floor void beneath the main hallway). Dr Hunyak identified Thermafleece in ceilings above the hallway in the old part of the house where the drawings show Soundblocker. In another instance, the plans showed neither type of insulation above the cinema but Thermafleece was found there, according to Dr Hunyak No reliance can in my view be placed on the accuracy of these drawings.

286. In their experts' joint statement, each of the experts considered what adjustments to their own valuations should be made. They also addressed, on a "price only" basis, the scheme of works that the other had devised. As a result, Mr Sullivan's valuation of his scheme remained at £163,652.41 but Mr Daly's price of his scheme reduced to £7,446,039.54. Mr Sullivan's price for Mr Daly's scope of works was £2,648,914.76 and Mr Daly's price for Mr Sullivan's scheme was £175,421.62.

287. Mr Daly also addressed Mr Sullivan's scheme on a somewhat expended basis, which Mr Sullivan later accepted in evidence was appropriate in part, and the cost of these works was £308,745.08.

288. The experts further adjusted their valuations either at the outset or during the course of their evidence, in light of errors or further information that had come to light since the joint statement, or upon reconsideration of some points in response to cross-examination. Thus, Mr Sullivan prepared an updated assessment shortly before he gave evidence explaining the basis on which he now valued his scheme of works (for Thermafleece and Soundblocker removal) at £204,730.26 (exclusive), to include removal of the whole of the ceilings.

289. What became clear to me when evidence was given by each of the experts is that they have approached the design of the scope of works on different bases. Mr Sullivan confirmed that, on the basis of the WWF's drawings provided to him, he had devised a

scheme to remove Thermafleece and Soundblocker from its identified locations (assuming it was still present, or that some of it was present). When asked what he would do if the drawings proved to be wrong, he said that he would engage a building surveyor to do exploratory works – but this was not priced or mentioned in his report and valuation. It was something that he only addressed for the first time when giving his evidence in court. Mr Daly on the other hand had designed his scheme of works on the basis that there was no reliable information about the location (or former location) of Thermafleece and Soundblocker, that the VGB works had failed, and that the contractor would be required to tender on the basis that they had to guarantee the removal from the house of every remnant of those types of insulation. This would include any concealed insulation that had not been found by VGB, and any wisp of insulation that might have been left behind, for example by snagging on a protruding nail or the sharp edge of a furring or fitting in the wall or ceiling void. A contractor, he pointed out, would not be willing to give an undertaking about the efficacy of such works without having stripped everything back to the main structure and satisfied themselves that no piece of natural insulation remained.

290. Unsurprisingly, therefore, the prices for the different schemes of works were greatly different. That is because Mr Sullivan was only pricing for opening up enough of the walls and ceilings identified on the drawings to find out whether suspect insulation was present and then to pull out any such insulation, and reinstate; whereas Mr Daly was pricing for removal of all internal plasterboard throughout the house, on internal walls and on ceilings and any raised floors, and all fittings within the voids, in order to guarantee that in the spaces revealed no piece of Thermafleece or Soundblocker remained. Mr Daly did at one point use the word "guarantee" (day 7, p.13, line 3) and elsewhere he said that the contractor would have to ensure 100% removal of insulation and provide what he called "an undertaking" in that regard. He was therefore designing a scheme that was guaranteed to be 100% successful in relation to the removal of every piece of insulation, though not guaranteed to prevent any clothes moths being in the house for reasons unconnected with the insulation.

291. The reasons given by the Claimants for the appropriateness of Mr Daly's scheme were that the works had to "ensure" that no infested insulation remained in the house, and that in order to achieve that, the works had to address the following four possibilities as explanations of why a moths problem persisted after the VGB works:

    i) There could have been a lower level infestation of the Soundblocker that was missed by VGB;

    ii) Small pieces or remnants of Thermafleece may have been missed or left in place unwittingly by VGB;

    iii) Gravid female moths escaping VGB's works may have moved to Soundblocker at that time;

    iv) Walls or ceilings thought in 2020 to contain only Soundblocker might have had Thermafleece behind them too.

    There was no evidence in support of possibility (iv), which is no more than speculation; nor is there any evidence that any of the batches of Soundblocker supplied were defective, because insufficient borax was applied to them in the manufacturing process or for any

other reason. The manufacturer of Soundblocker is not the same as the manufacturer of Thermafleece, and there is no logical reason why a supply of Soundblocker would be defective because a supply of Thermafleece was (if indeed that was the reason for the infestation of it). Equally, as Dr Whittington explained, if Soundblocker had not become infested between 2013 and 2020, there was no reason why it would thereafter.

292. Possibilities (i), (iii) and (iv) would nevertheless be addressed relatively straightforwardly by locating all Soundblocker in the house and carefully removing it, and with it any Thermafleece that is thereby revealed. It is possibility (ii) that hugely increases the cost of the Claimants' scheme of works. That is because it is (accordingly to Mr Daly) necessary to remove every plasterboarded side of every wall and ceiling, and all architectural features and decorative plasterwork attached to them (such as architraves, skirtings and cornices), and all fitted furniture, in order to be able to audit the spaces with 100% assurance. The Claimants submit that the appropriate scheme of works is one which addresses all four potential sources of moths. They suggest that that answer to what works are appropriate is established by the evidence given by Dr Hunyak that he believes that the only solution to cure the problem is to knock down every wall in the property so that everywhere can be checked.

293. I do not accept that the answer to the question what works should be costed is determined or even evidenced by what Dr Hunyak says that he thinks needs to be done. He notably did not say (but could have said) that, if rescission were refused, the Claimants would set about doing Mr Daly's scheme of works. What he did say was that the Claimants do not feel that they should have to do this work. I find that, if rescission were refused, the Claimants would not do the works that Mr Daly proposes. There is no evidence that they would seek to eradicate the problem and stay in the house. On the contrary, in this claim they are seeking rescission and therefore must have decided to move out of the house, contingently on the court granting them their preferred remedy. Mr McGhee clarified that handing back the house would not be dependent on WWF making full repayment at the same time, so removal from the house would be expected to be soon after judgment.

294. It is clear too that the Claimants have fallen out of love with the house, as a result of the difficulties that they have experienced since 2019. That is understandable. Dr Hunyak said that he wished to give the house back because he regretted buying it. Since the Claimants' lawyers act on behalf of both Claimants, seeking rescission, I must assume that Ms Patarkatsishvili also wants to move out. In those circumstances, the Claimants would not undertake a long project and spend £7.44 million plus VAT in return for a guarantee that no trace of Thermafleece or Soundblocker remains in the house. They might do some lesser works, on advice, in order, to make the house more readily saleable on the market, or they might take their chances by marketing the house as it stands and leaving it to a purchaser to decide what works to do. The Claimants have very substantial resources and are not dependent on the sale of the house or achieving a particular price in order to rehouse themselves.

295. In principle, the appropriate works are those that an owner, or an intending purchaser, would carry out in their own interest and at their own expense, to put the property into a satisfactory condition. There is no absolute objective of ridding the house of every shred of insulation or every moth. As Dr Whittington accepted (and Mr Perry's evidence supports), many houses in London experience the presence of some clothes moths that can cause damage to clothing. The loss that should be compensated is the diminution in value of the house reflecting the cost of works that will put it into the condition that the

Claimants believed they were acquiring, not the cost of works that will put the house into a better condition with a degree of assurance for which they did not bargain.

296. Looked at in that way, or indeed as a matter of common sense, the scheme of works prepared by Mr Daly is manifestly excessive. No rational owner would proceed to spend £7.44 million plus VAT on a house valued at £32.5 million to be assured that no wisp of insulation exists in the house that could feed moth larvae. Nor would a purchaser who sought to deduct that cost be the successful bidder for the house. The amount of nearly £9 million inclusive of VAT is out of all proportion to the extent of the problem, and the works specified are on any view excessive, as they include the removal of both sides of the same partition wall, the jettisoning of all the timber studwork, structure and mechanical and electrical systems within the walls and ceiling voids, the jettisoning of all architectural features and fixed furniture (including two fitted kitchens), and replacement of all these items with new. The scheme of works is disproportionate because the choice for the owner is not between spending that huge sum on the one hand and spending nothing and putting up with an increased level of moth activity on the other, but between spending that very large sum and spending a smaller sum that would provide a reasonable degree of assurance, though not an absolute guarantee, that moths will not be sustained for years to come by natural insulation in the house. The risk that it is part of the Soundblocker that is now sustaining a smaller moth colony, or that Soundblocker is concealing previously unidentified Thermafleece, can be addressed by doing a lesser scheme of works. The risk that it is remnants of Thermafleece can be significantly reduced if such works include a degree of targeted opening up and sampling of areas from where it is believed that Thermafleece was removed by VGB.

297. In my judgment, the works that a prudent and well-advised owner or purchaser would carry out would be much less than the extravagant scope of works of Mr Daly but more than the scope of works of Mr Sullivan. They would be closer to Mr Sullivan's scheme, but would not be constrained by any dubious assumption about where Thermafleece and Soundblocker were installed by WWF's builder. Instead, there would need to be a process of opening up parts of the walls and ceilings, to ascertain what insulation existed in what locations. The photographs of the VGB works taken by Dr Hunyak provide a reasonable guide to the nature of the work that VGB did and how they did it. The evidence that is available suggests that VGB did a thorough job where they did dismantle walls and ceilings to remove insulation. What VGB did not do was open up in this way when they found Soundblocker that did not appear to be infested with moths. Since, on this occasion, all Soundblocker will be removed, that limitation of VGB's works (which could explain the continuing moths issue) will be taken away.

298. Although a few of Dr Hunyak's photographs do show wisps of insulation snagged on nails or attached to studwork, these photographs were taken during the course of the VGB works, not at the conclusion of the removal and cleaning stage before new insulation and plasterboard was installed. It does not therefore follow that wisps of insulation visible in photographs remained in place at a later time. There is, in my view, no justifiable conclusion that VGB did its work carelessly or inadequately. Indeed, it is odd for the person who commissioned and to a significant extent supervised those works, who relies on VGB's hearsay statement about what they did (viz removed all Thermafleece insulation), and who has the ability to investigate further within the house, to be asking the Court to conclude that the work that VGB did do was defective.

299. It must be for the Claimants, who have to prove their loss, to establish that the value is diminished to the extent that they claim because of Thermafleece being left behind. This they have not done, though, logically, there exists a risk of some Thermafleece remaining. Based on all the evidence that I heard, apart from the speculative possibility that more Thermafleece is concealed by Soundblocker (which will be addressed by the careful removal of Soundblocker), the risk of any significant and damaging quantity of Thermafleece remaining in the house is in my judgment small. If it did, the continuing problem with moths would have been much greater.

300. Accordingly, the scope of works that a reasonable owner or purchaser would require is opening up internal walls and ceilings (and any raised floor areas) to ascertain where Soundblocker is located and to remove it (and with it any Thermafleece found), and replace it with synthetic insulation. Where synthetic insulation is found in place, it will be reasonable to assume – subject to some localised checks and sampling – that VGB had correctly removed the natural insulation. The process of opening up requires, as Mr Sullivan eventually conceded, cutting full length and full height holes in partition walls and removing the whole of the ceiling boards, to gain effective access to make those checks. Some sample architectural features should be removed to check whether pockets of insulation had been missed by VGB around such features, but with a view to re-using the same features, where possible, not discarding and replacing them. Depending on what was found, further exploratory works or further opening up might be needed. It would certainly not be necessary to rip out all fittings and M&E conduits and apparatus and replace them with new, as Mr Daly considers.

301. The Court was provided with little guidance about how such exploratory works might be conducted. Mr Sullivan expressed some views about what a building surveyor might be able to do with thermal imaging equipment or a borescope, but he had not considered this in any detail, much less priced it. Mr Daly frankly accepted that he did not have sufficient knowledge of such techniques. The scheme of works that I have broadly described is not one that has been quantified or priced by either surveyor.

302. In the surveyors' joint statement, Mr Daly has priced a varied version of Mr Sullivan's scheme of works, which is called Option 2. This is still based on Mr Sullivan's approach of targeting areas identified on WWF's drawings, but it allows for opening up of larger areas of wall and the whole of the ceilings in those targeted areas. The other differences in pricing are that preliminaries are itemised rather than being just a percentage allowance, and overheads and profit are allowed at a higher rate of 20%, in view of the nature of the work and the risk element in the contract. Further differences then arise in Mr Daly's assessment of some quantities and in his general approach to pricing. This is the version of works that Mr Daly prices as £308,745.08.

303. This costing, however, adopts the more limited targeted approach that Mr Sullivan advocated, on the assumption that WWF's drawings were accurate. For reasons I have given, that cannot be assumed. The appropriate works will therefore require more work to be done to open up areas of other internal walls, raised floors and ceiling voids to identify what insulation is present and remove any Thermafleece or Soundblocker found there. There will be additional work to remove sample architectural features to see whether VGB missed any insulation located there. Depending on the outcome of these samples, further investigations or works may be required. It is, perhaps, impossible, if the works are approached in this iterative way, to calculate exact quantities or rates now for all work that might be required. Estimates and allowances would have to be made.

304. Had I reached a conclusion that rescission was unavailable or should be refused, I would have been left with two alternatives in seeking to quantify the damages: one, to direct a further hearing, with evidence from the expert surveyors, to address this different approach to the works required and a reasonable estimate of their cost; the second, to make a rough and ready assessment of the likely cost, which – added to the extra monetary allowance that the expert valuers have agreed – can stand as the measure of the difference in value for which the Claimants would be compensated. Given that I have ordered rescission and am addressing the scope and cost of remedial works issue only in case it becomes material at a later stage, I will take the second approach.

305. I have no difficulty in preferring the opinions of Mr Daly on the right approach to assessing costs issues to those of Mr Sullivan, though for reasons already given I do not accept his evidence about the appropriate scheme of works. I was unimpressed by Mr Sullivan's grasp of the matters in issue, which to a considerable degree, I consider, was work that had been done for him by his team, and with the detail of which he was insufficiently familiar. I was unimpressed by his exercise of judgement, which seemed to me to be flawed in many instances, and by his approach to answering questions that were put to him. With one exception (which he later partly withdrew) he was unwilling to make sensible concessions and consider in an open way whether his opinion should be qualified or corrected, and instead he argued with many questions of Mr McCreath and did not answer them or, in some cases, try to answer them. On costs matters, I found Mr Daly to be a sensible and helpful witness, who made appropriate concessions when he realised that he was in error or where there was scope for a range of views. His approach to rates and other costing issues was more persuasive and reliable than Mr Sullivan's.

306. I will therefore start with Mr Daly's valuation of £308,745 for Option 2. More extensive works than are costed in his Option 2 will be needed in the first place, for reasons that I have given. Depending on what those works reveal, further removal and reinstatement works, or sampling or testing of other areas, may be required. There is therefore both an increased initial cost of works and a significant contingency item.

307. Looking at the breakdown of costs in the Scott Schedule attached to the joint statement, at pages 7 and 8, it seems to me that the items that are most likely to increase for the reasons explained above are items 2, 7, 8, 9, 10 in relation to ceilings (total: £93,546.10); items 12, 13, 16, 17, 18, 19, 20, 21 in relation to walls (total: £53,051.80), item 34, preliminaries (£48,008.75) and item 35, OHP (£51,457.51). For the increased initial scope of works, I will add 50% to the totals for the ceilings and walls. For the preliminaries I will add 25%, on the basis that there will be an increase in some of the elements of the assessed preliminaries but not all. The OHP is calculated at 20%, which will be applied to the new total. I will then add a contingency item at 20% of the aggregate cost of the works (which is double what would be a standard allowance for designed works, on account of the increased risk of further works being needed), and there will be VAT at 20%.

308. While acknowledging that this is a broad brush exercise, it is similar to the kind of assessment that an intending purchaser would have to make, absent the opportunity to carry out exploratory works to establish exactly what is required. A purchaser intending to bid for the house would not have the benefit of a fully and accurately costed scheme of works. It therefore does not seem to me to be unjust to assess the difference in value of the house in this way.

309. To reach the difference in value damages figure, the extra sum agreed by the valuers will be added, namely 25% for Mr Sullivan's scheme of works, properly to reflect the difference in value. Given that the scheme of works that I am assessing is much closer to Mr Sullivan's works than Mr Daly's scheme, it is obviously appropriate for that figure of 25% to be used, rather than the fixed £1.35 million that it was agreed should be added to the cost of the Daly scheme to measure the difference in value.

310. The Claimants also claimed costs associated with the works to the house, namely the costs of their moving out and housing themselves and their family elsewhere for the duration of the project. I have found that the Claimants are intending to leave and sell the house in any event, and that they do not intend to carry out the works and then reoccupy the house. There are therefore no additional losses associated with carrying out works to the house of the type that the Claimants are seeking. It is possible that the Claimants might have carried out works, on advice, so that they could then sell with assurance that the problems have been remedied, but equally it is possible that they might not have done so. It was not established, on a balance of probability, that the Claimants would have moved out earlier than they otherwise would, in order to do the works, and so would have lost the use of house for the duration of the works. I therefore would not have awarded damages to compensate for the loss of use of the house, or the cost of alternative accommodation, during the works. There would in any case be a degree of double counting, if such damages were awarded, as the additional 25% that it is agreed should be added to the cost of the works reflects at least in part the time and inconvenience of having to do the works.

Miscellaneous points raised by the Defendant

311. At various stages of the presentation of the Defendant's case, a number of other points were advanced on his behalf by his legal team. I have dealt with the principal arguments but, for the sake of completeness, add the following observations.

312. There was a suggestion trailed in the Defendant's skeleton argument and repeated in written closing submissions that the Claimants did not provide money for the purchase of the house, BILI did; and that this had a bearing on the consideration of what loss if any was suffered by the Claimants and whether rescission should be granted. The point was not developed in any detail in argument.

313. The First Claimant's family have considerable wealth, which is held and managed for them by BILI. The First Claimant is, no doubt, entitled to ask for a share of the money, as a beneficiary of her late father's estate. The fact that the money is invested or controlled by BILI rather than the Claimants personally does not mean that it was not the First Claimant's (or the Claimants') money that was used to buy the house, or that some other approach to damages or remedy should be taken because the Claimants do not themselves write a cheque.

314. The Defendant also sought to make something of the fact that the First Claimant did not herself make a witness statement or come to court to support her husband in advancing their claim. Mr Seitler suggested to Dr Hunyak in cross-examination that his wife was not present because she does not support the claim, and he denied it. The claim form was signed on behalf of both Claimants and Squire Patton Boggs act for both Claimants.

There is nothing, in my view, in the fact that the First Claimant did not want to be seen more publicly advancing the claim.

315. As to failure to provide a witness statement to "corroborate" her husband's evidence, or add to it, there is no requirement for her to do so, nor any inference to be drawn from failure to do so. The allegations made in the claim are not ones that in law require corroborative evidence. Further, it is obvious from Dr Hunyak's evidence that he was the one actively involved in the purchase of the house and the works, not the First Claimant. The Claimants' failure to rely on any evidence that the First Claimant could give leaves them potentially more exposed to a risk of failing to prove their case, and the Defendant made extensive submissions about the paucity of evidence on certain matters, and alleged that Dr Hunyak's evidence was unreliable. I have already addressed those matters. The Defendant sought to identify various alleged uncertainties relating to the Claimants' case that the First Claimant could have given direct evidence about, but in none of these is there reason to think that the First Claimant was in a better position than Dr Hunyak to give evidence.

316. The Defendant also invited the court to draw adverse inferences from the failure to call a solicitor from Farrer to give evidence about their communications with BILI, or from VGB or Environ. No adverse inference can be drawn on the basis that the Claimants have not waived privilege in their or BILI's communications with Farrer, nor (apart from being able to confirm that the Report was given to BILI) is it obvious what relevant evidence Farrer could have given on a relevant issue. It is true that Mr Grybauskas of VGB might have been able to explain exactly what works they did and what steps they took to ensure that no trace of Thermafleece was left in the house, but I have in any event reached a conclusion in favour of the Defendant on the issue of the quality of VGB's work as a non-specialist contractor. The Claimants served hearsay notices in relation to statements from VGB and Environ. They said that they had made repeated attempts to contact Mr Grybauskas but received no response. The truth of that statement was not further challenged.

317. As to Environ, the Claimants explained that a response was received from Environ saying (somewhat ironically) that they could not provide evidence because of confidentiality obligations owed to WWF. The Claimants pointed out that that would not preclude WWF from calling them to give evidence. In any event, what matters in this case is what Environ's reports stated, and the content of the email communications between the Woodward-Fishers and Environ, not what the technicians at Environ subjectively thought about the infestation that they found.

318. The final point is that Mr Seitler argued at the outset and repeated in closing submissions that it cannot be right that the presence of some moths had to be disclosed by WWF, otherwise every seller of a property will have to disclose the presence of moths, or otherwise be at risk of a claim for damages or rescission. That of course is not the position. There is no duty of disclosure on a seller of real property (*caveat emptor*), except to the extent that a failure to disclose would make information otherwise given to a buyer misleading or incomplete.

319. What a seller does have to do is provide honest answers to pre-contract enquiries, if they answer them at all. So, if a question is asked whether within a specified period the sellers have seen a clothes moth in the property, or suffered moth damage to clothing, and the truthful answer is "yes", the seller must either decline to answer, if they consider that the

enquiry is inappropriate, or say "yes", with or without further particulars. If the question is whether the seller is aware of any infestation of vermin, and the seller has experienced no more than a few moths and occasional damage to clothing (the "normal" London experience, as Mr Seitler called it), the honest answer will be "no". However, if the seller knows that they have, or may have, an infestation of moths, the only honest answer would be "yes" or "no, but the property was identified on [date] as having a clothes moth infestation".

320. The suggestion that a conclusion of misrepresentation in this extreme case will cause a general conveyancing problem is simply wrong.