Neutral Citation Number: [2021] EWHC 8 (Ch)

Case No: BL-2019-CDF-000019

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 8 January 2021

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

MAHMUT AGIT CEVIZ	**Claimant**
- and -	
(1) ANTHONY FRAWLEY	
(2) ANNA POPE	**Defendants**

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- -

Owain Rhys James (instructed by **Jones Hedley Solicitors**) for the **Claimant**
Jay Jagasia (instructed by **Ince Gordon Dadds LLP**) for the **Defendants**

Hearing dates: 12 and 13 November 2020
Written submissions: 2 and 9 December 2020

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Approved Judgment

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

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10am on Friday 8 January 2021.

JUDGE KEYSER QC:

Introduction

1. This case concerns a written agreement ("the Agreement") about an Italian pizzeria at Unit 6, The Globe Centre, Wellfield Road, Cardiff ("the Premises").

2. In very broad terms, the Agreement was for what might loosely be called a joint business venture between the claimant, Mr Mahmut Agit Ceviz, and the defendants, Mr Anthony Frawley and Ms Anna Pope, involving the incorporation of a new company to set up and run the restaurant.

3. Mr Ceviz claims an order for performance of the Agreement or damages for its breach. Specifically, he claims payment of moneys he says he is owed under the Agreement; he also claims that, on the true construction of the Agreement or by necessary implication, he was entitled to be a director of the new company and to have a 50% shareholding in it, and in that regard he seeks a mandatory injunction for performance of the Agreement or damages in lieu.

4. Mr Frawley and Ms Pope accept that the Agreement was made, though they do not agree with Mr Ceviz's case as to its meaning and implications. However, they say that they were induced to enter into the Agreement by misrepresentations made to them by Mr Ceviz concerning the existing lease of the Premises and that they were entitled to rescind and have rescinded the Agreement, and they counterclaim repayment of moneys paid under the Agreement and damages for deceit or under section 2(1) of the Misrepresentation Act 1967.

5. The trial was heard over two days by Cloud Video Platform, with written submissions thereafter. I am grateful to Mr James and Mr Jagasia, counsel respectively for Mr Ceviz and for Mr Frawley and Ms Pope, for their submissions and for the constructive way in which they approached the trial.

6. The remainder of this judgment will be structured as follows. First, I shall make some general observations about the witnesses who gave evidence at trial. Second, I shall set out the main facts. Quite a lot of the matters raised in evidence have at best tangential relevance to the issues in the case, and I shall try to restrict the narrative to material with some bearing on those issues. Although I have regard to all the evidence, there is much of it that I shall not refer to. Third, I shall identify and discuss the issues.

The main witnesses

7. A number of people gave evidence at trial. It is disappointing to relate that the only witness whose evidence carried complete conviction, Mr Cipriano Perez, addressed solely matters of little if any relevance to the issues in the case. I shall make general comments on the four main witnesses.

8. The claimant, Mr Ceviz, was in many respects a very poor witness. His answers in cross-examination were long, discursive and frequently self-contradictory and

inconsistent with his witness statement. A question is the extent, if any, to which that was because he was being untruthful. That question can be answered only by considering the evidence as a whole and, in that context, considering also what is known of Mr Ceviz. He is a Kurdish Turk. His English is good but falls short of fluency; he describes it as his third language, and it is clearly not his first. He also has what might be called a practical approach to business dealing, which affords a minimal place to legal and technical formalities. I formed the clear impression that he did not have a very firm grasp of some of the finer (and even not so fine) points of what had transpired, though these might be obvious to a lawyer. I also bear in mind the possibility that on occasion the meaning he intended to convey in documents written on his behalf might, so to speak, have become lost or at least confused in translation. These caveats cannot succeed in making Mr Ceviz an accurate or very reliable witness. However, when his evidence is considered objectively in the context of the entirety of the other evidence, it is in my judgment found not to mislead from the path to a true understanding of the case.

9. The first defendant, Mr Frawley, was a clear and largely coherent witness, polite almost to excess, who tended to give seemingly interminable answers to the simplest of questions, whether through garrulousness or for some other reason. Some of the evidence that he gave was inherently implausible and other parts can be seen on analysis to be, though speciously plausible, untrue. I have formed the view that Mr Frawley, though a good performer, was not an honest witness.

10. A further observation does not reflect adversely on Mr Frawley but on whoever was responsible for drafting his witness statement. It was 22 pages long, comprised 111 paragraphs and contained a great deal of comment and commentary that has no proper place in a witness statement. Witness statements are for the giving of evidence, not for arguing the case, making points against the opponent, or providing commentary on documents.

11. The second defendant, Ms Pope, is Mr Frawley's wife. She adopted his evidence and was accordingly questioned more briefly. Her answers were clear, direct and succinct. She showed what appeared to be strong emotion at the harm said to have been inflicted on her and her husband by Mr Ceviz, but the explanations she gave as to what this consisted of suggested a significant lack of understanding on her part. She seemed to me to be heavily reliant on Mr Frawley for her perceptions concerning the events giving rise to the case.

12. The other very significant witness was Mr Tuan Hai Duong, the director of and shareholder in THD Properties Limited ("THD"), which was the landlord and the owner of the freehold reversion of the Premises and of the other units at The Globe Centre as well as of other properties nearby. Mr Ceviz had intended to call Mr Duong as a witness but, being unable to persuade him to give a witness statement, obtained permission to serve a summary of his proposed evidence. At a late stage of the proceedings Mr Duong instructed his own solicitors, who prepared a witness statement that he signed. The statement contained evidence supportive of the defendants' case rather than Mr Ceviz's case and purported to be offered neutrally to set the record straight. At the beginning of the trial the proposal was put to me that Mr Duong would give evidence on his own behalf and that both parties would be permitted to cross-examine him. That proposal did not find favour; I required that he be called by one party or the other or not at all. In the event the defendants called

him. Mr Duong said that he had known Mr Ceviz for much longer than he had known Mr Frawley, and he spoke of Mr Ceviz as "a friend", while nevertheless giving evidence largely hostile to him. The central question concerning Mr Duong's evidence is whether he was, as he presented himself, an impartial friend of the truth. In my view, he was not, for reasons that will appear in the following narrative.

Narrative

13. Mr Ceviz has been involved in various business ventures, including a number of restaurants. In May 2016 he went into business with one Mr Raymanjit Sandhu in an Indian restaurant, called Chaiholics, that Mr Sandhu was already running at the Premises. The agreement was that Mr Ceviz would invest in the business and that he and Mr Sandhu would henceforth operate the restaurant through a new company. Accordingly they incorporated Chai Central (Cardiff) Limited ("Chai") on 12 May 2016. Mr Ceviz and Mr Sandhu were the directors of Chai and they held the issued shares in Chai in the proportions 49:51. I accept Mr Ceviz's evidence that he invested £43,000 for his interest in the business, of which £20,000 was paid to Mr Sandhu and the rest was used to upgrade Chaiholics, which had hitherto been something in the nature of an Indian tearoom, into a fully-licensed restaurant with a bar and beer garden and to provide a deposit for rent under the new lease of the Premises, as mentioned below.

14. There was an existing lease of the Premises with only a relatively short term remaining, which was held by Mr Sandhu. Mr Ceviz and Mr Sandhu wanted the security of a longer term and to that end approached Mr Duong. It was Mr Duong's practice to make regular visits to the various properties owned by THD and chat to the tenants, and to conduct discussions and negotiations for new leases directly with the prospective tenants before instructing solicitors to deal with the formalities. He described this as "the old-fashioned way" of doing business.

15. By a Lease ("the 2017 Lease") dated 16 January 2017 between (1) THD as landlord and (2) Chai as tenant and (3) Mr Ceviz and Mr Sandhu as guarantor, THD granted to Chai a lease of the Premises for a term of 15 years from and including 16 January 2017. The 2017 Lease contained provisions requiring Chai to register the 2017 Lease at HM Land Registry and prohibiting Chai from assigning the 2017 Lease without the prior written licence of the landlord. The provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 were disapplied; Mr Duong always insisted on the exclusion of security of tenure for his business tenants.

16. Chai did not register its title under the 2017 Lease. It is unclear what, if any, were the reasons for this. Matters of a technical nature, such as legal requirements and the financial record-keeping of Chai, were dealt with by Mr Sandhu, who was also a practising solicitor. However, at that time nobody appears to have been concerned by the failure to register, if indeed anybody noticed it. Chai took over the running of Chaiholics at the Premises. I accept Mr Ceviz's evidence that he took regular drawings from the business from January 2017.

17. In the spring of 2017 Mr Sandhu left the country. Initially he said that he was just visiting a sick relative and would return. But he did not return, and on 25 May 2017

he resigned as a director of Chai and transferred his shareholding to Mr Ceviz, who thereby became the sole director and member of Chai.

18. Mr Ceviz thought that the time was ripe for a new start at the Premises. Chai was facing stiff competition from another Indian restaurant nearby, and Mr Sandhu had been the person within the company with expertise in Indian cuisine; Mr Ceviz's experience was with Turkish food. Accordingly, he had the idea of running a new Turkish restaurant from the Premises.

19. On 20 June 2017 Mr Ceviz sent to Mr Duong a WhatsApp message (the messages between Mr Ceviz and Mr Duong appear all to have been WhatsApp messages): "Hi mate. I'm thinking to put grill in chai, do have any advise (sic) or suggestion???" Mr Duong replied that advice should be taken from a surveyor and that detailed plans would be required for planning approval, and he suggested a suitable person whom Mr Ceviz might contact. Mr Ceviz proceeded to instruct an architect to prepare designs for a flue for use with a charcoal grill and applied to Cardiff Council for planning permission for the flue.

20. On 6 July 2017 Mr Ceviz procured the incorporation of another company, Caroce Limited ("Caroce"), of which he was at all times the sole director and member, with the intention that in future he would carry on business at the Premises through Caroce. He informed Mr Duong that he had set up a new company.

21. On 30 July 2017 Mr Duong sent a message to Mr Ceviz, asking him to pay arrears of rent on the Premises and continuing:

> "The lease needs to be changed to your new company asap for your benefit as the solicitor confirms you cannot trade with by (sic) another company And (sic) lease in another as I thought.
>
> They charge 1000 plus vat.
>
> This needs to be paid before commencing.
>
> The sooner the better for your sake ending any previous liabilities. As you know ray [Mr Sandhu] really mess up and only you are around.
>
> Please sort out the transfer, thanks."

That message set in train a course of events with a direct bearing on the case. Its significance lies also in the fact that it shows that Mr Duong was concerned to ensure that occupation of his premises coincided with the right to occupy.

22. On 21 August 2017 Mr Ceviz and Mr Duong exchanged a sequence of messages about the transfer to Caroce. Mr Ceviz suggested that it would be better for Caroce to take a new lease of the Premises, but Mr Duong said that it would be cheaper to assign the 2017 Lease from Chai to Caroce, and Mr Ceviz ended by saying, "OK". In evidence, Mr Duong remarked that Mr Ceviz was always looking for the cheapest option. That is probably true, though cost was first raised as an issue by Mr Duong himself.

23. In October 2017 THD instructed solicitors to act in respect of the licence to assign the 2017 Lease to Caroce. Mr Duong told the solicitors that THD did not require references for Caroce or a deposit for rent. It was already holding a deposit of £6,000 from Chai, which had been paid by Mr Ceviz on behalf of Chai.

24. On 1 December 2017 solicitors instructed by THD wrote to Mr Ceviz at Chai; among other things, the letter said:

> "[I]t would appear that Chai Central (Cardiff) Ltd has failed to register the Lease at the HM Land Registry. As you know, the Lease is for a term of 15 years and it must be registered at the HM Land Registry. May we also remind you that clause 10.10 of the Lease requires you to apply for registration *promptly* following completion of the Lease and send our client official copies of your leasehold title within one month after registration has been completed. You have not complied with clause 10.10 of the Lease and must forthwith rectify this without further delay.
>
> In the circumstances, we would ask that you seek immediate legal advice and assistance in relation to the above, and immediately apply to the Land Registry to register the Lease and provide us with an official copy of register entries of your title. Any Licence, if granted, will be subject to and conditional upon your title having been registered at the HM Land Registry, and any assignment can only take place thereafter.
>
> Strictly on a without prejudice basis, we are instructed to send you a draft Licence to Assign and Guarantee but such Licence cannot be completed until we have confirmation from your solicitors that you have submitted to the Land Registry to register the Lease."

Mr Ceviz's evidence was that he did not see the letter of 1 December 2017 at the time or, indeed, until the day before the trial. I think that the evidence was honestly given but that he probably did receive the letter. There is no good reason why he should not have done. It is quite likely, however, that he did not read the letter or did not do so carefully, because he was discussing matters directly with Mr Duong. Anyway, the matter addressed in the letter was certainly one of which Mr Ceviz became aware in December 2017.

25. Notwithstanding the terms of that letter, by a deed of Licence to Assign dated 6 December 2017 and made between THD as landlord and Chai as tenant and Caroce as assignee and Mr Ceviz as guarantor, THD granted to Chai a licence to assign its estate and interest under the 2017 Lease to Caroce on the terms and conditions in the deed. Mr Ceviz signed the Licence to Assign at the Premises in Mr Duong's presence.

26. The grant of the Licence to Assign is explained by the letter dated 8 December 2017 from THD's solicitors to Chai:

> "We write further to our letter of 1st December, and understand that you have discussed the above matter with Mr Duong of our client and returned the signed Licence to Assign and Guarantee to him. We have been advised by Mr Duong that you have confirmed to him that you had consulted your solicitors in relation to the submission of an application to the HM Land Registry to register [the 2017 Lease] and that your solicitors will write to us to confirm that they have submitted the application on your behalf. We have not yet heard from your solicitors and await hearing from them as soon as possible.
>
> In the circumstances, and in accordance with our client's instructions, the Deed granting Licence to Assign and Guarantee ('Deed') has been completed. We enclose two signed copies of the said Deed dated 6th December 2017 and would remind you again that it is a condition of the Licence that you must forthwith apply to HM Land Registry to register the Lease and ensure that the Lease is registered at the Land Registry within 2 months from the date of the Deed, and upon completion of the registration let us have an official copy of the register entries of your title. Your proposed assignment of the Lease to Caroce Ltd cannot take place until you have provided us with the said official copy of the register entries."

27. Mr Duong told Mr Ceviz that he should instruct solicitors in order to have the 2017 Lease registered. He gave Mr Ceviz the details of a solicitor whom he used, Ms Sarita Kruzins. Mr Ceviz's evidence was that it was through speaking to Mr Duong in December 2017 that he learned that the 2017 Lease had not been registered as it was required to be. Accordingly he instructed Ms Kruzins to attend to the registration.

28. On 15 January 2018 Mr Ceviz made an application for Chai to be struck off the register. That was an unfortunate and strange thing to do at that time. Mr Ceviz's evidence was that he believed that the execution of the Licence to Assign constituted an assignment of the 2017 Lease to Caroce. This could explain the application, because it would mean that Chai was no longer relevant, and the registration of the lease could be dealt with by Caroce. On the other hand, in his oral evidence Mr Ceviz frequently mentioned that in 2018 he was "in the process" of transferring the lease and had not decided whether it would go to Caroce or into his own name. All of this probably indicates the fact that Mr Ceviz regarded the important issue to be what he and Mr Duong arranged together and that he understood—and probably cared—little with regard to legal niceties. The fact that he applied for Chai to be struck off shows, in my view, that he thought that Chai's role was concluded and that the completion of the transfer of the 2017 Lease was only a technicality. Probably he thought it was simply a matter of choosing in which name to register the lease. I do not think he understood that a separate assignment was required or that he understood, if he read, either the Licence to Assign or the letter of 8 December 2017.

29. On 18 January 2018 Ms Kruzins sent an email to THD's solicitor as follows:

> "I write because I have been instructed by Mr Ceviz in respect of the registration of a Lease relating to [the Premises]. I note that details have not been supplied to HM Revenue and Customs and therefore penalties will be incurred. I have advised Mr Ceviz concerning this matter and once the Lease has been submitted to the Land Registry I shall of course let you know."

Ms Kruzins promised to keep THD's solicitors informed of progress, but in fact no further substantive communications between the solicitors took place until May 2018 (referred to below).

30. However, Mr Ceviz and Mr Duong remained in contact. By a message on 23 January 2018 Mr Ceviz asked Mr Duong for a "receipt for £6000k (sic) Rent Deposit" in respect of the 2017 Lease and for a letter acknowledging a debt of £10,000 due for repayment in March. Mr Duong replied: "The bond I can provide you with a receipt. A proper rent deposit deed paper by solicitors will cost." He gave an assurance that the debt—which he says, and I accept, had nothing to do with the Premises—would be repaid, and ended: "You will have no issues regarding these points I given you, as we had a gentleman agreement which I always honour. I'm due down at the globe later I pop in. thanks." Mr Ceviz replied: "All I need record for rent deposit and return 10k by end of march." Mr Duong replied: "Yeah no probs as said."

31. I turn to consider the origins of the business relationship between Mr Ceviz and Mr Frawley and Ms Pope.

32. In 2017 Mr Frawley and Ms Pope were in business with two other people, running an Italian restaurant and pizzeria at an address near to the Premises through a limited company, Da Mara Restaurant and Pizzeria Limited ("Da Mara"), of which all four were directors and shareholders. Da Mara's trading premises were occupied under a lease from Mr Duong's mother; Mr Duong dealt with matters on behalf of his mother and was effectively the landlord. In March 2018 Mr Frawley and Ms Pope resigned as directors of Da Mara, and they were not further involved in the running of that restaurant and pizzeria, though they remained shareholders in Da Mara. Instead, in the circumstances I shall narrate, they set up what can only have been a rival business at the Premises.

33. Mr Ceviz and Mr Frawley had got to know each other during 2017. At some point in late 2017 or early 2018 they had discussions that led to the idea of using the proposed flue at the Premises not for a charcoal grill but for a wood-fired pizza oven. There is a dispute, not in itself important, as to who originated the discussions or first came up with the idea of installing a pizza oven at the Premises. Mr Ceviz says that, when Mr Frawley learned in late 2017 that he intended to install a flue for a charcoal grill at the Premises, he remarked to Mr Ceviz that the place would be ideal for a wood-fired pizza oven, and that this led to discussions in late 2017 and early 2018, with a view to Mr Ceviz going into business with Mr Frawley and Ms Pope and opening at the Premises not a grill house but a traditional Neapolitan pizzeria. By contrast, Mr Frawley says that the discussions commenced only in mid-March 2018, when Mr Ceviz asked him to call at the Premises and enquired about the feasibility of installing a pizza oven; and that a few days later, after learning that the cost of installing a grill would be beyond his means, Mr Ceviz contacted him again and asked whether he and

Ms Pope would be interested in operating a pizzeria from the Premises. If it matters, I think it likely that in general conversation in December 2017 or early 2018 Mr Frawley, who was probably already thinking of leaving Da Mara, pointed out to Mr Ceviz that the proposed works at the Premises could accommodate a pizza oven. There was no discussion at that stage of a joint business venture—Mr Ceviz confirmed in cross-examination that no such thing was discussed on the occasion of the first conversation about a pizza oven—but when Mr Ceviz learned the cost of installing such a grill, he decided that he needed a business partner and further conversations in early 2018 raised the possibility of going into business together. Whatever the truth concerning their origins, the discussions moved towards the eventual agreement for a form of joint business venture in a pizzeria at the Premises. The practical contribution that Mr Ceviz would be making to the new business was the provision of fully-fitted restaurant premises. As for Mr Frawley and Ms Pope, they would be funding the acquisition and installation of the pizza oven and would be meeting other set-up costs.

34. What is of importance is what was said concerning the rights that the new business would have to occupy the Premises, because it is the case of Mr Frawley and Ms Pope that they were induced to enter into the Agreement by misrepresentations made to them by Mr Ceviz. Their pleaded case is that on several occasions before the Agreement was signed he told them orally "that his company, Caroce, held a 13-year lease of the Premises and that he would arrange for the defendants to 'take over' that lease (which was discussed between the parties to be by way of a sub-letting arrangement)."

35. The account in Mr Frawley's witness statement is as follows:

> "The Claimant informed me that he had a company called Caroce Limited ('Caroce') who had a 13 year lease of the Premises and that we could operate with the benefit of the lease. I had no reason to doubt the Claimant at the time, I was aware that THD were the landlord who were also the landlord of the Da Mara premises. I searched on companies house and could see that Caroce did exist and the Claimant was a director. Therefore when the Claimant told me that Caroce had a 13 year lease I trusted that it was true. I asked for a copy of the lease on numerous occasions and received assurances from the Claimant that a copy would be provided and that I was not to worry about it."

36. In answer to questions in cross-examination, Mr Frawley gave evidence to the following effect. On the occasion of the first conversation with Mr Ceviz about the possibility of installing a pizza oven at the Premises—which, according to Mr Frawley was in March 2018 and was concerned only with giving advice to Mr Ceviz about the feasibility of installing a pizza oven; there was no suggestion of any kind of joint business venture—Mr Ceviz stated that his company had a 13-year lease of the Premises. This was repeated in subsequent conversations, when a joint business venture was being discussed. Mr Ceviz mentioned the name of his company, Caroce, and Mr Frawley verified at Companies House that there was such a company and that Mr Ceviz was its director (statement, paragraph 26). The existence of a 13-year lease was a critical factor in persuading him and Ms Pope to enter into an agreement with

Mr Ceviz because, although they did not intend to remain in Cardiff for more than three years, a lease of that length would ensure that the business was a valuable asset when they left. If they had not believed that there was a 13-year lease, they would not have made an agreement with Mr Ceviz. They did not see the lease, and of its terms they knew only that the rent was £24,000 per annum, but they had no reason to doubt its existence in view of what Mr Ceviz told them.

37. Mr Ceviz's written evidence on the point was as follows:

> "I believe I may have mentioned to Tony that I had taken over the lease in my own name although I do not believe I ever mentioned Chai Central (Cardiff) Limited or Caroce Limited to him. His only interest was in having somewhere to trade from for the next 3 years and he was not therefore interested at all in the lease or its terms, although I believe I told Tony the rent which was paid under the lease, £2,000 a month … As the length of the business venture was going to be limited to 3 years or shortly afterwards Tony had no interest at all in the remainder of the terms of the lease."

When setting out the terms of the agreement (statement, paragraph 24), Mr Ceviz said that it was agreed that "Caroce would remain the tenant of the premises but the new business would take over the rent and service charge payments." In paragraph 11 of his reply, Mr Ceviz admitted that in the course of the discussions that led to the eventual agreement he told Mr Frawley "that the pizza business could avail itself of the benefit of the lease which existed in relation to the Premises".

38. Mr Ceviz's oral evidence on this matter was at times very difficult to follow, but it came to this. At the first discussion concerning a pizza oven at the Premises—which he said was in December 2017—he told Mr Frawley that the lease was held by Chai. Later he mentioned to Mr Frawley that he was in the process of transferring the lease; he did not mention Caroce, but he may have said that he was transferring it into his own name. He did not mention a 13-year term.

39. I make the following findings of fact. During the first conversation about a pizza oven in December 2017, Mr Ceviz mentioned that he was in the process of transferring the lease of the Premises from Chai to his new company. The mention of the lease during a conversation that had nothing to do with a joint business venture was not, as Mr Frawley suggested in his evidence, part of a cunning plan on Mr Ceviz's part to entice Mr Frawley into a venture that was not mentioned until some time later. Mr Ceviz simply mentioned it in the course of telling Mr Frawley what he was doing: as Mr Sandhu had left, he was going to close the Indian restaurant and open a Turkish grill; and the lease would be transferred from the company that had been set up to run the Indian restaurant to the new company that had been set up to run the Turkish grill. As the conversation was held in December 2017, it is unlikely that Mr Ceviz said merely that the lease was held by Chai; he will also have mentioned the transfer of the lease. As the Deed of Licence to Assign either was in preparation or had just been executed, it is unlikely that Mr Ceviz said that the lease was being transferred into his own name. I find that neither the length of the lease nor the name of the new company was mentioned in the first conversation: neither was relevant in the circumstances. I find that in the course of subsequent conversations

leading to the making of the Agreement Mr Ceviz did not say that there were 13 years remaining on the lease: he denies doing so, and there were not 13 years but 14 years remaining. It is unlikely that he specifically named Caroce as the potential assignee of the lease; if he did, it was not a matter of importance to Mr Frawley and Ms Pope.

40. Before the Agreement was made on 12 April 2018, Mr Frawley made no request to Mr Ceviz to see the 2017 Lease. He confirmed this in cross-examination, although his witness statement appeared to say the contrary. As the defendants' case is that Mr Ceviz's representation that there was a 13-year lease was critical for their decision to enter into the Agreement and invest (as they claim) £50,000 or thereabouts in the venture, the omission to ask to see the 2017 Lease before the Agreement was made is remarkable. Mr Frawley's evidence was that Mr Ceviz appeared trustworthy and they had no reason to doubt what he said; therefore there was no need to ask to see the lease. I do not accept that explanation, for reasons that will become apparent.

41. Mr Frawley did, however, give evidence that before signing the Agreement he spoke to Mr Duong and asked him if he would be content for him and Ms Pope to run a pizzeria at the Premises, and that Mr Duong said he would be "OK" with that. That, said Mr Frawley, was as far as the exchange went, because he had interrupted Mr Duong while the latter was eating and it was a very quick conversation. The next conversation between the two men concerning the Premises was (he said) in May 2018, after the Agreement had been signed. Mr Duong did not mention any conversation until I asked him questions at the conclusion of his evidence, when he said that in February or March 2018 Mr Frawley had told him that he was thinking of going into business with Mr Ceviz, but nothing more was said until May 2018.

42. I do not believe Mr Frawley's or Mr Duong's evidence on this point. I find that more was said between the two of them before 12 April 2018 and that the explanation for much of what did and did not happen lies in this conversation. This finding, which of course is contrary to the evidence of the participants in the conversation, rests on probable inferences that I draw from my assessment of both of these witnesses and from my consideration of the entirety of the evidence. I make the following specific observations.

    1) As I have already observed, the defendants' case that the existence of a 13-year lease was crucial to their decision to enter the Agreement with Mr Ceviz sits uneasily with the fact that at no time before signing the Agreement did they ask to see the lease. To say, as Mr Frawley did, that Mr Ceviz "seemed like a nice enough guy", and that he saw no reason to doubt him, is not persuasive. It is even less persuasive in circumstances where Mr Ceviz's business partner, whom Mr Frawley had known quite well, had left suddenly and without explanation. The suspicion is immediately aroused that Mr Frawley was not relying on anything said to him by Mr Ceviz.

    2) As I have also mentioned, Mr Duong was a hands-on landlord. He had daily involvement with his tenants and he liked to make arrangements himself and to his own satisfaction, using professionals for necessary formal and technical matters but not delegating to them the substantive aspects of his property affairs. Mr Frawley, as an existing tenant of Mr Duong via Da Mara, was well aware of this. He will also have been well aware that the head landlord's consent would almost certainly be required by the terms of the lease. It is very

unlikely that he went ahead with the pizzeria project without first gaining some assurance that it would be acceptable to Mr Duong. A vague mention by Mr Frawley that he was thinking of going into business with Mr Ceviz, which is all that Mr Duong admitted to having occurred, would be wholly inadequate. It is strongly probable that there was more to it than that.

3) Mr Duong may have been relatively relaxed about the particular arrangements made by people whom he knew (for example, he did not mind whether there was a new lease or an assignment of the 2017 Lease, and he did not mind whether the tenant was Caroce or Mr Ceviz), but there is reason to suppose that he was concerned to ensure that THD's properties were occupied by people with rights to occupy them, and that formalities were not bypassed. This is illustrated by the message of 30 July 2017 (paragraph 21 above). It is improbable that Mr Duong would simply have said that he would be "OK" with Mr Frawley running a pizzeria at the Premises, which according to Mr Frawley is all that he said before the Agreement was made. The strong probability is that he would have made it clear that, although he had no objection to the proposal, he would require that matters be put on some formal footing. That, in itself, makes it likely that the question of the existing lease would have been raised between Mr Duong and Mr Frawley.

4) But the matter goes further. This communication between Mr Duong and Mr Frawley was taking place at the very time when Mr Duong was trying to get Mr Ceviz to resolve the position concerning the 2017 Lease. The likely date of the communication is in mid- to late March 2018 (and on Mr Frawley's evidence it could not have been any earlier). By this time the licence to assign the 2017 Lease had expired and no confirmation had been received that the 2017 Lease had been registered or that the assignment had taken place. It is in my view a practical certainty that Mr Duong would have raised with Mr Frawley not only the need for the pizzeria's status at the Premises to be formalised but also, in at least broad terms, the state of affairs concerning the existing lease.

5) I do not accept Mr Frawley's explanation that his first conversation with Mr Duong was cursory because he had interrupted Mr Duong in the middle of a meal. The evidence shows that Mr Duong was a very frequent visitor to The Globe Centre and its environs and spent a good deal of time chatting with the occupiers. If Mr Frawley wanted to talk to him about a matter of any importance, he would not lack opportunity and would not have to choose an awkward moment. And, if the conversation were for any reason curtailed, it could be resumed with ease. If Mr Duong had not had time for anything other than a brief word, it is very probable that he would have taken a prompt opportunity to speak again to Mr Frawley and make clear that he would want something formalised in respect of his occupation. In addition, of course, communications could take place by text message—a medium that Mr Frawley and Mr Duong certainly used very freely from at least September 2018 onwards.

6) Mr Frawley's evidence is that the existing lease was indeed discussed with Mr Duong, but only in mid-May 2018, after the Agreement had been signed. I refer to this below. Neither the defence and counterclaim nor the defendants'

witness statements referred to the earlier conversation; it was first mentioned in cross-examination. I believe that Mr Frawley has deliberately altered the sequence of events, so as to suggest that he had no conversation at all with Mr Duong concerning the lease until after the Agreement had been signed.

7) As I shall explain below, Mr Frawley's evidence concerning what happened after the conversation in mid-May 2018 is also unpersuasive and I reject it.

43. The probability is, and I find as a fact, that before 12 April 2018, and probably in mid- to late March 2018, Mr Frawley spoke to Mr Duong about his proposal for a venture at the Premises and that Mr Duong told him the substance of the problems concerning the existing lease but made it clear that he would be content for the pizzeria to operate provided this were put on a formal footing.

44. The discussions between Mr Ceviz and Mr Frawley led to the making of the Agreement on 12 April 2018. The Agreement was expressed to be "[r]egarding Anatoni's Traditional Neapolitan Pizzeria Limited to be of Unit 6 Globe Centre, Wellfield Road Cardiff CF24 3PE", and it provided as follows:

> "That we are in agreement as of 23rd May 2018, that all parties named above have agreed to the following providing that Cardiff City Council and all other governing authorities agree to running of Anatoni's Traditional Neapolitan Pizzeria Limited and place no restrictions on the business:
>
> 1. Anthony & Anna will run Anatoni's Traditional Neapolitan Pizzeria for a minimum of 3 years at the above named address.
>
> 2. Agit will receive a weekly payment of £500.00 for the first 52 calender (sic) weeks.
>
> 3. From year 2 onwards the net profit after settlement of all bills and salaries of staff and directors will be split 50% for Agit, 25% for Anthony and 25% for Anna.
>
> 4. Agit has an option to sell the business at current market value on the basis of 3 independent valuations by registered commercial valuers. Up until the end of trading year 5 if Agit decides to sell the business or should Anthony and Anna decide to resign as directors between year 3 and 5 and give Agit full directorship or Anatoni's Traditional Neapolitan pizzeria Agit will return 40% of the *valuation (*Valuation = Average of 3 independent valuations – 30%) to Anthony and Anna either by a one off lump sum payment or by a monthly instalment basis that must be agreed upon by all parties beforehand.

> 5. The day to day running of the business will primarily be the responsibility of Anthony and Anna with Agit having no fixed responsibilities."

45. The Agreement makes no mention of the 2017 Lease or any other lease. That raises the question why this should be. The Agreement was typed up by Ms Pope's daughter-in-law, Emma Pope. The witness statements of Mr Frawley (paragraph 52) and Emma Pope (paragraph 5) say that Emma Pope "prepared" the Agreement. In cross-examination, Mr Frawley said that he told Emma Pope what had been agreed with Mr Ceviz and that she "drafted" the Agreement. When she was cross-examined, Emma Pope said that Mr Frawley and Ms Pope had told her about the 13-year lease. When she was asked why, in that case, it was not mentioned in the Agreement, she said that she had merely typed to Mr Frawley's dictation. That is not consistent with the other evidence as to the production of the document. However, whether or not it is correct, the question remains unanswered why the Agreement, drafted either by Mr Frawley personally or upon instructions he provided to his step-daughter-in-law, does not mention the allegedly critical fact that occupation of the Premises by the pizzeria was to be under a 13-year lease held by Caroce. I believe and find that the omission is because that basis of occupation was not critical. The important thing was that there was an agreement with Mr Ceviz and that Mr Duong was content; whether the matter were ultimately dealt with by regularising the existing lease and an assignment or an underlease, or by the simple expedient of a direct agreement with Mr Duong, was secondary. This also is why the defendants never asked Mr Ceviz for a copy of the 2017 Lease before the Agreement was made or before the new company went into the Premises.

46. On 17 April 2018 Chai was struck off the register of companies and dissolved.

47. Mr Frawley and Ms Pope procured the incorporation on 9 May 2018 of Anatoni's Limited ("AL": nothing turns on the difference between its name and the name envisaged in the Agreement) with a share capital of 100 £1 shares. Mr Frawley and Ms Pope were each issued with 50 shares in AL and were the two directors.

48. AL started trading as a pizzeria at the Premises on 13 June 2018. It has been successful.

49. The evidence as to the sequence of events around the closure of Chaiholics and the opening of the pizzeria is imprecise and inconsistent. Mr Frawley's evidence was that Chaiholics closed for business about three weeks before 23 May 2018, which was the commencement date of the Agreement. Mr Ceviz's witness statement (paragraph 25) said: "We signed the agreement on 23rd May and immediately made preparations for the opening of the new restaurant. The business was closed for approximately 3 weeks and then opened on 13 June." In my view, it is likely that the gap between the closure of Chaiholics and the opening of the pizzeria (13 June 2018) was three weeks, as Mr Ceviz says. There is no apparent reason why Chaiholics should have stopped operating before works of preparation for the pizzeria were due to begin (Mr Ceviz is unlikely to have taken much notice in this regard of the date of dissolution of Chai). The commencement date of the Agreement, namely 23 May 2018, is the most likely date for the new business to take occupation of the Premises. I can find no documentary evidence of works of fitting-out at the Premises before 23 May 2018. The shopfront glass was renewed on 3 June 2018, according to the invoice. The pizza

oven was installed on 4 June 2018. I comment below on the evidence that suggests, to the contrary, that Mr Frawley and Ms Pope were engaged on works of fitting out the Premises before 23 May 2018.

50. Meanwhile, no progress had been made on the assignment of the 2017 Lease to Caroce. It appears that in April 2018 THD's solicitors had sent an email to Ms Kruzins and that there had been a telephone conversation. But on 13 May 2018 THD's solicitor sent an email to Ms Kruzins as follows:

> "Despite previous emails and telephone discussion, I still have not heard from you in respect of the registration of the lease, and we still have not received notice of assignment as required under the licence.
>
> As you know the licence is only valid for three months from 6th December 2017, which is now expired. Unless the lease has been registered within the time stipulated in the licence, the matter cannot proceed. Your client Chai Central (Cardiff) Ltd will need to apply to our client for a new licence and to pay for our client's costs in respect thereof if they still wish to assign the lease to Caroce Ltd. That is in addition to any conditions and requirements that our client may impose in accordance with the provisions in the lease."

51. On 21 May 2018 Ms Kruzins replied:

> "Unfortunately my client dissolved the Company Chai Central (Cardiff) Limited. I advised him either to restore the Company to the register or to contact your client as to the way to proceed. I understand he has now spoken with your client and I look forward to hearing from you when you have your client's instructions."

52. Mr Duong's evidence was that at or around the time of the email of 13 May 2018 from his solicitors he spoke to Mr Ceviz, who refused to pay for a new licence to assign the 2017 Lease and said that his solicitor was dealing with the registration. When he learned that Chai had been struck off the register, he told Mr Ceviz that he had no legal interest in the Premises because the tenant company had been dissolved. Mr Ceviz was not asked specifically about such a conversation. His evidence, however, was to the effect that he was reluctant to get involved in restoring Chai to the register or dealing with the registration and assignment of the 2017 Lease because he and Mr Duong were talking about a new lease of the Premises; though if it became necessary to restore Chai he would have been able to do so. I accept that this is how he viewed the matter at the time, and I think that this probably reflects the nature of the conversation or conversations that doubtless took place between him and Mr Duong. Although it is impossible to achieve certainty, I think it probable that very shortly after his solicitors sent the email of 13 May 2018 Mr Duong learned from Mr Ceviz that Chai had been struck off the register.

53. On 15 May 2018 Mr Duong on behalf of THD and Mr Frawley on behalf of AL signed a "License (sic) to Occupy Premises". Mr Frawley wrote in manuscript on the

document: "£250.00 to pay". The Licence to Occupy was typed on an estate agent's headed paper and was in the following terms:

> "Term of license: A License to occupy the premises whilst the Head Lease is being prepared.
>
> License Duration: From 15th May 2018 until 30th August 2018.
>
> Terms: As per Terms agreed in the Heads of Terms. (Attached) Tenant responsible for all utilities including gas, electricity, water, business rates, and any service charge where applied. The occupation of the premises is exclusive of the Landlord and Tenant Act (1954).
>
> Subject Property: [The Premises]
>
> Landlord: T.H.D. Properties Ltd …
>
> Tenant: Anatoni's LTD
>
> Misc: The assignment of the lease must complete and all relevant funds must be paid prior to the expiration of the License to Occupy."

54. Evidence about this document was given by Mr Duong and Mr Frawley. In his witness statement, Mr Duong stated that when he visited the Premises one day he saw Mr Frawley and Ms Pope engaged in refurbishing the unit and, having heard that there was "some sort of deal going on with Mr Ceviz", he told them that he required legal documents to be signed if their occupation of the Premises were to be allowed. He stated:

> "Mr Frawley explained that Mr Ceviz has told him that he should not speak to me as I am nothing to do with [the Premises] as Mr Ceviz had told Mr Frawley that Mr Ceviz held a 13-year lease and was in total control. I laughed at that statement. I responded to Mr Frawley something along the lines, 'I will keep this simple. I am the landlord', or words to that effect. Mr Frawley responded that I should deal with him. I was relieved that I was dealing with Mr Frawley not Mr Ceviz. I had known Mr Frawley from previous business dealings and he was a credible business person."

Mr Duong stated that he told Mr Frawley that a licence would have to be put in place, at a cost of £250, while the lease was sorted out, and that Mr Frawley said that the licence should be in the name "Anatoni's", "for now". Mr Frawley's account was broadly consistent with Mr Duong's evidence.

55. I do not believe this account of what happened in connection with the Licence to Occupy. First, the terms of the conversation are inherently implausible, in circumstances where Mr Frawley knew that Mr Duong was the landlord and both men had an existing relationship. Second, the conversation ceases to make any sense when

the fact of the earlier conversation is known, even if that earlier conversation were as cursory as Mr Frawley says. Indeed, it is wholly incredible if, as I believe, there had been a substantial earlier conversation. Third, although it is possible that re-fitting works had started at the Premises as early as 15 May 2018, it is more probable that they did not start until more than a week later; in which case the account of the origins of the Licence to Occupy is incorrect. Fourth, it is probably significant that the Licence to Occupy was signed only two days after the email of 13 May 2018, which recorded the expiry of the existing licence to assign the 2017 Lease and envisaged the possibility of a further licence to assign.

56. In my view, the position is probably that during their previous conversations Mr Duong and Mr Frawley had agreed that the new company would have to enter the Premises only when a formal document had been signed to regularise the position. By agreement, accordingly, the Licence to Occupy was signed before the new company went in and any work started. The document was signed at the very time when Mr Duong's solicitors were chasing Mr Ceviz's solicitors in connection with the 2017 Lease; that matter was almost certainly very much on Mr Duong's mind, and it is clear that he was having informal discussions with Mr Ceviz about it as well. It is highly probable that Mr Duong put Mr Frawley clearly in the picture as to the latest position concerning the existing lease at the time when the Licence to Occupy was signed. Having seen Mr Duong give evidence, I do not for a moment believe that he would have bypassed this matter when getting Mr Frawley to sign the Licence to Occupy.

57. Two particular things about the Licence to Occupy may be noted in passing. First, it refers to Heads of Terms; none have been disclosed. Second, it is internally inconsistent as to whether there was to be a new head lease or an assignment of a lease; this, I think, reflects the secondary importance that was being attributed to legal formality as compared to practical arrangements, albeit that it was clear that the practical arrangements would have to be given legal form.

58. I find that Mr Frawley did not, after signing the Licence to Occupy, ask Mr Ceviz for a sight of the 2017 Lease. I also find that the reason for this is that he was relying not on what Mr Ceviz said, or on his impression that Mr Ceviz "seemed like a nice enough guy", but on his discussions with Mr Duong. Mr Frawley's evidence was to the effect that after signing the Licence to Occupy he did ask Mr Ceviz for a copy of the existing lease but that Mr Ceviz brushed off the request by saying that Mr Duong was just being difficult and that of course there was a lease as he had said. Mr Frawley said he did not press the point. That evidence was incredible and I reject it. Mr Ceviz said that he was not asked for sight of the 2017 Lease until January 2019, and I accept that evidence.

59. On 5 June 2018 there was a sequence of messages between Mr Ceviz and Mr Duong. The way they are written makes them not entirely easy to interpret, but it seems to me that it comes to this. Mr Ceviz expressed disgruntlement both at his solicitor ("she give me a headache") and at the expense to which "registration" would put him. By "registration" I take him to mean, in context, the registration of title under the 2017 Lease. There was discussion of proceeding by the grant of a new lease instead of assignment of the 2017 Lease. Mr Duong observed that, if there were a new lease, Mr Ceviz would not need to use a solicitor, and Mr Ceviz observed that he would be able to recover the money he had advanced for registration. There was discussion of the

term of the new lease and agreement at "6.5 + 6.5 [years]". Mr Ceviz said that he would take the new lease in the name of Caroce, not in his own name.

60. Further messages between Mr Ceviz and Mr Duong show that they informed their respective solicitors of their agreement and that they were discussing the payment required by THD's solicitors for the new lease.

61. In his witness statement, Mr Duong stated that the exchange of messages on 5 June 2018 took place because he did not wish to speak to Mr Ceviz by telephone because "I was with my family and he is [an] aggressive person". He stated that he was still dealing with Mr Ceviz as he was talking about restoring Chai to the register, registering the 2017 Lease and seeking a licence to assign it. However, he never met Mr Ceviz, Mr Frawley and Ms Pope together and he was annoyed at Mr Ceviz's constant change of intention as to which company would be the new tenant. Mr Duong stated that on 13 June 2018 he met with Mr Ceviz, who confirmed that the tenant under the new lease would be Anatoni's, as it was registered for VAT. "This was confirmed by Mr Frawley separately."

62. On 26 June 2018 Ms Kruzins sent an email as follows to THD's solicitor:

> "As you know, Chai Central (Cardiff) Limited is a dissolved Company. I am instructed that both our respective clients have discussed the matter between themselves and in order to move forward I understand your client is prepared to grant to my client a new Lease for a term of six years and six months, renewable for a further term of six years and six months at the expiry of the original term.
>
> I should be pleased if you would confirm your client's instructions and I look forward to hearing from you."

63. On 27 June 2018 Mr Ceviz sent a message to Mr Duong:

> "Hi mate, I spoke to solicitor (sarita) yesterday about new lease agreement she was happy and send email to your solicitor as well, (don't worry about solicitor cost all arranged) let's move on and meet up for meal in saray [restaurant] (you are paying meal!) like Tony [Mr Frawley] said to me we need stop ignoring each other, move on leave behind all other small arguments."

64. Mr Duong's evidence was that by this time he had lost patience with Mr Ceviz.

65. On (Friday) 30 June 2018 Mr Ceviz sent a message to Mr Duong: "have you speak to your solicitor about lease?" Mr Duong replied: "Lease can be drawn up straight away but need the fees paid first". A long series of short messages followed. Mr Ceviz appeared to believe that he had paid Caroce's solicitor the money required by THD's solicitors and would not be charged anything by Caroce's solicitor. The conclusion of the messages was, however, that Mr Ceviz would arrange for the transfer of any necessary money and that matters would be concluded on "Monday", which I take to be 2 July 2018. Mr Duong questioned these messages; he said that some of them

might be authentic but that he felt that the chain had been "mixed and matched". He was unable to give particulars, other than the general difficulty of making sense of all of the messages. I accept that the chain is genuine and in order.

66. Mr Duong's evidence was that Mr Ceviz paid only £2,000, which was less than the amount required by THD's solicitors (£2,100: £1,750 plus VAT). He stated that no further discussions concerning the lease took place during July and August as Mr Ceviz was away and he was content that Anatoni's was paying the licence fee regularly and was making a success of the business.

67. On 5 September 2018 Mr Ceviz sent a message to Mr Duong: "Hai. When lease are going to be complete? Thanks". Mr Duong replied: "Next week hopefully".

68. On 14 September 2018 Mr Duong instructed his solicitors in respect of the grant of the new lease to AL. On the following day he had a conversation with his solicitor in respect of the identity of the guarantors of the new lease. Mr Duong said that he understood that Mr Ceviz was a shareholder in the Company, but the solicitor informed him that the shareholders and directors were Mr Frawley and Ms Pope and said that it was normal for the directors to be the guarantors.

69. On 25 September 2018 Companies House issued written notice to the directors of Caroce (that is, to Mr Ceviz) that, unless cause were shown to the contrary, at the expiration of two months Caroce would be struck off the register and dissolved.

70. On 23 October 2018 Mr Ceviz enquired of Mr Duong by message: "Hai, any news from lease?" Mr Duong replied that it was awaiting the bank's approval and that he would check on the position.

71. On 31 October 2018 Mr Duong signed a warning notice for the purpose of excluding the provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 from the new lease. This was provided to Mr Frawley.

72. On 5 November 2018 Mr Duong sent a message to Mr Frawley:

> "Hi Tony, further to our conversation to confirm 5k.
>
> 6k return in three months. 20% interest.
>
> Please can you transfer the funds to the rent account—ref loan.
>
> Interest would be given back to you in cash an doriginal amount refunded back."

The fact that Mr Frawley had agreed to make a loan on these terms to Mr Duong is itself of no significance. However, it serves to cast further doubt on the impression given by Mr Frawley that he had limited or no contact with Mr Duong during summer and autumn of 2018, while Mr Ceviz was supposedly negotiating the new lease, and to suggest that the relationship between Mr Duong and Mr Frawley was closer than they were willing to acknowledge.

73. On 15 November 2018 THD received consent from the bank, Assetz Capital Trust Company Limited, to the proposed lease in favour of AL.

74. On 30 November 2018 Mr Frawley and Ms Pope signed declarations acknowledging the exclusion of sections 24 to 28 of the Landlord and Tenant Act 1954 from the new lease.

75. On the morning of 3 December 2018 Mr Duong sent a message to Mr Frawley, telling him that he "should have you copy of lease later today." This message only serves further to undermine Mr Frawley's incredible claim that when he signed the new lease he thought it was just an assignment of the existing lease.

76. Later that day, 3 December 2018, the new lease ("the 2018 Lease") was signed at the Premises. It was made between (1) THD as landlord and (2) AL as tenant and (3) Mr Frawley and Ms Pope as guarantors. THD demised the Premises to AL for a term of 6 years commencing on 3 December 2018 at a rent of £24,000 for the first year, £26,400 p.a. for the second, third and fourth years, and £29,040 p.a. for the fifth and sixth years. Clause 10.10 gave AL an option to renew for a further period of 6 years on the terms set out in that clause. (The shorter term with the option to renew was, in my view, a specific advantage to the defendants, who did not intend to remain in Cardiff for longer than about three years but who would have an interest in the continued viability of the business thereafter, if it proved to be a success.) The provisions of sections 24 to 28 of the Landlord and Tenant Act 1954 were disapplied from the 2018 Lease.

77. Mr Frawley's evidence was that the 2018 Lease was negotiated entirely by Mr Ceviz and that he, Mr Frawley, signed it "in the belief that it was basically a document effecting AL taking over the existing 2017 Lease" (witness statement, para 96). I reject that evidence. In my judgment, it is clear that Mr Frawley and Mr Duong have attempted to create a false picture of what was going on in the latter part of 2018. The truth is simply that, when Mr Duong found that Mr Frawley and Ms Pope were the directors of AL, he cut Mr Ceviz from discussions and dealt with Mr Frawley (consistently with this, his oral evidence was that he would only deal with the directors); that Mr Frawley knew perfectly well both the position regarding the 2017 Lease and—because he had negotiated it with Mr Duong—the nature of the document he was signing; and that, with Mr Duong's active assistance, Mr Frawley has since early 2019 been advancing an untrue account of what transpired in 2018 in an effort to achieve a position in which Mr Ceviz is excluded from any interest in the pizzeria.

78. On 7 December 2018 the original 2018 Lease was delivered by hand to Mr Frawley, who on 10 December 2018 signed a form acknowledging receipt of it.

79. On 11 December 2018 Caroce was dissolved.

80. On 14 December 2018 Mr Ceviz, by message to Mr Duong, asked: "any news from lease??" Mr Duong replied that he would "drop it in later". Mr Duong's evidence was that he did not want to tell Mr Ceviz that he had already delivered the 2018 Lease to Mr Frawley and Ms Pope as he considered that Mr Ceviz had no standing in respect of the 2018 Lease and so did not want to have any dealings with him in respect of it. I think that is true, in this sense: that Mr Duong was allowing Mr Ceviz to believe that they were the ones who were sorting out the lease and that a draft lease would be provided to him, but he was concealing the fact that he was now dealing directly with Mr Frawley and had already finalised the lease.

81. On 26 December 2018 Mr Ceviz sent another message to Mr Duong: "Hai, can you drop lease tomorrow?" Mr Duong replied, "I drop it already[,] Tony got it."

82. Mr Ceviz's evidence, which I accept, was that he first saw the 2018 Lease when he found it in an envelope at the Premises over the New Year period, while Mr Frawley and Ms Pope were away.

83. On 10 January 2019 Mr Ceviz sent a text message to Mr Frawley:

> "[W]e need have a meeting, me you and Hai [Duong], I will not accept this lease, I just told hai as well.
>
> You should never sign lease without asking me Tony.
>
> He is say Tony and anna was happy to sign lease.
>
> I just spoke to him now."

84. Mr Ceviz and Mr Frawley arranged to meet on the following morning.

85. On the afternoon of 22 January 2019 Mr Ceviz sent a message to Mr Duong:

> "Hai, the lease need to be 13 years, and rent increase should be 2021 and every four year review, keep your promise and Honour as we agreed like a gentleman. I always help you and trust you with lots of everything. Don't break this trust for £2000 pound."

Mr Duong replied:

> "Listen everything was explained to Tony the lease is 6.5 years plus 6.5 years … if you are not sure u better speak to your business partner."

86. On the evening of 22 January 2019 there was an exchange of iMessages between Mr Frawley and Mr Duong. Mr Duong sent the following long message (for ease of reading, I shall correct some spelling and supply some punctuation—and some words—in accordance with my interpretation of what was written):

> "Old lease was in this name. [A screen shot of company details for Chai was included.]
>
> No completion of assignment was made, as delayed [owing] to the facts this lease was never registered so transferred wasn't possible.
>
> me … (sic) permission to was given to assign was late December 17 early January 18.
>
> Response to landlord solicitor was they [were] taking instructions and advise their clients of their position; when a plan of action was made their solicitor confirm it can't take

> place due to the facts their client dissolve their company … making their lease nil and void … not forgetting it was already breach of contract by failing to register a lease by law.
>
> He confirm he wanted to reactivate the company but still that doesn't change the fact of breach, and main issue was without registration no transfer were legal … this concluded the matter … out of good faith a new lease was offered at current market conditions subject to landlord's bank approval.
>
> Agreed in principle was rent commencing was at the same amount due to the fact of both yourself and Anna's credentials and as new operators, shareholders are of irrelevance to me only director at that time which are yourselves.
>
> Lease completed.
>
> I hope this clarify the position.
>
> For your information too he was not on Chai Central. Caroce was never a tenant, just a proposed assignee. Chai Central was not in a position to complete the transfer."

87. Mr Frawley's evidence was that it was only on receipt of this message, or at least at about the same time, that he learned of the existence of Chai.

88. On 25 January 2019 Mr Ceviz sent a message to Mr Duong asking for the return of his £6,000 rent deposit. In an immediately following message he wrote: "I can't see anything in the lease you have mentioned about rent deposit?" I take this to mean that, as there appeared to be no requirement for a rent deposit in the 2018 Lease, Mr Ceviz wanted the return of the deposit paid under the 2017 Lease. Mr Duong replied:

> "I can confirm Bond was paid for the last old lease …
>
> However I will honour the bond and return it to you out of good faith on the condition that a replacement bond shall be in place by the current company leaseholder with the fees for a rent deposit deed to be drawn up officially."

89. Also on 25 January 2019 Mr Ceviz sent a text message to Mr Frawley, asking for Mr Frawley's solicitor's email address so that he could "forward him all written between myself and Hai as well".

90. On 30 January 2019 Mr Ceviz arranged by text message for Mr Frawley to reserve a table at the Premises for a couple of restaurant reviewers. Mr Frawley confirmed the reservation and asked Mr Ceviz: "Sis [presumably, Did] you have a chance to get the old lease?" Mr Ceviz's evidence was that this was the first time he was asked for a copy of the 2017 Lease; he denied that Mr Frawley had asked him for it repeatedly. He replied to Mr Frawley:

> "Tony, don't worry about old lease and everything under new lease now, also I'm not showing any shareholders in Anatoni's ltd, from 1st of February I have to be director in Anatoni's ltd."

I take the first part of this reply to mean: "Never mind the old lease! It's the terms of the new lease (which is the existing lease) that I am unhappy with." Mr Ceviz's unhappiness with the new lease was twofold: first, he did not approve of the rent review provisions; second, he appears to have believed that the lease was only for six years but to have overlooked the option to renew for a further six years. The second part of the reply is indicative of the fact, apparent from the evidence at trial, that Mr Ceviz does not have a firm grasp of the distinction between shareholders and directors. The reply is inconsistent with Mr Frawley's claim that it was Mr Ceviz who negotiated the 2018 Lease.

91. On 31 January 2019, Mr Duong sent an iMessage to Mr Frawley: "Did he get you the old lease in the end[?]" Mr Frawley replied: "Not yet, I'll give you a quick call later or tomorrow and explain." Mr Duong replied: "No worries. Is he still playing up with you[?]" The answer was presumably given in the "quick call" that followed.

92. On 26 February 2019 solicitors instructed by Mr Frawley wrote to Mr Ceviz. The letter accused Mr Ceviz of fraudulent misrepresentation:

> "[D]uring discussions surrounding the Agreement you repeatedly assured our client that your company Caroce Limited (Co. No. 10853531) had the benefit of a 13 year lease of the Premises and that our client's company could avail of (sic) that lease (we assume by way of underlease) and would pay its rent to Caroce. You were informed that our client required Caroce Limited to be VAT registered but you did not want to do so (sic). The lease was therefore to be assigned to Anatoni's Limited.
>
> Our client repeatedly asked you to provide a copy of the lease but you failed to provide it. Our client proceeded on the basis that he trusted that you had the lease and would eventually provide it to him. You have never done so.
>
> Having discussed this matter with your landlord, the actual position is that Caroce Limited never held a lease of the Premises. This is entirely contrary to the representations made to our client prior to the Agreement."

The letter went on to accuse Mr Ceviz of "a pre-meditated attempt by [him] to acquire an interest in [Mr Frawley's] business":

> "It is evident from a consideration of the factual background in this matter that you have fraudulently misrepresented the actual position to our client in order to induce him and his wife into entering the Agreement which culminated in you making a significant financial gain. In return you have not, and were not ever in a position to, to provide (sic) anything of value to our

> client. If the true position was known to our client, he and his wife would certainly not have agreed to enter the Agreement with you."

This allegation of a "pre-meditated attempt" to "acquire an interest in [Mr Frawley's] business", with the consequent proposal in the letter to have rescission on the basis that Mr Ceviz would have no further rights under the Agreement and Mr Frawley and Ms Pope would allow him to retain the moneys he had already received, is quite striking, in circumstances where (1) Mr Frawley never had any relevant pre-existing business except via the Agreement, (2) he was only able to establish one at the Premises on the back (so to speak) of Mr Ceviz, and (3) he arranged a new lease to his apparent satisfaction without any regard or reference to the previous lease.

93. At all events, Mr Ceviz instructed solicitors—not those who now act for him—and they responded on 19 March 2019. The letter denied misrepresentation. It said that the 2017 lease was valid, but also that Chai had been dissolved on 17 April 2018 "by agreement between our clients." Some of the main things in the (not at all points coherent) letter are the following:

> "It is untrue for your client to say that our client represented that Caroce Limited had the benefit of a 13 year lease at the premises. There was a meeting between the landlord and our clients and there was a discussion on whether the new lease should be in the name of Caroce Limited or Anatoni Limited. The landlord did not mind which company held the lease. It was suggested that the lease be in the name of Caroce Limited and that the business would trade under the name of Anatoni Limited. In fact our client paid the sum of £2,000 to the landlord in respect of the landlord's fees for the lease to Anatoni Limited. Also, the bond of £6,000 that our client paid to the landlord in respect of his previous lease was held by the landlord as a bond in respect of the new lease for Anatoni Limited. It is untrue of your client to state that he required Caroce to be VAT registered.
>
> Subsequently, the parties agreed to enter into a new lease under the name of Anatoni Limited. Our client had been running the business under the name of Caroce Limited and the lease was in the name of [Chai]. This was our client's business and it was successful. Your client came to our client and said he could continue to make a success of the restaurant and it would enable our client to work part-time. Negotiations commenced in approximately February 2018 and the agreement was concluded on 12 April 2018.
>
> Part of the agreement was that our client was to be a director of Anatoni Limited and also a 50% shareholder in the company. The company was set up by your client's accountant, Simon Lewis. Our client had assumed that this had been done.
>
> …

> Clearly, your client has decided to set up a new company so that both he and his wife could control it to the exclusion of our client. Your client has behaved in an underhanded manner to say the least … [and], together with his wife, have (sic) connived to take our client's profitable business and renege on the agreement to compensate him for this. …
>
> Your client has no valid reason for rescinding the agreement. our client is entitled to damages from your client and his wife."

94. There was much further correspondence, but I shall not recite the mutual accusations and justifications it contains. On 17 April 2019 the defendants' solicitor wrote a lengthy rebuttal of Mr Ceviz's case. There had been no response to that letter, when on 7 May 2019 Mr Duong sent a message to Mr Frawley, as I think with reference to Mr Ceviz: "Any news on the fucker?" Mr Frawley replied: "Not a word, I think I will this week tho". He was correct, because a substantive response was sent by Mr Ceviz's solicitors on that day.

95. Mr Ceviz commenced proceedings on 5 September 2019. The defence was filed on 31 October 2019. On 4 December 2019 Mr Ceviz filed a defence and made a request under CPR Part 18 for further information. On 16 December 2019 there was an exchange of messages between Mr Frawley (AF) and Mr Duong (HD). Partial disclosure of these messages had been made before trial, and the remainder were disclosed shortly after the conclusion of the trial. For convenience, I shall combine some messages that were originally sent separately and introduce some obvious corrections:

> "AF [I]f your about later I can run by a couple of questions Agit solicitor wants to know about discussions we had when completing the lease, just so your up to speed with it all. Cardiff City Council confirmed by email that he never had an Alcohol licence in there. The last one ceased in there in June 2016. I have a copy for you if you need it.
>
> HD Discussions? Don't say too much. I pop in around 4pm ish ok. U don't need to say anything.
>
> AF That's what I thought. We didn't really have in-depth ones. 4 is fine, see you then.
>
> HD No discussions I grant a least u sign it that's it. They very frustrated as I haven't answered. Or play ball with their story. So they moving goal post. They creating story on lease discussion etc. Simple a grant licence. Then a lease was done u sign. He had nothing to do with it. He's not the landlord or has any control rights or dictations. Remember your agreement has nothing him on the lease. He wants to link he has ownership in it.

> AF Yea, I can see that. they are searching for me to say things that they can not get from you. You'll see better when you see what there looking for. He is heavily relying on evidence from you
>
> HD Without me he is fucked. His story has no substance without my backup. So the angle they use is u. To link it up. Don't say a word. Using what u say against u. To put him in the lease picture. Agreement has nothing to do with lease. His objective is wanting the lease as the agreement is fuck all on it.
>
> [Then follows an exchange where Mr Frawley remarks that he has found a number of text messages that will "heavily condemn" Mr Ceviz and disprove his case. The sequence continues:]
>
> HD Without a statement from me they cannot put an accurate story.
>
> AF We can run through the questions so you can see what he's up to. I'm saying very little on all of them.
>
> HD It be messed up it's just his say only. U don't need to answer.
>
> AF He's trying to cover himself on all sides, but he's in deep shit with this at the mo.
>
> HD I went to repossess the place. A licence was offered out of good faith and a lease was granted thereafter as my choice end off. [Probably: … as my choice. End of.] He's nothing to do with my place or any influence. He mess up and lost the lease his own fault. He sold u something he never completed on to officially owned. That's facts and simple. … U [Presumably: He] was in many many breaches. I gave him warning after warning letters etc and gave him last chance by granting an assignment which he fail to complete. He is victim to his own circumstances. He fail himself. He closed his company. I demonstrated enough fairness. Basically he failed. U gave him a lifeline. That's facts, truth. Otherwise he would of owe my rent for 13 years. he was and did go bust."

96. How one reads that sequence of messages depends in part on the view one has formed of the participants through their evidence and on an assessment of the wider factual position. The view I have formed is adverse to Mr Duong and Mr Frawley. Some of the contents of the exchange is entirely fair. But in my view the correct interpretation to place on the messages as a whole is that Mr Frawley and Mr Duong were not interested in a bona fide attempt to present an accurate record of events but, to the

contrary, were trying to ensure that (in a familiar expression) they "got their story straight" and stuck to it, saying just enough to damage Mr Ceviz's case but ensuring that, by adopting a minimal approach—in Mr Frawley's case, by saying as little as he could; in Mr Duong's case, by withholding material assistance that it was within his power to give—they avoided the fuller picture that might show matters in a different light. Points of particular significance include the following: (1) that the messages give the lie to Mr Duong's attempt to portray himself as an impartial bystander who, having had no desire to get involved, would of necessity tell the unvarnished truth; (2) that the messages clearly have to do with the response that the defendants were to give to the Part 18 request for further information, although at trial, when only some of these messages had been disclosed, Mr Frawley was adamant that he had not discussed the Part 18 response with Mr Duong; (3) that the messages serve further to undermine Mr Frawley's claim—which even without the messages I should have regarded as plainly false—that he was involved in no discussions at all regarding the 2018 Lease, which was negotiated by Mr Ceviz, and that he did not even understand that he was signing a lease.

The issues

97. I have not found the statements of case to be as useful as I could have wished. The particulars of claim were admirably succinct at a mere two pages. The defence and counterclaim, by contrast, ran to 20 pages and suffered from the modern curse of including background material, comment, argument and excess detail, so that it is hard to see the wood for the trees. Unsurprisingly, this provoked an almost equally discursive 9-page reply and defence to counterclaim.

98. Although there are other ways of ordering the analysis, the issues seem to me to be as follows:

    1) What does the Agreement mean, when it is correctly construed and necessary terms have been implied?

    2) On the assumption that the Agreement remains effective, are Mr Frawley and Ms Pope in breach of it?

    3) Have Mr Frawley and Ms Pope validly rescinded the Agreement on the grounds of misrepresentation by Mr Ceviz?

    4) If there were misrepresentations as alleged: (a) are Mr Frawley and Ms Pope entitled to damages for deceit or under section 2(1) of the Misrepresentation Act 1967; (b) is any further relief required?

The meaning of the Agreement

99. At the outset, I should make clear that I am concerned with the meaning and effect of the Agreement: that is, the written document made on 12 April 2018. Mr Ceviz's pleaded case concerns the meaning and effect of this document. It does not state any

case concerning a further or collateral oral agreement between the parties. Some evidence was given in that regard, but no application was made to amend the statements of case.

100. Mr Ceviz contends that, on its true construction or by necessary implication, the Agreement contained terms (1) that the shares in the new company would be held as to 50% by Mr Ceviz and as to 25% each by Mr Frawley and Ms Pope, and (2) that Mr Ceviz would be a director of the new company. Mr Frawley and Ms Pope deny that the Agreement contained either term.

101. The general principles of construction are settled and not in dispute. They were summarised pithily by Lord Bingham of Cornhill in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215 at [12]:

> "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed."

The ramifications of that approach have been discussed in detail in many recent cases. A helpful summation of the main points was provided by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645 at [17]-[19]:

> "17. The well-known general principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.
>
> 18. A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:
>
> i) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

ii) The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;

iii) When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;

iv) Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;

v) While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;

vi) When interpreting a contractual provision, one can only take into account facts or circumstances which

> existed at the time the contract was made, and which were known or reasonably available to both parties.
>
> 19. Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated."

102. In the context of this case, I ought to make the further points (1) that the background material available as an aid to construction does not include the parties' negotiations and (2) that post-agreement conversations are not admissible as an aid to construction, at least in a contract of this nature.

103. As for the implication of contractual terms, in *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, the Supreme Court confirmed and approved the traditional approach. A term will be implied into a contract only if it is necessary to give business efficacy to the contract (in the sense that, without the term, the contract would lack commercial or practical coherence) or—which will often amount to the same thing—if the term is so obvious that it "goes without saying". A term will not be implied if it is incapable of clear expression, or if it is unreasonable or inequitable, or if it contradicts an express term of the contract. In *AG of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988, Lord Hoffmann had appeared to suggest that the traditional tests for the implication of terms were simply aspects of a unitary exercise of construction, in which the sole question was: "is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" (see his judgment at [17] to [22]). In the *Marks and Spencer* case, the Supreme Court did not go so far as to say that Lord Hoffmann's approach had been wrong, but it indicated firmly that his approach, though "quite acceptable", was open to interpretations contrary to the correct state of the law, should not be regarded as authoritative guidance on the implication of terms, and did not change the pre-existing law. Lord Neuberger (whose reasoning represents the majority in the Court) explained the relationship between construction and interpretation as follows:

> "28. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if

> so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication.
>
> 29. In any event, the process of implication involves a rather different exercise from that of construction. As Sir Thomas Bingham trenchantly explained in *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 at p 481:
>
> > 'The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.'"

(For recent advocacy of the importance of Lord Carnwarth's "iterative" approach in the entire exercise, see Beatson, Burrows and Cartwright, *Anson's Law of Contract* (31st edition, 2020) at p. 162.)

104. As for the Agreement, it makes no express mention at all of shareholdings in the new company, including any on the part of Mr Frawley and Ms Pope, whether at the outset or at any time thereafter, and the only mention of directorships is the rather oblique reference in clause 4. This fact could point in either of two directions: either (as the defendants would say) it reflects the intention that the new company would be that of the defendants and that the arrangement was for the terms on which their company, having nothing to do with Mr Ceviz, would carry on business at the Premises; or (as Mr Ceviz would say) it reflects the fact that the new company was a joint venture among all three persons, and that the intentions regarding shares and directorships are to be gathered from the provisions relating to the practical functioning of the new company.

105. In my view, on a correct construction of the Agreement, Mr Ceviz is entitled to be a director of AL. The reasons for this conclusion are as follows:

1) Clause 5 seems more consistent with Mr Ceviz being a director. To specify that he has no "fixed responsibilities" is naturally understood as an acknowledgment that his role in the business—which is that of the company—is not one of day-to-day management or hands-on running. This is neither a necessary nor a suitable provision if he is not to be a director at all; if he were not a director, he would have no responsibilities in respect of the company.

2) Clause 4 supports Mr Ceviz's contention that he was to be a director, for two reasons.

    a) Mr Ceviz is given what is described as "an option to sell" the business of the company. It is difficult, albeit not perhaps impossible, to make sense of this unless it is envisaged that Mr Ceviz will be a director with authority to act on behalf of the company, and the first alternative in the second sentence of clause 4 envisages that the option should be exercisable while Mr Frawley and Ms Pope are still directors. It is therefore likely that the clause envisages Mr Ceviz having executive powers and responsibilities as a director at a time when the defendants are directors.

    b) The second alternative in the second sentence of clause 4 ("Anthony and Anna decide to resign as directors between years 3 and 5 and give Agit full directorship") is in my view better understood as meaning that upon their resignation as directors after year 3 Mr Ceviz will be the only director. It could possibly be construed as referring to a situation in which they resign and appoint him as sole director. However, that would have been much easier to say if it is what was meant. Further, such a construction would create a lacuna if the defendants were to resign but not appoint Mr Ceviz as sole director. A possible answer to that objection would be to imply an obligation that, if they were to resign after year 3, they must appoint him as sole director. In my view, that is a convoluted interpretation of provisions that can be given a simple meaning.

3) Accordingly, I would construe the Agreement as follows. Mr Ceviz, Mr Frawley and Ms Pope will be the directors of AL. AL will operate the pizzeria for a minimum of 3 years, and for at least that period Mr Frawley and Ms Pope will remain as directors and will be responsible for the day-to-day running of the business. After that initial period, and until the end of year 5, Mr Ceviz can require that the business be sold, whether all three of them remain directors or whether Mr Frawley and Ms Pope have resigned leaving him as the sole director.

106. I am further of the view that from year 2 Mr Ceviz was entitled to have a 50% shareholding in AL. This seems to me to be the most coherent interpretation of clause 3 of the Agreement. The Agreement is a contract among the three persons named in it, namely Mr Ceviz, Mr Frawley and Ms Pope. It does not purport to be made by AL and, as AL had not yet been incorporated, it could anyway only have created personal obligations as among the parties: see section 51 of the Companies Act 2006. Agreement that the company should pay a share of its profits to a person with whom it had no contract is problematic, unless what is meant is that the payments of profits are

in the nature of dividends to the shareholders. Further, the net profits are to be payable "after settlement of … salaries of staff and directors". If Mr Ceviz were not a shareholder (whether or not he were a director in a minority on the board) this benefit would be potentially illusory, because the defendants as sole members and as controlling the board would be able to nullify or at least minimise the benefit under clause 3 by inflating directors' salaries. Only as a member would Mr Ceviz have standing within the company to object to this happening. These considerations, though not logically compelling, are sufficiently weighty to warrant a construction of clause 3 as indicating the shareholdings in AL. An alternative analysis would be to say that it is necessary to the business efficacy of clause 3, in the sense explained above, to imply the term as to the shareholdings. For my part, I prefer the simple route of construction.

Breach of the Agreement

107. For reasons that I shall explain, I hold that the Agreement subsists. On that basis, it is not in dispute but that Mr Frawley and Ms Pope are in breach of the Agreement, because they have not procured the payment of moneys to Mr Ceviz pursuant to clause 2 since February 2019 and pursuant to clause 3 at all.

108. On the basis of my construction of the Agreement, Mr Frawley and Ms Pope are also in breach of the Agreement because they have not procured or caused the allotment of a 50% shareholding to Mr Ceviz and his appointment as a director.

Misrepresentation, Rescission and Damages

The statements of case

109. Mr Frawley and Ms Pope claim that they were entitled to rescind the Agreement because they were induced to enter into it by material misrepresentations on the part of Mr Ceviz. The plea of misrepresentation is at paragraph 10 of the defence and counterclaim:

> "The claimant repeatedly represented and/or assured the defendants that his company, Caroce, held a 13-year lease of the Premises and that he would arrange for the defendants to 'take over' that lease (which was discussed between the parties to be by way of a sub-letting arrangement). … Those express representations and assurances carried with them the following implied representations:
>
> (a) The existing lease was in Caroce's name and Caroce would be able to effect an assignment or underletting of that lease;

> (b) No steps had or would be (sic) taken by the claimant to prevent an assignment or underletting of the existing lease;
>
> (c) The existing lease had been validly registered at HM Land Registry such that a valid legal interest subsisted;
>
> (d) Stamp duty land tax had been paid in respect of the existing lease such that it could be (and had been) validly registered; and/or
>
> (e) No steps had been taken or not taken by the Claimant which would or could give rise to a ground of forfeiture of the existing lease."

In Further Information provided under CPR Part 18, Mr Frawley and Ms Pope averred that the representation that Caroce held a 13-year lease of the Premises was made "orally on several occasions during the parties' first meeting in approximately the middle of March 2018" and was repeated at further meetings up to the signing of the Agreement. They say that they requested a copy of the lease in early July 2018, after THD had requested payment of a fee for a licence to occupy and had said that there might be problems with the lease, and that Mr Ceviz had responded, "Of course I have a lease, don't be stupid. It is just the landlord penny-pinching." They say that they became aware of Chai only when told of it by THD on 22 January 2019.

110. Paragraph 12 of the defence and counterclaim avers that in reliance on those representations and assurances and believing them to be true Mr Frawley and Ms Pope entered into the Agreement, took up occupation of the Premises, invested heavily in the Premises, and commenced and continued to operate the restaurant business there. After several paragraphs of narrative and comment, paragraph 18 avers that the representations set out in paragraph 10 were untrue. The particulars of falsity come to this:

- Caroce did not have a lease of the Premises at all and so could not assign any lease or sub-let the Premises.
- The lease in existence at the date of the Agreement was the 2017 Lease, which was held by Chai and had not been assigned to Caroce.
- By applying for Chai to be struck off, Mr Ceviz had taken steps that (i) would prevent an assignment of the 2017 Lease or sub-letting of the Premises and (ii) would or could give rise to a ground for forfeiture of the 2017 Lease (apparently under clause 10.1.4, which provided that liquidation, including voluntary liquidation, was a ground of forfeiture).
- As it had not been registered, the 2017 Lease did not take effect in law.

111. The prayer to the counterclaim seeks a declaration "that the Agreement was procured by fraudulent or alternatively negligent misrepresentations and that the Agreement has

been rescinded and the defendants are entitled to be repaid all sums paid under it". There is also a claim for repayment of the sums paid and for damages.

Misrepresentation

112. In the light of my findings of fact, I reject the case that Mr Ceviz represented that Caroce held a lease of the Premises or that the (unexpired?) term of the lease was 13 years. However, I accept that Mr Ceviz said that he was in the process of transferring the lease of the Premises from Chai to his new company; he thereby represented that Chai had a lease of the Premises. That was not itself a misrepresentation, because at all times prior to the Agreement Chai did indeed have a lease of the Premises, albeit that it took effect only in equity. However, in my judgment the representation did imply the further representations that there were no reasonable grounds for believing (a) that the existing lease could not be assigned or (b) that it was vulnerable to imminent forfeiture, extinction or loss or (c) that the new pizzeria would not be able to occupy the Premises by virtue of it. Those were misrepresentations, because the 2017 Lease had not been registered, because no assignment had been effected pursuant to the licence to assign that had previously been granted, and because the existing lessee was in the process of being struck off the register of companies.

113. However, I find and hold: first, that the representations were not made fraudulently; second, that the defendants did not rely on them, at least in any respect in which they were false; and, third, that rescission would not be available even if there had been reliance.

Fraud

114. The defendants have, from the beginning, advanced the allegation that Mr Ceviz deliberately misled them in furtherance of a fraudulent scheme both to extricate himself from the financial liabilities associated with his failing restaurant business and the 2017 Lease and to acquire a share in their valuable business. I reject this allegation and regard it as fantastical. In respect of the first part: the existing Indian restaurant was clearly struggling, which is why Mr Ceviz thought of replacing it with a Turkish grill, but there is no evidence that Mr Ceviz had any significant existing debt concerning the Indian restaurant or the premises; and the introduction of AL would not release him from liability under the 2017 Lease unless either it were replaced by a new lease or it were assigned to AL and no guarantee were sought from him—neither of which courses was originally envisaged, at least according to the defendants. In respect of the second part: the defendants had no relevant existing business; they were only able to set up such a business at the Premises by means of an agreement with Mr Ceviz; and, despite the defendants' insistence to the contrary, Mr Ceviz, as the sole owner of Chai and the person whose money had gone into fitting out the premises was responsible not only for providing them with the opportunity to carry on business at the Premises but for giving them the start-up assistance of a fully equipped restaurant and kitchen.

115. The more realistic basis for alleging fraud, dispensing with the implausible attribution of the alleged motive, is simply that Mr Ceviz knew that his representations were false or did not believe them to be true or did not care whether they were true or false. I reject this contention. The first point to note is that the express representation was true; only the implied representations were false. The second point to note is that Mr

Ceviz had little true understanding of the legalities of the position but thought of the matter in terms of its practicalities. The practicality, as he understood it and reasonably understood it, was that there was no true problem over his continuing occupation of the Premises. This is reflected in his communications with Mr Duong and is the reason why he took the unfortunate, indeed very silly, step of seeking Chai's dissolution. So far as he understood the matter, the question of a new lease or an assignment was a technical issue, the only practical implication of which might be a difference in legal fees. Further, as Mr James rightly observed, the idea that Mr Ceviz was seeking to mislead anyone as to the position regarding the lease is implausible, because if the matter were of any importance the truth would be easy to discover and impossible to conceal: all that would be required would be for Mr Frawley to speak to Mr Duong or to insist on seeing the existing lease.

116. For the avoidance of doubt, however, I accept that Mr Ceviz had no reasonable ground for belief in the truth of the implied representations, albeit that I consider that he did have reasonable grounds for belief that there was no practical problem threatening the likelihood that the pizzeria could occupy the Premises.

Reliance

117. As to reliance, I have made clear that I do not regard Mr Frawley as an honest witness and I do not believe his claim that he placed reliance on anything he was told by Mr Ceviz about the existing lease. As Mr James submitted, the lack of reliance is indicated by the apparent omission both to record anything about the basis of occupation of the Premises in the Agreement and to take any steps to verify the position regarding the existing lease—not just the unexpired term, but any of the other provisions and obligations contained in the lease. Mr Frawley and Mr Duong have not been candid about their dealings at any time during 2018 and 2019. I have very little doubt that by the time the Agreement was signed Mr Frawley had become aware through Mr Duong of the substance of the position regarding the 2017 Lease—that there was an ongoing problem regarding registration and assignment—but also, critically, that Mr Duong was content for the new business venture to operate at the Premises through the existing lease or a new lease. The two things that mattered to Mr Frawley were (a) that he had an agreement with Mr Ceviz that the pizzeria would trade at the Premises and (b) that Mr Duong (whose consent would have been required whatever the arrangement) was also content. I do not believe that Ms Pope played any direct part in the discussions with Mr Ceviz or Mr Duong; rather, as I think, she left those matters to Mr Frawley and relied on what he told her.

Rescission

118. My findings as to reliance mean that there can be no claim to rescission. Nevertheless, I shall consider that remedy on the assumption that, contrary to my findings, there was reliance.

119. It is worth, first of all, taking a moment for an overview of the position. In April 2018 Mr Ceviz was in occupation of the Premises through his company, Chai, and was continuing to discuss directly with Mr Duong the way in which to regularise the situation with either the 2017 Lease or a new lease. There is, in my view, no reason to suppose that the position would not have been sorted out, as this was the desire of both men. The Premises were still functioning as a fully equipped restaurant. The

defendants had nothing to do with the Premises and they had no "Anatoni's" business. Then the Agreement is made: Chai's restaurant closes; the premises are re-branded as a pizzeria; the new restaurant trades in the manner it was always intended to trade and (subject to the present Covid-related difficulties) continues to be very successful. The position regarding AL's occupation of the Premises is regularised: not through resolving the problems with the 2017 Lease and by consequent assignment and/or sub-letting, but by a new lease, which is granted after Mr Ceviz has been cut from the discussions in late 2018. The term of the new lease, if the option to renew is exercised, is until December 2030. The substance of the defendants' complaint is that in early 2018, whatever the precise date, they were told that there was an existing lease with a 13-year term. They never asked to see the existing lease, so the understanding concerning the time-frame cannot have been very precise. (Indeed, the case advanced is that Mr Ceviz said that there was a lease with a 13-year term, not that there was a lease with 13 years of the term left to run.) The defendants' position is materially no different from what they can ever have thought it would be. Dissatisfaction with the 2018 Lease arose on the part of Mr Ceviz, not the defendants. Mr Jagasia submits that the 2018 Lease is materially less advantageous to the defendants than the 2017 Lease would have been. However, the respects in which it could be said to be less advantageous concern either matters in respect of which they claim to have made no inquiries before making the Agreement (in respect of the detailed terms of the 2017 Lease, including the provisions as to rent) or matters where the supposed disadvantage is illusory or speculative (in respect of guarantors' liability: the terms of any sub-lease or assignment remained to be worked out, both with Mr Duong and with Mr Ceviz). Yet the defendants contend that legal analysis, and perhaps justice too, should result in Mr Ceviz losing all his entitlements under the Agreement and, for good measure, restoring all moneys he received under it and paying damages as well.

120. The counterclaim is for a declaration that the Agreement *has been* rescinded. This is an assertion that the defendants have exercised the self-help remedy of rescission at common law, which is available only on the ground of fraudulent misrepresentation. As I have found that there was no fraud, that remedy was not available to the defendants. They must therefore rely on the equitable remedy of rescission for innocent misrepresentation, which lies at the discretion of the court.

121. The first reason why I would not have granted rescission is that restitutio in integrum is not possible, even by the lights of the flexible approach taken by equity. For the defendants, Mr Jagasia submitted that Mr Ceviz provided literally nothing to the venture pursuant to the Agreement and that therefore there is nothing to restore to him. I regard that as simplistic. It is not possible to restore Mr Ceviz to the position he was in when the Agreement was made. Although in principle it might be possible to restore both Chai and Caroce to the register of companies, the supervention of the 2018 Lease and of AL's venture at the Premises means that this can achieve nothing of utility. Mr Ceviz's actions in closing the existing restaurant, agreeing to the entry of the defendants and the operation of AL's business at the Premises, and taking no action to regularise the position vis-à-vis his own companies once he had the agreement with the defendants, and the defendants' actions in taking the 2018 Lease for AL mean that the "rescission" being contended for does not mean any such thing: instead of an undoing of the rescinded contract and a restoration of the prior position (albeit, in the case of equitable rescission, taking a flexible approach to such

restoration), there would just be a case of the defendants taking the benefit of the bargain but cutting Mr Ceviz out of it. Mr Jagasia sought to rely on the wide and flexible powers of the courts of equity to achieve practical restitution where literal restitution is impossible. While I acknowledge the breadth of the power, it is not the case that it can always necessarily be exercised, and I do not think that it is feasible to exercise it here. There would be no genuine ability to place a realistic value on the rights and opportunities lost by Mr Ceviz, and no method of doing so has been proposed. The change in the parties' position is irreversible and rescission cannot be achieved without injustice.

122. A second ground on which I would have refused rescission encompasses affirmation and delay.

123. Affirmation requires knowledge not only of the material facts but of the right to rescind, absent at least a deliberate decision not to investigate that right (cf. Andrews, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies*, 3rd edition 2020, at paras 3-027 and 3-028). The defendants made payments under the Agreement to Mr Ceviz as late as 21 February 2019, which even on their case was at least several weeks after they knew the material facts that they rely on as having given the right to rescind. However, in itself this would not, I think, justify a finding that they had affirmed the Agreement, because it could not be shown either that they had knowledge of their right to rescind or that they had decided not to investigate their rights.

124. However, in my view the facts as they emerge from the totality of the evidence do justify a finding of affirmation. The defendants knew the material facts about the Premises before they signed the Agreement; the reasons for this belief appear from the narrative above. Even if that were wrong, however, I should have no reasonable doubt that they knew the position when the Licence to Occupy was signed on 15 May 2018. Mr Jagasia, indeed, submitted that the Licence to Occupy reflected THD's knowledge that there was no existing or subsisting right to occupy the Premises (written submissions, paragraph 31); and in substance the point seems largely sound. Although Mr Duong may not then have known that Chai had been dissolved (though I think Mr Ceviz had probably told him), he did know that the 2017 Lease had not been registered or assigned and that the term of the Licence to Assign had expired, and that any occupation of the Premises required his agreement, whatever the precise arrangement might be. He and Mr Frawley have not been candid as to their communications and discussions at any stage of this affair. As I have previously explained, I consider it highly probable that Mr Duong laid the position out clearly to Mr Frawley when the Licence to Occupy was prepared and signed, before (as I think) AL went into occupation of the Premises. In those circumstances, the defendants set up the pizzeria, negotiated the new lease while allowing Mr Ceviz to think that he would be dealing with that matter, and did not purport to rescind the Agreement until February 2019 after the events recited above. It has not been shown that the defendants had positive knowledge of any right to rescind that may have existed. (Given my other findings, there was no such right.) But the facts are consistent only with a decision not to investigate their rights. Their conduct up to and including the final payment made under the Agreement accordingly constitutes affirmation of it.

125. An alternative analysis of the same facts justifies refusing rescission on the ground of lapse of time. This ground operates where the party seeking rescission has, with

knowledge of the material facts giving the right to rescind albeit without knowledge of that right, delayed for a substantial period of time without seeking rescission. What is a substantial period of time will be fact-specific; there is no hard and fast rule. (See generally *Leaf v International Galleries* [1950] 2 KB 86; and Andrews, Tettenborn and Virgo, op. cit. at paras 3-033ff.) In the present case, if the defendants had acted promptly in rescinding the Agreement, Mr Ceviz would have had opportunity to seek to regularise the position regarding his own occupation of the Premises. The delay from April or May 2018 deprived him of that opportunity.

126. A third basis on which I would have refused rescission is the jurisdiction under section 2(2) of the Misrepresentation Act 1967:

> "Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party."

Mr Jagasia noted that the claimant had not sought to rely on this provision; however, it confers a power on the court that can be exercised if the court considers it equitable to do so. I should have considered it equitable to uphold the Agreement. I should also have considered that nominal damages would suffice. There is nothing in section 2(2) to require that damages awarded in lieu of rescission be substantial; of course, in most cases they will be, but I cannot see that it is axiomatic that they must be. As I have observed, the defendants' pleaded case on misrepresentation does not justify the conclusion than they are in any materially different position from that in which they expected to be. The court is directed to have regard to "the loss that would be caused by [the misrepresentation] if the contract were upheld". But (a) any "loss" to the defendants would be caused not by the misrepresentation but by their inability to cut Mr Ceviz out of the Agreement and (b) this goes to show that any so-called rescission that left the defendants holding the ring but free of the obligations under the Agreement would offend principle. A distinct basis on which damages may be awarded remains to be considered.

Damages

127. Section 2(1) of the Misrepresentation Act 1967 provides:

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable

> notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true."

128. In view of my findings, no question of damages arises. If it had, I would not have awarded any. The short point is that the defendants did not suffer any loss by their entry into the Agreement. The substance of their complaint is that Mr Ceviz obtained valuable rights under the Agreement and did so by his misrepresentation. But such rights as he obtained concerned a business that existed only in consequence of the Agreement. Mr Jagasia submits, as mentioned above, that the 2018 Lease is less favourable to the defendants than occupation under the 2017 Lease would have been. Even if that were right, it would not assist. This is not a claim for breach of contract; there are no warranties on Mr Ceviz's part. The measure of damages under section 2(1) is a tortious measure; specifically, it is that applicable to claims in deceit. The defendants have not shown any reason to suppose that they would have been in a better position if they had not entered the Agreement. Their own case is that they had been intending to move to London to live with Ms Pope's parents, and that it was the unlooked-for opportunity of running a pizzeria at the Premises that caused them to put those plans on hold. There is no evidence to establish that this resulted in any loss, far less what that loss might be. Mr Jagasia submitted that the court could make consequential orders to establish the loss (written submissions, para 36). However, it is for a party that brings a damages claim to establish that claim at trial.

Conclusion

129. The claim succeeds.

130. The counterclaim fails.

131. I shall give counsel an opportunity to make representations, either in writing or at a short hearing, as to the appropriate form of the order.