Neutral Citation Number: [2025] EWHC 494 (Ch)

Case No: BL-2023-MAN-000070

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

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 05/03/2025

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

JAMES HENRY ASHWORTH	**Claimant**
- and -	
KEVIN PHILBIN	**Defendant**

- -
- -

Sinclair Cramsie (instructed by **Broadfield Law (UK) LLP**) for the **Claimant**
Martin Budworth (instructed by JMW Solicitors LLP) on behalf of the **Defendant**

Hearing dates: 11-13 , and 18 February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 5 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ CAWSON KC SITTING AS A JUDGE OF THE HIGH COURT

HHJ CAWSON KC:

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Introduction

1. By the present claim, the Claimant, Mr James Henry ("Harry") Ashworth ("**Mr Ashworth**"), seeks to recover the sum of £429,500 alleged to be due to him from the Defendant, Mr Kevin Philbin ("**Mr Philbin**"), as guarantor under the terms of a Guarantee and Indemnity dated 13 August 2018 and made between Mr Philbin (1) and Mr Ashworth (2) ("**the Guarantee**"). By the Guarantee, Mr Philbin guaranteed the liabilities to Mr Ashworth of Mr Mark Williamson ("**Mr Williamson**") under the terms a Share Purchase Agreement dated 13 August 2018 and made between Mr Ashworth (1) and Mr Williamson (2) ("**the SPA**"). The particular liability is alleged to arise under clause 3.1(a) of the SPA.

2. Clause 3.1(a) of the SPA provided that an additional £900,000 should be payable to Mr Ashworth by Mr Williamson: "… in the event that before 31 December 2018 or such later date as the parties agree St Annes PCC enters into a new lease to start before 31 March 2019 or such later date as the parties agree on the same terms mutatis mutandis as the current one for in excess of £100,000 per annum starting rent."

3. It is common ground that no such new lease was entered into by 31 December 2018, whether to start before 31 March 2019 or otherwise, and that there was no express agreement concluded between the parties as to "such later date". The principal issues that arise in the case are:

i) As to whether, by implication, an agreement extending the dates provided for by clause 3.1(a) was concluded, meaning that the conditions provided for by clause 3.1(a) were satisfied by the grant of a new lease on 5 September 2019 with a commencement date of 10 May 2019; and

ii) If not, whether an estoppel by representation, promissory estoppel or estoppel by convention has arisen so as to prevent Mr Philbin from maintaining that the condition was not so satisfied.

4. Mr Ashworth was represented by Mr Sinclair Cramsie of Counsel, and Mr Philbin was represented by Mr Martin Budworth of Counsel.

The parties and the relevant individuals and entities

5. At all relevant times, Rushcliffe Holdings Ltd ("**Holdings**") was the main holding company for the Rushcliffe Group of companies ("**the Group**"). All the relevant companies within the Group have entered into creditors' voluntary liquidation since the key events the subject matter of the present proceedings.

6. Included within the Group were Rushcliffe (St Annes PCC) Ltd ("**Rushcliffe St Annes**") and Rushcliffe (Heysham PCC) Ltd ("**Rushcliffe Heysham**"). As I understand it, the immediate holding company of Rushcliffe St Annes and Rushcliffe Heysham was Rushcliffe PCC Ltd

7. Rushcliffe St Annes owned a primary care centre known as St Annes Primary Care Centre, Durham Avenue, Lytham St Annes, Lancashire ("**St Annes PCC**"), and Rushcliffe Heysham owned a primary care centre known as Heysham Primary Care Centre, Middleton way, Heysham, Lancashire ("**Heysham PCC**"). At all relevant times, St Anne's PCC and Heysham PCC were let to local NHS trusts through NHS Property Services Ltd and used for the purposes of doctors' surgeries and other healthcare uses.

8. Historically, Mr Ray Ingleby ("**Mr Ingleby**") had been a director of Holdings (together with Mr Ashworth) and majority shareholder therein. However, Mr Ingleby was made bankrupt some years ago and, at all relevant times prior to the key events the subject matter of the present proceedings, the ultimate beneficial owners of Holdings, and hence of the Group, were:

i) As to 70% of the issued share capital, a trust called the Orchard Trust, which held its shares through a nominee Gibraltar registered company known as Rushcliffe Gibraltar Ltd; and

ii) As to 30% of the issued share capital, Mr Abi Ajram ("**Mr Ajram**").

9. At all relevant times, Mr Ashworth was the sole director of Rushcliffe St Annes and Rushcliffe Heysham, and managed the affairs thereof. Mr Ashworth was also a director and employee of other companies within the Group, including Holdings. Latterly, Mr Ashworth was a director of Holdings together with Mr Wajid Hussain.

10. Tokachi Estates Limited ("**Tokachi**") is a trust company which held the beneficial interest in options over St Annes PCC and Heysham PCC ("**the Tokachi Options**"),

which were due to expire in April or May 2019. The individual behind Tokachi is Mr Ian Rose ("**Mr Rose**"), who is a close business associate of Mr Philbin. The Tokachi Options had initially been granted to Mr Philbin in 2014 when he advanced funds, but they were acquired from Mr Philbin by Tokachi in 2017. The Tokachi Options were, at all relevant times, held through a nominee company, KRIP Ltd ("**KRIP**") (a name which includes the initials of Mr Rose and Mr Philbin).

11. In the course of his evidence, Mr Philbin described himself as a debtor of Tokachi, and he said that he potentially stood to benefit, by way of a reduction of his indebtedness, on an advantageous sale of St Annes PCC and/or Heysham PCC. Certainly, Tokachi stood to benefit from a sale of St Annes PCC and Heysham PCC on advantageous terms prior to the expiration of the Tokachi Options.

12. Mr Philbin is a Solicitor by profession, who was previously in practice as such, Latterly, and by the time of the key events in question in relation to the present proceedings, Mr Philbin had ceased to practice as a Solicitor and became solely involved in commercial and development activity. In evidence, Mr Philbin came across as extremely business savvy.

13. Mr Philbin' involvement with the companies associated with Group goes back to 2009, initially acting on behalf of an investor therein prior to the incorporation of Group itself in 2010. Thereafter, Mr Philbin became involved with Mr Ingleby, and assisted in providing funding, in return for which the Tokachi Options were granted to him. My understanding is that Mr Philbin's involvement in relation to the Group, including Rushcliffe St Annes and Rushcliffe Heysham, at the time of the key events in relation to the present proceedings, was primarily in representing the interests of Mr Rose, Tokachi, and KRIP, and his own interests in connection therewith.

14. Mr Williamson has, at all relevant times, been a close business associate of Mr Philbin as demonstrated by the circumstances of the present case described below where Mr Williamson became a party to the SPA to assist Mr Philbin. Whilst it is not alleged that Mr Williamson acted as Mr Philbin's agent, it is clear from the evidence that all key matters concerning the SPA and the relationship with Mr Ashworth in connection therewith were closely discussed between them, and that Mr Williamson did not do or say anything without Mr Philbin's authority or agreement.

15. F Parkinson Ltd is a construction company which was owed £1.2m by Rushcliffe. In August 2018, Mr Philbin purchased this debt for c£860,000 and assigned it to Tokachi.

16. RCA Developments Ltd ("**RCA**") is a company through which the Mr Ashworth purchased land adjacent to St Annes PCC, which included land usable for car parking ("**the Car Park Land**").

17. SAPC Limited ("**SAPC**") is a company through which Mr Ashworth purchased the Car Park Land from RCA in August 2018. It is the share capital of SAPC that was the subject matter of the SPA.

18. Assura Plc ("**Assura**") purchased Heysham PCC from Rushcliffe Heysham in October 2018, and St Annes PCC from Rushcliffe St Annes in March 2019, in the circumstances referred to below.

19. Each of Mr Ashworth, Mr Philbin and Mr Williamson gave evidence at trial. There were no other witnesses.

Key factual narrative

20. A significant part of Mr Philbin's trial witness statement is taken up with his version of the history of the Group, going back to 2009. This includes a number of criticisms in relation to Mr Ashworth's past conduct pre-dating the events immediately relevant to the present dispute. The relevant paragraphs (paragraphs 9-111 and 127) were the subject matter of an application made by Mr Ashworth to have the same stuck out. Save in relation to paragraphs 9-13, this application was dismissed by HHJ Cadwallader on 1 November 2024. However, sensibly and realistically, the issues raised by these paragraphs were barely touched upon during the course of the trial. In the light thereof, it is neither necessary nor appropriate for me to make any determinations in respect of the matters raised thereby, and in particular the allegations of misconduct made against Mr Ashworth. Consequently, these paragraphs do not assist me as far as the determination is concerned of the factual issues that do require to be determined in the present case, nor in respect of the credibility of any witness.

21. One thus starts with events in 2018, at which time contemplation was being given to the sale by Rushcliffe St Annes and Rushcliffe Heysham respectively of St Anne's PCC and Heysham PCC prior to the Tokachi Options expiring.

22. In connection with any such sale, Mr Ashworth had identified the advantage of purchasing the Car Park Land in order to enhance the consideration capable of being achieved for St Annes PCC. This was, essentially, for two reasons. Firstly, Mr Ashworth had perceived that there was the possibility of obtaining planning permission to construct an additional floor at St Annes PCC, thereby increasing the passing rent and the value of the reversionary interest, but in order to obtain such planning permission, it would first be necessary to demonstrate that additional car parking was available. This could be provided by the Car Park Land. Secondly, and more controversially, Mr Ashworth had identified that the existing car parking available at St Annes PCC was insufficient for the purposes of its existing planning permission, and that, therefore, that additional car parking was required to be obtained to meet this planning issue.

23. Mr Ashworth sought to obtain funds to purchase the Car Park Land from Mr Philbin and Mr Williamson, but they informed him that they did not have the money available to assist as confirmed by paragraph 118 of Mr Philbin's witness statement. Hence, Mr Ashworth raised monies from elsewhere in order to fund the initial purchase of the Car Park Land together with other land by RCA. The Car Park Land was then sold on by RCA to SAPC for £80,000.

24. It is Mr Philbin's and Mr Williamson's case that whilst Mr Ashworth informed them of the requirement for car parking for the development of an additional floor at St Annes PCC, until very late in the day, he concealed from them the requirement for additional car parking in respect of the existing planning permission. This is disputed by Mr Ashworth.

25. It is further Mr Philbin's and Mr Williamson's case that prior to August 2018, Mr Ashworth had said to them, in contemplation of the sale of St Annes PCC and Heysham

PCC, that he was looking to get something in the region of £1 million as an overall reward for his work, and that he regarded this as an entitlement owed to him. Mr Philbin and Mr Williamson recognise in their evidence that, notwithstanding any past criticisms, they valued the role that Mr Ashworth had recently played, and recognised the important role that he would need to play in getting a sale of the properties across the line, and ultimately in bringing about the liquidation of the relevant companies following such sale.

26. Important correspondence passed between Mr Ashworth and Philbin in August 2018.

27. On 7 August 2018, Mr Ashworth sent to Mr Philbin, copying in Mr Williamson, a draft of an email proposed to be sent to Mr Ajram and Mr Philbin, which Mr Philbin described in an email dated 8 August 2018 in reply as a "good email". In the draft email, which I understand was subsequently sent to Mr Ajram, Mr Ashworth referred to his impending retirement and stated that he was owed a bonus of £100,000 in respect of each of the St Anne's PCC and the Heysham PCC, that he was owed a £300,000 loyalty bonus for "staying with Rushcliffe when the ceiling fell in following Ray's bankruptcy", and that he was owed £300,000 in salary that he had not taken. He concluded by saying: "I would like to think that whatever the outcome of your discussions there are sufficient funds to put to one side to ensure I get what is due to me and would like you both to acknowledge the position." The total of these various amounts identified was £600,000.

28. By a further email dated 8 August 2018, Mr Philbin sent to Mr Ashworth, copying in Mr Williamson, a first draft of the SPA. Mr Philbin explained that he would not be buying the shares in SAPC as this would be tactically disadvantages vis-à-vis Mr Ajram, so the shares would be purchased by Mr Williamson with Mr Philbin providing a guarantee. The draft SPA provided for a consideration of £600,000, i.e. the total of the sums referred to in Mr Ashworth's email of the previous day. A draft of the Guarantee was subsequently provided.

29. Mr Ashworth responded to Mr Philbin with further email dated 8 August 2018 in which he stated that: "Buying the land for the car park was a measure taken to help the Rushcliffe situation and was not meant to be a ransom chip held by me." He went on to suggest that with "all this aggro with [Mr Ajram] it has become of vital importance to the value, even the future of St Anne's (sic)", he suggested that if he sold then, and Mr Ajram prevailed, then he would "probably lose out".

30. Mr Philbin responded to say that he was not sure that he understood what Mr Ashworth was saying, but went on to say that he agreed that Mr Ashworth had been "brilliant" and stated that his plan was "to pay regardless of what happens - I will owe you £600k tomorrow as stage I of the exit? … This gives you and your wife a starter for 10 of at least £600k".

31. In a subsequent email on 8 August 2018, Mr Philbin said: "if you want more money please just ask but do remember that I am not even certain that there will be a deal with the doctors so I am taking a huge gamble as I always have with this. Any more would need to be conditional on the new lease but once we get it I would bring forward the dates if that's a problem?"

32. The reference to a new lease was a reference to the situation in respect of St Annes PCC, where, as I understand it, the existing lease was due to expire, or at least it was anticipated that securing a new lease would significantly enhance the value of the reversionary interest that that Rushcliffe St Annes was looking to sell.

33. There were further email exchanges during the course of that evening in which Mr Ashworth raised the fact that Mr Ajram was talking to others to try and get an advantage, to which Mr Philbin responded that he would report in after speaking to Mr Ajram, but said that as Mr Ajram had only 30% of the shares "in a company with zero value", he could not win.

34. Mr Philbin places great weight on an email sent to him by Mr Ashworth at 05.29 the following morning (9 August 2018). In this email, Mr Ashworth mentioned the further car parking issue in relation to the existing planning permission, suggesting that this only came to light when an application was submitted in respect of the proposed development. He stressed the serious effect that this could have on the value of St Annes PCC. He referred to Mr Ajram saying that he believed that he had a right to "more than half the shares", and Mr Ashworth then said: "if he will not negotiate with you then his only way forward is to buy the land. If he does and will pay me £1.5m nett immediately and I can retire straightaway."

35. It was Mr Philbin's and Mr Williamson's evidence that this was the first occasion on which Mr Ashworth had raised the further planning issue relating to the need for land, i.e. the Car Park Land, provide car parking to satisfy the existing planning permission. Further, it was Mr Philbin's evidence that he regarded this email as an attempt by Mr Ashworth to blackmail him by, effectively, saying to him unless he was able to make £1.5 million from the sale of the shares in the company that owned the Car Park Land, then he could look to Mr Ajram and frustrate Mr Philbin interests in securing the most advantageous sale of St Annes PCC. Mr Philbin described being furious about this turn of events and as feeling as if he had been "mugged from behind".

36. It was Mr Philbin's evidence that although he considered that he was being blackmailed by Mr Philbin, he considered the better course was to play along with Mr Ashworth by agreeing to the terms of the SPA that were ultimately agreed, but in circumstances in which Mr Philbin considered that the prospects of the conditions in clause 3.1(a) being satisfied were extremely remote in view of the tight time limits imposed by the latter provision.

37. On these issues, it is Mr Ashworth's case that Mr Philbin and Mr Williamson were aware of the further car parking issue well prior to the relevant email correspondence in August 2018, and following on from Mr Philbin's email in which he had said to Mr Ashworth that if he wanted more money he should "just ask" but that any more would need to be conditional on a new lease. He says that he did ask, and that is where the figure of £1.5 million came from.

38. It is against this background, that the SPA was entered into on 13 August 2018, with Mr Williamson being the party thereto for the reasons that have been explained by Mr Philbin, and Mr Philbin guaranteeing Mr Williamson's obligations thereunder. It is common ground that the thinking was that the Car Park Land would be sold together with St Annes PCC, and that it was through the sale thereof that a significant sum of

money would become available to pay to Mr Ashworth as foreshadowed by the email correspondence.

39. So far as the terms of the SPA are concerned, the key points are that:

i) It provided for Mr Williamson to lend SAPC £80,000 so that it could repay Mr Ashworth the £80,000 that had been lent to SAPC to fund the purchase of the Car Park Land.

ii) The "Purchase Price" payable for the shares held by Mr Ashworth in SAPC was expressed by clause 3.1 to be as follows:

> "3.1 The total consideration for the sale of the Sale Shares is £600,000 rising to £1,500,000 (Purchase Price) which shall be paid to the Buyer as follows:
>
> (a) £300,000 upon the later of the sale by Rushcliffe PCC Limited of Rushcliffe St Annes PCC Limited or by Rushcliffe St Annes PCC Limited of its primary care centre and 6 April 2020 PROVIDED THAT this figure will increase to £1,200,000 in the event the before 31 December 2018 or such later date as the parties agree St Annes PCC enters into a new lease to start before 31 March 2019 or such later date as the parties agree on the same terms mutatis mutandis as the current one for in excess of £100,000 per annum starting rent;
>
> (b) £300,000 upon the later of the sale by Rushcliffe PCC Limited of Rushcliffe Heysham Ltd or by Rushcliffe Heysham Ltd of its primary care centre and 6 April 2020."

iii) Clause 9 provided that the SPA constituted the entire agreement between the parties and superseded and extinguished all previous discussions, correspondence, negotiations, drafts, agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

iv) Clause 10.1 provided that no variation of the SPA should be effective unless it was in writing and signed by the parties (or their authorised representatives).

40. On the same day as the SPA was entered into, the Guarantee was executed whereunder Mr Philbin guaranteed the obligations of Mr Williamson under the SPA. For present purposes, it is relevant to note clauses 2.3 and 3.2(b) thereof:

i) Clause 2.3 provided that:

> "The Guarantor as principal obligor and as a separate and independent obligation from his obligations and liabilities under clause 2.1 and clause 2.2, agrees to indemnify and keep indemnified the Seller in full and on demand from and against all and any losses, costs, claims,

> liabilities, damages, demands and expenses suffered or incurred by the Seller arising out of, or in connection with, any failure of the Buyer to discharge or perform any of the Guaranteed Obligations or from any of the Guaranteed Obligations not being recoverable for any reason."

ii) Clause 3.2(b) provided that the liability of the Guarantor should not be reduced, discharged or otherwise adversely affected by:

> "any variation, extension, discharge, compromise, dealing with, exchange or renewal of any right or remedy which the Seller may now or after the date of this deed have from or against the Buyer or any other person in connection with the Guaranteed Obligations."

41. A sale of the Heysham PCC to Assura was fairly quickly achieved after the SPA on 2 October 2018. Notwithstanding that the same did not strictly fall due for payment to Mr Ashworth pursuant to clause 3.1(b) of the SPA until 6 April 2020, the sum of £300,000 was, in fact, paid to Mr Ashworth shortly after sale, on 18 October 2018.

42. However, neither the entry into a new lease in respect of, nor a sale of St Annes PCC was achieved by 31 December 2018, and until sometime thereafter. Indeed, it became clear relatively soon after the entry into the SPA that this was likely to be the case as complications arose in relation thereto. As I have said, it was Mr Philbin's evidence that he always thought the prospects of meeting the deadlines provided for by clause 3.1(a) of the SPA to be remote. However, I note that matters are expressed rather differently in the Defence in that, at paragraph 24 thereof, it is said that when the SPA was entered into, the dates of 31 December 2018 and 31 March 2019 were thought achievable, and that so far as a new lease was concerned, it "simply took at least eight months longer than had been expected when the SPA was entered into".

43. It was, further, Mr Philbin's evidence during the course of cross-examination that, from his perspective, he saw a quick sale of St Annes PCC as being a priority over achieving an enhanced price through being able to enter into a new lease given the need to achieve a sale prior to the expiration of the Tokachi Options.

44. It was Mr Philbin's evidence that Mr Williamson thought that Mr Ashworth knew about the time limits provided for by clause 3.1(a) of the SPA but that he, Mr Philbin, was not sure as to whether or not he did. However, both considered that it would be a good idea not to tell him about them, or to take any point in relation thereto, because they wanted to keep him on board providing assistance in relation to the sale and subsequent liquidation.

45. Mr Ashworth accepts that he did not raise with either Mr Philbin or Mr Williamson the conditions provided for by clause 3.1(a) the SPA, and that he did not seek to agree "such later date[s]" for the purposes of clause 3.1(a). Mr Ashworth did not really explain why he had not done so, although the fact that he did not do so is relied upon in support of the proposition that he believed that the additional £900,000 would be payable notwithstanding that the dates provided for could not be met because he understood from the circumstances and from what was being said that Mr Philbin and Mr Williamson were agreeable to that. This forms the basis of his case as to implied agreement and estoppel.

46. In the event, an agreement for the sale of St Annes PCC was entered into on 26 March 2019 between Rushcliffe St Annes (1), SAPC (2) and Assura (3) ("**the St Annes Sale Agreement**"), before any new lease could be entered into with NHS Property Services Limited. Under the St Annes Sale Agreement, Rushcliffe St Annes sold St Annes PCC, and SAPC sold the Car Park Land (for a consideration of £500,000). There was thereby achieved a sale of St Annes PCC before the Tokachi Options expired, thereby enabling KRIP/Tokachi to receive a significant proportion of the proceeds of sale.

47. The consideration payable to St Annes PCC on completion of the St Annes Sale Agreement on 26 March 2019 was £25,253,934. However, the St Annes Sale Agreement provided for the payment of further deferred consideration of £5,401,314.56 once a number of conditions had been satisfied as set out in paragraph 2.1 of Schedule 7 to the St Annes Sale Agreement, including the granting of a new lease to NHS Property Services Limited. A new lease was granted on 5 September 2019, when Assura granted a new lease to NHS Property Services Limited. On the same day, the deferred consideration of £5,401,314.56 was paid by Assura.

48. In paragraph 20 of his witness statement, Mr Williamson refers to having had talks with Mr Ashworth prior to the sale of St Annes PCC completing on 26 March 2019. He there concedes that it is likely that he and Mr Philbin did discuss paying Mr Ashworth more money following the sale if the new lease was agreed "as it would result in a higher sale price", that Mr Philbin said that he would "bear this in mind", and that he, Mr Williamson, did feed this back to Mr Ashworth, but he maintains that he did not mention that this would be the additional purchase price payable pursuant to clause 3.1(a) of the SPA, or that this would be something that Mr Ashworth would be entitled to, "just that it would be considered".

49. Mr Ashworth's evidence in respect of these discussions with Mr Williamson prior to sale are referred to in paragraph 34 and 35 of his witness statement. His evidence is to the effect that that he asked whether, in the light of the larger increase in the sale price achieved as a result of managing to persuade the tenant to occupy more of the second floor of St Annes PCC, he might be entitled to some extra reward over and above the additional monies payable pursuant to clause 3.1(a) of the SPA. It is his evidence that it was this in respect of this extra reward that it was fed back to him that Mr Philbin would give consideration to paying more money, i.e. over and above the additional monies payable pursuant to clause 3.1(a) of the SPA which would be payable in any event.

50. Mr Ashworth was paid the sum of £300,000 payable in any event pursuant to clause 3.1(a) of the SPA on 18 April 2019, i.e. in advance of when the same strictly became due on 20 April 2020. There was discussion regarding paying Mr Ashworth these monies by way of loan for tax reasons, presumably avoiding CGT, and a draft loan agreement was prepared, but ultimately this option was not pursued.

51. Further, following completion, further discussions took place along similar lines to those that took place prior to completion at a bar on Deansgate, Manchester.

52. An issue thus arises as to whether the further monies that it seems to be common ground that Mr Ashworth was seeking confirmation would be paid represented:

i) As maintained by Mr Ashworth, the £900,000 alleged by Mr Ashworth to be payable to him pursuant to clause 3.1(a) of the SPA over and above the initial £600,000 payable pursuant thereto; or

ii) As maintained by Mr Philbin, monies over and above the sum of approximately £1 million that Mr Philbin suggests that he and/or Mr Williamson had in principle been prepared to pay to Mr Ashworth for his efforts (irrespective of but to include the £600,000 payable in any event under clause 3.1 of the SPA) reflecting a "nest egg" in that amount that Mr Philbin says was initially promised to Mr Ashworth by Mr Ingleby.

53. As to Mr Ashworth's case, it is to be noted that in paragraph 20 of the Amended Particulars of Claim, it is alleged that after the execution of the new lease and the sale of St Annes PCC, Mr Williamson and Mr Philbin "expressly and repeatedly acknowledged that the Claimant was entitled to the Additional Purchase Price of £900,000 and made a number of part payments to discharge that outstanding sum …"

54. As to Mr Philbin's case, it is appropriate to note at this stage what was said by Mr Philbin at paragraph 174 of his witness statement:

> "After the sale– not before - Mark and I began to discuss what to do and after the entry into the guaranteed lease, we decided that we ought still to try to get Harry close to his £1m target as we had sympathy with him despite his veiled threats about the car park land. We thought he still deserved it morally, as he had done his best despite failing to achieve the 31 December 2018 target date and we felt honour bound. We could have said that his demand in August 2018 broke this bond – but we felt that would have been harsh and we had never told Harry that we no longer considered ourselves bound. It would be bad form to decide to let him crack on delivering the lease and then, at the end, tell him that we had allowed him to work under the wrong assumption. In my mind Harry had made an attempt to improve on his target £1m. He had failed but unless we had told him he had blown his £1m it would have been unfair to save it up and only tell him at the end."

55. A further discussion took place between Mr Ashworth, Mr Philbin and Mr Williamson at San Carlo restaurant in Manchester on 26 November 2019. It is Mr Ashworth's pleaded case, in paragraph 21 of the Amended Particulars of Claim, that during the course of this meeting Mr Philbin accepted that the additional consideration payable pursuant to clause 3.1(a) of the SPA was owed, but said that he had a project in Poole that needed to be completed before the payment could be made.

56. It was Mr Ashworth's evidence that there was discussion at this meeting regarding outstanding matters, including the outstanding balance that he says was due to him. He said that there had been little contact since the completion of the sale of St Annes PCC, and that he was getting concerned. He said that he raised the fact that he had not been paid in full, although he cannot recall whether there was discussion with regard to any specific amount outstanding. He says that Mr Philbin informed him that he had been over-extended by a project that he was involved in Poole, but that as soon as that was sorted, he would settle matters with Mr Ashworth. He says that Mr Philbin informed

him that Mr Williamson was in the same position, being owed monies at the time, and that he had no reason not to trust Mr Philbin.

57. At paragraph 42 of his witness statement, Mr Williamson referred to there having been a further meeting at San Carlo in Manchester but that he could not remember the detail thereof save that it was "more of a celebration". However, in the course of giving oral evidence, when questioned in relation to this meeting, he provided much more detail regarding the discussions at this meeting, explaining that his memory of the meeting had "improved" since he made his witness statement.

58. As I shall explain in more detail below, in a text dated 25 May 2020 sent to Mr Williamson, Mr Ashworth said that he was "roughly £450k down on the agreement." In the course of cross-examination, Mr Williamson was asked as to which agreement he understood Mr Ashworth to be referring to in this text. His initial response was that Mr Ashworth was referring to the SPA. However, when then taken to a subsequent text dated 25 May 2020 in which Mr Ashworth had said that the "minimum due to me is the balance on the agreement around 450k", Mr Williamson then said that Mr Ashworth was referring to what had been discussed at the meeting at San Carlo in November 2019 before, subsequently, in his evidence suggesting that he understood the reference to "agreement" as being a reference to what had been discussed between him and Mr Ashworth in January 2020.

59. In January 2020, Mr Ashworth's accountants, Whitehead & Howarth, prepared a tax return for Mr Ashworth for the year ended 5 April 2019, i.e. the year in which he had disposed of the shares in SAPC to Mr Williamson. The tax return and accompanying computations showed the capital gain on the sale as being £1,999,999, the difference between consideration of £1,200,000, and a cost of £1. The computations showed the relevant gain as qualifying for Entrepreneurs' Relief, with CGT being payable at a rate of 10%, i.e. £119,999.90.

60. The gain referred to of £1,200,000 is £600,000 more than the £600,000 that indisputably fell due pursuant to the terms of clause 3.1 of the SPA, but £300,000 light of the total additional consideration potentially payable pursuant to clause 3.1(a) of £900,000. In evidence, Mr Ashworth explained this difference as being a mistake on his part as to the total amount payable pursuant to clause 3.1(a). In submissions, it was suggested by Mr Cramsie on behalf of Mr Ashworth that this might be because clause 3.1(a) refers to the figure payable pursuant to that sub-clause as increasing to £1.2 million. No other explanation has been provided for this difference, and the point is taken by Mr Philbin that the gain disclosed is different than that provided for by clause 3.1 of the SPA on Mr Ashworth's own case as to that gain, namely £1.5 million (less £1).

61. It is Mr Ashworth's evidence that he had a number of telephone conversations with Mr Williamson in January 2020, exchanged a number of texts with him, and had a meeting with him on 29 January 2020 during the course of which he explained to Mr Williamson that he needed monies to pay the CGT that arisen on the sale of his shares in SAPC, and to pay for the purchase of a new house. He says that in response to this latter request for money, he received assurances that there was no problem with payment other than timing.

62. In relation to the meeting on 29 January 2020, it is to be noted that on 28 January 2020, Mr Williamson had texted Mr Ashworth to ask him how much he needed, to which Mr Ashworth had replied "166k", and Mr Williamson had responded: "Leave with me". Reference was then made in the texts to meeting in Manchester the following day. Mr Ashworth texted to ask if there was a problem, to which Mr Williamson responded: "No mate just need to structure it so you can answer any future questions with impunity And tax advantageous." This final response is relied upon by Mr Philbin as demonstrating an intention to deal with payments on an individual basis in a tax efficient way, rather than as recognising that there was any balance due under the SPA.

63. In paragraph 22 of the Amended Particulars of Claim, it is pleaded that in the course of the discussions and text messages exchanged in January 2020, Mr Ashworth explained that he needed to submit a tax return declaring the additional purchase price payable pursuant to clause 3.1(a) of the SPA as a capital gain and needed to pay tax on the gain, and also explained that he was in the process of buying a new house and needed to pay the deposit.

64. As to discussions in January 2020, at paragraph 26 of his witness statement, Mr Williamson said this:

> "In early January 2020 Harry told me that he needed money to satisfy his upcoming £120,000 capital gains tax bill and that he wanted to put down a deposit on a retirement property. I spoke to Kevin about this. We knew this would be the start and not a one off request for money. As stated I particularly felt sorry for Harry and had promised him I would do what I could to get him further money. Kevin was very concerned over Harry's past behaviour and his actions and the way he had used the piece of land owned by SAPC Limited to drive a very high price for his own return. Kevin was concerned as to what problems he might be willing to cause now or in the future if he felt his efforts were not appreciated. Between us we believed that if he wanted a further £600,000 then he was looking for c £lm net of tax for his self-described 'retirement pot'. We felt we should do what we could to continue to fund Harry's lifestyle up to that amount whilst the Rushcliffe group was in existence. This was both as a fulfilment of a moral obligation and also to provide the funding for him personally to handle the administration and ultimately liquidation of the group in a professional manner."

65. Further, Mr Williamson says that when Mr Ashworth had said that he required £120,000 to meet the CGT liability, he assumed this related to a £600,000 gain on the basis of tax being paid at a rate of 20%.

66. In the event, after £10,000 had been paid on 3 January 2020, a further sum of £157,500 was paid on 3 February 2020, Mr Ashworth says by Mr Rose.

67. Mr Ashworth relies upon further texts as demonstrating that he subsequently chased payment due under clause 3.1 of the SPA in addition to the initial two payments totalling £600,000 that had been paid. In particular, reliance is placed upon the following texts:

i) A text dated 27 March 2020 in which Mr Ashworth made the point that when he was needed to "get the deal through" there was constant daily contact, and that when more than £2 million than was originally anticipated was achieved "everyone was happy". He then complained that he could not get an answer "on how i am going to get whst (sic) is owed to me to stop me losing both my new house and the deposit i have already paid. I get the impression that nobody gives a f***" - [my emphasis]. Reliance is placed by Mr Ashworth on the fact that Mr Williamson does not challenge this in any way and simply asks Mr Ashworth to let him (Mr Williamson) find out. Reliance is further placed upon an email exchange between Mr Ashworth and Mr Philbin shortly after this text exchange, in which it is said that Mr Philbin had the opportunity to dispute that monies were "owed" to Mr Ashworth, but did not do so. On the other hand, it is suggested on behalf of Mr Philbin that this exchange shows Mr Ashworth considered that he was entitled payment because he deserved it, not because thought that it was contractually due. The further point is made on behalf of Mr Philbin that Mr Ashworth was not threatening to enforce his rights under the SPA as such.

ii) A text dated 2 May 2020 in which Mr Ashworth asked: "Does that mean I could get what is owed to me?" [My emphasis].

iii) A text dated 15 May 2020 in which Mr Ashworth said: "What's the latest. Starting to get very concerned about the whole situation. I am down a hell if (sic) a lot of money which is needed in a hurry." Although this is relied upon by Mr Ashworth, Mr Budworth also relied upon this, and the reference to Mr Ashworth being down a hell of a lot of money, as being consistent with Mr Ashworth recognising that the conditions in clause 3.1(a) of the SPA had not been met.

iv) The text dated 25 May 2020 that I have already referred to which read: "Starting to get very nervous. My deal depended on the sale if (sic) both properties which took place within the parameters. I was told i would get a bonus for the additional work i did and the enhanced value received on the sale. As it stands, I am roughly £450k down on the agreement circa 25k down on expenses fir (sic) Rushcliffe around £42k on the purported purchase of the house. Can you advise me how much i can expect and when it is likely to be … I have committed to buying a house and after the last debacle don't want to be in the same position again." [My emphasis again].

The references to "deal" and "the agreement" are particularly relied upon by Mr Ashworth. Further, the point is made that the reference to being roughly £450,000 down is consistent with the gain of £1,199,999 identified in Mr Ashworth's 2019 tax return, the £450,000 being a reference to the £600,000 additional payment over and above the undisputed £600,000 payable under clause 3.1, less the sum of approximately £150,000 paid since January 2020.

Mr Philbin, on the other hand, points to the fact that what is being sought is a balance, if anything, of £600,000 and not the £900,000 provided for by clause 3.1(a) of the SPA. Further, it is submitted on Mr Philbin's behalf that the references to a "bonus for the additional work" and to "deal" being consistent

with Mr Ingleby's promised "nest egg", and an understanding that predated the SPA that the sale of the properties would provide a mechanism for the realisation of a "nest egg" for Mr Ashworth.

v) Mr Williamson responded to the earlier text dated 25 May 2020 by, essentially, saying that he was not sure about how much Mr Ashworth could expect, but that Mr Philbin would look after him dependent upon "what happens with everything else". By further text dated 25 May 2020, Mr Ashworth responded by saying: "That's quite worrying. The minimum due to me is the <u>balance on the agreement</u> around 450k, rushcliffe expenses around 24k and around 42k loss on the previous house purchase. Is any part of that in doubt and if so why? Very nervous about the whole thing. Fighting for info doesn't help." Mr Williamson then responded: "No Harry the minimum is not in doubt it's the amount above."

As mentioned above, when Mr Williamson was questioned about this response, and why he had not challenged the reference to there being the balance on the agreement of around £450,000, he first sought to suggest that a figure of £600,000 had been agreed at the meeting at San Carlo in November 2019, before subsequently suggesting that the figure was discussed in January 2020.

vi) Further monies were paid in that £50,000 was paid to Mr Ashworth on 5 June 2020, £100,000 on 9 June 2020, £50,000 on 10 June 2020 and £25,000 on 27 August 2020. Mr Ashworth took up the question of the further sums that he then said were due to him in a text to Mr Williamson dated 3 September 2020, in which he said: "really pissed off now. Kevin being totally unfair. He's had the money and is basically f***ing me over. He's cost me over 69k in lost deposits and general expenses, still <u>owes me 220k</u> from the <u>agreed deal</u> and hasn't had the courtesy to contact me direct … My agreement is with you so i couldn't care less what they do with Rushcliffe." [My emphasis]. Mr Williamson responded to say that he had asked Mr Philbin to speak to him, saying "I'm sat in the middle here." Reliance is placed by Mr Ashworth upon the fact that Mr Williamson did not challenge the fact that £220,000 was due pursuant to an "agreed deal".

68. Mr Ashworth followed up upon the text dated 3 September 2020 to Mr Williamson in an email dated 4 September 2020 sent directly to Mr Philbin, copying in Mr Williamson. In the course of this email, Mr Ashworth stated: "Bearing in mind that I am already £40k+ down on the purchase of the previous property and £20k+ down on supporting Rushcliffe to the end of the St Annes development and am still owed £220k from the original agreement (plus a promised goodwill payment for my efforts)." He went on to say that he had "cause to wonder whether there is any intention to pay any of the funds due to me."

69. In response to this latter email, Mr Philbin did not challenge any of the assertions in Mr Ashworth's email but sought to explain the difficulties that he faced in making the payments sought. At one point in his response, Mr Philbin said: "you've earned good salary plus a good capital gain - and I am sending £25k as agreed … meanwhile Assura and Begbies are holding monies that should have made you whole." In response to this, Mr Ashworth responded to say that he understood that Mr Philbin had "issues" caused by others, for that reason had not pushed harder for further payments and that once he received the £25,000, he would not need to trouble Mr Philbin further until "you are a

bit less hassled." He went on to say that the lack of communication was giving him great cause for concern, but that he now felt "much happier now I know what's going on."

70. The further sum of £25,000 was paid to Mr Ashworth on 7 September 2020.

71. A further payment of £25,000 was made to Mr Ashworth on 27 May 2021. This followed on from an exchange of emails in which Mr Ashworth had chased Mr Williamson for payment. In an email dated 27 May 2021 to Mr Ashworth, Mr Philbin said this: "Harry your doggedness will ensure you outlast us all!!!!! I promise by the way that you and your family will get <u>all that has been agreed</u>." [My emphasis].

72. A further payment of £5,000 was made on 1 November 2021, and one of £30,000 on 16 May 2022.

73. On 30 August 2022, Mr Ashworth emailed Mr Williamson attaching a document described as "Kevin Philbin Debt.xlsx". There was a spreadsheet attached to this email that set out details of the "Kevin Philbin Debt", made up of the following, namely: "Final payment due on sale" (£600,000), "Aborted legal fees" (£37,360), "Architects Fees" (£4,000), "LA Fees" (£1,326), and "Post-completion costs" (£27,944), total £670,630. Credit was then given for the payments made on 3 January 2020, 3 February 2020, 5 June 2020, 9 June 2020, 10 June 2020, 27 August 2020, 7 September 2020, 27 May 2021, 1 November 2021, and 16 May 2022 referred to above, which totalled £477,500, leaving a balance of £193,130.

74. On 14 September 2022, Mr Ashworth emailed Mr Philbin under the heading "Outstanding monies", referring to the fact that Mr Williamson had told him that "you will provide me with an undertaking against the funds held by Cowgills to clear the monies owed to me (£193,130). This has been outstanding for almost 3 years." In response, by email dated 23 September 2022, Mr Philbin responded to say: "We will get there in the end. I will make sure that as soon as Cowgills pay out the <u>SAPC deferred</u> is paid" [my emphasis].

75. This later correspondence is all relied upon by Mr Ashworth to support his case that he was seeking to recover monies that were due to him pursuant to the SPA, and specifically clause 3.1(a) thereof, albeit that he continued to seek to recover a balance of £600,000 rather than the additional £900,000 provided for by the latter provision, and in support of his case that this was recognised by Mr Philbin, not least by his reference to the payment of "SAPC deferred".

76. In evidence, Mr Philbin accepted that as time has gone on it had become clear to him that Mr Ashworth was seeking payment on the basis that sums were due pursuant to the SPA, and that that explained his own reference to "SAPC deferred" albeit that he did not accept that Mr Ashworth had any entitlement to payment of any outstanding monies pursuant to SPA, and that the payments that were made over and above the undisputed £600,000 payable pursuant to clause 3.1 of the SPA were paid because he and Mr Williamson felt honour bound to make payments in the light of the £1 million "target" that predated the SPA, as explained in paragraph 174 of Mr Philbin's witness statement referred to in paragraph 54 above.

77. On 24 November 2022, Mr Ashworth's Solicitors sent a Letter of Claim to Mr Philbin's Solicitors. It was therein asserted, in simple terms, that whilst, in accordance with clause 3.1 of the SPA, the two instalments of £300,000 had been paid, an agreement for a lease had also been entered into "in accordance with clause 3.1(a) of the SPA, meaning the first £300,000 instalment increased to £1,200,000." The letter then gave credit for the further payments that had been made over and above the two instalments of £300,000, leaving a balance of £429,500. In addition, it was asserted that aborted legal fees, architect and survey fees and "LA fees" totalling £40,825 and been incurred in consequence of the failure to make the payment of the full amount due pursuant to the SPA, resulting in an overall claim of £555,920.89.

78. By way of response, by letter dated 28 November 2022, Mr Philbin's Solicitors took the point that the conditions provided for by clause 3.1(a) of the SPA had not been satisfied, that there be no agreement in relation to later dates, and consequently that no further liability had arisen under the SPA than in respect of the payment of the two instalments of £300,000.

79. In consequence of the parties being unable to resolve their differences, the present proceedings were commenced on 28 July 2023.

Mr Ashworth's case

Implied Agreement

80. Mr Ashworth's primary pleaded case is that there was an "implied agreement" to extend the expiry date provided for by clause 3.1(a) of the SPA for completing a new lease to a date after 5 September 2019 (the date on which a new lease was in fact granted), and to extend the expiry date for commencing the new lease to a date after 10 May 2019 (the commencement date provided for by such new lease).

81. In paragraph 30 of the Amended Particulars of Claim, it is pleaded that this agreement is to be implied from the conduct of Mr Williamson and Mr Ashworth both before and after the execution of the new lease on 5 September 2019, and to give effect to their "obvious intentions". Reliance is placed on the matters pleaded in paragraph 17, 18 and 20-27 of the Amended Particulars of Claim, including:

    i) The common understanding of the parties, continuing after the expiry dates provided for by clause 3.1(a) of the SPA, that Mr Ashworth would still be entitled to the additional purchase price payable thereunder;

    ii) The parties' "repeated acknowledgements that the Claimant was entitled" to the additional purchase price; and

    iii) The numerous part payments of the additional purchase price.

82. It is Mr Ashworth's case that, on the basis of this implied agreement, the conditions provided for by clause 3.1(a) of the SPA were satisfied by the agreed extended dates, and therefore that the additional sum of £900,000 payable pursuant thereto became payable on 6 April 2020.

83. As to Mr Ashworth's case as to the common understanding of the parties, it is necessary to go back to paragraph 17 of the Amended Particulars of Claim wherein it is pleaded:

> "Although the Claimant and Mr Williamson did not expressly agree to extend the Expiry Dates [i.e. those provided for by clause 3.1(a) of the SPA], their common understanding as the negotiations continued beyond the Expiry Dates was that the Claimant would still be entitled to the Additional Purchase Price if the proposed new lease could be granted before the sale."

84. The point was taken on behalf of Mr Philbin that the parties could not have held the pleaded common understanding because the new lease was, in fact, granted on 5 September 2019, i.e. after the sale of St Annes PCC on 26 March 2019 – see, for example, paragraph 6 of Mr Budworth's Skeleton Argument dated 8 November 2024 prepared for the trial listed in November 2024 that had to be vacated and relisted due to Mr Ashworth being ill in hospital. The response on behalf of Mr Ashworth had been that it was understood that the sale of St Annes PCC had not been finally completed until 5 September 2019 because a document headed "Completion Statement" had been produced relating to the balance of £5,394,623.92 payable on that date as "Deferred Consideration" less various expenses, suggesting that that is when the "sale" could have been regarded as having taken place.

85. During the course of the trial, and as a result of me querying why the Annes PCC Sale Agreement had not been produced, authority was obtained from the liquidators of Rushcliffe St Annes to produce the same, and it was produced. This document, which can be seen to have been signed by Mr Ashworth on behalf of Rushcliffe St Annes, showed that completion of the sale had taken place on 26 March 2019, with the deferred consideration being payable upon satisfaction of the conditions that I have referred to above, i.e., in fact 5 September 2019 when the new lease was granted.

86. During the course of Mr Philbin's evidence, on the beginning of the third morning of the trial, Mr Cramsie produced on behalf of Mr Ashworth an application to amend paragraph 17 of the Amended Particulars of Claim so as to substitute the words "resulted in an increase sale price" for the words "could be granted before sale" in the extract therefrom referred to in paragraph 83 above, and to amend paragraph 18 of the Amended Particulars of Claim to substitute the word "achieved" for the words "completed at" on the final line thereof.

87. As Mr Philbin, and those who represent him, had had only a matter of some 10 minutes to consider the application before Mr Philbin was due to resume giving evidence, and therefore required an opportunity to consider the application before responding to it, I indicated that I would defer consideration of the same until I heard submissions. Thereafter, and in the gap of some 3 days between the close of evidence and submissions, Mr Philbin served evidence in opposition to the application (a witness statement of his Solicitor, Mr Michael Kennedy), and Mr Ashworth served a witness statement in response thereto (a witness statement of his Solicitor, Mr Jonathan Sachs).

88. The essential point taken by Mr Philbin in opposition to the application to amend is that it is far too late. It is said that the issue had been flagged up a long time ago, that the evidence even prior to production of St Annes PCC Sale Agreement pointed to the sale

having completed on 26 March 2019 even if Mr Ashworth could not recall that as having been the case, and that it would be unfair for Mr Ashworth to be able to run a case in respect of a common intention that Mr Philbin had not had the opportunity to consider prior to giving evidence, and on which Mr Ashworth had not been cross-examined.

89. The position therefore is that there is an inconsistency between Mr Ashworth's existing pleaded case as to common intention, and the case that he would wish to run in respect thereof.

90. Rather than dealing with the application to amend on the day set aside for submissions at the start before hearing submissions, I indicated that I would hear submissions on the application together with the submission on the claim, as that would allow me to more fully understand how the former fitted in with the latter, and deal with my decision thereon in my judgment. I will return to the application to amend in due course.

91. The question of the parties' common intention is relevant to the issue of implied agreement, and also to Mr Ashworth's case of estoppel by convention, but not necessarily Mr Ashworth's case of estoppel by representation or promissory estoppel.

Estoppel by representation and promissory estoppel

92. Mr Ashworth's case as to estoppel by representation and promissory estoppel is pleaded in paragraphs 31-33 of the Amended Particulars of Claim. As to the promises and/or representations relied upon, the case is pleaded in paragraph 31 relying upon the matters alleged in paragraphs 17, 18 and 20-27 of the Amended Particulars of Claim, and Replies 7 to 18 of Mr Ashworth's Part 18 Reply dated 23 February 2024. On the basis thereof, it is alleged that Mr Williamson and Mr Philbin:

> "31.1 impliedly promised and/or represented to the Claimant that he would be and/or was entitled to the Additional Purchase Price notwithstanding the expiry of the Expiry Dates; and/or
>
> 31.2 impliedly represented to the Claimant that the necessary conditions for payment of the Additional Payment Price set out in clause 3.1(a) of the SPA had been satisfied."

93. As I shall return to in due course, there may be something of an overlap between the principles of estoppel by representation and promissory estoppel, although I read paragraph 31.1 as relating to Mr Ashworth's case on promissory estoppel, and paragraph 31.2 as relating to Mr Ashworth's case of estoppel by representation given that it relates to a representation of existing fact or state of affairs, i.e. that the relevant conditions had been satisfied.

94. In paragraph 32 of the Amended Particulars of Claim, it is then alleged that Mr Ashworth acted in reliance on the implied representations by:

i) Paying tax on the gain attributable to the additional purchase price payable pursuant to clause 3.1(a) of the SPA;

ii) Paying a deposit on the purchase of a new house which was subsequently forfeited; and

iii) Purchasing another home and undertaking extensive renovation works to that new home in circumstances in which as a result of having dome so, Mr Ashworth was left financially strained.

95. Without any further plea as to loss or detriment, it is then alleged in paragraph 33 of the Amended Particulars of Claim that, in the circumstances, Mr Williamson and Mr Philbin are estopped from now asserting that Mr Ashworth is not entitled to the additional purchase price because of the expiry of the expiry dates provided for by clause 3.1(a) of the SPA, or that the necessary conditions for payment of the additional purchase price have not been satisfied, on the grounds that it is an equitable for them to do so.

Estoppel by convention

96. As to this head of claim, it is alleged that Mr Ashworth, Mr Williamson and Mr Philbin acted on "the common assumption that the Claimant was entitled to the Additional Purchase Price notwithstanding the expiry of the Expiry Dates and/or the necessary conditions for payment of the Additional Payment Price set out in clause 3.1(a) of the SPA had been satisfied". It is alleged that the common assumption was evidenced and/or given expression by the matters set out in paragraph 17, 18 and 21-27 of the Amended Particulars of Claim, and in Replies 7 to 18 of the Part 18 Reply dated 23 February 2024.

97. As to the other ingredients of this alleged estoppel, Mr Ashworth pleads essentially the same case as pleaded in paragraphs 32 and 33 of the Amended Particulars of Claim in respect of his case as to estoppel by representation and promissory estoppel.

Summary of Mr Ashworth's case

98. Mr Ashworth's case therefore is that the conditions for the payment of the additional sum of £900,000 payable pursuant to clause 3.1(a) of the SPA had been satisfied following an agreed extension of the dates provided for thereby, or are to be treated as having been satisfied by virtue of an estoppel arising that prevents Mr Philbin from contending to the contrary, or that the sum of £900,000 is not otherwise payable. On the basis thereof, Mr Ashworth seeks the balance of the £900,000 that has not been paid, namely £429,500.

Mr Philbin's case in defence

Implied Agreement

99. On behalf of Mr Philbin, Mr Budworth referred me to the analysis of the circumstances in which an agreement might be implied as considered in the decision of HHJ Pearce in *Zymurgorium v Hammonds of Knutsford* [2021] EWHC 2295 at [23]-[25], where HHJ Pearce had referred to the relevant principles as summarised by Vos LJ in *Heis v MF Global UK Ltd* [2016] EWCA Civ 569, at [13]. These principles included that no contract should be implied on the facts of any given case unless it was necessary to do so in order to give business reality to a transaction and to create enforceable obligations

in circumstances in which one would expect such enforceable obligations to exist. This was not inconsistent with Mr Cramsie's case on behalf of Mr Ashworth that this involved essentially the same considerations as arose in considering whether a term ought to be implied into a contract, an essential requirement being that it should be necessary to do so. However, Mr Budworth submitted that there was no necessity to imply an agreement of the kind sought to be implied by Mr Ashworth on the present facts.

100. More fundamentally, Mr Budworth submitted that there was no common understanding of the parties to the SPA, whether continuing after the expiry of the dates provided for by clause 3.1(a) of the SPA or otherwise, that Mr Ashworth would still be entitled to the additional purchase price provided for thereby notwithstanding the expiry of such dates, whether as originally formulated in paragraph 17 of the Amended Particulars of Claim, or as reformulated by the proposed amendment thereto. Further, Mr Budworth submits that the evidence does not support there having been repeated acknowledgements that Mr Ashworth was entitled to the additional purchase price, or that payments made to Mr Ashworth over and above the undisputed initial two instalments of £300,000 were paid by reference to clause 3.1(a).

101. In particular, reliance is placed upon the absence of evidence that Mr Ashworth ever specifically mentioned the additional purchase price in his conversations with Mr Williamson and Mr Philbin, and specifically to £900,000 having become payable. It is submitted that Mr Ashworth made an extremely poor job of trying to explain how he consistently "forgot" the £300,000 difference between the £900,000 that would have become payable pursuant to clause 3.1(a) of the SPA, and the £600,000 that he declared (together with the initial £300,000 x 2) in his 2019 tax return, that thereafter formed the basis for his calculations of the balance said to be due from Mr Williamson and Mr Philbin prior to the letter of claim in November 2022.

102. Mr Philbin's case is that the Court cannot be satisfied that Mr Ashworth contemporaneously considered that he had an entitlement to the additional purchase price payable pursuant to clause 3.1(a) of the SPA as opposed to some general perceived entitlement to a "pot" of £1 million based what historically he may have been promised by Mr Ingleby, or what he thought that he was entitled to as ventilated in the email correspondence in early August 2018. In any event, even if Mr Ashworth did contemporaneously consider that he was so entitled, it is Mr Philbin's case that that was not made clear to him or to Mr Williamson, who had differing views in respect what Mr Ashworth may have believed, and did not, it is said, acknowledge any such entitlement on the part of Mr Ashworth, and indeed were careful not to do so.

103. Further, Mr Budworth submits that, to the extent that it is asserted that there was some agreement as to later dates within the mechanism of clause 3.1(a) of the SPA, as opposed to some agreement to vary the terms thereof, the case fails at first base because it has not been specified what "such later date" so agreed upon is in respect of each of the two expiry dates in question. Rather, the implied agreement as pleaded in paragraph 30 of the Amended Particulars of Claim refers to "a date after 5 September 2019" and "a date after May 2019" rather than some specific date as such.

104. Further, it is submitted that if, contrary to Mr Philbin's primary case, some implied agreement did come into existence, then, on proper analysis, it amounted to a variation of clause 3.1 of the SPA with two consequences:

i) It was ineffective by virtue of clause 10.1 of the SPA because clause 10.1 provides that no variation of the SPA should be effective unless it was in writing and signed by the parties (or their authorised representatives), which the alleged implied agreement was not. Further, it is submitted that the dicta of Lord Sumption JSC in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119 at [14] et seq excludes the possibility of asserting an estoppel to negative the effect of clause 10.1 absent some clear representation that the variation could be effective notwithstanding clause 10.1.

ii) The variation would fall foul of the rule in *Holme v Brunskill* (1878) L.R. 3 Q.B.D. 495, under which any material variation of the terms of the contract as between the creditor and the principal debtor will discharge the surety. Mr Budworth submits that neither clause 2.3 nor clause 3.2(b) Guarantee assist Mr Ashworth because:

a) So far as clause 2.3 is concerned, whilst this provision seeks to categorise Mr Philbin as principal obligor subject to a separate and independent obligation from his obligations as guarantor, liability is still dependent upon "any failure of the Buyer to discharge or perform any of the Guaranteed Obligations", and so the obligation is still to be construed as a guaranteed obligation subject to the rule in rule in *Holme v Brunskill***.**

b) So far as clause 3.2(b) is concerned, reliance is placed on *Triodos Bank NV v Dobbs* [2005] EWCA (Civ) 630 as authority for the proposition such a provision will be ineffective if variation is such as to extend the guaranteed obligations beyond the "purview" of the original guaranteed obligations. It is submitted that that would be the effect of the variation if effective.

Estoppel

105. In summary, Mr Philbin's case is that, however Mr Ashworth's case in estoppel is put, there are a number of fundamental difficulties in its way, in particular:

i) It is submitted that, on the facts, the parties were not talking about the same thing, and therefore there can have been no clear and unequivocal representation sufficient to found an estoppel by representation or a promissory estoppel, and no convention or common understanding sufficient to provide the basis for an estoppel by convention.

ii) The alleged detrimental reliance relied upon by Mr Ashworth (payment of tax, payment of house deposit, and purchase and renovation of another home) is, it is submitted, on proper analysis, a fiction. It is said that sums representative of the tax paid by Mr Ashworth and his loss deposit were, in any event, paid to him during the course of 2020.

iii) Further, it is submitted that Mr Ashworth's case in estoppel is, in essence, about finding a new promise to sue upon, and that Mr Ashworth is therefore seeking to rely upon estoppel as a sword and not a shield, which, it is submitted, is impermissible.

Summary of the defence

106. It is, therefore, Mr Philbin's case that Mr Ashworth has failed to establish either an implied agreement or any form of estoppel which overcomes the difficulty that the conditions provided for by clause 3.1(a) of the SPA were not satisfied within the time provided for thereby, with the consequence that the additional purchase price of £900,000 provided for thereby has never become payable in accordance with the terms of that provision.

Approach to the evidence

107. The key events in the present case go back as far as 2018, and much is said to turn on discussions at meetings and otherwise that took place between the parties in 2019 and early 2020, and their respective recollections thereof. Given the passage of time since the events in question took place, it is important for me to bear firmly in mind the observations of Leggatt J (as he then was) in *Gestmin SGPS S.A. v Credit Suisse Limited* [2013] EWHC 3560 (Comm) at [15]-[22] with regard to the unreliability of human memory, in particular when asked to recall events some years after the event, and his caution, expressed at [22], to place limited, if any, weight on witnesses' recollections, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

108. I note one particular comment of Leggatt J at [18] that: "Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time."

109. I would also note the observations made as to the importance of contemporaneous documents by Males LJ in *Simetra Global Assets Limited v Ikon Finance Limited* [2019] EWCA Civ 1413 at [48] reinforcing what was said by Leggatt J in Gestmin:

> "48. In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents."

110. In addition to documentary evidence, it is plainly appropriate to test the witness evidence against the inherent probabilities of the relevant situation, and considerations such as the consistency (or otherwise) of a particular witness' evidence with other evidence, the internal consistency of that evidence, and the consistency of that evidence

with what the witness might have said on other occasions – see *Kimathi v The FCO* [2018] EWHC 2066 (QB), at [98].

111. The established approach to fact-finding thus requires reliable contemporaneous documentary evidence to be used as a platform, to which are added known or established facts, agreed facts, or probable facts (both inherently probable and by inferences properly drawn from known, established or agreed facts), which the Court will then build upon by reference to witness testimony which is consistent or compatible with that underlying body of reliable documentary evidence and is not tainted or flawed by other indicators of unreliability – see e.g. *Re Parsonage (deceased)* [2019] EWHC 2362 (Ch), per HHJ Simon Barker QC at [32]-[37].

The Witnesses

112. Mr Ashworth, Mr Williamson and Mr Philbin each gave evidence, in that order.

Mr Ashworth

113. I did not consider that Mr Ashworth was seeking to deliberately mislead the Court in any way, but his evidence was, in a number of respects, extremely vague and self-serving.

114. Thus, for example, I accept the criticism that he provided no cogent explanation as to why, and in what circumstances, he had come to make an "error" as to the amount said to be due to him under clause 3.1(a) of the SPA, and to proceed on the basis that it was £600,000 rather than the £900,000 provided for thereby. Further, Mr Ashworth was extremely vague as to why he had not, at the time, sought to raise the issue of the dates provided for by clause 3.1(a) with Mr Williamson or Mr Philbin before the first of the key dates expired on 31 December 2018 when it became known that that date would not be met, such as by seeking the express agreement of Mr Williamson to an extension, or at least seeking clarification from Mr Williamson or Mr Philbin that no point would be taken as to Mr Ashworth's entitlement to the £900,000 provided that a new lease was granted that served to enhance the sale price of St Annes PCC.

115. Further, I note Mr Budworth's observation that, at one stage's evidence, Mr Ashworth responded to say: "I don't think that is my case" in respect of a particular proposition.

116. In the circumstances, and given the considerations that I have identified with regard to the passage of time, I consider that I must treat Mr Ashworth's evidence with regard what was said in the course of discussions at meetings and elsewhere with caution, at least unless supported by documentary evidence or the inherent probabilities of the situation.

117. I bear in mind that the onus of proof is on Mr Ashworth to establish his case.

Mr Williamson

118. Again, I do not consider that Mr Williamson set out to mislead the Court in the evidence that he gave, but again I must, I consider, treat his evidence as to contemporaneous events, and in particular with regard to what might have been said at meetings and in the course of discussions, with a considerable degree of caution.

119. The point is, I consider, illustrated by Mr Williamson's responses during the course of his cross examination with regard to the texts sent on 25 May 2020. As I have explained, originally he seemed to accept that the reference to "agreement" in the first of the texts was a reference to the SPA, but then when asked in relation to the "minimum not in doubt" in a later text, he sought to tie this in with an agreement as to the payment of an additional £600,000 reached at the meeting at San Carlo on 26 November 2019, only later to suggest a discussion in January 2020 as an alternative. As I have ready identified, this is in circumstances in which he had said, in paragraph 42 of his witness statement, that he could not recall the detail of the meeting at San Carlo. Whilst Mr Williamson explained that his memory of the meeting at San Carlo had improved since he made his witness statement, this explanation lacks reality and I consider it more likely that Mr Williamson has, albeit quite possibly entirely innocently, created a false narrative in his own mind to explain the reference to agreement in the texts.

Mr Philbin

120. Mr Philbin struck me as an astute and wily operator, as I believe, illustrated by his own evidence that whilst agreeable to the SPA providing for total consideration of £1.5 million, the entitlement of Mr Ashworth to anything in excess of the initial £600,000 provided for in the first draft was conditional on meeting conditions that Mr Philbin believed were incapable, or at least very likely of being incapable of achievement.

121. Further, with regard to the contents of paragraph 174 of Mr Philbin's witness, I struggled to find any solid evidential basis for the suggestion that Mr Ashworth had a "£1m target", whether dating back to Mr Ingleby's involvement or otherwise, and I find it difficult to accept that Mr Philbin felt honour bound in any way to make payments to Mr Ashworth simply because he "deserved it morally". This does, I consider, serve to undermine the reliability of his evidence.

122. I consider the reality of the position is more likely to be that the commercial advantage of keeping Mr Ashworth on board so far as getting a new lease in place, and subsequently overseeing the liquidation of the relevant companies, provided the real motivation for providing assurance in relation to the making of payments to Mr Ashworth, and the actual making payments to Mr Ashworth, even though he was alert to the point that the dates provided for by clause 3.1(a) of the SPA had expired, and thus that, without more, Mr Ashworth was not entitled to the further £900,000.

123. In light of these considerations and again given the effect of the passage of time on recollections, I consider that I must treat Mr Philbin's evidence with considerable caution.

Findings in relation to factual issues

124. As I have already indicated, I find it difficult to see that there is any documentary evidence to support the proposition that Mr Ashworth had a "£1m target" which, in some way, underlay the discussions and communications that took place leading to the entry into of the SPA and the Guarantee.

125. Mr Ashworth had, on 7 August 2018, put forward figures that totalled £600,000, and that sum provided the basis of the consideration originally provided for by the first draft of the SPA. On Mr Philbin's own case, the jump to £1.5 million occurred because Mr

Ashworth was able to leverage the position by playing the card of his ownership (through SAPC) of the Car Park Land and its significance in enhancing, if not preserving the value of the St Annes PCC reversion through the requirement for such land in order to satisfy the existing planning position. On his case, having been blackmailed by Mr Ashworth, and in order to avoid the threat of Mr Ashworth doing some deal with Mr Ajram, agreement was reached as to the terms of clause 3.1(a) of the SPA as a mechanism for, potentially at least, paying a significantly greater sum than £600,000 to Mr Ashworth. The suggestion of there being some underlying £1 million target sought to be achieved by Mr Ashworth does not, as I see it, fit in with this scenario.

126. As to whether Mr Philbin was, in fact, ambushed and blackmailed by Mr Ashworth by his email sent early in the morning of 9 August 2018, I have my doubts as to whether Mr Ashworth was doing more than playing the cards that were commercially open to him given that he had managed to acquire (through SAPC) the Car Park Land. It may be that Mr Philbin was unaware of the further planning issue relating to the existing planning permission, and the lack of sufficient parking, but, to the extent that it might be relevant, I do not accept that this was something that was deliberately concealed from Mr Philbin until the last minute in order to achieve a commercial advantage. Further, what Mr Philbin has subsequently said with regard to Mr Ashworth being an essentially good man, and someone to whom he considered that he was morally obliged to make or cause payments to be made to, does not rest easily with the outrage that he now says that he has in respect of a stunt that he claims was pulled on him by Mr Ashworth.

127. So far as Mr Ashworth is concerned, I consider it important to bear in mind that Mr Philbin is a commercially astute Solicitor, whereas Mr Ashworth entered into the SPA without legal representation and thus without independent advice as to the terms of the SPA. Bearing in mind Mr Philbin's evidence that he did not consider the conditions in clause 3.1(a) of the SPA to be readily achievable, I consider it unlikely that he would have brought the same to Mr Ashworth's attention. I consider that the more likely explanation of events is that Mr Ashworth, albeit not an unintelligent man, simply did not take on board the time limits in clause 3.1(a), and simply assumed that if a new lease could be achieved before the sale of St Annes PPC and so reflected in the value thereof, then he would be entitled to the additional consideration provided for thereby.

128. Thus, I consider that the more likely explanation of events is that Mr Ashworth simply did not appreciate the nuances of clause 3.1(a), and that once the new lease was in place he felt confident as to his entitlement to receive the additional consideration provided for by this provision. Further, I consider that, on a similar basis, the likelihood is that Mr Ashworth misunderstood or misread the amount potentially payable to him as additional consideration pursuant to clause 3.1(a), perhaps given the reference to £1,200,000 therein. On this point, I take on board that £1.5 million was a figure that Mr Ashworth had mentioned as potentially payable by Mr Ajram in his email sent early in the morning on 9 August 2018, but against this is the fact that Mr Ashworth reported his capital gain for the purposes of his 2019 tax return as being £1.2 million, and it was based upon that figure (£600,000 plus £600,000), that he calculated the sums due to him in the texts dated 25 May 2020, and in the various communications thereafter. To the extent that I conclude, which I do, that Mr Ashworth had in mind his entitlement under the terms of the SPA in reporting his capital gain for tax purposes, and in sending

the texts and other communications, then I consider that this is best explicable on the basis of the mistake that he says that he made despite my reservations in respect of this explanation.

129. Mr Philbin's answer to this is that the additional £600,000 related to something else, namely what was said to have been Mr Ashworth's original £1 million "target" plus some provision for tax, and Mr Philbin's case is that the "agreement" and "deal" that Mr Ashworth was referring to in his texts and other correspondence, related to some understanding with regard to this original £1 million "target", and/or a figure of £600,000 discussed at the San Carlo meeting on 29 November 2019, or in discussions between Mr Williamson and Mr Ashworth in early January 2020.

130. However, I consider that there are a number of difficulties with this analysis, including that:

i) There is, as I have identified, no obvious documentary evidence to support there being the alleged original £1 million "target", and such a "target" appears inconsistent with the correspondence and other circumstances leading to the entry into of the SPA where Mr Ashworth had identified figures totalling £600,000 which were reflected in the £600,000 payable in any event under the SPA;

ii) The suggestion of the figure of £600,000 being discussed at the San Carlo meeting, or in January 2020, as forming the basis of some agreement separate from the SPA was not something dealt with in Mr Williamson's or Mr Philbin's witness statements, and was suggested by Mr Williamson the first time during the course of his cross examination in circumstances in which he unconvincingly suggested that his recollection in respect of San Carlo meeting had improved since he made his trial witness statement. Although paragraph 26 of Mr Williamson's witness statement (referred to in paragraph 64 above) does refer to Mr Ashworth wanting a further £600,000, this is not tied to any particular conversation, and is not how matters are put by Mr Philbin. Further, in contemporaneous documentation, Mr Ashworth referred not simply to "agreement" or "deal", but to "the original agreement" and to the "Final payment due on sale", and Mr Philbin himself referred to "the SAPC deferred".

131. In short, I do not consider that the counterfactual asserted on behalf of Mr Philbin is credible or answers the point, and I find that the more likely explanation is that Mr Ashworth had misread or misunderstood the provisions of the clause 3.1(a) of the SPA so far as the effect of the conditions were concerned and as to how much was payable by way of additional consideration thereunder, and that that is why he sought from Mr Williamson and Mr Philbin the £600,000 that he considered that he was "owed" pursuant to the "original agreement", i.e. the SPA.

132. In the light of Mr Ashworth's own contemporaneous understanding of the position, including a lack of understanding as to the true effect of clause 3.1(a) and belief that the latter provision entitled him to additional consideration of £600,000, rather than £900,000, it is necessary to consider in more detail Mr Philbin's understanding and position.

133. As I have said, Mr Philbin's position is that whilst Mr Williamson may have thought that Mr Ashworth knew that the time limits provided for by clause 3.1(a) of the SPA had expired, he was not so sure. However, as they themselves accept, they decided that they would not, in any event, inform Mr Ashworth that the time limits had expired because they wished to secure his continuing cooperation and assistance with regard to the sale of St Annes PCC etc. . In the light thereof, I consider it somewhat unlikely that they would have specifically raised the question of further consideration payable pursuant to clause 3.1(a) in any context. Thus, I consider it unlikely that they would have made express reference to monies being due to Mr Ashworth under the terms of the SPA, or to the figure of £900,000 provided for by clause 3.1(a) thereof.

134. Having rejected, as I have, the suggestion of there being some pre-existing expectation on the part of Mr Ashworth to a £1m "target" dating back to Mr Ingleby, or as to there having been some understanding or agreement reached at the San Carlo meeting on 29 November 2019 or in January 2020 with regard to the payment of an additional £600,000 to Mr Ashworth, it follows that, to the extent that Mr Ashworth considered that he was owed a specific sum under a specific agreement, as the texts and other correspondence clearly demonstrate that he did, I find that this could only have been because he considered that he was owed monies under the SPA. Consequently, to the extent that Mr Ashworth was being assured by Mr Williamson or Mr Philbin that payment would be made, e.g. by being told at the San Carlo meeting that he would be paid when Mr Philbin had overcome his Poole difficulties, he must have understood that the latter were thereby confirming his entitlement to additional consideration pursuant to clause 3.1(a) of the SPA, even though that was not their intention.

135. Further, I consider that Mr Williamson and Mr Philbin must have appreciated that Mr Ashworth considered that he was owed monies under the SPA, even if they considered that he did not because of the expiration of the relevant time limits in clause 3.1(a) of the SPA before the conditions were met. The evidence of Williamson and Mr Philbin was to the effect that, in respect of the later correspondence from Mr Ashworth, they appreciated that he must have considered that he had some entitlement under the SPA, but I consider that the reality is that they must have appreciated that this was the case at a much earlier stage, and probably throughout, given there being no other basis for Mr Ashworth considering that he was entitled to further payment. Consequently, they must, as I see it, have understood that their assurances would be taken by Mr Ashworth to be acceptance by them that he was owed monies pursuant to the SPA.

136. Thus, the position is, as I see it, that whilst Mr Williamson and Mr Philbin might have given Mr Ashworth the impression that they were accepting that he was owed further monies over and above the initial £600,000 under clause 3.1(a) of the SPA and must have understood that that was the case, the reality was that:

i) As I have found, Mr Ashworth was unaware of the difficulty confronting him with regard to the expiry of the time limits under clause 3.1(a);

ii) Mr Williamson and Mr Philbin, at least subjectively, did not consider that Mr Ashworth was entitled to further monies pursuant to the SPA because they were aware that the time limits provided for by clause 3.1(a) had expired without any express agreement having been reached to extend the time periods provided for thereby;

iii) Mr Williamson and Mr Philbin deliberately did not seek to disabuse Mr Ashworth of his belief that he was entitled to further monies pursuant to the SPA, although they considered that he was not because the relevant time periods had expired. However, in addition to what I consider must have been their understanding that as to how assurances as to payment would be understood by Mr Ashworth, they were also prepared to cause further monies to be paid to Mr Ashworth in order to keep him on board with regard to the sale of St Annes PCC and the subsequent liquidation of the relevant companies.

137. In these circumstances, and given their different subjective understandings as the whether the conditions of clause 3(1)(a) of the SPA had been satisfied, I consider that it is difficult to see that there can have been any common understanding:

i) Of the kind pleaded in paragraph 17 of the Amended Particulars of Claim, whether in its original form to the effect that Mr Ashworth would still be entitled to the additional consideration provided for by clause 3.1(a) of the SPA if a new lease was granted prior to sale, or in its amended form, if a new lease resulted in an increased sale price, was to enhance the sale price; or

ii) More generally as to Mr Ashworth's entitlement pursuant to clause 3.1(a) of SPA to the further consideration of £900,000 notwithstanding that the time period as expressly provided for thereby had expired.

138. Given that I have found that the common understanding alleged by Mr Ashworth 17 of his Amended Particulars of Claim has not been established either in its unamended form, or in the form sought to be relied upon by amendment through his application to amend, it is strictly unnecessary for me to determine the application to amend. However, had I been required to do so, I would have dismissed the application as having been made too late in the day. Whilst it is true that St Annes PCC Sale Agreement was only produced during the course of the trial, the particular point had been taken well prior to trial. Although the September 2019 completion statement may have suggested a form of completion at that stage, other evidence pointed to sale having occurred on 26 March 2019, and I consider that the onus was upon Mr Ashworth to seek an answer to these inconsistencies prior to trial rather than rely upon the happenstance of me raising the issue with regard to the non-production of St Annes PCC Sale Agreement during the course of the trial. Thus, to the extent that any formal determination of the amendment application is required, I will dismiss it, irrelevant though it has become.

139. In the light of the above findings, I turn to consider whether any of the various ways in which Mr Ashworth's case is put forward is made out.

Determination

Implied agreement

140. We are not here concerned with whether a contract has been concluded in the ordinary sense requiring an intention to create legal relations and consideration, given the pre-existing legal relationship between the parties under the terms of the SPA, and that what is required is agreement, or common accord, that date by which St Annes PCC was required to enter into a new lease was the date on which the new lease was actually

entered into, and that that new lease might start on the date on which it did actually start.

141. However, Mr Ashworth does, it seems to me, still have to show that there was an agreement, i.e. that the parties came to a consensus ad idem or meeting of minds to this effect.

142. Where, as in the present case, there is no express agreement, then the question is as to whether the fact of an agreement can be inferred from the circumstances. As to this, it is to be borne in mind that agreement is not a mental state but an act, or inference from conduct – see Chitty on Contracts, 35 edn, at 1-053 and 1-066. Further, it is incumbent upon the party asserting an implied agreement to show the necessity for implying it, as I understand both parties to accept – see *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] 1 WLR 1192 at [102], per Mance LJ.

143. It is trite that the question as to whether a contract has been concluded is essentially an objective question. However, the authorities demonstrate that unlike the case of a written contract, the interpretation of a contract that is not written is a matter of fact on which the parties' subjective understanding of what they were agreeing is admissible – see e.g. *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776, at [82], per Lord Neuberger. If the terms of a non-written contract may turn upon the subjective understanding of the parties as to what they were agreeing, then it seems to me that the very question as to whether agreement was reached in the first place is capable of being influenced by their subjective understanding of the position, unless the *necessary* inference from their conduct is that they have reached agreement with their putative counterparties. An example of the latter would be the passenger permitted to board a bus. From the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry them safely to their destination - see Chitty (supra) at 1-066.

144. I consider it necessary to have regard to these considerations in determining the question as to whether the implied agreement alleged by Mr Ashworth was, in fact, concluded. Having done so, I have been unable to conclude that the agreement alleged by Mr Ashworth has been established for the following reasons:

    i) On the present facts, I consider that the absence that I have found of a common understanding of the kind alleged by Mr Ashworth is fatal to his case because, on the present facts, and absent such common understanding, I consider it impossible to conclude that there was any consensus ad idem or meeting of minds with regard to new agreed dates for the purposes of clause 3(1)(a) of the SPA. The existence of an alleged common understanding forms a key part of Mr Ashworth's pleaded case as to there being an implied agreement as demonstrated by paragraph 30.1 of the Amended Particulars of Claim.

    ii) A further key element of Mr Ashworth's pleaded case is what are alleged to be "the parties' repeated acknowledgements that the Claimant was entitled to the Additional Purchase Price" alleged in paragraph 30.2 of the Amended Particulars of Claim based upon the conduct alleged in earlier paragraphs of the Amended Particulars of Claim. However, it is not Mr Ashworth's case that there has been a variation of the SPA, but rather an implied agreement to "such later

date(s)" for the purposes of clause 3.1(a) of the SPA, which would not amount to a variation of clause 3.1(a), but rather a way of carrying it into effect. I consider it unlikely, for the reasons that I have explained, that either Mr Williamson or Mr Philbin expressly acknowledged any further entitlement of Mr Ashworth under the terms of the SPA, or at least that they did so in terms that made it clear that they were agreeable to any specific "such later date(s)" for the purposes of clause 3.1(a) of the SPA, as opposed to more generally indicating a preparedness to make further payments to him. In these circumstances, I do not consider that anything said by either Mr Williamson or Mr Philbin necessarily points there having been concluded an agreement by implication as alleged.

iii) Further, insofar as paragraph 30.3 of the Amended Particulars of claim relies upon the various further payments that are centred been made as "part payments of the Additional Purchase Price", I do not consider the circumstances in which the same came to be made to be sufficiently unequivocal, when taken together with the absence of the alleged common understanding, to enable me to conclude that the necessary inference is that the parties had agreed to extend the time limits provided for by clause 3.1(a) of the SPA.

iv) In short, I do not consider that the acts of the parties, set in their particular context, as a matter of necessity, lead to conclusion that they must have reached agreement as to any "such other date(s)" for the purposes of clause 3.1(a) of the SPA.

145. Given my finding that there is no implied agreement as alleged by Mr Ashworth, it is strictly unnecessary for me to consider in relation to this element of Mr Ashworth's case the alternative defences that the alleged implied agreement involves a variation that falls foul of clause 10.1 of the SPA and/or the rule in *Holmes v Brunskill* so far as Mr Philbin's liability as guarantor is concerned. However, even apart from clauses 2.3 and 3.2 of the Guarantee, had I concluded that agreement had been reached between the parties for the purposes of clause 3.1(a) of the SPA with regard to "such later date(s)", then I would have rejected these defences on the basis that the agreement established was not a variation of the terms of the SPA falling within clause 10.1, but rather involve the carrying into of effect to a provision thereof, and that the rule in *Holmes v Brunskill* was therefore also not engaged, or if it was, that it could not properly be said that what occurred was outside the "purview" of the Guarantee and so reliance could be placed on clause 3.2(b) of the Guarantee.

Estoppel

Estoppel by convention

146. I will deal firstly with estoppel by convention which generally depends upon there being a common understanding or assumption between the parties as to the particular effect of a contractual provision, and some expression of that common understanding or assumption which crosses the line – see *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, [2022] AC 886, and Chitty on Contracts (supra) at 7-016 et seq.

147. As I have found that there was no common understanding or assumption between the parties of the kind alleged, it follows that any claim of estoppel by convention based upon the existence of such a common understanding or assumption must fail.

148. There are authorities that suggest that an estoppel by convention may arise where an assumption is shared by one party and acquiesced in by the other – see *Republic of India v India Steamship Company Co Ltd ("The Indian Endurance and the Indian Grace")* [1998] AC 878 at 913-914. However, that is not how the present case as to estoppel by convention has been put in the present case.

Estoppel by representation and promissory estoppel

149. I was not addressed in any detail as to the distinction between estoppel by representation and promissory estoppel, and Mr Cramsie merely suggested in closing that Mr Ashworth's case as to estoppel by representation may add little to his promissory estoppel case. There is some overlap between the two – see, e.g. Snell's Equity, 35th edn at 12-006. However, I do consider it important to identify what type of estoppel Mr Ashworth's case is properly founded upon bearing in mind that the distinction between estoppel by representation and promissory estoppel essentially turns upon the nature of the representation that founds estoppel. In the case of estoppel by representation, the representation relates to some existing fact or state of affairs, but promissory estoppel is concerned with the situation where the representation is not factual but promissory, i.e. a promise or undertaking as to the future – see Spencer Bower, Reliance-Based Estoppel, 5 edn, at 1.25.

150. Mr Ashworth's case as to the alleged promises or representations that are said to found an estoppel is set out in paragraph 31 of the Amended Particulars of Claim as referred to in paragraph 92 above. I do not read the alleged representations as being promises or undertakings as to the future, but rather as being, in substance, representations of fact or as to an existing state of affairs, namely that Mr Ashworth was entitled to the additional consideration provided for clause 3.1(a) of the SPA notwithstanding the expiration of the dates of 31 December 2018 and 31 March 2019 expressly provided for thereby before the relevant conditions attached thereto had been satisfied, because such conditions had otherwise been satisfied, or were to be treated as satisfied.

151. This approach is, I consider, consistent with authorities to the effect that a representation as to rights as between parties is to be treated as a representation of fact which may found in estoppel by representation of fact – see Spencer Bower (supra) at 2.14 and 2.31. On this basis, I consider that Mr Ashworth's estoppel claim under this head of claim is best analysed in terms of an estoppel by representation, rather than a promissory estoppel.

152. It is therefore appropriate to consider the essential requirements of an estoppel by representation. So far as relevant, the key requirements thereof are the following:

    i) A clear representation of existing fact, i.e. as to an existing state of affairs, which may be express or implied, or made by conduct. The requirement of a clear representation is similar to that required in the context of misrepresentation, and requires a statement which relates, by way of affirmation, denial, description, or otherwise, to a matter of fact. However, there is no need to apply the same stringent requirements of certainty as for a contractual promise.

ii) The representation must be intended to be relied upon and thus must reasonably be understood by the representee as intended by the representor to be relied upon. The representor's intention that the representation be acted on is assessed objectively.

iii) The representee must rely upon the representation, and so the representation must either generate a belief or confirm a belief of the representee. The mere fact that the representor might have acted in the same way in any event but for the representation does not necessarily mean the estoppel claim must fail, at least if it can be shown that the representation affected in some way the decision of the representee to act in the way that he did – see *Dadourian Group International Inc v Simms* [2009] EWCA Civ 169, [2009] 1 Lloyds Rep 601 at [99].

iv) The representee must suffer detriment. As to the role played by detriment in operation of the estoppel, in *Kelly v Fraser* [2012] UKPC 25, [2013] 1 AC 450, at [17], Lord Sumption observed that: " … [t]he relevance of detrimental reliance in the law of estoppel by representation is that it is generally what makes it unjust for the representor to resile from his previously stated position." The detriment can take any form. If the change of position of the representee in reliance upon the representation is more than minimal, so that it would be unjust for the representor to be able to resile from the promise, then an estoppel may be established.

See Chitty on Contracts (supra) at 7-006 et seq, and Spencer Bower (supra) at 2.10 et seq, 5.4 et seq, and 5.41 et seq.

153. It is necessary therefore to consider whether these various requirements are satisfied on the facts of the present case.

154. The first question is as to whether there was a clear and unambiguous representation to the effect that Mr Ashworth was entitled to the additional consideration provided for in clause 3.1(a) of the SPA notwithstanding the expiration of the dates of 31 December 2018 and 31 March 2019 expressly provided for thereby, either because the necessary conditions had otherwise been satisfied, or were to be treated as satisfied.

155. I consider it reasonably clear that in the conversations at the meeting at San Carlo on 29 November 2019 involving Mr Philbin and Mr Williamson, in the discussions between Mr Ashworth and Mr Williamson in January 2020 that Mr Philbin was aware of, as well as in the texts and correspondence thereafter, that Mr Ashworth was asserting a claim for more than the initial £600,000 payable under clause 3.1 of the SPA, and doing so on the basis of being entitled thereto even if he did not specifically mention clause 3.1(a) of the SPA. Further, I consider it clear that Mr Philbin and Mr Williamson both indicated to him that that entitlement was accepted with the excuse for non-payment being given that the monies were not presently available to pay Mr Ashworth, e.g. Mr Ashworth being informed at the San Carlo meeting and on other occasions that Mr Philbin was waiting monies from his Poole project. As I have found, I consider that I should proceed on the basis that Mr Ashworth contemporaneously believed that he had an entitlement to the further consideration payable pursuant to clause 3.1(a) of the SPA given that a new lease in respect of St Annes PCC had been entered into, and that

Mr Philbin and Mr Williamson did not wish to disabuse him of this understanding, because they wanted him his continued assistance.

156. In the circumstances, in accepting Mr Ashworth's entitlement to further monies, and providing him with assurances in respect thereof, as well as in paying or causing to be paid further monies to him over and above the initial £600,000 to which he was entitled, Mr Philbin and Mr Williamson were, I consider, plainly representing to Mr Ashworth that he would get the money to which he was entitled. As the only basis for Mr Ashworth being entitled to further monies could have been, on the basis of my findings, pursuant to clause 3.1(a) of the SPA, I consider that these representations on the part of Mr Philbin and Mr Williamson must be regarded as being representations to the effect that Mr Ashworth was entitled to the further consideration payable pursuant to clause 3.1(a), notwithstanding that the dates provided for thereby had expired and that Mr Philbin and Mr Willaimson did not believe that have been the case.

157. The second requirement is that Mr Philbin and Mr Williamson, or at least Mr Philbin, intended that Mr Ashworth should act on these representations. As to this, I consider it clear that, on their own evidence, Mr Philbin and Mr Williams did wish Mr Ashworth to act in these representations, because they wish to secure his further continued assistance.

158. The next question is as to whether Mr Ashworth acted in reliance upon the representations. In the circumstances of the present case, I consider it appropriate to consider the question of reliance together with that of detriment. As I have considered in paragraph 152(iv) above, the key question is whether in acting in reliance upon the relevant representation the representee has so changed their position, or acted to their detriment, that it would be unjust for the representor to be able to resile from that which they had represented. I note that, in this respect, there is no need for the detriment to be financially quantifiable, and that a common, if not the most common form of detriment is a lost opportunity to take a different course, in which case it does not matter that is unclear whether such an alternative course would have been beneficial - see Chitty on Contracts (supra) at 7-012 referring to *Kelly v Fraser* (supra) at [17], and *Greenwood v Martins Bank Ltd* [1933] A.C. 51.

159. Mr Ashworth deals with reliance in paragraph 46 et seq of his first trial witness statement, without alleging detriment as such, apart from pleading out the ways in which he says that he acted in reliance upon the alleged representations, or explaining the basis upon which it is said that it would be unjust for the Mr Philbin to be able to resile from that which had been represented. Mr Ashworth, who was not cross-examined on the issue of reliance and detriment, identifies in paragraph 46 of his first trial witness statement, as he had in his Amended Particulars of Claim, two types of reliance, firstly payment of CGT on the whole £1.2 million that he thought that he says that he was entitled to, and money spent in respect of the purchase of property. He neither pleads, nor refers in either of his trial witness statements to having continued to work for the benefit of the Rushcliffe group companies as director and employee in reliance upon the representations alleged to found the estoppel. As considered further below, I consider that any consideration of reliance and detriment must be confined to Mr Ashworth's pleaded case.

160. I consider that Mr Ashworth has, just about, shown enough to enable me to conclude that he did act in reliance upon the above representations on the part of Mr Philbin and Mr Williams. I have had not inconsiderable reservations in this respect, given that, on the basis of my findings, Mr Ashworth held his belief as to his entitlement as to the further consideration in any event. However, I consider that the representations in question are likely at least to have confirmed his belief prior to his acting thereupon in the way that is alleged, cf. *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] Q.B. 84, at 105, per Robert Goff J.

161. As apparent from the authorities referred to in paragraph 152(iv) above, on the question of detriment, the key question is whether the fact that representee has charged his position in some way makes it unjust or inequitable for the representor to resile from his previously stated position. In answering this question, it is necessary to bear in mind that this later question is to be judged at the moment that the representor seeks to resile from the representation, here when Mr Philbin's Solicitors responded to the letter of claim in November 2022 – see Spencer Bower (supra) at 5.51. On the other hand, it is to be noted that detriment is not the measure of the representee's claim, and an estoppel by representation of fact does not operate *pro tanto* but bars denial of the relevant fact, save to the extent that the representee demonstrates that this would work an injustice – see Spencer Bower (supra) at 5.50. Thus, any sufficient detrimental reliance in the present case would serve to enable Mr Ashworth to say that Mr Philbin is estopped from asserting that the conditions imposed by clause 3.1(a) of the SPA prevent Mr Ashworth from recovering the balance of the £900,000 payable pursuant thereto.

162. The authorities indicate that if the benefits derived from reliance on the representation outweigh the detriment suffered or to be suffered, then an estoppel might be avoided, but the onus will generally be upon the representor to show that this was the case – see Spencer Bower (supra).

163. A difficulty that I have is that the case as to detriment was not really developed in closing submission, and the case as advanced in paragraph 41 of Mr Cramsie's Skeleton Argument for trial, relying upon paragraph 174 of Mr Philbin's witness statement, is neither pleaded nor covered in paragraph 46 et seq of Mr Ashworth's first trial witness statement, where he deals with the question of detrimental reliance. Consequently, Mr Budworth's submissions on detriment were limited to the pleaded case (see paragraph 31 of his Note for Closing).

164. On the basis of Mr Ashworth's pleaded case, I have been unable to conclude that Mr Ashworth has, in reliance on the representations, suffered detriment sufficient to support an estoppel by representation. In this respect, it is, I consider, important to bear in mind that, ultimately, Mr Ashworth has received £470,500, or £480,500 (the difference does not matter), of the £600,000 additional consideration that he contemporaneously, rather than with the benefit of hindsight, believed that he was entitled to under clause 3.1(a) of the SPA in circumstances where, as I have held, there was no obligation on Mr Williamson to make the payment of the £900,000 that Mr Philbin had guaranteed.

165. So far as the payment of tax is concerned, it is certainly true that Mr Ashworth did complete his 2019 tax return on the basis of having made a capital gain of £1.2 million. However, he was able to pay the CGT due out of the monies that were advanced to him in January or early February 2020. He is not, therefore, out-of-pocket, particularly bearing in mind that he would have had to pay tax on the initial £600,000 and any further monies received in any event.

166. So far as money spent on property is concerned, the first matter is the loss of a deposit on a property that Mr Ashworth proposed to buy in early 2020, that he was unable to complete because further monies were not provided to him to enable him to do so. However, again, monies were subsequently advanced that were sufficient to reimburse him in respect of this lost deposit of £36,000.

167. So far as the purchase of another property is concerned, sufficient monies were provided to enable him to buy and refurbish this property out of the further monies that were advanced over and above the initial £600,000. However, his complaint is that because he was expecting to receive further monies, he spent the money that he did receive on the property, leaving him with insufficient funds, thereafter, causing him unspecified "unexpected financial difficulties". However, these latter difficulties are not explained.

168. Mr Ashworth is thus plainly not out-of-pocket as a result of his reliance upon the relevant representations, and now has, if he still retains it, the benefit of a renovated property purchased out of and renovated using the further monies that were advanced over and above his strict contractual entitlement.

169. In these circumstances, and bearing in mind that the question turns upon the position at the time that Mr Philbin first sought to resile from the representations in November 2022, I find it impossible properly to conclude that the way that Mr Ashworth might have changed his position in the circumstances of the present case in reliance upon the representations that were made is such as to make it unjust or inequitable for Mr Philbin or Mr Williamson to now take the point that later dates were not agreed for the purposes of clause 3.1(a) of the SPA, and so Mr Ashworth is not entitled to the £900,000 that would have been payable pursuant thereto had later dates been agreed.

170. It was argued by Mr Budworth that the estoppel claim should fail because Mr Ashworth is seeking to use the estoppel as a sword rather than a shield, when that is impermissible. Given my finding that the estoppel has not been established in any event, it is not strictly necessary for me to determine this issue. However, I shall do so in case I am wrong in respect of that finding.

171. I do not consider that an estoppel would be defeated on the basis suggested. Estoppel by representation prevents a party from alleging that the facts represented by them are untrue, even where that is actually the case. Properly analysed, it does not give rise to a cause of action, but merely has the effect that where the representee seeks to maintain a cause of action apart from the estoppel, the representor will be prevented from relying in defence to the claim upon a fact or statement of affairs inconsistent with the representation that the representor had acted upon. Thus, the estoppel is not being deployed as a sword in support of some cause of action that did not otherwise exist, but rather as a shield as against a defence that the representor might otherwise have been able to run - See Chitty on Contracts (supra) at 7-013, and *Nippon Menkwa Kabushiki*

v Dawson's Bank Ltd [1935] 51 LI L Rep 143, PC, per Lord Russell of Killowen at 150. This is, as I see it, just such a case.

172. I would add that even if the other requirements of promissory estoppel could be made out, reliance upon that estoppel would, I consider, fail on the same basis, namely that insufficient detriment has been established to found the basis of the estoppel.

173. I would further add that if I am wrong as to my conclusions in respect of reliance and detriment, and Mr Philbin and Mr Williamson are estopped as alleged, then:

i) I do not consider that the entire agreement provision within clause 9 of the SPA provides any assistance to Mr Philbin, as I consider that this is concerned with pre-contractual representations, post-contractual representations that might give rise to estoppel is by representation, rather than claims based upon post-contractual events relating to performance of the SPA.

ii) Whilst the rule in *Holmes v Brunskill* (supra) might be of assistance to Mr Philbin if any estoppel had only been as between Mr Ashworth and Mr Williams, as Mr Philbin was party to the making of the representations that were relied upon, I consider that the estoppel would be binding upon both Mr Williams and Mr Philbin, with the result that Mr Philbin would have been estopped from denying that clause 3.1(a) operated to provide for the further consideration of £900,000 to be payable to Mr Ashworth.

Conclusion

174. I have concluded that Mr Ashworth has failed to establish the implied agreement that he seeks to rely upon so far as the operation of clause 3.1(a) of the SPA is concerned, and that Mr Ashworth has also failed to establish that any form of estoppel operates so as to require clause 3.1(a) of the SPA to take effect so as to provide for the payment of further consideration of £900,000 to Mr Ashworth. Consequently, I consider that the claim must be dismissed.