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Case Nos: CL-2016-000799
CL-2018-000106
CL-2018-000109

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2021

Before :

MR JUSTICE JACOBS

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Between :

MICHAEL ANTHONY TUKE	**Claimant**
- and -	
(1) DEREK HOOD	**Defendants**
(2) J D CLASSICS LIMITED (in Administration)	
(formerly JD CLASSICS HOLDINGS LIMITED)	
~~**- and -**~~	
~~**KEVIN HELLARD AND AMANDA WADE**~~	~~**Interested**~~
~~**(As Joint Trustees in Bankruptcy of Derek Hood)**~~	~~**Party**~~

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Alexander Wright and Edward Jones (instructed by **Wilmot & Co Solicitors LLP**) for the **Claimant**
Joshua Crow (instructed by Fieldfisher LLP) for **Mr. Hood**

Hearing dates: 15 January 2021

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Approved Judgment

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MR JUSTICE JACOBS

Mr Justice Jacobs :

1. This judgment concerns a number of consequential issues arising from my judgment handed down in October 2020. References in square brackets are to the paragraphs of that judgment. The issues before me relate to:

   a. The calculation of damages for loss of investment opportunity.
   b. The appropriateness and amount of a credit for sums received by Mr. Tuke in the context of his claim for loss of investment opportunity.
   c. The calculation of interest on the sums awarded to Mr. Tuke.
   d. Costs of the proceedings.
   e. Permission to appeal.
   f. Stay of execution.

A: Calculation of damages for loss of investment opportunity

2. Within the context of the arguments for permission to appeal, Mr. Crow on behalf of Mr. Hood has identified what he contends to be an error in the calculation of the damages for loss of investment opportunity. He submitted that if the court (or Mr. Tuke) accepts that this point is in fact correct, it is not too late to reflect the adjustment in the final order. I did not understand Mr. Wright to contend that correction of this error, if it existed, could not be made at this stage.

3. If an error indeed exists, I would be minded to correct it. I also consider, for reasons which will become apparent, that this possible error raises, as a matter of substance, essentially the same question as was reserved for further argument and decision at the 'consequentials' hearing which took place on 15 January. That question (see [675]) concerns the correct quantification of damages for loss of investment opportunity, and in particular the question of whether, and if so how, credit should be given for the value which Mr. Tuke received when he sold the "investment cars".

4. In those circumstances, the sensible course is to correct any possible error in quantification now, particularly bearing in since the alternative would be to leave the error uncorrected, but to give permission to appeal to the Court of Appeal whilst in the interim granting a stay of execution (to the extent that the error impacted on quantum of the judgment in favour of Mr. Tuke). This would be undesirable. Moreover, the approach to the calculation of the loss of the loss of investment opportunity claim, and the alleged error, has a potential impact on other issues (apart from permission to appeal) which were live before me; in particular the question of credit and the calculation of interest. It would be artificial to decide those issues without considering and resolving the point raised as to the calculation of damages for the loss of investment opportunity claim.

5. I should mention that this point was not previously identified, at the time when the draft judgment was provided to the parties, either by Mr. Hood himself (who represented himself at trial) or by counsel acting for the Mr. Hood's bankruptcy trustees, who were participating at an earlier stage of the trial. The point has now been identified by Mr. Crow. He had previously been one of the counsel who had acted for Mr. Hood, but he had ceased to act prior to the trial and has only recently come back into the case. The point was raised for the first time only shortly before the hearing on 15 January 2021.

6. This point arises in the following context. Mr. Tuke's claims against Mr. Hood in these proceedings relate to various transactions which, as he successfully alleged, were procured by Mr. Hood's fraud. Many of these transactions involved Mr. Tuke being induced to sell valuable cars at an undervalue, usually involving the provision of overvalued cars by way of part exchange. In each of those transactions at an undervalue, Mr. Tuke received money and/or cars by way of part exchange.

7. The computation of damages in respect of Mr. Tuke's losses flowing from the series of frauds was not straightforward. The claim for damages included, but was not confined to, the loss on the sale at an undervalue itself; i.e. what Mr. Wright described as the 'base claim'. This is because Mr. Tuke successfully contended that, if he had not been defrauded, he would have sought to retain particular cars which would have substantially increased in value. This aspect of the claim was the referred to as the "loss of investment opportunity" claim in respect of the "investment cars". There were 6 such investment cars (treating the GT 40s as a single car): see [671]. All of these cars, apart from the Jaguar Lightweight E Type, was the subject of an allegation that there had been a sale at an undervalue. That allegation succeeded in respect of all of those cars, apart from the Jaguar C Type: see [488].

8. My approach to the assessment of damages was to consider these two aspects of the claim for damages separately. One reason for this approach was that the "base claim", comprising the amount that Mr. Tuke lost at the point of sale, when he was deceived into selling each car at an undervalue, was a comparatively straightforward calculation involving the comparison of what Mr. Tuke gave up with what he received. Whilst this calculation did involve the need to assess market values, as to which there was usually a substantial dispute, it was not affected by various arguments and uncertainties which related to claim the loss of investment opportunity. Those arguments revolved around what would have happened in the counterfactual world, and whether Mr. Tuke would or would not have been able to retain the investment cars: see [637] – [669]. I accepted the claim for loss of investment opportunity, but held that a 25% discount should be applied to reflect various uncertainties.

9. Although aspects of Mr. Crow's argument on permission to appeal criticised this approach, I do not consider anything even arguably wrong with it. I consider that it was a sensible way in which to approach the issue of damages. The base claim was not affected by the substantial arguments relating to uncertainty. Uncertainty issues was at the heart of the argument on the loss of investment opportunity claim. Mr. Tuke was entitled to say, and indeed established, that there were different heads of loss which flowed from the frauds which were perpetrated on him, including the loss flowing from the loss of investment opportunity. Indeed, Mr. McWilliams (who appeared at trial for the trustees) rightly did not dispute this is a matter of principle.

10. However, Mr. Crow's argument is that the damages awarded for loss of investment opportunity, as in fact calculated, involved an element of double counting. The relevant computation of damages (after having addressed the issues relating to uncertainty) is addressed in paragraphs [670] – [677] in the judgment. The calculation there compared the difference between the present value of the investment cars (i.e. the 2020 value) and the value of the benefits received by Mr. Tuke (cash and part exchange cars) which were received. Mr. Crow argued that if this approach to damages was to be taken in relation to the investment cars, then it could not be

additional to the "base claim", since that would involve an element of double counting.

11. He illustrated the argument with a hypothetical situation:

> Imagine that a defendant defrauds a claimant into selling the defendant a gold bar worth £10, paying the claimant only £5. Imagine also that before trial the value of the gold bar increases to £15. On the Judge's approach in the hypothetical situation, the claimant would recover, for the initial fraud, **£5**, being £10 minus £5. But the claimant would also recover, for the loss of investment opportunity, **£10**, being £15 minus £5 (leaving aside the discount for uncertainty). The claimant would therefore end up with **£20** = £5 (initial consideration) + £5 (basic loss) + £10 (loss of investment opportunity). The claimant has received a windfall of £5 by reason of the double counting of the initial loss. Had no fraud been committed, the claimant would have had only a gold bar worth £15.

12. I think that Mr. Crow is correct in principle. The point could be further illustrated by assuming that Mr. Tuke had been fraudulently induced into giving away a valuable car worth £ 1 million for nothing. The car would, if retained, have been worth £ 2 million. The "base claim" damages on this basis, looking at the loss at the time of the transaction, would be £ 1 million: i.e. £ 1 million given away less zero received. When it comes to computing the loss of investment opportunity, the overall claim could be computed by looking at the present value (£ 2 million) and deducting the value received (£ 0), to produce an overall loss of £ 2 million. Or the claim could be calculated by starting with the base claim (£ 1 million), and then calculating the loss of investment opportunity by reference to the difference between the value of the car at the time of the transaction (£ 1 million) and the present value (£ 2 million); i.e. a further £ 1 million. Each approach calculates a loss of £ 2 million. However it would not be appropriate simply to add the base claim (£ 1 million) to a loss of investment claim (£ 2 million) calculated by reference to the difference between present value and value received in the past. This would result in the award of £ 3 million damages in respect of a car which, if retained, would be worth £ 2 million.

13. Accordingly, I consider that an adjustment is indeed required to the calculation in paragraph [671]. Since my approach was to calculate the base claim for each transaction, and to look separately at the loss of investment opportunity claim, the starting point for the latter claim should indeed be, as Mr. Crow submitted, the market value of each car (as I have determined it to be in the context of each base claim). That market value should then be compared with present value so as to produce, prior to the 75% discount, the additional loss of investment opportunity claim. This eliminates double counting.

14. As Mr. Wright indicated in paragraph 35 (a) (i) of his written submissions (in relation to permission to appeal), the loss of investment opportunity claim was intended to reflect the "subsequent enhancement in value of the Investment Cars", and this was cumulative to the claim for the "base damages". He rightly said in his oral submissions that the loss of investment claim represents the "subsequent increase". Mr. Crow's approach does in my view result in the "subsequent" enhancement or

increase being awarded, this being the intention of my award of damages for loss of investment opportunity.

15. I should say I have no doubt that, as Mr. Wright submitted, it is permissible to have cumulative claims for the "base claim" and the subsequent enhancement of value. Indeed, as he pointed out, there could be a claim for loss of investment opportunity in respect of a car which was not in fact sold at an undervalue, as in the case of the E-Type or (as I held) the C Type. The reason is that the sale of those cars was a consequence of Mr. Hood's frauds, in particular the fraud in relation to the Group C cars, which preceded the sale in question. So there is no difficulty in principle in claims being advanced by reference to the loss suffered immediately on a sale at an undervalue, and the separate loss suffered by reason of the car not being retained for the future. This is no difference in substance to valuing the relevant asset a later date (which Mr. Crow accepted to be permissible), albeit that in the present case the valuation at the later date needed to pay regard to the arguments based on uncertainty. On any view, however, the relevant calculation should avoid double counting, and thus truly reflect the "enhancement".

16. This means, by my calculation, that the relevant figures for the loss of investment opportunity should compare the present value (£ 23,790,000) with the following values at the time of each transaction:

GT 40s	£ 2,075,000
Jaguar C Type	£ 2,550,000
Jaguar XKSS	£ 3,500,000
Jaguar XK 120	£ 1,250,000
Aston Martin Volante	£ 850,000
Jaguar Lightweight E Type	£ 4,392,360
Total	**£ 14,617,360**

17. This produces, as Mr. Crow submitted in footnote 3 to his skeleton argument, a difference of £ 9,172,640 between present value and the value at the time of each transaction. Subject to the issue of credit (which I consider not to be required for reasons set out below), the award for loss of investment opportunity is therefore **£ 6,879,480** after the 25% discount. This is indeed, as Mr. Crow calculated, a reduction of £ 2,021,250.

18. It follows that I do not think that Mr. Wright was correct, in so far as he argued that the calculation of damages was appropriate because damages were being awarded for frauds which were anterior to each transaction at an undervalue, or because of the cumulative effect of the frauds. I fully agree with him that an award of damages representing the enhancement in value that Mr. Tuke would have enjoyed is indeed appropriate (as I have decided), since these losses flowed from frauds which were anterior to each transaction whereby valuable cars were sold at an undervalue. For example, the Group C transaction, which did not involve the sale of cars by Mr. Tuke at an undervalue, was indeed causative of subsequent sales. However, this does not in my view meet the point that the damages calculation in [671] – [672] involves an element of double counting in relation to each the amounts actually awarded in respect of loss of investment opportunity for the investment cars.

B: Credit

19. It is convenient to take this point next, since it is, on analysis, the same as or very closely related to the previous point.

20. The argument in relation to credit arose only because the calculation of loss of investment opportunity was calculated by reference to the net benefits received by Mr. Tuke: see paragraph [675]. Now that the calculation of this loss is simply by reference to the loss of the enhanced value – i.e. the comparison between the value of the investment cars when sold by Mr. Tuke, and their present value – any argument in favour of giving credit for receipts of cash or cars falls away.

21. Thus, the value received by Mr. Tuke at the point of sale (whether cars or cash or both) is taken into account as part of the calculation of damages in respect of the base claim. Damages are awarded by reference to the difference between what Mr. Tuke received at that time, and the value of the asset which he gave up. Thus, the value received is fully taken into account at that time, and it is unnecessary and would be inappropriate to take it into account, again, at a subsequent stage. As far as the loss of investment opportunity is concerned, the revised calculation is based only on a comparison between value of the relevant asset at the point of sale and value at a later stage. The benefit received by Mr. Tuke no longer forms any part of that calculation, and it is not necessary to make any adjustment for the benefit received. This has, as I have said already, been taken into account at an earlier stage. There is no logical basis on which it can be said that the monies which Mr. Tuke received – whether for the investment cars or indeed for the non-investment cars – diminished the loss of investment opportunity represented by the difference between the market value of the cars which he was defrauded into selling, and the present value of those cars.

22. In view of this conclusion, it is not necessary to consider the other arguments in relation to the giving of credit for the benefit of receipts. These arose in the context of a calculation of loss of investment opportunity which started with the value of the benefits received by Mr. Tuke. Now that this is no longer a component of the calculation, it is not necessary to address in detail the somewhat complex arguments of the parties as to what, if any, credit should be given in respect of a calculation which started on that basis. In fact, it seems to me that the answer to that question is essentially the one which is given in this judgment. The calculation of loss of investment opportunity should be recalibrated so that it is only based on the difference in value at the material points in time. The effect is to avoid the need for credit for the benefit of receipts. The same point can be put differently as follows. If the existing calculation had remained (i.e. that which starts with the calculation of benefits received by Mr. Tuke) then there would in my view indeed be a need to give credit for benefits received by virtue of those receipts, in order to eliminate the effect of double counting. That need is catered for by the recalibration of the starting point.

C: Interest

23. Mr. Tuke seeks interest at the rate of 4.5% compounded on various elements of his damages claim. Mr. Crow argues that Mr. Tuke should receive no interest at all, and in any event the rate should be 2.5%.

24. The straightforward claims to interest are in respect of the claims on the two acquisitions (AC Aceca and the Mercedes Gullwing), and on sales transactions involving the four non-investment cars (Jaguar Mk II; Jaguar XK 1505S; Group C

Transaction; Mercedes Gullwing). Interest was sought in respect of the loss under each transaction, as set out in [634], from the date when each transaction was concluded. For example, Mr. Tuke overpaid £ 69,000 for the AC Aceca in April 2010, and sought interest from that time on the loss. Similarly, in April 2014, Mr. Tuke sold the Mercedes Gullwing at an undervalue, and claimed interest on £ 162,000 since that time. I was provided with calculations of interest, up to 15 January, totalling (in round terms) £ 422,000 for the two purchase cars, and £ 334,000 for the non-investment cars

25. I consider that it is appropriate to award interest in respect of each of these successful claims. There is a real, and indeed entirely conventional, loss suffered by Mr. Tuke at the time that he overpaid for cars, and also when he sold cars at an undervalue.

26. Mr. Crow submitted that the loss of investment opportunity claim precludes all claims for interest, since that claim was based on the premise that Mr. Tuke would have retained cars rather than selling them. He says that, in relation to the loss of investment opportunity claim, the judgment did not distinguish between the various frauds.

27. I agree that different considerations apply to the claim in respect of the cars which were subject to the loss of investment opportunity claim. Indeed, Mr. Tuke's calculation and Mr. Wright's argument accepts that this is so. But there is in my view no logical reason why a conventional claim for interest should not be made in respect of damages awarded in respect of cars which are not subject to the claim for loss of investment opportunity. When Mr. Tuke overpaid for those cars, or sold them at an undervalue, he suffered a loss there and then. That loss is the subject of his "base claim", and there is no claim for loss of investment opportunity. In respect of some cars, there is (as described above) an additional claim for loss of investment opportunity, based on the enhancement of value that would have been received on those cars subsequently. The existence of that additional claim does not provide any reason to decline to award interest on the loss suffered pursuant to Mr. Hood's frauds concerning cars where no such claim arises. Those losses, and the fact that Mr. Tuke was out of pocket in consequence of those frauds, are not diminished by the successful loss of opportunity claim in respect of other cars.

28. Mr. Tuke also seeks compound interest on 25% of the amounts awarded to him in respect of the sales transactions involving the investment cars where the following damages were awarded:

	Transaction	**Amount awarded**
9	Aston Martin Vantage Volante / XK120 670033	**550,000**
6	Jaguar XKSS / Lister Knobbly	**900,000**
2	Ford GT40 Race car (MKl) / Ferrari	**895,000**
7	Jaguar XK120 (JWK 651) / Replica E Type	**350,000**

29. Mr Tuke accepts, and has always accepted, that his claims for compound interest on these sums are alternative to his claims for loss of investment opportunity in respect of the investment cars. That is because, as Mr. Wright submitted, both claims are essentially related to the "time value of money" that Mr Tuke ought to have received, but for Mr Hood's fraudulent conduct. However, Mr. Wright relies upon the fact that the court has not accepted that claim in full. It has awarded Mr Tuke 75% of the amounts claimed in his loss of investment claim, principally on the basis that there was a 25% chance that he would not have been able to retain the Investment Cars.

30. Mr Tuke therefore claims interest on 25% of the amounts set out above, on the basis that such an award would not be inconsistent with the alternative claim for loss of investment opportunity. The total amount sought is, in round terms, £ 315,000. Mr. Wright submits that such an award would provide proper compensation for the time value of money, but in different ways. The time value would partly be compensated for (75%) by the award for loss of investment opportunity, but the remaining element (25%) should be compensated for by interest in the ordinary way. Mr. Wright said that if (for example) there had only been a 10% chance that the cars would have been retained, there would be undercompensation if no interest were awarded in respect of the 90% chance that the cars would have been sold anyway. There was, he submitted, no *via media* between retaining and selling. The 25% was simply the obverse of the 75% chance of selling, in circumstances where the probabilities had to add up to 100%.

31. Mr. Crow submitted that the argument confused liability with quantum. The claim for loss of investment opportunity was successful. However, in assessing the quantum of the claim the court applied a rate of 75% to reflect the uncertainties as to how much profit Mr. Tuke would actually have made. The Court did not decide that the claim was 75% successful and 25% not successful so as to generate some gap into which a compound interest claim could fit. The 25% discount reflected the factoring in of relevant factors relating to the uncertainty of what Mr. Tuke might or might not have done.

32. I do not accept it is appropriate to award this element of the interest claimed; i.e. by adding £ 315,000 to the substantial award (£ 6.879 million) for loss of investment opportunity. I consider that the claim for loss of investment opportunity was indeed a true alternative to a claim for compound interest. It does not cease to be a true alternative on the grounds that, when quantified, the calculation has, in order to compensate for uncertainties, involved a 25% reduction by reference to the overall claim. Those uncertainties were not limited to the question of whether Mr. Tuke would or would not have retained the cars. They factored in the cost of maintenance if he had done so. I agree that this was not the most significant point, but it does in my view illustrate that the difficulty in taking the percentage approach for which Mr. Tuke contends.

33. I also agree with Mr. Crow that it is important to recognise that the loss of investment opportunity claim was successful. The question was how to calculate the loss which flowed in all the circumstances. Having made a successful claim on the basis that Mr. Tuke would have received significantly enhanced value if he had not sold the cars at the time, I do not consider that there is a residual claim for loss of the time value of 25% of the "base claim". The loss of investment opportunity claim which has succeeded is not, in my view, looking at the time value of money in the way that a

claim for interest does. Rather, it is a specific claim made on the basis that a particular investment would have been retained, so that compensation by reference to the time value of the money lost on the transaction itself (i.e. the amount of the undervalue and interest thereon) was not the right way to measure loss. That claim has succeeded, in a very substantial sum, taking out of a discount for uncertainties. There is in my view no room for an additional interest claim. Even if there were I do not think that it would be just to award additional interest in circumstances where a very substantial sum has been awarded in respect of the alternative claim.

34. This leaves the question of interest rates, as to which the debate was between 2.5% compound and 4.5% compound. I was referred to a number of authorities in this area. I consider that the 4.5% compound rate meets the justice of this case. Whilst it may be the case that, during at least some of the period over which interest will run, an individual such as Mr. Tuke might have been able to borrow at a rate of around 2.5% if he provided security in the form of real property, I do not consider that the calculation of interest should be based on those rates. The fact that Mr. Tuke may have had such property as potentially available to provide as security seems to me to involve looking at his personal circumstances, as well as ignoring his potential difficulties in taking out a loan on the matrimonial home contrary to the wishes of his wife. Furthermore, during at least some of the period since the frauds were committed, secured lending on residential property was in the region of 4.5%: see paragraph 43 (2) of the judgment of Hildyard J. in *Challinor v Bellis* [2013] EWHC 620 (Ch) (where the judge ordered 3% over base rate).

35. I also consider it relevant, in the context of the broad exercise of my discretion on this issue and awarding 4.5%, that the interest award in respect of the losses on the sales transactions is an award of equitable compensation, where it is permissible to look at returns which could have been achieved with the relevant funds: see *Watson v Kea Investments* [2019] EWCA Civ 1759, paragraphs [70] – [74]. Given that the relationship between Mr. Tuke and Mr. Hood/ JDC was related to proposed investment gains in the classic car market, it is in my view legitimate in the context of equitable compensation to have regard to the fact that significant investment gains could and would have been made. Such investment returns would have been substantially in excess of the 4.5% rate. I also note that the borrowing rate at the material times for wealthy individual such as Mr. Tuke, who wished to raise money on the security of cars was (as shown by the Group C transaction) 6%; again a rate in excess of 4.5%.

36. Accordingly, I accept the calculation of interest in Mr. Tuke's schedule, prepared for the hearing on 15 January, in respect of the purchase transactions and the sales transactions involving the non-investment cars.

D: Costs

37. It is common ground that such costs as are awarded should be on an indemnity basis. Mr. Crow argues, however, that no costs should be awarded, at least in respect of the period after 5 July 2018, alternatively from 12 September 2018 onwards, because of offers to settle the litigation which were for significantly more than Mr. Tuke has recovered. He also submits that Mr. Hood should recover at least some proportion of his own costs in respect of that period. Reliance was also placed upon an earlier letter, dated 25 January 2018, in which an offer was made to settle the claim in respect of the

Jaguar XK 120. Mr. Crow also referred to the fact that the claim had a "significantly inflated quantum", when comparing the amounts ultimately awarded with those claimed. Reliance was also placed upon the fact that Mr. Tuke lost on some issues.

38. CPR 44.2 (4) requires the court to pay regard to all the circumstances, including (a) the conduct of the parties, (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful, and (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

39. There is no doubt that Mr. Tuke is the successful party in the present litigation. He has obtained judgment for very significant sums against Mr. Hood: in round terms, these are £ 4.247 million in respect of the base claims, £ 6.879 million in respect of loss of investment opportunity, and £ 776,000 in respect of interest: totalling £ 11.9 million.

40. Furthermore, the facts which lead to the conclusion that indemnity costs are in principle appropriate are also, in my view, very important when it comes to the application of CPR 44.2. This is a case where the court has made numerous findings of fraud against Mr. Hood. There were a very large number of occasions on which Mr. Hood misled Mr. Tuke, and this conduct was persisted in over very many years in full knowledge of Mr. Tuke's need for cash and the financial pressure that he was under. It was, as Mr. Wright submitted, a flagrant breach of the trust that Mr. Tuke placed in Mr. Hood, who sought to portray himself as Mr. Tuke's friend. Mr. Hood has never admitted any aspect of his dishonesty, and maintained throughout the trial that there were, for example, real third party purchasers and sellers who were referred to in the correspondence described in the judgment. Mr. Hood has fought this case hard, and for a long time. He has lost on all material factual issues. Part of his defence involved, as I have found, the *ex post facto* production of the September 2010 letter whose authenticity I have rejected.

41. Ordinarily, in these circumstances it would be obvious that Mr. Hood should pay the entirety of the costs of the proceedings. That remains the case even though there were certain issues on which Mr. Tuke did not succeed. Successful litigants, particularly in complex litigation, rarely win every point. The arguments on which Mr. Tuke failed were, primarily, legal arguments: the most significant being the issue raised by Mr. McWilliams for the trustees, concerning the measure of recovery against a dishonest assistant. This was probably the most significant reason why the quantum of the claim, as ultimately awarded, was much lower than the amount claimed. The claim overall, however, cannot fairly be described as inflated or exaggerated. Whilst Mr. Tuke did not succeed on every point raised in the case, he succeeded on the arguments to which the vast majority of the evidence and argument was directed. Leaving aside the effect of the offers relied upon, I consider that there would be no reason to order Mr. Hood to pay less than the entire costs of the action.

42. Having considered the three offers relied upon, I reach precisely the same conclusion. None of them is, in my view, of any material weight when set against the above matters.

43. The first offer, sequentially, was an offer in January 2018 to settle one aspect of the proceedings, the claim in respect of the XK 120. This is not significant in my view. It was not an offer to settle the entirety of the litigation. There may have been some very

small saving of costs, in respect of that claim alone, if the offer had been accepted. However, Mr. Tuke was fully entitled not to settle aspects of the case on a piecemeal basis, particularly since it was an important part of his case (which was disputed in all respects) that there was a similar *modus operandi* in relation to the various frauds. It is reasonable in those circumstances, where fraud generally is denied – and where the nature of the offer relied upon will still leave the vast majority of issues to be decided at trial – for a party to wish to place the full picture before the court, so that the court can see the facts in the round.

44. The second offer was made on 5 July 2018. It was an offer to pay £ 20 million, with certain security. The offer was to settle "the claims that your client has against him and/or the Company, in full and final settlement of these and future claims". The terms of the letter make it clear that the agreement of the Company (i.e. JDC) had not yet been obtained. It was also conditional upon receiving the consent of Mr. Hood's wife. This had not yet been obtained. The cash payment offered was £ 2 million, with further sums of £ 9 million being paid on the first and second anniversary of the proposed agreement. A list of proposed security was provided, but there was no documentation to support any of the figures which were given.

45. Mr. Crow's argument as to the relevance of this offer is that Mr. Tuke has recovered less than the £ 20 million offered, and that he is therefore in a worse position than he would have been if the offer had been accepted. There were, in my view, inadequacies with this offer which are similar to those which I consider below, in connection with the September offer. I do not think that Mr. Tuke acted in any way unreasonably in declining to accept it. The amount of cash offered was small, and the prospect of recovering anything else was dependent upon the uncertain value of the security and Mr. Hood's promises to pay more money in 12 and 24 months' time. In circumstances where, as Wilmots said in their response of 12 July 2018, Mr. Hood had made dishonest representations as to the value of cars over many years, it seems to me to be entirely reasonable for a party to decline to accept an offer based upon unsupported estimates of values and promises to pay some distance in the future.

46. It is also not possible fairly to compare this offer of £ 20 million with Mr. Tuke's recovery against Mr. Hood in these proceedings. That is because the offer would have involved a settlement of the claim against JDC. That claim would not, for example, have the same difficulties in relation to accounting for profits as arose in relation to the claim against the dishonest assistant.

47. The next offer relied upon was an offer made on 12 September 2018. This letter was followed by a sequence of "without prejudice save as to costs" correspondence, between Mr. Hood's then solicitors, Freeths, and Mr. Tuke's solicitors, Wilmots. The material sequence of correspondence continued with: an e-mail from Mr. Michael Grenfell (the partner at Wilmots who was dealing with the case at that stage) dated 14 September 2018; an e-mail from Ms. Wilson of Freeths on 28 September 2018; a response from Mr. Grenefell on the same day; an e-mail from Mr. Grenfell on 8 October; and a response from Ms. Wilson on 9 October. The position reached by the 8/9 October exchange was that Mr. Tuke was unwilling to carry on negotiations until some £ 5 million had been received in Freeths' client account, and that Ms. Wilson was "in the process of seeking to raise cash in order to make a cash payment to Mr. Tuke as part of a wider settlement deal". Her 9 October email also referred to a prior indication from Mr. Grenfell that there could be some movement on the £ 25 million

figure if a "sizeable cash payment could be paid up front". Following the 9 October e-mail, however, I was not shown any admissible offer whereby any cash payment was being offered to Mr. Tuke.

48. The correspondence shows that both parties were negotiating at levels which were substantially above the level of the judgment which Mr. Tuke has now obtained against Mr. Hood. One explanation for this, as is apparent from the 5 July 2018 letter, is that Mr. Tuke also had substantial claims against JDC, and the parties may well have had in mind the need for a complete resolution of claims to achieved. This is not least because of the potential for a successful claim by Mr. Tuke against JDC to result in claims by the company against Mr. Hood.

49. Standing back from the detail, the correspondence also shows that Mr. Tuke wanted, if he were to settle the proceedings, to receive a sizeable cash sum, rather than simply the promise of payment at some point in the future. That seems to me to be entirely reasonable. One of the points which was fairly made by Mr. Grenfell in the correspondence (in his email of 28 September 2018) was that from Mr. Tuke's point of view, payment over 2 years was worse than going to court and getting a judgment "next year" which would be enforceable. Ms. Wilson, in the final e-mail in the sequence, recognised the importance of Mr. Hood trying to raise cash. No clear offer of immediate cash was, however, ever forthcoming. As I read the correspondence, what Mr. Tuke was being offered were promises by an individual whom Mr. Tuke reasonably believed to be dishonest (as established in these proceedings) to pay money some distance in the future, attended by uncertainty as to whether those sums would be paid. These promises were accompanied by references to the possible provision of security, but Mr. Grenfell raised legitimate questions in the correspondence as to the true value of the security being discussed. The correspondence contains no independent valuations of any of the possible security, and another point fairly made by Mr. Grenfell in the correspondence was that Mr. Hood's valuations were (on the basis of the claims which Mr. Tuke was making) not to be trusted.

50. As far as concerns the detail of the 12 September 2018 letter is concerned, the headline figure offered was £ 18 million. However, the offer made on 12 September 2018 did not provide for any specific cash sum to be paid. The letter referred to the fact that Mr. Tuke had demanded an up-front "substantial cash payment", but said that Mr. Hood was not in a position to meet that demand. The offer which was made indicated that some cash might be forthcoming, but without giving any figure or indication of how much it might be. The material part of the offer was:

> 1. £ 9 million to be paid by 11 September 2019, by way of cash (with as much cash as our client is able to raise being provided in a lump sum within 14 days of the entering into of the settlement agreement) or, if our client does not have sufficient cash to pay to your client, the transfer of assets up to the outstanding sum, with independent valuations having been obtained by an agreed value; and
>
> 2. £ 9 million to be paid by 11 September 2020, by way of cash or, if our client does not have sufficient cash to pay to your client, the transfer of assets up to the outstanding sum,

> with independent valuations having been obtained by an agreed valuer."

51. If the £ 18 million figure is taken as a headline figure, and it is compared to Mr. Tuke's recovery, then it could be said that Mr. Tuke has not beaten the 12 September 2018 offer. However, I do not consider that it is appropriate simply to look at the headline figure offered. It is also highly relevant that there was no clear offer of any immediate cash, and that what Mr. Tuke was being offered were promises, from an individual reasonably believed to be dishonest, to pay in the future. The first tranche of £ 9 million was to be paid a year later (September 2019), and the second tranche two years later (September 2020). In my view, this makes the straightforward comparison between sums recovered, and sums offered, inappropriate. The point can be illustrated by considering Mr. Tuke's position if this trial had not been adjourned in March 2020 due to the Covid-19 pandemic. Had the case been concluded at that point, Mr. Tuke would have obtained an enforceable judgment (say in June or July 2020) for sums which (inclusive of interest) exceeded the amount which Mr. Hood had offered to pay by that time (£ 9 million in September 2019).

52. Furthermore, I do not agree with Mr. Crow's submission that the key question, or at least the only key question, is whether or not Mr. Tuke has beaten this offer. I consider that there is a broader question, in circumstances where I am not concerned with an offer made under Part 36 and where it is a feature of the offer that no immediate cash is to be forthcoming. That broader question is whether the recipient is acting reasonably when he responds to the offer. This approach is consistent with the judgment of the Court of Appeal in *Coward v Phaestos* [2014] EWC Civ 1246. The court said:

> "[74] … In determining whether and, if so, how to take account of an offer, as required by CPR 44.2(4)(c), the judge is entitled to consider whether an offeree acting reasonably would require further clarification before considering whether to accept the offer…
>
> …
>
> [93] In my judgment, the starting point is to recognise that Part 36 and Part 44 are separate regimes with separate purposes. Part 36 is a self-contained code dealing with offers of settlement made in accordance with and subject to the terms of Part 36, which specifies particular consequences in the event that such offers are not accepted. That those consequences include features which go far beyond that which might be ordered by way of costs under Part 44 only serves to underline that it is a separate regime from Part 44.
>
> [94] While Part 36 is highly prescriptive in its terms, and highly restrictive of the exercise of any discretion by the court in any particular case, Part 44 confers on the court a discretion in almost the widest possible terms. CPR 44.2(1)(a) provides that

> the court has a discretion as to whether costs are payable by one party to another. By virtue of 44.2(2), it is only if the court decides to make an order for costs that the general rule that the unsuccessful party will be ordered to pay the costs of the successful party applies, but it is made clear that the court may make a different order. A non- exhaustive list of the orders for costs which the court may make is set out in 44.2(6). The only express limitations on the discretion of the court are set out in 44.2(4) which is cited earlier in this judgment. The breadth of the discretion is illustrated by the requirement that the court "must have regard to all the circumstances" and the limitation is simply that the court "must have regard to" the three matters specified in subparagraphs (a)-(c). It is by sub-paragraph (c) that the court "must have regard to" any payment into court or admissible offer to settle, not being an offer to which the cost consequences under Part 36 apply."

53. Another important feature of the 12 September 2018 letter is that there was no offer of any immediate security for the payments to be made in one year and two years hence. The terms of the offer were couched in terms that unspecified security would be provided when the payments were due to be made (i.e. in September 2019 and September 2020) if Mr. Hood could not pay cash at that time.

54. It is in my view unsurprising that Mr. Tuke did not consider this proposal to be satisfactory, and his response to it cannot in my view be regarded as unreasonable. Mr. Tuke was being asked not to pursue current claims in return for a commitment by Mr. Hood to pay money, or provide unspecified security, some 12 or 24 months hence. Furthermore, those promises were being made by an individual who was believed, on the basis of grounds which I have held to be justified, to be dishonest and to have defrauded him. It is unsurprising, and entirely reasonable, that Mr. Tuke was looking for at least some immediate cash. Otherwise, his acceptance of the offer would put him in the position of waiting a year to see what happened, and then (if the agreement was breached) starting further proceedings, in circumstances where the second payment would not be due for a further year. Viewed overall, the offer would buy Mr. Hood considerable time, but provide Mr. Tuke with little or nothing, apart from promises, in return.

55. Matters moved on in subsequent correspondence. This indicates that the parties were considering the provision of immediate security. However, Mr. Grenfell raised legitimate concerns, essentially as to the absence of reliable information as to the value of the security under discussion. There is no material before me which would enable me to conclude that any of the security then being proposed was in fact adequate. To my mind, this reinforces the reasonableness of Mr. Tuke's approach that a substantial cash payment was required. The cash figure which was ultimately under discussion (£ 5 million) is substantially below the figure which Mr. Tuke has now been awarded. Had some significant cash been made available, the impression that I have from the correspondence is that the gap between the parties may have been bridgeable. But this was never tested, because no firm cash was offered. There is no suggestion in the correspondence that Mr. Tuke was being unreasonable in asking for

a substantial cash payment. On the contrary, the e-mail from Ms. Wilson on 9 October indicates that efforts were being made to meet Mr. Tuke's requirement.

56. Accordingly, Mr. Tuke was being asked not to press forward with a substantial claim in circumstances where (i) there was no offer of payment of immediate cash (ii) (based on the 12 September 2018 letter) the first payment of any money would not be paid for a year, and there was uncertainty as to whether that payment could in fact be made; (iii) the second payment would not be made for two years, and there was again uncertainty as to the ability to make the payment; and (iv) security was being discussed, but legitimate questions were raised as to its sufficiency. All of this was against the background of a substantial claim against Mr. Hood relating to his dishonesty over a considerable period of time. It seems to me that Mr. Tuke was in those circumstances acting reasonably in deciding to continue with the litigation, and to seek to obtain an enforceable judgment which could reasonably be expected to be forthcoming before the lapse of the two years contemplated by Mr. Hood's settlement proposals. But for the impact of Covid-19, Mr. Tuke would have obtained by June/ July 2020 an enforceable judgment which was in excess of the amounts that Mr. Hood had promised to pay by that time.

57. Thus, whilst I have considered these settlement proposals, I do not consider that they are of any weight when seen in the balance with the other factors to which I have referred.

58. Accordingly, Mr. Hood should pay the costs of the proceedings on an indemnity basis.

59. I consider it just to order a payment on account. Mr. Hood says that he does not have the means to pay. That appears to be the case, and indeed it appears that he does not have the present means to pay the principal and interest either. He is therefore facing bankruptcy, in consequence of having defrauded Mr. Tuke and then lost the present litigation which Mr. Tuke has had to pursue at substantial expense. I do not consider that these circumstances provide a good reason why Mr. Hood should not be ordered to make a payment on account.

60. Mr. Tuke's total costs are just under £ 1.4 million. The total costs strike me as very reasonable, and this is a case where indemnity costs have been ordered. The payment on account sought is 60% or £ 800,000. I consider that this amount is reasonable and should be ordered.

61. There was no dispute that there should be interest on costs. Such interest is sought at 4%, and then (3 months post judgment) at 8%. I agree with this approach and so order.

E: Permission to appeal

62. I refuse permission in respect of each of the 4 grounds. The nature of the points taken will be apparent from my reasons, below, for rejecting them.

63. *Grounds 1 and 2.* Provided that there is no double-counting, there is no real prospect of persuading the Court of Appeal that it is impermissible to calculate damages, in a case such as the present, by considering: (i) the loss suffered on each transaction

whereby Mr. Tuke overpaid for cars purchased, or sold cars at an undervalue, thereby suffering an immediate loss at the time of the transaction itself; and (ii) loss of investment opportunity relating to the cars that would (but for the fraud) have been retained and thereafter increased in value. There was no suggestion at trial that this was an impermissible approach to damages.

64. *Ground 3*: the 75% assessment, in the context of the loss of investment opportunity claim, is an evaluative decision, where there is no real prospect of the Court of Appeal taking a view contrary to that taken by the judge who heard and evaluated the evidence. The particular factor now identified (failure to give credit for possible increase in the value of the cars exchanged for the investment cars) was not identified as a significant factor at trial, and was not relied upon as being a relevant factor for consideration in the evaluative exercise. There are no factual findings to support the proposition that the particular cars exchanged for the investment cars (which in some cases were replicas) would have increased in value.

65. *Ground 4*: mitigation had not been pleaded, even though Mr. Hood was represented by counsel until shortly before the trial commenced and all pleadings were settled by counsel. My decision that it could not fairly be raised during the trial, in the manner in which it was raised, is a case management decision on which there is no real prospect of a successful appeal. Furthermore, some of the mitigation points relied upon by Mr. Hood in closing were not put to Mr. Tuke at all. Where points were put, I concluded that (even if the point could be taken, in the absence of a pleading), there was in any event a reasonable basis for declining to accept the offers made: see [393] [432] [554] [589] [621]. There is no real prospect of a successful appeal on the issue of reasonableness.

66. The case on mitigation was therefore not decided on the basis that an offer from a defendant was not relevant to mitigation. This is not the issue addressed in e.g. paragraphs [393] and [590]. The point there addressed is Mr. Hood's argument that a later sale at a higher price reduces Mr. Tuke's loss. It does not, and I do not understand that argument to be pursued by Mr. Crow.

F: Stay of Execution

67. The relevant principles were summarised by Eder J in *Otkritie International Investment Management Ltd & Ors v Urumov (aka George Urumov) & Ors* [2014] EWHC 755 (Comm) at §22, as follows:

> "i) First, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court: CPR r 52.7.
>
> ii) Second, the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending: Winchester Cigarette Machinery Ltd v Payne, CA Unrep, 10 December 1993, per Ralph Gibson LJ.
>
> iii) Third, as stated in DEFRA v Downs [2009] EWCA Civ 257 at §§8-9, per Sullivan LJ (emphasis supplied):

> *"... A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.*
>
> *It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal. So what is the basis on which a stay is sought in the present case?"*
>
> iv) Fourth, the sorts of questions to be asked when undertaking the "balancing exercise" are set out in *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065 at §22, *per* Clarke LJ (emphasis supplied):
>
> *"By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"*
>
> v) Finally, the normal rule is for no stay to be granted, but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal: *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474 at §13, per Potter LJ."

68. Mr. Crow does not dispute these principles, and submits that the key question is whether there is a risk of injustice on either side if the stay is granted or refused. He says that a key factor is the risk of an appeal being stifled. Such appeal could significantly reduce the damages payable. Mr. Hood's personal circumstances mean that he is likely to suffer irremediable prejudice if made subject to an order to make an immediate payment to Mr. Tuke. Mr. Hood has overturned the bankruptcy order made

last year. However, his assets are still subject to a charge in favour of the trustees. If an order for immediate payment is made, the likely consequence is that Mr. Hood will be made bankrupt and be unable to fund his lawyers' conduct of the appeal.

69. I have no doubt that my discretion should be exercised against granting a stay in the present case.

70. First, there is no compelling reason for departing from the default position and the presumption that no stay should be ordered. Mr Tuke is *prima facie* entitled to enforce the rights that have been vindicated by the judgment.

71. Secondly, the proposed appeal is in my view hopeless. The only point of substance was Ground 2, but this has been addressed (in the manner proposed by Mr. Hood) in my final quantification of damages for loss of investment opportunity. Moreover, the only challenges in the proposed grounds of appeal are to my conclusions on quantum. There is no challenge to my findings on liability. I do not accept that there has been insufficient time to identify any possible challenges. The judgment was handed down in October, and Mr. Hood has had some legal advice (from people who had previously advised him) since December.

72. Thirdly, there is no challenge to the amount of £ 4.2 million awarded in respect of the "base claims", except for an entirely unrealistic argument on mitigation. Since Mr. Hood would be bankrupted by his liability for those sums alone, any justification for a stay – based on the proposed appeal relating to the issues concerning loss of investment opportunity – falls away.

73. Fourthly, a stay in this case will cause substantial injustice to Mr Tuke. Mr Tuke has had to wait many years to obtain judgment against Mr Hood. The earliest established claims date back to March 2010. He has done so in circumstances where Mr Hood has done everything he can (including by producing a document whose authenticity I have rejected) to prevent judgment being entered against him, to delay every step in the process. Further delay would deny Mr Tuke that justice, and will also because it will prevent Mr Tuke from taking steps to secure his rights by enforcement. I consider that Mr. Tuke should be put in a position whereby he can take immediate steps to secure his rights. Those steps will likely include the need for action against third parties to whom valuable assets appear to have been transferred by Mr. Hood. A trustee in bankruptcy will be in a good position to take such steps. I agree with Mr. Wright that it is important that this process moves forward as quickly as possible so as to ensure that available assets are collected. Any delay in the enforcement process may well prejudice Mr. Tuke.

74. Fifth, there is no good evidence, and certainly no strong grounds, to suggest that Mr Hood would suffer from injustice if the order consequent to the judgment was not stayed. Mr Hood is, by his own admission, insolvent, or at least (as Mr. Crow said in his skeleton argument): "Mr Hood does not assert that he is solvent". He appears not to be in a position to pay those elements of the judgment (the base claim) as to which there can be no realistic appeal. He is facing therefore bankruptcy irrespective of the other quantum appeals. Given Mr Hood's financial position, there is no real prospect of Mr Tuke being paid in full and having to account to Mr Hood for any over-payment in the extremely unlikely event that Mr Hood's quantum appeal was to be

successful. But even if that unlikely event were to transpire, I have no reason to think that Mr. Tuke would be unable to make such repayment.

75. Finally, I do not accept that any appeal would be stifled if a stay is refused. If there were any merit in the proposed appeal (which, in my view, there is not) it would be open to Mr. Hood's trustees in bankruptcy to fund it if so advised. Mr. Hood would also be able to pursue any appeal as a litigant in person. He may also be able to do so with the benefit of any third party funding that he is able to obtain. He has, in the past, successfully obtained third party funding; for example, for his bankruptcy appeal and for the present 'consequentials' hearing.

76. For the same reasons, I decline to order a temporary stay pending an application to the Court of Appeal. I consider that a stay would produce a serious injustice to Mr. Tuke.