



Neutral Citation Number: [2021] EWHC 829 (Comm)

Case No: LM-2020-000063

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LONDON CIRCUIT COMMERCIAL COURT

Royal Courts of Justice,
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 7 April 2021

Before :

MR ANDREW HOCHHAUSER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Between:

- (1) **Dr FARAMARZ SHAYAN ARANI**
- (2) **Mr DAVID ROSSELL GRIFFITHS**
- (3) **FARSHID ZOLGHADR**
- (4) **MARK GROSSE**
- (5) **SHAHNAZ ZOLGHADR**

Claimants

- and -

CORDIC GROUP LIMITED

Defendant

ADAM SOLOMON QC instructed by **Penningtons Manches Cooper** for the Claimants
PAUL SINCLAIR QC and **THOMAS LAZUR** (instructed by **A&L Goodbody**) for the
Defendant

Hearing dates: 4, 5 November and 3 December 2020

APPROVED JUDGMENT

I direct that pursuant to CPR PD 29A para. 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailli. The date and time for hand-down is deemed to be 2pm on Wednesday 7 April 2021.

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MR ANDREW HOCHHAUSER QC :

Introduction

1. There are two applications before me. They both relate to a claim and counterclaim arising from a Share Purchase Agreement dated 1 November 2018 (the “**SPA**”), whereby the Defendant, Cordic Group Ltd (then Bonumcorpus (No 14) Limited) agreed to purchase from the Claimants the shares in Cordic Ltd (the “**Company**”).
2. The first is an application by the Claimants by an Application Notice dated 25 June 2020 (the “**Claimants’ Application**”) for summary judgment under CPR r.24.2(a)(ii) on the Claimants’ Claim and on the Counterclaim on the basis that the Defendant has no real prospect of successfully defending the claim and no real prospect of succeeding on its Counterclaim, and there is no other compelling reason why the case should be disposed of at trial, alternatively that the Defence and Counterclaim be struck out under CPR r.3.4(2)(a) on the basis that there are no reasonable grounds for defending the claim or bringing the counterclaim.
3. The second application is an application by the Defendant to amend the Defence and Counterclaim pursuant to CPR r17.1(2)(b), which was made by an Application Notice dated 4 November 2020 (the “**Defendant’s Amendment Application**”). It was made on the basis that the Defendant was no longer pursuing its application, made orally to file and serve a Rejoinder and Reply to Defence to Counterclaim.
4. The procedural history of the Defendant’s Amendment Application is somewhat complicated. The Defendant’s Amendment Application, with a draft amended Defence and Counterclaim, was served after the end of the first day’s hearing. It was presented at the beginning of the second day of the hearing. Mr Solomon objected to it being considered then, because he had been given little time to consider it. Furthermore, during the course of oral argument, it became apparent that further consideration needed to be given to formulation of some of the proposed

draft amendments to it. On 5 November 2020, I therefore made the following Order (the “**5 November Order**”):

“1. The Defendant shall file and serve a final draft Amended Defence and Counterclaim by 10am, 9 November 2020 to replace the draft Amended Defence and Counterclaim provided with the Defendant’s Application Notice dated 4 November 2020 to amend the Defence and Counterclaim. There is no need for any amendment to the Application Notice.

2. The evidence relied on in support of the Defendant’s application to amend shall be the evidence served in response to the Claimants’ application for Summary Judgment and strike out filed and served on 26 October 2020 (the witness statements of Bernardus Van Schriek and Stuart Nevin and their exhibits).

3. Any evidence in response to the Defendant’s application shall be filed and served by the Claimants on or before 4pm, 16 November 2020.

4. Any evidence in reply to the Claimants’ evidence shall be filed and served by the Defendant on or before 4pm, 20 November 2020.

5. A hearing to consider the Defendant’s application to amend and consequential considerations arising out of the Court’s Judgment on the Claimants’ application for Summary Judgment and Strike Out Applications and shall be listed together when the Judgment is handed down. The time estimate for both matters is 1 day.

6. Costs reserved.”

5. A revised draft Amended Defence to Counterclaim was duly served on 9 November 2020. Evidence to which I will later refer was served pursuant to the timetable set out in the 5 November Order.

6. Thereafter, unexpectedly on 18 November 2020, I received from Mr Lazur, a further supplementary skeleton argument. It stated, amongst other things:

“I apologise for the unusually late nature of this submission and the disruption it may cause. However, given the discovery of documents in support of the Defendant’s case on fraud following the hearing it is submitted that it is appropriate to add this issue at this late stage.

The point is a simple one: the Claimants should not be entitled to the release of the retained sum by way of specific performance because they have come before the Court with “unclean hands”.

7. The Claimants objected to this late submission and after receiving further written representations from the parties, I made the following Order on 23 November 2020:

“UPON THE submission of a supplementary skeleton argument (“the Supplementary Skeleton”) from the Defendant under cover of an email of 18 November 2020

AND UPON the Court considering the communications from both parties between 18 and 20 November 2020 and noting the Claimants’ objection to the Defendant’s ability to advance the points raised in its Supplementary Skeleton

AND UPON the Defendant’s Counsel indicating that the Defendant does not seek to and will not re-argue points raised previously at the summary judgement hearing

IT IS HEREBY ORDERED:

1. There be a further hearing (“the Further Hearing”), to be set down on the first available date for the convenience of the Court and parties’ counsel, to consider:

(1) the issues raised by the Supplementary Skeleton and the Claimants’ objections thereto; and

(2) the Defendant's application to amend its Defence and Counterclaim.

2. Time estimate for the Further Hearing shall be 1 day. The parties' submissions at the Further Hearing be limited to 2 hours each, with the ability to the Defendant to reply for a further 15 minutes.

3. Counsels' clerks to liaise with the clerk to the Judge to arrange a date for the Further Hearing.

4. The Further Hearing shall be conducted remotely.

5. The Claimants shall file and serve any skeleton argument on which they intend to rely, in response to the Supplementary Skeleton and the Defendant's application to amend, by no later than 4pm 2 clear days before the hearing.

6. The Defendant shall file and serve any skeleton argument on which it intends to rely by no later than 4pm 2 clear days before the hearing.

7. Save as aforesaid, there be no further submissions or evidence in respect of the Further Hearing.

8. The costs of and occasioned by the Further Hearing be reserved."

8. The further hearing took place on 3 December 2020 (the "**December Hearing**").

Representation

9. The Claimants have been represented throughout by Adam Solomon QC. At the first hearing (the "**First Hearing**") the Defendant was represented by Thomas Lazur, but at the December Hearing he was led by Paul Sinclair QC. I am grateful to Counsel for their helpful oral and written submissions.

The background

10. The Company provides fleet management solutions for taxi, private hire and courier businesses through software it has developed. Following an initial offer by the Defendant to purchase the shares in the Company, there was about six months of negotiation, including a lengthy process of technical and legal due diligence. The parties were represented in the negotiations by the same firms which currently act for them.
11. Under the SPA, the total consideration for the purchase of the shares was £10.2m. It provided that £2m of that sum was to be paid into a Retention Account, being an interest bearing account to be established by the Defendant's solicitors ("A&LG") on terms set out in Schedule 5 to the SPA, namely that it would be released to the Claimants 16 months following completion, which took place on 1 November 2018, unless a Claim (as defined) had been notified in accordance with the provisions of clause 6, which, together with Schedule 3, contained the Warranties and Indemnities. The money in the Retention Account was held in accordance with a letter signed by the parties (the "**Escrow Letter**"), which authorised A&LG to establish and operate the Retention Account.
12. The material provisions of the SPA are as follows:

- (1) Under clause 1 entitled "Definitions and Interpretation":

*1.1 ... "**Claim** means a Warranty Claim...*

***Disclosed** means disclosed in the Disclosure Letter in such manner and in such detail as to enable the Purchaser to understand the nature and scope of the disclosure and to make an informed and proper assessment of the matter concerned;*

***Disclosure Bundle** means the bundle of documents annexed to the Disclosure Letter;*

***Disclosure Letter** means the letter dated the same date as this Agreement from the Vendors to the Purchaser disclosing exceptions to the Warranties together with all documents and information attached to it in the Disclosure Bundle...*

Escrow Letter means the letter, in the agreed form, to be signed by the parties instructing and authorising the Purchaser's Solicitors to establish and operate the Retention Account...

Estimated Claim Amount means the genuine and bona fide estimated amount claimed by the Purchaser...

Information Technology means the information and communications technologies, all computer systems and hardware (including network and telecommunications equipment) and all software (including associated preparatory materials, user manuals and other related documentation) owned, used, leased or licensed by the Company;

Intellectual Property Rights means patents, trade marks, service marks, logos, get-up, trade names, internet domain names, rights in designs, copyright (including rights in computer software), database rights, semi-conductor topography rights, utility models, rights in know-how and other intellectual property rights, in each case whether registered or unregistered and including applications for registration, and all rights or forms of protection having equivalent or similar effect anywhere in the world;

Licences In means the licences of Intellectual Property Rights which have been granted to the Company;

Licences Out means the licences of Intellectual Property Rights which have been granted by the Company to third parties...

Release Date means the first Business Day following the date falling 16 months from Completion...

Retained Amount means £2,000,000;

Retention Account means the interest-bearing account to be established by the Purchaser's Solicitors and dealt with in accordance with the terms of the Escrow Letter...

Transaction Documents means:

- (a) *this Agreement;*
- (b) *the Disclosure Letter;*
- (c) *the Tax Deed;*
- (d) *the Consultancy Agreements;*
- (e) *the Escrow Letter;*
- (f) *the Loan Note Instrument; and*
- (g) *all documents or agreements, connected with or ancillary to any of the documents or agreements referred to at paragraphs (a) to (f) above, which are in the agreed form...*

Warranties means the warranties in clause 6 and Schedule 3;

Warranty Claim means a claim for a breach of any one or more of the Warranties...

1.2 Unless otherwise provided, references to recitals, clauses, paragraphs, schedules and annexures are to recitals, clauses, paragraphs, schedules and annexures contained in this Agreement and reference to this Agreement includes reference to its schedules.

1.3 Headings and the contents page are inserted for convenience only and do not affect the construction of this Agreement.....

1.5 The Warranties, and all other obligations, covenants and representations arising under this Agreement, given or entered into by the Vendors are given or entered into jointly and severally....

1.8 Where any Warranty is given on terms that it is to the best of the knowledge and belief of the Vendors (or any other words to this or a similar effect), the Vendors will be deemed to have the knowledge and belief which they would have had if they had made due and careful enquiries, including enquiries of each

other Vendor and of each of Idris Davies, Matt Gadsby and Martin Carr.”

- (2) Clause 3.2, entitled “**Payment at Completion**”, states: *Subject to clause 3.5 below [Repayment of Director’s Loan], on Completion, the Purchaser shall ...*

3.2.3 pay the Retained Amount into the Retention Account...

- (3) Clause 4.3, entitled “**Purchaser’s Obligations at Completion**”, states:

...4.3.2 The Retained Amount shall on Completion be paid by the Purchaser into the Retention Account, which shall be maintained in accordance with Schedule 5...

- (4) Clause 6, entitled “**Warranties and Indemnities**”, states:

“6.1 Warranties:

6.1.1 The Vendors warrant to the Purchaser as at the date of this Agreement that, save as Disclosed or otherwise expressly provided for in this Agreement, each of the Warranties is true, complete accurate and not misleading.

6.1.2 Each of the Warranties is separate and independent and is not limited by reference to any other paragraph of Schedule 3 or by anything in this Agreement (other than the provisions of this clause 6) or the Tax Deed.

6.1.3 Subject to clause 6.1.4, none of the Warranties will be deemed in any way to be modified or discharged by reason of any investigation or inquiry made or to be made by or on behalf of the Purchaser, and no information of which the Purchaser has knowledge (whether actual, constructive or imputed and including, without limitation, any information known by or disclosed to any of the Purchaser's agents or professional advisers) other than by reason of it being Disclosed will prejudice any claim which the Purchaser may

be entitled to bring or will operate to reduce any amount recoverable by the Purchaser under this Agreement.

6.1.4 The Purchaser warrants to the Vendors that except for matters Disclosed, it has no knowledge of any fact, matter or circumstance that might constitute a breach of any Warranty.

6.2 Deductions and Withholdings: *All sums payable by any party under this Agreement shall be paid free and clear of all deductions or withholdings unless such deduction or withholding is required by law.*

6.3 Limitations: *Notwithstanding any other provision of this Agreement, but subject to clause 6.4, the Vendors will not be liable:*

6.3.1 Time:

(i) For any Warranty Claim unless notice of the Warranty Claim is given in writing by the Purchaser to the Vendors setting out full particulars of the grounds on which the Warranty Claim under this Agreement is based within the 16 months following Completion, except that for a Warranty Claim relating to Tax or a claim under the Tax Deed, the time limit is seven years from the end of the accounting period in which the corporation tax return relating to the accounting period of the Company current at Completion is due to be filed. ...

6.4 Non-applicability of Limitations: *The limitations and exclusions contained in this Agreement will not apply to any claim under this Agreement to the extent that it:*

6.4.1 relates to the Vendors' title to, or the status or validity of, the Shares;

6.4.2 relates to any criminal fine or penalty; or

6.4.3 arises (in whole or in part), or is increased or delayed, as a result of any fraudulent act, omission or

misrepresentation or any wilful misconduct, wilful concealment, or wilful misstatement by the Vendors...

*6.6 **No Representation:** Information supplied by or on behalf of the Company to the Vendors or their respective employees, officers, agents or professional advisers prior to Completion in connection with the Warranties or the exceptions, or the information Disclosed or Tax Deed or otherwise in relation to the business and affairs of the Company, will not constitute a representation, warranty or guarantee as to its accuracy, and the Vendors assign to the Purchaser any claims which they might otherwise have against the Company or its employees, officers, agents or professional advisers in respect of that information, and undertake not to bring any action or proceedings in relation to it..."*

- (5) Clause 8.6 entitled "**Whole Agreement**" states:

"The Transaction Documents (including the documents and instruments referred to therein) supersede all prior representations, arrangements, understandings and agreements between the parties relating to the subject-matter thereof, and set forth the entire, complete and exclusive agreement and understanding between the parties relating to the subject-matter thereof. No party has relied on any representation, arrangement, understanding or agreement (whether written or oral) not expressly set out or referred to in the Transaction Documents."

- (6) Clause 8.8 entitled "**Remedies Cumulative**" states:

"The provisions of this Agreement and the rights and remedies of the parties are independent, cumulative and are without prejudice and in addition to any other rights or remedies which a party may have whether arising under statute, at common law, in equity, under contract, by virtue of custom or otherwise. The exercise by a party of any one right or remedy under this

Agreement, under statute, at law or in equity will not (unless expressly provided in this Agreement, under statute, at law or in equity) operate so as to hinder or prevent the exercise by that party of any other right or remedy.”

(7) Schedule 3 entitled “**Warranties**” states:

...11.2 Products

The Company owns or is the licensee (under the Licences In) of all intellectual Property Rights in the Products and save under the Licences Out no third party has any right to use, sell, lease, license, copy, sub license, modify, adapt, change or otherwise deal in any Products.

11.3 Licences In and Licences Out

The Vendor has Disclosed a list of the Licences In and the Licences Out together with a description, in each case, specifying in particular the parties thereto. In respect of Licences In and Licences Out:

11.3.1 The Licences In and the Licences Out are binding and in force. So far as the Vendors are aware, none of the parties to them is in default, there are no grounds on which they might be terminated and no disputes have arisen.

11.3.2 So far as the Vendors are aware, the Licences In cover all of the Intellectual Property Rights used (but not owned) by the Company. None of the Licences In is due to expire or is capable of being terminated at will by the licensor within 24 months from Completion.

11.3.3 The Licences Out do not restrict the Company from using the Intellectual Property Rights to which they relate.

11.3.4 All Licences Out and Licences In have been granted and taken in the ordinary course of the Company's business.

11.4 No Infringement by the Company

11.4.1 So far as the Vendors are aware, none of the Intellectual Property Rights owned or used by the Company and none of the operations of the Company infringes the Intellectual Property Rights of a third party.

11.4.2 No written claim has been made by a third party against the Company which alleges that the operations of the Company infringe, or are likely to infringe, the Intellectual Property Rights of a third party or which otherwise disputes the right of the Company to use the Intellectual Property Rights owned or used by the Company...

11.7 Adequacy of Intellectual Property Rights

The Company owns, or has licensed to it, all Intellectual Property Rights which are required to carry on the Company's business as it is now, and as it has been for the six months prior to the date of this Agreement, carried on.

11.8 Restrictions on Use

11.8.1 There are no agreements or arrangements which restrict the disclosure, use or assignment by the Company of the Intellectual Property Rights owned by the Company.

11.8.2 Save under the Licences In the Company is not under any obligation to pay a royalty, licence fee or other consideration, or to obtain approval or consent, for use of the Intellectual Property Rights owned or used by the Company.

11.9 Loss of Intellectual Property Rights The Intellectual Property Rights owned or used by the Company will not be lost, or rendered liable to termination, by virtue of the acquisition of the Shares or the performance of any of the Transaction Documents...

12 INFORMATION TECHNOLOGY

...12.2 To the extent that elements of the Information Technology are not legally and beneficially owned by the

Company, the Company has all necessary valid and subsisting licenses from the owner of the Information Technology to use such elements of the Information Technology in the manner in which such Information Technology are used in carrying on its business.

12.3 So far as the Vendors are aware, the Company is not in breach of any rights, obligations and/or licenses pursuant to which the Company uses the Information Technology...

12.13 Full details of all agreements in relation to the Information Technology (including, without limitation, licences, maintenance agreements, support agreements and software escrow agreements), are set out in the Disclosure Letter.

13 DATA PROTECTION AND PRIVACY

13.1 The Company has at all times complied with the Data Protection Laws in all material respects.

13.2 The Company has:

13.2.1 introduced and applied appropriate data protection policies and procedures concerning the collection, use, storage, retention and security of Personal Data (details of which have been Disclosed), and implemented regular staff training, use testing, audits or other documented mechanisms to ensure and monitor compliance with such policies and procedures...

14 GENERAL LEGAL COMPLIANCE

14.1 Compliance with the Law

The Company has carried on its business in all respects in accordance with applicable laws, regulations and bye-laws in England and all foreign countries in which it operates, and there is no investigation or enquiry by, or order, decree or judgment of, any court, governmental agency or regulatory body outstanding against the Company.

14.2 Licences and Consents

All statutory, municipal and other licences, consents, permits and authorities necessary for the carrying on of the business and activities of the Company as now carried on (including the Softmerge product) have been obtained and are valid and subsisting and all conditions thereof have been complied with in all material respects and, to the best of the knowledge and belief of the Vendors, none of them is likely to be suspended, cancelled, revised, refused or revoked including as a result of the implementation of the Transaction Documents.

(8) Schedule 5 entitled “**The Retention Account**” provides:

“1 No part of the Retained Amount shall be released out of the Retention Account otherwise than in accordance with this Schedule and the terms of the Escrow Letter.

2 Subject as otherwise provided by this Schedule, the amount (if any) standing to the credit of the Retention Account (including any accrued interest but less any applicable charges or fees levied by the Escrow Bank) on the Release Date shall be released to the Vendors’ Solicitors within five Business Days of the Release Date (and the receipt by the Vendors’ Solicitors will be an absolute discharge to the Purchaser for this amount and who shall be responsible for ensuring that such sum is apportioned between the Vendors in such proportions as are equivalent to the percentage of Shares held by each Vendor as set out opposite their name in Schedule 2) ...

5. If a Claim has been notified by the Purchaser to the Vendors in accordance with the provisions of clause 6 of the Agreement prior to the Release Date, no amount shall be released to the Vendors’ Solicitors from the Retention Account otherwise than in accordance with the provisions of the remainder of this Schedule. Any Claim notified in accordance with this paragraph 5 shall (if not previously Resolved or withdrawn) be

deemed to have been irrevocably withdrawn six months after the date on which notice of the relevant Claim was given (and no new Claim may be made in respect of the same facts) unless on or before that date, legal proceedings have been issued and served on the Vendors in respect of the relevant Claim.

6. Nothing in this Schedule shall prejudice, limit, restrict or otherwise affect any right, including the right to make a claim under this Agreement, or any other remedy the Purchaser may have from time to time against the Vendors either under this Agreement, the Tax Deed or under any other document executed pursuant to this Agreement or at common law.

Claim

7. If: ...

7.2 on the Release Date, a Claim is still outstanding, the parties shall, within five Business Days of the Release Date, instruct the Purchaser's Solicitors in writing to pay to the Vendors' Solicitors, (and the receipt by the Vendors' Solicitors will be an absolute discharge to the Purchaser for this amount and who shall be responsible for ensuring such sum is apportioned among the Vendors, in such proportions as are equivalent to the percentage of Shares held by each Vendor as set out opposite their name in Schedule 2) out of the Retention Account an amount equal to the amount standing to the credit of the Retention Account less the Estimated Claim Amount in respect of all Claims (together with any interest which has accrued from the date of Completion to the date of payment on the amount so paid)."

13. It is not disputed that by the Release Date, 1 March 2020, the Defendant had paid none of the Retained Amount to the Claimants, despite no Claim having been made.
14. On 2 March 2020, A&LG sent letters (the "**2 March Letters**") to each of the Claimants stating:

“As you are aware, Cordic Ltd is a booking and data despatch service provider who provide fleet management solutions targeted at the taxi, private hire and courier service sectors. Cordic Ltd makes use of so called PAF data from Royal Mail in its systems and services. It has come to the Purchaser’s attention that there is no commercial licence to do this, in breach of numerous warranties provided to the Purchaser by the Vendors under the SPA, including but not necessarily limited to the following:”

It then recited paragraphs 11.2, 11.3, 11.4, 11.7, 11.8, 11.9, 13.1, 13.2.1 and 14 of the Warranties in Schedule 3. It concluded:

“Next Steps

The Purchaser will obviously not be in a position to release any escrow funds to the vendors until such times as this matter may be resolved.

We reserve all of the Purchaser’s rights and remedies, whether arising under the SPA or otherwise, including the right to commence legal proceedings against the Vendors without further notice.

In the event that any proceedings are issued this notice will be relied upon on the issue of costs.”

Significantly, the 2 March Letters made no allegation of fraud on the part of any of the Claimants.

15. The Claimants’ solicitors replied by a letter dated 23 March 2020. The letter made a number of points:

- (1) The 2 March Letters were confusing and embarrassing for want of particularity;
- (2) The assertion by the Defendant that the 2 March Letters advanced a Claim under the warranties was wrong and bound to fail. Amongst other things, there was no proper particularity;

- (3) To the extent that the 2 March Letters purported to be Claims under the SPA, they were served outside the limitation period pursuant to clause 6.3.1, given the date of Completion under the SPA was 1 November 2018 and AL&G letters were dated 2 March 2020;
- (4) Unless the default of failing to release the Retained Amount was remedied, the Claimants would issue proceedings.
16. By a letter dated 9 April 2020, A&LG replied, rejecting all the contentions advanced by the Claimants' solicitors, stating "*we disagree that the Notice of Warranty Claim served on your Clients on 2 March 2020 [...] was out of time and cannot properly be brought*".¹ That letter also concluded by reserving the Defendant's rights, including the right to commence legal proceedings.
17. On 17 April 2020, the Claimants issued and served a Claim Form and Particulars of Claim, seeking specific performance of clause 2 of Schedule 5 of the SPA, namely payment to their solicitors of the Retained Amount in the Retention Account, including interest, but less any applicable charges or fees levied by the Escrow Bank) (the "**Retention Account Money**") and indemnity costs.
18. On 1 June 2020, the Defendant served a Defence and Counterclaim, denying that, on the basis on the claims set out in the 2 March Letters, the Claimants were entitled to sums in the Retention Account and further claiming a right to set off the sums claimed under its Counterclaim against the Retention Account Money. The Counterclaim contained claims for breach of warranties and representations, relying at paragraph 18 on breaches of most, but not all, of the paragraphs in Schedule 5 referred to in the 2 March Letters, and additionally relying on paragraphs 12.2, 12.3 and 12.14 of the Schedule. Paragraphs 19-21 of the Counterclaim stated:

¹ Although that point was subsequently abandoned – see paragraph 11(5) and (6) of the Defence and Counterclaim, which states: "(5) *It is admitted that a Claim, as defined by paragraph 5 of Schedule 5 would have to be notified in accordance with the provisions of Clause 6 of the SPA prior to the Release Date. Such a claim would therefore have to have been notified on or before 1 March 2019.* (6) *Although the notices referred to above were a day late for the purposes of a Claim under paragraph 5 of the SPA...*" After some equivocation at the First Hearing, Mr Lazur accepted that no Claim had been made within time.

“19. The Claimants each made the representations set out above with the intention of inducing the Defendant into agreeing to the terms of the SPA.

20. Induced by and acting in reliance upon each of the representations set out above, the Defendant entered into the SPA.

21. In breach of clause 6.1.1 of the SPA, the warranties set out above were false. The representations set out above were false. In particular: ...”

[paragraphs 11.3, 11.3.1, 11.3.2, 11.4.1, 11.7. 11.8.1,11.8.2, 12.2, 12.3 and 14.2 were referred to.]

19. In its prayer for relief, the Defendant counterclaimed:

- (1) Rescission of the contract;
- (2) Damages for breach of contract;
- (3) Damages for fraudulent misrepresentation;
- (4) Damages under s.2 of the Misrepresentation Act 1967;
- (5) Damages for negligent misstatement; and
- (6) An indemnity.

20. On 22 June 2020 the Claimants served a Reply and Defence to Counterclaim. Three days later the Claimants issued the Claimants’ Application. On 27 July 2020, they responded to a Request for Further Information relating to the Reply and Defence to Counterclaim.

The evidence

21. The Claimants adduced the following evidence:

- (1) The first witness statement of Richard Marshall, a partner in Pennington, Manches Cooper LLP, instructed by the Claimants (“**Marshall 1**”) dated 25 June 2020 and its exhibit, in support of the Claimants’ Application;

(2) The second witness statement of Richard Marshall dated 16 November 2020 (“**Marshall 2**”) and its exhibit, in opposition to the Defendant’s Amendment Application

22. The Defendant adduced the following evidence:

(1) The first witness statement of Bernardus Van Shriek, a director of the Defendant, dated 26 October 2020 (“**Van Shriek 1**”) and its exhibit, in opposition to the Claimants’ Application;

(2) The first witness statement of Stuart Nevin, a solicitor of A&L Goodbody dated 26 October 2020 (“**Nevin 1**”) and its exhibit, in opposition to the Claimants’ Application;

(3) The second witness statement of Stuart Nevin dated 9 November 2020 (“**Nevin 2**”) and its exhibit, in support of the Defendant’s Amendment Application. I permitted it to be adduced, although there was no provision for it in the 5 November Order.

The law in relation to summary judgment

23. There was common ground as to the principles to be applied to the applications. The power to award summary judgment is to be found in CPR 24.2, which, so far as material, states that:

“The court may give summary judgment against a claimant or a defendant on the whole of the claim or on a particular issue if-

(a) it considers that -

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

24. The relevant principles were summarised by Floyd LJ in *TFL Management Services Limited v Lloyds TSB Bank Plc* [2014] 1 WLR 2006 at [26] to [27]. In that passage, Floyd LJ referred to an earlier

decision of Lewison J (as he then was) in *Easy Air Limited (Trading as Open Air) v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15], where he summarised the principles in the following way:

“... the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even

where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand, it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.”

25. I also remind myself of the following:

- (1) the criterion “real” is not one of probability, it is the absence of reality: see Lord Hobhouse in *Three Rivers District Council v Bank of England (Number 3)* [2003] 2 AC 1 [158];

- (2) an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issues having regard to all the evidence: see *Apovdedo NV v Collins* [2008] EWHC 775 (Ch);
- (3) in relation to the burden of proof, the overall burden of proof rests on the applicant to establish that there are grounds to believe the respondent has no real prospect of success and there is no other compelling reason for trial. The standard of proof required of the respondent is not high; it suffices merely to rebut the applicant's statement of belief.

The law in relation to the strike-out application

26. The Claimants have also applied under CPR 3.4(2), pursuant to which “*the Court may strike out a statement of case if it appears to the court (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim.*” As in *Laminates Acquisitions v BTR Australia Ltd* [2003] EWHC 2540 (Comm) at [29], the parties before me drew no material distinction between the test to be applied here and that to be applied under CPR 24.2.

The applicable principles when considering whether to grant permission to amend a statement of case

27. The test to be applied in an opposed application to amend a statement of case is the same as the test applied to an application for summary judgment. The question is whether the proposed new defence has a real prospect of success: see *Slater & Gordon (UK) 1 Ltd v Watchstone Group plc* [2019] EWHC 2371 (Comm) at [34]-[37] per Bryan J], my decision in *SPI North Ltd v Swiss Post International (UK) Ltd* [2019] EWHC 2004 (Ch) at [5], *Hewson v Times Newspapers* [2019] EWHC 1000 (QB) at [17] per Nicklin J. In that regard I refer to the authorities summarised at paragraphs 24 and 25 above.
28. By reference to the principles stated by Nicklin J in the *Hewson* case at [15]-[16], at the further hearing Mr Sinclair submitted that this was an application made at an early stage of the proceedings, with no limitation issues arising and it would be in accordance with the overriding

objective to permit the amendments if they have a real prospect of success. I agree. I note that Mr Solomon did not suggest otherwise.

The Parties' Submissions

29. The parties have made detailed written and oral submissions at both hearings. I have considered them carefully. Despite the submission from the Claimants that I should decline to deal with the Amendment Application at this stage, having received oral and written submissions from the parties at the December Hearing, in my view it is appropriate to do so now. I shall set out the Claimants' submissions in support of the Claimants' Application based on the original Defence and Counterclaim. I shall then summarise the Defendant's case as set out in the draft amended Defence and Counterclaim and its submissions on both applications made orally both at the original and the December hearings, save as to the "clean hands" issue. I will then address the Claimants' submissions opposing the Defendant's Amendment Application. Finally, I will address the submissions made by both parties in relation to the "clean hands" argument at the December Hearing. I will then give my conclusions. When considering whether to grant the Claimants' Application, I shall do on the basis of the draft Amended Defence, although if the Defendant succeeds only on the basis of the draft amendments, that may materially affect any costs orders made.

The Claimants' submissions in support of the Claimants' Application on the basis of the original Defence and Counterclaim

30. Mr Solomon submitted that there had been no notification of a Claim, pursuant to clause 6.1.3 of the SPA, with the result that the Claimants were entitled to be paid the Retention Account Money without any stay or deduction. He placed considerable reliance on the decision of Simon J (as he then was) in *Ipsos SA v Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm) as to the purpose of a notification clause. At [19], Simon J stated:

"The commercial purpose includes ensuring that sellers know in sufficiently formal terms that a claim for breach of warranty is to be made so that financial provision can be made for it."

31. Additionally, he relied upon [19]-[21] of the *Ipsos* case for the following propositions:
- (1) The commercial purpose of such clauses (as set out at paragraph 30 above) is not served if the notice is uninformative or unclear (relying on *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423 at [90] (itself followed more recently by *Teoco UK Ltd v Aircom Jersey 4 Ltd and another* [2018] EWCA Civ 23 at [22]) and *Laminates Acquisitions v BTR Australia Ltd* [2003] EWHC 2540 (Comm), [2004] 1 All ER (Comm) 737 at [29]);
 - (2) A notification clause is construed by answering the question as to how it would be understood by a reasonable recipient with knowledge of the context in which it was sent;
 - (3) The notice must specify that a claim is actually being made rather than indicating the possibility that a claim may be made (see also the *Laminates* case at [33-34]).
32. At [31] of the *Laminates* case, Cooke J made clear that the burden is on the party seeking to bring a claim to demonstrate that it has complied with the notification provisions.
33. The consequences of failing to comply with the notification provisions means that there is no liability for the vendor (see the *Teoco* case at [33]). The notification provision “*was intended as a gateway to liability on the part of the Seller. The parties agreed that in respect of Claims which did not comply, the Seller would have no liability*”.
34. Applying those principles to the current case, it is clear that no Claim has been notified. Clause 6.3 provides “*...the Vendors will not be liable*” and 6.3.1(i) continues “*For any Warranty Claim unless notice of the Warranty Claim is given in writing by the Purchaser to the Vendors setting out full particulars of the grounds on which the Warranty Claim under this Agreement is based within the 16 months following Completion [...].*”
35. Mr Solomon submitted the following is clear:

- (1) Clause 6.3 removes all liability for a Warranty Claim if there has been no notification;
- (2) The date of Completion under the SPA was 1 November 2018;
- (3) A&LG's letters were dated 2 March 2020, and they were therefore outside the limitation period pursuant to clause 6.3.1;
- (4) The 2 March Letters merely reserved the right to bring proceedings, and failed to specify that a claim was actually being made;
- (5) There was no attempt at all to specify the factual basis on which the claim is posited, rather than merely indicate that there might be a claim under the warranties. Clause 6.3.1 of the SPA required "*full particulars of the grounds on which the Warranty Claim under this Agreement is based*". This is in contrast to the relevant clauses in the *Ipsos* case which required only "*reasonable detail*" (at [10]).

36. Accordingly, no notification has been made of a Claim. In such circumstances, he submitted that the payment claimed must be made.

No right to withhold from the Claimants the money in the Retention Account

37. The only basis provided under the SPA for withholding amounts in the Retention Account is as provided by Schedule 5 and is dependent on the prior notification of a Claim.

38. Paragraph 2 of Schedule 5 of the SPA makes it clear that the monies remaining in the Retention Account "*shall*" be released to the Claimants' solicitors within five business days of the Release Date being the first business day following 16 months from Completion, i.e. 1 March 2020, subject only to the provisions of Schedule 5. Paragraph 2 provides (insofar as is relevant):

*"Subject as otherwise provided by this Schedule, **the amount (if any) standing to the credit of the Retention Account** (including any accrued interest but less any applicable charges or fees levied by the Escrow Bank) on the Release Date **shall be released to the Vendors' Solicitors within five Business Days of the Release Date** [...]." [emphasis added]*

39. Clause 5 of Schedule 5 of the SPA provides (insofar as is relevant):
- “If a Claim has been notified by the Purchaser to the Vendors in accordance with the provisions of clause 6 of the Agreement prior to the Release Date, no amount shall be released to the Vendors’ Solicitors from the Retention Account otherwise than in accordance with the provision of the remainder of the Schedule. [...]”*
40. The purpose of holding the Retained Amount in an escrow account, with A&LG as escrow agent, was to provide the Claimants with secure funds, and for the Claimants to be able obtain the funds without the requirement to obtain and enforce a judgment debt.
41. Given that there was no notification of a Claim, there is no basis whatsoever for failing to comply with the mandatory requirement to release the monies in the Retention Account.
42. Paragraph 9(2) of the Defence asserts that paragraph 5 of Schedule 5 of the SPA includes the right to set off or withhold sums in respect of claims under paragraph 6 of Schedule 5 (albeit the Defence provides no reasoned basis for that assertion). That assertion is simply wrong: it does not. In any event, paragraph 5 of Schedule 5 is only applicable if a Claim has been notified prior to the Release Date. There has been no Claim notified, whether prior to that date or at all.
43. Further paragraphs 9(3) and (4) of the Defence (insofar as that sub-paragraph is understood) assert that a right to withhold sums in the Retention Account can be exercised at any time (or in the alternative under paragraph 9(4)), within 5 business days of the Release Date, by setting off any claim (even if it is not a Claim). Such a proposition is entirely untenable:
- (1) There is nothing in the SPA which says anything like that, and the only basis for withholding sums is in accordance with Schedule 5 and the notification of a Claim. In fact, the SPA entirely contradicts such an approach and (as set out below), there is no right to set off under the SPA, which is specifically prevented by clause 6.2;

- (2) Any right to withhold sums could only ever have been exercised prior to the Release Date. Notwithstanding that there is no right to set off in any event, were the Defendant's assertion correct, it would be possible to set off claims after the (mandatory) release of the Retention Account, which is plainly wrong and could never have been workable.

Clause 6.4.3 of the SPA

44. When I referred him to the provisions of clause 6.4.3 of the SPA, which, as earlier stated, provides:

“Non-applicability of Limitations: The limitations and exclusions contained in this Agreement will not apply to any claim under this Agreement to the extent that it:

6.4.3 arises (in whole or in part), or is increased or delayed, as a result of any fraudulent act, omission or misrepresentation or any wilful misconduct, wilful concealment, or wilful misstatement by the Vendors...”

he dealt with it as follows.

45. He accepted that clause 6.4.3 gave a right to bring properly pleaded claims (with a small 'c'), based on fraud, but these were not “Claims” as defined, and such claims would not operate so as to prevent payment out of the money in the Retention Account. Furthermore, on a proper reading of paragraphs 5 and 6 of Schedule 5 of the SPA (recited at paragraph 12(8) above), there is no entitlement to prevent or delay payment from the Retention Account.
46. He also pointed to the absence of particularity in the 2 March Letters. When one looks at the provisions of paragraph 7.2 of Schedule 5 to the SPA, the requirement to give “full particulars”, included an obligation to make an Estimated Claim Amount, namely bona fide estimate of the quantum of the Claim. This was needed in order to determine how much to withhold.

No right to set off

47. There is no right to set off under the SPA. Clause 6.2 is clear and unequivocal:

“Deductions and Withholdings: All sums payable by any party under this Agreement shall be paid free and clear of all deductions or withholdings unless such deduction or withholding is required by law.”

48. A removal of a right to set off may be excluded by agreement of the parties. It must be clear and unambiguous in the contract, but no more than that is required. Further, such a term is not to be treated in the same way as an exclusion clause: *FG Wilson (Engineering) Ltd v John Holt & Company (Liverpool) Ltd* [2012] 2 Lloyd’s Rep. 479 at [83].

49. The Court of Appeal in *BOC Group plc v Centeon LLC* [1999] 1 All ER (Comm) 970 at [980A and G] held that the failure of a clause to use words such as “payment in full without deduction or withholding” was indicative that there was no prohibition of the right to set off. In this case, the parties have deployed the very words identified in *BOC* as those which parties might be expected to use in order to exclude a set off.

50. A strikingly similar clause was considered in *Lotus Cars Ltd v Marcassus Sport S.A.R.L* [2019] EWHC 3128 (Comm) at [6] and was held by Phillips J (as he then was) to prohibit set off [34]-[38].

51. The words of clause 6.2 are clear and unambiguous:

(1) They refer to all sums payable. There is no exception whatsoever, so that it is not open to the Defendant to argue that the amounts in escrow are excluded;

(2) They expressly state that the sums shall be paid “*clear of all deductions or withholdings*”, being the very phrase used by the Court of Appeal in *BOC* as being indicative of exclusion of set off. These words can have no meaning other than to exclude set off, nor has any other meaning been suggested by the Defendant;

(3) The only limited exceptions are those required by law, and it is not suggested that the Defendant's claim falls within such an exception. Plainly, therefore, set off is excluded.

52. In reply, in relation to the ambit of the set-off clause, clause 6.2 of the SPA, Mr Solomon relied upon the Court of Appeal decision in *WRM Ltd v Woods* [1998] C.L.C. In that case, the material clause provided:

“5.8 Save as provided by cl. 5.7 [which related to a limited set-off in relation to retention notes] the purchaser shall not be entitled to set off against any amount otherwise payable to the vendors under this agreement (whether pursuant to the terms of the retention loan notes or otherwise) or any other agreements or documents to be entered into by the vendors or any of them in connection therewith, any amount which the purchaser claims is due from the vendors or any of them to the purchaser ... under or by reason of any breach of any amount which the purchaser claims is due from the vendors or any of them to the purchaser ... under or by reason of any breach of the terms of this agreement...”

53. Morritt LJ, with whom Buxton LJ agreed, gave the only reasoned decision. Mr Solomon relied upon that judgment for the following principles as to the correct approach to a set-off clause:

- (1) A clause such as such clause 5.8, and by parity of reasoning clause 6.2 of the SPA, was clear and operated to exclude the possibility of set off in respect of all sums claimed to be due because a warranty contained in the agreement was broken or because a representation made therein, whether innocently, carelessly or fraudulently, was false;
- (2) The parties to a contract could exclude the remedy of set off in relation to allegedly fraudulent misrepresentations;

- (3) As in the WRM case, given the width of the warranties in the SPA, there was no reasonable possibility of the sellers being liable for a misrepresentation not coming within any of the warranties;
- (4) A set off is a remedy available to both parties to cross claims. As explained by Neil LJ in *Coca Cola Finance Corp v and Finsat International Limited*, [1996] CLC 1564, a provision excluding it is one which defines the payment obligation but does not exclude it. The exclusion of such remedies should be clear, but no more is required than that. In particular such a term is not to be treated in the same way as an exclusion clause and is therefore not to be regarded as an “exclusion” for the purposes of clause 6.4 of the SPA.

54. The effect of a valid no set off clause means that the Claimants are entitled to summary judgment on their claim forthwith with no stay of execution, and that any cross-claim could not be ventilated in these proceedings (to the extent that it is not struck out in any event): see *Lotus Cars* at [29].

55. The remainder of the points raised by the Defendant only go to the question of whether they should be able to maintain a freestanding claim, after judgment has been ordered for Claimants.

The Defendant’s claims for breach of warranty claim, misrepresentation and negligent misstatement

56. Clause 6.4.3 only permits fraud claims. The allegation of breach of warranty based on fraud is hopeless and should never have been made. There is no fact or matter alleged which makes the allegation of fraud tenable. A party alleging fraud must allege and prove primary facts which justify the inference of dishonesty. This is not merely the test at trial, but as was made expressly clear in *Three Rivers District Council v Bank of England* [2001] UKHL 16, [2003] 2 AC 1, per Lord Millett at [186], is a question which equally must be addressed in the statements of case:

“At trial the court will not normally allow proof of primary facts which have not been pleaded and will not do so in a case of fraud. It is not open to the court to infer dishonesty from facts

which have not been pleaded, or from facts which have been pleaded but are consistent with honesty". [emphasis added]

57. If allegations of fraud or deceit rest upon drawing inferences about a defendant's state of mind from other facts, then those other facts must be clearly pleaded, and the inference of dishonesty must be more likely than one of innocence or negligence: *Cunningham v Ellis* [2018] EWHC 3188 (Comm) at [42]. At paragraph 11(2)(iv) of the Defence, an allegation was made that the First and Second Claimants "*knew or ought to have known*". As Millett LJ (as he then was) stated in *Paragon Finance plc v Thakerar & Co* [1999] 1 All ER 400, at 407c-e:

"An allegation that the defendant 'knew or ought to have known' is not a clear and unequivocal allegation of actual knowledge and will not support a finding of fraud even if the court is satisfied that there was actual knowledge."

58. In the original defence, there is no fact or matter pleaded or set out by the Defendant other than the fact of the warranties themselves, and a bare assertion (which is misconceived as per *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm) see paragraph 59(3) below) that the warranties were fraudulent representations. Irrespective of the fact that they could not be representations at all, asserting that there were clauses in a contract could never amount to primary facts which could form the basis of a claim in fraud.

59. The Claimants relied upon the following points to argue that the original allegations do not stand a real prospect of success:

- (1) Paragraphs 19 and 20 of the Defence, which asserted that each of the warranties was a representation, made with the intention of inducing the SPA and relied on by the Defendant when entering into the SPA, are unsustainable;
- (2) Insofar as there is any allegation of pre-contractual representations (and there appear to be none in the original defence) the Whole Agreement provision in clause 8.6 of the SPA, and in particular the final sentence which states: "*No party has relied on any*

representation, arrangement, understanding or agreement whether written or oral not expressly set out or referred to in the Transaction Documents.” precludes this;

(3) A warranty cannot amount to a representation: see *Idemitsu Kosan Co Ltd v Sumitomo Corp* [2016] EWHC 1909 (Comm); [2016] 2 C.L.C. 297. In that case, similar to the present, the question for the Court was whether there should be summary judgment against the claimant purchaser under a share purchase agreement. Andrew Baker QC (as he then was, sitting as a Judge of the High Court) granted summary judgment. In doing so, he rejected the argument that the warranties in the signed, and draft execution copies, of the agreement amounted to representations (and it is noted there is no allegation in the original Defence of any pre-contractual representation, irrespective of the fact that it would make no difference as per *Idemitsu*). In reaching his conclusion, he applied the approach of Mann J in *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch), and declined to follow that of Arnold J (as he then was) in *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch);

(4) He held where a seller by a contract of sale “warrants” something about the subject matter sold, he is making a contractual promise. By contracting on such terms, the seller is not purporting to impart information; he is not making a statement to the buyer. He is making a promise to which he will be held accountable by way of an action for breach of contract, subject to the terms of the contract and the general law on breach of contract: see [14], [16], [18] and [20]. If nothing is relied on beyond the bare fact of providing a document containing warranties, this will indicate no more than a willingness to give contractual warranties in the concluded contract: see [27] and [30]. In any event, a non-reliance clause would defeat a claim based on representations: see [36] and [42].

60. The approach in *Idemitsu* was accepted and followed in *Ivy Technology Ltd v Martin et al* [2020] EWHC 94 at [30-34], where Teare J refused to

allow an amendment which pleaded that warranties contained in an agreement could be relied upon as representations on the grounds that it had no real prospect of success.

The Counterclaim for rescission

61. Mr Solomon submitted that the claim for rescission is hopeless for the following reasons:

(1) There has been inordinate delay by the Defendant, which, as set out at paragraph 11(1)(vii) of the Defence, became aware of the issue on which it now relies “*in early 2019*”. At no point prior to the Counterclaim has it sought to rescind the SPA (nor is there any explanation of this delay in the Defence);

(2) The Defendant has clearly affirmed the SPA by (inter alia) its inaction since early 2019, continuing to carry on under the SPA since completion of the SPA, and by writing the 2 March letters which expressly state that they are written “*in accordance with Sections 6 and 8.11 of the SPA*” such that they purport to bring a Warranty Claim under the SPA, and by the letter of 9 April 2020 from A&LG, which again asserts the fact that the Defendant was bringing claims under the SPA. By causing its solicitors to write those letters purporting to bring claims under the SPA, the Defendant affirmed the SPA.

62. Both delay and affirmation are fatal for a claim for rescission.

63. The Counterclaim does not stand a real prospect of success. In those circumstances it should be struck out and summary judgment ordered for the Claimants in respect of it.

The Defendant’s allegation of risk of dissipation

64. Mr Solomon submitted that neither Nevin 1 nor Van Shriek 1 submitted by the Defendant assists in the determination of the matters now before the Court.

65. In Nevin 1, Mr Nevin asserts that there is a “*risk of dissipation of assets*” because the First Claimant has transferred assets out of the jurisdiction. As to that Mr Solomon made the following submissions:

- (1) If the Claimants’ application is successful, this point is irrelevant. The Defendant will not have any claim remaining;
- (2) At paragraph 16 of Nevin 1, the Defendant asserts (on the basis of no evidence at all) that because the First Claimant (only) is dealing with his assets, it means he is trying to move his assets beyond the Defendant’s ability to get a costs order against him. This point is absurd. The First Claimant is permitted to deal with his assets, but also the First Claimant is only one of five Claimants, and the Defendant has said nothing about what assets any of them have in this jurisdiction.
- (3) Further, this point proceeds on the basis, as stated by Mr Nevin at paragraph 17 of Nevin 1, that the Claimants’ Application is successful, but the Defendant’s counterclaim is somehow permitted to go to trial. If the Defendant seeks to freeze the Claimants’ assets, it should have made an application to do so, and it has not. In any event, if the Claimants’ application is successful, it will be because the Defendant’s argument as to the effect of the ‘no set off’ clause has failed. The Defendant may not undermine that conclusion by such an argument.

66. In relation to Van Schriek 1, Mr Van Schriek seeks to make:

- (1) Assertions about representations which were made to the Defendant by the Claimants. However, this does not reflect how the Defendant has pleaded its case.
- (2) Various factual points as to the Reply and Defence to Counterclaim.

Mr Solomon recognised that I cannot determine any of those facts at this hearing, but he submitted it is not necessary to do so in order to determine the Claimants’ Application in their favour.

The Defendant's submissions in support of the Amendment Application and in opposition to the Claimants' Application

67. Mr Lazur outlined the background facts on which he relied as follows:

- (1) By March 2019, the Defendant discovered that the Company's software had been using and distributing an address database (the "Address Data") in breach of the single user licence that had come with it;
- (2) The significance of this is set out in Van Shriek 1. The ability accurately to find addresses is at the core of the Company's business. The cost of obtaining the appropriate licences for this database, or an equivalent database from another provider, is so prohibitive that it would significantly impact the Company's profitability. Had this issue been known at the time, the Defendant would not have entered into the SPA.
- (3) The Defendant believes that the Claimants knew (or ought to have known) about this licencing issue at the time of the sale, and of its significance to the business. The failure to disclose it during the due diligence process was deliberate (or reckless) and in breach of the Warranties contained in paragraphs 4.1, 4.2, 11.3, 11.4, 11.5, 13.3, and 14.2) of Schedule 3 to the SPA.²

A summary of the Defendant's case

68. Paragraph 1 of the draft amended Defence and Counterclaim states:

"At the time of SPA the Company used a database of address files (the "Address Data") within its dispatch system in breach of the limited licence the Company had for its use. This was a breach of several of the warranties provided by the Claimants under the SPA. The First, Second and Third Claimants knew at the time that the Company was in breach of licence and were actively concerned of "the serious cost to us if we are found out." Contrary to their actual knowledge they confirmed that the

² I note, however, that paragraphs 4.1, 4.2 and 13.3 of Schedule 3 are not referred to or relied upon in paragraphs 18 and 21 of the original or the draft amended Defence which address the claim for breaches of Warranty claims.

warranties were true. This gives rise to a claim for breach of warranty against each of the 5 Claimants, founded on the fraud of the First, Second and Third Claimants. No allegation of fraud is made against the Fourth or Fifth Claimants. There is a fraudulent misrepresentation claim against the First, Second and Third Claimants arising out of the same facts. There is a claim against all of the Claimants under the Misrepresentation Act 1967 and for negligent misstatement, although those claims are expressly without prejudice to the Defendant's contention that the only inference from the actions and communications of the First, Second and Third Claimants is fraud.

The remainder of that paragraph is deleted, including the pleading that “*the Defendant counterclaims for rescission of the SPA and/or damages.*”. The allegation, however, resurfaces in paragraph 27 of the Counterclaim and in paragraph (1) of the prayer for relief. Although it received little attention on behalf of the Defendant in written or oral argument, Mr Sinclair indicated at the further hearing that it had not been abandoned. I shall treat it as a live plea and address it below.

The amendments to the Defence

69. It was submitted on behalf of the Defendant that all the amendments stand a real prospect of success.
70. The documents which the Defendant has unearthed and pleaded strongly support the case that the First, Second and Third Claimants knew the facts and matters which rendered the statements of fact contained in the warranties false and deliberately covered them up.
71. The primary facts to be relied on at trial to justify the allegation of fraud are clearly stated in the draft Amended Defence and Counterclaim and Lord Millett's test in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 at [184] to [186] (which was relied on by the Claimants at the First Hearing) is satisfied.
72. It is notable that the Claimants' evidence, namely Marshall 2, in opposition to the amendment contains no more than a bare denial of the

allegations. There is no attempt to provide an explanation for the wealth of material which supports a strongly arguable claim in fraud.

73. The legal issues arising on the amendment also have a real prospect of success.
74. In particular the breach of warranty claim in the draft amended Counterclaim is now clearly differentiated from the misrepresentation claim. The Defendant has a real prospect of succeeding in its argument set out at paragraph 22A of the draft amended Defence and Counterclaim that the breach of warranty claim falls within the scope of a claim under clause 6.4.3 of the SPA as it “*arises (in whole or in part) or is increased or delayed, as a result of any fraudulent act, omission or misrepresentation or any wilful misconduct, wilful concealment or wilful misstatement by the Vendors*”.
75. At the First Hearing Mr Lazur accepted that, although the pleaded breaches gave rise to a Warranty Claim as defined by the SPA, pursuant to clause 6.3.1(i), the Claimants are not liable for any Warranty Claim unless notice is given in writing within 16 months following completion. It was admitted that the 2 March 2021 Letters were one day late and therefore were not compliant with the terms of clause 6.3.1.
76. He submitted, however, that is not the end of the matter, because one has to have regard to the provisions of clause 6.4.3, which disapplies the “*limitations and exclusions contained in the [SPA]*”. It expressly states that they “*will not apply to any claim under the [SPA] to the extent that it arises (in whole or part ... as a result of **any fraudulent act, omission or misrepresentation** or wilful misconduct, wilful concealment **or wilful misrepresentation** clause [emphasis added]*”.
77. At paragraph 2.1 of Van Shriek 1, Mr Van Shriek refers to a considerable amount of technical and legal due diligence. During the due diligence exercise, he contends that the Claimants failed to answer the due diligence questions honestly. Had that been done, he says the issue, which is the subject matter of the dispute, namely the misuse of Address Data and the misuse of the license agreement would have been

identified. Further Mr Nevin exhibits a series of emails to Nevin 2, which he says, at paragraphs 8-10 therein, are highly relevant to the issue of fraud and provide significantly more support for the allegations than was appreciated existed at the date of providing the original pleading, or indeed the first draft amendment. They provide good evidence that the warranties were false for the reasons pleaded in paragraph 11(2) of the amended Defence and Counterclaim.

78. There is thus a clear basis for a fraudulent breach of warranty claim which the Defendant is entitled to bring against the Claimants by reason of clause 6.4.3. The original pleaded Defence in this regard was an adequate pleading, but were there any doubt about that, the amendments to paragraph 11, paragraph 21, 22 and 22A in the draft amended Defence, set out a clear basis for fraud to be alleged against the First, Second and Third Claimants. In particular, the references to “*known or ought to have known*” in paragraph 11(2) (iv) of the Defence have now been deleted. In any event, the *Paragon* case can be distinguished because of the nature of the cause of action was different. In relation to a claim made pursuant to clause 6.4.3 arises out of a fraudulent act “by the vendors”, if one of the Claimants acted fraudulently, the claim can be made against all of the Claimants, as pleaded in paragraph 1 of the draft amended Defence.

The draft amended Defence based on Misrepresentation and Negligent Misstatement

79. In his skeleton for the First Hearing, at paragraph 21, Mr Lazur submitted that the Claimants were wrong to argue that the warranties under the SPA could not be additionally representations. He relied upon the passage in Chitty on Contract, 33rd Edition at 7-007, which states “*A representation is merely a statement of a fact, past or present.*”
80. He submitted that the warranties relied upon by the Defendant are without doubt representations, and by way of illustration pointed to the warranties in paragraphs 11.3 of Schedule 3. The warranties relied on by the Defendant are without doubt representations by that definition. He contended the legal issue is not whether these are representations, but

whether they are representations capable of forming the basis of a claim for misrepresentation or negligent misstatement. The Defendant accepts that those causes of action require more than the mere incorporation of representations into a contract.

81. That distinction is significant. If the Claimants are right that the warranties cannot be representations at all, there is a risk that the non-applicability of limitation clause at 6.4.3 would have no effect. It was accepted on behalf of the Defendant that those causes of action require more than the mere incorporation of representations into a contract.
82. Mr Lazur referred to five authorities, to which I shall turn shortly, which he said appeared not to speak with one voice, but he submitted that the apparent conflict can be resolved as follows: the Defendant must prove that:
- (1) The representation was made before entering the contract;
 - (2) The representation induced the contract; and
 - (3) The express terms of the SPA do not exclude these alternative causes of action.
83. He submitted the principles were correctly summarised in Cartwright: Misrepresentation, Mistake and Non-Disclosure, 5th edn, at paragraphs 8-002-003.

The five authorities

84. The first decision was that of the Court of Appeal decision in *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235, where Rix LJ, giving the only reasoned judgment, considered the following warranty which had been incorporated into a licence agreement with exclusive rights provisions:

“Licensor represents and warrants to Licensee as follows ...

That Licensor has not entered into any agreement which conflicts with the right granted herein to Licensee. Licensee has exclusive first exploitation right in the licensed territory.”

85. The Court of Appeal had no difficulty concluding that this language contained representations of fact. As to whether the representation was a pre-contractual representation, the exclusive rights provisions were introduced as an additional part of the bargain as the terms of the contract were drafted. Rix LJ concluded at [21]-[24] that those precontractual negotiations, culminating in the incorporation of the warranty into the draft agreement, amounted to a pre-contractual representation, saying at [24]:

“... It is a representation of fact which was bargained for in the letters ... which Pulse agreed to give ... by saying it accepted the amendment and which was duly set out in the amended draft contract proffered for signature together with that letter and also in the complete form of contract re-sent in the following January.”

86. The second was *Invertec Ltd v De Mol Holding BV and Henricus Albertus De Mol* [2009] EWHC 2471 (Ch), where the claimant (“**Invertec**”) claimed damages for fraudulent misrepresentation, misrepresentation under the Act and negligent misstatement arising out of a sale and purchase agreement. The contract in that case was structured in a similar way to the SPA. Clause 5.1 of the contract in that case provided:

“5.1 Accuracy of warranties

The Vendor warrants to the Purchase (sic) that, as fairly disclosed by the Disclosure Letter, the Warranties are true and accurate in all material respects.”

87. After a full trial, having concluded that the defendant had no honest belief in representations made before and within the contract, at [362]-[363], Arnold J (as he then was) rejected the argument that, because Invertec’s claims were all framed by reference to warranties in the SPA, the claimant could not have a claim for misrepresentation.
88. At [388]-[391], Arnold J concluded, *obiter*, that Invertec would have had alternative claims under the Misrepresentation Act 1967 and negligent

misstatement, notwithstanding the incorporation of a fraud and entire agreement clause (clause 19.2) on similar terms to that contained in the SPA.

89. The third case was *Bikam OOD and Central Investment Group SA v Adria Cable S.a.r.l.* [2012] EWHC 621 (Comm). This case concerned another share purchase agreement on similar terms to the present case and in *Invertec*, save that importantly in *Bikam* the SPA incorporated the following exclusive remedies clause:

“9.10 The Buyer acknowledges and agrees that its sole remedy against Sellers for any breach of the Sellers’ Warranties is set out in this Clause 9 and that, except to the extent that the Buyer has asserted a claim for indemnification prior to the relevant Liability Termination Date, the Buyer shall have no remedy against the Sellers for any breach of the Sellers’ Warranties.”

90. On an application for summary judgment, Simon J (as he then was) considered that the clause extracted above, read together with the other relevant terms of the contract as a whole, provided a contractual regime which was sufficient to confine the purchaser’s rights to contractual claims. Mr Lazur submitted that, unlike that case, here there was no “exclusive remedies” clause and indeed, clause 6.4.3 of the SPA expressly envisaged the possibility of a fraudulent misrepresentation claim.

91. At [38] Simon J said:

“I am doubtful that a representation which only appears in a contract can fall within the terms of s.2(1) of the Misrepresentation Act 1967 in the light of the wording of the statute, however it is unnecessary to decide the point; and I proceed on the basis that the misrepresentation claims are properly arguable subject to the contractual issues.”

92. The fourth case referred by Mr Lazur was *Sycamore Bidco Ltd v Breslin and Dawson* [2012] EWHC 3443 (Ch). In that case, as here, the claimant (“**Sycamore**”) pursued claims for breach of warranty contained in a

share purchase agreement, in addition to alternative claims under the Misrepresentation Act 1967, and the tort of negligent misrepresentation. Sycamore's claims for breach of warranty succeeded. The issue was whether it could avoid the contractual limitations placed on the warranty claims under the agreement by pursuing its alternative causes of action.

93. Sycamore there did not rely on anything other than the terms of the warranties in the agreement to support its alternative causes of action. The warranty provision in that agreement differed from the one in *Invertec* and provided as follows:

"5. Seller Warranties

5.1 The Sellers severally warrant to the Buyer in the terms set out in Part B of Schedule 4, and the Warrantors severally warrant to the Buyer in the terms set out in Part C of Schedule 4, subject to the provisions of clause 8.

5.2 Each Warranty is to be construed as a separate and independent warranty and, save as expressly provided otherwise in this agreement, will not be limited by reference to or inference from any other Warranty or by any other provision of this agreement and subject to clause 8, the Buyer will have a separate claim for every breach of Warranty ..."

94. At [203], Mann J gave six reasons for concluding that the warranties in that contract were not representations, although Mr Lazur submitted that (iii) and (v) extracted below were key to that conclusion:

"... (iii) The words of the warranting provision (clause 5) are words of warranty not representation. There is a legal distinction between the two and (subject to a point made about a later reference to representations, as to which see below) there is no reason to extend the words beyond their natural meaning. In order to make the relevant material a representation one has to find something in the SPA which is capable of doing that. It is not enough that the subject matter of the warranty is capable of being a representation. One has to find out why those words are

there. One finds that in clause 5; and what one finds is words of warranty, not words of representation. ...

(v) Clause 8 of the SPA contains significant limitations on the liability under the “Warranties”. It does not refer to representations. The clause is obviously a significant part of the overall structure of liability. If the warranties were capable of amounting to representations as well, then on the strict wording of this clause it would not apply to any such misrepresentation. The sellers would thus be deprived of a large part of their protection and limitation. That would be a strange and uncommercial state of affairs and can hardly have been intended. This is strikingly so in relation to clause 8.2 containing the overall cap on recoveries and on what could be recovered from each warrantor, (unless, in relation to the overall cap a misrepresentation claim were construed as a claim under the Agreement, which would be a forced construction). If this cap does not apply then Mr Dawson could find himself liable for £17m, when he had contracted for a cap of £317,000. It is also true of clause 8.1. This consequence would be avoided if one construed claims under the “Warranties” as including representations made in the warranty provisions, but again that would, in my view, be a very forced construction.

95. At [209] Mann J disagreed with the approach taken by Arnold J in *Invertec*, summarised above. Mann J considered that a proper reading of the wording of the relevant clause of the contract (clause 5) in *Invertec* should have led Arnold J to reach the conclusion that there was nothing to make the warranties into representations. He went onto say, however, that even were the wording the same, he believed that Arnold J would have reached the same conclusion, and that was an incorrect result. He said:

“For the reasons given above, I think that there is no satisfactory answer to be given by those claiming representations to have been made, to the question which has to

be asked: Why have the warranty provisions been inserted in the contract? The answer is to be found in clause 5 in each case – they are there because they are warranted. There is nothing more to make them into representations. I do not think it affects the position that in the present case, as in Arnold J’s, the parties (and in particular the warrantors) knew what was coming because drafts have been exchanged and the terms of the contract negotiated. What the warrantors knew to be coming, or more precisely knew they were going to be providing, were expressed to be warranties, not representations.”

96. Mr Lazur submitted that Mann J was wrong to criticise Arnold J. In *Invertec* the judge considered a case which relied on pre-contract negotiations culminating in the incorporation of the warranties and had no difficulty finding that these were the result of extensive negotiations and pre-contractual representations. The distinction to be drawn was that in *Sycamore* there was no reliance on pre-contractual negotiations: the case was founded exclusively on the terms of the SPA which, in that case, confined the claimant to claims for breach of contract.
97. Finally, Mr Lazur referred to the *Idemitsu* case, relied upon by the Claimants and referred to at paragraphs 58-60 above. Idemitsu’s original Particulars of Claim relied on the warranties in the agreement as representations. Following the summary judgment hearing, Idemitsu provided draft amended Particulars of Claim, which relied on the exchange of draft contracts for signature as a basis upon which it was said that the warranties were representations made prior to the formation of the contract.
98. The Deputy Judge considered the *Sycamore* and *Invertec* decisions and followed *Sycamore*, concluding that the warranties under the agreement could not amount to representations, stating at [20]:

“...if a contractual provision states only that a party gives a warranty, that party does not by concluding the contract make

any statement to the counterparty that might found a misrepresentation claim.”

99. He went on to find that the provision of an execution copy of a contract could not amount to a representation as alleged, accordingly the claim based on precontractual negotiations was rejected and summary judgment was ordered. The judge also commented that he disagreed with the approach taken by Arnold J in *Invertec*. Mr Lazur, however, submitted that in reality, there is no conflict between the authorities. Idemitsu was unable to show that the warranties were the product of precontractual negotiations, and the contractual regime provided by the express terms of the contract was sufficient otherwise to exclude claims for misrepresentation. The claimant was therefore limited to claims for breach of contract.
100. I deal with the Claimants’ responses to the Defendant’s submissions on the five authorities, insofar as they are not earlier set out above in paragraphs 58-60 above, when considering their submissions on the draft amended Defence and Counterclaim.

The way in which the Defendant now advances its case on misrepresentation and negligent misstatement

101. The draft amended Defence has reformulated the Defendant’s case. The reference to “*representations*” has been deleted from the opening words “*warranties and representations*” in paragraph 11(2) of the draft amended Defence. Further paragraphs 19 and 20 of the Defence which asserted that each of the warranties was a representation which was made with the intention of inducing the SPA and relied on by the Defendant in entering into the SPA, has been deleted.
102. Instead, a new defence and counterclaim is brought on the basis of pre-contractual negotiations at paragraphs 22A-H. Paragraph 22A states:

“As a consequence of the circumstances surrounding the negotiation and purpose of the SPA, the Claimants each owed the Defendant a common law duty to give full disclosure of all information technology, intellectual property and licencing

issues that could properly affect the operation or profitability of the Company”.

103. Paragraph 22B of the draft amended Defence opens with the sentence:
- “The Defendant will rely on the following representations as set out in the Transaction Documents in particular the disclosure bundle as pre contractual representations: ...”*
104. The misrepresentation and negligent misstatement claims do not suffer from the alleged defects which the Claimant claimed as the basis for summary judgment. The misrepresentations are tied to specific representations made in the Transaction Documents, in particular the Disclosure Bundle, which were made pre-contractually in response to due diligence requests rather than simply the contractual warranties. As can be seen from paragraphs 52-56 of the Claimants’ skeleton for the First Hearing, this was the heart of the Claimants’ objection at the summary judgment application.
105. The Defendant therefore relies on the following in support of its misrepresentation claim:
- (1) The background to the incorporation of the warranties on the basis that the warranties are representations, and
 - (2) Additional representations included in the Transaction Documents.
106. On the basis of the pleaded facts in the draft amended Defence and Counterclaim and the evidence provided by Mr Van Schriek, the Defendant has a real prospect of succeeding in a claim for misrepresentation or negligent misstatement, as long as those claims are not excluded by the express terms of the SPA. This case is distinguishable on the facts from *Sycamore* and *Idemitsu*. It is closer on the facts to *Eurovideo* and *Invertec*.
107. As to whether the parties intended to exclude claims for misrepresentation or negligent misstatement by the express terms of the contract:

- (1) In each case, it is necessary to examine carefully the terms of the relevant contract. The SPA clarifies that the parties had no intention to exclude claims for misrepresentation or negligent misstatement. There is no ‘exclusive remedies’ clause as was the case in *Bikam*. Indeed, clause 6.4.3 of the SPA expressly envisages the possibility of fraudulent misrepresentation claims.
- (2) The “No Representation” clause at clause 6.6 (recited at paragraph 1(4) above) and the “Whole Agreement” clause at 8.6 (recited at paragraph 1(5) above) of the SPA will not apply to claims which arise as a result of any fraudulent act or omission by reason of clause 6.4 of the SPA.
- (3) Additionally, as a matter of common law, it is well established that if an agreement is induced by fraud then clauses such as these will be ineffective: see *Trident Turboprop (Dublin) Limited v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm) per Aikens J (as he then was) at [42] and *J N Hipwell & Son v Szurek* [2018] L & TR 15 at [16] per Hildyard J.
- (4) Furthermore, clause 8.8 of the SPA entitled “Remedies Cumulative” emphasises that:

“The provisions of this Agreement and the rights and remedies of the parties are independent, cumulative and are without prejudice and in addition to any other rights or remedies which a party may have whether arising under statute, at common law, in equity, under contract, by virtue of custom or otherwise. ...”

- (5) A similar provision is incorporated at Paragraph 6 of Schedule 5, which states:

“Nothing in this Schedule shall prejudice, limit, restrict or otherwise affect any right, including the right to make a claim under this Agreement, or any other remedy the Purchaser may have from time to time against the Vendors either under

this Agreement, the Tax Deed or under any other document executed pursuant to this Agreement or at common law.”

This provides further clarification, this time in the context of the release of the Retained Amount, that the Defendant’s rights were not limited to Claims as defined by paragraph 5 of Schedule 3.

- (6) The Claimants rely on the entire agreement clause contained in clause 8.6, but that does not have the effect it claims:

“The Transaction Documents (including the documents and instruments referred to therein) supersede all prior representations, arrangements, understandings and agreements between the parties relating to the subject-matter thereof, and set forth the entire, complete and exclusive agreement and understanding between the parties relating to the subject-matter thereof. No party has relied on any representation, arrangement, understanding or agreement (whether written or oral) not expressly set out or referred to in the Transaction documents.”

- (7) The Defendant’s case is founded upon representations in the Transaction Documents (see the definition recited at paragraph 12(1) above and paragraph 22C of the draft amended Defence, which in particular relies upon the Disclosure Bundle) and does not conflict with clause 8.6 of the SPA:

- (a) The Defendant relies on the warranties that are representations. Although it accepts that it must prove that those representations were the result of pre-contractual negotiations if it is to succeed in its claims for misrepresentation or negligent misstatement, the language of clause 8.6 acknowledges that there are representations within the Transaction Documents that were relied on by the parties on entering the contract;
- (b) That conclusion is supported by the general principles set out above, and by clause 1.5 which states:

“The Warranties, and all other obligations, covenants and representations arising under this Agreement, given or entered into by the Vendors are given or entered into jointly and severally.” (emphasis added)

(c) Further, the Defendant relies on additional representations made during the legal due diligence process which were incorporated into the Transaction Documents in any event.

(8) As in the *Teoco* case, referred to at paragraph 31(1) and 33 above, the notification provision, which was complied with here by the 2 March Letters and A&LG letter of 9 April 2020, is the gateway which enables the misrepresentation claim to be made.

108. In those circumstances, the parties did not intend to exclude claims for misrepresentation or negligent misstatement by the terms of the SPA and the Defendant has a real prospect of succeeding with those claims at trial.

109. In the alternative, claims for fraudulent misrepresentation are not excluded by operation of clause 6.4.3 as that claim falls within the definition of “*any claim*” to the extent it arises “*as a result of any fraudulent ... misrepresentation*”. If the claim for breach of warranty is not excluded, the claim for fraudulent misrepresentation is equally unaffected.

The right to withhold or to set off against the Retained Amount

110. Paragraph 11(6) of the Defence remains unamended, it provides:

“Although the notices referred to above were given a day late for the purposes of a Claim under paragraph 5 of Schedule 5 of the SPA, the letters did give adequate notice, if notice was needed, of the material facts which form the basis of claims which were not excluded by clause 6.3.1(i) or any other express term of the SPA. In particular:

(i) The common law causes of action for negligent misstatement and/or fraudulent misrepresentation and/or the claim under the

Misrepresentation Act 1967 are unaffected by clause 6.3.1(i) or any other express term of the SPA; alternatively

*(ii) Each of the causes of action identified in the previous subparagraph and the claim for breach of warranty under the SPA arise out of a “**fraudulent act, omission or misrepresentation or ... wilful misconduct, wilful concealment, or wilful misstatement...**” by the Claimants. By operation of Clause 6.4 of the SPA, the limitation at clause 6.3.1(i) does not apply.*

The notices were given within the 5-day period for issuing an instruction to release the sums held in the Retention Account and, to the extent necessary, provide the basis for withholding that instruction and exercising a right of set off.”

111. The right to set-off the sums claimed under the Counterclaim against the sums claimed by the Claimant is also pleaded in paragraph 12(2) of the Defence, which is also unamended.
112. Despite accepting that the claims referred to in the 2 March Letters do not amount to Claims, as defined, the Defendant relies upon paragraph 6 to Schedule 5, which provides that:

“Nothing in this Schedule shall prejudice, limit, restrict or otherwise affect any right, including the right to make a claim under this Agreement, or any other remedy the Purchaser may have from time to time against the Vendors either under this Agreement, the Tax Deed or under any other document executed pursuant to this Agreement or at common law.”

113. Mr Lazur submitted that this paragraph foresaw that claims, other than a Claim as defined by the Contract, might arise and the parties were careful to ensure that the Schedule would not restrict any right or remedy arising out of any such claim.
114. The reliance by the Claimants on clause 6.2 of the SPA (recited at paragraph 12(4) above) is misplaced, because that limitation is not

effective for a claim that falls within clause 6.4 as that provision applies to all limitations and exclusions in the SPA, not merely those set out in clause 6.3.

115. In the alternative, a right of set off arises out of the claims pleaded by the Defendant. That is a right that is protected by the express terms of the contract set out above. The exercise of that legal right is an act “*required by law*” and is permitted by clause 6.2.
116. If it is right that the Defendant has real prospects of succeeding on any one of its claims, it was entitled to exercise that right to prevent the release of the Retained Amount and is entitled to do so until its counterclaims are finally resolved.

Risk of dissipation

117. If, contrary to the submissions set out above, the Court considers that it is appropriate to order the release of funds from the escrow account, the Defendant asked the Court to make an order pursuant to CPR PD 5.2 that those sums should be paid into Court to be held on escrow, pending the outcome of the Counterclaim in circumstances where the Defendant has a concern that there is a risk of dissipation of assets, as explained at paragraph 11 to 17 of Nevin 1. It is to be noted that Mr Lazur did not develop this in further submissions at the First Hearing.

The Claimants’ submissions in relation to the draft amended Defence and Counterclaim

118. Applying the authorities referred to at paragraph 27 above, the amendments to the Defence and Counterclaim should not be allowed because they do not stand a real prospect of success. The amendments do not alter the fact that there is no coherent permissible defence to the to the Claimants’ clam.
119. It is to be noted that the amended claim in fraud is now not directly pursued against all five Claimants, as is made clear at paragraph 1 the draft: “*No allegation of fraud is made against the Fourth or Fifth Claimants.*” No explanation has been given as to the basis on which it was felt able to allege fraud against the Fourth and Fifth Claimants,

which should never have made. That point is not addressed in the statements supporting the application to amend.

120. It is not correct, as contended on behalf of the Defendant, that the allegation of fraud against some of Claimants covers all of them by reason of the wording of clause 6.4.3.
121. It is not disputed, and has never been disputed, that a claim based on warranties under the SPA given fraudulently is potentially permissible and not time-barred by the SPA. However, that is not the end of the matter: such a claim must still be arguable. It cannot, for example, be based on the assertion that a warranty is a representation (even if given fraudulently). A warranty, without more, is not a representation, and simply stating that a warranty was a fraudulent representation changes nothing: see *Idemitsu* at [14] That, however, remains the Defendant's pleaded position in the draft amendment.
122. Accordingly, any such assertion that the warranties were "*statements of fact*", which the Defendant makes repeatedly, and without any basis other than that they are warranties, must plainly be struck out (see for example, the amendments to precisely that effect at 6(2) and 11(1A). Those assertions appear in the Defence (which falls to be struck out in its entirety in any event), but they have become the basis on which the Defendant's claim in fraud proceeds, as paragraph 16 of the Counterclaim repeats the Defence.
123. In Marshall 2, Mr Marshall, on instructions, denies entirely the allegations of fraud which now appear in the draft amended Defence. At paragraph 8 he refers to the due diligence process, and states:

"As part of the due diligence process, there were due diligence inquiries and replies to those, which became part of the Disclosure letter, and which itself formed part of the Transaction Documents."

He points out later in the paragraph that the confirmation at the top of the second page of the Disclosure Letter provides as follows:

“The disclosure of any matter or document shall not imply any representation, warranty, assurance or undertaking by the Vendors not expressly given in the SPA, nor will such disclosure be taken as extending the scope of any of the Warranties.”

124. At paragraph 10 and 11 of Marshall 2, Mr Marshall refers to the facts that despite having discovered the alleged fraud in early 2019 and discussed it at Board level in March 2019, the Company (a) continued to employ the Second Claimant for almost 18 months thereafter, (b) still continues to employ the Fourth Claimant.

The five authorities referred to by the Defendant

125. In relation to the five authorities relied upon by the Defendant, in addition to his earlier submissions on *Itemitsu* when opening, Mr Solomon made the following points:

- (1) In relation to the *Bikam* case, the definition of “Seller’s Warranties” included representations: see [8]. At [38] Simon J, when refusing the defendant the right to bring anything but contractual claims, held:

“I recognise that a claim for negligent misrepresentation involves an allegation of fault and involves a different measure of damages, but it seems to me that a court should at least have in mind the contractual allocation of risk and reward when deciding whether the parties are to be taken to have intended that claims for misrepresentation based on the same facts as give rise to the claim for breach of warranty are to fall entirely outside the confined liability prescribed by the SPA.”

- (2) Where there are conflicting decisions at first instance, the Court should apply the principles laid down by Nourse J (as he then was) in *Colchester Estates (Cardiff) Ltd v Carlton Industries Ltd* [1986] Ch 80 and *Re Cromptons Leisure Machines Ltd* [2006] EWHC 3583 (Ch) where at [5], having approved the approach in the *Colchester Estates* case, Lewison J (as he then was) said as follows:

“In my judgment, the time has come when the law ought to be taken as settled at first instance without the need for argument. It is all the more important in cases like this in which the need for detailed legal research and argument drives up the cost of administration to the ultimate detriment of the creditors. I hold that the approach of the latest cases, that is to say the decisions of His Honour Judge Norris QC and Pumfrey J in which the relevant earlier decisions were considered, must be taken to be the law at first instance. If that is wrong it must be put right by the Court of Appeal.”

The effect of this is that the Court is obliged to follow the approach of Mann J in *Sycamore*, Andrew Baker QC in *Idemitsu* and Teare J in *Ivy Technology*, and not the approach earlier taken by Arnold J in *Invertec*.

- (3) Reliance was placed on the second holding in the headnote of *Idemitsu* in the report at [2016] 2 CLC 297, which addressed the issue of pre-contractual negotiations and clearly summarised why the misrepresentation claim had no real prospect of success.

126. Turning to the specific amendments to the draft Defence and Counterclaim to which objection is taken:

- (1) The amendments at paragraph 1 of the Defence sets out what “claims” the Defendant has. These are not part of its defence at all. In any event, for the reasons set out at the First Hearing, the Defendant has no potential claims other than those in fraud, and is prevented from claiming under the Misrepresentation Act 1967 and for negligent misstatement;
- (2) Paragraph 9 of the Defence is a denial of paragraph 9 of the Particulars of Claim, which asserts that save as provided in clause 5 of Schedule 5 of the SPA, there is no basis for withholding the amounts standing to the credit in the Escrow Account. Paragraph 9 of the Particulars of Claim is unarguably correct. In seeking to amend paragraph 9 of the Defence, by adding the words

“particularly for its counterclaims that fall within the scope of clause 6.4”, the Defendant is seeking to maintain an unarguable stance, for the reasons set out at paragraphs 42-43 above. The additional words add nothing to the Defendant’s case which remains unarguable;

- (3) The amendments at 11(1A) to the effect that the warranties were *“statements of fact”*, and that *“the statements were made dishonestly and fraudulently”* are unarguable;
- (4) Paragraph 11(2)(xiv) asserts *“The warranties (and representations in the Transaction Documents particularised in the Counterclaim below) [....]”*. There were no *“representations”* in the Transaction Documents. As set out by Mr Marshall at paragraph 8 of Marshall 2, the Disclosure Letter provides:

“The disclosure of any matter or document shall not imply any representation, warranty, assurance or undertaking by the Vendors not expressly given in the SPA, nor will such disclosure be taken as extending the scope of any of the Warranties.”

There are no representations made at all in the Transaction Documents, and there are none given in the SPA. The Defendant’s amended claim, which is simply asserted by the Defendant and fails entirely to take into account the actual Transaction Documents, is wrong and should never have been made;

- (5) Although no objection was taken to the amendment at paragraph 11(5), which corrects the date on which a Claim had to be notified, Mr Solomon argued that it was incumbent upon the Defendant to make clear its position in relation to whether or not it was contending that a Claim had been made. I must say that I regarded the Defendant’s position to be clear from paragraph 11(6), namely that no Claim had been presented within the required period;
- (6) The assertion at paragraph 22B that the Claimants *“each owed the Defendant a common law duty to give full disclosure of all*

information technology, intellectual property and licensing issues that could materially affect the operation or profitability of the Company” is unarguable. The law is caveat emptor, hence the need for a purchaser to obtain warranties and indemnities. There is no such duty known to law;

- (7) Paragraph 22C asserts that the Defendant “*will rely on the following representations set out in the Transaction Documents (in particular the Disclosure Bundle) as precontractual representations*”. As set out above, there were no representations in the Transaction Documents, as specifically agreed by the parties. The entirety of paragraph 22C is wrong, and so, accordingly, are 22D-22H;
- (8) Clause 8.6 of the SPA provides that nothing prior to, or other than the Transaction Documents contained any representation, and is an entire agreement clause. Accordingly, given the Transaction Documents do not contain representations, the Defendant may not bring any claim for misrepresentation, whether under the 1967 Act or for negligent misstatement. Accordingly, as contended at the First Hearing, paragraphs 23-24 must be struck out, and the draft amendments to those paragraphs do not save them. Further, (save for fraud) only misrepresentations or misstatements claims brought within the contractual limitation time limit are permissible: see *Bottin (International) Investments Ltd. v Venson Group plc, Grant Scriven, Clive Lawson Smith* [2004] EWCA Civ 1368, where per Gibson LJ stated at [65]:

“To my mind it makes no commercial sense for the Agreement to impose conditions as to the giving of notice of a breach of warranty and as to the commencement of proceedings for such breach and limiting the maximum liability if Bottin was intended to be left free of those conditions and those time limits and the limits on liability by treating the same warranties as representations. Mr. Glick was, in my judgment, plainly right to submit that the obvious commercial purpose in the conditions and limits

was to enable the Warrantors to know that they would not be sued on the warranties if no notice was served in time and proceedings were not brought in time and that, if they were sued, there was a quantified limit to their liability. That purpose would be frustrated if the claim for breach of warranty could be regarded as a claim in misrepresentation.”

Mr Solomon also relied upon the decision of the Court of Session of *B.S.A. International S.A. v Hugh McLelland Irvine, John Alastair Irvine, Douglas Forbes Irvine* [2010] CSOH 78 at [12]:

“The paramount consideration, in my opinion, is the fact that the parties could not have intended to allow one party to circumvent the carefully drawn time-bar provisions by formulating their claim as one for misrepresentation rather [than] for breach of warranty.”

Accordingly, it is clear that the Defendant may not pursue claims under the Misrepresentation Act 1967 or for negligent misstatement, and the amendments to paragraphs 23 and 24 do nothing to remedy the position.

- (9) The Claimants did not oppose the amendment of the amounts claimed at paragraph 26(1) and (8), which reduces the amount claimed by over 50%, but no explanation was given as to the basis on which the amendment was made and why the earlier, higher, figure had been contained in the original Defence and Counterclaim with a signed statement of truth. An explanation should be required prior to any permitted amendment;
- (10) The Defendant’s draft amended Counterclaim still maintains a claim for damages on the tortious rather than contractual basis, or damages based on entering into the agreement rather than for breach of warranty. That is plainly wrong for the reasons given above. Further, it appears that the Defendant has suffered no loss at all to date: there is no evidence or plea that any third party has sought to

sue the Defendant for breaches of licences. Accordingly, there are no losses from breaches of any warranty, whether or not the warranty can be said to be fraudulent, and the Defendant should not be permitted to amend a hopeless claim for loss.

127. In the premises, the amendments now advanced do not assist the Defendant. They should not be permitted. Mr Solomon submitted the Defendant's Defence and Counterclaim remains hopeless, and should be struck out, and no amendments permitted.

Should the Court entertain the Defendant's further submissions on the "clean hands" argument, submitted after the conclusion of the First Hearing?

128. The Defendant submitted that, although the point could have been raised at the first hearing, the Court has jurisdiction to accept further submissions, even after judgment is handed down and until the Order is sealed: see the White Book 40.2.1 and the cases referred to therein. Mr Sinclair also relied on *Willow Corp Sarl v MTD Contracts Ltd* [2019] EWHC 1192 (TCC) at [7], as an example where further submissions were lodged after a hearing, judgment having been reserved. I note that in that case, it was after a judgment had been given in another case.

129. Mr Sinclair submitted that I should approach the question whether to admit such submissions by reference to the overriding objective. He drew my attention to the following points in favour of admitting them:

- (1) The point raised by the Defendant in its Supplementary Skeleton was a brief point of law which could be addressed concisely and without undue use of the Court's time.
- (2) The Claimants have had a full opportunity to respond to the point and are not taken by surprise.
- (3) The parties already intended to have a one day hearing before the Court to deal with the amendment application and therefore the Court's resources are not being misused.
- (4) The point raised in the Defendant's Supplementary Skeleton was a matter of importance which the Court has a duty to take into account

when considering the Claimants' application for summary judgment. The Defendant relied upon the Court of Appeal decision in *Quadrant Visual Communications v Hutchison Telephone (UK)* [1993] BCLC 442, and in particular the judgment of Butler-Sloss J, at 452, where she said at 452b:

“Such reprehensible conduct means that the plaintiffs came before the court “with ‘unclean hands’, a matter which the judge had a duty to take into account in coming to a conclusion in the exercise of his discretion.”

130. Mr Sinclair submitted that it would be wrong for the Court to determine the summary judgment application without considering whether the point raised in the Defendant's Supplementary Skeleton is valid, namely whether the Claimants come to court with clean hands and/or whether the SPA is tainted by fraud.
131. Mr Solomon urged me to refuse to consider the point. The Defendant's Supplementary Skeleton was submitted without seeking permission from the Court and without notice or forewarning to the Claimants. The “clean hands” contention is not pleaded in either the original or either version of the draft amended Defence, despite the fraud exception in clause 6.4.3 of the SPA being relied upon as early as 9 April 2020. This is to be contrasted to the *Quadrant* case where it had been argued from the outset.
132. If the point is to be taken, it must be part of the Defendant's case, and be fully and properly pleaded: see *Prudential Assurance Co Ltd v Revenue and Customs Comrs* [2016] EWCA Civ 376 at [20]-[21] per Lewison LJ. The function of a judge is to adjudicate only on the issues raised by the parties in their pleaded cases, “*rather than to carry out some wider inquisitorial function as a searcher after the truth.*” per the Supreme Court in *Sainsbury's Mastercard Ltd v Mastercard Inc and others* [2020] UKSC 24.
133. Further the Defendant relied on no evidence in support of the allegation. This last submission was rather undermined by his next point, which

was that the documents relied upon by reference to those mentioned and quoted in part in the draft amended Defence had not come to light as part of any “discovery process”. They have always been in the Defendant’s possession. No explanation has been provided as why the search for such documents had not been done earlier, when pleadings were served or before service of the first round of witness statements. The point was always open to the Defendant. It had simply failed to take it and should not be permitted to do so at this late stage, causing the disruption to which Mr Lazur himself referred at paragraph 13 of the Defendants’ Supplementary Skeleton.

The Court should consider the “clean hands” argument

134. In my judgment, in the exercise of my discretion, it is appropriate for me to consider the ‘clean hands’ point taken in the Defendant’s Supplementary Skeleton. It is common ground that it will only need to be considered if the Claimants are successful in establishing an entitlement to specific performance, all the arguments advanced by the Defendant at the First Hearing having failed, the draft amendments to the Defence have been held not to have a real prospect of success and the Court having found that there is an adequately pleaded case in fraud in the Counterclaim or the draft amended Counterclaim, which stands a real chance of success
135. Having read the *Quadrant* decision, although it is not completely clear, it does not appear that ‘clean hands’ argument was pleaded, as opposed to being simply the subject of submissions. That it probably was not pleaded is suggested by the passage in the judgment of Stocker LJ at p451c:

“Once the court is asked for the equitable remedy of specific performance, its discretion cannot be fettered. Once the assistance of the court is involved, by one of the parties in a discretionary matter, that party is bound by the general discretion of the court to grant or refuse the remedy sought...”

136. I accept that the point clearly could and should have been taken at the First Hearing, permission should have been sought to serve the Defendant's Supplementary Skeleton and the Claimants should have been put on notice in advance that the point was to be taken. These matters will be taken into consideration when considering costs, but that is not a reason, in my view, to shut them out. By the December Hearing the Claimants had been given a proper opportunity to address the point. Time had to be allocated to hear the Defendant's Amendment Application in any event and dealing with this point at the same time seemed to me an appropriate way forward. I heard full argument on the matter and I will take it into account in reaching my decision.

The Defendant's submissions on "clean hands"

137. The Defendant submitted that if the Court finds that the Defendant has adequately pleaded a case in fraud, the Court will need to consider the merits of that case in fraud in order to weigh up whether its discretion should be exercised not to grant summary judgment. For that purpose, the Court was asked to consider the emails referred to in the Amended Defence and Counterclaim, and in particular:

- (1) The emails from the First, Second and Third Claimants responding to Royal Mail's claims that the Company was using its address database without a licence; and
- (2) The email from the Second to the First Claimant sent at the time of the Due Diligence process which stated:

"As you know, we are currently using the Post Office database in a way which is almost certainly in breach of their licence terms. I am working on changing over to open-source data. This would mean that we can no longer display the house numbers in a given postcode – something that was added in the 2.4 release, to try and attract a customer who never actually bought the system. I thought that it was too risky to leave this feature in the product, given the possible serious cost to us if we are found out."

At paragraph 6 of the Defendant's Supplementary Skeleton, Mr Lazur submitted that these emails from the First, Second and Third Claimants do not change the nature of the case that was originally pleaded by the Defendant. However, the emails do significantly shift the balance away from any innocent explanation and towards a finding of fraud at this early stage of proceedings.

138. The First, Second and Third Claimants were therefore aware of the nature of the allegations made against them and the existence of these emails when they instructed their legal team to pursue the remedy of specific performance.
139. The Defendant has raised a triable issue even on the unamended pleading that the Claimants lack clean hands and/or that the SPA is tainted by fraud. In those circumstances the Court should not grant summary judgment unless and until it has resolved the question of whether the Claimants do indeed lack clean hands (and the degree thereof) and whether the SPA is tainted by fraud.
140. Mr Sinclair drew my attention to the judgment of Stocker LJ in the *Quadrant* case, where at p450j-451 he indicated that:

“in my judgment the remedy of specific performance is an equitable remedy which the court does not and should not grant to a plaintiff who is behaved in a reprehensible manner and whose hands are not clean or in favour of a plaintiff where there is a prima facie case that is the situation...” [emphasis added].

He submitted that there was a prima facie case established here, which was all that that was necessary. No substantive response to the allegations was provided in Marshall 2, other than a bald denial. The Court should therefore hold the ring until trial when the matter could be properly investigated. At trial, it would still be possible for the Claimants to argue an entitlement to specific performance.

141. Insofar as the Claimants contended that they could simply amend the prayer for relief to include a claim for damages, that would not assist

them because it would not be “a sum payable under the SPA”, but damages for breach of the terms of the SPA, and it is arguable that this would not engage the ‘no set off’ provision in clause 6.2 of the SPA.

The Claimants’ submissions on “clean hands”

142. Mr Solomon submitted that it was important to take into account the Claimants’ case on the Defendant’s allegations is set out in the Reply and Defence to Counterclaim at paragraph 7.4.3. He emphasised the following points:

- (1) Address data is just one of dozens of components which are necessary to the successful functioning of the relevant system. “Address lookup” makes up a very small proportion of what it does;
- (2) Dr Arani purchased the Address Data on a disc;
- (3) There were fundamental deficiencies in the data, and it became clear that no single source was adequate, so the Company developed a new address database based on open-source crowd sourced data, which was better for the needs of the industry. This took place in 2018, prior to the SPA.

143. The allegations now made by the Defendant are simply wrong, and tenuous. This can be seen from the following:

- (1) Despite having discovered the alleged fraud in early 2019 and having apparently discussed it at board level in March 2019, the Defendant did nothing about it in the eleven board meetings which followed, other than to note it as an outstanding action. Indeed, notwithstanding that specific allegations of dishonesty are made against the First and Second Claimants, the Defendant retained the First Claimant on its board until 21 July 2020 and the Second Claimant was retained as a software consultant until 1 August 2020. The Fourth Claimant, against whom fraud was alleged in the original Defence (now abandoned) remains in the Defendant’s employment. The allegations of dishonesty and fraud are entirely inconsistent with such an approach;

- (2) Despite purportedly being aware of the fraud, the Defendant failed entirely to state that it was relying on any fraud when it first alleged that it had a claim, in the 2 March 2020 Letters. Furthermore, it is clear that the Counterclaim (said to be worth much more than the claim) was only brought because the Claimants demanded payment. Mr Solomon submitted it is noteworthy that the Defendant's evidence fails to address any of these points, notwithstanding that at the First Hearing these points were raised on behalf of the Claimant in submissions. Very similar facts caused the Court in *Invertec* at [251]-[252] to examine the allegations made by a purchaser "*with a degree of scepticism*". I interject to note that nonetheless Arnold J concluded that *Invertec* did have valid complaints.
- (3) The Defendant's arguments to prevent payment from the Retention Account have become increasingly desperate, including rescission and some form of quasi-freezing order based on alleged dissipation of assets by the First Claimant. This is yet another attempt to escape its contractual obligations.
144. Further, even on the Defendant's case, the "*clean hands*" defence does not apply to the Fourth or Fifth Claimants, the fraud claims against them having been dropped without explanation. Such conduct does not support the Defendant's argument that the Court should exercise its discretion in the Defendant's favour. Further, the Defendant does not explain why those Claimants, who are not alleged to have clean hands, should be deprived of a remedy to which they would otherwise be entitled.
145. The suggestion at paragraph 8 of the Defendant's Supplementary Skeleton that the Claimants were obliged to provide witness evidence in response to *Nevin 2* is wrong. First, permission to serve that evidence was not sought either before or after its service. *Nevin 2* simply exhibited emails, taken out of context, and without any confirmation that there are no other relevant emails. Mr *Nevin* provided no evidence from his own knowledge and there is no evidence from anyone at the Defendant concerning the matter.

146. In any event in Marshall 2, Mr Marshall denied the allegations and set out the background as to how the allegations first emerged and why they are so incredible.
147. In these circumstances, the Claimants submitted that there is no basis on which the Court should decline to order specific performance if they were otherwise entitled to that remedy. Each case turns on its own facts and this one is far removed from the *Quadrant* case, where the Court took the view at p451g-h that “*the conduct [...] amounted at the very least to trickery*”, save that in both cases the evidence should be treated with scepticism.
148. Even were the Court to hold that there is a *prima facie* case that the First, Second and Third Claimants had unclean hands, contrary to the Claimants’ earlier submissions above, Mr Solomon submitted that the Court should still decline to exercise its discretion in favour of the Defendant.
149. The SPA is a complex agreement, being the result of negotiations by commercially experienced parties, with the benefit of expert legal advice. It is predicated on the Claimants receiving the Retention Account Monies, which represented a significant proportion of the purchase price of £6.25m, in the event there was no Claim, and the Defendant not being entitled to withhold or set off any amount, notwithstanding that all parties understood that there was a possibility that a further claim could be made based on fraud. It is simply not now open for the Defendant, relying on its own breach (i.e., its failure to pay the monies in escrow), to contend that the SPA could function in any other manner.
150. On that basis, the Court should not accede to the Defendant’s submission.

Discussion and conclusions

151. In my judgment the Claimants are entitled to summary judgment for specific performance of clause 2 of Schedule 5 of the SPA, namely payment to their solicitors of the Retained Account Money. In neither

the original, nor the draft amended Defence, has the Defendant established a Defence which stands a real prospect of success nor is there any other compelling reason why that case should be disposed of at trial.

152. I reach this conclusion for the following reasons:

- (1) As is admitted by the Defendant the 2 March Letters were sent outside the limitation period set down by clause 6.3.1 of the SPA;
- (2) In any event, in my view, those letters did not comply with the provisions of that clause because:
 - (a) they did not contain “*full particulars of the grounds on which the Warranty Claim under this Agreement is based*” as required by clause 6.3.1 of the SPA;
 - (b) they merely reserved the right to bring proceedings, rather than specifying the claim which was actually being made; and
 - (c) they did not set out an Estimated Claim Amount as required by paragraph 7.2 of Schedule 5 to the SPA;
- (3) Properly analysed, the 2 March Letters were a last-minute tactic, designed to avoid having to pay the Claimants the money in the Retention Account, in relation to matters of which the Defendant had been aware since January 2019. Significantly there was no allegation of fraud contained in the 2 March Letters.
- (4) In those circumstances, the Defendant did not establish compliance with the notification provisions as it was required to do (see *Laminates* at [31]);
- (5) Whilst it is common ground that under clause 6.4.3 of the SPA, the Defendant is entitled to bring a claim for a fraudulent breach of warranty after the limitation period contained in clause 6.3.1 of the SPA, I do not accept the Defendant’s submission that such claims (as opposed to a “Claim” which is defined as including “Warranty Claims”) have the same effect of entitling the Defendant to withhold payment of the money in the Retention Account. These were

carefully drafted provisions by experienced businessmen with the benefit of legal advice and a clear distinction is drawn in the SPA between the effect of Warranty Claims which are made within a particular period and those claims which are made outside that period. As Simon J stated in the *Ipsos* case:

“The commercial purpose includes ensuring that sellers know in sufficiently formal terms that a claim for breach of warranty is to be made so that financial provision can be made for it.”

- (6) In my view, the same rationale applies here. I accept Mr Solomon’s submission that the purpose of holding the Retained Amount in an escrow account, with A&LG as escrow agent, was to provide the Claimants with secure funds, and, subject to the provisions of 6.3.1 and Clause 5 of Schedule 5 of the SPA, for the Claimants to be able obtain the funds without the requirement of obtaining and enforcing a judgment debt.
- (7) I accept the Defendant’s submission that clause 6.4.3 also permits a properly pleaded claim for fraudulent misrepresentation (and I will deal shortly with what that constitutes), but I do not accept that any such claim would permit the Defendant to withhold payment of the Retention Account Money. That entitlement only arises in relation to Claims, including Warranty Claims. This conclusion is reinforced by the words of clause 6.2 of the SPA, which provides:

“All sums payable by any party under this Agreement shall be paid free and clear of all deductions or withholdings unless such deduction or withholding is required by law.”

I will address what is meant by “*required by law*” below.

- (8) I do not accept that the Defendant is entitled to bring a claim in negligent misrepresentation or under the Misrepresentation Act 1967, because they fall outside the scope of clause 6.4.3. and are inconsistent with clause 8.6 of the SPA. I develop those matters below. Even assuming that I am wrong on this and there is an

entitlement to bring such claims, for the reasons given in sub-paragraph (7) above and sub-paragraph (9) below, they would not prevent payment out of the Retention Account Money;

- (9) Given that there was no notification of a Claim, there is no basis for failing to comply with the mandatory requirement to release the Retention Account Money. I do not accept the Defendant's assertion in paragraph 9(2) of the Defence that paragraph 5 of Schedule 5 of the SPA includes the right to set off or withhold sums in respect of any claims under paragraph 6 of Schedule 5. That is not what the words say. The opening words of paragraph 5 of Schedule 5, which could not be clearer, state; "*If a Claim has been notified by the Purchaser to the Vendors in accordance with the provisions of clause 6 of the Agreement prior to the Release Date.*" [emphasis added]. There has been no Claim notified, whether prior to that date or at all. Furthermore paragraphs 9(3) and (4) (which is wrongly numbered (2)) of the Defence appear to assert that a right to withhold sums in the Retention Account can be exercised at any time (or in the alternative under paragraph 9(4)), within 5 business days of the Release Date, by setting off any claim (even if it is not a Claim). That, in my view, is inconsistent the language of paragraph 5 of Schedule 5 of the SPA, which I have emphasised above and paragraph 11(5) of the draft amended Defence, which states;

"It is admitted that a Claim, as defined by paragraph 5 of Schedule 5 would have to be notified in accordance with the provisions of clause 6 of the SPA prior to the Release date. Such a Claim would therefore have to be notified on or before 1st March 2020."

Why would there be such strict requirements as to time in relation to a Claim, yet none in relation to other claims, for the purposes of withholding the Retention Account Money? That makes no sense, as well as ignoring the opening words of paragraph 5. It is a defence which stands no real prospect of success.

(10) By reason of the above, in my judgment, under the terms of the SPA there is no basis for withholding payment of the Retention Account Money.

Is there a right of set off in relation to the draft amended Counterclaim?

153. I have reached the conclusion that there is no right to set off the Retention Account Money against the sums claimed in the Counterclaim, assuming for present purposes, that it is allowed to proceed on the basis that it stands a real prospect of success.

154. I reach that conclusion for the following reasons:

- (1) I rely upon the clear wording of clause 6.2 and paragraph 2 of Schedule 5 to the SPA. The wording in clause 6.2 is similar (a) to the words “*payment in full without deduction or withholding of any sort*”, which, Evans LJ said in the *BOC* case at p980b, although “*not necessarily a magic formula*” were “*words which are all familiar in contexts such as this.*” and (b) the wording of the relevant clause in the *Lotus* case which was held to be a valid set off clause.
- (2) As was made clear in the *WRM v Woods* case, the parties to a contract can exclude the remedy of a set off in relation to allegedly fraudulent misrepresentations;
- (3) Since clause 6.2 containing the “no set off” clause is not to be construed as an exclusion clause, but one which defines the payment obligation (see: *WRM v Woods*, applying *Coca Cola Finance Corp v Finsat International Limited*, referred to paragraph 53(4) above and *FG Wilson* at [83]). It is therefore not to be regarded as an exclusion for the purposes of clause 6.4 of the SPA. I therefore do not accept the defence as set out either in paragraph 11(6) or 12(2) of the Defence, nor do I accept that such a set-off is “*required by law*”, by reference to the wording in clause 6.2 of the SPA. The law did not require a set off in any of the cases referred to above.

The alleged risk of dissipation

155. There has been no formal application for a freezing order against the Claimants. Given that I have found that the Claimants are entitled to

summary judgment on their claim, this remedy is only available in relation to the draft amended Counterclaim. The Defendant is seeking a payment into court of the Retention Account Money, to be held in escrow pending the determination of the Counterclaim.

156. The material evidence is to be found at paragraphs 11 to 17 of Nevin 1. It relates only to the activities of the First Claimant. No criticisms are made of the other four Claimants, and no mention is made about what other assets they may have within the jurisdiction. I note that in paragraph 12 of Marshall 2, Mr Marshall refers to the First Claimant having invested £200,000 in the Group on 1 November 2018 and the Fourth Defendant having invested £75,000 on the same date.

157. At paragraph 16 Mr Nevin states:

“The Defendant is extremely concerned that the First Claimant may be considering, or may be in the process of moving assets out of the reach of the Defendant in the event that the Claimant faces an adverse costs decision of the Court. We will be taking this matter up with the claimants directly and may need to make an appropriate application to the Court based on the outcome of those investigations. “

158. In my judgment, the absence of a formal application is the end of the matter. However, even if a formal application had been made, the evidence is wholly insufficient to justify the course sought by the Defendant. I am not satisfied that the evidence demonstrates a real risk of dissipation on the part of the First Claimant so as to frustrate any adverse costs order, let alone any judgment on the proposed Counterclaim (which is not the basis on which Mr Nevin seeks a payment into court). Furthermore, there is no basis put forward on which the other Claimants should have their share of the Retention Account Money frozen, other than by the fact that the First Claimant is entitled to a share in it. It is really an impermissible attempt to introduce a set off by the back door.

Given the summary judgment granted in favour of the Claimants, should the draft Counterclaim be permitted to proceed?

159. I do not accept Mr Solomon's submission that since the Claimants' claim has succeeded, that the entire litigation is brought to an end, making it incumbent upon the Defendant to launch a new claim or claims, insofar as I find that it or any of them have a real prospect of success.
160. He relied upon the *Lotus Cars* at [29] for the proposition that any cross-claim could not be ventilated in these proceedings (to the extent that it is not struck out in any event). It is important, however, to examine the facts of that case, as to why the judge there reached that conclusion. As can be seen at [9] the defendant, Marcassus Sport S.A.R.L ("**Marcassus**") had brought parallel proceedings in the Toulouse Commercial Court. Those proceedings mirrored those in the counterclaim. Phillips J stated at [29]:

"If Lotus succeeds in an application for summary judgment based on clause 29.2, it would be entitled to immediate judgement without a stay. Should Marcassus then continue with its counterclaim, it would be by way of independent proceedings, such that it would be Marcassus that was pursuing exactly the same cause of action in two sets of proceedings: at that point the court might well be obliged to stay them under Article 29. The reality, of course, is that Marcassus would have no reason to pursue its counterclaim in this jurisdiction once the rationale of attempting to avoid immediate judgement and enforcement in respect of Lotus claim had been removed."

161. That is not the situation here. There are no parallel proceedings and if I find that there is a valid Counterclaim, it should remain as a surviving part of this litigation. It would be contrary to the overriding objective to deal with matters justly and at proportionate cost, to compel the Defendant to commence the same litigation as a claimant, rather than as an existing counterclaimant. I therefore reject the Claimants' submission in this regard.

Is the draft amended Counterclaim one which stands a real prospect of success?

162. I accept the Claimants' submissions that the manner in which the Counterclaim was originally pleaded was inadequate and stood no real prospect of success. In particular:

- (1) The pleading in fraud was insufficient, because there were no facts pleaded, other than the warranties themselves, the assertion that they were false and an allegation in paragraph 11(2)(iv):

“given that Dr Faramarz Shayan Arani and David Griffiths knew or ought to have know both of the existence of the Address Data and that its use by the Company was in breach of any limited licence that had been obtained, the warranties and representations were made wilfully and in the knowledge that they were false, alternatively they were made recklessly, careless as to whether they were true or false”.

- (2) On the basis of the *Paragon* case, pleading a case in fraud on the basis that someone “*knew or ought to have known*” is insufficient. That the case was not properly formulated can be seen from the excision of those very words from paragraph 11(2) of the draft amended Defence and Counterclaim, the reliance being now on actual knowledge or recklessness as set out at paragraph 11(1A), based upon the documents now set out in paragraph 11(1B) of the draft amended Defence and Counterclaim and the withdrawal of all fraud allegations against the Fourth and Fifth Claimants.
- (3) I accept the Claimants' submissions that paragraphs 19 and 20 of the Counterclaim were unsustainable, because on the basis of the decisions in *Sycamore*, *Idemitsu* and *Ivy Technology*, a warranty cannot amount to an actionable representation. Those decisions departed from the approach of Arnold J in *Invertec*. Applying the dicta of Nourse J in *Colchester Estates (Cardiff) Ltd v Carlton Industries Ltd* and Lewison J in *Re Cromptons Leisure Machines Ltd*, this court is obliged to follow the more recent decisions and not *Invertec*. I would add that I would have taken the same course, even

were I not obliged to do so. I note that in the draft amended Defence and Counterclaim, these paragraphs have been deleted.

- (4) Other than reliance on the warranties contained in the SPA, there were no pre-contractual representations pleaded, and on that ground alone the misrepresentation case was unsustainable. In my view, clause 8.6 of the SPA, the Whole Agreement clause, prevents such a claim being made. I shall consider the way in which such claims have been reformulated below.

163. I now turn to the draft amendments, beginning with the breach of warranty claim.

The reformulated fraudulent breach of warranty claim

164. As stated in paragraph 154(5) above, it is common ground that under clause 6.4.3 of the SPA, the Defendant is entitled to bring a claim for a fraudulent breach of warranty after the limitation period contained in clause 6.3.1 of the SPA. Looking at the amendments which have now been made to paragraphs 11, 18, 19, 21, 22 and 22A of the draft amended Counterclaim, in my judgment they satisfy the test of having a real prospect of success and that the reformulated fraudulent breach of warranty claim should be permitted to proceed to trial in relation to the First, Second and Third Claimants only. I do not accept the Claimants' criticisms of paragraphs 6(2) and 11(1A). The warranties relied upon in the draft amended Counterclaim contained statements of fact and are promises to which the Claimants can be held accountable by way of an action for breach of contract.

The reformulated misrepresentation claim

165. I agree with Mr Solomon's submission that paragraph 22B of the draft Counterclaim is not an accurate statement of the law and stands no reasonable prospect of success. There is no common law duty owed by the Claimants to the Defendant to "*give full disclosure of all information technology, intellectual property and licensing issues that could materially affect the operation of profitability of the Company.*" In my judgment, the protection given to the Defendant is limited to that provided in the warranties contained in the SPA, having been the subject

of detailed negotiation. That was the purpose of clause 8.6 of the SPA, which precludes any negligent misrepresentation claims or those brought under the Misrepresentation Act 1967. I do not accept that clause 8.8 of the SPA or paragraph 6 of Schedule 5 to the SPA, relied upon by the Defendant produce a contrary result.

166. Also I regard the reasoning in the *Bottin* and *B.S.A.* cases referred to at paragraph 126(8) above applies here.

167. Whilst I accept that clause 6.4.3 of the SPA expressly envisages the possibility of a fraudulent misrepresentation claim, and that clause 8.6 of the SPA will not apply to circumstances where the agreement is induced by fraud: see the *Trident* and *JN Hipwell & Son v Szurek* cases referred to at paragraph 107(3) above, the difficulty the Defendant faces is finding an actionable representation. The warranties themselves in the SPA cannot amount to representations, so as to found a separate misrepresentation claim for the reasons set out in paragraph 162(3) above. Instead, at paragraph 22C of the draft Counterclaim, the Defendant relies upon “the Transactions Documents”, recited at paragraph 12(1) above. Those include “(b) the Disclosure Letter”.

168. The difficulty I have with such reliance is that:

- (1) The Transaction Documents are those which constitute the transaction itself and therefore, following the approach taken in *Sycamore*, *Idemitsu* and *Ivy Technology*, it is hard to see how they can contain pre-contractual representations which induced the Defendant to enter into the transaction of which they form part; and
- (2) As pointed out by Mr Marshall in paragraph 8 of Marshall 2, the second page of the Disclosure Letter expressly states:

“The disclosure of any matter or document shall not imply any representation, warranty, assurance or undertaking by the Vendors not expressly given in the SPA, nor will such disclosure be taken as extending the scope of any of the Warranties.”

169. I therefore have reached the conclusion that none of the claims based on misrepresentation in the draft amended Counterclaim have a real prospect of success and should not be permitted to proceed to trial.

The claim for rescission

170. That dispenses with the claim for rescission. In any event, however, I agree with Mr Solomon’s submissions that there has been inordinate delay by the Defendant, which, as set out at paragraph 11(1)(vii) of the original Defence, became aware of the issue on which it now relies “*in early 2019*”. At no point prior to the Counterclaim has it sought to rescind the SPA (nor is there any explanation of this delay in the Defence). Further the Defendant has clearly affirmed the SPA by continuing to carry on under the SPA since completion of the SPA, and by writing the 2 March letters which expressly state that they are written “*in accordance with Sections 6 and 8.11 of the SPA*” such that they purported to bring a Warranty Claim under the SPA, and by the letter of 9 April 2020 from A&LG, which again asserted the fact that the Defendant was bringing claims under the SPA. Both delay and affirmation are fatal to a claim for rescission. Although Mr Sinclair indicated at the Further Hearing that this remedy was still being pursued by the Defendant, it was hardly mentioned in submissions and indeed the reference to it was excised from paragraph 1 of the draft amended Defence and Counterclaim.

The “clean hands” argument

171. In the exercise of my discretion, having found there is no defence to the Claimants’ claim for specific performance, I am not satisfied that this is an appropriate case to withhold payment of the Retention Account Money to the Claimants on the basis that the First, Second and Third Claimants do not have clean hands.

172. I reach that conclusion for the following reasons:

- (1) Whilst I accept that the draft amended Counterclaim now raises a properly pleaded claim for fraudulent breaches of warranty against the First, Second and Third Claimants, which should proceed to

trial, and that the *Quadrant* case stated that a *prima facie* case of unclean hands may suffice, the present case is not in the same category as the *Quadrant* case where there was a clear finding that the plaintiffs' failure to disclose the second marketing agreement was reprehensible and "*the conduct [...] amounted at the very least to trickery*";

- (2) The timing and manner of the allegations of fraud are significant and need to be examined with a degree of scepticism. I bear in mind the points made by the Claimants set out at paragraphs 143(1) and (2). There has been no explanation as to why (a) nothing was done by the Defendant about these claims for over a year, and (b) the claim in fraud was originally brought against all the Claimants and then abandoned against the Third and Fourth Claimants. At this stage, the allegations are simply allegations;
- (3) The Defendant was willing to enter into the SPA, which expressly provided for payment of the Retention Account Money to the Claimants, even where there may be allegations of fraud pending, that were not Warranty Claims brought within the time limit contained in clause 6.3.1 of the SPA: see in this regard *WRM v Wood*;
- (4) Where no allegations of fraud are now being made against the Fourth and Fifth Claimants, it would not be fair to deprive them of their share of the Retention Account Money.

Summary of conclusions

173. I therefore:

- (1) grant summary judgment to the Claimants on the Claimants' Application on the basis that neither the original nor the draft amended Defence stand a real prospect of success;
- (2) in the exercise of my discretion, decline to refuse specific performance based on the allegations that the First, Second and Third Claimants had unclean hands;

- (3) hold that the original Counterclaim did not stand a real prospect of success and would have been struck out;
- (4) grant the Defendant's Application on the basis only of the draft amended Counterclaim based on fraudulent breaches of warranty;
- (5) decline to order that the Retention Account Money should be paid into Court to be held on escrow pending determination of the permitted amended Counterclaim.

Next steps

174. I would be grateful if a draft Order could be agreed between the parties, reflecting the above conclusions, and if there are differences between them, their respective contentions should be set out, track-changed in different colours. I will hear any consequential applications on the handing down of this judgment.
175. There will have to be a timetable set for service of the amended Counterclaim, reflecting the findings set out in the Judgment and the Order on the Defendant's Amendment Application, and for service of an amended Defence to Counterclaim and any Reply, if so advised. There should then be provision for a Costs and Case Management Conference.
176. It only remains for me to thank Counsel once again for the assistance they have given me.