Neutral Citation Number: [2022] EWHC 1218 (Comm)

Case No: CL-2019-000477

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 20/05/2022

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

IVY TECHNOLOGY LIMITED	**Claimant**
- and -	
(1) MR BARRY MARTIN **(2) MR PAUL BELL**	**Defendants**

- -
- -

Edward Levey QC and Nick Daly (instructed by **Malvern Law Ltd**) for the **Claimant**

The First Defendant acting in person

Adam Solomon QC and David Lascelles (instructed by **Hill Dickinson LLP**) for the **Second Defendant**

Hearing dates: 6-20 December 2021, 10 January 2022
Draft judgment circulated to the parties: 9 May 2022

Approved Judgment

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

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Mr Justice Henshaw:

(A) INTRODUCTION

1. This judgment follows the trial of the Claimant's ("***Ivy***")'s claims against the First and Second Defendants ("***Mr Martin***" and "***Mr Bell***" respectively) for (i) fraudulent misrepresentation, (ii) breach of warranty, (iii) breach of covenant and (iv) unlawful means conspiracy.

2. With the exception of the breach of covenant claim (in respect of which it is alleged that Mr Bell is liable in conspiracy only), Ivy seeks to establish primary liability on the part of both Mr Martin and Mr Bell for each of the causes of action. Ivy relies *inter alia* on the allegation that Mr Martin was acting as Mr Bell's agent at material times.

3. The claims relate to the purchase by Ivy of 21Bet, an online gambling business ("***the Business***") made up of various corporate entities:

   i) Aureate Gaming Solutions Limited ("***Aureate***"), incorporated in Malta;

   ii) City Support Services Limited ("***City Support***"), incorporated in the UK;

   iii) Alibaba Services Limited ("***Alibaba***"), incorporated in Bulgaria;

   iv) Viktra Limited ("***Viktra Belize***"), incorporated in Belize, and

   v) Tristate Solutions Limited ("***Tristate***"), incorporated in Montenegro.

   The purchase took place by a sale and purchase agreement dated 4 April 2019 ("***the SPA***").

4. Ivy is part of the Tabella group, which is based in Prague and runs an online betting business.

5. Mr Martin is a businessman with experience in the gambling sector. Mr Martin was a signatory to the SPA and was defined in the SPA as the "*Shareholder*" of the companies sold thereunder. Mr Martin negotiated the sale with Ivy between May 2018 and the execution of the SPA in April 2019. Prior to the execution of the SPA, Mr Martin was the beneficial owner of 50% of the shares sold thereunder ("***the Shares***").

6. Mr Bell is a wealthy businessman and investor. Mr Bell had previously worked with Mr Martin in relation to other business ventures including 666Bet, a gambling business which was liquidated in 2015 after accumulating substantial debts. Mr Martin and Mr Bell set up 21Bet in 2016 after Mr Martin approached Mr Bell with the idea and Mr Bell facilitated an initial payment (described as a loan) of £1 million for the purpose. It is common ground that Mr Bell beneficially owned 50% of the shares in the companies comprising the 21Bet business.

7. Mr Bell was not named on the face of the SPA. Mr Bell said in his first witness statement that Mr Martin "*kept [him] up-to-date on the sale of the Business to [Ivy] at a high level*" and that "*as a 50% shareholder, [he] expected to receive [his] share of the balance of the sale proceeds*". Mr Bell attended one meeting with representatives of Ivy in Prague in early October 2018 ("***the Prague Meeting***") but did not otherwise communicate directly with them during the negotiation of the SPA.

(B) PROCEDURAL BACKGROUND

8. By a claim form dated 31 July 2019, Ivy claimed against Mr Martin for fraudulent misrepresentation, breach of warranty and breach of a 'non-compete' restrictive covenant under the SPA. It claimed against Mr Bell for the torts of unlawful means conspiracy and inducing breach of contract. Ivy also claimed against AXL Media Limited ("***AXL***"), a separate company owned by Mr Martin's daughter, on the basis that it was involved in procuring the breach of the restrictive covenant and/or had conspired to use unlawful means to cause Ivy damage.

9. This matter first came before the court in the context of an application for a freezing order. That order was granted by Knowles J on 29 July 2019, with the result that Mr Martin and Mr Bell (along with AXL) were prohibited from removing from the jurisdiction or disposing of assets up to the value of £4 million. I discharged the freezing order insofar as concerned Mr Bell on the return date, 26 September 2019. In my judgment ([2019] EWHC 2510 (Comm)), I explained that I did not consider that Ivy had provided solid evidence of a risk of dissipation of assets by Mr Bell such as to justify the continuation of the freezing order against him.

10. On 11 November 2019, Ivy applied for permission to amend the claim form and Particulars of Claim to allege that: (i) the SPA was made by Mr Martin on his own behalf and on behalf of Mr Bell, so that Mr Bell was also liable to pay damages for breach and to repay sums paid under the SPA; and (ii) the warranties contained in the agreement were relied on as and were intended to be representations by Mr Martin on his own behalf and/or as agent on behalf of Mr Bell.

11. The amendment application came before the court on 17 January 2020. In his judgment ([2020] EWHC 94 (Comm)) and order dated 28 January 2021, Teare J granted permission for the first amendment. He refused permission for the second on the basis that he had no reason for thinking that such a case would succeed against Mr Bell.

12. Mr Bell appealed against Teare J's order granting permission for the first amendment. Mr Bell advanced three grounds of appeal: (i) that the express terms of the SPA excluded any liability of Mr Bell; (ii) that Ivy and Mr Martin expressly contracted in the SPA on the basis that Mr Martin was the sole beneficial owner of the Shares, and therefore that Ivy was estopped from contending to the contrary; and (iii) that Ivy irrevocably elected to bring its claim for breach of the SPA against Mr Martin, to the exclusion of Mr Bell, when it commenced the proceedings.

13. Judgment was given by the Court of Appeal on 19 November 2020 ([2020] EWCA Civ 1563). The Court of Appeal dismissed the appeal, finding *inter alia* as follows:

    i) In view of the heavy burden of persuasion on a party who seeks to argue that a known and identified principal is to be excluded from a contract (per *Filatona Trading Ltd v Navigator Equities Ltd* [2020] EWCA Civ 109 ("***Filatona***") at [126]) and the potential for evidence as to the factual matrix to emerge at trial, Ivy had a real prospect of showing that the parties did not intend to exclude the liability of Mr Bell under the SPA (§§ 17-19).

ii) It was necessary to investigate the factual matrix of the SPA before determining whether an estoppel could operate to prevent Ivy from asserting that Mr Martin was not the sole beneficial owner of the Shares (§§ 30-31).

iii) The question of whether Ivy had irrevocably elected to sue Mr Martin and not Mr Bell for breach of the SPA was one of fact and was not fit for summary determination.

14. In August 2021, it was ordered by consent that Ivy's claims against AXL be discontinued and that the continued freezing injunction be discharged as against AXL. Further amendments were then made to the Particulars of Claim pursuant to the order of HHJ Pelling QC dated 2 November 2021. These amendments reflected the discontinuance of the case against AXL and sought to clarify other aspects of Ivy's case.

15. The case was heard over the course of two weeks in December 2021. Due to the worsening COVID situation and a positive test within the attendees, Mr Bell gave evidence remotely on the sixth day of the trial and the trial was thereafter heard remotely. Written closing submissions were provided in early January, with oral closing submissions on 10 January 2022.

(C) WITNESSES

16. The witnesses at trial were as follows.

(1) Claimant's witnesses of fact

17. Mr Neil Copans is the vice-president of Tabella, a technology company that provides customer services and marketing services to online casinos and is part of the same group of companies as Ivy. It appears that Tabella employees conducted the negotiations for the SPA on behalf of Ivy.

18. Mr Copans was involved in the negotiations between Ivy and the First and Second Defendants, including the Prague Meeting. He was also involved in conducting due diligence on behalf of Ivy and appears to have been in regular communication with Mr Martin. Mr Copans continued to be involved in 21Bet after its acquisition by Ivy. He was a good witness.

19. Mr Amit Hooja is the Chief Executive Officer of Tabella. Mr Hooja gave evidence that he instructed Mr Copans to carry out the due diligence process and was only involved at a "*very high level*". Like Mr Copans, Mr Hooja was present at the Prague Meeting. Mr Hooja evidently had limited recollection of the relevant events by the time of trial, but I am satisfied that he gave a truthful account of those matters and impressions which he did remember.

20. Mr Archibald Watt, an accountant, is the Chief Financial Officer of Tabella. Mr Watt joined Tabella in December 2018 and was involved from that time in the negotiations for the purchase of 21Bet. He gave evidence that he was not involved in the due diligence process in relation to the purchase of 21Bet. He was, however, closely involved in the running of 21Bet after completion of the sale. Mr Watt gave his evidence fairly and honestly.

(2) First Defendant's witnesses of fact

21. Mr Martin gave evidence in relation to the state of the 21Bet business, the negotiations for sale of 21Bet, the development of Premier Punt (a betting company acquired by AXL which is the subject of the breach of non-compete covenant claims) and the aftermath of the sale of 21Bet. He was at times argumentative or evasive in giving evidence. For the reasons which appear later, I am unable to accept significant portions of his evidence.

22. Ms Ashleigh Martin, Mr Martin's daughter, gave evidence in relation to her involvement in the 21Bet business and the development of Premier Punt. There are several emails from Ms Martin which describe her job title at Premier Punt as Customer Support Manager, but she gave evidence that she was the Chief Executive Officer of Premier Punt. Ms Martin changed her name to Ms Ashleigh Chaplin in the AXL records at Companies House on 19 January 2019, albeit she had married in 2012. I found parts of her evidence implausible, particularly regarding her role and that of others in relation to Premier Punt, and the reasons for changing her name as recorded at Companies House.

(3) Second Defendant's witnesses of fact

23. Mr Bell gave evidence in relation to the nature of the Simplify businesses, payments made by the Simplify businesses and other entities to 21Bet, the state of 21Bet's finances, his communications with Mr Martin, the Prague Meeting and Premier Punt. Mr Bell was from time to time evasive or argumentative when giving evidence, and for the reasons set out later, I am unable to accept considerable portions of his evidence.

(4) Experts

24. Ivy and Mr Bell both submitted expert reports. Mr Martin did not. By order of Mr Richard Salter QC, the expert reports were confined to the following issues:

    i) whether the alleged representations made by Mr Martin as to the financial position of 21Bet were accurate and, if not, to what extent;

    ii) whether the warranties contained in clauses 7.18 and 7.26 of the SPA were accurate and, if not, to what extent;

    iii) the value of the business as at the date of the SPA;

    iv) if the said warranties were not accurate, the value that 21Bet would have had as at the date of the SPA if they had been accurate; and

    v) the loss and damage to 21Bet (if any) resulting from the involvement (if any) of Mr Martin in Premier Punt after the SPA.

25. Mr Jeffrey Davidson, an accountant, provided an expert report and gave expert evidence on behalf of Ivy. He was a good witness.

26. Mr Andrew Donaldson, an accountant, provided an expert report on behalf of Mr Bell. During the trial, Ivy indicated that it would not seek to cross-examine Mr Donaldson on his expert report.

27. The experts also produced a joint statement dated 26 November 2021.

(D) FACTS

28. In this section, I set out the factual background, and findings on a number of key matters, with reference to the evidence given by the witnesses and the contemporary documents.

(1) 666Bet and investigations against Mr Bell

29. Mr Bell and Mr Martin met for the first time in 2013. In 2014, they set up 666Bet, an online sports betting business. Mr Bell provided capital while Mr Martin acted as chief executive officer. 666Bet's UK gambling license was suspended in 2015. Its parent company was subsequently liquidated. The demise of 666Bet was reported in national newspapers.

30. Around the same time, Mr Bell was arrested (though not charged) in the UK and the Isle of Man in 2015 in connection with an investigation into a £21 million VAT fraud and money laundering investigation. In 2017, he was the subject of a confiscation order imposed by the Deputy High Bailiff of the Isle of Man.

(2) Establishment of 21Bet

31. In 2016, Mr Martin approached Mr Bell with the idea for a new online gaming business. 21Bet was subsequently established.

32. The UK arm of 21Bet was initially operated through a UK company, Viktra Business Limited ("***Viktra***"), which was incorporated in August 2016. As explained further below, Viktra was put into liquidation in May 2018 and replaced in this role by City Support.

33. 21Bet also operated in other jurisdictions through Aureate, Alibaba and Tristate. The registered shareholder of Aureate, City Support and Alibaba was Mr Richard Hogg. This arrangement appears to have been for the purpose of obtaining and maintaining licences from gambling regulators, who generally place restrictions on the type of person who may hold a gambling licence. It is common ground that (at least in the period preceding the execution of the SPA) the beneficial owners of 21Bet were Mr Martin and Mr Bell. Mr Martin accepted in evidence that Mr Hogg did not play a day-to-day role in the management of the business.

34. 21Bet's business revenue streams were UK gaming, non-UK gaming, BetExchange (where 21Bet appears to have acted as an intermediary between betting companies rather than taking bets directly from customers) and "*VIP*". "*VIP*" business refers to income from certain high net worth individuals, to whom 21Bet appears to have provided a personalised "*off-the-books*" service. UK revenue was channelled through Viktra and later City Support, while non-UK revenue (at least predominantly) passed through Aureate.

35. 21Bet initially operated on a platform provided by FSB Technology (UK) Limited ("***FSB***"). I understand that this meant that FSB held the relevant gambling licence for 21Bet and collected the gross gaming revenue ("***GGR***") from bets placed on 21Bet's

website. Each month, FSB would subtract its fees and pass the net gaming revenue ("***NGR***") to 21Bet.

(3) Involvement of Simplify

36. The 21Bet companies received substantial funding from various companies using the name "*Simplify*". The Simplify companies are payroll and recruitment businesses under the control of members of Mr Bell's family. They were acquired in or around 2016 and include:

    i) Simplify Business Limited ("***SBL***"), which was incorporated in April 2008. Its original directors were a Ms Emma Hainsworth and a Ms Victoria Moran, who were also its shareholders until at least 18 April 2016. On 1 July 2016 they resigned as directors, and Ms Nicola Scambler (Mr Bell's daughter) was appointed;

    ii) Simplify Contracting Services Limited ("***SCL***"), of which Ms Scambler was a director and shareholder from November 2016;

    iii) Simplify Umbrella Ltd ("***SUL***"), of which Ms Scambler was a director from July 2016; and

    iv) Simplify Holdings Limited ("***SHL***"), which was incorporated in June 2016. Ms Scambler was a 50% shareholder of the company, the other 50% shareholder being Mr Bell's other daughter, Ms Melissa Bell. Ms Bell's shareholding was transferred to Ms Scambler in June 2017, and Ms Scambler was then registered as a person with a significant interest in the company. SHL acquired an interest in SBL on 18 April 2017. However, SHL's filed accounts as at 30 June 2017 and 30 June 2018 indicate that it was a dormant company with no assets.

37. Ms Scambler was diagnosed with a sarcoma in 2016. She travelled to the United States of America for chemotherapy and immunotherapy treatment regularly thereafter. Mr Bell gave evidence that she had been very ill over a period of five years, and that hospital treatments "*took over her life*" following her diagnosis. She died in December 2020.

38. Payments by the Simplify entities to Viktra and City Support in the period from February 2017 until the date of the SPA on 4 April 2019 amounted to £1,812,445. Mr Bell acknowledges that SBL loaned sums "*in excess of £3,000,000*" to 21Bet, albeit that there was no formal loan agreement or security due to the "*friendly terms*" between Mr Bell and Mr Martin. Mr Bell stated in his second witness statement that he expected to "*receive half of the profits of [21Bet] because [he] had arranged the funding."*

39. Mr Bell also gave oral evidence that he invested £300,000 of his own money in 21Bet when it was set up. When presented with Schedule 3 to the Claimant's Skeleton Argument, which showed that Mr Bell had invested £400,000 between 3 March 2017 and 22 September 2017, Mr Bell accepted that he had in fact personally invested £400,000.

40. There is a dispute between the parties as to whether Mr Bell or Ms Scambler was controlling the Simplify entities and providing financing to 21Bet. Mr Bell gave

evidence that he did not have a role in 21Bet and that his involvement was limited to protecting Nicola's interest with regard to the loans made by Simplify. He explained that he would liaise with the Simplify businesses "*several times a day*" to protect Ms Scambler's interests while she was ill, but that Ms Scambler exercised "*full control*" over those businesses.

41. There is evidence of payments to 21Bet from other companies associated with Mr Bell. BWM Developments Ltd ("***BWM***"), for example, made two payments of £11,500 to Viktra in February 2017. One of Mr Bell's companies, Hexagon Solutions Ltd, also guaranteed the lease of 21Bet's offices.

42. Mr Bell regularly referred in correspondence with Mr Martin to payments that he had made to 21Bet. He did not distinguish between payments made personally and by Simplify entities. On 10 October 2017, for example, Mr Bell said in an email that "*I am not throwing any more funds in ad hoc*". On 8 November 2018, he said that "*I have £3m in and over 3 years later it needs another £2m to stay afloat.*" In other documents Mr Bell referred to "*his*" loans and to "*my own investments in to this project*". I do not accept Mr Bell's oral evidence that by referring in some of these communications to "*my loans*" he meant only the £400,000 which he had personally lent to the business. That would, for example, be inconsistent with the reference in the 8 November 2018 email to his having "*£3m in*", and would in any event be surprising: even on Mr Bell's case, he had a strong interest in protecting the £3 million which Simplify had put into the business, not merely his own direct personal lending.

43. It is also notable that none of the disclosed documents contain any evidence of Mr Bell consulting or updating Ms Scambler (or her husband) about the status of their lending to 21Bet or about further funds which Mr Bell arranged to be paid, on a very frequent basis, by Simplify companies to or for the benefit of 21Bet. In addition, Mr Bell's evidence that his 50% beneficial interest in 21Bet had arisen from merely arranging the Simplify loans is hard to credit. In my view, by far the most probable explanation of the position is that the monies advanced by Simplify were in commercial terms Mr Bell's money.

(4) 21Bet's financial difficulties and the Viktra liquidation

44. From at least 2017, 21Bet appears to have been heavily reliant on the funding provided by the Simplify entities and/or Mr Bell. Injections of cash were frequently necessary to enable 21Bet to meet debts as they fell due. Viktra's bank statements show, for example, that the company's balance dropped to £23.97 in February 2017 before £19,850 was provided by SBL. Again in March 2017, an injection of £20,000 was required from SBL when Viktra's balance dropped to £2,200 shortly prior to paying out £19,620.

45. It was a frequent occurrence over the whole period from May 2017 to March 2019 that Mr Martin would need to ask Mr Bell for money in order to meet the Business's liabilities to a variety of third parties, such as suppliers, affiliates, rent and wages. For example, in April 2017, Mr Martin estimated that the Business would need £120,000 per month from Mr Bell for the next three months and Mr Bell explained that "*the office*" was sending Viktra £20,000 per day, as that was the daily limit of the amount that could be transferred.

46. After the end of that three-month period, on 24 August 2017, Mr Bell said that "*the office*" was sending "*3 x 20*" to cover a shortfall in relation to a Turkish payment, and that he would arrange for a further £50,000 in relation to a development relating to Betfair.

47. On 29 August 2017, Mr Bell told Mr Martin that he had "*organised 50 today to Viktra, same tmw. Will sort another 100 this week. Will sort 250 next week*" (this money was required in order for the businesses in Turkey and China to "*go live*").

48. Mr Martin in an email of 20 September 2017 to Mr Bell said:

> "I walked away from the meeting this week feeling very deflated and I am sure you felt the same. Coming to you every time, cap in hand with more news of cash flow issues is something I do not relish and I can assure you nothing will give me more pleasure then it being the other way round and asking 'where do you want the profits sent mate?'.
>
> I honestly believe this is not too far away now and thought it a good idea to give you a brain dump of the next 3 months as I really didn't do a good job on Monday of purveying the message.
>
> Let me break it down by territory and project …."

Mr Bell replied:

> "The concern is that none of the countries are actually producing now after 2 years and well over £2m invested. And 400k is needed just to stay afloat asap. We have gone backwards since April. The business model isn't working and the reliance on Affiliates has failed? September is obviously a bad month with no certainty that future months will be any better given the business model.
>
> We need to look at the next 3 months cash required as any new jurisdictions will be 6 months to a year before they become positive given previous results China on reflection hasn't worked and is probably gone. Not sure about the other new jurisdictions? Maybe we cut back to Uk TR and Scandi and prove we can make money before we start moving too far. I think this is going to cost another £500k in losses before it turns around?"

Mr Martin responded the following day:

"*It is hard to disagree with your summary, concise and on point as always …*"

49. On 22 September 2017, Mr Bell told Mr Martin that he had sent "*100*" today. On 3 October, Mr Bell told Mr Martin that he had sent "*20 today*" and would "*sort more this week*".

50. In similar vein to the exchange on 20 September, Mr Bell emailed Mr Martin on 10 October 2017:

> "It sounds good but I am not throwing any more funds in ad hoc. We are now £2.5m plus and over 2 years with no repayment plan as the main gaming business is still not break even?
>
> September was a joke. October is not that great and will we cover the overhead!
>
> Basically the business isn't performing. Tell me if I am wrong? We had discussions in April and it has not improved. Let's make a plan for how much and how long? Is China closed as this has burnt a lot of cash. The other jurisdictions don't cover much at all.
>
> I bit my lip all summer waiting for the new season to take off. It hasn't. It's October?? The BF [Betfair] potential doesn't mask this!
>
> I need a plan for both the gaming and BF as they are separate. I need to understand the overall plan as it will be £5m before long? Sorry to be blunt but I need some expectations on this business Barry.
>
> Every Fucking email dresses stuff up to then ask me for money**
>
> Tell me that I am missing something and cheer me up ?????? Sorry to be blunt but reality check."

Mr Martin responded on 11 October 2017: "*I make you 100% right and prefer we both tell it as we see it.*"

51. On 12 October 2017, Mr Martin emailed Mr Bell to request his "*permission*" to "*start the process of winding up Viktra Business*". Mr Martin stated that Catena Media Limited ("***Catena***") had passed "*our debt*" of £217,000 to a collection agency, and that there was an outstanding amount of "*circa £60k*" due to HMRC. (Mr Bell explained in his witness statement that Catena was a company which drove traffic to the 21Bet website in jurisdictions where the advertisement of online gaming was prohibited, such as Turkey and China.) Mr Martin said that "*we can lose all this debt for a fee of £5k +VAT*". He explained that "*The idea is to create a newco with bank account, not called Viktra but set up as a 'trading as Viktra' so we can continue to take in payments from FSB without any questions for their side*".

52. Mr Martin's oral evidence, supported by Mr Bell in his oral evidence, though not foreshadowed in any of their witness statements, was that the "*main reason*" for putting Viktra into liquidation was a contract with Wolverhampton Wanderers Football Club ("***Wolves***"), which would require Viktra to make an additional payment of approximately £1,000,000 on their promotion to the Premier League. Wolves achieved promotion to the Premier League in April 2018, but Mr Martin alleges that it "*looked like*" they were going to achieve promotion prior to that date. There was no reference to Wolves in Mr Martin's 12 October 2017 email to Mr Bell about the reasons for liquidating Viktra. The email did, however, touch again on the business's financial problems:

> "This month, as there are zero funds coming from FSB, there is a shortfall for salaries, rent and a few outstanding bills of such as annual renewal of our Curacao license £13k, Gloucester Rugby first quarters payment £14k etc adds up to just under £100k.
>
> From here I think we need to sit down and go over where we expect the business to be and if changes need to be made as far as reducing overheads then we can look at each area to see how we can turn this into profitability quickly."

53. Moreover, Mr Bell's response, the same day (12 October 2017), made the point in trenchant terms:

> "It will have repercussions for Richard.
>
> Yet again more surprises about hidden debts.
>
> No accounts and no control.
>
> If you think you are writing my loans off to Viktra you are Fucking kidding yourself ??
>
> You are papering over the cracks because the business has failed."

Mr Martin's reply indicated that he would not seek to write off that which Mr Bell had referred to as "*my loans*", but rather:

> "The debt to you remains with me and business, under whatever name it trades under until you are paid back in full and we come out of the other side."

Mr Martin did not, however, take issue with Mr Bell's point that the Business had failed (a point which Mr Bell repeated in his reply, again the same day).

54. Although the liquidation account includes a debt to Wolves of £168,544, neither Mr Martin's email to Mr Bell, nor Mr Bell's response, nor any other contemporaneous document to which I was referred, contained any suggestion that the Business was (as early in the season as October) contemplating the team's promotion, or that the possibility of having to pay them £1 million had anything to do with the decision to liquidate Viktra. I consider that Mr Martin's evidence to this effect, and Mr Bell's evidence in support of it, was untrue and was merely an attempt to seek to deflect attention from the obvious fact that Viktra was liquidated because it was already insolvent. Moreover, the final paragraph quoted above from Mr Martin's email, which referred to *"look[ing] at each area to see how we can turn this into profitability quickly"*, underlines the point that the business as it stood was not profitable and that both Mr Martin and Mr Bell knew that.

55. The list subsequently produced of Viktra's creditors does not indicate that any of the loans, whether from Mr Bell personally or from Simplify, were included in the liquidation; and Mr Martin did not suggest in his oral evidence that he understood that

any of Mr Bell's personal loans had been written off as part of the liquidation. I do not accept Mr Bell's evidence that Mr Martin was simply trying to pacify him by saying they would not be written off. Thus Mr Bell had three interests in the subsequent sale of 21Bet: the money he personally had lent to it, the money Simplify had lent, and his 50% beneficial interest as equity shareholder.

56. The correspondence between Mr Martin and Mr Bell during this period continued to reflect the fact that the Business was in significant financial difficulty. In an email exchange on 26 October 2017, Mr Martin informed Mr Bell of cost-saving measures that he had put in place, adding that *"You did mention you can assist with the salaries this month which is much needed so if you could send £50k over today so I can get the guys paid by the end of the week, that would be a huge help"*.

Mr Bell responded:

> "This doesn't achieve anywhere near enough to keep this business afloat?
>
> The biggest issue is that there isn't enough income to cover the current overhead and that means Sofia and London.
>
> What income are we likely to receive at the end of November given the October run rate?
>
> And what is the possibility that Catena move towards a winding up petition?
>
> At the moment I don't see any justification for putting any more money in as it looks like dead money??
>
> I thought there were funds in the wallets to pay staff wages? If not you need to address them and tell them the bad news that due to poor trading the business has run out of money. Surely they can see this as there is no income coming in?
>
> Do they all sit there thinking all is ok?
>
> You will soon test the loyalty when you tell them they aren't getting paid.
>
> I have now lost confidence that this is viable as when you look at it we don't have one single jurisdiction that pays it way after 2 years plus of endeavours.
>
> Needs a total rethink.
>
> It looks like we are hanging around hoping that some massive income stream is going to appear. It obviously isn't.
>
> Not good."

Mr Martin's reply began by accepting that "*Agreed this is a grave situation and the UK business not receiving income this month has caused a huge hole in the cash flow for sure*".

57. On 29 December 2017, Mr Martin asked Mr Bell if he would be "*ok sending £15k a week in Jan?*" – this money was needed because Viktra had agreed 'payment plans' in respect of the substantial arrears owed to Catena and HMRC, and had agreed to pay them €10,000 and £5,633 per week respectively.

58. These financial difficulties continued into 2018. In an email of 15 February 2018, for example, Mr Martin requested that £15,000 be sent to Viktra because "*2 bills that needed to be paid this week clean us out. IBM/Silverpop £9k and Iovation £4k*".

59. In an email of 21 February 2018, Mr Martin said:

> "It's been a really tough 5 months for both me and the business as I am sure you know but, out of flames I really do believe we have a phoenix. We are not fully out of the woods just yet and will come onto the areas that I need your assistance on but given we have reduced the cost base by over 50% and the revenues have been steady with a much lower cost of sale as well, I am very confident that the darker days are very much behind us. …
>
> The main issue right now is cash flow. Last month we paid off over £60k's worth of old debt plus (with your help), 6x €10k payments to Catena, and 5x £5.6k payments to the HMRC. We are literally living hand to mouth in as far as keeping our payment wallets with some balance but constantly withdrawing what we can to pay off the running costs and debts. Everyday myself Jade and Harry sit down and go through every payment wallet in detail and do what we can to keep them healthy for the players but allowing us to move funds into the bank."

60. On 26 February 2018, Mr Martin thanked Mr Bell for transferring £2,000, describing that very modest payment as a "*life saver*". The following day, 27 February 2018, Mr Martin thanked Mr Bell for "*sorting £20k from Simplify*" which was enough to "*[sort] half the salaries*", but he chased for another £20,000 for the rest of the wages, plus another €20,000 to pay Catena. On 1 March 2018, Mr Martin apologised for "*pestering*" but said that he "*really needed some more funds to Viktra (had £10k and £20k so far) and we had £40k of wages plus £20k needed for Catena*". Mr Bell said in response that "*Office sent 40 for wages*".

61. Mr Martin emailed Mr Bell on 12 March 2018:

> "To be discussed:
>
> 1. School fees (I've got one more week before the kids will be excluded)
>
> 2. New lease on house (Viktra didn't passed the credit check as it needed to be trading for 3 years +)

> 3. Cash Flow & New Product Spend
>
> 4. An approach from large Portuguese affiliate wanting to invest up to £1.5m. How that could be structured and what valuation?
>
> 5. Staff/Share option Scheme"

Mr Bell responded later the same day:

> "… On point 4 I will be blunt as any new investor will have to repay my loans before they even start looking at equity. Almost 3 years and getting up to £3m. I have been fairly patient. And the fact that you are now looking around for other investors is a fucking kick in the bollocks? So not happening…"

Mr Martin replied:

> "… Cash flow has been really difficult. Trying to find the majority of the £70k per month we have to pay to Catena and the HMRC is not an easy task, but we are getting there. Juggling the cash around from wallets is a tough and time consuming task but we got ourselves into this hole and we have to trade our way out. Catena has another 6 weeks (€60k) to go and HMRC 9 weeks (£50k). Once these are cleared, the business will have some room to breathe..."

62. On 14 March 2018 Mr Martin emailed Mr Bell:

> "Just had the school onto me again about the unpaid fees from December. Can you let me know if these can be sorted please. If it's a no then please do let me know as I will have to make other arrangements somehow. I am sorry to bring this and the moving home up in the last few days as I can't imagine what you are going through with Nicola right now but please know I wouldn't unless it was important."

Mr Bell responded the following day:

> "Your email this week to me comes across as follows:
>
> That we need further investment from elsewhere?
>
> We need to start giving equity away to staff? Who have never made any fucking money.
>
> There is £100k still needed to pay off old debts to Catena and HMRC. Oh and can I just sort out your lease and school fees?
>
> You must think I am a cunt mate ?"

63. On 21 March 2018, Mr Martin emailed Mr Bell:

> "I know you have had some pretty unscrupulous partners in the past and I can assure you I am not one of them. Even over the last 6 months where I have been really struggling financially, I have never taken a penny out of the business and have had to borrow money from friends and we are even having to sell Lisa's car to make ends meet. I have not been this skint in over 20 years. …
>
> On a personal note, I have had to personally borrow £65k from Mark Blandford (owner of FSB and major shareholder of GVC) this week as I was facing both my boys being excluded from school for non-payment plus being homeless at the end of March. I could not let that happen."

Mr Bell responded the same day:

> " … I agree that your personal stuff should not be included in business affairs I am glad that you have sorted things out.
>
> To be skint as you say you are is not good and I understand what your commitments are. 5 years of [666Bet] and [21Bet] have not produced the potential return we thought? It's not for the want of trying. …
>
> From my point of view the business has had lots of time and plenty of investment. To be blunt it has been a bad investment. But it does have potential?
>
> It needs to start generating a return for both of us as it doesn't cover its overheads let alone have a chance of paying the investment or giving you a salary to pay for monthly living expenses and school fees etc."

64. Also in March 2018, City Support was incorporated. The process of liquidating Viktra began with the appointment of a liquidator in May. Documents from the liquidation show that Viktra's debts as at April 2018 stood at £518,468.78. No Simplify business was listed among the creditors. At trial, Mr Bell appeared to suggest that this must have been a mistake on the part of the directors of Viktra. Mr Martin had, however, provided Mr Bell with a list of creditors in an email of 22 March 2018 which did not include Simplify.

(5) Initial negotiations with Ivy/Tabella

65. Mr Hooja and Mr Copans spoke with Mr Martin via Skype in May 2018, after an introduction through a mutual contact (Mr Richard Thorp) at FSB. Negotiations to buy 21Bet began almost immediately and continued between June and November 2018. Mr Copans' evidence, which I accept, was that "*[a]t Tabella we are constantly looking to acquire businesses that are profitable but where, with extra money put in, they can be made more profitable*". Mr Hooja's evidence was to the same effect. He said:

> "I had told Barry at some point during the negotiations (I do not know at which meeting) that we put in money on marketing and help grow businesses. We are marketeers and understand it well. That was our sales pitch. We bring in marketing optimization. You can build from scratch and have a negative period for a bit. But I wanted to start from a place that covered that. I would never have done the deal otherwise. I did not intend to invest in a negative business."

That evidence is plausible, and consistent with all the contemporary documents reflecting Ivy's approach to the acquisition of 21Bet; and I accept it.

66. On 31 May 2018, Mr Martin sent Mr Copans and Mr Hooja a spreadsheet setting out "*key performance indicators*" for 21Bet's businesses in 2017. These included overall GGR and NGR figures, as well as player numbers and figures for different revenue streams. The total NGR was £2,953,472, with the UK business producing £1,589,182 of that figure. In the body of the email, Mr Martin provided details of websites operated by 21Bet, languages offered and payment providers. He said "*Sorry this may be a bit piece meal but hopefully will be enough for you to at least build a picture of the business*". The spreadsheet was not linked to any underlying data.

67. Mr Copans responded the following day stating that "*I have done a quick calculation for a profit and loss summary for 2017 and my calculation says that profit for the year 2017 was GBP205,447, however you mentioned that profit for the year was around 1,8 million GBP. I would like to chat to you on this spreadsheet and also have some additional questions to ask and further info to request*". Mr Martin in cross-examination said he could not remember saying the profit for 2017 was around £1.8 million, though he did not positively deny it:

> "Q. … First of all, it's right, isn't it, you had told him in a conversation the profit was 1.8 million?
>
> A. I -- possibly, I can't remember, I'm afraid."

I agree with the Claimant that in the light of the contents of the emails, it is highly probable that Mr Martin did say that.

68. On 4 June 2018, Mr Martin sent a similar spreadsheet but giving the figure for 21Bet UK NGR as £2,984,138 rather than £1,589,182, the figure for 21Bet Exchange NGR as £890,409 rather than £672,109, and the total NGR as £4,566,727 rather than £2,953,472 ("***the 4 June Spreadsheet***"). The total costs remained £2,748,024, meaning that the difference between NGR and total costs was £1,818,703. The '21bet UK' NGR figure had been increased by including an amount of £1,405,502 purportedly in respect of VIP cash. Later, on 8 June 2018, Mr Martin told Mr Copans that he would break the £2,984,138 UK NGR figure down into VIP and non-VIP revenue, and a subsequent spreadsheet at stated £1,578,635 in respect of non-VIP revenue and £1,405,502 in respect of VIP revenue (the sum of which is £2,984,138).

69. In the meantime, in a Skype message conversation on 6 June 2018, Mr Martin and Mr Copans appear to have discussed the spreadsheets. During the conversation, Mr Martin stated "*I know the 1.8m EBIT number was correct as we have gone through this process*

4 weeks ago". The following exchange then took place between Mr Martin and Mr Copans via Skype message:

> Neil C 6/8/2018 11:40:33 AM
>
> also your new spreadsheet splits 21bet UK & 21bet VIP UK TP/Cash
>
> Neil C 6/8/2018 11:40:53 AM
>
> what is 21Bet VIP UK TP/Cash?
>
> Barry Martin 6/8/2018 4:40:03 PM
>
> So these are the UK VIP 'cash' clients.

Ivy argued in its skeleton argument and at trial that the VIP business did not in fact exist, or not to the extent that Mr Martin represented, and accordingly that the addition of the VIP numbers by Mr Martin was a means of artificially inflating 21Bet's revenues.

70. On 11 June 2018, Mr Copans produced a model for 21Bet's financial performance for 2018 which he sent to Mr Hooja. As Mr Copans stated in his email to Mr Hooja, this indicated that "*UK is making approx. 25-30k GBP profit a month but .com is way more profitable*".

71. On 11-12 June 2018, Mr Copans and Mr Martin had the following exchange:

> "Neil C 6/11/2018 9:09:29 PM
>
> Hi Barry in the morning, please can you send me the numbers for 21betuk vip / cash for 2018 (jan to April so far)
>
> Barry Martin 6/12/2018 8:31:51 AM
>
> Received. To view it, go to: https://login.skype/com/login/sso?go=xmmfallback&docid=0-weu-d9-9983e2c9fb1cbe2e52b62c85d6e0a04f
>
> Barry Martin 6/12/2018 8:32:13 AM
>
> Morning Neil, added a new column on the UK KPI tab with the numbers requested
>
> Neil C 6/12/2018 8:56:24 AM
>
> Thanks Barry
>
> Neil C 6/12/2018 8:56:30 AM
>
> will take a look
>
> Neil C 6/12/2018 9:00:40 AM

> ok I see it
>
> Neil C 6/12/2018 9:01:03 AM
>
> please refresh my memory exactly as to what this UK VIP / TP / Cash is and how it works again if you dont mind ?
>
> Barry Martin 6/12/2018 9:12:11 AM
>
> Basically it's all our VIP who may or may not be in the UK and use our telephone service for placing bets, football players that have to keep off the radar, cash punters and others that do not welcome the whole KYC process.
>
> Mostly cash but some is on credit.
>
> Barry Martin 6/12/2018 9:20:27 AM
>
> We have a partnership with a large Conceirge business that really drives this business. Lots of high rollers.
>
> … [discussion of status of VIP revenue]
>
> Neil C 6/12/2018 11:27:43 AM
>
> ok and those numbers are GGR (not NGR)?
>
> Barry Martin 6/12/2018 11:31:19 AM
>
> Yes. We are running at around 9-10% on bonuses in mostly Monthly cashbacks to selected players
>
> Neil C 6/12/2018 11:31:39 AM
>
> ok so I can take off 10% to get NGR?
>
> Barry Martin 6/12/2018 11:31:51 AM
>
> Yes."

72. In the same exchange, on 12 June 2018, Mr Martin and Mr Copans also discussed the 2018 figures. Mr Copans asked Mr Martin "*does it sound possible that you have done 2,045 million NGR [Net Gaming Revenue] in 1st 4 months across the board?*" Mr Martin replied "*yes that sounds about right as we have had a really good start to 18*".

(6) Initial Ivy offers

73. Ivy's first offer to purchase 21Bet was made by Mr Copans in an email of 19 June 2018. Ivy offered to make a fixed payment of £5.4 million, with £2.4 million paid upfront, followed by £1.8 million at the end of year 1 and £1.2 million at the end of year 2. The basis of calculation for the fixed payments was stated by Mr Copans in the fourth line of his email to be: "*GBP1,8 million x 3 (PE Ratio) = GBP 5,4 million*". The accompanying spreadsheet showed the same calculation, with "*EBITDA 2017*" stated

to be £1.8 million. Thus this offer was evidently based on the £1.8 million figure for 2017 which had originated with Mr Martin.

74. Ivy also proposed to pay 50% of yearly earnings before interest, tax, depreciation and amortisation ("***EBITDA***") growth at the end of years 1 and 2, up to a maximum of £9 million. The estimated growth figures in Mr Copans' email were £2.2 million for year 1 and £2 million for year 2, giving payments of £1.1 million and £1 million. Mr Copans stated at the bottom of the email: "***Please note*** – *Assumptions / estimates of EBITDA are used in b.2 and c.2 to illustrate the growth calculations and we do firmly believe that such growth is both realistic and achievable.*"

75. On 2-3 July 2018, Mr Martin travelled to Prague to meet with Mr Copans and Mr Hooja. In an email to Mr Bell on 3 July, Mr Martin informed Mr Bell that Ivy had made an offer to buy 21Bet and that the offer was:

> "Upfront payment of £2.4m
>
> Year's 1, 2 & 3 fixed payments of £1.8m
>
> There is also a £1m per year payment over 3 years for growing the business to 50% YoY."

76. The following day, 4 July 2018, Mr Martin explained Mr Bell that "*There were some facts that I didn't go into detail with them over a few debts we still have. This is why I would like to go back to them and say we take £2.25m upfront but we put £150k matched by them so we have £300k in the business to tidy things up and allow us to move into the operation debt free.*"

77. Mr Martin added that:

> "From a personal perspective I am very keen [to go ahead with Ivy's offer] as I know I have mentioned it before, but I am really struggling personally. A £102k PAYE tax bill, £60k I owe to Mark Blandford which I had to borrow for the rent and school fees. I can't even afford to go on holiday this year as Lisa and I only get £1900 a month and I haven't taken any money out of the business as there isn't any spare. This would be massive for me as without this or any further funding, I just don't see a way to trade my way out of this anytime soon."

Mr Bell responded that he would "*Call you in an hour to discuss*".

78. Also on 4 July 2018, Mr Martin emailed Mr Hooja, and said "*After speaking to my investor this morning, I would like to propose a slightly different deal*". The "*different deal*" was essentially the one envisaged in his email to Mr Bell. Mr Martin said that "*This £300k will allow me to pay a few bonuses to key staff, pay Richard Thorp a finders fee, provide Richard Hogg at Spinnr a lump sum bonus and secure a few of the key staff in Estonia*". Mr Martin also requested that he be paid "*an ongoing consultancy fee for my services*".

79. On 10 July 2018, Mr Martin forwarded Mr Bell an email requesting rental payments of approximately £14,000. He asked that Mr Bell "*sort the rent*". Mr Bell then asked for the "*latest on the acquisition*", to which Mr Martin replied that Mr Hooja would be visiting 21Bet and that he would keep Mr Bell updated when he knew more.

80. On 12 July 2018 Mr Copans then prepared a further document, which in his witness statement he explained as follows:

> "After Barry's visit I got a document up and running to input the 2017 and 2018 figures for the business using information sent to me by Barry. The first version was on 12 July 2018 .... The purpose of the document was mainly to verify the figures for 2017 and also to record the numbers for 2018, up to April 2018, which could then be extrapolated. There were several different verticals (divisions) included in the original sent by Barry and my detailed calculations for each vertical were as follows (NGR stands for 'net gaming revenue'):
>
> (a) Non-UK NGR: NGR was provided to me for the period 1 January 2018 to 30 April 2018 and the accumulated NGR for that period was £ 941,120 (this was just Barry's figure).
>
> (b) Exchange: Monthly NGR figures were provided for the months of January 2018 to the end of April 2018 and the NGR from this division for that period accumulated was £ 278,413.
>
> (c) UK NGR: NGR was provided for the UK side of the business for the months of January 2018 to April 2018. The total NGR for the UK portion of the business for that period was £367,615.
>
> (d) VIP Cash: The VIP Cash portion Gross Gaming Revenue ("GGR") of the business according to the numbers provided for the months of January 2018 to April 2018 was provided by Barry and the cumulated total GGR for this period amounted to £509,463. It looks as if I was given these numbers by 11 June 2018 as they first appear in a calculation I sent to Amit on that date [126, 127]. The VIP figure appears on the sheet in document [165] marked "UK KPI's" and set out the figures for the cash sportsbook and cash casino, which made up the VIP side of the business. I then estimated that an approximate 10% bonus rate should be applied to the GGR figure to get to an estimated NGR value for this period. Barry suggested 10% as being an accurate bonus ratio for this segment of the business. After deducting this bonus percentage, the estimated NGR for this division for the period January 2018 to April 2018 amounted to £458,517. All of this was provided by Barry in one spreadsheet with numbers but without corroborating evidence or calculations." (Copans 1st w/s § 8)

81. Mr Bell requested another update from Mr Martin on 18 July 2018, to which Mr Martin responded that he had "*Just landed in Amsterdam to meet the guys tonight re the sale.*"

On the same day, Mr Martin asked Mr Bell whether he had "*[got] any funds sent for the rent as yet?*" Mr Bell relied "*Shit forgot mate … Do I pay direct or to City ?*" On 19 July 2018, Mr Bell emailed Mr Martin stating "*Paid today from BWM ref Viktra*".

82. On 22 July 2018 Mr Hooja circulated 21Bet's offer internally. The offer was now framed as a fixed purchase price of £5.55 million, made up of £2.55 million upfront, followed by £1.8 million at the end of year 1 and £1.2 million at the end of year 2. The accompanying spreadsheet again referred in the first line to an "*EBITDA 2017" of "£1,800,000*". The total purchase price of £8,650,000 was expressed as an "*Effective PE Ratio*" of 4.81.

(7) Due diligence questionnaire

83. On 26 July 2018, Mr Copans sent Mr Martin a due diligence questionnaire ("***the DDQ***"). He explained that it was "*necessary to get as much information as possible so that we can perform the due diligence to the utmost detail and if all goes according to plan, the deal can go through very quickly after that.*"

84. Mr Martin then provided an initial set of responses to the DDQ on or around 30 July 2018. The information he provided included the following:

i) In response to question 1.2 ("*Details of all companies which have been in the Group since its inception. Explain the reasons (eg sale of liquidation) for any company leaving the Group since that date*"): "*Viktra Business Limited UK. Had to close the company down after losing the bank account due to gaming related transactions were identified by Lloyds Bank [sic]*".

ii) In response to question 3.1 ("*Names and addresses of all current shareholders of the Company, showing the number of shares held and whether held beneficially or otherwise (eg as trustee or as nominee), with copies of all relevant documentation (eg declarations of trust or nomineeship): "Officially all the relevant entities are owned by Richard Hogg but the true ownership is Mr B Martin & Mr P Bell 50-50 ownership*".

iii) In response to question 3.4 ("*Details of any charge, lien or other encumbrance or third party interest over any share capital or other securities of the Company*"): *"£2.5m Loan note issued against all assets by Mr P Bell*".

iv) In response to question 5.1 ("*Details of all debtors (including trade debtors) and creditor balances of Group Companies in excess of £5,000…*"): "*Evolution €98,000 Catena Media €87,600 AOEN technologies €42,500 Optival £70,102*".

85. Mr Martin accepted that he had completed the DDQ, and that Viktra had in fact been liquidated with liabilities of almost £600,000 (excluding the sums owed to Simplify companies and to Mr Bell). The suggestion that Viktra had to be closed for the reason stated in the DDQ was false. Mr Martin in substance accepted that he had lied, and said he could not remember why:

> "Q. The explanation you gave was that Lloyds had closed the account due to identifying some gaming transactions the truth as we now know because we've seen all the documents is that

> Viktra was put into liquidation because it was massively in debt to HMRC, Catena a whole load of other people and Simplify?
>
> A. Yes.
>
> Q. Why did you lie to Tabella and Ivy about the reason that Viktra had been closed?
>
> A. Maybe it was -- I actually can't remember, to be honest.
>
> Q. Let me ask you, I don't want to pre-suppose my answer; do you accept it was a lie?
>
> A. Lie? You could -- I think misinformed possibly.
>
> Q. This was a deliberate attempt on your part to mislead Ivy, wasn't it, Mr Martin?
>
> A. I wouldn't say it was a deliberate attempt, but it was definitely an error.
>
> Q. If you were being honest you would have explained that Viktra had been put into liquidation because it had massive debts; that would have been the truthful answer, wouldn't it?
>
> A. Looking back at what Mr Watt was saying this morning and yesterday, it literally made no difference.
>
> Q. The truthful answer at the time would have been we put Viktra into liquidation because it had massive debts; do you accept that?
>
> A. The truthful answer at the time ... yes, I would suppose I would have to accept that.
>
> Q. Do you accept that you knew when you filled out this document what the truthful answer was?
>
> A. I would have to concede that point as well.
>
> Q. Now can you explain to the court why you didn't give the truthful answer, but you gave a dishonest answer?
>
> A. I am sorry, I can't remember."

There is no evidence that Ivy was ever told that Viktra had in fact been liquidated due to having substantial liabilities to HMRC and others.

86. In response to a question from Mr Copans about the arrangement with Mr Hogg, Mr Martin said in an email of 30 July 2018 that "*there is a deed of trust in place between us showing the agreement we have as myself and Mr Bell as the owners of these businesses."*

87. The DDQ disclosed a £2.5m loan note in favour of Mr Bell. Mr Copans' evidence was that he did not think anything in particular of this; it was normal for an investor to fund this sort of business in the background, and he (Mr Copans) thought that the £2.5m was a historic debt; he had no idea that Mr Bell was continuing to put further monies in the business on an ongoing basis, and Ivy were never told that it was necessary for him to do so in order for the business to survive. Mr Copans in his written evidence said that if he had known that Simplify had in fact made 41 cash injections into the Business in the period from May 2018 to April 2019 totalling £671,000, "*it would have been a matter of real concern to me that a supposedly profitable business required such regular injections of cash*". In cross-examination he said:

> "Now, capital injections are an asset, which doesn't actually affect the profitability calculation, but if I was aware that there was regular injections coming into the business, what it would have meant is that the revenues either would have been overstated or the expenditure would have been understated which would have raised alarm bells."

I accept that evidence. It is an entirely plausible reading of the information provided on the DDQ response, and also inherently highly probable that Ivy did not know or believe that the business was relying on regular injections of cash from Mr Bell (or Simplify) in order to pay its ordinary operating costs and to survive. Had Ivy known that, it would have cast a completely different light on the Business, and it would have made no sense for Ivy to be valuing the Business (as the contemporaneous documents show it was, at least in terms of its offers) on the basis of any positive EBITDA at all, let alone one of £1.8m million.

(8) August 2018 negotiations

88. Discussions continued between Mr Copans and Mr Martin in early August 2018. Mr Copans explained that Mr Martin and he agreed that Mr Copans would go to London on 9 August 2018 to meet and do some due diligence on the 2017 numbers, as the intention was to make an offer based on the full year of 2017. On 3 August 2018 Mr Copans sent Barry a profit calculation for 2017 and indicated the information he needed to see in order to verify the numbers. Mr Copans expected to be able to check the figures by accessing the platform "*back end*" or back office, which would include a server, application and a database where all online gaming activity would be recorded, including the GGR and NGR figures. Mr Copans also wished to verify the financial information against the bank statements.

89. Mr Martin in his witness statement said Mr Copans had, over a period of two months, received documentation from all the components of the Business, with full access to all their gaming back offices (including FSB), all historic data back to the Business's launch, payment provider statements, invoices, HSBC bank statements and a plethora of other documents. However, Mr Copans found that it was impossible to do any kind of accurate due diligence on these numbers, for a number of reasons including the following:

i) Certain bank accounts had been closed down: Mr Copans said Mr Martin told him that he had almost no statements, and that the bank would not be prepared to give him copies of any previous bank statements as the accounts had been

closed down; Mr Martin also said Viktra Business Limited had been closed down. Mr Copans said in his witness statement that he did not remember whether Mr Martin said anything about the City Support account statements but that he did not see these until after Ivy signed the SPA in April 2019. Mr Copans accepted in cross-examination that he did in August 2018 see two months' worth of City Support bank statements, as well as Viktra bank statements relating to two months in 2017. The latter were provided by Mr Martin to Mr Copans in the form of two spreadsheets named "*Lloyds Viktra.xlsx*" and "*Lloyds Viktra 2.xlsx*" which showed *inter alia* payments in and out of the Viktra account in 2017. Several payments into the account had been blanked out, which can now be seen to relate to payments made by Simplify entities.

ii) No accounting package was used in the business: the Business and financials were run on Excel spreadsheets.

iii) The platform used for the non-UK business (Aliquantum) was antiquated, with poor reporting, and had only just been launched in the business. The previous platform had been discontinued and was initially developed and managed by one of Mr Martin's previous employees, Carlos, who had left the business and he was supposedly the only person able to obtain reports. There were therefore no reports or financial information for that part of the business for the period Mr Copans was seeking to audit.

iv) There was no financial data or other information from two other offices, Montenegro and Bulgaria, which were run by local directors.

v) A large portion of the business and the income apparently earned during the year was from VIPs, being essentially a cash business. Mr Copans said Mr Martin explained that there were people who, for various reasons, should not be seen to be gambling, such as professional sports players, and who preferred to be under the radar (or words to that effect). The sports part of the business was run on an Excel spreadsheet for the VIP cash portion and it was impossible accurately to audit that part of the business. The "*casino*" part of the business was run online through a platform.

vi) It was in general very difficult to find many of the general office expenses and invoices that had been captured in the Excel spreadsheets.

90. Mr Martin said in evidence that he had located the Viktra bank statement data for March and June 2017 in a "*spreadsheet knocking around in a Drop Box somewhere*", but that he did not have the full set of Viktra bank statements available in electronic form. That was despite the fact that at the time in question, on 25 April 2017, Mr Martin had emailed to Mr Bell bank statements for the period 27 March to 25 April 2017 in csv (spreadsheet data) form; on 8 August 2017 sent Mr Bell the bank statements for June, July and August 2017 in csv form; on 7 September 2017 Mr Martin sent Mr Bell the bank statements for August and September 2017 in csv form; and on 27 February 2018 he sent Mr Bell the statements for December, January and February in csv form. Mr Martin disclosed the csv documents in these proceedings. He claimed to have forgotten, when dealing with Mr Copans, that he had previously emailed all these bank statements to Mr Bell. In my view that is improbable, and I consider it far more likely (taken in the context of all the other evidence in this case) that Mr Martin withheld bank

statements from Mr Copans in order to minimise the information provided about Viktra's unhappy history.

91. Mr Martin also said he did not notice that the references to Simplify had been deleted in the electronic versions of the March and June 2017 bank statements sent to Mr Copans in August 2018, and did not know who had done that. That too is, in my view, unlikely: it is hard to envisage any reason why those redactions would have been made other than to reduce the visibility to Ivy of Simplify's cash injections into the business, and Mr Martin was unable to suggest any. He suggested that the documents would historically have been used "*to provide information on income to a plethora of different businesses, whether it be payment providers or wallets*", but could not explain why 21Bet might have been happy to disclose to such entities everything on the spreadsheets other than the references to Simplify.

92. Mr Martin made the point that Ivy already knew from the DDQ that Simplify had advanced money to the Business, but (a) the DDQ referred to a loan from Mr Bell, not Simplify, and (b) as noted above there is a substantial difference between what was reasonably understood to be a historic loan and regular ongoing financial support to pay routine expenses.

93. Mr Bell, for his part, relies on the fact that, on 20 August 2018, Mr Martin sent Mr Copans copies of City Support's HSBC bank statements for the period from 3 June to 2 August 2018, which included reference to payments to the company by Simplify of £9,500 on 2 August 2018, £5,000 on 5 June 2018 and £5,000 on 7 June 2018. Mr Copans in cross-examination explained that he did not know who Simplify was at that stage, and there is no evidence that the name "*Simplify*" was ever mentioned to Mr Copans prior to the Prague Meeting. Mr Copans said:

> "… 5,000, 5,000 and 9,500 is less than GBP20,000. In the space of two months in a business of a substantial size is irrelevant, it's something I would have just glossed through. I wouldn't be interested in such small amounts. It meant nothing. So in a due diligence what I would like to mention is that our job is not to go in there with a negative mindset to actually catch the client out, we are in there to go with a positive mindset. We rely on the figures and what we like to do is we look for material imperfections and misstatements that would potentially affect our business."

and that at the time he had no idea who Simplify was. I accept that evidence.

94. Reverting to the meetings in early August 2018, Mr Copans said that while he was sitting with Mr Martin during these meetings, Mr Martin sent him various documents and other items to try to verify the numbers, including a spreadsheet for the VIP bets for 2017. However, whilst Mr Copans saw no red flags, the entire pack that was provided to him was in complete disarray and insufficient, and he regarded the two days he spent in London as a waste of time. Mr Copans denied Mr Martin's suggestion that he was given "*complete access to 21bet's financial and operational data*": rather, he was given access to some information, but there were new platforms and no access to historical figures for accounts and platforms that no longer existed. Most of the information was just in Excel spreadsheets and not on a third party platform so Mr

Copans was dependent on the accuracy of what Mr Martin was telling him and the information he was providing.

95. Meanwhile, Mr Bell and Mr Martin continued to correspond about the sale and the state of the business in August. On 8 August, Mr Bell asked Mr Martin whether there had been any progress on the sale. They arranged to speak by phone. On 16 August 2018, Mr Martin emailed Mr Bell referring to another possible purchaser for the business, adding:

> "The clock is ticking so they will have to pull their finger out as the Kendo's are cracking on with the DD and they want the deal done by mid Sept. They are 75% through it but their tenacious little South African Jew boy accountant is no fool and I'm sure they will have something to say about a few of the holes in our numbers. Not that they can prove them wrong, just hard to fully get them verified. I'll keep you posted on developments."
>
> PS On the wages for this month, FSB are not being helpful so if you can send me over some funds leading up to payday that would be a lifesaver mate. Will need £54k".

Mr Martin and Mr Bell explained that "*kendo*" was a term used to refer to a person with a great deal of money, and (according to Mr Bell) who was not necessarily straight in his business dealings. Here it was used to refer to Ivy. The reference to the "*South African Jew boy accountant*" was, Mr Martin said, to Mr Copans. Mr Bell insisted that he had no idea to whom Mr Martin was referring, though he eventually accepted that it must have been someone doing due diligence on Ivy's behalf. Ivy suggests that Mr Martin's statement that Ivy would notice the "*holes*" in the numbers, which they would not be able to prove wrong but also could not easily fully verify, indicates of itself that Mr Martin and Mr Bell knew the figures put forward to Ivy were wrong. I do not necessarily read the email in that way. However, it is at least consistent with a belief that the Defendants were not in a position to demonstrate the accuracy of the numbers presented.

96. As a result of the problems referred to above, Mr Copans decided he would need to change tack. He said that following his return to Prague, he and Mr Hooja agreed that instead of using the 2017 figures, they would extrapolate the financials for the 2018 year to date, for all the different revenue streams, based on the limited information they had. Since their 'audit' was done towards the end of August 2018, they decided to extrapolate the information in the following way:

i) UK business: Mr Copans' team reconstructed the NGR on a month to month basis from the UK, by taking all the final monthly invoices as settled by FSB to Mr Martin from January 2018 to July 2018 and then extrapolating what they estimated such NGR would be for the full year of 2018. The FSB numbers were one of the few things they could verify as they could log in to the back end to see high level GGR, and they also had the e-mails from FSB to Mr Martin which he forwarded and which gave the net settlement figures.

ii) Non-UK /.com business: as noted earlier, Mr Copans had been unable to access the previous reporting for this part of the business. After much discussion, Mr

Martin mentioned that he had been in touch with the previous employee, who would be able to reproduce these reports but only in his spare time over a period of weeks and that he was going to charge Ivy something in the region of € 6,000. Mr Copans had originally wanted to get this information but ultimately decided that it would be simpler just to extrapolate using the current figures. Therefore, they decided to reconstruct reports from the new platform, from the time it launched to the date of due diligence (13 June 2018 to 21 August 2018 - 68 days), and then extrapolate those numbers for the full year 2018.

iii) VIP: The VIP cash portion of the business had not been run through any platform, although from June 2018 Mr Martin had started using Digitain (which Mr Copans understood to be sports betting software) and so part of the VIP income came through that platform and there were numbers for June and July 2018. Aside from that, Mr Copans decided that he would have had to rely on Mr Martin's figures, and he did not see anything to back up the figures for January to April 2018.

iv) Bet exchange: The bet exchange portion of the business was audited for the period from 1 January 2018 to end of July 2018 and extrapolated for the full year 2018. Mr Copans believed the figures had come from a spreadsheet prepared by Mr Martin, on a monthly basis, which could not be verified by reference to any "*back end*".

v) Costs and expenses: Mr Copans said no accounting package was used for expenses or other operational and marketing costs, and there was a lack of documentation. It was not possible to verify much of it from bank statements as, according to Mr Martin, certain bank accounts had been closed down and the bank was unable to provide copies of prior bank statements.

97. On 27 August 2018 Mr Copans produced a model in an Excel workbook, which extrapolated 21Bet's net 2018 profit as being £1,643,947.58 based on information he had received. Mr Copans explained this in his witness statement (§§ 22-25) as follows:

> "I used the information sent to me by Barry and some of his staff in August 2018 to do the extrapolation. I sent Barry a first version of the extrapolation on 23 August 2018 setting out an income statement for the business for 2018 … and then an updated version on 27 August 2018 first thing in the morning ….

21Bet EBITDA Extrapolation Calculation for 2018		
21Bet UK - NGR January to July 2018 - extrapolated for all 2018	£	609,134.47
21Bet Non-UK - NGR 13th June to 21st August 2018 - extrapolated for a full year	£	592,177.19
Exchange - January to June 2018 - extrapolated for all 2018	£	384,489.82
VIP Cash NGR - extrapolated for 2018	£	1,260,875.16
TOTAL NGR for all sectors of 21Bet - 2018	*£*	*2,846,676.64*
Less: Expenses 2018	*-£*	*1,202,729.06*
Affiliate costs	£	237,680.64
NON UK Casino Fees & Sportsbook fees - 8% of Net deposits	£	47,374.18
3rd Party Tools	£	49,941.82
Payment Costs - non UK deposits @ 4% (excl. manual deposits)	£	54,104.41
Facebook Ads	£	2,250.00
Sponsorship Fees	£	-
SMS/Email	£	19,919.90
Wiraya	£	2,672.61
Staff & Offices	£	713,785.51
Taxes	£	-
Miscellaneous (Depreciation, chargebacks, finance costs, travel, other)	£	75,000.00
NET PROFIT 2018	£	1,643,947.58

The calculation predicted net profit (EBITDA) of £1,643,947.58 for 2018. I remember showing the £1.643m extrapolation to Barry and discussing it with him on Monday 27 August 2018. Barry and I spoke by phone for about 40 minutes I believe at 9.28am (Prague time). My skype messages show the call lasted that long. We went through the summary line by line. That figure was subsequently amended slightly to £1,665,655.33. This change was after discussing certain of the expense amounts and assumptions made by me in calculating such expenses for that period. Barry advised me to amend certain expense item values and assumptions in order to give a more accurate amount for expenses for the year 2018. I had sent him the spreadsheet and asked him to look over it, make material comments and see whether anything stood out. I remember we changed the affiliate costs, and the casino and sports book fees from 8% to 15%. Payment costs for UK deposits were reduced from 4% to 3%. At the end of the day I was an outsider to the business, I wanted Barry to look at it and see if anything stood out re methodology. There were obviously judgement calls on our side, such as assuming that the income would continue on the same path for the rest of the year. But I wanted Barry's confirmation on these numbers and the methodology, assumptions and rationale. This was the revised extrapolation:

21Bet EBITDA Extrapolation Calculation for 2018		
21Bet UK - NGR January to July 2018 - extrapolated for all 2018	£	609,134.47
21Bet Non-UK - NGR 13th June to 21st August 2018 - extrapolated for a full year	£	592,177.19
Exchange - January to June 2018 - extrapolated for all 2018	£	384,489.82
VIP Cash NGR - extraploated for 2018	£	1,260,875.16
	£	2,846,676.64
Less: Annual costs	-£	1,181,021.30
Affiliate costs	£	214,596.09
Casino Fees & Sporstbook fees - 15% of Net deposits	£	88,826.58
3rd Party Tools	£	49,941.82
Payment Costs - non UK deposits @ 3% (excl. manual deposits)	£	40,578.31
Facebook Ads	£	13,641.10
Sponsorship Fees	£	-
SMS/Email	£	19,919.90
Wiraya	£	39,732.00
Staff & Offices	£	713,785.51
Taxes	£	-
NET PROFIT 2018	£	1,665,655.33

> After we had made the changes, Barry said that he was comfortable with the adjustments and the revised EBITDA. The difference was approximately only £20,000. I am informed that Barry says he had "no involvement in the calculation and assessment of the EBITDA figure". It is true that I carried out the calculations, but this was based on the information he gave to me and he confirmed that he agreed with our numbers and methodology.
>
> The total bottom line profit extrapolated for the period of 2018, which was signed off by Barry and applied to the offered purchase price was £1.665m for the year 2018."

98. In cross-examination on behalf of Mr Bell, Mr Copans was not directly challenged as to the contents of this conversation with Mr Martin on 27 August 2018, save to ask whether any record of it existed, but it was in substance suggested that he cannot have regarded Mr Martin as making any type of representation. Mr Copans' oral evidence was as follows:

> "Q. Now, you tell us in your witness statement at paragraph 24 that Barry had agreed your methodology, last words; do you see that?
>
> A. That is correct.
>
> Q. Can you show the judge where you set out your methodology to Barry and he agreed it?
>
> A. No, I can't. The reason is that it was all done over a Skype call. I sent Barry the -- my workings and my calculation, I think, if I remember correctly, it was on 27 August 2018. I sent him my extrapolated calculations and we had a long Skype call where

> we went over everything on the phone. Took Barry through it. I mentioned to him that this is your business, you understand it. I am putting the numbers together and I would like to get essentially your rubber stamp on my methodology as how to arrive at these calculations.
>
> Q. You knew that he wasn't an accountant, didn't you?
>
> A. Yes, I did he told me on many occasions.
>
> Q. Many occasions. He is emphasising to you "I am no accountant, I don't understand all the detail" that's what he was telling you, wasn't he?
>
> A. He told me that on many occasions.
>
> Q. You knew, didn't you, that he would be relying on your very detailed analysis?
>
> A. He ran the business and he was the CEO of the business. I have been a CEO of my own business in a similar type of industry. And irrespective of whether I am an accountant or he's an accountant, you should always understand the numbers. On a day-to-day basis, he knows -- Can I finish?
>
> Q. Sorry.
>
> A. On a day-to-day basis as a CEO he would understand what type of revenues the business is doing. If nothing else, he would know a monthly revenues what it is doing. If he had no idea as to what revenues were, I would be completely flabbergasted.
>
> Q. You are talking about best practice, not about what was actually happening. You knew, because you had seen it, that everything was a total mess and he was telling you repeatedly he wasn't an accountant. So you knew, didn't you, that he had no idea whether your figures were correct?
>
> A. No, I did not. I never said -- I said everything was a complete mess where I was trying to verify the limited information I had. It's very possible to make accurate assessments of the type of -- of a type of numbers, but as I was not the CEO and as I was not involved in the business and just an outsider trying to verify the information that I had, I relied on Barry to take a look at it and say does this look correct to you. Now, yes, he didn't understand Excel for sure and he was not an accountant, but I think any CEO in a business of this type would understand and have a fair idea of what the numbers would look like."

99. Mr Martin in his oral evidence accepted that there had been a call on 27 August 2018 during which he and Mr Copans had run through the figures, and he said that he had no

reason to disagree with Mr Copans' evidence that Mr Martin told Mr Copans that he was "*comfortable*" with the EBITDA figure of £1.6m. Mr Martin also said that, although he was not an accountant, the figure of £1.6m "*looked good to me*":

> "Q. They weren't just buying a brand, Mr Martin, they were buying a business which you told them was making a profit of 1.6 million and that with investment would smash it out the park. They did not know that they were buying a basket case which was being kept alive by Simplify, did they, Mr Martin?
>
> A. The 1.6 came out of Mr Copans' due diligence which again he carried out himself and I was not able to criticise his workings.
>
> Q. You told him that you were comfortable with that figure, Mr Martin?
>
> A. Yes, it looked good to me, but if you put a piece of art in front of me, not being an accountant, but if you put a piece of art in front of me, I couldn't be constructively criticising a piece of art that I was very unaware of, very similar to his workings.
>
> Q. You knew full well that when you gave them the impression that this was a profitable business it was anything but that, didn't you?
>
> A. No, I brought -- no."

100. I accept Mr Copans' evidence as to the course of the Skype conversation on 27 August, including as to what Mr Martin said to him and the degree of reliance which Mr Copans was placing on Mr Martin.

101. Mr Copans accepted in evidence that he had made an error in his calculation (entering a loss figure as a profit) which meant that the extrapolated profit was overstated by approximately £355,000. Two further errors in Mr Copans' figures were discussed during Mr Davidson's evidence: a currency error and a possible error in the Digitain (a betting software provider) figures, which together resulted in a further £325,000 overstatement in the extrapolated figures for the year. The cumulative result of these errors was accepted by Mr Davidson as potentially meaning that Mr Copans should have stated the EBITDA for 2018 as just under £1 million, rather than approximately £1.64 million.

(9) Ivy's 27 August 2018 revised offer

102. On 27 August 2018, after the Skype call between Mr Copans and Mr Martin referred to above, Mr Copans sent Mr Martin a revised offer for 21Bet. This offer provided as follows:

> "1. New EBITDA Calculation revised at GVP 1,65million
>
> a. PE Ratio = Total fixed purchase price = 3 x 1,65 = GBP 4,95 million paid as follows

> a.1. Upfront payment = GBP 1,95 million GBP
>
> a.2. Fixed Purchase price during year 1 = GBP 1,5 million
>
> The original deal was to have this fixed price be paid at the end of year 1, however we are happy with this to be paid on a monthly basis during the course of year 1 (and year 2) up to a maximum of GBP 1,5 million per year.
>
> This amount can be paid out of the VIP Portion NGR.
>
> a.3 Fixed purchase price during year 2 = GBP 1,5 million (same terms as in point a.2 above)
>
> 2. Additional year on year growth on EBITDA (50% of year on year growth) same as before for tears 1,2 & 3 up to a cap of GBP 10 million for the deal (therefore, total year on year growth capped at GBP 5,05 million (GBP 10 million – fixed price of GBP 4,95 million)
>
> 3. Additional provision if NGR for year 1 and / or year 2 falls below GBP 1,2 million per year, the fixed price of EBITDA gets revised down to what the equivalent multiple of 3 x PE Ratio is, but the cap remains at GBP 10 million for overall business"

The offer was thus expressly based on an EBITDA of £1.65 million.

103. Mr Martin responded the same day. He said:

> "Thanks for sending over this revised deal and also the time on the call this morning.
>
> As I said on the phone I think we are undervaluing the business considerably and taking the snapshot at this time of the year is not the best for our valuation. Having said that, I am still very hopeful of getting this over the line and a tweak here and there and I am hoping we can move forward.
>
> The one thing that I need a concession on is the upfront amount. It has to be £2.5m as Paul Bell is not going to agree anything less. Without his blessing, I cannot do this.
>
> I am not too concerned about getting the year 1 and 2 payments in instalments as long as we can agree the following:
>
> 1. We agree a monthly consultancy fee for myself of £15k per month paid for by Tabella
>
> 2. There are cast iron guarantees on these Yl & Y2 payments as laid out in a contract that has been fully agreed by my solicitors

> as I need to be fully comfortable that I will see something from the 4 years of hard work.
>
> Also any of these growth/bonus payments will be based on the £1.65m EBITDA and cap on these at £5m in additional payments.
>
> I'm sure the rest of the peripheral T&C's can be sorted within the contract."

104. Mr Martin kept Mr Bell informed of the negotiations over the course of 27 and 28 August. When Mr Martin forwarded Ivy's offer on 27 August, Mr Bell responded:

> "What do you think? It's basically the loan back plus £lm each.
>
> The risk is we see the first payment then nothing else as once they have control they will see all the numbers?
>
> The alternative is that the current business needs funding?
>
> There is also the Premier alternative?
>
> My initial reaction is tell them they are miles off
>
> Shall we have a call later?"

Mr Bell suggested in his oral evidence that his reference to when Ivy "*see all the numbers*" referred to the future performance of the business rather than historic figures. However, the numbers Ivy would see "*once they have control*" would be the existing numbers, not future numbers. I consider his response to indicate a fear that Ivy would realise that the business was not as it had been represented to be.

105. Mr Martin's answers in cross-examination about this email to him from Mr Bell were evasive:

> "Q. Look, now, please, at 561. You forward it to Paul and he says to you: "What do you think? "It's basically the loan back plus £1m each." The risk is that we see the first payment then nothing else as once they have control they will see all the numbers?" Now, why would it be that once Tabella -- once Ivy saw the numbers, why was there a risk that you would then not receive the two fixed payments of 1.5 million? Why was that a risk?
>
> A. This is Paul's comment, right?
>
> Q. I see. So you don't know why he was saying to you that there was a risk that Ivy would refuse to pay the two fixed payments?
>
> A. Actually, I thought the risk was more around Paul's -- and mine actually -- not being very trusting given the make-up of the Tabella group.

> Q. Look at the words on the page, Mr Martin. "The risk is we see the first payment, then nothing else as..." as, in other words because, "once they have control they will see all the numbers." So what was -- did you understand Paul meant by that when he said: the risk is that once we saw the numbers, we Ivy, wouldn't pay anything more? What did you understand by that?
>
> A. You'd have to ask Paul that.
>
> Q. Are you able to tell the judge what you understood at the time when you received the email that he meant by it, or was it just completely baffling to you and you didn't understand?
>
> A. No, it wasn't baffling.
>
> Q. So what did you understand?
>
> A. Obviously there was a lot of investment, but yeah, I'm not sure actually what he meant by it, to be honest.
>
> Q. You are not telling the truth when you say to my Lord that you didn't understand what he meant by that, are you?
>
> A. I'm not sure -- I'm not sure it's obvious what Paul meant.
>
> Q. You understood that what he meant was the numbers -- we've put forward numbers which don't stack up and when they see the truth, they won't pay even the minimum amount.
>
> A. You are paraphrasing quite a bit there.
>
> Q. I am, but I am trying to understand, because you are not -- I am trying to suggest to you what I think you would have understood Paul to have meant.
>
> A. That is -- that's possibly a way you could comprehend that line.
>
> Q. Is it the way you understood it at the time?
>
> A. Maybe not as much as he did.
>
> Q. Why did you understand that Paul thought there was a risk that once we saw the numbers we wouldn't pay anything more?
>
> A. I'm not sure."

106. Mr Martin responded to Mr Bell's email stating that he was "*in 2 minds*":

> "One is that the biz needs around 200k to clear some debts and then another 300k to enable us to move it forward. Do we punt it out to them and asset strip what we need for Bethappy and

> Premier Punt and go again? If we can get any funds going forward then see it as a bonus?
>
> UK is doing really well right now and our costs are really low so a little injection could see things start to increase further.
>
> The other side is there are over 6 interested parties now in the biz and even though the DD may not stand up to rigorous scrutiny, there are some non gaming people taking a look and they may not be able to uncover what the kendos did. And basically, they are getting our biz to pay us back over 3 years and that is even if we see a penny."

Asked about the last sentence quoted above, Mr Bell said he thought Mr Martin meant merely that Ivy would not make the payments based on future profits. When it was suggested that some of the future payments were fixed, he made the point that it was August and he was on holiday (which he was).

107. Later that day, Mr Martin sent another update on the negotiations. He also asked Mr Bell for money, stating that "*We need a little more cash for the wages if possible please*", and "*a few bills we need to sort if you can help out*". Mr Martin said £32k had been sent for the wages, but another £20k would be needed to complete the salaries for the month. Mr Bell responded to Mr Martin's summary of the negotiations by saying:

> "Let's have a chat tmw mate
>
> I just need to understand where we are going with this and look these people in the eye
>
> I don't think we will see any more funds after the initial payment and that will mean the other fellas getting involved as I don't see how we can tie it up with Legal's?
>
> We are in for £2.8
>
> 3 years down the Line
>
> And you haven't earned for a year.
>
> It's a difficult decision either way
>
> What's your thoughts as it doesn't generate as much as you needed to sort your stuff?"

As to Mr Bell's repetition here of the point about seeing nothing after the initial payment, Mr Bell in cross-examination again made the point about future earnings, then resorted to the fact that he was on holiday. In this instance, however, Mr Bell was the author of a substantive message to Mr Martin, whether or not he was on holiday. It is true that § 3 of Ivy's revised offer meant that, in certain circumstances, the otherwise fixed payments for Years 1 and 2 could be revised downwards, but the Business's performance would have had to be very poor for the Defendants to receive nothing at all over and above the initial £1.95 million. I consider the more realistic view to be that

Mr Bell was again indicating concern that Ivy would find that even the current earnings were not as they were being portrayed.

108. Mr Martin replied:

> "I'm torn too mate. This is the only real offer on the table but having calls every day with guys who seem to be very interested. Just worried that after any in depth DD, our numbers won't stand up.
>
> I've never sold a biz before so not sure what can be done in the contract to give us some peace of mind in getting paid Y1 and Y2.
>
> Maybe drag our heels on this deal and see where we are end of Sept? Or we both fly to Prague and you can meet the guys and get a flavour of what is on the table?"

109. Following various internal discussions, Mr Copans sent a revised offer to Mr Martin on 30 August 2018, referring to concerns about the "*sustainability of the VIP Cash portion*" and proposing a reduction in the purchase price if the VIP cash portion fell below £200,000 in subsequent years. Mr Copans noted that "*we are paying a multiple of 3 x on this part of the business, which is a high multiple based on the fact that we know very little about this part of the business nor know anything about how to control it or maintain the existing numbers.*"

110. Around the same time, Mr Martin appears to have proposed to Mr Bell that they meet jointly with Ivy in Prague.

111. In the meantime, Mr Martin's requests to Mr Bell for money to pay regular overheads continued. On 6 September 2018, only a few weeks before the Prague Meeting, Mr Martin was chasing for more funds – "*really need these please if possible*". Mr Bell asked Mr Martin to remind him what needed paying and, in response, was told: "*so we have £14k left on salaries plus another £30k needed for other bills such as Evolution 10k, Catena 10k and Digitain 10k*".

(10) Prague Meeting 1 October 2018

112. A meeting took place between Ivy and 21Bet in Prague on 1 October 2018. It appears to have lasted approximately two and a half hours. Mr Copans, Mr Hooja, Mr Bell, Mr Martin were present, as were other Ivy representatives. There appear to be no notes or minutes of the discussions.

113. Mr Bell has given evidence that he was present in order to "*support*" Mr Martin and determine whether Ivy were serious about purchasing 21Bet. He also said that his purpose was to protect his daughter and ensure that Simplify's debts were paid. He stated in his witness statement that he told Ivy during the Prague Meeting that his interest was "*limited to getting the loans repaid to SBL for Nicola's benefit.*"

114. Mr Hooja's evidence in his witness statement for trial was that he did not remember much of what was said at the meeting. He knew Mr Copans had carried out some due

diligence in August and calculated an EBITDA figure of £1.65m; recalled that Mr Martin considered the EBITDA to be higher but said he could agree to £1.65m: Mr Hooja said he thought Mr Martin had said that at the Prague Meeting although he was not entirely sure. He was sure that someone on the 21Bet side said that the Business was worth more than Ivy was paying, and that the clear impression Ivy were given was that the Business was profitable but that with further investment in marketing from Ivy it could be more profitable. Mr Hooja said the 21Bet side said they were sure they were going to make £1.6m but were in growth mode and might do more next year; and Mr Martin said that with Ivy's investment in marketing they would "*smash it out the park*".

115. Mr Hooja recalled Mr Bell stressing to Ivy that he wanted them to get close to £10m for the business, a figure derived from a multiple of the EBITDA figure, and saying that once Ivy were in control of the business they could affect EBITDA, so the earn-out could not be based purely on EBITDA. As a result, there was discussion about a formula based on NGR along with EBITDA, which Mr Copans and Mr Hooja said they would discuss and reflect in a revised offer. His evidence on this point gains support from the fact that that is what Ivy then did: see § 147 below.

116. Mr Hooja said Ivy were aware that Mr Bell had lent the business £2.5m, but that it was certainly not mentioned that he was continuing to put money into the business.

117. Mr Hooja was cross-examined about his earlier statements and the development of Ivy's case about the Prague Meeting. In his first written evidence, an affidavit dated 3 August 2019 in support of Ivy's application for freezing orders, Mr Hooja dealt only briefly with the negotiations, and did not make specific reference to the Prague Meeting. He said Ivy was repeatedly told by Mr Martin that the EBITDA of the Business in 2018 was £1.6 million, and that that was based on figures provided by Mr Martin to Mr Copans on 27 August 2018 for the four income streams of the business, extrapolated for the full year.

118. Mr Hooja also made a first witness statement, dated 30 August 2019, in opposition to Mr Bell's application to set aside the freezing order against him. In the meantime, Ivy's original claim form and Particulars of Claim had been served, alleging misrepresentations by Mr Martin though not Mr Bell. Mr Hooja's first witness statement did address the Prague Meeting (to which Mr Bell had referred in his own evidence). Mr Hooja said Mr Martin had by then provided his information about the Business's EBITDA, and that the EBITDA figure of £1.6 million was the subject of discussion at the Prague Meeting:

> "6. The EBITDA figures of £1.6 million were obviously known at the time and they were the subject of discussion as the purchase price of the deal was based on a multiple of EBITDA and so was the possible profit share.
>
> 7. The meeting and the discussion of all present proceeded on the clear basis that 21Bet was a profitable business, from which Mr Martin would be able to earn considerable sums in earn-out, and, obviously, the Claimant would earn still more in profit.
>
> 8. Mr Bell was not in any way taken aback by this or unaware of the EBITDA that was central to the discussions. There was never

> any suggestion from Mr Martin or Mr Bell that those figures were inaccurate or that there was any doubt over the profitability of 21Bet. Instead he participated in the discussions on the basis of the profitability of 21Bet and the EBITDA figures. He seemed to be concerned to advise Mr Martin and get him the best deal."

119. Mr Hooja said in oral evidence that Ivy did rely on representations by Mr Bell, and was not sure why that was not set out in his 3 August 2019 affidavit. As to the Prague Meeting, he said he did not remember specifically what was said but remembered the gist. The gist was that there were active negotiations about the price and how the mechanics would work, and how the earn-out based on EBITDA might affect the future earn-outs. He was sure that Mr Martin or Mr Bell – he could not remember for sure which of them – said the business was profitable or self-sustaining from its revenue; and that Mr Martin would be able to earn considerable sums under the earn-out provisions.

120. Mr Bell submitted in closing that Mr Hooja's first witness statement did not allege that Mr Bell himself made representations. However, the paragraphs from that statement which I have quoted in § 118 above, plainly state that Mr Bell participated in discussions at the meeting about and on the basis of the business's profitability and the EBITDA figure of £1.6 million. That evidence is consistent with Mr Hooja's witness statement for trial and his oral evidence. I do not consider it undermined by the fact that the brief account of the facts given in Mr Hooja's affidavit in support of the freezing orders did not deal with the Prague Meeting.

121. Mr Copans said the main purpose of the Prague Meeting was to have a brainstorming session to finalise and agree on the purchase price of the deal. He recalled Mr Bell introducing himself and explaining that most of his money had come from his payroll business and, Mr Copans thought, mentioning the name Simplify.

122. Mr Copans said the EBITDA that had been calculated was not a specific topic of conversation as it had already been agreed, and the focus was more on the growth and the remuneration and the calculation of Mr Martin's earn-out. However, he said, the basis of the whole meeting was that the business was profitable and was expected to generate significant profits in the future. Also, "*the discussions about the overall purchase price (not just the upfront payment) were on the basis of EBITDA multiples. We had made clear that overall we would be happy paying five times EBITDA but the issue was how to carve that up. So the £1.6m figure for EBITDA was acceptable to all parties*".

123. Mr Copans said Mr Martin in the meeting was very positive about the business, on numerous occasions he said that once Tabella came on board "*we would smash it out the park*"; and that Mr Martin "*also mentioned that there was the potential to make a lot more than £1.6m in the years to come if money was put into marketing*".

124. Mr Copans said both Mr Martin and Mr Bell spoke at the meeting, though Mr Bell probably did more of the talking about the mechanism for calculating the purchase price and, Mr Copans thought, mentioned the £1.6m EBITDA figure in that context, but Mr Copans could not specifically remember. Mr Bell had said his role was "*in getting the best deal for [Mr Martin]*" as Mr Martin was continuing to run the business. There was discussion of various options regarding Mr Martin's profit share.

125. Mr Copans said Mr Bell seemed happy to let Mr Martin do most of the talking and he certainly did not say anything to suggest that he disagreed with Mr Martin's positive assessment of the profitability of the business. One point of discussion was the suggestion that the earn-out should be based on a percentage of NGR and not only EBITDA. Mr Bell was concerned that the EBITDA for the three years after the sale would be minimal or could be in a loss-making situation as Ivy might overspend, which could impact on any future earn-outs calculated by reference to EBITDA. It was agreed that the parties would seek to agree a formula for this.

126. Mr Copans said the parties spoke for a few hours at Ivy's office and then went for lunch at about 1pm at a restaurant, where the conversation continued for 2 hours or so. His recollection was that the discussion in the office was more general and that the main details of the conversation took place at lunch.

127. In cross-examination it was suggested to Mr Copans that no figure for EBITDA was mentioned at the meeting, in a passage which it is necessary to quote at some length:

> "Q. Am I right in thinking, aren't I, that EBITDA wasn't actually a specific topic of conversation in Prague?
>
> A. It would have been. Of course it would have been.
>
> Q. You can't remember, can you, whether the figure of 1.6 EBITDA was mentioned?
>
> A. So the entire meeting --
>
> Q. Mr Copans, can you remember whether the figure of 1.6 EBITDA was mentioned in Prague?
>
> A. It would have been mentioned, of course.
>
> Q. You can remember that?
>
> A. I can remember that it would have been mentioned – can I clarify, please, my Lord?
>
> MR JUSTICE HENSHAW: Yes.
>
> A. So the entire basis of the meeting was to come to a purchase price, purchase price for the business. We needed to get Mr Bell and Mr Martin and myself and Mr Hooja around a table to try and finalise what we thought was a fair purchase price of the business. Everyone at that meeting knew that purchase price was based on a multiple of EBITDA. It's inconceivable to think that I would not have mentioned the amount 1.6 as the basis for the calculation of how the purchase price was agreed.
>
> MR SOLOMON: So let me be very clear about this. You are telling the judge now that you can specifically remember that the figure of 1.6 EBITDA was mentioned in Prague?

A. I cannot remember the meeting verbatim as it was three and a half years ago, but I am very certain that the discussion would have mentioned that the multiple of the calculation for the purchase price would have been the basis as a multiple of the EBITDA calculation of 1.6 million.

Q. Very certain the discussion would have mentioned the purchase price being a multiple of the EBITDA of 1.6?

A. That's correct.

Q. So therefore the figure of 1.6 EBITDA must have been mentioned, mustn't it?

A. Yes.

Q. And you know that, that's your evidence, is it?

A. I remember it being said. Can I say verbatim that everything from that meeting word for word –

Q. I am not asking you about everything, I am asking you specifically about 1.6 EBITDA?

A. Yes.

Q. Is your clear recollection now that 1.6 EBITDA was mentioned?

A. It would have been.

Q. Yes. Thank you. The reason I am pushing you on this, Mr Copans, is because your witness statement says you cannot specifically remember that point. Have a look, would you, at paragraph 34, page B14. You say: "At the meeting both Barry and Paul spoke although Paul probably did more of the talking about the mechanism for calculating the purchase price and so I think he mentioned the 1.6m EBITDA figure in this context but I cannot specifically remember." Can you explain to the judge why, when you were writing your witness statement, you couldn't specifically remember that but now you are certain of it?

A. I can't explain it.

Q. Is it because the truth is it wasn't mentioned, Mr Copans?

A. I cannot specifically remember exactly what was said word for word, but I remember that the basis of the calculation that we used would have been 1.6 million.

> Q. No one in the meeting said there was a current EBITDA of 1.6 million, did they?
>
> A. I am pretty certain that it would have been discussed at the meeting.
>
> Q. No one at the meeting said that 21Bet was profitable or self sustaining on its revenue?
>
> A. We -- it would have been discussed, I imagine, that the business was doing well and that it was a profitable company it would have been assumed.
>
> Q. Were there conversations that were had outside Mr Bell's earshot about this?
>
> A. I don't remember the specifics word for word of how that meeting happened. Mr Bell might have gone to the bathroom at some particular point in time, so would have I. I don't remember exactly what happened word for word in that meeting.
>
> Q. No one said that Mr Martin would be able to earn considerable sums under the earn-out provisions in the SPA, did they?
>
> A. Word for word, as I mentioned many times, I cannot remember the meeting word for word. I have a good recollection of the semantics of the meeting and I remember what was said, but if you ask me word for word for that meeting, it was three and a half years ago, I can't not remember the specifics.
>
> Q. I am right, aren't I, that neither Mr Martin nor Mr Bell said that if you spent too much money running the business, the EBITDA in future would be lower than the current EBITDA of 1.6 million?
>
> A. Again, word for word, I don't remember, but I know that it was a discussion that was had. I think Mr Bell --I remember Mr Bell being concerned about the EBITDA calculation. His concerns -- and I remember him specifically mentioning an example that we, as the buyer, could manipulate the EBITDA by spending excessive amounts of marketing so that the business would grow in the future, but it would negatively affect the EBITDA and Mr Martin would not earn any money and Mr Martin was, I understood, to be the seller."

128. The suggestion that Mr Copans had, in this evidence, departed from his witness statement was not entirely fair, because (a) he was not reminded during this questioning that in his witness statement he had (in addition to saying he believed Mr Bell had referred to the £1.6 million figure) also said that the discussions of price and earnout were on the basis of EBITDA multiples, that the £1.6 million figure was acceptable to

all parties, and that Mr Martin had "*also mentioned that there was the potential to make a lot more than £1.6m in the years to come if money was put into marketing*" (see above); and (b) the gist of his oral evidence, consistently with his witness statement, was that he did not recall any part of the meeting verbatim but was sure that the £1.6 million figure must have been mentioned.

129. Mr Copans' witness statement also included the following two paragraphs:

> "38. I have been shown paragraph 21 of Paul Bell's first witness statement in which he says that it was explained at the meeting in Prague that he had loaned money to the business and that he injected funds into the business on an ad hoc basis for working capital purposes because the revenue of the business could be quite erratic from month to month and in some months Barry would inform him that he required funds to cover certain overheads.
>
> 39. I am fairly sure this is broadly what he said but there was never any mention that he actually had put in further funds or was continuing to put them in. At the meeting in Prague Paul just referred to himself as having put money into the business. We understood they were personal loans. He did not go into the mechanics and whether the monies were loaned by companies. And if further funds were still being put in, I would have expected to have been told about that. It is true that he did mention that he had put £2.5m into the business but my understanding was that this was a historic loan. I now understand that, in fact, he was still putting money into the business on an ongoing basis (as I have described above) and, indeed, that without his money, the business would have collapsed. That is certainly not something he told us at the meeting. If we had been told that he was putting more money into the business on a regular basis in order to keep it afloat, that would have been very worrying indeed and, in all likelihood, it would have been a deal-breaker."

130. In cross-examination, quoted paragraph 38 above, and the first nine words of paragraph 39, were put to Mr Copans, completely ignoring the remainder of paragraph 39. It was suggested that Mr Copans thereby accepted that Mr Bell told Ivy at the Prague Meeting that funds had been injected into the business on an *ad hoc* basis for working capital because the business's revenue could be erratic from month to month and funds were required to cover overheads. Unsurprisingly, in the light of the remainder of paragraph 39, Mr Copans denied both that that was what Mr Bell had said at the Prague Meeting and that he, Mr Copans, had ever accepted that Mr Bell said that. I accept Mr Copans' oral evidence, which I find entirely plausible and also consistent with the explanation given in paragraph 39 of his witness statement read as a whole. It is also consistent with Mr Hooja's oral evidence that Mr Bell did not tell Ivy, and Ivy did not know, that Mr Bell had been causing funds to be injected into the business in this way.

131. Mr Martin in his witness statement said nothing about this meeting. His evidence in cross-examination included the following:

> "Q. Now, there were discussions at the meeting, weren't there, about there was a concern by -- expressed by you and Mr Bell that the EBITDA figure, if Ivy put a lot of money in to marketing, that would bring the EBITDA figure down?
>
> A. No. I think it -- we are talking about the consideration that given they had full control over the P&L that they could drive the consideration figure down going forward.
>
> Q. Exactly. So going forward, if they put too much money into marketing, that would drive the EBITDA figure down?
>
> A. I believe that was the bones of the conversation, but EBITDA wasn't really discussed per se of the business because they'd already done their due diligence and EBITDA was not really discussed as far as an ongoing concern.
>
> Q. It was discussed in the context that if Ivy put a lot of money into the business that would bring the EBITDA figure down and that would impact on the money you would earn?
>
> A. I think the real concern was more around once the – the way that the earn-out could be manipulated."

Further:

> "Q. And the premise of that whole discussion was the fact that there was an EBITDA which had been agreed in August of around 1.6 million?
>
> A. Mr Copans' EBITDA -- yeah, workings were obviously there to see.
>
> Q. And those were the numbers that you were comfortable with, yes?
>
> A. Given my very limited knowledge of accountancy practices, yes, I was happy that Neil was professional enough to pull together those numbers given the information he had had to hand.
>
> Q. Those numbers which you agreed in August are the ones that everyone had in their mind and were discussing in the context of the October meeting about the EBITDA?
>
> A. I am not a mind reader, I am not sure exactly what everyone had in their mind at the meeting.
>
> Q. You were all talking about the distinction between how much upfront how much by way of earn-out, and all of those discussions were based on the EBITDA of 1.6 million --

> A. The conversation was never that specific. We were talking about football, talking about Tabella's business. We spent most of the time in their offices, walking round, looking at their outbound VIP calls. They were really selling to us more than us selling to -- in fact, I'd say 90 per cent of the time they were selling to us because they really wanted to get the deal done because they were buying what we felt was a very valuable brand.
>
> Q. We've already seen one email where you say in August that Ivy were undervaluing the business. Now, consistent with that, at the October meeting, you were saying to Ivy "You guys, you are getting a really good deal here, aren't you?" That's what you said to them.
>
> A. Maybe not in those terms, but of course I am going to sell the business. I was very proud of what we'd done.
>
> Q. You were giving them the impression that what they were doing was entering -- they were getting a good deal by buying this business for 5 million. That's the impression you were giving them, isn't it?
>
> A. They did their own calculations on EBITDA.
>
> Q. And you were encouraging them in that belief that they were getting a good deal, weren't you?
>
> A. I was selling the business. I was obviously putting my best foot forward."

132. Thus Mr Martin accepted that there was a discussion about the risk of Ivy bringing the EBITDA down, after buying the business, to the detriment of the seller(s). That supports the view that the express discussion at the meeting was premised on the parties having indeed arrived at an understanding as to the EBITDA of the business; and the "*workings*" by Mr Copans to which Mr Martin referred were the calculations of the £1.6 million EBITDA for 2018.

133. Mr Bell's first witness statement, prepared in August 2019 (in the context of the freezing order application), referred briefly to the Prague Meeting, indicating that the deal at that stage was *"still in progress and subject to due diligence"*, and that he saw the main purpose of the meeting as being to figure out whether Ivy was genuinely interested in progressing with the purchase.

134. Mr Bell also said in his first witness statement:

> "Mr Hooja asserts at paragraph 52 of the Affidavit that the Claimant "discovered" cash injections totalling £670,000 made by me in 2018 and 2019. During the meeting in the Czech Republic, it was explained to the Claimant that I had loaned personally, or facilitated loans from third parties (including

> SBL), in the sum of around £2,500,000 to the Business. I explained that I inject funds into the business on an ad hoc basis for working capital purposes; the revenue of the business can be quite erratic from month to month and in some months Mr Martin would inform me that he required funds to cover certain overheads. That was explained to the Claimant during the meeting in October 2018. I do not know what else Mr Martin told (or did not tell) the Claimant about the cash injections I made following the meeting in October 2018." (§ 21)

135. I find that evidence wholly implausible. The contemporary documents, supporting the evidence of the Ivy's witnesses, make clear that Ivy made and priced its offer for 21Bet on the basis that it was a profitable business with an EBITDA of the order of £1.6m. Information suggesting that the Business was in fact unable even to pay its regular outgoings without being propped up by financial support arranged by Mr Bell would have placed an entirely different complexion on the Business. In Mr Copans' words, "*if we had been told that [Mr Bell] was putting more money into the business on a regular basis in order to keep it afloat, that would have been very worrying indeed and, in all likelihood, it would have been a deal-breaker*". That evidence, which I accept, makes perfect sense. Even if Ivy might nonetheless have contemplated buying the 21Bet business for its brand or prospects, there is no reason to believe it would have purchased an ailing, or even loss-making, business on the terms which it offered and contracted for. Moreover, there is no contemporary document, on either side, supporting Mr Bell's assertion that Ivy was told at the meeting that he was making regular cash injections into the Business. One would have expected such documents to exist, because such information would have been new to Ivy and commercially significant. Instead, such documents appear only following Ivy's purchase of the Business.

136. When cross-examined on this point Mr Bell tended to resort to assumptions about what Ivy must have been told or learnt outside of the meeting:

> Q. But they had no idea, did they, that Simplify was bank rolling the business, did they?
>
> A. I would disagree with you. You've shown me lists and lists and lists of credits into bank accounts from Simplify, 20,000, 20,000, 10,000s, they're being shown as part of the bundle. I would assume they were shown as part of the due diligence. And they are a material and significant credits to the bank entries of whether it was Viktra or whether it was City Support, so they're important and I don't know how they could be missed in any due diligence, especially when it's being referred to that Simplify is the funder of this business.
>
> Q. Well, it's not for you and I to discuss at this stage what was shown in the due diligence, but the only -- there are -- the bank statements showed three payments by Simplify, only three payments. But we are not to discuss that. I want to ask you about the Prague meeting. There was nothing said at the Prague meeting that would give Ivy the impression that over the

previous six weeks, tens of thousands of pounds had been pump[ed] into the business by Simplify to keep it afloat, was there?

A. I totally disagree with you. If Ivy are doing their due diligence, I would expect that they are looking at the bank statements, and seeing the credit entries from Simplify --

…

Q. Please focus on my question and answer my question. The question I asked you was this. I didn't ask you about due diligence, I didn't ask you about bank statements, I asked you this. There was nothing said at the Prague meeting that would give Ivy the impression that over the previous six weeks tens of thousands of pounds had been pump[ed] into the business by Simplify to keep it afloat, was there? That was my question; answer it, please.

A. Didn't discuss that six weeks. Only acknowledged and discussed that there was a significant debt to Simplify.

Q. You know full well, don't you, Mr Bell, that if Ivy had been told at the Prague meeting that Simplify was pumping money into this business to keep it afloat, that would have scuppered the deal? That's true, isn't it?

A. It's not true. Ivy are told that Simplify is funding this business. So quite the opposite of what you're saying. I'm saying Ivy were told this business has taken two-point something million of funding to get it where it is today.

Q. There was --

A. That's not being withheld, that's actually being shouted from the rooftops by Mr Bell.

Q. Ivy knew that in the past you had put money into the business. They did not know, did they, that you were keeping it afloat on a rolling basis? They had no idea, did they?

A. That's impossible because the business was being funded by Simplify up until, I think, March when the deal was done and they would have access to bank statements and whatever information that would show that.

Q. The entire premise of the October meeting was that the business was healthy and profitable, wasn't it?

A. That's not anything made by me. Absolutely no statement made by myself. I'm there on the basis of what I've just discussed with you."

137. That evidence fails to support the assertion made in Mr Bell's witness statements that Ivy was told at the Prague Meeting that Simplify (or, as Mr Bell put it in his first statement "*I*") was injecting working capital into 21Bet on an ad hoc basis.

138. In his second witness statement, produced for trial, Mr Bell reiterated the evidence quoted above, and added further comments. One of these was to suggest that Ivy "*was aware that 21Bet had staff that needed paying each month. They must have realised that SBL was paying those wages directly, or else seen the deposits from SBL*". There is no basis for that assertion, which appears to assume that Ivy knew the 21Bet was making insufficient funds itself to pay its own staff. On the contrary, had the business been making EBITDA of £1.6m or indeed any significant positive profits, there would be no reason to assume that it could not pay its staff without support from Simplify.

139. In addition, Mr Bell said:

> "14. My involvement in 21Bet was limited to arranging funding and other financial support as required as well as offering guidance and support as and when it was required. Typically Barry would email or ring me to ask for funds to cover certain overheads. I did not know all of the overheads of the business but there were a few larger ones that were critical to the business, including affiliates such as Catena Media. …Affiliate costs usually needed to be paid upfront and Barry often asked for funding to cover them.
>
> 15. Another main overhead of 21Bet was the wages, which SBL funded most months. I recall they were often paid by SBL directly and so I did not know the cash call for wages."
>
> and:
>
> "36. In the Reply (paragraph 7), Ivy also alleges that at the meeting Barry represented that the EBITDA was £1.6M and that I knew that to be untrue. I cannot recall Barry discussing an EBITDA of £1.6M and, generally, I did not witness any discussion on those types of numbers. However, even if I had heard Barry say that (of which I have no recollection), I could not possibly have known that to be untrue. I had no involvement in the due diligence process and had not seen any of 21Bet's financial documents; I was only ever provided with high level information (NGR and cash flow) from Barry. Across my businesses, I employ around 60 accountants to advise me on financials. I was not, and would not have been, in a position to verify that EBITDA figure. I engage accountants to do that for me."
>
> and (more generally):
>
> "80. I did not know if the business was profitable or self-sustaining. I had never seen a full set of management accounts. I was shown the gaming revenue, which only gives you part of the

> picture. My view was that Ivy was able to increase the gaming revenue then the business would be able to get into a position where it could make a profit. All of the structure of the business was in place and so the potential was there."

140. However, in his oral evidence Mr Bell said, repeatedly, that the business was clearly making no profits and had no EBITDA, because otherwise it would not have required regular cash injections from Simplify and would have been paying tax. Mr Bell also made the point himself, in the emails quoted in §§ 48, 50, 53, 56 and 63 above, all pre-dating the Prague Meeting, that the business was making no money. Indeed, it was suggested to Mr Bell in cross-examination that, specifically at the time of the Prague Meeting, the business was in as bad a state as it had ever been, with large amounts of cash being put in to keep it afloat, to which Mr Bell replied that *"I will make the same statement I've made all the way along, there's no EBITDA, it's not making any money"*. Accordingly, the suggestion in Mr Bell's witness statement that, had Mr Martin said the business had an EBITDA of £1.6m, then he, Mr Bell, "*could not possibly have known that to be untrue*", must itself be untrue. The same applies to his evidence that he did not know whether the business was profitable or self-sustaining. He clearly knew it was neither. Moreover, Mr Bell must have known these statements to be untrue, since they were clearly inconsistent not only with his own emails in 2018 but also the oral evidence he went on to give in December 2021.

141. Mr Bell's suggestions that he knew only about the main overheads and did not know the cash call for wages are also belied by the contemporary documents, which show Mr Martin very frequently telling Mr Bell about even relatively modest overheads, as well as the sums needed for wages, and asking Mr Bell to provide funding to cover them. In cross-examination he eventually accepted that he was aware of "*lots of the liabilities of the business*" (adding that he had to ask for more information all the time), and that every time there was a request for payment from Mr Martin, Mr Bell required an explanation as to what the money was needed for.

142. The fact that Mr Bell gave this evidence in his statement, which I consider to have been clearly untrue, affects his credibility in general, including what reliance can be placed on his evidence about other aspects of the Prague Meeting.

143. Mr Bell also said in his oral evidence that historic EBITDA was not discussed at the Prague Meeting; payments by Simplify over the previous few weeks were not specifically mentioned, but it was acknowledged that there was a significant debt to Simplify; that he did not make any statement to the effect that 21Bet was currently profitable; and that he did not discuss the financial performance of 21Bet. Mr Bell said there was "*not a lot to recollect*" about the Prague Meeting. His evidence included the following passage:

> "I believe [Ivy's] forecasts, that their offer was based on forecast EBITDAs and brand, and what they could do to the current business given their massive power, economies of scale, because one of the things was that they'd fairly obviously close the London office and there would be jobs gone and move it to their Czech Republic organisation because they were a much slicker organisation than what Barry had."

144. Mr Bell said he did not remember a discussion about Ivy driving the EBITDA down by spending money on marketing, and added:

> "I do accept that Ivy were saying [at the Prague meeting] they were going to take the business to a new level with investment, with their database, with their various different success they'd had with turning brands around. I accept that, you know, they've got much deeper pockets than certainly myself allegedly and that they had big plans to go and increase net gaming revenue and probably introduce some economies of scale, which probably meant consolidating to Czech Republic rather than into London, and they had a good chance of achieving the forecast that they said. At no stage have we discussed historics in terms of EBITDA because, as I say again, I don't believe there is any historic EBITDA."

> "Q. The [Prague] meeting was all about what a great business this was and what an even better business it could be. That was the gist of the conversation, wasn't it?

> […]

> A. I'm disagreeing with you, Mr Levey, that the whole premise of the meeting was how successful the business was, et cetera, et cetera, because that would be contradicting why I'm actually there in the first place, which is to understand who these people are and how is Simplify going to get paid. I'm certainly not there to say look at how great this business is, its EBITDA, et cetera, et cetera, because by definition of all the things I've said consistently, cash and tax, you sort of say it in a cynical way. But that's my simple view of where this business is. It's not making any money. I am not going to fly to Prague and say "Hey, guys, look at this, this is the making loads of money," because that simply wasn't the case."

145. However, the discussion about Ivy impacting the earn-out by reducing the Business's EBITDA (e.g. by spending too much on marketing) would make little or no sense if the only EBITDA under discussion were future EBITDA and the business currently had no positive EBITDA at all. To suggest that Mr Martin and Mr Bell were in fact worried that Ivy would turn a very unprofitable business into what should be a very profitable one, but at the same time would overspend on marketing and thereby prevent it becoming very profitable, is a convoluted and in my view unrealistic view of the discussion. The expressions of concern about Ivy reducing the EBITDA make sense only in the context of the pretence that the business currently had positive EBITDA, on the basis of which the Defendants claimed to have an expectation of earn-out payments. (The Defendants' real concern, no doubt, was to avoid too much of the price being based on earn-out, precisely because they knew there was no positive EBITDA.) Moreover, the communications between Mr Martin and Mr Bell to which I refer at §§ 104-107 further support the view that Mr Bell knew that the basis of Ivy's offers, and the premise of the discussion at the Prague Meeting, was the Business's current

EBITDA: not merely some hoped-for future level of profits which a currently loss-making business might eventually be induced to make.

146. I have carefully considered all this evidence as a whole. I have also taken account of the way in which Ivy's case has developed, including the fact that representations were not pleaded as having been made by Mr Bell personally until Ivy's Re-Amended Particulars of Claim dated 3 November 2019; and the absence of any contemporaneous records of the discussion. I conclude as follows:

i) The EBITDA figure of £1.6 million was mentioned at the Prague Meeting, as a measure of current (not merely future) profitability, and was the premise of the discussion about the purchase price and earn-out provisions.

ii) Mr Martin indicated that the business had the potential to make more than £1.6 million of profits if there was enough investment in marketing.

iii) Mr Bell actively participated in discussions about EBITDA and profitability, including (specifically) by expressing concern that Ivy might reduce the business's EBITDA below its current levels and thereby affect the amount payable under the proposed earn-out provisions. I am satisfied that this part of the discussion occurred, and also that the concern expressed related to Ivy reducing EBITDA below current levels.

iv) It was implicit in all three of the above statements that the business was (at the very least) currently a profitable one, and (hence) able to pay its outgoings from its revenues.

v) Ivy was not told at the meeting that Simplify companies were making regular cash injections into the Business in order to address cashflow problems and keep the business afloat.

I accept the written and oral evidence of Mr Hooja and Mr Copans to the above effect, and reject the contrary evidence of Mr Martin and Mr Bell.

(11) Aftermath of the Prague Meeting

147. On 4 October 2018 Mr Copans sent Mr Martin a revised offer for the purchase of 21Bet. He said that Ivy "*would like the previous offer on the deal to remain exactly the same thing except for one additional requirement which will give you a guaranteed minimum payout in respect of NGR (instead of EBITDA)*". Mr Copans said that Ivy would pay out a minimum of 7% on NGR at the end of each year, irrespective of EBITDA. Mr Martin forwarded this offer to Mr Bell asking for a discussion about it.

148. On 9 October 2018 Mr Copans sent Mr Martin a further revised offer, which Mr Martin forwarded to Mr Bell. This appeared to improve on the previous offer by including 10% of EBITDA as a guaranteed payment, with a "*Fixed payment on EBITDA*" of £750,000 unless the NGR payment dropped below £750,000 ("***the NGR Condition***").

149. Meanwhile 21Bet's funding difficulties continued. On 2 October 2018, the day after the Prague Meeting, Mr Bell told Mr Martin that he had transferred £20,000 to the Business.

150. On 9 October 2018, Mr Martin told Mr Bell that for that week he needed £20,000 for Catena, £4,000 for Sofia business taxes, £16,000 for "*outstanding player withdrawals*" and £15,000 for recruitment fees; and on 12 October 2018 he asked for a further £15,000 for the Persian gateway setup. (The latter related to a different project which Mr Bell and Mr Martin were taking forward at around that time, separately from the 21Bet business and to be run from an office in Manchester.) Mr Martin's email listed overall "*Outstanding Debts*" which ran to £502,230. Nevertheless, Mr Martin also proposed "*having some bigger hitters within the business to take the load off me*" and "*a six-month plan around every territory on marketing and acquisition. It may not bring immediate results, but really start to get us in the game and get 21bet a bigger footprint in each of the areas*".

151. On 17 October 2018, Mr Martin told Mr Bell that, as he and Mr Bell had discussed the previous day, for the following week they needed "*£30k (10+20) plus £50k from you for the VLounge payment*".

(12) Draft information memorandum

152. While negotiations were proceeding with Ivy, Mr Martin was continuing to explore other potential sales options. Mr Andrew Burlywood at Burlywood Capital LLP prepared an information memorandum which was sent to Mr Bell on 16 October 2018. Mr Martin's email to him suggested that Burlywood Capital "*have a few on the hook already*".

153. The draft information memorandum, which was 3 pages long, stated that the Business had made a profit of £1.9m in 2017 and was forecast to make a profit of £2.3m in 2018. Mr Bell said in evidence that he did not recall reading it, and that he received "*30 to 50 information memorandums a month*". I do not find it possible to conclude that Mr Bell actually read this document. It is, on the other hand, likely that Mr Martin (who sent it to Mr Bell) had done so, and thus knew that Burleywood were contemplating telling prospective purchasers that the business was generating profits at those levels. That lends some support to the view that Mr Martin is likely to have made similar representations to Ivy.

(13) Alan Spence

154. On 30 October 2018, Mr Alan Spence was taken on as a VIP customer of 21Bet.

155. On 4 November Mr Martin forwarded a "*VIP Users report*" to Mr Bell. He stated that "*Alan Spence had 9 of 10 winners from UK leagues and only lost 2 of his doubles yesterday with some very late goals (United was one of them) and overall we got extremely unlucky*". Mr Bell responded "*So is he £700k up yesterday?"* After Mr Martin confirmed this, Mr Bell responded "*So he has bust the business in a day ? Fuckin nuts Barry*". Mr Martin replied suggesting that Spence would lose in the long term, to which Mr Bell said:

> "I understand all of this.
>
> But my concern is that it's another Tabor situation where the size of the bets overtakes everything else.

> And as the business is skint it's simply me underwriting his bets which isn't where I need to be.
>
> The business owes me £3m.
>
> It also has trade debts of £500k plus.
>
> And vip creditors now approx £1m.
>
> I agreed to cover the historical debts so we could push on with Developments in the business.
>
> The vip stuff has now taken over all of this."

156. Mr Martin reported further Spence wins on 8 November 2018, suggesting nonetheless that:

> "We have so much going on to be truly positive about with Persia, Premierpunt/666, the B2B business"

leading to the response from Mr Bell:

> "… The business is bust again ? It now needs somewhere near £2m. It's a black hole Barry. Always promise of something good in the future, but every business sector has failed: China, Turkey, Russia, Betfair, Matchbook, Russia VIP, UK VIP, Scandinavian.
>
> 21Bet is bust again. I have £3m in and over 3 years later it needs another £2m to stay afloat. Where is the business sense in lending this more funds? Nothing ever comes back.
>
> And you ask what company I want to sponsor the horses with ? Are you serious? It's all desperate stuff.
>
> You take the Kendo from last month: having to get up at 4am for cricket bets and don't make any money out of him? I suggest you stop taking VIP bets before the hole gets bigger. It's doubled since Sunday.
>
> It's a fucking mess Barry. And you are dreaming if you think this is good business long term. The bets are too big for the business. So it's exactly the same as Tabor again. What cashflow do you have ?"

157. On 12 November 2018 Mr Martin emailed Mr Bell stating that "*We need to talk about Alan Spence as he rang me very irate and talking about us defrauding him and speaking to his lawyers the UK gambling commission*". Later in the email exchange, Mr Martin suggested that "*Even if we can get over 100k to show we are willing and able to pay it will help*". Mr Bell responded "*I don't agree*". Asked how he would proceed, Mr Bell stated "*The business is bust*". In response, Mr Martin said "*We are on the verge of a sale and have a change of getting out of this with some payback*".

158. Mr Spence went on to win over £780,000 by 13 November 2018, at which point his account was closed with 21Bet owing him over £740,000. A repayment plan was agreed between Mr Martin and Mr Spence on 14 November 2018. This included an agreement that any outstanding balance would be paid from the proceeds of sale of 21Bet.

159. An initial payment of £40,000 was paid on account to Mr Spence. Mr Bell gave evidence that he did not recall being involved in that payment:

> "Q. You were aware that there was an arrangement with Alan Spence that he'd be paid GBP40,000 a month until the sale went through, weren't you?
>
> A. When was I made a aware of this arrangement? Because I'm saying I don't know of any arrangement. I've refused Mr Martin's request for me to lend him hundreds of thousands of pounds to fund VIPs. So how can I be party to a 40 grand a month, or whatever the other parts are in this letter, it's a letter -- I don't think I am cc'd into the letter, am I?"
>
> and:
>
> "Q. Mr Bell, you were fully aware of the Alan Spence situation, you say you weren't privy to it?
>
> A. Yes, I'm aware because I've been asked if I can lend/fund Mr Martin the money. I refused."

160. However, it appears that at least some of the payments to Mr Spence were facilitated by payments from Simplify entities. In March 2019, for example, payments into the City Support bank account were typically followed by payments out in roughly equivalent amounts to Mr Spence. Moreover, on 4 March 2019 the following exchange occurred between Mr Martin and Mr Bell:

> [Martin] "Yes mate all good, all salaries sorted. Thanks.
>
> You still want to send Spence 20 this week?"
>
> [Bell] "Yes use today for that"
>
> [Bell] "Sorry I didn't know it was for that as I used €17k to clear the Sofia office salaries as they needed it for tomorrow …
>
> We have got £4500 left.
>
> Spence is not expecting anything so anytime this week will work I'm sure if that's ok with you."

161. Mr Bell was asked in cross-examination what he meant by saying "Yes use for that":

> "MR LEVEY: … When you said: "Yes use today for that", Mr Bell, you were telling -- you were answering the question

> whether Mr Spence -- the money you had put in that day should be used for Mr Spence and you instructed Mr Martin accordingly, did you not?
>
> A. Isn't it referring to salaries, quite on the contrary, that's my interpretation.
>
> Q. No, it's not Mr Bell: "You still want to send Spence 20 this week? "Yes use today for that." That's the truth, isn't it?
>
> A. Mr Martin is asking me if I want to send Spence 20 this week.
>
> Q. And you answer the question, don't you?
>
> A. I am saying it's relating to salaries.
>
> Q. Okay. I suggest to you you are not telling the truth about that, are you?
>
> A. I am disagreeing with you, Mr Levey."

162. I do not accept Mr Bell's evidence on this point. As was clear from Mr Martin's email, and as Mr Bell's second answer quoted above indicates he understood, Mr Martin asked Mr Bell for an instruction about whether to pay Spence. On this occasion Mr Bell told him not to. At the very least, what this exchange shows is that, contrary to Mr Bell's evidence in court, he knew perfectly well about the arrangement to make periodical payments to Spence. His specific denial of that fact further undermines his credit as a witness. Further, and substantively, the Spence arrangement lends additional support to the view that both Mr Martin and Mr Bell knew the business was unable to meet the gambling debt owed to Spence other than by hoping to pay in many monthly instalments (or, ultimately, from the proceeds of the sale of the business).

(14) Early November 2018 negotiations

163. In late 2018 Mr Martin was negotiating with other potential purchasers of 21Bet, including FansUnite. On 1 November 2018, as part of his negotiating strategy, Mr Martin told Mr Copans details of an offer that FansUnite had made. Mr Copans asked, *"with regards to above deal, if I can ask what EBITDA targets are they expecting? because the way I see it, our deal is pretty similar except for upfront?".* Mr Martin replied:

> "not going below what we already do so 1.8m"

Mr Martin did not dispute that he was thereby telling Mr Copans that, as at November 2018, 21Bet was making an annual profit of £1.8 million:

> "Q. … So you are repeating to Neil on 1 November that you are currently doing 1.8 million. In other words, that this business that you own, as at November 2018, you are telling him it's making an EBITDA, an annual profit, of 1.8 million and that was a lie, wasn't it?

A. That's what I thought was the truth."

164. Also on 1 November 2018, Mr Copans sent a further offer to Mr Martin. In this version (which revised the offer made on 9 October 2018), the NGR Condition was removed and Mr Martin was offered an annual salary of £150,000 plus a bonus. Ivy also offered to include "*10% of all Laba EBITDA*". (Laba appears to have been a separate gambling business.) Having set out the offer, Mr Copans stated that "*we would like to do a new 1 day due diligence on the numbers of the last 3-4 months in your office just so we get a better picture of everything that is currently happening numbers wise in the business*".

165. On 13 November 2018 Mr Copans sent Mr Martin a further offer in the form of a spreadsheet. Mr Copans' calculations gave a projected EBITDA for "*Year 1*" of £900,000. The offer included £2.55 million upfront, and yearly payments of £750,000 (expressed as "*Fixed amount on EBITDA*") 7.5% of NGR for three years. Payments of 10% of EBITDA and 10% of Laba EBITDA were also offered, along with an annual salary of £150,000 plus bonus for Mr Martin. On 19 November 2018, Mr Copans revised this offer in a Skype exchange with Mr Martin.

166. 21Bet's financial difficulties continued. On 20 November 2018, Mr Martin told Mr Bell that the business needed to pay its rent as a priority. On the same date, Mr Martin raised in an email to Mr Bell the possibility of moving out of 21Bet's current offices in order to reduce costs. When Mr Bell asked "*Isn't there a surplus from Fsb?"* (i.e. gambling revenue), Mr Martin responded: "*When you factor in paying £40k to Spence, £20k for Dharmesh and £20k to V-Lounge plus wages and a few affiliates we will be left with nothing*". In a later email in the same exchange, Mr Bell said:

> "It is difficult to get motivated about a business that is bust
>
> Let's get the sale completed and pay off what is owed to the various creditors
>
> …
>
> How much do you have in the bank today and what is the forecast cashflow?"

167. Mr Martin responded:

> "Cash situation: still yet to get the final invoices from FSB but we will clear £130-140k at the end of Nov. £50k on wages, £30k on casino and sportsbook content providers plus the VIP debt, PAYE and lease/rent makes things very tight. In fact we will be about £43k short.
>
> .com is +£15k
>
> Cash in the bank today: Aureate (new account opened yesterday) £1k and HSBC £1.9k."

(15) Late November/December 2018 meetings

168. On 19 November 2018 Mr Copans, Mr Hooja and Mr Amit Jain of Cascade Global met Mr Martin in London. They discussed the deal. Mr Martin accepted in evidence that he did not mention the debt owed to Mr Spence at this meeting. Later that afternoon, Mr Copans told Mr Martin by WhatsApp that Ivy was prepared to increase the upfront payment to £3 million, but the trade-off was a reduction in the guaranteed yearly payments for years 1, 2 and 3 from £750,000 to £600,000. Mr Martin responded asking for "*2m over 3 years*", explaining that he believed a minimum of £5 million was a deal "*I think I can get Paul to agree to*". Ivy agreed to take that proposal away.

169. On 21 November 2018 Mr Copans emailed Mr Martin stating that he was "*really glad that we have finally come to an agreement on the commercials*" of the deal. The commercial terms were summarised in Mr Copans' email of that evening as including (i) £3 million upfront payment, (ii) £600,000 guaranteed for years 1, 2 and 3, (iii) earn-out payments of 7.5% of NGR, 10% EBITDA, and 10% of the Laba EBITDA for years 1, 2 and 3, (iv) a maximum of £10 million, and (v) an agreed salary for Mr Martin of £150,000. The spreadsheet attached by Mr Copans assumed projected EBITDAs of £900,000, £1,800,000 and £2,600,000 for "*Year 1*", "*Year 2*" and "*Year 3*" respectively.

170. On 22 November Mr Martin responded stating "*I will be instructing lawyers in the next 48hrs so please take this as an acceptance of the offer and the green light to get this completed*". On 26 November Ivy's lawyer, Dotan Baruch, became involved in the transaction. Accountants Beavis Morgan LLP ("***Beavis Morgan***") appear to have begun acting for Mr Martin around the same time. On 3 December, a first draft of the SPA was circulated. On 5 December 2018, Mr Martin attended the Tabella Christmas party in Prague.

171. Mr Watt visited 21Bet on 10 December 2018 and became heavily involved in the negotiation of the terms of the SPA from this point onwards. He produced revised revenue projections for 21Bet for 2019 in late December. In his witness statement, he said that the basis of all his discussions with Mr Martin was that 21Bet was healthy and profitable, and one which according to Mr Martin had potential to be even more profitable. That evidence was not challenged in cross-examination.

(16) 21Bet's financial difficulties in late 2018

172. 21Bet's financial difficulties appear to have been particularly acute in this period. On 22 November, Mr Martin emailed Mr Bell. He said that "*Given the balance we will receive from FSB next week is £125k as per my email, I am really struggling to find a way to budget for all of the payments needed this month including the new lease completion payment*". On 15 December 2018, Mr Bell emailed Mr Martin asking "*what is the position on Creditors?*" Mr Martin responded explaining that:

> "[Mr Spence] had 40k and issued another cheque for 40k dated end of December but given all the operational debt and salaries left over from last month with his initial payment and the lease payment, I'm going to have to explain to him that we have to hold off cashing it.
>
> …

> The rest I am just trying to keep at bay until we can get this sale over the line."

173. In an email of 27 December 2018 to Mr Bell, Mr Martin stated that "*The last 6 weeks have been some of the darkest I have had to face. No car, no money, battling with creditors everyday both business and personally including the HMRC. I am usually a very positive guy but this has been extremely trying*." Later in the email, he said that "*I fully understand you not getting excited a business that is broke*". On 29 December, Mr Bell responded:

> "Barry
>
> Obviously the situation isn't good
>
> I honestly don't know how you have kept the business going
>
> …
>
> Has the sale gone cold ?
>
> …
>
> The business has not made any money after 3 years and plenty of investment
>
> I really don't know where this goes but something will bring this to an end as it's impossible to juggle these Creditors forever.
>
> I assume it needs between 1m and 1.5 just to stay alive ?"

174. Mr Martin responded on 2 January 2019 explaining that the sale was "*still on*" and he was "*hoping to get the kendos over the line in 2-3 weeks*".

175. On 7 January 2019 Mr Martin forwarded Mr Bell an email from FansUnite, another potential purchaser of 21Bet. He listed the "*Pros*" and "*Cons*" of doing a deal with them. Under "*Cons*", he stated:

> "With them going public, we will ever get passed their DD?
>
> I did make them very aware that we would never stand up to a KPMG style DD process as we have so many gaps in the numbers over the last 2 years which they said they understand. I also said please do not expect audited accounts as we have done them given that the UK business is operating under the FSB UK license and our.com business is mostly Turkey and we keep most of the grey stuff well off the radar."

Among the "*Pros*", Mr Martin listed "*Solid guys (no kendos)*".

(17) January 2019 – March 2019 negotiations

176. Negotiations continued in January 2019. Mr Mike Kitto of Beavis Morgan began to correspond with Ivy more regularly on Mr Martin's behalf. On 24 January 2019, Mr Kitto sent a balance sheet for 21Bet as at 31 December 2018. The balance sheet showed assets of £125,324.88, liabilities of -£149,445.83. Mr Watt circulated this document internally at Ivy, stating:

> "Guys, please see attached. In summary 21Bet doesn't have enough cash to pay out its players should they all request withdrawals at the same time. SPA allows for this, with assumption that working capital is 0 and allowing purchase price to be adjusted up or down in the event that it isn't and in this case we would be paying around £60k less.
>
> These numbers also imply that either Barry is taking out more than the company is generating or that costs are higher than income."

177. On 29 January 2019 Mr Martin gave notice to FSB, the platform used by 21Bet to run its UK business, terminating its agreement with FSB on 90 days' notice. In his email of 10 January 2019, Mr Martin had stated that he could not "*stand by and watch 21bet wither and die*" as a result of changes in FSB's policies and did not see any other option than moving to a new UKGC licensee to "*give 21bet a fighting chance of survival."* FSB was eventually replaced in this role by SBTech, a platform operated by Incentive Games Limited.

(18) Pre-sale discussions between Mr Martin and Mr Bell in early 2019

178. On 29 January 2019 Mr Martin forwarded Mr Bell a copy of the draft SPA. Mr Martin in an email of 31 January asked Mr Bell whether he had had a chance to look at it.

179. On 1 February 2019 Mr Martin emailed Mr Bell with the subject line "*PLAN C*". In the email, he stated: "*As we touched on during the meet on Wednesday, we have spent quite a bit of time on putting together a very detailed plan on how a 21bet V2.0 would look*". It is not clear whether Mr Martin was referring to a scenario in which 21Bet was not sold, or whether he was proposing developing a new company after the sale.

180. On the same day, Mr Martin sent an email to Mr Bell with the subject "*Andy Rennison*". He said "*This guy is getting very irate talking about going to the UKGC over his payment. Any chance we could send him £20k today and the rest next week? He is owed in total £34k.*" The following day, Mr Martin asked Mr Bell for £30,000 because he had "*3 £10k I need to pay to the Israeli, Andy Rennison and a payroll tax bill in Sofia*".

181. On 26 February 2019, Mr Martin sent Mr Bell an agenda for a call. The agenda included "*Distribution of funds post completion*", "*Funds for month end*" and "*Incentive Games Purchase*". On 28 February 2019, Mr Martin requested a further "*2x£20k*" for 21Bet. On 4 March 2019, Mr Bell said "*19 sent today Did u get 20 Friday*". Mr Martin responded "*Yes mate all good, all salaries sorted*".

182. On 7 March 2019 Mr Martin sent Mr Bell a further mark-up of the SPA. On 12 March 2019, Mr Martin sent Mr Watt and Mr Copans an updated version of the balance sheet provided in January 2019. The balance sheet now showed assets and liabilities as at 28 February 2019. Assets now totalled £147,938.17, liabilities £123,573.40. Mr Martin sent a further updated version on 28 March 2019. This balance sheet, which was also stated to be "*As of 28th Feb 2019*" showed assets of £157,972.96 and liabilities of £156,338.41.

(19) Finalisation of the sale and terms of the SPA

183. The question of who would actually be party, as seller(s), to the SPA does not appear to have been finally settled until a fairly late stage in the discussions. The first draft of the SPA, sent to Mr Martin in January 2019, defined the selling shareholders as Mr Hogg and Mr Markovic, i.e. the persons in whose names the shares in the companies were registered. In an email to Mr Bell dated 11 February 2019, Mr Martin said:

> "Not sure if you have had a look at the Tabella SPA but currently it has Richard Hogg and Milos Markovich (director of the business in Montenegro) on the hook for all the warranties which I really don't feel comfortable in getting them to sign on off given they won't be benefiting financially from the deal."
>
> I think it only right for you and I to be on the contract and given that to be correct, are you still happy we engage with DA Beachcroft or would you prefer for Hill Dickinson or any law firm of your choosing to take over the final part of signing off the SPA?"

Mr Bell responded simply "*Will have a look mate*".

184. Mr Bell explained in his witness statement that he then spoke to Mr Roger Pointon at Hill Dickinson LLP, who in turn informed Mr Martin that Mr Bell would not provide any warranties under the SPA. Mr Bell also stated that he told Mr Martin that he "*wanted nothing to do with the SPA*". Consistently with Mr Bell having declined to sign the SPA, a few days later, on 24 February 2019, Mr Kitto told Mr Martin that in the latest draft of the SPA:

> "You are now the seller and [Mr Hogg/Mr Markovich] have come out entirely. The easiest approach to this is probably going to be to transfer the shares into your name before completion, coupled with written confirmations/releases from the guys. I suggest we wait to see what Neil [Mr Copans]/Dotan [Ivy's lawyer] come back with and we can knock that hurdle over then it really should be straightforward."

185. Mr Kitto's advice was forwarded to Ivy, but the evidence does not indicate what, if any, specific response was received. There is also no direct indication, at least, of any release from Mr Bell of his 50% beneficial interest, or any discussion of any such release. The reason for that is unclear from the evidence. However, in later drafts of the SPA, and the final version, Mr Martin alone was defined as the selling shareholder.

186. Mr Watt's evidence was that Mr Martin mentioned at a meeting in mid to late January 2019, with Mr Kitto also present, that Mr Bell did not want his name put in the SPA as a party: because Mr Bell was not on the share register, did not want his 50% ownership to be disclosed in writing and instead wished his shareholding to be hidden. In cross-examination, Mr Watt added that he told Mr Jain that Mr Bell did not want to be included in the SPA, and (he recollected) Mr Jain was content to proceed on that basis. I return later to this evidence, which I accept.

187. On 29 March 2019 Mr Martin emailed Mr Bell stating "*Kendo's sent back SPA with most of the indemnities remove so Monday looks like signing day now. Let's catch up Monday to sort funds*". Mr Kitto and Mr Martin continued to negotiate with Mr Watt and other Ivy representatives on the final wording of the SPA over the following days. On 3 April 2019, a final balance sheet was sent by Mr Martin to Mr Watt. This showed assets of £96,249.47 and liabilities of £149,026.81.

188. The SPA was signed and dated 4 April 2019. In the preamble to the SPA, Ivy was stated to be the "*Purchaser*", with Mr Martin defined as the "*Shareholder*" and the "*Companies*" sold defined as Aureate, City Support, Alibaba, Viktra and Tristate. The recitals recorded *inter alia* that:

> "WHEREAS, the Shareholder is the beneficial owner of the entire share capital of Aureate, City, Viktra and Tristate on a fully diluted basis, his shares being held by nominees (the "**Individually Held Shares**");
>
> …
>
> WHEREAS, The Shareholder holds all beneficial rights, title and interest in and to the Individually Held Shares;
>
> …
>
> WHEREAS, no Person other than the Shareholder is entitled to any right in and to Aureate, City, Viktra and Tristate;
>
> …
>
> WHEREAS, the parties wish to set forth in writing herein their agreements relating to the purchase of all of the Shares".

189. The body of the SPA contained the following provisions:

> "1.1.33. "**Party**" means the Shareholder, the Companies and the Purchaser; and collectively, the "Parties".
>
> …
>
> 2.1 Subject to the terms and conditions of this Agreement, the Purchaser agrees to purchase from the Shareholder and the Shareholder agrees to sell, transfer, assign and deliver to the Purchaser at the Closing, free and clear of all Liens, in accordance with and subject to the Shareholder's warranties in

this Agreement, all right, title and interest in and to all of the Shares. For the avoidance of doubt, the Alibaba Shares are purchased as an asset of Aureate.

…

7 Warranties of the Shareholder

The Shareholder warrants to the Purchaser that all of the following warranties are true and correct as of the Effective Date and will be true and correct as of the Closing Date in respect of the Companies:

…

7.18 Each Company has no liabilities, claims, or obligations of any nature, whether accrued, absolute, contingent, anticipated, or otherwise, whether due or to become due, that that Company cannot pay when due and which are or could become a Lien against or otherwise have an adverse effect on any of the assets or the business of that Company.

…

7.26 A schedule including each of the Companies' assets and liabilities as of February 28th, 2019 (the "Financial Statements") is attached hereto as Schedule 7.26. The Financial Statements have been prepared in accordance with generally accepted accounting principles. The Financial Statements give a true and fair view in all material respects of the financial condition of the Companies as of the date indicated. Since February 28, 2019, the operations and business of each of the Companies have been conducted in all respects only in the ordinary course of business, and none of the Companies has entered into any transaction which was not in the ordinary course of its business and no event has occurred which has or which might cause an adverse effect on either of the Companies and/or their business."

…

15.1 This Agreement constitutes the full and entire understanding and agreement between the Parties with respect to the subject matter hereof and supersedes, nullifies and terminates all prior agreements, understandings and negotiations, both written and oral, between the Parties with respect to the subject matter hereof. Subject to the provisions of Article 7.28, no representation, inducement, promise, understanding, condition or warranty not set forth herein has been made or relied upon by either Party hereto.

…

> 9.6 The Shareholder shall not, unless agreed to by the Purchaser, directly or indirectly, by themselves or through any affiliated or associated Person, in any role whatsoever, anywhere in the world for a period commencing on the Effective Date and ending 2 (two) years from the end of the Third Earn-out Period: (i) participate, assist or otherwise be directly or indirectly involved or concerned, financially or otherwise, as a member, director, consultant, adviser, contractor, principal, agent, manager, beneficiary, partner, associate, trustee, financier or otherwise in any activity which is identical, similar or otherwise competes with the Business; (ii) interfere or seek to interfere, directly or indirectly, with any relationship between the Purchaser and/or the Companies and any client, customer, employee or supplier of any business related to the business of any of the Companies and/or the Purchaser; (iii) solicit for employment, or hire, any employee or consultant of any of the Companies and/or the Purchaser. Nothing in this Article 9.6 shall derogate from the applicable non-compete provisions in any employment agreement of a Shareholder. If the foregoing provision shall be held, for any reason, illegal or unenforceable in any respect, the scope of such provision shall be deemed narrowed down so as to make it legal and enforceable under applicable law. The Shareholder acknowledges that the Purchaser may be irreparably harmed by any breach of this Article 9.6 and that there would be no adequate remedy at law or in damages to compensate the Purchaser for any such breach. The Shareholder agrees that the Purchaser shall be entitled to injunctive relief requiring specific performance by the Shareholder of this Article 9.6 and the Shareholder hereby agrees to waive any requirements for posting a bond in connection with any such action.
>
> …
>
> 15.12 Nothing in this Agreement, express or implied, is intended to confer upon any third party other than the Parties hereto or their respective successors and assigns any rights, remedies, obligations, or liabilities under or by reason of this Agreement, except as expressly provided in this Agreement."

190. At Schedule 7.26, a financial statement was provided for 21Bet current as at 31 March 2019 (suggesting that the reference to 28 February 2019 in clause 7.26 itself was an error). The statement provided that 21Bet's net current liabilities were £52,777.34.

191. The financial structure of the deal was as follows:

    i) Ivy agreed to pay the "*Initial Consideration*" in exchange for the shares (clause 3.1). The "*Initial Consideration*" was £3 million, but subject to an adjustment to take account of the Business' liabilities as set out in the financial statements contained in Schedule 7.26 (around £50,000). Therefore, the initial upfront payment was about £2.95 million.

ii) In addition, clause 3.2 provided for three Earn-out Periods (i.e. for years 1, 2 and 3 post-acquisition); and for payment of (i) "*Annual Consideration*" of £600,000, and (ii) further "*Earn-out Amounts*" as set out in Annex 1. Annex 1 provided for these Earn-Out Amounts to be calculated as percentages (between 7.5% and 10%) of 21Bet's Net Gaming Revenue, EBITDA and EBITDA attributable to non-Asian activities during the Earn-Out Periods.

192. Clause 5 provided for a "*Closing*", with the Companies and Mr Martin required to take various steps and provide various documents to Ivy to conclude the sale (e.g. resolutions of the Companies approving the sale, share transfer deeds, and other formal documentation) (clause 5.3). Clause 5.4 provided that Ivy could agree to delay the fulfilment of these steps at its sole and absolute discretion. The Initial Consideration was intended to be provided by Ivy upon closing (clause 5.5). One condition of closing was the delivery of an executed employment agreement between Mr Martin and Lotus Technology Limited. Mr Martin was to have a continued role in the 21Bet business.

193. Mr Martin and the Companies were unable to satisfy all the steps required for Closing under clause 5.3, but Ivy agreed to a delay in the fulfilment of those requirements (pursuant to clause 5.4). Ivy therefore transferred £2.95 million to the client account of Beavis Morgan LLP on 3 April 2019, effectively as a pre-payment to purchase the Business pending completion of the outstanding steps for Closing.

(20) Division of the sale proceeds

194. Mr Bell gave evidence that, to his frustration, Mr Martin had proceeded without him in selling 21Bet. He stated that he was not invited to be party to the sale. He then qualified this to state that he was not invited "*formally*" by Mr Martin to be party to the agreement.

195. The documented course of events was as follows. The initial payment of £2.95 million was sent by Ivy to Beavis Morgan on 3 April. This factored in a £50,000 discount reflecting the balance sheet position as at the end of March 2019. In an email of 4 April 2019, Mr Martin asked Mr Bell for "*the bank details of where you want the funds sent*". Mr Bell responded that he would "*send Simplify details in a minute as it will be treated as repayment of Loan account*". He also asked "*Can I just check where funds are coming from and amount ?*" Mr Martin responded "*Beavis Morgan LLP … Just a little under £1.2*". Mr Bell then asked "*Can I have a breakdown of how the £3m is being split out ?*" Mr Martin responded attaching a spreadsheet which showed *inter alia* payments of £694,962 to Mr Spence, various payments to creditors, a payment of £500,000 to Abensons solicitors (accepted in effect to be a payment to Mr Martin), and a payment in an unspecified amount to SBL. The reference for the SBL was stated to be "*Loan repayment*".

196. Mr Bell gave evidence that SBL received approximately £1.1 million. He also gave evidence that he did not agree this division of the proceeds of sale, but that Mr Martin had told him that he would receive further consideration from the earnouts. Mr Martin's oral evidence was that he and Mr Bell did make an agreement about the division of the sale proceeds, but Mr Bell denied this and said "*Simplify is just given the leftovers*". I do not find Mr Bell's evidence on this point credible. Simplify may not have had a written loan agreement, but had plainly advanced considerable sums to 21Bet which both Mr Martin and Mr Bell viewed as loans. Further, Mr Bell had been the person

calling the shots in terms of finance throughout the story, and made no complaint when Mr Martin emailed him the division of proceeds. It is not plausible to suggest that Mr Martin could or would simply have decided for himself to take £500,000 personally while leaving Simplify substantially out of its money and Mr Bell's personal loans to 21Bet entirely unpaid.

197. In a subsequent email from Mr Martin to Mr Hooja on 5 June 2019, Mr Martin stated that "*I am meeting Paul Bell (our investor in 21bet) on Friday and if we are to discuss any potential revisions to the SPA in light of the last 8 weeks and would need to get him to agree to any changes*". Similarly, Mr Martin told Mr Watt the same day that he was meeting Mr Bell on Friday to discuss the current situation with Tabella and the proposed changes. Mr Bell said that he had no recollection of any such meeting, and that he thought Mr Martin was "*using me as leverage*".

(21) Mr Bell's role in relation to the sale of the business

198. Mr Bell in his first witness statement said:

> "10. Mr Martin approached me about the Business in or around 2016. I agreed that the Business was a good opportunity and facilitated a loan of £1m from Simplify Business Ltd (SBL; a company I discuss further below). I was the beneficial owner of 50% of the shares in the Business alongside Mr Martin, who managed the business on a day-to-day basis. I had limited involvement in the management and direction of the Business; Mr Martin would ask me for advice occasionally and for further funding as and when required. Save for that, I left the business to Mr Martin. As is clear from my affidavit dated 9.8.2019, I have a number of business interests and do not have time to micro-manage them all and do not do so.
>
> 11. In or around August or September 2018, Mr Martin informed me that he had been approached by the Claimant as interested buyers of the Business. Mr Martin was interested in selling but the deal seemed to progress slowly. I attended a meeting with the Claimant in October 2018 in the Czech Republic. At that stage, the deal was still in progress and subject to due diligence. My understanding from Mr Martin was that the Claimant was blowing hot and cold and so he was unsure as to whether the sale was going ahead. The purpose of that meeting, from my perspective, was to figure out whether the Claimant was genuinely interested in progressing with the purchase.
>
> 12. Mr Martin kept me up-to-date on the sale of the Business to the Claimant at a high level; he would mainly let me know how the deal was progressing for the purposes of managing the cash of the business. In general terms Mr Martin informed me about the purchase price, that the consideration was to be deferred over a three year period, that all creditors of the Business would be repaid as part of the deal and that he would be working for the Business for a number of years post-completion. I left all of the

details to Mr Martin and never had sight of the Agreement. I have never dealt with (or even heard of) the solicitors he used for the Agreement.

13. I have been shown an e-mail dated 5.06.2019 in which Mr Martin states to the Claimant that he will need to get me to agree any potential revisions to the Agreement … I understand that Mr Martin made such a statement because the Claimant was threatening to withhold consideration due under the earn-out provisions in the Agreement. I can only assume Mr Martin wanted to speak to me about that because it impacted on the repayment of creditors of the Business (including me) and the payments I would receive.

14. I had no involvement in the pre-completion due diligence or disclosure process. I never dealt with the Claimant in respect of its due diligence. My knowledge of the finances was all high level. As I have said already, Mr Martin asked me to inject cash into the business on occasion and, to that end, he would give me an idea of the monthly revenue and overheads, though I never checked the underlying figures. I did not have the knowledge of the finances of the Business to provide the Claimant with any information for its due diligence process.

15. Any conversation I had with Mr Martin about the due diligence or disclosure process was also high level. Mr Martin would update me on the progress of the sale and, as part of that, he did inform me that the due diligence process was taking some time. Save for those types of conversations, I cannot recall that Mr Martin and I ever discussed the pre-completion due diligence or disclosure. I certainly did not tell or agree with Mr Martin what he should or should not disclose. That was all left to Mr Martin and his solicitors. ...

…

[25e] I had very limited involvement in the sale of the Business. Mr Martin provided me with high level updates on the sale to the Claimant (for example, to let me know it was or was not progressing) for the purposes of managing cash flow. The longer it took to complete the sale, the more requests for cash injections I received from Mr Martin. I had no knowledge of the details of the deal and, save as explained elsewhere in this statement, had no involvement in the due diligence or disclosure process. To be clear, Mr Martin informed me that creditors of the Business would be repaid from the consideration paid by the Claimant for the shares and, as a 50% shareholder, I expected to receive my share of the balance of the sale proceeds but, that aside, I never reached any agreement with Mr Martin on the sale."

199. It is evident from quoted §§ 10, 13, 15 and 25(e) above that Mr Bell regarded himself as both a 50% shareholder in and a creditor of the 21Bet business, and that he left the due diligence – including what should and should not be disclosed – to Mr Martin and his solicitors. He was indeed a creditor, by reason of the personal loans of £400,000 he had made (albeit his witness statement for trial makes no mention of them), and – in substance though not in law – by reason of the Simplify advances which he sometimes referred to as monies which he had lent and which I concluded earlier were probably owed to him in commercial terms.

200. Mr Bell's second witness statement included various statements relevant to his role in the sale of the business, which it is necessary to set out at some length in order to give the full flavour:

> "11. When 21Bet was first set up, my expectation was to receive half of the profits of the business because I had arranged the funding. There was no formal, written agreement with Barry; it was all agreed on a handshake.
>
> …
>
> 22. … From around October 2017, I can recall Barry telling me that the business was going well (with the cash flow and gaming revenue improving) and asking for lump sums to cover certain overheads. I cannot recall any specifics about that; I relied on what Barry was telling me at the time. However, in or around early 2018 I said to Barry that he needed to find a new investor as it had become clear that Nicola was not going to be involved in the business and I thought SBL should not keep providing funding. In 2018, SBL was injecting up to £50,000 a month to cover wages and certain creditors (with some or all wages being paid by SBL directly). I believe Barry then started talking about selling 21Bet.
>
> 23. By that stage in 2018, my focus was looking after SBL's interest in 21Bet with the aim of getting SBL's debts repaid for the benefit of my daughter, who was seriously ill at the time. I wanted to protect her interests as the ultimate shareholder in SBL. Save for that, I had lost interest in 21Bet entirely – I told Barry just to get on with a sale if that is what he considered best and get the debts paid off. The priority was repaying SBL.
>
> 24. I expected Barry to keep me up to speed on his plans to sell 21Bet because of the debt owed to SBL, but I would not say he needed my approval to go ahead with it. Barry and I never discussed that he was selling shares on my behalf and I did not view him as my agent. It was his deal as far as I was concerned.
>
> …
>
> 27. … My primary focusses were whether Ivy was a serious buyer (I did not think Barry should be wasting time otherwise)

and would SBL be repaid its debt. I was working on the basis that I was unlikely to make any return personally and said to Barry that I would be happy if SBL got its money back and left him to it. I was not interested in the detail.

…

33. [in the context of the Prague meeting] … My role was to form a view on whether Ivy was serious or just another prospective buyer making empty promises. As far as I was concerned, I was not "at the table" meaning I did not treat it as my deal. I was there to support Barry. For me, it was a day trip to look these guys in the eye and see how they operated.

34. During the meeting, I made it clear that I was not going to have any interest in the business following the deal and that I wanted SBL's debt repaid as it was the biggest creditor of the business. I believed the debt to SBL to be somewhere between £2M-3M at that time and I am 90% certain I told them that.

…

39. I did not authorise Barry to make any statements regarding the affairs of 21Bet on my behalf and he was not my agent. I have bought and sold many businesses over the years and know how the sale process operates. As I say elsewhere in this statement, if I had been a party to the sale I would have had my own solicitors and accountants responding on due diligence issues and setting out information relevant to the sale; I would not have made "*off the cuff*" statements, or allowed Barry to make "*off the cuff*" statements on my behalf, during an informal meeting/lunch.

…

51. Barry was keen to get a sale over the line because I was threatening to pull the plug on any further funds from SBL and Barry owed money to the likes of Alan Spence and HMRC. Barry was panicking about the debt owed to Alan because of the potential implications for him personally. If Barry became known as someone who did not honour a gambling debt, he would be finished in the gaming industry.

…

54. Ivy did come back to the table and Barry finalised the deal. I had no idea about the mechanism for completion. I stayed out of it. Barry just told me when the deal had completed.

…

56. In the lead up to the completion of the SPA, Barry approached me, pleading poverty and asking whether SBL would mind if he took a slice of the Initial Consideration. He proposed to pay £1M to SBL, £1M to the VIPs, around £500,000 to other creditors and he would retain the balance. He told me that the deferred consideration element would pay off SBL. I was not happy about that but it was Barry's deal. He entered the deal on his own, and not on my behalf.

…

60. In my first witness statement, I stated that I never had sight of the agreement (paragraph 12). I still have no recollection of seeing the SPA but am informed by my solicitors that Barry did forward me copies of the SPA by email (for example, see disclosure reference D2/ED/282). I never read the SPA; I just left this to Barry as I was not a party and did not view it as my deal.

61. If I had been a party to the deal, I would have instructed my own lawyers and made certain demands, such as security for the deferred consideration. ...

62. I have been shown an email dated 11 February 2019 … in which Barry states that Richard and Milos Markovich are "on the hook for all the warranties", stating that he thought I ought to "be on the contract" and asking if I wanted Hill Dickinson to act. I told him I would have a look at it. I cannot recall exact dates but I had a high level conversation with Barry about the warranties in the SPA, in which he informed me that Ivy wanted me to be bound by them. I thought they may want me on the hook because I was "the money".

63. I did not review the SPA myself, but spoke to Roger Pointon at Hill Dickinson LLP in March 2019. I understand Roger informed Barry that I would not give any warranties under the SPA.

64. I informed Barry myself that I would not be signing any warranties. I knew nowhere near enough about 21Bet to be providing warranties and made that very clear to Barry. For completeness, Barry had no authority to enter into the SPA on my behalf. I never informed him to act in that manner and, in fact, I specifically told him that I wanted nothing to do with the SPA.

65. Following that, I had no idea what Barry was agreeing in respect of the warranties as I did not review them. In any event, there was never any prospect of my being a party to the SPA or giving warranties. I was not at the table and so had no idea why I would want to, or need to, give warranties. Barry was the one

selling the business. He was the one with the knowledge and in the position to make representations and give warranties, not me.

…

[68b] I was not involved in the negotiations. I do not know what Barry told Ivy about my role and involvement in the business. I was not aware at the time (and have only become aware because of this claim) that Barry told Ivy that he required my "*blessing*" to proceed with the sale. In reality, Barry did not need my blessing. I expect such comment was part of Barry's attempts to negotiate a better deal with Ivy.

…

[68e] I do not know what Barry said to Ivy about our respective roles within the business. Barry did do all of the work and I did organise funding; however, I disagree that I was "in the shadows". I was not hiding from anyone.

…

[68g] Barry was not my agent, nor was he authorised to act on my behalf in relation to the SPA.

…

71. Barry did not need my authority or permission to do the deal with Ivy; it was up to him who he dealt with regarding the sale of the business. He ran the sale past me because I wanted to ensure SBL would be repaid its debt. Obviously if the deal meant SBL would end up with nothing I was not going to be happy. Barry took control of the whole process himself without any input from me. He did not have my authority to make any representations on my behalf. If the intention had been for Barry to complete that form on my behalf, I would have involved my own solicitors as above.

…

72. I understand Barry does not dispute that he informed Ivy that the EBITDA of 21Bet in 2018 was £1.6M that FSB owed 21Bet money and that 21Bet was profitable and self-sustaining. Again, none of those statements were made with my authority or otherwise on my behalf. I never got involved in any of the negotiations and have no idea where the EBITDA figure came from. 21Bet worked on net gaming revenue less wages and office space and so I do not know how the EBITDA was calculated or what it was based on. I believed the £1.6M figure must have been put forward by Ivy following its due diligence as I have no idea how Barry would have gone about quantifying the EBITDA. …

> 76. I do not know what Barry was telling Ivy about the debts of 21Bet, but I had no reason to suspect that he was not being transparent with them. Ivy had spent the best part of six months on due diligence and going over the deal with Barry. Ivy had two bites at due diligence; they did the initial due diligence at the 21Bet offices when they had access to all of the systems of the business (or so Barry told me). They then went cold on the deal before coming back and doing further due diligence before committing. Barry informed me that he had given Ivy everything they asked for. Also, they appeared to have a credible accountant doing the due diligence and I trusted he would have looked at 21Bet's bank accounts, wallets and NGRs (amongst other things). All of that data is in reports or statements that cannot be manipulated.
>
> …
>
> 81. Barry and I never discussed misleading Ivy or fudging the figures in any way. I never instructed or encouraged Barry to make any specific statements regarding 21Bet. As I have said elsewhere in this statement, I took no part in the due diligence process, including the DDQ, and had no idea what Barry was saying to Ivy. I believed Ivy had carried out a thorough due diligence exercise and had access to all underlying data. As far as I was concerned, Barry was participating in that process properly and transparently."

201. Mr Copans' evidence was that, while he was in London on the due diligence visit to London in early August 2018, Mr Martin and he discussed various other matters. He believed, though he was not sure, that it was on that occasion that Mr Martin first mentioned Mr Bell. Ivy was aware of Mr Bell's involvement from the DDQ. Mr Martin told Mr Copans that Mr Bell was a partner in the business and that they had previously worked together in relation to a business known as 666Bet, a company whose gambling licence had been suspended. Mr Martin also mentioned that Mr Bell had been arrested at the airport. Mr Copans could not remember the specifics or the reason why Mr Martin mentioned that. Mr Copans then said in his witness statement:

> "Barry told me that Paul's involvement was kept "in the shadows" and he (Paul) insisted on not being named anywhere near the business "officially". The very clear implication of what he told me was that Paul's name would not appear on any of the transaction documents. Although he did not say so in terms, the impression I got was that Paul had something of a black mark against his name because of 666Bet and that he preferred to keep a low profile, avoiding being named in an official capacity. My impression was that Barry ran the business operationally and took most decisions but high level decisions with financial implications were taken by the two of them. I was not surprised by the reference in the due diligence questionnaire to the fact that the shares were stated as being legally owned by Richard Hogg but beneficially owned 50/50 by Barry and Paul. There is often

> a face for the business and after what happened with 666Bet the heat would have been on Paul and he would not have been able to get a gambling license in his own name. I thought that Barry was representing himself and Paul in the negotiations. Barry said that Paul was too busy to do much and so he (Barry) was given the task of negotiating the deal."

202. In oral evidence, Mr Copans said he did not remember telling anyone else at Ivy that, according to Mr Martin, Mr Bell wished to remain in the shadows. On the other hand, he recalled that Mr Martin had told both him and Mr Hooja about 666Bet at the same time. Mr Copans did not (as Mr Bell wrongly suggests in his written closing) suggest that Mr Martin told him and Mr Hooja at the same time that Mr Bell wished to remain in the shadows.

203. Mr Copans also confirmed in oral evidence that he understood Mr Martin to be representing both himself and Mr Bell, and recollected having told Mr Hooja that on many occasions. He understood that Ivy was contracting with Mr Bell, but Mr Bell's name was not going to be on the contract because Mr Bell didn't want it to be. Mr Copans said that was pretty normal in the industry to have a proxy shareholder who is acting on behalf of the real beneficial owner, as in this case, where Mr Hogg was the acting owner and (Mr Martin told him) Mr Martin and Mr Bell were the 50/50 owners. Asked about the contents of the SPA, Mr Copans said:

> "At the end of the day, as I mentioned to you before, the drafting the agreement with Barry, my understanding was that we had a side agreement with (inaudible), so it was normal in this kind of business to do things that way. I trusted Barry that he had a side agreement and that whatever was agreed with him meant that he was contracted to both parties"

204. Mr Copans was cross-examined about when Mr Martin told him that Mr Bell's involvement would be kept in the shadows, and said this was on several occasions, a recurring theme, one of which was (as mentioned in Ivy's Reply) at a due diligence meeting with Mr Martin on 9 and 10 August 2018. It was suggested in a long, and at times confusing, cross-examination that Mr Copans was being inconsistent and untruthful in his evidence on this point, and also that he was confusing it with a statement Mr Martin once made about himself staying in the shadows. Mr Copans accepted that his witness statement did not specify where and when Mr Martin told him Mr Bell was to remain in the shadows, and said he could not recall the exact times and dates. Mr Copans agreed that the allegation in the Reply that it was said during his visit to London must have come from him, and said that that visit would have been one of the occasions on which it was said: it was a constant narrative. That evidence was in turn said to be inconsistent with the Reply, which refers to only one occasion.

205. In my judgment there is no merit in the criticisms of Mr Copans' evidence on these matters. As noted above, Mr Copans indicated in his witness statement that his visit to London was, he believed, the first time Mr Martin mentioned Mr Bell; and he proceeded to explain various things Mr Martin told him about Mr Bell including the 'shadows' point. It is reasonable to suppose that, as Mr Copans said in his oral evidence, the visit to London was an occasion on which Mr Martin made that point to Mr Copans. Given that Mr Copans very fairly made clear that he could not specify the other particular

occasions on which Mr Martin told him this, it is unsurprising that the Reply mentions only one, and that fact does not in my view undermine Mr Copans' evidence in any way. I accept his evidence on these matters as being truthful, plausible and accurate.

206. Mr Copans was also challenged on his evidence that Mr Martin told him Mr Bell had been arrested at the airport in connection with 666Bet. It was suggested that that was inconsistent with Mr Hooja's original affidavit in support of the freezing order. Mr Hooja there stated that he understood from an internet search conducted by Ivy's lawyers that Mr Martin and Mr Bell had a history of working together, and that they previously worked together on 666Bet, referring to various Press articles including about Mr Bell's arrest. Mr Copans agreed that he would have discussed events before Mr Hooja's affidavit was put together, but said he was not involved in its preparation or, so far as he recalled, shown it in draft. Mr Copans did not recall himself telling anyone else at Ivy about the 666Bet matter, though he was pretty certain that Mr Martin told Mr Hooja about those matters too, albeit he could not remember when.

207. Mr Copans was also asked about the warranties in the SPA. He said in examination in chief that he had no recollection of Ivy asking for Mr Bell to be bound by them. He recalled Mr Martin having told him that Mr Bell put in the money but did not want to be operationally involved or named in any share registers or documentation. Mr Copans considered that only Mr Martin could give relevant disclosure against the warranties, because Mr Martin was the person who would be continuing in the Business.

208. Mr Hooja's affidavit and witness statements did not refer to having learned any of the information about 666Bet and Mr Bell's arrest from Mr Copans, as opposed to from his lawyers' internet searches prior to the freezing injunction application. In his oral evidence he said his affidavit did not seek to give the impression that the information was only newly obtained, and that Mr Copans had also told him that Mr Martin had been involved in other gambling businesses and that there had been a messy transaction in which a business had had to close. He thought Mr Copans could have told him this before the SPA was entered into, though he was not sure. He could not remember whether he had previously been told that 666Bet and Mr Bell had been involved in VAT fraud and money laundering allegations, or that Mr Bell had been arrested. He had been told that Mr Bell wished to remain in the shadows, in one or two meetings prior to when he swore his affidavit, but could not remember when, and was not sure why his affidavit did not say so. He also believed that 666Bet had been mentioned in "one of the phone calls". The following exchanges then occurred:

> "Q. Mr Martin, did Mr Martin himself tell you any of the facts that you report in paragraph 50?
>
> A. I don't remember specifically, but I am pretty sure 666Bet was mentioned in one of the phone calls.
>
> Q. So other than the bare mention of 666Bet, Mr Martin had not told you any of the facts that you deal with in paragraph 50?
>
> A. At least I remember so.

> Q. Yes. As far as you recall, all of those facts were facts and matters you discovered shortly before the freezing order pursuant to an internet search conducted by your lawyers?
>
> A. Yes."

209. In my view Mr Hooja's evidence on these points was truthful. It is apparent that he had limited recollection about precisely what he was told when, but I am satisfied (notwithstanding the rather general nature of the final question and answer quoted above) that Mr Hooja had a recollection of being told, at the time the transaction was being negotiated, about a prior messy transaction leading to a business having to be closed, with 666Bet having been mentioned, and about Mr Bell wishing to remain in the shadows.

210. Mr Hooja went on to say, in his oral evidence, that he understood at the time the deal was done that Mr Bell wanted to be in the shadows, and it was very normal in the industry to have proxy relationships. Asked whether he understood Mr Bell to be a party to the SPA, Mr Hooja replied that the business was being sold to Ivy by Mr Martin and Mr Bell. It was then suggested to Mr Hooja that he was saying he understood Mr Bell to be a party to the SPA but wished to remain in the shadows (which Mr Hooja accepted was what he thought), but it was then put to him that he cannot have thought that otherwise his affidavit would have said so. Mr Hooja replied that he did not remember, and that he was just giving an account of what he thought and believed.

211. I am satisfied, having seen and heard his evidence, that Mr Hooja was being truthful and that he was told something, while the purchase of 21Bet was being negotiated, about the messy 666Bet transaction and about Mr Bell wanting to remain in the shadows. In addition, I am sure he considered Ivy to be buying the Business from both Mr Martin and Mr Bell - Ivy had, after all, been told they were its 50/50 beneficial owners – and in that sense may have believed Mr Bell to be a party to the SPA. Given, however, that the SPA on its face recorded Mr Martin alone as the selling shareholder, it is unsurprising that Ivy's original case, and the evidence put forward in support of the freezing order application, did not assert Mr Bell to have been a party to the agreement.

212. Mr Hooja also gave this evidence about the warranties:

> "Q. Yes. You knew that, in order to give the warranties, Mr Martin would have to give disclosure about those warranties, wouldn't he?
>
> A. Yes.
>
> Q. And that's based on his personal knowledge of the operational side of the business, isn't it?
>
> A. Yes.
>
> Q. Mr Bell wouldn't have had that personal knowledge because he wasn't involved in the operational side of the business, was he?

> A. I don't believe so because any shareholder would want to know what and how the business is doing. That's very normal.
>
> Q. The warranties, therefore, were warranties that were personally provided by Mr Martin, weren't they?
>
> A. Yes, for the business.
>
> Q. You knew that Mr Bell hadn't been asked to give any warranties himself, didn't you?
>
> A. I don't remember that, but from my own perspective I had it confirmed when I met Mr Bell in Prague and we had a good meeting and we could see easily eye to eye and that was enough for me.
>
> Q. You didn't discuss the warranties in Prague, did you?
>
> A. Not specifically.
>
> Q. No. You knew that Mr Bell wasn't giving any warranties, didn't you?
>
> A. At the time of the SPA?
>
> Q. Yes.
>
> A. It was left to our legal team and our -- Mr Watt."

213. Mr Bell submits that Mr Hooja therefore confirmed that the warranties were personally provided by Mr Martin, as only he had the personal knowledge of the Business. That is a materially inaccurate summary of the evidence quoted above. Mr Hooja in fact took issue with the suggestion that Mr Bell lacked sufficient information about the Business in order to be able to provide warranties, albeit he did not positively suggest that he understood Mr Bell in fact to be giving warranties. His third answer, starting "*I don't believe so*", was expressing disagreement rather than agreement with the questioner.

214. Mr Watt said in his witness statement:

> "I also remember that Barry mentioned at a meeting with Mike Kitto also present that Paul did not want his name put in the SPA as a party to the agreement. I was told by Barry that this was because he was not on the share register and he did not want it put in writing that he was a 50% owner and wanted his shareholding to be hidden. I thought this must be because of what had happened with 666Bet. 666Bet had collapsed in 2015 owing money to customers. This discussion with Barry was at some point in mid to late January 2019."

215. In cross-examination Mr Watt said that the Ivy representatives understood from the very beginning that Mr Martin was acting as Mr Bell's agent, though he made the point

that he was an accountant not a lawyer. He was asked to whom at Ivy he gave the information quoted above from his witness statement. Mr Watt said he did not mention it to anyone in the context of the application for a freezing order, because Ivy knew that Mr Bell had not wanted to be named in the SPA. At the time, however, i.e. after the meeting with Mr Kitto, Mr Watt said he had reported to Mr Jain at his Berkeley Square office that Mr Bell did not want to be named in the SPA. There were no notes of that meeting. Mr Watt said he did not find it particularly surprising, as he understood from the way Mr Martin had phrased it that it would have something to do with the 666Bet situation. He recollected that Mr Jain was content to proceed on the basis that Mr Bell was not a party.

216. In the course of his oral evidence, Mr Watt confirmed that he was aware that Mr Martin and Mr Bell had had previous involvement with 666Bet, and he thought Mr Martin had actually mentioned that. It was then suggested that Mr Watt had not said so in his witness statement, and that he and Mr Copans had in fact concocted the evidence. I reject that suggestion, and indeed have considerable doubt about whether it could properly be made. The evidence quoted above from Mr Watt's witness statement clearly indicates that he knew, at the time, about 666Bet; and though it does not say in express terms that Mr Watt knew about 666Bet from Mr Martin, it is certainly not inconsistent with that having occurred. On the contrary, the words "*This discussion with Barry …*" immediately after the reference to 666Bet tend to suggest that Mr Martin may well have been the source, or a source, of information about 666Bet.

217. Mr Watt also said in his oral evidence that he was aware, before the SPA was signed, that Mr Bell had been arrested. Mr Watt said he lived in the Isle of Man at the time, and the arrest was big news there. He joined Ivy only in December 2018 and did not know what knowledge other members of the Ivy team had about Mr Bell's arrest.

218. Mr Watt was asked about the discussions he had about the warranties. He confirmed that these discussions were with Mr Martin and Mr Martin's representative, and that Mr Bell was not mentioned during the discussions. Mr Watt said he did not know what Mr Bell's level of knowledge about the Business was, or about the depth of communication between Mr Bell and Mr Martin, though he expected that they would have communicated given that Mr Bell was a 50% owner of the Business. Further, Mr Watt said, Mr Martin kept referring to Mr Bell in terms that he was communicating with him about the deal. Mr Watt said he had not spoken to Mr Bell at all, but he was operating in the belief that Mr Martin was Mr Bell's agent. Mr Watt accepted the general proposition that the warranties were dependent on Mr Martin's personal knowledge of the Business, but did not accept that he knew they were personal warranties given by Mr Martin only. He did agree that no-one ever suggested that Mr Bell should give disclosure against the warranties.

219. I accept Mr Watt's evidence as being truthful and as reflecting his genuine understanding of the position at the time the deal was done.

220. The 'shadows' point was also put to Mr Martin in cross-examination, who denied it, making the point that Mr Bell was named as a beneficial owner in the DDQ, and adding that after the Prague Meeting he did not believe he or Mr Copans had mentioned Mr Bell at all. However, there is no inconsistency between Mr Bell being named on the questionnaire as a co-owner but being kept in the shadows so far as the transaction

documents were concerned; and having heard the evidence as a whole I do not accept Mr Martin's evidence on this point.

221. On a related topic, Mr Bell in his written closing suggest that Mr Copans was being untruthful and partisan by suggesting in oral evidence that he assumed Beavis Morgan to have been acting for both Mr Martin and Mr Bell. That suggestion appears to be based on the following exchanges:

> "18 Q. Yes. You knew that Beavis Morgan weren't acting for Mr Bell?
>
> A. I always assumed they were.
>
> Q. Why?
>
> A. Because he was a 50 per cent shareholder in the business.
>
> Q. No one ever said to you that Beavis Morgan were acting for Mr Bell, did they?
>
> A. It was always implied.
>
> Q. Where is it implied?
>
> A. In my understanding, he was a 50 per cent shareholder and any type of business, which I mentioned yesterday -- and I know you said I shouldn't mention again -- but --
>
> Q. Yes?
>
> A. -- what I mentioned is that in this type of business it's normal.
>
> Q. There's no need to repeat that. I am asking you different question. Where did Beavis Morgan ever expressly or by implication say that they were acting for Mr Bell?
>
> A. They didn't.
>
> Q. We can see in this email that they are expressly talking about considering protections for Barry, aren't they?
>
> A. That's correct.
>
> Q. No one is discussing protections for Mr Bell, are they?
>
> A. No.
>
> Q. And the SPA was structured on the basis that payments would be made to Barry, wasn't it?
>
> A. Yes, but Barry had told me on numerous occasions that all the money, the first 2.5 million would go directly to Mr Bell so --

> Q. But you weren't paying that directly to Mr Bell?
>
> A. No, we were paying it to Mr Martin and he was going to pay it to Mr Bell. He mentioned on many different occasions the first 2.5 million was going to Mr Bell so I just assumed that to be correct because I trusted Barry in what he told me and I believed that to be the case"

In my judgment, Mr Copans' answers to these questions do not indicate, nor even provide a basis on which it could reasonably be alleged, that he was being untruthful or partisan. Nor was any such allegation put to Mr Copans on this point.

222. The contemporary documents referred to in section (D) above show that Mr Martin kept Mr Bell fully updated about the discussions with Ivy, forwarding offers to him and discussing the proposed terms with Mr Bell.

223. Moreover, Mr Martin made clear to Ivy that he needed Mr Bell's blessing of the contemplated deal (see the 27 August 2018 communication quoted in § 103 above, and the 19 November 2018 email quoted in § 168 above about what Mr Martin thought he could get Mr Bell to agree to); and, afterwards, of any revisions to it (e.g. on 5 June 2019, § 197 above). Mr Bell denies that his approval was necessary but I am unable to accept that evidence. He was a 50% beneficial owner of the business, had funded it in part himself and in part via Simplify, and had been in control of the purse strings throughout. He wished to see the Simplify advances repaid and, as his written evidence indicated, his share of the balance of any sale proceeds. It is obvious that Mr Martin will have required Mr Bell's blessing both of the deal and of any subsequent revisions to it.

(22) Post-sale events

224. After the sale, certain Ivy/Tabella employees became involved in the running of 21Bet. Mr Watt and Mr Christopher Owen attended the 21Bet offices. During this period, it became apparent that 21Bet had a number of outstanding liabilities:

i) On 8 April 2019, Mr Martin forwarded Mr Watt an email sent by Mr Alan Brett of ADS, an accountancy firm, regarding liability to HMRC for PAYE/NIC for March 2019 for £8,714.97.

ii) On 12 April 2019, Mr Martin received an email from Mr Hogg forwarding a request from the Malta Gaming Authority ("***MGA***") for payment in respect of £45,080.52 outstanding from Aureate for annual licence fees and/or compliance contribution fees.

iii) On 23 April 2019, Mr Watt circulated cash flow calculations which showed that 21Bet needed significant capital injections. He explained that "*we urgently need £65k (THIS WEEK) to take us through to the middle of May, followed by an additional £50k to take us to end June*". He said that there were various reasons for this, including no revenue coming from FSB due to "*the migration*", increased salaries, Gamingtec set up fees, unexpected legal fees and business rates.

iv) On 1 May 2019, HMRC provided statements of liabilities showing debts owed by City Support in the sum of £18,667,90. These related to PAYE and National Insurance Contributions.

v) On 9 May 2019, bailiffs arrived at the 21Bet offices in respect of outstanding rent payable by 21Bet. Mr Watt said in his witness statement that he was accordingly required to make an immediate transfer of approximately £15,000.

vi) In late May 2019, Ivy became aware that prior to the sale of 21Bet Mr Martin had negotiated a rate with AliQuantum, a Maltese gaming platform provider, which would increase by £15,000 on sale of 21Bet.

225. Mr Watt said in his witness statement that he also became aware of a Bulgarian tax debt of around €18,000 for the period from January to March 2019.

226. It also became clear around this time that Mr Martin was involved in a dispute with FSB, arising from the UK business having migrated customers from the FSB platform to the SBTech platform. Mr Watt summarised this in an email to Mr Jain and Mr Hooja on 29 April 2019:

> "The relationship between Barry and FSB has irretrievably broken down and consequently we cannot count on receiving ANY funds from them as FSB fear fines from UKGC [UK Gambling Commission] relating to failure to carry out sufficiently detailed source of wealth and source of funds checks on 21Bet customers."

227. FSB was demanding a large sum to be put in escrow to cover historic liabilities to the UK Gambling Commission and threatening not to effect the migration. Mr Martin knew at least by 29 March 2019 (when he received a detailed email on the topic) that there were still a number of significant matters that needed to be resolved with FSB before the migration could be allowed to proceed, including outstanding invoices and other issues. Mr Martin accepted in his oral evidence that the migration from FSB to a new platform was a "*critically important aspect of the business*". Nevertheless, none of this was disclosed to Ivy.

228. Mr Copans' evidence was that Ivy discovered, after acquiring the Business, the following matters:

i) There was no income from FSB in 2019. FSB was the platform used by the UK business and it was substantially loss-making.

ii) There was also no income from the Bet Exchange side of the Business (i.e. peer-to-peer betting), which had ceased to exist in late 2018 due to problems with the Aliquantum platform.

iii) The VIP cash business had been essentially closed down after the Alan Spence debacle, and so that very significant part of the projected revenue of the Business was in fact producing only "*very minimal income*". Moreover, the evidence suggested that the VIP cash business had never really existed, or at least not to the extent that Mr Martin had told Ivy during the negotiations.

iv) The non-UK part of the business also produced far less income than as set out in the 2018 EBITDA extrapolation that Mr Copans had calculated in conjunction with Mr Martin.

229. Mr Watt's evidence was that "*it was the worst state I had seen a business in during my entire professional career"*; that the Business was unable to pay its debts without significant injections of cash from Ivy; and that over £250,000 was put into the Business to keep it afloat by end of June 2019, only 2 months after the acquisition.

230. Having been updated on 21Bet's financial position, Mr Jain emailed Mr Watt on 30 April 2019 stating that "*We bought business under the assumption that it is generating £150k per month in net positive cash flow. Barry lied to us and did not disclose that this is not the case. Due to ambiguity with the cash business, we could not verify all this and that was my fear in the first place*". He said that he would "*put a hold on Barry's salary till business starts generating positive cash flow*".

231. Mr Copans' evidence was that Mr Martin pulled him aside shortly after the SPA and, during that conversation, Mr Martin effectively accepted that the Business had been on life support, that he had needed the cash to pay off his personal and business debts, and that he had been prepared to make the deal happen at any cost, essentially by not telling the truth about the true state of the Business. Mr Copans was not directly challenged about this evidence, though it was put to Mr Martin in cross-examination. Mr Martin denied it, saying the gist of the conversation was "*look, Neil, I want to work with guys. What shall we do? How do we get out of this? How can I help? How can we move it forward?*" There are no contemporary records of this conversation. Mr Martin is bound, in the light of all the matters I have referred to above about the state of the business, to have realised what a poor state it was in, and it is entirely plausible that he would have admitted this. He could not credibly take any other approach. It is also entirely possible that he admitted to having lied. However, I note that Mr Copans does not allege in terms that Mr Martin specifically admitted to lying, and it is not a matter on which I find it necessary to reach a conclusion. The real question is whether he did lie, which is a matter I consider later.

232. Mr Martin requested that Ivy "*look upon this current situation as a blip that will right itself very quickly*". In relation to the VIP business, he said that "*For the last two months we had stopped all VIP activity purely based on the fact that our investor (who was providing any shortfall in funds with FSB not sending any monies at all) was not willing to give the financial backing necessary to run an effective VIP service*".

233. In early May 2019, Ivy became aware that Mr Bell had been making significant capital injections over the course of 2019. On 7 May 2019 Mr Watt emailed Mr Martin stating that "*there are a number of large transaction that I don't understand. I have tabulated them on spreadsheet (attached) and hoped you could complete the explanations*". The table showed sixteen payments from Simplify Umbrella between 2 January 2019 and 29 March 2019, adding up to a total of £320,000. In the "*explanation*" column, Mr Martin appears to have entered "*business Loan Note*". A similar exercise was carried out for the period from April to December 2018 in late May. In an email to Mr Copans on 21 May 2019, Mr Watt concluded: "*From this analysis Paul was bankrolling the business for all of 2018*".

234. On 16 and 17 May 2019 Mr Watt and Mr Copans discussed what they had found by going through 21Bet's financial information. The conversation included:

> [16/05/2019, 12:07:22] Archie Watt: Hi Neil, I have been going through the bank statements for the whole of 2018. Were you aware that Paul had pumped in over £350k to keep the company going over that period? This is on top of the £319k that he pumped in during 2019
>
> …
>
> [16/05/2019, 12:08:01] Neil Copans: I wasnt aware of that
>
> [16/05/2019, 12:08:20] Neil Copans: My understanding is he put in 2.5 million
>
> [16/05/2019, 12:08:29] Neil Copans: and then another 300 or so Jan to April
>
> …
>
> [16/05/2019, 12:09:19] Archie Watt: This isn't a business, it's a basket case
>
> …
>
> [16/05/2019, 12:10:14] Archie Watt: I am going to try to pull together some accounts for 2018/19 which may provide some clarity
>
> …
>
> [16//05/2019, 13:09:41] Neil Copans: its no question that we have to adjust the purchase price (to say the least)
>
> …
>
> [17/05/2019, 15:12:43] Archie Watt: Basically his numbers on VIPs for 2018 are a total fabrication based on nothing whatsoever".

235. Mr Watt said that by late May 2019, it had become apparent to Ivy that the Business was "*not a viable business or going concern*". In late May/early June 2019 Ivy representatives also discovered some of the communications about Premier Punt to which I refer in section (D)(24) below.

236. On 4 June 2019 Mr Watt raised the issue of Mr Bell's loans to 21Bet with Mr Martin. Mr Martin responded that "*Funds from P Bell is a tough one as it was only ever a hand shake and no docs exist*". Mr Watt replied that "*we need something in writing, particularly as there is no evidence that the loan has been repaid*".

237. It appears that Ivy began to wind up the 21Bet business thereafter, and it ceased trading. City Support was dissolved on 11 February 2020.

(23) 21Bet's actual financial position

(a) Experts' reports

238. It was common ground between the accounting experts called by Ivy and Mr Bell that the alleged representations about the Business's profitability, if made, were materially inaccurate (Joint Statement § 1.1). The experts added, in their Joint Statement dated 26 November 2021, the following:

> "In particular:
>
> i) Mr Davidson concluded that the representations made, specifically that annualised EBITDA was £1.6m, were inaccurate to a very material extent. In the analytical review set out in Sections 4-6 of JD1, the UK business alone was shown to be making losses in excess of £1.5m in the period to 31 December 2018 and losses to 31 March 2019 of £1.75m.
>
> ii) Mr Donaldson concluded from the analysis of CSS bank statements and his reconstruction of the Profit and Loss Account and the Balance Sheet, that the Business was not generating EBITDA of £1.6m in 2018 and, in fact, was loss-making.
>
> 1.3 The Experts point out for the sake of completeness that, while they agree that the representations were materially inaccurate, they reach slightly different amounts for the loss they consider the business was actually making. Mr Davidson says it was a loss of £1.75 million. Mr Donaldson a loss of £1.6 million. They agree from an accountant's point of view the difference is not materially relevant.
>
> 1.4 The above position considers only the UK business. The experts agree that the non UK business was also loss making." (§§ 1.2 to 1.4, footnotes omitted)

239. The experts also agreed that in this case, where there is no evidence that the business paid interest, or incurred depreciation or amortisation, EBITDA is broadly synonymous with profit before tax (Joint Statement § 3.2(iii)).

240. Mr Davidson's view, which was not challenged, was that UK part of the Business made losses in the year to 31.12.2018 of £1.5m and, and in the period from 1.1.2018 to 31.3.2019 of £1.75m. He also found that the non-UK part of the Business made a loss for the year ended 31.12.2018 of £502,525, giving a combined loss for the entire Business of £2.25m.

241. Mr Donaldson did not quantify the losses in the non-UK part of the Business, but in considering the Business's overall balance sheet as at 4 April 2019 he took into account the balance sheet from Aureate's statutory accounts for the year ended 31 December

2018, which showed net liabilities of £908,057. Aureate's statutory accounts for that period showed a net loss of €119,729, following a net loss of €888,328 in 2017, albeit the auditors were unable to express an opinion on the accounts due to lack of audit evidence. Mr Donaldson did not suggest that Aureate might, contrary to the accounts, in fact have made a profit in 2018, and (as noted above) agreed that the business as a whole made a loss. Nor was it suggested to Mr Davidson, at least not in terms, that the business as a whole in fact made a profit in 2018. In order for that to have happened, the non-UK part of the business would have had to make a profit in excess of the losses made by the UK part of the business, which the experts agreed were at least £1.6 million.

242. Mr Donaldson also agreed (in the context of the warranty issues) that "*without the additional support from Simplify, the Business was unable to meet its liabilities as and when they fell due*" (Joint Report § 2.2(ii)).

(b) Liquidation of Viktra

243. Until April 2018, the UK side of the business was operated through Viktra. Viktra went into liquidation on 1 May 2018, with net liabilities of £584,568, excluding the significant sums which the business owed to Simplify and to Mr Bell personally.

244. The decision to put Viktra into liquidation appears to have been taken at some point in late November 2017 and the process was underway at least by March 2018. The reason why Viktra was put into liquidation was because it had substantial liabilities to Catena, HMRC and others and, due to its cash-flow issues and lack of gambling revenue, it was not able to pay wages, rent and other ongoing liabilities. The plan - which was put into effect by the subsequent incorporation of City Support - was to put Viktra into liquidation and to set up a 'phoenix company' in its place. These considerations were set out in an email from Mr Martin to Mr Bell on 12 October 2017, which among other things said:

> "With your permission, I would like to start the process of winding up Viktra Business and let me explain why I think it is a necessity.
>
> Catena Media have pass our debt on to a collection agency and they have included £27k of collection fees which I really don't
>
> understand but the bill is £217k. This is a disputed figure as we had the debt at around £100k. Add on to this the outstanding amount to HMRC for PAYE of circa £60k and we can lose all this debt for a fee of £5k +VAT.
>
> Today I had a meeting with an accountant called Alan Brett (he is the owner of the ADS group out of Dartford) who I have used in the past and is very good with this type of thing. The idea is to create a newco with bank account, not called Viktra but set up as a 'trading as Viktra' so we can continue to take in payments from FSB without any questions for their side.

> Once this is set up and we are through this month's payroll, Alan can begin his work of moving the registered offices over to his specified address, winding up Viktra and getting a clean start under newco.
>
> From here Alan will also provide us a full payroll service, monthly management accounts, look after our VAT and corporation tax, provide a full set of numbers and make sure that everything is above board from the get go. For this he charges £600 per month+ VAT.
>
> The great thing is he will send in one of his accountants to us and go over all the figures once a month and will give me much needed assistance in this area for both newco, Aureate and also To Play Central.
>
> We spoke at length about any repercussions for Richard or the business going forward and he said the amount owed to HMRC won't be enough for them to chase. Also Catena wont have a leg to stand on after Viktra is wound up. Yes of course we will not be able to work with them but after them passing it on to a collection agency, that is pretty much a given.
>
> This will not apply to VIPbets.co.uk as it would be a brand-new entity giving us lots of opportunity, if we decide to go down that route which is certainly not part of the initial plan.
>
> So where does that leave the business going forward?
>
> …
>
> From here I think we need to sit down and go over where we expect the business to be and if changes need to be made as far as reducing overheads then we can look at each area to see how we can turn this into profitability quickly.
>
> It would be good to go over this in more detail either on the phone or in person so we can agree the best way forward."

(c) Aureate's financial statements

245. All of the Business' non-UK gambling revenue went through the Maltese company, Aureate, the other overseas companies which formed part of the business being 'costs centres' only (as both Mr Davidson and Mr Martin indicated).

246. According to its audited financial accounts, for the year ended 31 December 2017 Aureate made a loss of £888,328, and for the year ended 31 December 2018 a loss of £119,729.

(d) Cash injections

247. In the period from 14 February 2017 to 2 March 2018, Simplify companies made 69 cash injections into Viktra totalling £1,126,940, in addition to the £400,000 paid in by Mr Bell personally between March and September 2017.

248. In the period from 24 May 2018 to 29 March 2019, Simplify companies made 42 cash injections into CSS totalling £685,505. These included payments totalling about £52,000 in the month leading up to the Prague Meeting on 1 October 2018, and payments totalling about £194,000 in the month leading up to the SPA. As Mr Davidson explains, the contributions were made on average once a week. Save for two periods of approximately two months each when no capital injections were made, no period longer than 17 days passed without the need for a capital injection.

249. In the words of Mr Bell in his oral evidence, "*if the business continues to need cash, … it must be making losses*", and "*As I said to you previously, I don't believe there's any EBITDA because cash is king and cash is constantly being required*".

(e) Cross-examination of Mr Davidson

250. The Defendants nonetheless advanced two main lines of argument to the effect, broadly, that the performance of the Business must have been better than might otherwise appear.

251. These lines of argument focussed in part on the figures for VIP customers betting in cash, which Ivy suggested must have been an area where Mr Martin had been able to inflate the figures in order to portray a profitable business. Mr Martin gave oral evidence that:

i) "*cash was a liberal term*", since VIP payments also came in electronically through e-wallets and similar e-payment solutions ("*e-wallets*"); and

ii) the VIPs were based not just in the UK and income also came through Aureate's Satabank account, in Malta, consistently with contemporaneous documents in which Mr Martin told Mr Copans in June 2018 that the VIPs might or might not be in the UK, and that the business could not declare the amounts for tax purposes so the monies were "*moved to Malta*".

252. The first of the Defendants' lines of argument is made by reference to a Schedule 5, prepared on behalf of Mr Bell, based on the bank statements for Viktra (unavailable at the time of Mr Davidson's report), CSS and Aureate, indicating *inter alia* that there were a total of £349,293 of payments into Viktra's and CSS's UK accounts (at Lloyds Bank and HSBC respectively) in the period January to July 2018 in cash, or from e-wallets and/or from persons at least some of whom Mr Davidson accepted were likely to be VIPs. This part of the schedule thus excludes payments from Aureate, FSB and Simplify. It was suggested to Mr Davison in cross-examination that these receipts were consistent with the assumptions Mr Copans made about net gaming revenue from VIPs.

253. However, Mr Davidson disagreed with this suggestion. He pointed out that:

i) in order to form any assessment of net gaming revenue from VIPs, it was necessary to have regard not only to sums coming in but also to payments out to VIPs;

ii) it would also be necessary to distinguish sums coming in by way of gross revenue from sums paid by way of deposits e.g. to cover margins;

iii) his analysis of transactions in the City Support bank account (which was available to him when he produced his report), for the overall period from April 2018 to May 2019, indicated a net cash loss of £69,565;

iv) the maximum income coming into the Viktra bank account in January to April 2018 (when Viktra ceased trading) that could constitute VIP income totalled approximately £39,000;

v) in the period from the beginning of the use of the City Support bank account (23 April 2018) up to the end of July 2018, total receipts less payments out were £158,000; and

vi) Aureate's bank statements (see further below) showed an overall net cash loss of during the period January to April 2018.

254. The general thrust of Mr Davidson's evidence, which I accept, is that it is not legitimate to conclude, from a list of payments into the Viktra and City Support accounts, that there was net gaming revenue of any particular amount. Moreover, such data needs to be seen in the light of all the other evidence, to which I refer below, indicating that the business was not profitable.

255. The second line of argument focussed on credits to Aureate's Satabank account in the period January to April 2018, which were also set out in the schedule prepared on behalf of Mr Bell. (Proper bank statements for this account existed only up to the end of April 2018.) These credits totalled €406,265.94.

256. Mr Davidson in his report noted that this level of receipts was difficult to reconcile to the level of revenue recorded in Aureate's statutory accounts for 2018, namely €355,502 for the year as a whole. However, he noted that in the same 4-month period, January to April 2018, payments out of the bank account amounted to €413,000, suggesting a cashbook loss for the period. One of the payments out (€55,000) reflected a VIP loss, and there were also payments of €102,200 to "*Viktra Business*" and €119,800 to City Support, indicating a degree of support for the UK business. Mr Davidson noted difficulties in reconciling the figures to the statutory accounts: for example, these showed software licence fees of €25,000 whereas the bank statements referred to software licence fees of €57,087. Mr Davidson concluded that it was difficult to gain a clear picture of non UK trading from the various sources, but it remained the case that the Aureate financial statements did not show a profit and nor did the bank statements indicate a cash surplus from trading.

257. In cross-examination it was suggested that these cash payments indicated that the Aureate accounts grossly overstated its revenue for the year as a whole. Mr Davidson accepted that most of the payments listed in Mr Bell's schedule appeared to come from e-wallets and platforms, suggesting that they represented revenue (i.e. net of gaming

losses for the company), although he could not confirm the position definitively one way or the other. However, he pointed out that it was entirely possible, as was the case with the English company, that total revenue by the end of the year was lower than the cash received into the bank account in the first part of the year.

258. Mr Copans in his EBITDA calculations had relied on a figure of €123,562 for non-UK NGR for the 68 day period from 13 June to 21 August 2018, thus about €55,000 a month, extrapolated to an annual NGR of £592,177. It was suggested to Mr Davidson that NGR at that level could easily be accommodated within revenue of €406,000 received in the period January to April 2018. Mr Davidson considered, however, that one needed to be very careful before drawing any such conclusions by comparing two different periods of time. In addition, as noted earlier, the overall payments out of the Aureate bank account over the period January to April 2018 exceeded payments in, suggesting a cash book loss.

259. In these circumstances, I do not accept Mr Bell's contention that one can justify the figure of £468,054 for VIP NGR provided by Mr Martin to Mr Copans by assuming the £349,293 payments into Viktra's and CSS's accounts, plus the €406,266 payments into Aureate's Satabank account, to be made up mostly of VIP NGR.

260. Mr Bell makes the further point that the VIP figures for June and July 2018 (which Mr Copans was told amounted to €112,491, or about £100,000) could reliably be regarded as revenue as they were derived from invoices from the Digitain platform that the Business had started using. As a result it was only the non-Digitain figures for January to April 2018 where Ivy had to rely on numbers provided by Mr Martin. That is consistent with Mr Copans' evidence, but the Digitain revenue accounted only for less than a quarter of the VIP NGR said to exist.

261. Mr Davidson also noted in his report that:

> "4.41 Aureate appears to have incurred significant transaction costs in both periods. In 2017 revenue of €521,270 was supported by transaction fees expensed of €324,401 (62%). In 2018 revenue of €355,502 was supported by transaction fees of €251,662 (71%). In both periods such fees appear to be very high. I am instructed, in general transaction fees is approximately 4%-6% of the NGR, thus at this level of transaction expense, NGR expected would be around €4.2m for 2018 and €5.4m in 2017, which does not appear to be what the accounts report.
>
> 4.42 It appears that Aureate was unable to provide its auditors with access to the company's different bank accounts and, consequently, the auditors were unable to determine whether any adjustments to the items above were necessary.
>
> 4.43 Aureate's loss-making position is further emphasised by transactions in the UK bank statements. In the period April 2018 to April 2019, total receipts in the UK from Aureate were £25,622 but total payments to Aureate amounted to more than double that of £57,304, suggesting it required ongoing financial

> assistance from CSS. The Aureate Accounts also suggest that that company received support from its "director" to the tune of €200,000 by December 2018, though I note that this sum had reduced from €300,000 the year before.
>
> 4.44 The loss-making position in Malta can be contrasted with the forecast EBITDA for 21Bet, which suggested that the non-UK business was generating annualised net earnings of approximately £600k during 2018."

262. It was suggested to Mr Davidson in cross-examination that, if transaction fees were in fact at the level of 4-6% referred to in quoted § 4.41 above, then Aureate would have made a profit. Counsel for Mr Bell suggested that the position must therefore be that either the revenue was understated in the accounts or the transaction fees were overstated. Mr Davidson considered, however, that a third possibility was that the stated figures were correct, and the transaction fees were higher than he had been instructed would generally be the case. He accepted that he said in his report that the lack of an audit opinion made the accounts "*wholly unreliable*", though he indicated that that usually meant that the company's losses were understated. As to his assumption about the level of transaction fees, Mr Davidson said in cross-examination:

> "Well, first of all we are not talking about my experience. As I say here, I am instructed that in general transaction fees are approximately four to 6 per cent of NGR. I think that one of the inferences of the several that are available, other than the two you have concentrated on, is that those are a different type of transaction fee to the ones in the accounts. The accounts in black and white have stated revenue and the accounts in black and white have stated the costs. If one is wrong, then the inference can be drawn from the other. But I certainly have no knowledge or experience to say that the accounts are wrong."

263. Ivy point out that the FSB reports indicate that the transaction fees incurred by the UK part of the Business were very significantly higher than 4-6%: in March 2017, the NGR (the total of the sports and casino remittances) was £173,000 and the net remittance was £110,000 suggesting a transaction fee of 36%; in May 2017, the NGR was £224,000 and the net remittance was £163,000 suggesting a transaction fee of 27%; in July 2017, the NGR was £142,000 and the net remittance was £95,000, suggesting a transaction fee of 33%; and in August 2017, the NGR was £122,000 and the net remittance was £67,000 suggesting a transaction fee of 45%. Ivy also notes that Mr Martin's oral evidence was that the information used to prepare the Aureate accounts probably came from Harry Bull, whom Mr Martin elsewhere described as "*probably my closest confidante in the business*".

264. In my view Mr Davidson's evidence on this point was entirely realistic, and the generalised assumption to which he referred to transaction fees of order of 4-6% provides insufficient basis to seek to rewrite the accounts: particularly in circumstances where the evidence as a whole indicates that the Business as a whole was not generating profits.

265. Mr Davidson accepted that if the transaction fees were reduced to about 5%, then Aureate would have made a profit in 2018 (though not in 2017), though only if one further assumed that the sums shown in the accounts as transactions fees were not properly classified as some other form of expense. However, as noted above, there is no good reason to make that assumption: and in any event, the modest Aureate profit that would result from reducing the transaction fees in that way would not come close to offsetting the losses in the UK part of the business.

266. Perhaps most importantly, it was not suggested to Mr Davidson that the 21Bet Business as a whole was anything other than loss-making in 2018. (Indeed, in the context of the warranties, it was positively suggested to Mr Davidson that the business was clearly loss-making as at 4 April 2019, the date of the SPA.)

(f) Contemporaneous emails

267. The contemporaneous documents, particularly frequent emails between Mr Bell and Mr Martin, show beyond doubt that the Business was not generating sufficient cashflow to pay its regular outgoings (including salaries, rent and tax), let alone investments such as development projects; and as a result was wholly reliant on injections of cash arranged by Mr Bell. This is clear from the emails and other documents referred to in §§ 44, 45, 48 ("*cap in hand with more news of cash flow issues*", per Mr Martin), 56, 57, 58, 59 ("*living literally hand to mouth in as far as keeping our payment wallets with some balance but constantly withdrawing what we can to pay off the running costs and debts*", per Mr Martin on 21 February 2018), 60, 61 79, 81, 95 and 111 above, which span the period from February 2017 to September 2018; and all of these relate to the period before Mr Spence started to make large winnings adverse to the business (commencing on 4 November 2018). The emails referred to in §§ 166, 167, 172, 173 ("*The last 6 weeks have been some of the darkest I have had to face. No car, no money, battling with creditors everyday both business and personally including the HMRC*", *per* Mr Martin on 27 December 2018) and 180 above indicate that there was no improvement in the ensuing months, even though the business was only making modest part-payments to Mr Spence and was relying on the proceeds of sale of the business to pay the bulk of what was owed to him. The communications referred to at §§ 224-234 above indicate that this – a Business unable to pay its debts as they fell due – was also the situation which Ivy found when it acquired 21Bet in spring 2019.

268. Moreover, the contemporary documents indicate that the problem was not merely one of cashflow but, more fundamentally, that the Business was not making money or even breaking even. That can be seen from the communications referred to in the following paragraphs of this judgment:

i) § 48: Mr Bell's assessment on 20 September 2017 that the business needed 400k just to stay afloat, and would make another £500,000 in loss before it turned around, with which Mr Martin agreed;

ii) § 50: Mr Bell's suggestion that the main gaming business was "*still not break even?*", with which Mr Martin also fully agreed;

iii) §§ 51-53 and 222: Mr Martin's proposal on 12 October 2017 to "*turn this into profitability quickly*" (plainly acknowledging by implication that the Business

was currently not making profits), and Mr Bell's response that the Business "*has failed*";

iv) § 54: Mr Bell's suggestion on 26 October 2017 that Mr Martin's cost-saving measures did not achieve "*anywhere near enough to keep this business afloat?*", and his statements that there "*isn't enough income to cover the current overhead*", there was "*no income coming in*" and the money he had injected was "*dead money*"; and Mr Martin's agreement that the situation was "*grave*";

v) § 61: Mr Bell's statement on 21 March 2018 that the Business "*doesn't cover its overheads let alone have a chance of paying the investment or giving you a salary to pay for monthly living expenses and school fees etc*";

vi) § 75: Mr Martin's statements on 4 July 2018 that he had not taken any money out of the Business as there was none spare, and that the proposed sale to Ivy "*would be massive for me as without this or any further funding, I just don't see a way to trade my way out of this anytime soon*";

vii) § 159: Mr Bell's statements on 4 November 2018, after learning of Mr Spence having won £700,000, that the Business was "*skint*", "*owes me £3m*" and "*has trade debts of £500k plus*" in addition to now having VIP creditors of about £1 million;

viii) § 160: Mr Bell's statements on 8 November 2018 that the Business was "*bust again*" and a "*black hole*" in which "*every business sector has failed*" and "*[n]othing ever comes back*";

ix) § 161 and 166: Mr Bell's statements on 12 and 20 November 2018 that the Business was "*bust*";

x) § 173: Mr Martin's statement on 27 December 2018 that the business was "*broke*"; and

xi) § 173: Mr Bell's response on 29 December 2018 that the business "*has not made any money after 3 years and plenty of investment*" (and, he assumed, needed between £1 million and £1.5 million just to stay alive).

269. These documents provide compelling evidence that, unless Mr Martin and Mr Bell had fundamentally misunderstood the position during the entire period from September 2017 to December 2018, the Business was neither profitable nor self-sustaining, but rather was making substantial losses.

270. That position was also, of course, reflected in the impact on Mr Martin's personal financial position, put forward in strong terms in the communications referred to at §§ 61, 62, 63, 76 and 173 above.

(g) Evidence of Mr Bell

271. Mr Bell in his oral evidence made perfectly clear, repeatedly, that he did not consider the business to be making any profits, or any EBITDA, particularly because (a) the business repeatedly needed cash injections in order to pay its running expenses (and, as Mr Bell put it, "*cash is king*"), and (b) there was no sign that any tax was being paid on

any profits. As quoted earlier (§ 140 above), Mr Bell's position was that *"there's no EBITDA, it's not making any money"*.

(h) Evidence of Mr Martin

272. Mr Martin in his witness statement, dated 14 July 2021, said very little about the actual profitability and sustainability of the business, save for this:

> "… 21 bet wasn't without its issues at the time of its completion but moving onto a new license in the UK and new technology across both the UK and non UK businesses, achieving the forecasts numbers which both myself Neil Copans and Archie Wall had pulled together were eminently achievable and overall was worth every penny that had been paid and subsequently invested. Only a few months previously the business was achieving over £240,000 per month in gross gaming revenues in the UK alone. (Annexe 3)"

citing an FSB Trading Summary dated September 2018 indicating a total remittance of £245,246 to the Viktra business. He made no suggestion that the Business was actually self-sustaining (paying its expenses from its own revenues) or profitable, let alone to the extent represented to Ivy.

273. In his oral evidence, Mr Martin denied that he knew that the business was unprofitable. He suggested that profits had been invested in the business, for example in the following exchanges:

> "Q. If this business was worth -- was making a profit of 1 million, 1.8 million, half a million, any positive figure, where is the money? It's a question: where is the money?
>
> A. I don't know.
>
> Q. There wasn't any.
>
> A. There was, there was money around.
>
> Q. How could it be a profitable business if you are not taking the money out and it's not in the business? Where are the profits of this business to be found, Mr Martin?
>
> A. Well, every penny that we ever -- 21Bet was never meant to be something that was, you know, revenue generating from day 1, it was always about investing, growing, investing, growing, and that's all we ever did in the business.
>
> Q. But you told Ivy -- and we are going to come onto this, I will move on -- that this was a business that was making 1.6 or GBP1.8 million. If that was the case, where was the money? Where were the profits?
>
> A. Invested in the business."

and:

> "Q. Now, you knew that this business was not making a profit of GBP1.8 million as at June 2018 for all the reasons we have just discussed; do you agree with that, Mr Martin?
>
> A. It depends how you mash up the numbers, I suppose.
>
> Q. No, it doesn't because EBITDA is the profit of the business. In other words, the operating profit at the end of the year when you take up all your income and take away all your liabilities, you have a profit of 1.8 million; you knew that was not true, didn't you?
>
> A. Well, I am not being an accountant I obviously took off a lot of the liabilities when we liquidated Viktra and also I treated a lot of the investment as investment."

274. Similarly, Mr Martin suggested that by 2018 the Business had 50-60 staff, three or four offices and a "*multitude of assets*", and that revenue was being spent on investment, Bet Fair, new exchange, new software platforms, new domains, new staff, new offices. However, as was put to Mr Martin in cross-examination, it is entirely implausible to suggest that a business which required very frequent cash injections arranged by Mr Bell in order to pay basic overheads such as salaries and rent was, at the same time, earning substantial revenues which were instead being ploughed into new offices, platforms and domains. Moreover, the contemporary documents show Mr Martin also requesting money from Mr Bell for investment/development purposes (see, for example, those referred to in §§ 46 and 47 above).

275. Mr Martin also suggested that some profits were or could be represented by sums owed to the business by customers:

> "Q. I am not going to repeat everything I asked you before, but I will just ask you again this. Where were the profits? If they weren't in your pocket and they weren't in the bank account, where were the profits, Mr Martin?
>
> A. Where?
>
> Q. Yes.
>
> A. Well, there was -- if you look a little closer at the -- I did have this conversation with Mr Copans. The VIP business is quite a precarious one, much of it is done on credit and some of those creditors were, you know, very difficult to track down. We had one particular one that owed us over GBP100,000. We also had a situation, I think it was around March, maybe February, when one of our Turkish banks -- there was a thing going on in Turkey with Mr Erdogan clearing up a number of -- … Around the early part of 2018, there was quite a severe … crackdown on these non-monopolised gaming entities which meant a lot of the bank

> accounts were closed and those bank accounts were cleaned of our funds with no recourse of getting our money back."

276. However, irrecoverable debts could obviously not properly be counted as part of profits. There is, moreover, no indication in the documents presented at trial of any such problem in obtaining funds from Turkey which were due to the Business.

277. Mr Martin suggested that VIP revenue was coming into the Aureate account with Satabank in Malta, or to various Turkish banks the Business was using, or in cryptocurrency. He was asked why, in that case, the business continually needed more money from Mr Bell in order to pay its overheads:

> "Q. So if you've made 1.4 million in 2017 and you had made GBP508,000 in the first four months of 2018, where does that money -- when the punters lose their bets, where do we see it coming into the business, Mr Martin?
>
> A. Like I said, it could come into the Turkish banks that me were using, it could come into cryptocurrency or it could come into our Satabank.
>
> Q. And then it would be brought into UK to pay some of the bills that you are desperately trying to pay and that Mr Bell has pay for you; is that not right?
>
> A. Not all the time, no.
>
> Q. Not all the time, but why --
>
> A. There was money coming in.
>
> Q. If there's 1.4 million in the business in 2017, VIP cash and there's 500,000 in first four months of 2018, why is Paul bemoaning the fact that the business is bust, why are you calling him up every time you need to pay a bill of two or GBP3,000?
>
> A. Slightly elongating the truth, but like I said, we invested a lot of that money back into the business.
>
> Q. It has to come into the business in order to invest it, doesn't it, Mr Martin?
>
> A. Actually, no, it doesn't not all the time. We had with our Turkish banks we spent quite a lot of money on the platform that we bought that was paid out of -- I think it was out of one of the Turkish banks that we used.
>
> Q. Are you able to point to any document at all –
>
> A. No.

> Q. -- that we can see where there this mysterious VIP cash is coming into the business?
>
> A. No, I can't. Not at the moment. Unless you look at the Sata statements, which I'm sure there's quite a few payments coming in from wallets."

278. Later in his evidence Mr Martin accepted, however, that any revenue coming in from Turkey ultimately had to be accounted for in the accounts of the UK company or of Aureate.

(i) Conclusion

279. Viewing this evidence in the round, the position is very clear. The Business was making no profits but was heavily loss-making and unable to pay its way, in both 2017 and 2018. That was the conclusion both experts reached and was not seriously challenged. It is consistent with the liquidation of Viktra and Aureate's statutory accounts. It is also consistent with the Business's need for regular and large infusions of cash arranged by Mr Bell, and all the contemporaneous correspondence showing that the Business was making no profits and was unable to pay its basic regular outgoings from its own revenues. The Defendants' rear-guard efforts to paint a different picture by reference to such matters as incomplete and inconclusive data about overseas VIP income are unpersuasive and unrealistic.

(24) Premier Punt and the Incentive licence

280. In parallel with the events set out above, the Defendants were involved in discussion and activities in connection with a potential new business, Premier Punt, and the acquisition of a gaming licence owned by Incentive Games Limited ("***Incentive***").

281. In August 2018, Mr Martin and Mr Bell began corresponding about the possibility of acquiring Premier Punt, a gambling business owned by Premier Punt Group Limited ("***PPGL***") operating under a gaming licence and gaming platform owned by Incentive. The CEO of Incentive and of PPGL was a Mr John Gordon. Discussions between Mr Gordon and Mr Martin about the acquisition of the Premier Punt business commenced in August 2018.

282. On 18 August 2018 Mr Martin forwarded Mr Bell an email exchange that he had had with Mr Gordon regarding the acquisition of Premier Punt. Mr Martin said to Mr Bell that he "*Would like to discuss the opportunity*". Mr Bell responded "*Ok mate Spk Monday*". On Monday 20 August, Mr Martin emailed Mr Bell again informing him that "*They have already dropped the price to £65k … Defo worth a discussion*".

283. On 24 August 2018 Mr Martin sent Mr Bell an email setting out what would be required to start the Premier Punt business. Among other things, Mr Martin proposed that "*We would nick Alex Drummond … from 21 and build a team around him*". He also referred to the fact that "*we have over 200k players already signed in the UK and over £1.8m GGR from players who have either closed their accounts or self-excluded".* On the same day, Mr Bell responded "*Worth a go mate Spk Tuesday*".

284. On 28 August 2018 Mr Martin explained to Mr Bell: "*This is how it will look – We would nick Alex Drummond (our current Affiliate Manager) from [21Bet] and build a team around him*". Alex Drummond, a senior 21Bet employee, was later moved across to head up the new Premier Punt team in February 2019. His LinkedIn profile and email signature suggest that he became Premier Punt's UK Gaming Manager.

285. On 4 September 2018 Mr Martin sent Mr Bell an email with the subject line "*New Co for Prem Punt*". In the email, Mr Martin said:

> "We are at contract stage with both the prem punt guys and SB tech for the gaming platform so we need to get a company in the frame. You said you had a few we could use with bank accts. Can you help in getting the details to me please?"

In a Skype exchange the same day, Mr Bull said "*thought the idea was to keep premier punt hush hush*", to which Mr Martin replied "*it is*". In cross-examination he explained that he meant it was to be kept secret from his colleagues, apart from Mr Bull (whom he described as his closest confidante).

286. On 5 September 2018 a new company, AXL Media Limited ("***AXL***"), was incorporated. Ms Ashleigh Martin, Mr Martin's daughter, was the sole director and shareholder of the company. Both Mr Martin and Mr Bell suggested in their evidence that the business belonged to her.

287. Ms Martin had previously worked for 666Bet and 21Bet. In her witness statement, she explained that she left 21Bet "*in or around September 2018*". At trial, she gave evidence that she first discussed the possibility of acquiring Premier Punt with Mr Martin in August 2018, but that she did not get substantively involved in the business until late December 2018. She stopped other work in August or September 2018 and gave birth in October 2018. As Ivy point out, Ms Martin was clearly not a wealthy individual - indeed, very far from it. The evidence indicates that, in September 2018, she owed money to HMRC and was even struggling to afford a buggy (or, she said in oral evidence, an expensive car seat) for her child.

288. None of the contemporary emails between Mr Martin and Mr Bell relating to Premier Punt referred to it as being Ms Martin's business, or even mentioned her at all. Mr Bell agreed in cross-examination that Ms Martin did not have the qualifications or experience to be the CEO of a gaming business. Ms Martin's Premier Punt email signature stated her role not to be director or shareholder, but "*Customer Support Manager*", and it appears she dealt with the website's 'live chat' function, payments and verifications.

289. In her oral evidence, Ms Martin said she was the CEO of Premier Punt, but chose to describe herself as a customer support manager so as not to "*overwhelm*" the other employees. She also said that she chose to do customer support online 'chats' so that she could work from home and look after her young baby, and that she "*went in once a week to meet Alex [Drummond]*". However, later Skype messages between Ms Martin and Harry Bull on 29 November 2018 suggest that Ms Martin was worried about what the consequences of being a director might be for her, and she asked Harry for reassurance in that regard: "*surely dad won't let anything happen to me*?" A subsequent

Skype exchange between Mr Bull and Ms Martin, on 4 March 2019, was to similar effect.

290. I find the evidence that Premier Punt was owned and operated wholly or mainly by Ms Martin implausible. The contemporary documents, and the inherent probabilities (specifically, Ms Martin's lack of relevant experience and the motive Mr Martin and Mr Bell had to create another phoenix-like business), all strongly suggest the true position was that Ms Martin was used as a front.

291. Ms Martin said in her oral evidence that the money required to set up Premier Punt came from two of "*Dad's acquaintances*", namely Thomas Ashman and "*Civil Building Limited*". She said Mr Ashman provided £35,000 and Civil Building Limited provided £52,000, followed by a further £28,000 a few months later. Ms Martin said that funding had been set up on her behalf by her father, but that she never met either of the investors/lenders. After she had completed her evidence, Ms Martin produced some documents said to evidence the receipt of these monies from Mr Ashman and CBSL.

292. Ivy's subsequent enquiries indicated (as set out in their written closing) that there is no company registered in the name "*Civil Building Limited*" at Companies House, and that the only company whose name includes the words *"Civil Building"* is Civil Building Services Limited ("***CBSL***"). Ms Martin's documents include reference to payments made by "*Civil Building Ser*". CBSL is recorded as being a building company involved in site preparation, incorporated on 28 April 2017, whose accounts for the period ended 30 April 2019 were due on 31 January 2020 but have not yet been filed. According to its only set of filed accounts (i.e. for the period ended 30 April 2018), CBSL had net assets of £44,271.

293. As Ivy point out, it is unclear why a recently-formed building company with such limited assets would be investing £80,000 in an online gambling company. It is also unclear why the monies apparently provided from CBSL in February 2019 came in four separate tranches over two days for the very specific sums of £8,712.63, £7,439.25, £7,016.47 and £5,587.65. Such a pattern of payments might have other explanations, such as redirection of sums due under invoices payable to a business in which Mr Martin or Mr Bell had an interest. That would be speculation. However, it is striking that, even though Ms Martin's evidence was that Mr Martin arranged these payments, he himself provided no evidence about these alleged sources of the money. Nor were any documents produced evidencing the basis on which the money was provided to Premier Punt. Moreover, the extreme lateness of this evidence (not even foreshadowed in Ms Martin's own witness statement save for a reference to *"two informal loans provided by two family friends"*) made it impracticable for Ivy to test it in the usual ways, such as by investigating the alleged payees and their connections with Mr Martin and/or Mr Bell. In all the circumstances I find this evidence of very little value, and do not consider that it assists the court in deciding (should it be necessary) whether Mr Martin and/or Mr Bell had interests in Premier Punt.

294. Returning to the proposal discussed between Mr Martin and Mr Gordon by email on 5 September 2018, it appears to have involved (i) a marketing agreement under which PPGL would add AXL to their UK gambling licence and provide software, marketing and customer support; (ii) the sale of the Premier Punt brand and app to AXL for £65,000; and (iii) provision of a non-UK software licence.

295. At 12.49pm that day, Mr Martin sent Mr Bell copies of Heads of Terms which had been agreed with PPGL and asked Mr Bell whether he was authorised to sign them and proceed. Mr Bell said in his evidence that he did not authorise Mr Martin to sign the Heads of Terms and suggests that this was "*Barry running away with his plans*". He refers to the project as an investment opportunity which he rejected.

296. Later the same day, at 7.57pm, Mr Martin sent Mr Bell another email with the subject "Prem Punt" with a "*reminder*" about three things which were needed, namely: "*4 office desks*", "*company with bank account*" and "*will get the initial funding info next week to buy the brand/URL and get the Platform fee sorted*". Mr Bell responded: "*Ok ✓*". In his first witness statement, Mr Bell stated that he later, in or around June or July 2019, provided office space for five or six Premier Punt employees on a short-term basis (around six weeks) as a "*favour to Mr Martin's daughter*".

297. Mr Martin then sent a reminder on 17 September 2018, stating "*Any news on the newco/bank acct for Premier Punt*". Mr Bell said in response:

> "Will have full details for Consilium ltd tmw
>
> Remind of where funds will come from?
>
> And approx turnover through account"

Consilium Solutions Limited ("***Consilium***") is a company whose director, Mr Richard Ward, has also acted as director for SCL and BWM.

298. On 25 September 2018 Mr Martin chased Mr Bell again for the details of the "*newco business and bank details for Prem Punt*", sent him a further "*quick nudge*" about it on 26 September 2018, and then chased again on 27 September 2018. In response, Mr Bell said that he would have "*full details*" for Consilium the following day. As for desk space for Premier Punt, Mr Bell said that there was no space in Manchester, but it would be "*easy to sort*".

299. Further reminders were sent by Mr Martin to Mr Bell in September 2018 regarding "*Details of newco business and bank acct for Prem Punt" and "Desk space in London for Prem Punt?*". On 27 September 2018, Mr Bell responded "*Will have Consilium full details for tmw … Lots of space in Cheapside*".

300. Mr Bell did not ultimately provide office space in 2018, although (as noted above) Mr Bell did provide AXL with free office space in Cannon Street for a period of two months in 2019.

301. On 1 October 2018, Mr Martin emailed Mr Bell stating *inter alia*:

> "Prem Punt: £90k… £65k needed to buy the asset and £25k for set-up fee of the platform.
>
> …
>
> Both of the above we can through Consilium

> 21/City: 25k to finish off the last bits of wages and some other smaller bills
>
> Can I also ask if you can send another 20k next week as we do need to keep Catena onside."

302. Mr Bell responded "*Ok will get in gear on this lot tmw mate*". This and other responses from Mr Bell quoted above and below are inconsistent with his evidence that the Premier Punt project was no more than an example of Mr Martin running away with his plans.

303. On 7 October 2018 Mr Martin sent Mr Bell an agenda for a call. Item 1 was "*Tabella offer/Other Options*", and Item 2 "*Premier Punt*".

304. Mr Martin formulated a to-do list for Premier Punt and other projects, which he sent to Mr Bell on 9 October 2018. The items on the list included:

> "a. Create offshore entity for all contracts for PP …
>
> b. Consilium UK bank for office/PAYE/settlements etc
>
> c. You want to change Richard Ward as Director or leave him on it?
>
> d. £65k payment to Incentive Games for purchase of PP and database/app etc (can come from anywhere)
>
> e. £20k for Amelco to set up sportsbook/casino platform for PP (can come from anywhere)
>
> f. £15k for new Curacao License for PP for all the non UK biz (can come from anywhere)".

The email also contained a section referring to Premier Punt as a "*Backdoor Project*" and noted that "*We have all the 21bet database to go at with all the self-excluders as it is on a new UK license*". "*Self-excluders*" referred to a category of gamblers who, Mr Martin explained, exclude themselves for any particular gaming licence holder either as a form of protest or because they have gambling problems.

Mr Bell responded "*OK. Will come back with a plan mate*"

305. Mr Martin denied that the reference to Premier Punt as a 'backdoor' project indicated that it was a covert means of taking business out of 21Bet, and that any such thing actually occurred. On the other hand, Mr Bull at least clearly understood that Premier Punt was meant to be a secret from Ivy, as indicated by Skype conversations between him and Mr Alex Drummond in which Mr Bull stated that "*Ashleigh is signing docs, creating emails, opening bank accounts and now everyone on the other side know there is a connection (SBTECH and PP guys), absolutely no way new owners will not find out about it IMO*" (7 December 2018) and that "*21 should never see PP and PP should never see 21*" (25 April 2019).

306. In an email dated 17 October 2018, Mr Martin told Mr Bell that he was in the process of setting up an offshore company for Premier Punt which would be owned between them on a 50/50 basis. Mr Martin told Mr Bell that he "*just needed*" Mr Bell's passport and proof address signed by a solicitor/accountant.

307. In an email sent to Mr Bell on 6 November 2018, Mr Martin reported on the progress of Premier Punt and other projects. He stated as follows:

> "Premier Punt
>
> All on course for 1st December launch. We still need to organise the £65k to finalise the purchase of the domain and assets and £20k for the set up of the sports and casino platform with Amelco. We also still need the passport and proof of address for you and I to get Consilium offshore set up and bank account opened. Looking at the numbers for this, we could easily be doing the same figures, if not more than what we have in the UK currently within 6 months with literally no cost as we have all the data already."

308. In January 2019, Ms Martin's details at Companies House were updated to use her married name, Ashleigh Chaplin. According to her witness statement, Ms Martin considered using her married name when she first registered at Companies House but "*hesitated*" because using her married name was a "*big deal for [her]*". She said that she "*eventually decided to change to my married name*", but offered no explanation for this change of heart in January 2019 and why something that was a "*big deal*" for her in September 2018 ceased to be such in January 2019.

309. In her oral evidence, Ms Martin said she got married in August 2012 and never officially changed her name from Martin to Chaplin, not even on her passport. However, she finally decided in January 2019 that she would change her name to Chaplin, which is why she decided to change her details at Companies House. However, having apparently made the decision at long last to change her name, and gone to the trouble of changing her details at Companies House, she did not - in fact - go through with it and she has still not done so. When asked why she had not done so, Ms Chaplin said this was partly because she was "*a very busy person*", and partly because changing her name was a "*big deal*" which she was not ready to go through with. I find this evidence contrived and unlikely. The obvious explanation is that the change of name at Companies House was an attempt to conceal the links between Premier Punt and Mr Martin should third parties, particularly Ivy, subsequently wish to look into the ownership of Premier Punt.

310. On 17 January 2019, Mr Martin emailed Mr Bell in relation to a new proposal to purchase the gambling licence from Incentive at a cost of approximately £165,000. Mr Martin explained that Incentive already had in place agreements to move Premier Punt and 21Bet onto their license. Since 21Bet would then be fixed to a 3-year deal with Incentive, Mr Martin's idea was either to "*sell it back to them for much more or just keep control and make a few quid along the way*".

311. On 2 February 2019 Mr Martin sent Mr Bell an email with the subject line "*Plan D*". He said that he had "*Been giving the whole situation a lot of thought and I think plan D*

maybe the one we also need to look at". On the assumption that "*we do buy Incentive*", he proposed the following steps:

> "1. We sell 21bet to the best offer
>
> 2. We buy a new gaming domain and roll out a brand on the same platform as Premierpunt and 21.
>
> 3. We utilise the Premier punt staff and offices.
>
> 4. We have a huge database to kick off with so acquisition costs would be super low.
>
> 5. Overheads will be £5k per month to start
>
> 6. Once we get established, we can make a call on new offices and new team away from Premier.
>
> 7. Set up fee would be £20k for the platform and £1-£5k for a really good domain."

312. On 21 February 2019 Mr Bull explained that he had been to see three new offices and asked if there were any updates in relation to the Incentive purchase. Mr Martin said that things were moving ahead slowly but that there would be "*movement next week for sure*" once Mr Bell was back from his skiing trip.

313. On 25 February 2019 Mr Martin emailed Mr Bell suggesting that he meet with Rich Thorp of FSB as Mr Martin thought "*we can bag him for a senior role at Incentive Games*".

314. A sales plan was drawn up in relation to Incentive. This included the progress status of items such as "*Alex Drummond to complete PML application*", "*Premier Punt Go Live*" and "*Company sale contract agreed and signed*". The document was sent by Mr Martin to Mr Bell on 1 March 2019 and again on 20 March 2019.

315. In early April 2019, Harry Bull and Mr Bell exchanged emails with the subject line: "*Incentive Games*". By that time, Mr Bull was already using an "incentivegames" email address. The emails concerned the assistance which Mr Bell was providing in terms of providing office space and IT support, and the work which Harry Bull was doing in order for Mr Bell's daughter, Melissa Bell, to obtain a PML (personal management licence) which was needed in order to purchase the license from Incentive. Mr Bell told Mr Bull that "*we have 18 spare desks in Cannon St. Will have IT sorted for next week*". Mr Bull later told a colleague that Mr Martin had promised Mr Bull that he would, in Mr Bull's own words, "*pay me for my current job whilst getting paid for my new one*".

316. The SPA was signed on 4 April 2019.

317. In an email of 6 April 2019, Mr Bull thanked Mr Bell for meeting him. The subject line of the email was "*Incentive Games*". Mr Bull said that he had "*enclosed a few notes and screenshots on the PML application for the UBO*" and that "*In respect of the number of desks required to kick things off, 3 or 4 would be enough for the first few*

weeks, I will be using the 21bet offices next week which should reduce the urgency in getting I.T. set up". Mr Bell responded "*We have 18 spare desks in Cannon st Will have IT sorted for next week*".

318. In an email from Mr Martin to Mr Bell on 24 April 2019, Mr Martin wrote under the heading "*Incentive Group*" *"a. Spoke to Richard Ward last week about the office space. He said it maybe another week. Ready to go when you are. b. We need to get this UBO sorted ASAP. It is the last piece of the puzzle to get this deal over the line. Is Quinten still in the frame?"*

319. On 30 April 2019, Mr Bell responded to an email from Mr Bull regarding the "*contract details for the Cannon Street offices*" saying that "*I need to run through the business plan with Barry before we commit on this*". Mr Martin and Mr Bell appear then to have spoken by telephone.

320. On 5 May 2019 Mr Martin forwarded Mr Bell another list of items which included "*a. Offices (Regus)*", and repeated the point made in his 24 April email that "*b. We need to get this UBO sorted ASAP. It is the last piece of the puzzle to get this deal over the line. Is Quinten still in the frame?*" under the heading "*Incentive Group*". He attached a PowerPoint entitled "*Incentive Games Limited Purchase*". This modelled various financial aspects of the Incentive business, including start-up costs, operational costs and revenue.

321. It is unclear how these discussions ultimately progressed. Mr Bell's evidence was that he did not purchase Incentive, but was taking steps to buy it on behalf of his daughter. He said in the end the proposed acquisition did not work financially and did not proceed.

322. On Wednesday, 15 May 2019, Mr Bull said in a Skype message that it looked like "*Incentive is finally sorted*". He explained that Tabella was due to visit Incentive on Friday and hoped that "*nothing gets let out of the bag*".

323. On Friday, 17 May 2019, Mr Watt reported back to Mr Martin about his visit to Incentive and the negotiations he had with them that day, but there is no indication that he was told anything about the plans Mr Martin and Mr Bell (or his daughter) themselves had in relation to Incentive.

324. Ivy suggests that the evidence in relation to the proposal to purchase the Incentive license, and Mr Bell's involvement in that project, supports its case that Mr Bell was also involved in Premier Punt. It says the proposal to purchase the Incentive license ran alongside, and in tandem with, the Premier Punt project; it is inherently unlikely that Mr Bell had declined the opportunity to invest in Premier Punt and yet continued to be involved in the proposal to purchase the Incentive license; and the evidence shows that Mr Bell was still involved in the latter at least as late as 5 May 2019. I am, however, not persuaded that such an inference can safely be drawn. It is true that several of Mr Martin's emails discussed Premier Punt and Incentive as complementary or related proposals. However, Incentive had a different position in the market from Premier Punt, and was capable of being a freestanding business proposition.

325. Mr Watt gave evidence that following the acquisition of the Business, the Ivy team found Skype messages between Mr Bull and Mr Drummond regarding complaints from 21Bet customers about having received marketing emails from Premier Punt. No such

messages were included in the trial bundle, and Messrs Bull and Drummond (and any relevant customers) did not give evidence. It was suggested to Mr Watt in cross-examination that Premier Punt was in fact using a database provided by PPGL, to which he responded that he was not aware of that but it would "*make sense*".

326. The trial bundle did include a Skype exchange on 8 June 2019 between Mr Hogg and Mr Watt in which Mr Hogg reported that "*He did say though premier punt apparently is making money – why? Because all the best players were moved off 21 to pp*". The "*he*" appears to have referred to an employee named Ben, or (possibly) to Mr Martin itself. Ben was not called to give evidence, and the basis of his belief is unclear.

327. However, Mr Martin's email of 9 October 2018 about approaching the 'self-excluders' on 21Bet's database indicates that he certainly planned to make use of the database for Premier Punt's benefit. Mr Martin's emails of 6 November 2018 ("*as we have all the data already*") and 2 February 2019 ("*We have a huge database to kick off with*") were to similar effect. Mr Martin in cross-examination denied that customers had been in fact moved from 21Bet to Premier Punt. However, I consider it more likely than not that he did carry out his plan and that part of the explanation for Premier Punt's profits at least in its first few months of operation is the advantage gained by use of information from 21Bet's database.

328. From January 2019 to the end of May 2019, Premier Punt made NGR of some €494,337.03. During the same period, 21Bet was making very substantial losses: Mr Davidson noted that for January to March 2019, the UK business made a loss of £1.75 million.

(E) DECEIT

(1) Introduction

329. Ivy alleges that Mr Martin made the following representations in the course of negotiations for the SPA:

i) that the EBITDA of 21Bet Business in 2018 were, or were in the region of, £1.6 million, based on figures for income streams for the Business provided to Mr Copans on 27 August 2018 ("***the EBITDA Representation***"); and

ii) in general, that the Business was profitable and/or self-sustaining from its revenue, in fact so profitable that Mr Martin would be able to earn considerable sums under earn-out provisions contained in the draft of the SPA ("***the Profitability/Sustainability Representation***").

I refer to these together as the "***General Representations***".

330. Ivy also alleges that Mr Martin was authorised by Mr Bell to act as his agent in relation to the negotiation and sale of his 50% share of 21Bet; and that Mr Bell is therefore liable for the EBITDA Representation and the Profitability/Sustainability Representation.

331. Mr Martin in his Defence dated 26 February 2020 (drafted by counsel) admitted that he made the General Representations, albeit adding that:

> "[Mr Martin] had no involvement in the calculation and assessment of the EBITDA figure. [Mr Martin] believed that the EBITDA had been calculated as a true and reflective representation of the company's earnings before interest, tax, depreciation and amortization. It is to be expected that there will be variations in the application of the accounting standards that determine how any item forms part of a company's EBITDA. The application and interpretation of those accounting standards are outside of the experience and expertise of [Mr Martin]."

332. Mr Bell in his Defence, also pre-dating the fuller pleading of the allegations of the Prague Representations, made no admissions as to the General Representations allegedly made by Mr Martin, and denied that Mr Martin had any authority to make any representations on Mr Bell's behalf, let alone any representations made fraudulently. He also denied that he held Mr Martin out as having such authority, that Ivy understood Mr Martin to have made any representations on Mr Bell's behalf, and that Ivy relied on Mr Martin having any such authority or on Mr Bell having so held him out.

333. In addition, Ivy alleges that the following representations were made at the Prague Meeting ("***the Prague Representations***") by both Mr Martin and Mr Bell:

a) that the Business was profitable ("***the Prague Profitability Representation***"); and

b) that the Business had an existing EBITDA of £1.6 million ("***the Prague EBITDA Representation***").

I refer to these together as the "***Prague Representations***". I refer to the General Representations and the Prague Representations together as "***the Representations***".

334. Ivy alleges that the Prague Representations were made, expressly and/or by implication, in that (i) the discussion at the Prague Meeting about the purchase price *"were based on the Business being profitable and having a current EBITDA of £1.6m"*; (ii) *"[t]he gist of what the Defendants said at the meeting was that the Business was profitable and that, with further investment, it would be even more profitable …"*; and (iii) the Defendants wanted the upfront payment to be as large as possible, and *"expressed concern that, if the Claimant ended up spending too much money running the Business, the EBITDA figure in the future would be lower than the current figure of £1.6m, and that that would impact on any future earnout calculated by reference to the EBITDA"*.

335. Ivy's original Particulars of Claim, after referring to the alleged Profitability/Sustainability Representations, added the words "*as was discussed at [the Prague Meeting] by [Mr Martin] and [Mr Bell]*". In response to that allegation, Mr Martin made a general non-admission in respect of the Prague Meeting. Ivy's fuller allegations in relation to the Prague Meeting were pleaded by way of amendment, but Mr Martin's Defence was not amended to address them as such.

336. In relation to the allegation about the Prague Meeting referred to in § 335 above, Mr Bell said in his Defence he made no such assertion and had no recollection of Mr Martin

doing so. Mr Bell also made the positive averment in relation to the discussion at the Prague Meeting that:

> "During the said meeting, Ivy was informed that: (a) Mr Bell had facilitated loans to the Business in the sum of around £2.5million; (b) the funds had been injected into the Business on an ad hoc basis for working capital as the revenue of the Business could be erratic from month to month and in some months Mr Martin would inform Mr Bell that the Business required funds to cover overheads."

I have already rejected element (b) of this for the reasons given in section (D)(10) above. Mr Bell's Defence was not amended to respond to Ivy's amendments to allege the Prague Representations as such.

337. Ivy also alleged that Mr Martin and Mr Bell represented at the Prague Meeting that they had a genuine belief that, by agreeing to pay in the region of £8 million for 21Bet, Ivy was getting a good deal. However, Ivy elected in its written closing not to pursue its case based on that representation, though it maintained that the Defendants did in fact tell Ivy at the Prague Meeting that it was getting a good deal.

(2) Principles

(i) Deceit: general requirements

338. The basic ingredients of the tort of deceit are that:

i) the defendant made a false representation to the claimant;

ii) the defendant knew the representation to be false, or had no belief in its truth, or was reckless as to whether it was true or false;

iii) the defendant intended the claimant to rely on the representations;

iv) the claimant did rely on the representation; and

v) as a result the claimant has suffered loss and damage.

(See, e.g., *Vald Nielsen Holding AS v. Baldorino* [2019] EWHC 1926 (Comm) § 131).

Representation

339. A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true (see, e.g., *Vald Nielsen* § 132).

340. Determining whether any, and if so what, representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee (*ibid.*). The latter step will include considering whether the alleged representation has "*the character of a statement upon which the representee*

was intended, and entitled, to rely" (*Vald Neilsen* § 138); or, as it has also been expressed, "*whether the representee is entitled to take the statement seriously rather than with a pinch of salt*": *Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises* [2018] EWHC Civ 1857 ("***Nederlandse***") § 91.

341. Mr Bell cites a passage from Grant and Mumford, "*Civil Fraud*" (1st ed., 2018) for the proposition that statements, typically by vendors, which are put in general terms may be incapable of constituting actionable representations: they cannot reasonably be understood as containing statements of fact upon which the counterparty should rely. The authors state:

> "1-048
>
> An important caveat should be noted. It is a daily occurrence that where parties are engaged in negotiating a contract they adopt negotiating positions which do not necessarily represent their final position. The law has traditionally adopted a realistic view on representations made in such circumstances and judges have been unwilling to impose liability in situations where dissembling is a fact of life (such that both parties can reasonably be expected to be aware of and engaged in it). [*Vernon v Keys* (1810) 12 East 632; (1812) 4 Taunt 488.] However, where the line should be drawn in imposing liability is not always clear. [Thus in *Haygarth v Wearing* (1872) L.R. 12 Eq 320 a statement about the value of an estate inherited by a vendor, which was made by a purchaser to induce the vendor to sell, was not merely an assessment given as part of a negotiation, but an answer to a specific question made by a party who was in an unequal position of knowledge and genuinely sought guidance. Cf. *Armstrong v Strain* [1951] 1 T.L.R. 856.]
>
> 1-049
>
> The law similarly takes a realistic view over what used to be described as "puffs" but in more modern parlance is referred to as "sales talk". [Although not necessarily representations as to intention or the future, these are conveniently mentioned here, there being an obvious similarity with the law's approach to statements made in the course of negotiations.] Statements, typically by vendors, which are put in such general terms may be incapable of constituting actionable representations: they cannot reasonably be understood as containing statements of fact upon which the counterparty should rely. Again, the line between non-actionable sales talk and representations about the characteristics of the property or goods to be sold may be a difficult one to draw. [See *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147 (Comm), at [420]. Old cases include *Dimmock v Hallett* [1866] L.R. 2 Ch. App. 21 and *Johnson v Smart* (1860) 2 Giff 151, at 156, per Sir John Stuart V-C.]"

(footnotes interpolated)

In *Kingspan*, cited in the passage quoted above, Christopher Clarke J said:

> "420. There is a category of statement, sometimes referred to as "puffs" and, in more modern language mere sales talk, which will not found a case in representation. This may be so where a statement is in such general terms as to be unverifiable.
>
> 421. Thus in *Dimmock v Hallett* [1866] LR 2 Ch App 21 a description in auction particulars that a farm's land was " fertile and improvable" was said to be "a mere flourishing description by an auctioneer" which could not, save in extreme cases, be regarded as a misrepresentation, and a statement that the land " in course of time may be covered with warp and considerably improved at moderate cost " was said to put "a purchaser on inquiry, and if he chooses to buy on the faith of such a statement without inquiry, he has no ground of complaint".
>
> 422. In *Johnson v Smart* (1860) 2 Giff 151 at 156, a description in auction particulars which described a house which the purchaser had not seen as " substantial and convenient " was held to be " a description so relative in its terms to afford abundant opportunity for a conflict of evidence as to matters which are rather matters of opinion than of fact" . But the Vice Chancellor does not appear to have ruled out reliance on it on that basis since he went on to decide that the allegation that the house was not substantially built was not made out and accepted, on the evidence of three surveyors, that the description was not untrue."

342. Context is likely to be significant:

> "In some cases the statement in question may have been accompanied by other statements by way of qualification or explanation which would indicate to a reasonable person that the putative representor was not assuming a responsibility for the accuracy or completeness of the statement or was saying that no reliance can be placed upon it. Thus the representor may qualify what might otherwise have been an outright statement of fact by saying that it is only a statement of belief, that it may not be accurate, that he has not verified its accuracy or completeness, or that it is not to be relied on". (*Raiffeisen Zentralbank Osterreich v Royal Bank of Scotland* [2010] EWHC 1392 § 86)

343. As set out in *Vald Nielsen*:

> "Where one person has made a misrepresentation, it is open to him to correct the misstatement prior to the contract and to rely on the correction as a defence to a claim in deceit (effectively on the basis that the misrepresentations cannot have induced the claimant to enter the contract: see below). However, in those

> circumstances "it is not enough to show that the claimant could have discovered the truth, but that he did discover it." It is not sufficient just to provide documents from which the claimant could work out the truth: the correction must be made fairly and openly: see *Peekay v ANZ Banking Group [2006] EWCA Civ 386;* [2006] 1 CLC 582 at [29]-[40]. The explanation must be "quite clear": *Arnison v Smith* (1889) 41 ChD 348 at 370 per Lord Halsbury." (§ 143)

344. It may be necessary to read or construe different statements made at different times together, in order to understand their combined effect as a representation (*Vald Nielsen* § 142, citing Spencer, Bower & Handley, "*Actionable Misrepresentation*", 5th ed., § 4.24).

345. A statement of opinion is not in itself actionable. However, as indicated in *Clerk & Lindsell* (23rd ed.) §17-13, a statement of opinion will "*invariably*" be regarded as incorporating an assertion that the maker does actually hold that opinion.

346. At least where the facts are not equally well known to both sides, a statement of opinion by one who knows the facts best may carry with it a further implication of fact, namely that the representor by expressing that opinion impliedly states that he believes that facts exist which reasonably justify it: *Vald Nielsen* § 134 citing *Clerk & Lindsell* § 17-14, where the authors state:

> "Furthermore, at least where the facts are not equally well known to both sides, then a statement of opinion by one who knows the facts best will often carry with it a further implication of fact, namely that the representor by expressing that opinion impliedly states that he believes that facts exist which reasonably justify it. If he does not actually believe in such facts, it follows that he will be liable in deceit. In such a case, the test as to whether a statement of opinion involves such a further implied representation will involve a consideration of the meaning which is reasonably conveyed to the representee. The material facts of the transaction, the knowledge of the respective parties, their relative positions, the words of the representation and the actual condition of the subject-matter are all relevant to this issue."

347. A person may also be guilty of misrepresentation by conduct. There is no separate rule for representations by conduct; the relevant misrepresentation must be one that can be articulated or "*spelled out from conduct*" in the same way that an implied representation is "*spelled out from words*": *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm) §§ 131-132.

348. Silence by itself cannot found a claim in misrepresentation, but an express statement may impliedly represent something. The "*court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context*": *Vald Nielsen* § 136, citing *IFE v Goldman Sachs* [2006] EWHC 2887 (Comm); [2007] 1 Lloyd's Rep 264, § 50. As with express representations, this involves considering whether a reasonable representee in the position and with the known characteristics of the actual representee would reasonably

have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged: *Vald Nielsen* § 136.

349. As regards non-disclosure, the question is whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it. This should not, however, water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied: *Vald Nielsen* § 136, citing *Property Alliance Group Ltd v Royal Bank of Scotland PLC* [2018] EWCA Civ 355; [2018] 1 WLR 3259.

350. The representor must, however, understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement: *Vald Nielsen* § 137. It is also necessary "*to show that the representor intended his statement to be understood by the representee in the sense in which it was false"* (*Goose v Wilson Sandford & Co* [2001] Lloyd's Rep PN 189 § 41 per Morritt LJ).

Approving or adopting statements made by a third party

351. A defendant may also be liable for representations made by a third party if he manifestly approves and adopts those representations, and the other elements of the tort of deceit are satisfied against him. If so, then he will be liable as a primary tortfeasor, not merely on an agency basis. In *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 ("***Bradford***"), Viscount Maugham put it in this way:

> "My Lords, we are dealing here with a common law action of deceit, which requires four things to be established. First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit: *Peek v Gurney*, at p 390 *per* Lord Chelmsford, and at p 403, *per* Lord Cairns, and *Arkwright v Newbold*, at p 318." (p.211)

352. In *Vald Nielsen*, Jacobs J referred to the test in *Bradford* and said:

> "I do not consider that there is any special significance to the word "manifestly": it was used in that case to distinguish "mere silence, however morally wrong". If I am satisfied that the relevant representations were made by Mr. Bennett with the agreement of the other Defendants, then this would be a case of manifest approval and adoption." (§ 382)

353. Jacobs J went on to find (at §§ 383-386) that two co-defendants (Mr Baldorino and Mr Mantell) had approved and adopted the fraudulent misrepresentations in two emails by another co-defendant (Mr Bennett), albeit that they were only copied on one of the emails. The judge considered that it was "*improbable that Mr. Bennett would not have told the other Defendants about the request [in the first email], or that he would acted [sic] alone in deciding how to respond*". Jacobs J had "*no doubt that both Mr.*

Baldorino and Mr. Mantell were comfortable with Mr. Bennett providing figures, on 20 April [the first email], which were out of date and which did not represent their genuine and current views as to the prospects of the company" and that it was "*overwhelmingly likely that all aspects of Mr. Bennett's response on 3 June were agreed by all of the Defendants*".

354. Notwithstanding the focus on agreement in the passages to which I have referred (which may have been relevant also to the claim of unlawful means conspiracy), I do not read Jacobs J's judgment as suggesting that the approval and agreement need not be communicated to the representee in order for the approving and agreeing party to be liable in misrepresentation. The need for there to be such communication is consistent with the starting point of Jacobs J's analysis of the law of deceit: "*A representation is a statement of fact made by the representor to the representee…*" (§ 132). That, in my opinion, is the significance of "*manifestly*": the approval and agreement of the party alleged to be liable must have been manifested or communicated to the claimant.

Continuing representations

355. Whether a representation is treated as continuing at the moment it is acted on is a matter of interpretation of the representation. A representation made during the course of negotiations with a view to inducing the representee to enter into the contract will generally be characterised as continuing to the point when the contract is concluded, and the general principle is that a representation will be regarded as continuing until fully acted upon: *European Real Estate Debt Fund (Cayman) Ltd (in liquidation) v. Treon* [2021] EWHC 2866 (Ch) ("***ERED***") §§ 353-354.

356. A classic example of this type of continuing representation is a representation made during the course of negotiations in relation to the turnover of a business, which - given its nature - is normally treated as continuing up to the date of the sale of the business: *With v O'Flanagan* [1936] Ch 575, 580-581; *Briess v Woolley* [1954] AC 333, 344. However, as a matter of interpretation a representation *may* be treated as limited to a statement of the facts as they stand at the time the statement is made: *ERED* § 353. It will depend on what the representation is construed as meaning in the context in which it is made.

Falsity

357. The representation must be false. A representation may be true without being entirely correct, provided that it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimants to enter into the contracts: *Avon Insurance v Swire Fraser* [2000] Lloyd's Rep IR 535 § 17.

Mental element

358. The representor must have known the representations to be false, or have had no belief in their truth, or have been reckless as to whether they were true or false: *Derry v Peek* (1889) 14 App Cas 337.

359. The defendant's motive is irrelevant. "*If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was*

made": *Clerk & Lindsell* § 17-20, citing *Bradford* at p.211. What is required is an absence of belief in truth: *Vald Nielsen* § 147.

360. The ingredient of dishonesty (in the above sense) must not be watered down into something akin to negligence, however gross (*Vald Nielsen* § 148). The test is subjective, and it is not sufficient that any reasonable or honest person would regard the defendant as dishonest (*ERED* § 363). However, the unreasonableness of the grounds of the belief, though not of itself supporting an action for deceit, will be evidence from which fraud may be inferred (*Vald Nielsen* § 148, citing *Derry v Peek* at p.376).

Intended inducement

361. The representor must have intended to induce the representee to act as on the representation, though the authorities indicate that it is not necessary for the representor to have intended the representation to be acted on in the specific way in which it was (resulting in damage to the representee): see *Vald Nielsen* §§ 150-151.

Actual inducement

362. The representee must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it, and that, having that understanding, he relied on it (*Vald Nielsen* § 152). As Mr Bell says, that point is of particular significance in the case of implied representations.

363. The onus of proof is on the representee to show that the misrepresentation was "*actively present in his mind*" when he made the decision to enter into the transaction (*Vald Nielsen* § 154, *ERED* § 368, 370).

364. It is not necessary that the misrepresentation be the sole cause of the representee entering into the transaction on the terms he did; it need only be a cause: *Vald Nielsen* § 155, citing *Hayward v Zurich* [2016] UKSC 48 § 33. The question is whether the representation was a matter of some significance in the decision to take the course of action in question (*Vald Nielsen* § 157, *ERED* § 371).

365. Reliance can include cases where the representee is induced to persevere in a decision that it has already taken: see *Barton v County NatWest* [1999] All ER (D) 782 §§ 59-60, quoting *Australian Steel & Mining Corp v Corben* [1974] 2 NSWLR 202, 209 per Hutley JA. (See also *Edwards v Ashik* [2014] EWHC 2454 (Ch) §§ 36-37.)

366. The representee, having shown that the representation was actively present in his mind, may be assisted by an evidential presumption of fact that a representee will have been induced by a fraudulent misrepresentation intended to cause him to enter the contract: *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Enterprises* [2019] EWCA Civ 596 § 43. It has been stated that that inference will be "*very difficult to rebut*": *ibid*., citing *Hayward* § 43.

367. *"However, it remains the case that the "tribunal of fact has to make up its mind on the question whether the representee was induced by the representation on the basis of all the evidence available to it":* ibid., at §§ 25 and 43. If the representation is of "*no real significance, then a court will decline to hold that it was one of the reasons which induced the contract*": *Vald Nielsen* § 157.

368. The facts that the representor expects the representee to consider the information he provides and apply the representee's own experience and judgment when considering it, and that the representee does so, do not of themselves negate intended or actual reliance. The questions remain whether the representee intended the representee to place reliance on the information provided and whether the information played a real and substantial part in inducing the representee to act: see, e.g., *Ali v Abbeyfield V.E* [2018] EWHC 669 (Ch) §§ 144-148.

Negligence by claimant

369. It is no answer to a claim in fraud that the representee could have discovered the falsity of the statement by exercising reasonable care and skill: see *Standard Chartered Bank v Pakistan National Shipping Corp (Nos. 2 and 4)* [2003] 1 AC 959, §§ 10-18; *Hayward* § 39; *Vald Nielsen* § 158; *ERED* § 372.

Causation and loss

370. The representee must show that it has suffered loss as a result of the fraud. If the claimant would have acted in the same way even in the absence of fraud, the claim will fail: *ERED* § 374.

(ii) Existence of an agency relationship

371. An agency relationship arises either (a) by "*the conferring of authority by the principal on the agent, which may be express, or implied from the conduct or situation of the parties*", or (b) "*retrospectively, by subsequent ratification by the principal of acts done on the principal's behalf*": *Bowstead & Reynolds on Agency* (22nd ed.) ("***Bowstead***") § 2-001.

372. Conferral of authority will be express where the principal appoints the agent, whether in writing or orally, to act as his agent and the agent acquiesces. An agency relationship may be implied in circumstances where "*one party has acted towards another in such a way that it is reasonable for that other to infer from that conduct assent to an agency relationship*": *Bowstead* § 2-029. As stated in *Chitty on Contracts* (34th ed.) ("***Chitty***") § 21-029:

> "There are innumerable situations in which conferral of agency powers may be implied, though no authority was specifically given in fact … The most usual way in which conferral occurs is by an unwritten request, or by implication from the recognition by the principal of, or his acquiescence in, the acts of another. On the other side, the consent of the agent may be inferred from his acting on behalf of the principal; but the mere fact that he does what was requested by his principal does not necessarily mean that he does it on the principal's behalf."

373. Mr Bell submits that authority to act illegally will not usually be implied, citing Bowstead § 2-025 and the passage from *Pickard* referred to in § 421 below. However, the principal authority Bowstead cites on this point is the statement of the Privy Council in *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394, 411 quoted in § 389 below (as quoted by Lord Macnaghten in *Lloyd v Grace Smith*: see in particular

the passage starting *"it may be generally assumed"*). However, when read in full, those observations in fact indicate that a broad approach should be taken when construing the scope of an agent's authority, so as to avoid relieving the principal of liability for fraudulent acts committed within the scope of a general authority given to an act.

374. The question whether or not a particular relationship is that of agency "*depends upon what the parties have in substance agreed, rather than the label which they choose to place on it*": *UBS v Kommunale Wasserwerke Leipzig* [2017] EWCA Civ 1567 § 87 (cited in *Zedra Trust* [2019] EWHC 2191 (Comm) § 32). Further, what matters is not the parties' subjective understanding but whether, objectively, authority has been conferred to act on the principal's behalf (*Freeman & Lockyer v. Buckhurst Park Properties* [1964] 2 QB 480, 502-503).

375. Where the existence of an agency relationship is sought to be implied from conduct, "*it must be fatal to the implication of an agency relationship if the parties would have or might have acted as they did in the absence of such a relationship*": *The Magellan Spirit* [2016] 2 Lloyd's Rep 1 § 29. Further, as stated in out in *UBS v Kommunale Wasserwerke Leipzig*:

> "The court should not impose an agency analysis upon a relationship which may better be analysed in other terms, in particular where the intermediary (in that case the car dealer) has its own interest in the transaction as principal" (§ 88(i))

Hence it is not enough to show conduct that is consistent with an agreement or mutual intention that a person would contract as agent. It is necessary to identify conduct which was only consistent with such an agreement or mutual intention, and inconsistent with any other intended relationship.

376. It is possible to prove that authority has been conferred without direct evidence. As set out in *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) § 203:

> "The conferring of such authority does not have to be proved by direct evidence. It can be inferred from circumstantial evidence: and that circumstantial evidence can include things said by the agent to the other party."

377. Counsel for Mr Bell also referred to Bowstead § 1-004 in support of the proposition that a non-owner of property can contract to sell the property with the owner's consent without necessarily being the agent of the owner. Bowstead states:

> "… But the special features of an agent, in particular the fiduciary duties, derive from the power that some agents have to affect their principal's legal position. It seems best, therefore, to stress these aspects of agency, that is to say, both its fiduciary nature and its application to the process of contracting, transfers of property, and other alterations of the principal's legal position. The absence of both these features would make a finding of agency unlikely. As to the presence of authority, it has been said that: "The term 'agency' is best used … 'to connote an authority or capacity in one person to create legal relations between a

person occupying the position of principal and third parties.' Usually the legal relations so created will be contractual in nature".

Conversely, where there is no conferral of authority to alter legal relations, but merely a chain of contracts, the intermediate contracting parties will not normally be agents and will not routinely owe fiduciary duties up the chain. Equally, the mere fact that one person does something in order to benefit another, and the latter is relying on the former to do so or may have requested or even contracted for performance of the action, does not make the former the agent of the latter. So too a non-owner of property, with or without the owner's consent, can contract to sell it or to have it repaired or improved without necessarily being the agent of the owner. Nor does the fact that a third party, X, pays the remuneration of Y make Y the agent of X if Y is properly the agent of Z. It is quite common (and not improper if assented to by the principal) for an agent's remuneration to be paid by the third party or some other person. More generally, mere economic interdependence between two parties does not create one the agent of the other.

A focus on the conferral of authority to alter legal relations is also important in determining when one person with two potential principals is agent for one or the other. So an estate agent might be an agent for the vendor in marketing the property but, in receiving a deposit from the purchaser in advance of a binding contract, an agent for the purchaser, or just a stakeholder.

The centrality to agency of the conferral of authority to alter legal relations suggests that at common law being an agent is not a status, but a description of a person while and only so long as the person is exercising such authority. As to status, an agent's status will usually be that of employee or independent contractor (but sometimes a gratuitous actor), and agency is not a separate category. Equally, employees and contractors often have no authority to alter their appointer's legal relations, and if not exercising any authority are not properly described as an agent. Thus, a solicitor is usually a type of independent contractor, and when merely giving advice to a client is not an agent, but while acting for the client in communicating with outside parties would be an agent. An employee while formally on sick leave remains an employee but would not have actual authority as agent during the leave. One of the implications of this is that agency is of limited utility in the application of vicarious liability in tort, which usually operates on the basis of a party's status. On the other hand, advisers will often owe fiduciary duties, even though they are not agents in the standard sense of the term." (footnotes omitted)

378. Bowstead cites as an example *Foster v Action Aviation Ltd* [2014] EWCA Civ 1368 § 38. The question of agency which arose there was whether the seller of an aircraft was acting for the owner of the aircraft, or the beneficial owner of the company which owned the aircraft. The Court of Appeal agreed with the first instance judge in "*seeing no reason to depart from the usual presumption that, if a seller is acting for an agent at all, he is likely to be acting for the owner of the subject-matter of sale*". The Court of Appeal acknowledged that it was "*not … necessary to go to the length of holding that the owner of the thing sold is always a party to a contract of sale, since sellers often contract to sell goods which they do not own at the time of the contract. But on the basis that it is common ground that the seller was an agent, that seller must be acting for the owner and thus be able to transfer title*".

379. As it was common ground in *Foster* that an agency relationship existed, the authority is of limited assistance in the present case. However, the general point Bowstead makes is clearly logical: if an asset is sold via a chain of contracts, from A to B then to C, then B will not have A's authority to bind A to a contract with C, because no such contract will arise or be necessary. Further, as Bowstead states in § 8-002:

> "It can be added that it is undesirable that courts encourage claimants to name as parties to a contract claim persons simply on the basis that they own the subject-matter of the contract or have a legal (e.g. shareholding) or economic connection to the party named in the agreement. It is quite common, for instance, for an asset the subject of a contract to be owned by a party other than the promisor. There should be no presumption that the promisor is the agent, disclosed or undisclosed, of the owner, especially where it is known that the named party is not the owner and the owner has done nothing to encourage a belief that it backs the promise. The owner may have an arrangement with the promisor to pass title to the promisee when the time for performance arrives without being willing to be a party to the contract." (footnotes omitted)

citing *Foster* and other examples of cases where the asset was owned by someone other than the contracting seller.

380. Conversely, however, as Bowstead's examples of the solicitor and estate agent illustrate, it is possible to have authority to negotiate a transaction or otherwise communicate with third parties on a principal's behalf about it without having the authority to bind the principal to the transaction. An estate agent or solicitor typically will not have the seller's authority to bind the seller to a sale: the seller will enter the contract to sell personally and directly. Bowstead later refers (§ 8-196, Illustration 22) to the facts of *Armstrong v Strain* [1952] 1 KB 232:

> "An estate agent tells a prospective purchaser of a bungalow that any building society will lend £1,200 on a mortgage of it. The bungalow is in fact structurally unsound, but the estate agent was not fraudulent in making such statements. The owners of the bungalow, for whom the estate agent was acting, knew of the unsoundness, but not that the estate agent had made such a representation. The owner is not liable in deceit for the agent's

> false statement, it not having been proved that he deliberately kept the agent in ignorance of the facts."

381. If, however, the agent had known of the unsoundness and acted fraudulently, I see no reason why the principal could not then have been liable (subject to the point discussed under heading (iii) below). Even though the agent no doubt lacked authority to bind the principal to the contract of sale, he had authority to negotiate the proposed terms of the sale on the principal's behalf and, in doing so, to make representations on the principal's behalf. Similarly, a solicitor may be authorised to make representations to a third party in the course of negotiating a transaction even if the solicitor lacks authority to conclude the transaction itself.

382. Whether any such authority to make representations has actually been conferred – particularly in a case where the owner of the asset does not go on to contract with the buyer – must be a question of fact in each case. If A agrees to sell to B, who in turn sells to C, A and B being arm's length commercial parties (as in the case of a commodity sale transaction, for example), then it is unlikely that A will give any authority to B to negotiate with or make representations to C. The position may, however, be different if A and B are co-owners of an asset and B is, in substance, arranging the sale of both of their interests.

(iii) Liability of a principal for representations by his or her agent

383. Mr Bell submitted that he could not be liable for a fraudulent misrepresentation made by Mr Martin unless Mr Martin had Mr Bell's authority to act fraudulently. For the reasons which follow, I do not accept that submission.

384. Bowstead states at 8-177:

> "(2) A principal is liable in tort for loss or injury caused by an agent, whether or not an employee, and if not an employee, whether or not the agent can be called an independent contractor, in the following cases:
>
> …
>
> (b) (semble) in the case of a statement made in the course of representing the principal within the actual or apparent authority of the agent: and for such a statement the principal may be liable notwithstanding that it was made for the benefit of the agent alone and not for that of the principal."

385. In the footnote to (b), the authors refer the reader to the commentary to article 74 of Bowstead. Article 74 states that "*An act of an agent within the scope of the agent's apparent authority does not cease to bind the principal merely because the agent was acting fraudulently and in furtherance of the agent's own interests*". The commentary states *inter alia* that:

> "for the principal to be responsible under agency principles the agent must normally have been acting within the scope of the agent's actual or apparent authority. It is a well-known

> proposition that the mere fact that the principal by appointing an agent gives that agent the opportunity to steal or otherwise to behave fraudulently does not without more make the principal liable."

386. Actual authority has been discussed above. Apparent or ostensible authority arises "*Where a person by words or conduct represents to a third party that another has authority to act on his behalf*": *Chitty* § 21-063. The requirements for representations giving rise to apparent or ostensible authority are:

> "(i) A representation must be made by words or conduct. But though such representation may be express, it may also be implied from acts of a quite general nature, e.g. putting the agent in, or allowing him to adopt, a position carrying with it a usual authority. …
>
> (ii) The representation must be made by the principal, or someone authorised in accordance with the law of agency to act for him. A representation by the agent as to his authority cannot of itself create apparent authority. But the conduct of the principal may make it more reasonable for the agent's representation as to facts upon which his authority depends to be relied on; and in a well-known decision the principal was held bound on the basis that the agent, known to have limited authority to contract, nevertheless had authority to communicate the principal's approval to the transaction in question. …
>
> (iii) On general principles the representation must be of fact and not of law. …
>
> (iv) The third party must act on the representation. If he does not know of any representation, express or implied, but deals with the agent as a principal, it is obvious that he cannot rely on the doctrine. …
>
> …
>
> (vii) The authority will be that which the agent reasonably appeared to have to the third party, taking into account the manifestations of the principal, the implied authority normally applicable in the circumstances or to a person in the agent's position, or both." (*Chitty* § 21-063)

387. I was referred to several cases about when a principal is liable for the deceit of his agent, which Mr Bell argued either supported or did not contradict his submission. Some were cases of actual authority, some of ostensible authority.

388. In *Lloyd v Grace Smith* [1912] AC 716, the House of Lords held a firm of solicitors liable for a fraud committed by its managing client, whereby he deceived a widow into signing properties over to him, which he then disposed of for his own benefit. The leading judgment was given by Lord Macnaghten, with whom Earl Loreburn and Lords

Atkinson and Shaw agreed. A key question was whether the effect of *Barwick v English Joint Stock Bank* LR 2 Ex 259 was that a principal was not liable where an agent committed a fraud for the agent's own benefit. Lord Macnaghten held the answer to be no, and considered *Barwick* to mean that:

> "a principal must be liable for the fraud of his agent committed in the course of his agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not" (p.731)

389. Lord Macnaghten cited with approval the Privy Council's decision in *Mackay v Commercial Bank of New Brunswick* (1874) LR 5 PC 394, as follows:

> "The first important case in which the ruling in *Barwick's* Case was discussed was the case of *Mackay v. Commercial Bank of New Brunswick.* In that case the Judicial Committee reaffirmed the ruling of Willes J. There the fraud was committed for the benefit of the principal. But it was argued by Mr. Benjamin, Q.C., that the appellants in the Privy Council would be entitled to retain the verdict if they had sustained damage from the fraudulent representation of an agent, made within the scope of his authority, even though the principal had not profited thereby.
>
> The judgment was delivered by Sir Montague Smith. He observed that their Lordships regarded it as "*settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority.*" He discussed at some length what meaning was to be attached to the expression "*the scope of the agent's authority*." "*There are*," says Sir Montague Smith, "*some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine ... it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently frauds are beyond 'the scope of the agent's authority' in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds: at the same time, it is not easy to define with precision the extent to which this liability has been carried*."
>
> Then Sir Montague Smith says "*The best definition of it ... is to be found in the case of Barwick v. English Joint Stock Bank ", and he quotes the words of Willes J., who, after enumerating instances where the principle had been applied, proceeded as follows:*

> *"In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.""*

(pp. 732-733, footnotes omitted)

390. Lord Macnaghten also referred to observations by Lords Selborne and Blackburn in *Houldsworth v City of Glasgow Bank* (1880) 5 App. Cas. 317, including as follows:

> "Lord Blackburn's view of the judgment in *Barwick's Case* requires no explanation. It is clear enough. After referring to *Barwick's Case* he expresses himself as follows: "*I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This no doubt was a very technical question*"; and then come these important words:
>
> > "The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud."
>
> That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud. I think, too, that the expressions "*acting within his authority*," "*acting in the course of his employment*," and the expression "*acting within the scope of his agency*" (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever expression is used it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes J. is the best that can be given.
>
> In the case of *Udell v. Atherton* Wilde B., afterwards Lord Penzance, in his admirable judgment makes the following observation: "*It is said that a man who is himself innocent cannot be sued for a deceit in which he took no part, and this whether the deceit was by his agent or a stranger. To this, as a general proposition, I agree. All deceits and frauds practised by persons who stand in the relation of agents, general or particular, do not fall upon their principals. For, unless the fraud itself falls within the actual or the implied authority of the agent, it is not necessarily the fraud of the principal*." In the same case, in a passage which was approved apparently by the Court in *Mackay v. Commercial Bank of New Brunswick*, Martin B. stated the

> question to be, "*Was his" (the agent's) "situation such as to bring the representation he made within the scope of his authority?*" In those passages the true principle is, I think, to be found." (pp. 735-736, footnotes omitted)

391. I have quoted these passages at some length because they indicate, in my view, that the court in *Lloyd v Grace Smith* regarded the question before it as falling squarely within the realm of the law of agency, while further indicating that the scope of an agent's authority would where appropriate be given a generous interpretation (including to avoid a principal being able to avail itself of an agent's fraud without incurring liability), and that broadly speaking scope of authority and course of employment would amount to the same thing. Further, I explain below, nothing in the *Ocean Frost* contradicts these statements of principle in *Lloyd*: on the contrary, *Lloyd* is regarded as authoritative.

392. In *Briess v Woolley* [1954] AC 333, a company director had no authority to make representations to act in relation to the sale of shares prior to the company's annual general meeting. He had nevertheless made fraudulent misrepresentations in that period. He was then appointed at the general meeting to "*take up the matter further with that company with a view to completing the transaction*" (as the minutes recorded). It was not clear whether the director had in fact made any further representations after the date of the annual general meeting. The House of Lords found that the shareholders were liable for the director's fraud because the fraudulent misrepresentations were made within the scope of the negotiations that the director was authorised at the general meeting to conduct. Even if no further misrepresentations had been made after authority was conferred, the representations that had been made could be treated as continuing representations.

393. Lord Oaksey said at 344 that:

> "on the true interpretation of the minute of the general meeting, it is clear that Rosher was appointed … agent on behalf of all the shareholders of the company to negotiate the sale of their shares, and that in such circumstances the shareholders are responsible for any fraudulent representations he made in the course of those negotiations."

394. Lord Reid stated at 347-348:

> "Authority to "take the matter up further with that company with a view to completing the transaction on that basis" appears to me clearly to include authority to make such further statements and representations and to give such answers to any questions by the company and do such other things as he should think desirable or necessary to achieve a sale."

395. Lord Tucker noted that:

> "Barry J. held that the authority thus conferred on Rosher was not limited to accepting an offer to purchase and arranging the necessary transfers but that there being then no binding offer in

> existence which Rosher could accept forthwith, he was given authority to take the matter up further with the prospective purchasers and to make any statements concerning the company's business which might be required in order to induce them to enter into a binding contract." (pp. 351-352)

And, disagreeing with the Court of Appeal's view to the contrary, Lord Tucker stated:

> "… if, as I think, this is the proper construction of the minute, Rosher was from that time until the completion of the contract on November 12 the agent of [the shareholders], inter alios, to complete the negotiations and make a contract. He knew more about the business of the company than anyone else and would clearly have authority to answer all questions relevant thereto and to make any statements in connexion therewith necessary to bring about the desired result." (p.352)

There is an obvious parallel with the position of Mr Martin in the present case.

396. Similarly, Lord Cohen said:

> "My Lords, it is common ground between the parties that prior to October 14, 1948, Mr. Rosher had no authority to act in relation to the sale of the shares in Nutrifood Products Ld. (to which company I shall refer hereafter as "the company") on behalf of any of the shareholders of the company other than himself. It is also common ground that at the annual general meeting of the company held on that day the shareholders conferred on him some authority. The first question which your Lordships have to determine is as to the extent of that authority.
>
> …
>
> … I think the form of the minute necessarily involves that Mr. Rosher was authorized by the shareholders to give on their behalf such information as to the business of the company as the proposed purchasers might require before they would turn their proposition into a definite offer." (p.355)
>
> "… He had become the agent of the respondents to complete the negotiations for the sale of their shares as well as his own shares to the appellants. His authority extended to giving the appellants information as to the business of the company. It cannot be denied that if he had made a new fraudulent statement as to that business the respondents would have been liable to the appellants in damages for that fraud. …" (p.359)

397. The decision was accordingly based on the finding that the director had actual authority to conduct the negotiations; and the company was liable for a fraud committed in the conduct of those negotiations.

398. As regards the liability of a principal for a misrepresentation made prior to his conferring authority on the agent, Lord Tucker held that:

> "I agree, however, with Barry J, that the duty of the agent, who has made the misrepresentation, to correct it cannot be regarded as only a personal obligation. If he has in the meantime been appointed agent with authority to make representations for the purpose of inducing a contract he, in his capacity as agent, is by his conduct repeating the representations previously made by him. This is more particularly the case where the misrepresentation results from silence with regard to matters which if revealed would have rendered false statements which standing by themselves were literally true." (p.354)

399. Mr Bell makes the points that:

i) The shareholders in *Briess* did not dispute that if the director made fraudulent misrepresentations after his appointment, they would be liable: per Lord Reid at 348. There was therefore no argument on this point. The issue for the House of Lords was whether the shareholders could be liable for a misrepresentation by the director before his appointment, but not corrected thereafter.

ii) Further, *Briess* was decided before the House of Lords identified the distinction between reliance-based torts and other wrongs in *The Ocean Frost*: per Lord Keith at 780A-B (and in the Court of Appeal, per Goff LJ at 738C-E).

iii) *Briess* does not decide that a principal will be liable if an agent authorised to carry out an activity (negotiations) does so wrongly/by an improper mode (fraudulently), and if it did, it would no longer be good law.

400. Mr Bell's point (i) above is incomplete, since what was undisputed in *Briess* was that the shareholder would be liable if both (a) the agent had been given sufficient relevant authority and (b) the agent had gone on to make representations after the date of his appointment as an agent. Lord Reid made clear, at p.346, that the first question to be decided was the extent of the authority conferred on Mr Rosher by the shareholders, the only source of such authority being that conferred at the general minute in question. Lord Reid went on to say, on that issue:

> "The respondents say that the true meaning of this minute is that the shareholders only authorized Mr. Rosher to accept the sum of money which was being offered and that they gave him no authority to do anything else and, in particular, no authority to make any representations on their behalf. This was the interpretation accepted by the Court of Appeal. …
>
> My Lords, I am unable to accept that interpretation. … Mr. Rosher had been negotiating with the appellants, but in fact he had not then received any firm offer either from them or from Economic Utilities Ld. … If he did not say that a firm offer had been received, then the natural course for the shareholders to take was to authorize him to do all that was necessary to complete the

> transaction, and as I read the last sentence of the minute that is in fact what was done. Authority to "take the matter up further with that company with a view to completing the transaction on that basis" appears to me clearly to include authority to make such further statements and representations and to give such answers to any questions by the company and do such other things as he should think desirable or necessary to achieve a sale.
>
> If that be so, and if thereafter Mr. Rosher made any false and fraudulent representations which brought about the sale, then it was not disputed that the appellants must succeed." (pp. 347-348, my emphasis)

401. The passages quoted above from the speeches of Lords Tucker and Cohen also make clear that the first issue on the appeal was the extent of the authority conferred on the agent, Mr Rosher; and their conclusion was that he had authority to make such representations as he might think desirable or necessary to achieve a sale.

402. Mr Bell's point (ii) above is in my view incorrect and/or beside the point. The difference between reliance-based torts and other wrongs is that liability for the former depends on actual or ostensible (apparent) authority, and it is not possible to rely on ordinary principles of vicarious liability insofar as they would extend to matters beyond the agent's authority. However, as the passages quoted above show, *Briess* is squarely based on the agent's actual authority, as specifically ascertained by interpretation of the minute of the general meeting at which such authority was conferred. Lord Reid's speech included the following passage:

> "The general principle of vicarious liability for fraudulent misrepresentations is now well settled. I shall quote two short passages from the speech of Lord Macnaghten in *Lloyd v. Grace, Smith & Co.* Lord Macnaghten quoted from Lord Blackburn's speech in *Houldsworth v. City of Glasgow Bank* this passage, dealing with the case of *Barwick v. English Joint Stock Bank*: "*The substantial point decided was, I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud*." Then Lord Macnaghten added: "*That, my Lords, I think is the true principle.*" Then Lord Macnaghten quoted with approval, the following passage from the judgment of Bramwell L.J. in *Weir v. Bell*: "*every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract.*" That passage from the judgment of Bramwell L.J. was also quoted with approval by Viscount Haldane L.C. in *Mair v. Rio Grande Rubber Estates Ld.*, and I might add one sentence from the speech of Lord Moulton in that case: "*Now, it is elementary law that no person can take advantage of the fraud of his agent*."" (pp. 348-349, footnotes omitted)

That reasoning was squarely based on the agency reasoning set out in *Lloyd v Grace Smith*, which is binding and has been treated as correct in the subsequent case law.

403. As to Mr Bell's point (iii), the House of Lords in *Briess* treated the scope of Mr Rosher's authority as a question of fact to be determined by construing the minute of the general meeting at which he was appointed. The House concluded that he was authorised to make such further statements and representations and to give such answers to any questions and do such other things as he should think desirable or necessary to achieve a sale. It was conceded that such authority was wide enough to render the principal liable for a fraudulent representation made pursuant to that authority. In my view nothing in the later case law holds (in substance, let alone expressly) that the House of Lords was wrong to accept that concession.

404. Four more recent cases cited before me were *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462 (PC); *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1986] AC 717; *Dubai Aluminium Co v Salaam* [2002] UKHL 266; [2003] 2 AC 366; and *Winter v Hockley Mint* (also known as *Hockley Mint v Ramsden*) [2018] EWCA Civ 2480.

405. In *Kooragang*, the defendants' employee Rathborne, a valuer, carried out valuations on the defendants' behalf for a group of companies which was a client of theirs. Those valuations were made with the defendants' knowledge and authority. The group of companies failed to pay for the valuations and the defendants instructed the valuer not to carry out any more work for the group. However, the valuer then became a director of one of the group's member companies and, despite the defendants' instructions and without their authority or knowledge, carried out about 30 valuations for the group, using the defendants' stationery and signing in the defendants' corporate name. Some of these valuations were negligent, and the claimant group company sued the defendants. The action failed. Lord Wilberforce, delivering the judgment of the Privy Council, said:

> "Emphasising, once again, that there is no question in this case of any 'holding out' of Rathborne by the defendants (if there were, the case would be wholly different), the plaintiff's argument involves the proposition that so long as a servant is doing the acts of the same kind as those which it was within his authority to do, the master is liable, and that he is not entitled to show that in fact the servant had no authority to do them. This is an extreme proposition and carries the principle of vicarious liability further than it has been carried hitherto. It is necessary, first, to consider whether it is supported by authority." (p.473C-D)
>
> "In the present case, the defendants did carry out valuations. Valuations were a class of acts which Rathborne could perform on their behalf. To argue from this that any valuation done by Rathborne, without any authority from the defendants, not on behalf of the defendants but in his own interest, without any connection with the defendants' business, is a valuation for which the defendants must assume responsibility, is not one which principle or authority can support. To endorse it would

> strain the doctrine of vicarious responsibility beyond the breaking point and in effect introduce into the law of agency a new principle equivalent to one of strict liability. If one then inquires, as their Lordships think it correct to do, whether Rathborne had any authority to make the valuations in question, the answer is clear: it is given in clear and convincing terms by the trial judge. Rathborne was not authorised to make them: he made them during a period when the G.B. group were not in a client relationship with the defendants, when valuers were ordered not to do business with them. Rathborne did them, not as an employee of the defendants, but as an employee, or associate, in the G.B. Group and on their instructions. They were done at the premises of the G.B. Group, and using the staff of the G.B. Group: they were not processed through the defendants and no payment in respect of them was made to the defendants. Mr. Hodgson, the responsible director, knew nothing of them. They had no connection with the defendants except through the use, totally unauthorised - to say nothing more - of the defendants' stationery. A clearer case of departure from the course or scope of Rathborne's employment cannot be imagined: it was total." (p.475A-B)

406. Hence the valuations in question were outside the scope of the agent's actual or ostensible authority because they had nothing to do with the principal's business and were in no sense authorised by the principal. *Kooragang* provides no analogy to the present case. Ivy's claim against Mr Bell does not depend on Mr Bell having authorised Mr Martin simply to make "*representations*" as an abstract concept: the allegation is that he authorised Mr Martin to make representations to Ivy in order to bring out the sale of the business in which he, Mr Bell, was a 50% shareholder; and that the representations Mr Martin made were made pursuant to and within the scope of that authorisation. *Kooragang* emphatically does not decide that authority cannot be given to carry out acts of a particular class, with the result that a principal can be liable only where it has specifically authorised each and every particular act the agent undertakes. Indeed, such an approach would be nonsensical.

407. In *The Ocean Frost,* the defendant's chartering manager Mr Magelssen was authorised to sell a ship to the plaintiff. He also had authority to enter into a simultaneous 12-month charterparty to be granted by the plaintiff to the defendant. However, having accepted a bribe, Mr Magelssen in fact purported to bind the defendant to the sale of the ship and a 3-year charterparty from the plaintiff to the defendant.

408. The Court of Appeal held, first, that the 3-year charterparty was outside the scope of Mr Magelssen's general authority, and that he had no ostensible authority to bind the defendant to it. In the absence of any holding out by the defendant, Mr Magelssen could not confer ostensible authority on himself by his own assertion to the plaintiff that he had authority to enter into the 3-year charterparty (see, e.g., p.732F-g per Robert Goff LJ).

409. Secondly, the plaintiff argued that Mr Magelssen did have authority to negotiate the sale of the ship; that his fraudulent representation that he had authority to enter into the 3-year charterparty was made in the course of that authorised transaction; and that the

representation accordingly bound the plaintiff (see, e.g., p.736D-E, 737E, 750C-E). The Court of Appeal rejected that argument, on the basis that the representation about the 3-year charterparty fell outside Mr Magelssen's authority to negotiate the ship sale. There was no doubt Mr Magelssen did have authority to make representations in relation to the ship sale itself:

> "No doubt, by appointing Mr. Magelssen to his position and allowing him to act as such, they did represent that he had authority to bind his principals to those contracts which an agent in his position ordinarily has authority to make; and no doubt that ostensible authority would embrace the making of such representations concerning the subject matter of any such contract as might reasonably be understood to fall within such usual authority. But that does not, in my judgment, embrace authority by Mr. Magelssen to communicate approval by his superiors to his making contracts which, to the knowledge of the third party, he had no authority to enter into without such approval, with the effect that Mundogas would be bound by such communication" (p.732 per Robert Goff LJ)

410. Thus a representation to the effect that Mr Magelssen had authority to enter into a 3-year charterparty could not realistically be regarded as a representation made in the course of the negotiations, which he was authorised to conduct, for the sale of the ship:

> *per* Robert Goff LJ:
>
> "… where the servant induces the plaintiff to enter into an authorised transaction by means of a fraudulent misrepresentation which is not within his ostensible authority, the master will not be vicariously liable for the fraud. …
>
> For these reasons, in agreement with the conclusion reached by the Judge on this point, I am of the opinion that Mundogas is not vicariously liable to Armagas for the deceit of its servant, Mr. Magelssen, such deceit consisting of a misrepresentation which was outside the ostensible authority of Mr. Magelssen." (p.740B-D per Robert Goff LJ)
>
> *per* Dunn LJ:
>
> "Mr Magelssen had no ostensible authority to conclude the most unusual transaction involved in the three year charterparty, or to represent that he had received such authority, and in those circumstances I agree with the Judge that he was not acting in the course of his employment, and Mundogas are not liable for his fraud" (p. 752E per Dunn LJ)
>
> *per* Stephenson LJ:
>
> "… what was [in *Hamlyn v John Houston & Co* [1903] 1 KB 81] said about holding out must be read in the light of *Lloyd v. Grace*

Smith & Co. (1912) AC 716, where in holding the defendant solicitors liable for their managing clerk's fraud Earl Loreburn (at page 725) based their liability on the agent "purporting to act in the course of business such as he was authorised, or held out as authorised to transact on account of his principal" , and Lord Shaw of Dunfermline (at page 740) on the agent's ostensible or apparent authority. In *Uxbridge Permanent Benefit Building Society v. Pickard*, (1939) 2 KB 248, all three judges of this court, applying Lloyd's case, treated the fraudulent doing of an act of the class which such a servant or agent is actually authorised to do honestly as within his ostensible authority ... In *Navarro v. Moregrand Ltd.* (1951) 2 TLR 674, both Somervell LJ and Denning LJ … treated and applied Lloyd's case as deciding that a principal is responsible for the fraud of his agent acting within his ostensible authority; but Denning LJ regarded the course of employment as wider than the scope of actual or ostensible authority …

I prefer Somervell LJ's view to Denning LJ's and hold that by entrusting a servant or agent to do work or carry out duties of a particular kind or class the employer employs him, and holds him out as having authority, to do those acts and all that is reasonably incidental to them in the ordinary course of doing that work and carrying out those duties. He does not employ or authorise him to do the work or carry out the duties carelessly or dishonestly or unlawfully, but he will be responsible for his doing so unless what he does is outside the ordinary course of that work and those duties.

No attempt to formulate the test of what is taken outside the scope of the employment or authority is satisfactory or easy to apply. …

I find more help, and more justice, in testing the employer's responsibility by how unusual or abnormal the employee's transaction is. This approach to the problem is not without support from judicial authority.

…

There are clearly degrees of abnormality and the usual shades into the unusual at different points in different cases. But in this case what Magelssen did was so clearly and extravagantly unusual for a man in his position that it should not only have put the plaintiffs on inquiry but it fell right outside his authority or employment, whether or not the two are coextensive. True he had authority to sell the vessel, but he had no authority, express, implied or apparent, to back it with a charterparty and addendum with the features which the judge rightly accepted as unusual or even most unusual. What is more, the plaintiffs knew that his actual authority was limited to exclude this transaction looked at,

> as it must be, as a whole and not dissected, as counsel for the plaintiffs would dissect it, into its component parts (*Ilkiw v. Samuels* (1963) 1 WLR 991, 1004 per Diplock LJ).
>
> …
>
> The tort of deceit consists of some fraudulent misrepresentation which induces another to act to his detriment. If the detrimental action is the conclusion of a contract, I do not see how it can sensibly be said that a servant's fraudulent misrepresentation, which is not authorised by his master, is a mode of performing his duty, or of exercising his power, to conclude contracts for his master, whether the contract is authorised or unauthorised and whether the misrepresentation represents that the servant has authority or relates to some other matter. So if it were permissible to split Magelssen's transaction with the plaintiffs into an (authorised) contract of sale and an (unauthorised) charter back, as contended by plaintiffs' counsel, I agree with Robert Goff LJ that Magelssen's false pretence would remain unauthorised and a tort outside the course of his employment. But I do not accept that what the plaintiffs' counsel himself called "an integral transaction" can be split into sale and charter back, and so open the possibility of treating Magelssen's fraud as a dishonest mode of doing something he was employed to do honestly. Authority to sell the ship did not give him authority to back the sale with this charter; and I reject the argument that his fraudulent misrepresentation was made in the course of his employment because it was made to induce the sale, which was authorised, when it was in fact made to induce the whole unusual and unauthorised transaction of sale and charter back." (pp. 766B-768E per Stephenson LJ)

411. In the second sentence of the last paragraph quoted above, the words "*whether the contract is authorised or unauthorised and whether the misrepresentation represents that the servant has authority or relates to some other matter*" might conceivably be thought to suggest that Stephenson LJ considered that a fraudulent misrepresentation that had not been specifically authorised would fall outside the agent or employee's authority even if it related to a contract which the employee/agent had been authorised to negotiate. However, that would in my view be inconsistent with the foregoing parts of his reasoning, which focus on the scope of the transactions which the employee is authorised to enter into, rather than the difference between a fraudulent and a non-fraudulent representation. I understand Stephenson LJ's point to be, rather, that a fraudulent representation made in relation to a proposed contract cannot be regarded as within the scope of a general authority to make contracts regardless of (a) whether or not the contract in question is authorised and (b) whether the representation relates to the contract in question or (as was the case on the facts before the court) some other contract. I do not understand any of the members of the court to have rested their decision on the proposition that, unless specifically authorised, a representation made in the course of negotiating an authorised transaction will fall outside the scope of an employee or agent's authority merely by reason of being fraudulent.

412. Similarly, in the House of Lords, Lord Keith quoted without disapproval Sir Wilfrid Greene MR's statement in *Uxbridge Permanent Benefit Building Society v. Pickard* [1939] 2 K.B. 248, 254-255 that:

> "… in the case of the servant who goes off on a frolic of his own, no question arises of any actual or ostensible authority upon the faith of which some third person is going to change his position. The very essence of the present case is that the actual authority and the ostensible authority to Conway were of a kind which, in the ordinary course of an everyday transaction, were going to lead third persons, on the faith of them, to change their position, just as a purchaser from an apparent client or a mortgagee lending money to a client is going to change his position by being brought into contact with that client. That is within the actual and ostensible authority of the clerk."

and went on to conclude:

> "In the present case Mr. Magelssen was not authorised to enter into the three year charterparty, to do so was not within the usual authority of an employee holding his position, and Armagas knew it, and Mundogas had done nothing to represent that he was authorised to do so. It was contended for Armagas that concluding the contract for the sale of the vessel was within Mr. Magelssen's actual authority, and that inducing the sale by falsely representing that he had authority to enter into the charterparty amounted to no more than an improper method of performing what he was employed to do, such as in other contexts was sufficient to attract vicarious liability. But the sale of a ship backed by a three year charterparty is a transaction of a wholly different character from a straightforward sale, even if the charterparty is not to be regarded as a transaction separate and distinct from the sale, and Mr. Jensen and Mr. Dannesboe knew that Mr. Magelssen had no authority to enter into a transaction of that character on his own responsibility."

413. Hence the reason why the representation in *Ocean Frost* about the 3-year charterparty did not bind the defendant was not that it was made fraudulently: the reason was that it related to a wholly distinct and different transaction from the transaction (the sale of the ship) which Mr Magelssen was authorised to negotiate.

414. Mr Bell suggests that in *Lloyd v Grace Smith* [1912] AC 716, 735-736, which is followed in *Briess*, Lord Macnaghten did not draw a distinction between agency and vicarious liability principles, citing for that proposition statements by Lord Keith in *The Ocean Frost* at p.781E.

415. There is, however, no suggestion in the *Ocean Frost* that the Court of Appeal or House of Lords there considered that *Lloyd v Grace Smith* was either wrongly decided or inapplicable to cases of deceit. On the contrary, both the Court of Appeal and the House of Lords treated *Lloyd* as a leading case and as setting out the true principle that a

principal will be liable for an agent's fraud only if committed in the scope of his authority. Hence, for example:

i) Robert Goff LJ referred to *Lloyd* as showing that "*the criterion for the master's vicarious liability is that the servant acted within his ostensible authority*", praying in aid in that specific context the fact that "*Lord Macnaghten, in the context of a claim against the master for damages for his servant's deceit, treated, at p. 736, the expressions "acting within his authority" and "acting in the course of his employment" as meaning one and the same thing"* (p.738E-F);

ii) Dunn LJ stated: "*It may be that in theory a person can act in the course of his employment but beyond the scope of his authority. But Lloyd v. Grace, Smith & Co. [1912] A.C. 716; Slingsby v. District Bank Ltd. [1932] 1 K.B. 544 and Uxbridge Permanent Benefit Building Society v. Pickard [1939] 2 K.B. 248 all show that in cases of fraud the parameters of the course of the employment are set by the scope of the ostensible authority*" (p.751); and

iii) Lord Keith referred to *Lloyd* as the *"leading case in this field"* (p.780G) and similarly treated Lord Macnaghten's statement about scope of authority and course of employment as correctly limiting, rather than wrongly extending, the scope of the principal's liability:

> "It was argued for Armagas that in Lloyd v. Grace, Smith & Co. the fraudulent clerk was not acting within the scope of his actual or ostensible authority but was acting in the course of his employment, and that it was the latter which made the employer liable. In the present case, so it was maintained, Mr. Magelssen was acting in the course of his employment though not within the scope of his actual or ostensible authority, so Mundogas was liable. In my opinion the attempted distinction has no validity in this category of case. Lord Macnaghten, in Lloyd v. Grace, Smith & Co. [1912] A.C. 716 , 736, regarded the two expressions as meaning one and the same thing. The essential feature for creating liability in the employer is that the party contracting with the fraudulent servant should have altered his position to his detriment in reliance on the belief that the servant's activities were within his authority, or, to put it another way, were part of his job, this belief having been induced by the master's representations by way of words or conduct." (p.781)
>
> "In further pursuance of the argument, reliance was placed on a dictum of Denning L.J. in Navarro v. Moregrand Ltd. [1951] 2 T.L.R. 674 , 680 a case where a house agent had obtained an illegal premium from a tenant and the landlord was found liable for its repayment, who after referring to Lloyd v. Grace, Smith & Co. and the Uxbridge case, as authority for the view that a servant acting within his actual or ostensible authority was acting in the course of his employment, continued:
>
> "But the judge inferred from those cases the converse proposition - namely, that if a servant or agent is not acting

> within his actual or ostensible authority, then he is not acting in the course of his employment. I do not think that that is correct: it is a confusion between the responsibility of a principal in contract and his responsibility in tort. He is only responsible in contract for things done within the actual or ostensible authority of the agent, but he is responsible in tort for all wrongs done by the servant or agent in the course of his employment, whether within his actual or ostensible authority or not. The presence of actual or ostensible authority is decisive to show that his conduct is within the course of his employment, but the absence of it is not decisive the other way."
>
> This dictum, which was not concurred in by the other two members of the Court of Appeal, may have some validity in relation to torts other than those concerned with fraudulent misrepresentation, but in my opinion it has no application to torts of the latter kind, where the essence of the employer's liability is reliance by the injured party on actual or ostensible authority." (p.782)

416. Thus rather than disapproving *Lloyd* (as Mr Bell suggests was done) on the ground that it failed to distinguish principle of agency and vicarious liability principles, the *Ocean Frost* treated it as correctly stating the applicable principle in terms of the agent's authority.

417. Moreover, there is no suggestion in the *Ocean Frost* that the approach in *Lloyd* to determining the scope of an agent's actual authority, set out by Lord Macnaghten by reference to *Mackay*, was incorrect. Nor does anything in Lord Keith's speech in *The Ocean Frost* in any way undermine the approach taken in *Briess* (which was not cited in *The Ocean Frost*).

418. Mr Bell also submits that *The Ocean Frost* rejects the proposition that it is enough to show that the agent conducted dishonestly what he was authorised to do honestly, and that the argument to that effect is based on vicarious liability reasoning applicable to torts in general but not to deceit. Mr Bell relies on the following statements by Goff LJ and Dunn LJ, the first of which must be quoted at some length in order to understand precisely what proposition Goff LJ did not accept:

> Goff LJ
>
> "The conclusion of the judge was the subject of a strong attack in this court by Mr. Alexander for the plaintiffs. The burden of his argument was that Mr. Magelssen was authorised to negotiate and conclude the sale of the ship to the plaintiffs, and that in the course of his employment to carry out that authorised transaction he fraudulently misrepresented that he had authority to enter into the three year charter back. Since that fraudulent misrepresentation was made to induce the plaintiffs to enter into the sale contract which he had been authorised to make, the sale and charter back being (as Mr. Alexander called them) an "integral transaction", the fraudulent misrepresentation was

made in the course of his employment. It made no difference, submitted Mr. Alexander, that the three year charter was not within the ostensible authority of Mr. Magelssen. Of course, if an act is within the ostensible authority of a servant, clearly it will be performed in the course of his employment; but it does not follow, he submitted, that an act which is not within the ostensible authority of a servant cannot be performed in the course of his employment.

…

So here, in Mr. Alexander's submission, the relevant employment of Mr. Magelssen was to conclude a sale of the ship to the plaintiffs. He did fraudulently what he was authorised to do honestly, because he induced the sale contract by the fraudulent misrepresentation that he was authorised to enter into the three year charter back. This was therefore an improper mode of doing that which he was authorised to do, and so was in the course of his employment.

There is ample authority that a master may be vicariously liable for the fraud of his servant. This was so held by Holt C.J. in *Hern v. Nichols,* 1 Salk. 289: in more recent years, the same conclusion was reached in the leading cases of *Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259, and of *Lloyd v. Grace, Smith & Co.* [1912] A.C. 716, in which the House of Lords held that a master may be so liable where the servant's fraud is committed solely for his own benefit. Furthermore, there is authority that, where a servant is authorised to do a certain act and while doing that act he assaults the plaintiff, he may be held to have committed the assault in the course of his employment if it is an improper mode of carrying out that which he was employed to do (see *Dyer v. Munday* [1895] 1 Q.B. 742); and there is also authority that, where an agent bribes the clerk of the plaintiff in order to obtain information concerning the plaintiff which he was employed to obtain by legitimate means, the action of the agent in bribing the clerk may likewise be held to be committed within the course of his employment: see *Hamlyn v. John Houston & Co.* [1903] 1 K.B. 81. If a servant who is authorised by his master to conclude a certain contract with a third party, induces him to enter into the contract by a fraudulent misrepresentation, that may likewise be thought to be a wrongful mode of doing that which he is authorised to do so that the fraudulent misrepresentation is made in the course of his employment. It may also be thought to be immaterial whether the misrepresentation is itself within the actual or ostensible authority of the servant. The existence of such authority would be relevant to the question whether the representation could be imputed to the master, so that he is bound by it; for example, if it amounted to a collateral warranty, actual or ostensible

> authority would be essential before the master could be held liable for breach of the warranty. But, it may be said, actual or ostensible authority should not be decisive of the question whether the master is vicariously liable for the servant's tort, for which in any event the measure of damages is different.
>
> In my judgment, however, the weight of authority is against this approach. In cases of fraud at least, involving as they do a representation by the servant in reliance upon which the third party has acted to his detriment, the master can only be vicariously liable for the servant's fraud where he has acted within his ostensible authority. If this were not the law, in many cases where the servant has warranted his authority, fraudulently or even negligently, the master would be vicariously liable for the tort; there is no trace in the authorities of this being so. Similarly, if this is not the law, it is difficult to understand how, in certain cases where there has been an unsuccessful attempt to establish that a servant or agent acted within his ostensible authority, there was no alternative claim for damages on the basis of vicarious liability for deceit; …" (p.736 D-E and 737E-738C, per Goff LJ)

> "Accordingly it was said that Mr. Magelssen was acting in the course of his employment in making the representation and in signing the charterparty. Mr. Alexander boldly submitted that any fraudulent misrepresentation by a servant or agent which induced a contract which the servant or agent had actual authority to conclude was to be regarded as having been made in the course of the employment of the servant or agent, even if the representation was outside the scope of his ostensible authority.
>
> …
>
> Dunn LJ
>
> But the tort of deceit, involving as it does a fraudulent misrepresentation, does involve a holding out and at least an implied representation that the servant is acting within the scope of his authority. That is the whole basis of the tort, and it necessarily involves a consideration not only whether the servant was acting within his actual authority, but also whether in holding himself out he was acting within the scope of his ostensible authority. The scope of the ostensible authority defines the course of the employment." (p.750D and p.751C-D, per Dunn LJ)

419. The proposition which the Court of Appeal rejected in these passages was the notion that the principal could be liable for a representation made outside the scope of the agent's actual or ostensible authority, merely on the basis that the representation was

made in the course of his employment. On the facts of *The Ocean Frost,* as summarised above, the agent's representation about his authority to enter into a 3-year charterparty could be regarded as having been made in the course of his employment; however, it was clearly outside his actual and ostensible authority because he had no actual authority to enter into such a charterparty, nor had his employer held him out as having such authority: and he equally can have had no actual or ostensible authority to warrant that he possessed any such authority. Nothing in these passages does, or could, purport to depart from the approach taken in both *Lloyd* and *Briess* to the ascertainment of the scope of an agent's actual authority.

420. The error in Mr Bell's approach to the feasible scope of actual authority is illustrated by the fact that, on that approach, the claimant in *Briess* would have lost: on the basis that (a) the shareholders did not specifically authorise the particular fraudulent representation made (or the making of fraudulent representations in general), and (b) no ostensible authority was established. That would be an unprincipled result in circumstances where the shareholders had authorised Mr Rosher to do whatever he considered necessary to bring out the sale (and, albeit this is not a necessary ingredient, had then taken the benefit of the sale).

421. The judgments/speeches in *Pickard* and *The Ocean Frost* focus in places on ostensible as opposed to actual authority, or even positively suggest that a principal will not give actual authority to make a representation fraudulently (see, in particular, *Pickard* at p.254 "*When a person is put in that position his actual authority and his ostensible authority are in one sense the same, because the ostensible authority of a solicitor's clerk put in such a position coincides with the actual authority which he is given. But the ostensible authority may go a little further, and for this reason, that it is not within his actual authority to commit a fraud*"). However, these cases do not in my view lay down any rule of law that liability in a deceit case can be founded only on ostensible, as opposed to actual, authority. That would be inconsistent with the reasoning of the House of Lords in *Lloyd v Grace Smith,* based as it is, at least in part, on actual authority. It would also be inconsistent with *Briess,* where the House of Lords' conclusion on the question of authority was premised solely on the actual authority derived from the general meeting (as evidenced in the minute of it), and there was no evidence or reasoning based on reliance or ostensible authority. There is no sign that the shareholders had in fact held Mr Rosher out as having authority to negotiate on their behalf, and nor would his position as managing director involve ostensible authority to negotiate a sale of shares by a shareholder in the company. Mr Bell accepted, in his written closing (§§ 187 and 190), that liability in deceit can be founded on either the actual or the ostensible authority of the agent.

422. *Dubai Aluminium* concerned the liability of two solicitors' firms in respect of dishonest assistance putatively given by one of their partners. The House of Lords found *inter alia* that the firms were vicariously liable for the partner's conduct. At § 122, Lord Millett referred to Denning LJ's judgment in *Navarro* in support of the proposition that "*The vicarious liability of an employer does not depend upon the employee's authority to do the particular act which constitutes the wrong*". Lord Millett then stated:

> "This is equally true of partners, though it is perhaps less obvious in their case, since the relation between partners is essentially one of agency. An employer may authorise his employee to drive, but he does not authorise him to drive negligently. A firm

> of solicitors may authorise a partner to draft agreements for a client, but it does not authorise him to draft sham agreements. Lord Lindley wrote "it is obvious that it does not follow from the circumstance that such tort or fraud was not authorised, that therefore the principal is not legally responsible for it" cited in *Lindley & Banks on Partnership*, 17th ed (1995), pp 332-333."

423. As pointed out by counsel for Mr Bell in his skeleton argument, the reasoning in that case turned on the application of the first limb of section 10 of the Partnership Act 1890, which provides that a firm is liable for loss or injury caused to a third party as a result of any wrongful act or omission of any partner "*acting in the ordinary course of the business of the firm*". However, I do not accept Mr Bell's submission that it was *"recognised"* in *Dubai Aluminium* that the claim could not succeed based on authorisation *"as the wrongdoing partner had not been authorised to commit fraud"*. The case contains no such determination or observation.

424. In *Winter*, the Court of Appeal considered the proper legal test for determining whether a principal is liable for an agent's deceit. The case concerned the supply of equipment by Mr Winter trading as Erskine Hathaway. The equipment was sold by Erskine Hathaway to BNP Paribas, which then leased it to Hockley Mint. Erskine Hathaway paid rebates to Hockley Mint out of the profit from the sale to BNP Paribas. Mr Ramsden negotiated the terms of the tri-partite transactions on behalf of Erskine Hathaway, and in the course of those negotiations he dishonestly represented to Hockley Mint that the rebates were postage credits ultimately paid by Royal Mail and would be paid during the entire period of the lease. The court held that:

> "Plainly, if the express terms on which Mr Ramsden was authorised to act for Erskine Hathaway implicitly authorised him to negotiate and conclude the tri-partite transactions with Hockley Mint and BNP on terms that rebates to Hockley Mint were to be postal rebates originating with Royal Mail and were to equal or exceed Hockley Mint's financial liabilities under the leasing agreements, then Mr Winter is liable to Hockley Mint on the basis of Mr Ramsden's express authority." (§ 38)

425. That cannot be controversial: a principal will be liable for fraudulent misrepresentations made by his agent if the agent was expressly authorised to make the specific misrepresentations. The court added that:

> "*Armagas [The Ocean Frost]* is binding authority of the House of Lords that, where a claimant has suffered loss in reliance on the deceit of an agent, the principal is vicariously liable if, but only if, the deceitful conduct of the agent was within his or her actual or ostensible authority." (§ 48)

426. The Court of Appeal referred at § 52 to the passages of Lord Keith's judgment in *The Ocean Frost* that are cited above, before concluding that:

> "The analysis of the Judge did not identify or address the essential ingredients of vicarious liability of a principal for the deceit of his agent as required by *Armagas*: a holding out or

> representation by the principal to the claimant, intended to be and in fact acted upon by the claimant, that the agent had authority to do what he or she did, including acts falling within the usual scope of the agent's ostensible authority. Instead, he applied a broad principle of fairness and a test of "sufficiently close connection" derived from *Lister* and *Dubai Aluminium*. Those cases, however, did not concern a reliance based tort, and were not about the ostensible authority of an agent or employee as a result of a holding out by the principal or employer. They concerned the ordinary course of employment (in *Lister*) and the ordinary course of a firm's business (in *Dubai Aluminium*). That is why Armagas was not mentioned in any of the speeches in either case, and why Lord Nicholls in *Lister* said (at [30]) that in that case and in the other cases he cited there was no question of reliance or holding out, and why Lord Nicholls in *Dubai Aluminium* said (at [28]) that he left aside cases where the wronged party was defrauded by an employee acting within the scope of his apparent authority. In short, the first ground of appeal is correct in stating that the Judge applied the wrong test." (§ 63)

I note in passing that although the court spoke in terms of ostensible authority, nothing in *Winter* alters the general point that an agent's fraudulent misrepresentation may fall within the scope of his actual authority, if made in the course of negotiating a transaction which the agent has actual authority to negotiate.

427. The Court of Appeal in *Winter* accordingly rejected the broader test applied at first instance (which it summarised as "*whether it is just for the employer to bear the loss, and whether there was a sufficiently close connection between the employee's or agents wrongdoing and the acts he was employed to perform*" (§ 61)). The Court also rejected at § 65 a proposed gloss on *The Ocean Frost* test to the effect that "*a principal will always be liable for the dishonesty of his or her agent where the agent has acted with the intention of benefiting the principal*".

428. Accordingly, I do not consider that any of these authorities supports Mr Bell's proposition that a principal cannot be liable for his agent's fraudulent misrepresentation unless the principal has authorised it specifically or has given specific authority to make fraudulent misrepresentations in general. It is sufficient for the fraudulent misrepresentation to have been made in the course of a negotiation which the agent had the principal's actual or ostensible authority to carry out.

(iv) Contractual liability of principal not named in contract

429. Although this topic does not itself form part of the law relating to deceit, I include it here because the question of whether or not Mr Bell was party to the SPA forms part of the context for considering whether Mr Martin made representations with Mr Bell's authority.

430. The starting point is the general principles of contractual interpretation, which were summarised in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions." (§ 15)
>
> "the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision." (§ 17)

431. As to the admissibility of pre-contractual negotiations, Leggatt LJ in *Merthyr (South Wales) Ltd (FKA Blackstone (South Wales) Ltd) v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526 said:

> 52. It is established law that, as stated by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384-5, previous documents may be looked at to show the surrounding circumstances and, by that means, to explain the commercial or business object of a contract. …
>
> …
>
> 54. … What is not permissible, as the decision of the House of Lords in the *Chartbrook* case confirms, is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the *Chartbrook* case that it is not only statements reflecting one party's intentions or aspirations which are excluded for this purpose but also communications which are capable of showing

> that the parties reached a consensus on a particular point or used words in an agreed sense."

432. A contract may set out factual or other matters on the basis of which the parties agree to contract:

> "There is no reason in principle why parties to a contract should not agree that a certain state of affairs should form the basis for the transaction, whether it be the case or not. For example, it may be desirable to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance. Where parties express an agreement of that kind in a contractual document neither can subsequently deny the existence of the facts and matters upon which they have agreed, at least so far as concerns those aspects of their relationship to which the agreement was directed. The contract itself gives rise to an estoppel…". (*Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386 § 56)

An example is *Richards v Wood* [2014] EWCA Civ 327, where a declaration of trust began with a recital that "*Part of the said purchase price of £5,000 has been provided by Mr Richards and the balance of £4,400 by the purchasers*". The Court of Appeal held that:

> "All parties are bound by that agreed statement, whether it represented the truth or not. This is the traditional function of recitals which in this respect are part of a sub-species of estoppel known as contractual estoppel. One recent example is the decision of the Privy Council in *Prime Sight Limited v Lavarello* [2013] UKPC 22. Thus, contrary to Mr Elleray's submissions, the fact that all of the cash was provided by Mr Richards must be ignored in interpreting the deed." (§ 16)

433. The liability of a principal under a contract not naming him was considered in *Filatona* (cited in § 13 above). The issue there was whether a Mr Chernukhin was entitled to exercise contractual rights under a shareholders' agreement ("***SHA***") which had been entered into by his nominee, Ms Danilina, in circumstances where the counterparty to the agreement, Mr Deripaska, was aware that Ms Danilina was acting as Mr Chernukhin's agent. The Court of Appeal framed the enquiry in the following terms:

> "First, why was Mr Chernukhin not named as a party to the SHA? Secondly, in the light of this circumstance, is the SHA to be construed as excluding him from the contract?" (§ 53)

Plainly, the analysis need not be carried out in that order. As the Court of Appeal acknowledged, "*Ultimately, the order in which a court approaches such issues [the terms of the SHA and the relevant background] may not matter, providing it considers both aspects of construction*" (§ 8). The enquiry framed by the Court of Appeal nevertheless demonstrates the importance of the factual matrix (and particularly the reasons why the principal is not named in the contract) in cases where it is argued that

a disclosed principal is not bound by or cannot enforce the terms of a contract entered into by his agent because (*inter alia*) he is not named therein. The findings of the first instance judge, Teare J, to the effect that (i) it was more probable than not that Mr Chernukhin did not wish to advertise his interest in the company to which the SHA related, (ii) Mr Chernukhin authorised Ms Danilina to sign the SHA as his nominee, (iii) Ms Danilina agreed to do so, and (iv) Mr Deripaska was aware of this, constituted "*an important foundation*" for Teare J's conclusion that Mr Chernukhin was party to the SHA (§ 67 per Simon LJ).

434. The facets of the SHA relied upon in support of the argument that Mr Chernukhin could not sue thereunder included that:

i) Mr Chernukhin was not named in the preamble setting out the parties;

ii) clause 2.2 referred to the fulfilment of the agreement by the named parties;

iii) the SHA had relational aspects as regards the agent and the counterparty;

iv) the SHA included warranties regarding (a) the non-existence of agreements that might restrict or in any way impede the conclusion of the SHA, and (b) the creation of "*valid and lawful obligations of each of the Parties*";

v) the SHA contained an entire agreement clause (which used relatively standard wording);

vi) the SHA contained a transfer of control clause, which provided that the rights and obligations created "*for its parties*" could not "*be transferred and/or ceded by one Party without prior consent of the other Parties in writing*"; and

vii) the SHA contained a right of redemption by Mr Deripaska in the event of a change of control, subject to a supplemental agreement which provided that a transfer of the rights of Ms Danilina to Mr Chernukhin would not constitute a change of control.

435. However, Simon LJ concluded:

> "63. In my view the Judge was right to ask himself whether there were clear and unambiguous words or indications of an intent to exclude the known and identified principal. The expression 'very clear' used by the Judge may bring an emphasis to the exercise, where the principal is disclosed, but does not add very much to what is a general principle of construction that clear and unambiguous language is necessary before a court will hold that a contract has removed rights or remedies which one of the parties to it would have at common law."
>
> "101. Whether a contract 'unequivocally and exhaustively' defines the parties or whether the rights of a disclosed and identified principal have been 'clearly excluded by the terms of the contract', may be regarded as two ways of asking the same question; either way there is a heavy burden of persuasion on a

> party who seeks to argue that a known and identified principal is to be excluded from a contract. Like the Judge, I would accept that there are indications in the contractual provisions that the political importance of not referring to Mr Chernukhin as a party gives weight to the appellants' arguments; but like the Judge, I am satisfied that there is nothing in the background or the contractual terms sufficient to demonstrate a clear intent to exclude him from exercising his rights or incurring obligations under the SHA. To put it another way, the parties were not unequivocally and exhaustively defined by the terms of the SHA.
>
> 102. It follows that in my view the Judge was right to conclude … that Mr Chernukhin and not Ms Danilina was a party to the SHA, that Mr Chernukhin was entitled to exercise contractual rights under the agreement, that the arbitration proceedings were therefore validly constituted, ..."

436. Among other authorities, Simon LJ cited the statement of Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717G (in the context of the right to exclude a remedy for breach of contract for the sale of goods or for work and labour) that:

> "in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising from operation of law, and clear express words must be used in order to rebut this presumption."

437. Males LJ agreed, observing at §§ 122-123 that while the law recognises in the context of undisclosed principals a "*beneficial assumption*" to the effect that the counterparty "*is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract*" unless the terms of the contract or background circumstances expressly or impliedly exclude that possibility (*Teheran-Europe Co Ltd v. S.T. Belton (Tractors) Ltd* [1968] 2 QB 545, 555 per Diplock LJ), "*there is no need to resort to any such assumption*" in the case of a principal whose existence and identity are known to the counterparty. That is because, where there is a disclosed principal, "*All parties know the true position and can be taken to agree with it. If the counterparty did not agree to contract with the principal, he would say so*". Males LJ added:

> "124. On the facts found by the judge here, the counterparty (Mr Deripaska) knew that Ms Danilia was entering into the contract as the nominee or agent for a disclosed and identified principal (Mr Chernukhin); he always regarded Mr Chernukhin as the real party with whom he was contracting; it was in his interests, because only Mr Chernukhin and not Ms Danilina was in a position to provide the necessary finance, that this should be so; and he never said anything to indicate that he did not agree.
>
> 125. It was common ground between the parties that, in such a case, it would in theory be possible for the contract to provide that, notwithstanding the existence of the disclosed and identified principal, the contract should after all take effect as a

> contract between the counterparty and the agent. But that would be an odd agreement to make, at any rate on facts such as those found by the judge here. I do not find it surprising that the parties were unable to cite any case where a contract was concluded by an agent known to be acting on behalf of an identified principal, but where the contract contained language making it clear that it was the agent and not the principal who was to be bound.
>
> 126. I agree, therefore, that there is a heavy burden of persuasion on a party who seeks to argue that a known and identified principal is to be excluded from a contract, and that any such intention must appear clearly and unequivocally from the terms of the parties' contract."

438. More recently, an issue in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico* [2019] EWCA Civ 10, [2019] 1 WLR 3514 was whether the judge at first instance was correct to find that the terms of the contract were neutral as to whether the contract was made with an *undisclosed* principal in circumstances where those terms included an entire agreement clause. The Court of Appeal considered that the terms of the agreement were not neutral due to the presence of the entire agreement clause. The Court of Appeal held that "*Where there is an entire agreement clause this is evidence which tends to negative any suggestion that a party intended to sue or be sued by a person other than the counterparty in respect of disputes under the agreement*" (§ 113); and

> "I do not think that the entire agreement clause in the terms and conditions necessarily serve to exclude *altogether* the possibility that there might be undisclosed principals. The language used is not wholly unequivocal and the parties could, had they wished, have expressly stated that the parties thereto were the *only* parties that could sue and/or be sued. But they did not. On the other hand, I do consider that it is a cogent indication that the alleged agents (the First and Second Defendants) did not intend to act on behalf of an undisclosed third-party principal and that this was also the view of the Claimant. It is evidence that can go into the mix. In my view the Judge did therefore err in treating the terms of the agreement as neutral; he should have held that they were relevant and weighed against the Claimant". (§ 114)

(3) Application

(i) Representations made

439. As noted earlier, Mr Martin admits making both of the General Representations, though adding the rider quoted in § 331 above to the effect that he was not involved in the "*calculation and assessment*" of the EBITDA figure. Mr Bell made no admission on this point, but at trial did not accept that these representations were made.

(a) EBITDA Representation

440. Ivy alleges that Mr Martin made the EBIDTA Representation:

i) during the conversation with Mr Copans on 27 August 2018, when Mr Martin told Mr Copans that he was "*comfortable*" with the figure of £1.6m for 2018 (see §§ 97-100 above);

ii) on 1 November 2018, when in the context of a discussion about an alternative offer for the Business which he had received, Mr Martin told Mr Copans in a Skype message that the current EBITDA of the Business was £1.8m: see § 163 above; and

iii) more generally, because it was the EBITDA figure of (approximately) £1.6m which was at the heart of the parties' negotiations and the express basis of Ivy's offers, including its final offer which formed the basis of the SPA.

441. I find that Mr Martin did make the statements referred to in (i) and (ii) above, and the EBITDA figure was the express basis of Ivy's offers as indicated in (iii) above. This third point does not, in my view, constitute in itself a representation by Mr Martin. It meant Mr Martin was well aware that Ivy understood the EBITDA to be at that level, but representations were potentially made only to the extent that Mr Martin encouraged and fostered that belief by the alleged representations referred to in (i) and (ii) above and at the Prague Meeting.

442. As to whether these statements by Mr Martin constituted representations, the Defendants submit that:

i) Mr Copans' calculations and extrapolations, set out in his Excel workbook, contained errors in his handling of FSB and VIP (Digitain) income, which had a significant effect on the ultimate EBITDA figure. If the income stream figures actually provided by Mr Martin had been correctly plugged into the workbook, then the resulting EBITDA figure would have been less than £1m (as Mr Davidson in principle accepted).

ii) As August 2018 was only mid-year, the income stream figures provided by Mr Martin and his team were for only part(s) of 2018. In relation to each of the four income streams, Ivy relied upon a significant extrapolation. In the most extreme case this involved taking an income stream (non-UK NGR) for a 68 day period and multiplying it by more than five to extrapolate to a full year (arriving at £592k).

iii) Ivy adopted this approach rather than paying a mere €6,000 to obtain the accurate year-to-date figures. As Mr Davidson accepted, such an extrapolation was unhelpful in relation to producing annual figures for any business, but particularly in a gambling business where the amounts could fluctuate quite considerably month-on-month. In relation to the remaining income streams, two involved using data from January to July and one from January to June. Hence they involved the need, respectively, almost to double and actually to double the available data.

iv) These extrapolations have to be viewed in the context where Ivy was aware from the figures provided that there could be very significant fluctuations. For example, in relation to the UK NGR income streams (FSB), the figures provided for the months January to July 2018 were £5k, £46k, £14k, £33k, £65k, minus

£102k and £86k. Ivy was also well aware that VIP figures were inherently uncertain and that for such a business (in Mr Copans' words) "*you require a lot of money behind you to cover the losses as VIPs can hurt you as they play big and can win big*".

v) Mr Copans accepted that extrapolating as he did could produce figures that were "*wildly out*".

vi) As a result, the workbook did not (indeed could not) demonstrate that EBITDA for 2018 "*was*" £1.6m, nor could any statement of fact regarding the accuracy of the same be to that effect. Rather, it could only provide an extrapolation as to what 2018 EBITDA might be if income for the periods used accurately reflected ultimate income, and costs ultimately turned out to be in the totals there set out. Even putting matters at their highest, it could only amount to an uncertain prediction of EBITDA for 2018. That is acknowledged in Ivy's own evidence on this spreadsheet, and Mr Martin's claimed conveyed comfortableness with the same. Mr Copans' witness statement variously referred to the £1.65m as "*[t]he total bottom line profit extrapolated for the period of 2018"* and "*the EBITDA prediction for 2018*".

vii) It follows that, on any view, Mr Martin did not make the pleaded representation, namely a statement of fact that the EBITDA of the business in 2018 "*was or was in the region of £1.6m*".

Mr Bell adds that it is not alleged that Mr Martin made a representation that EBITDA for 2018 *would be* £1.6m, which would in any event not be a statement of fact, but rather a prediction as to the future which is not of itself an actionable misrepresentation: see *FoodCo UK LLP & Others v Henry Boot Developments Limited* [2010] EWHC 358 (Ch) §§ 193 – 207.

443. As to those various points:

i) The fact that, unknown to Mr Copans and Mr Martin, the workbook contained errors does not detract from the fact that the workbook stated an extrapolated figure of £1.65 million, and Mr Martin told Mr Copans that he was comfortable with that figure. As Mr Copans said in his oral evidence quoted in § 98 above, it was Mr Martin's business and Mr Copans was relying on him to know what type of revenues it was actually making. Nor do the inaccuracies in the workbook detract from the fact that Mr Martin told Mr Copans, in the Skype message of 1 November 2018, that the business was making EBITDA of £1.8 million.

ii) It was obvious to everyone that they were only part way through the 2018 year. Further, it was clear on the face of Mr Copans' workbook that the figure arrived at of £1.65 million for the full year was an extrapolation. As such, it had not been reached by forming a subjective opinion as to the future development of the business for the rest of 2018: instead, it derived from a straightforward mathematical calculation based on the revenues to date. In substance, therefore, the representation Mr Martin made was a representation of fact, namely that the business was generating net profits which, if they continued at the same level to the end of the year, would result in a net profit in the region of £1.65 million.

That was Mr Copans' understanding, as reflected in his oral evidence quoted in § 98 above to the effect that he relied on Mr Martin to know "*what type of revenues the business is doing ... monthly revenues what it is doing*". It was also the natural meaning of what Mr Martin said about being comfortable with Mr Copans' explanation, as I am sure Mr Martin realised. The fact that some of the extrapolations involved significant multipliers does not alter that fact. Equally, or more so, the nature of Mr Copans' extrapolation in August in no way detracts from the statement Mr Martin made at the beginning of November, by now 10 months into the year, that the EBITDA was £1.8 million.

iii) Mr Copans said in his oral evidence that, as well as costing €6,000, obtaining more accurate year to date figures would have led to a couple of extra weeks' delay. However, whether or not Mr Copans was unwise to choose instead to rely on the figures Mr Martin and his team had provided, and Mr Martin's representation as to the current EBITDA, the fact remains that (as Mr Copans' evidence about the 27 August discussions shows) he did rely on Mr Martin's representation. The same points apply in relation to the extrapolation as I have made in (ii) above.

iv) The facts that the figures could be subject to significant fluctuations, and that the VIP figures were unpredictable, meant that the final outturn for 2018 would not necessarily reflect the performance during the period from which the figures were extrapolated. However, that does not alter the nature of the representation made, to the effect that the business was generating net profits which, if they continued at the same level to the end of the year, would result in a net profit in the region of £1.65 million (August representation) or £1.8 million (November representation). It might affect the degree of comfort that Ivy could take from those represented facts, but that point goes to reliance, and even in that context does not undermine reliance.

v) The same considerations apply to the possibility that the extrapolated figures could be 'wildly out' from the ultimate actual figures. Moreover, Mr Copans made clear in his oral evidence that, whilst the figures could be wildly out, he did not regard his extrapolation method as inherently unsafe: he felt that it gave *"a true indication of what the annual revenue could be for the 12-month period based on the information I had".* Specifically in relation to the VIP business, Mr Copans said:

> "The VIP business was essentially an offline business. It was run as, for example, on cash and credit at an old-style booking-type business and I was not an expert nor did I plan to be an expert. I was just relying on the information that I was provided by Barry which showed me the numbers."

and:

> "I was provided information for certain parts of the year for the VIP business and I used those numbers to get to my number. So I was relying on the information and the numbers provided to me by Barry -- by me from Barry regarding the VIP numbers."

vi) It was obviously uncertain what the final outturn would be, because the future was unpredictable. However, as already noted, what the workbook indicated, and Mr Martin confirmed, was that the net profits which the Business had in fact made in the year to date were such that, if they continued for the remainder of the year, would result in EBITDA of £1.65 million or thereabouts. Similarly, what Mr Martin represented in November 2018 was that the net profits which the Business had in fact made in the year to date were such that, if they continued for the remainder of the year, would result in EBITDA of £1.8 million or thereabouts. Accordingly both statements were, or included, statements of fact as to the actual net profits to date.

vii) Those statements are consistent with Ivy's pleaded case of a representation that:

> "[t]he EBITDA (which is a measure of a company's profitability) of the Business in 2018 was or was in the region of £1.6 million. This was on the basis of figures for income streams for the Business provided to Mr Neil Copans of Tabella on 27 August 2018 ("the EBITDA Representation")"

Since the 2018 year self-evidently had not ended by the time the representation was made, it was and is obvious that the alleged representation was that the performance to date (as to which Mr Martin had provided figures to Mr Copans) were consistent with an EBITDA of something in the region of £1.6 million.

444. The Defendants also suggest that the fact, if it be such, that Mr Martin said that he was comfortable with the figure did not amount to Mr Martin making a representation to Ivy that Mr Copans' EBITDA figure was correct. I disagree. The context was a long and detailed discussion of the figures between Mr Copans and Mr Martin on 27 August 2018, as described by Mr Copans in his evidence quoted in §§ 97-98 above. Mr Copans was looking to Mr Martin to confirm whether or not Mr Copans had correctly understood the figures and what they indicated, and it was important to Mr Copans to have that confirmation given Mr Martin's much greater knowledge of the Business. Mr Martin provided it, and in my judgment thereby made the representation I have referred to above.

445. For these reasons, I consider that Mr Martin did make the EBITDA Representation by the means referred to in §§ 440(i) and (ii) above.

(b) Profitability/Sustainability Representation

446. Ivy submits that this representation, namely that the Business was profitable and/or self-sustaining from its revenue, was made in the following ways:

i) The '*Profitability*' limb of the representation necessarily follows from the EBITDA Representation: if the Business had an EBITDA of £1.6m, or anything like that figure, then that is a representation that the Business was profitable.

ii) Mr Copans said in his witness statement that Mr Martin "*definitely gave the impression that the business was profitable*"; and Mr Watt gave unchallenged evidence that when he visited the Business in December 2018, Mr Martin continued to represent that the Business was healthy and profitable (see § 171

above). Further, Mr Martin's statement on 6 June 2018 to the effect that the EBITDA for 2017 was £1.8 million (see § 69 above), though not relied on as a representation in relation to 2017 EBITDA as such, was itself one of the occasions on which Mr Martin represented that the business was profitable and self-sustaining.

iii) As to sustainability, Mr Copans' evidence in his witness statement was that Mr Martin "*always mentioned that at the current level the business could sustain itself but that to take it to the next level it needed further investment*".

iv) Moreover, by telling Ivy that the Business was profitable and had an EBITDA of approximately £1.6m, Mr Martin was impliedly representing, at the very least, that the Business was not insolvent on a cashflow basis, i.e. that it was able to pay its debts when they fell due.

447. I agree with Ivy that the EBITDA Representation also included a representation that the Business was, at the very least, profitable and – hence – able to cover its expenses and overheads from its revenues. I also accept the evidence of Mr Copans and Mr Watt about that was said to them about profitability and sustainability: generally over time in Mr Copans' case and during the early December 2018 visit in Mr Watt's case. These were all representations of fact.

448. Mr Bell contends, first, that the existence of any such representation is directly inconsistent with what Mr Bell told Ivy in Prague, to the effect that he had lent personally or facilitated loans from third parties (including SBL) and had done so by injecting funds into the business on an ad hoc basis for working capital purposes because in some months Mr Martin required funds to cover overheads. That submissions rests on evidence from Mr Bell which I have rejected (§§ 133-135 above), and the misconceived challenge to Mr Copans' evidence based on a highly selective reading of his witness statement to which I refer in §§ 129-130 above.

449. Mr Bell submits that it was obvious that the £2.5 million which Mr Copans said he understood to have been a historic loan was in fact working capital, seemingly on the basis that there was nothing else it could have been spent on. That assertion is based on part of the cross-examination of Mr Copans, in which he was asked how he understood the money would have been spent. Mr Copans realised that initially any business of this type would need substantial capital investment at the outset. Asked what he therefore believed the money had been spent on, Mr Copans referred to software and working capital. No suggestion was made to Mr Copans that that must be wrong, yet in closing Mr Bell asserted that the evidence was "*simply incredible*". I see no basis for that assertion, and I reject it.

450. Mr Bell also relies on oral evidence given by Mr Copans, when being asked about Mr Bell's operational involvement in the business, that Mr Martin would talk to Mr Bell whenever capital injections were needed. Mr Copans said he did not know that at the time but found out about it later. The following exchange also occurred:

> "Q. Let's be very clear about this. You knew at the time, didn't you, that regular funding was required and that Barry was speaking to Paul in order to facilitate that?

> A. I knew that Barry spoke to Paul on many occasions with regards to money issues and keeping the loop on financial implications of the business."

451. Mr Copans went on to (re)state that he did not know at the time that cash injections were being made through Mr Bell; but that after the SPA had been signed, when he met Mr Martin in his office, Mr Martin told him that Mr Bell had to put in further investment to keep the business afloat. I accept that evidence.

452. Mr Bell also relies on a passage in the report of Mr Davidson stating:

> "I am instructed that the Claimant became aware at around 30 July 2018, that Paul Bell, one of the beneficial owners of the business, had been making regular and substantial advances to the company to enable it to continue to trade. The total amount of these advances has been set as high as £2.5m (as per WS of NC) but the Claimant believed that this was, at least in large part, an historical debt relating to the period of trading through Viktra and even earlier entities."

453. The first sentence of this passage is obviously inconsistent with the evidence of Mr Copans and Mr Watt, and would have undermined the basis on which Ivy offered to (and did) buy the business as a viable going concern and at a price calculated by reference to an EBITDA of £1.65 million. Mr Copans confirmed that he was not the source of the statement. In examination in chief Mr Davidson said he thought he must have conflated information provided to him about the due diligence questionnaire with document separately provided about dealings between Mr Martin and Mr Bell about the business's funding needs, and from cash books. Mr Davidson confirmed that the sentence was included in a draft prepared after a meeting on 9 September 2021 which included Mr Copans and Mr Watt, but he did not have a note or clear recollection of the meeting, save that he recalled being told that Ivy knew from the due diligence document that money had gone in. Mr Davidson could not recall whether, following his draft report, he had further discussions with Mr Copans or Mr Watt. Mr Davidson disagreed with the suggestion that his paragraph correctly reflected his instructions from Ivy and Ivy's state of knowledge in July 2018.

454. It seems likely that someone at Ivy with responsibility for the litigation saw and approved at least the final draft of Mr Davidson's report. Nonetheless, I accept Mr Davidson's evidence that the paragraph in question must have arisen from an error. Its contents are inconsistent with clear and consistent evidence from Mr Copans and Mr Watt which I have accepted, and is inherently improbable for the reasons I have already indicated.

455. I conclude that Mr Martin did make the Profitability/Sustainability Representation, by the means and to the extent referred to in §§ 446 and 447 above.

(c) Prague Representations

456. I have set out earlier my findings as to what, materially, was said at the Prague Meeting. I have concluded that:

i) The EBITDA figure of £1.6 million was mentioned at the Prague Meeting, and was the premise of the discussion about the purchase price and earn-out provisions.

ii) Mr Martin indicated that the business had the potential to make more than £1.6 million of profits if there was enough investment in marketing.

iii) Mr Bell actively participated in discussions about EBITDA and profitability, including (specifically) by expressing concern that Ivy might reduce the Business's EBITDA and thereby affect the amount payable under the proposed earn-out provisions.

iv) It was implicit in all three of the above statements that the Business was, at the very least, currently profitable, and (hence) able to pay its outgoings from its revenues.

v) Ivy was not told at the meeting that Simplify companies were making regular cash injections into the Business in order to address cashflow problems and keep the business afloat.

457. Mr Martin's statement referred to in (ii) above impliedly repeated his representation in August 2018 that the Business was currently making EBITDA at a rate of £1.6 million per annum, and at the very least was profitable.

458. Mr Bell, by participating in the discussion in the way indicated in (iii) above, was, by clear implication, both (a) manifestly endorsing Mr Martin's statement to the effect that the Business was profitable and (b) himself representing that the business was profitable. An expression of concern that Ivy would affect the earn-out (which depended on positive EBITDA) by reducing the Business's EBITDA clearly implied that there was currently positive EBITDA of some kind, even if not at the level of £1.6 million. Moreover, I have no doubt that Mr Bell understood himself to be conveying this message to Ivy, and did so in order to help persuade Ivy to go ahead with the transaction, and preferably to do so on terms which maximised the fixed element of the price and minimised any element dependent on future EBITDA.

459. I conclude that both Mr Martin and Mr Bell made the Prague Profitability Representation, and that Mr Martin (at least) made the Prague EBITDA Representation. These too were representations of fact.

460. For the avoidance of doubt, in stating that at least Mr Martin made the Prague EBITDA Representation, I do not positively conclude that Mr Bell did not also make it. Rather, I conclude that the evidence in my view does not establish, on the balance of probabilities, that Mr Bell's contributions to the discussion referred to in §456.iii) above implicitly included (or endorsed Mr Martin's making of) a statement as to the Business's current EBITDA being at the specific level commensurate with £1.6 million for the year.

(d) Duration of representations

461. The Defendants suggest that any such representations (whether the General Representations or the Prague Representations) did not continue up to the date of the SPA, particularly in circumstances where:

i) Ivy was well aware that Mr Martin, far from being an accountant, did not even understand Excel;

ii) Ivy was also well-aware of the potential for significant fluctuations in the income, as noted above;

iii) there is not, nor could there be, any suggestion that Ivy was expecting Mr Martin to keep or update Mr Copans' workbook, or even himself provide updated income stream information, including in circumstances where Ivy was granted the access which it requested to the systems relating to the Business in the period up to the sale; and

iv) these points are reinforced by the particular way that the deal developed so (unexpectedly) slowly.

462. I do not accept the Defendants' submissions on this matter:

i) As Mr Copans said in the oral evidence I have already quoted, Mr Martin was the CEO of the Business and could be expected to know its levels of revenues and (more generally) financial performance. Indeed, the evidence I have summarised earlier indicates that Mr Martin knew perfectly well that the Business was not generating profits.

ii) The potential for significant fluctuations in income was not a reason to treat a representation made in late August (two thirds of the way through the year) as ceasing to be a representation as to the Business's financial performance up to that date, particularly when reinforced by Mr Martin's further statement on 1 November 2018 that the Business had maintained, and indeed increased, its profitability since then.

iii) The fact that Mr Martin was not expected to update the workbook does not mean that the representation he made in August 2018, and confirmed or added to in November 2018, fell away. The representation continued as a representation that the Business's financial performance up to August and November 2018 were consistent with annual net profits at least of the order of £1.6 million.

iv) Mr Bell suggested that the following evidence given by Mr Watt showed "*his attempt to paint the Defendants in a bad light, and at worst, of his lack of honesty*":

> "Q. I am right, aren't I, that you had complete access to the FSB platform?
>
> A. I didn't have complete access to the FSB platform. I wasn't given user ID and password.

> Q. If you have a look --
>
> A. I don't recall that I had that anyway and if I did have access to it, then I apologise.
>
> Q. Well, let's confirm this point because I can see you backtracking already, Mr Watt. Page C808, if you would. At the top --
>
> A. Okay.
>
> Q. -- Mr Martin sends you passwords, doesn't he, and the top one --
>
> A. Yes.
>
> Q. -- is to FSB.
>
> A. Okay. I accept that they were sent and I apologise, I did not mean to mislead, this is an oversight.
>
> Q. You were very quick to jump to the conclusion that you didn't have it, weren't you?
>
> A. I spoke too quickly, yes.
>
> Q. You had the passwords for FSB, you had complete access to the FSB platform from December, didn't you?
>
> A. I did."

I do not accept the Defendants' criticism of Mr Watt. Having read and heard his written and oral evidence, I am satisfied that he gave his evidence honestly, and on this occasion made an error which he readily and promptly accepted. I also note that it was not suggested to Mr Watt that he had given this evidence dishonestly, making the allegation in Mr Bell's closing submissions all the more unjustifiable.

v) Moreover, the email to which Mr Watt was taken, providing him the passwords for 21Bet's FSB and .com accounts, was dated 10 December 2018: after the commercial deal for the purchase of the business, including the price, had been done. An email in the same chain, dated 6 December 2018 from Mr Copans to Mr Martin and Mr Watt, indicates the purpose for which the passwords were provided. Mr Watt was going to visit 21Bet's offices to carry out various tasks, one of which was:

> "1. Software - he will look at reporting capabilities of both FSB and your .com software will also look at how the information extracted from FSB and your own software ends up in the accounting records, with particular emphasis on scalability."

Thus the reason for giving Mr Watt access to these accounts concerned a facet of accounting methodology. It was not designed as a means of providing him with an update as to the Business's overall financial performance, and would plainly have been inadequate for that purpose: since the FSB and .com accounts related to only part of the Business, and would also not contain any of the other information (such as overheads/expenses) needed to form a view of the Business's current performance. I do not consider it seriously arguable that giving Mr Watt access to these accounts for this purpose made the representations Mr Martin had made fall away. Equally, I do not accept the Defendants' submission that the provision of this access showed that the Defendants were not seeking to hide anything and cannot have been dishonest.

vi) Whilst the conclusion of the deal progressed slowly, the commercial terms including the price had been settled by the end of November 2018. Mr Copans said:

> "So when we finalised the numbers and there was a period in time, call it from the end of August till probably the middle of October, November when we actually finalised the numbers because we were negotiating based on EBITDA number, when we got to a final purchase price, we agreed in principle and at that stage we left it to the lawyers
>
> …
>
> My job, in terms of getting this deal over the line, was looking at the numbers, agreeing on the profitability, negotiating the acquisition and getting to a purchase price where I believed we would pay what we believed the business was worth and then I handed over the job and for whatever reason, we don't have to rehash it, it went back and forward for a period of, call it, from November to April, 4 months or so from that point in time."

Thus the fact that it took several months to reach the stage of signing the SPA did not mean that the price or its basis in the Business's EBITDA were continually revisited by Ivy, nor that Ivy in fact felt any need to do so. The length of that part of the process did not result in the representations which had led to the commercial agreement on price falling away.

463. The Defendants make the further submission that any earlier representation as to 2018 was overtaken by the provision by Mr Martin (via his adviser, Mr Kitto) to Mr Watt on 24 January 2019 of a balance sheet for the Business as at 31 December 2018 which showed net liabilities of the Business of £24k (even excluding what Ivy had been told was a £2.5m shareholder loan). In forwarding this schedule on to Messrs Copans and Hooja, Mr Watt stated:

> "In summary 21Bet doesn't have enough cash to pay out its players should they all request withdrawals at the same time…These numbers also imply that either Barry is taking out

> more money than the company is generating or that costs are higher than income".

464. The Defendants submit that Mr Copans accepted there were no dividends being drawn out, as had been stated in the DDQ (§ 4.6), and so Mr Watt's explanation that costs were higher than income was the only possible conclusion. They point out that Ivy was aware that the balance sheet attached to the SPA did not include debts of the Business which Mr Martin himself was going to pay (including the £2.5m loan or the debt to Mr Spence). The Defendants suggest that Mr Copans accepted that when he received the December 2018 balance sheet, he was aware that the Business could not pay its debts as they fell due. Mr Copans said this in oral evidence:

> "Q. So you knew from this schedule that Barry had sent to you, Ivy, at the end of January 2019 -- 2019 that the business had no money, didn't you?
>
> A. That was not the case, no. At a particular point in time, there were backing to pay the players out; it did not mean they had no money.
>
> Q. You knew that on a cash flow basis it was unable to pay its debts as at the end of December 2018 if the – if people had demanded repayment?
>
> A. To a certain extent that is correct.
>
> Q. So you knew it was cash flow insolvent at the end of 2018?
>
> A. I never said the word "insolvent".
>
> Q. No, I am asking you. I am suggesting to you, you knew, didn't you, that it was cash flow insolvent?
>
> A. No.
>
> Q. It couldn't pay its debt as they fell due?
>
> A. No.
>
> Q. You must have known, therefore, that the 1.6 million EBITDA figure couldn't possibly be correct?
>
> A. I had no idea that it couldn't be correct. I did the calculations and I was comfortable in my calculations based on the information provided.
>
> Q. Mr Watt says to you that either Barry is taking out more money than the company is generating or costs are higher than income. You knew, didn't you, that there was no money being taken out of the business, that no dividends were being paid?

A. Based on the information I was given, I had no idea that there weren't dividends, but it's very possible they were paid from an account that I hadn't seen.

Q. I am suggesting that you knew because it's said in the due diligence questionnaire. We can look at it if you want.

A. Okay. If, according to the due diligence questionnaire, there were no dividends paid out, according to Barry, then I would have believed that was the case.

Q. My Lord, for your note, it's page 397, paragraph 4.6 of the due diligence questionnaire. So there's no evidential basis for you thinking that Barry was taking money out of the company, was there?

A. I didn't have evidence of that in terms of bank statements.

Q. No, you had no basis for thinking that?

A. No.

Q. So, therefore, the only other conclusion that Mr Watt has suggested to you is that costs are higher than income?

A. That's what he's suggested.

Q. You agree with that, don't you?

A. At a particular point in time that could always be the case, but not over a lengthy period of time.

Q. How on earth can a business be generating 1.6 million profit if here we are at the end of 2018 it's in debt?

A. Because I performed the calculation at a point in time in August with the information I was given. My job was to come and look at the numbers, do the due diligence, perform the -- discuss and the purchase price for the acquisition, and I was comfortable with the number that we had obtained at August and then I had left it to the lawyers.

Q. You were fully aware by this point that the business wasn't profitable and couldn't sustain itself.

A. No, I was not.

Q. That's ignoring the 2.5 million debt, isn't it?

A. I was not aware that the business couldn't sustain itself."

Mr Copans also stated specifically that when he was provided with these financial statements, they meant the business "*could potentially have low cash flow, but it didn't necessarily discredit the 1.6 million EBITDA for the year that was predicted*".

465. Having listened to and read this passage as a whole, I understand Mr Copans to have denied, rather than accepting, that he knew that the business could not pay its debts as they fell due. He did not accept that he was positively aware, at the time, of the fact that Mr Martin was taking no money out of the company (whether as dividends or by any other means), and he was not aware that the Business could not sustain itself. Even if the Defendants were correct that by combining knowledge of the balance sheet as at 31 December 2018 with other sources of information about money being taken or not taken out of the company, it would not follow that the balance sheet led to any earlier representation about profitability being overtaken. A representation does not fall away simply because the representee is later provided with various pieces of information which, if combined, could lead to the conclusion that the representation was wrong or had ceased to be true. Further, I accept Mr Copans' evidence that he did not draw that conclusion. It is inherently unlikely that he did: had he done so, then it would have called into question the whole premise of the deal and, quite possibly, the veracity of what he had been told. Alarm bells would have rung. Moreover, as Mr Watt pointed out, the information to be gleaned from a snapshot of assets and liabilities is limited: the fact that its liabilities exceeded its assets at a particular time did not necessarily mean that the Business was unprofitable or unable to pay its debts as they fell due.

466. The Defendants refer to later schedules showing a worsening net liability position, with the final version (which became Schedule 7.26 to the SPA) showing a net liability position of £53k, and suggest that Mr Davidson accepted that these clearly signalled that the Business did not have sufficient funds to pay its current liabilities. Mr Davidson did agree that the 31 March 2019 schedule indicated that, as at that date, the company did not have sufficient funds to pay its current liabilities "*in the sense that the amount of the liabilities exceeds the amount of its assets*". However, Mr Davidson also said:

> "There is nothing on the face of this document that tells me what the performance of the business has been over any period other than to tell me that FSB, the trading with FSB over a three-month period, led to a loss because February was such a poor month."
>
> and:
>
> "The one that I think is probably most likely is that hardly anything, if anything at all, inference can be drawn as to performance from this. This is a statement to tell the buyer what they might expect on day 1 when they buy the business in terms of what assets they have and what liabilities they have. It's entirely silent really on how the business has performed or what the buyer is going to find out about the performance of the business afterwards…"

In the context of the warranties claim, Mr Bell in his written closing submission expressly accepted the evidence quoted above.

467. For these reasons, there is no merit in the Defendants' arguments that the representations made to them were overtaken by events. Nor do I accept their submission that Ivy by the stage of the SPA knew that the representations made to it had been wrong. The evidence does not establish that, and it is improbable that Ivy would have been willing to proceed with the deal, or to do so on the same terms, had it been aware of that.

(ii) Falsity

468. I have concluded above that Mr Martin made the General Representations (i.e. the EBITDA Representation and the Profitability/Sustainability Representation), the Prague EBITDA Representation and the Prague Profitability Representation; and that Mr Bell made (both directly and by approving the representation by Mr Martin) at least the Prague Profitability Representation.

469. I have set out my conclusions about the actual state of the business in section (D)(23) above. On the basis of those conclusions, all of these representations were false. The business was neither making EBITDA at a rate equivalent to £1.6 million per annum, nor any EBITDA at all. It was neither profitable nor self-sustaining: it was heavily loss-making and unable to sustain itself, instead relying on regular cash injections arranged by Mr Bell to fund ordinary operating expenses such as salaries and rent.

470. Even if I am wrong in my conclusions that the representations made were representations of fact, they were at least representations of opinion; and on that basis too they were false because neither Mr Martin nor Mr Bell had any genuine belief that the business was making or likely to make profits of the order of £1.6 million in 2018, nor any profit at all. On the contrary, as set out in section (iii) above, they both knew it was making heavy losses and could not meet its regular outgoings without the cash injections.

(iii) Mental element

471. The Defendants submit that even if any of the representations were made and were false, neither of them knew that to be the position.

472. In the case of Mr Martin, it is submitted that:

i) Several of the income streams provided by Mr Martin and his staff were reliable and could not be challenged: in particular, the UK NGR figures received via FSB, the exchange revenue figures supported by emails and statements provided by BetKurus, and Digitain figures for VIP income in June and July 2018;

ii) Mr Martin could not have been expected to notice the errors Mr Copans made in relation to the FSB and Digitain figures, referred to in § 101 above (and it was not suggested to him that he should have done);

iii) in the 19 months to April 2018 FSB income was running at a significantly higher rate than the total indicated in Ivy's workbook;

iv) receipts into the Satabank account were at a level that could accommodate non-UK NGR at the level Ivy assumed;

v) Mr Martin was not an accountant, did not understand all the details and did not understand Excel;

vi) more generally, Mr Martin was not a sophisticated operator; and

vii) Mr Martin provided Mr Copans with full access to data, including HSBC bank statements, and did not refuse access to bank statements to Mr Watt when asked for them in December 2018.

473. In my view, none of those matters assists the Defendants. Any suggestion that Mr Martin might not have noticed that Mr Copans had wrongly calculated the profits as being £1.65 million rather than just under £1 million is beside the point in circumstances where Mr Martin knew the business was making no profits, let alone profits of the order of £1 million. The communications referred to in § 268 above – either sent by Mr Martin, or sent to him and which he did not dissent from – indicate that he was perfectly well aware that the Business, which he was running, was making no profits, could not pay its basic outgoings from its own revenues, and had no prospect of making any overall profit in 2018. That was also clear from the facts that he had to call on Mr Bell so regularly to arrange for more money to be put in, in order to survive; and that Mr Martin himself had taken very little money out of the business, and not enough to pay his personal expenses. I have addressed the points about access to bank statements and other data in §§ 89-94 and 462(iv)-(v) above, and do not consider that they detract in any way from Mr Martin's knowledge as to the falsity of the representations he made. Mr Martin knew that the representations he made were untrue.

474. Mr Bell equally knew that the Business was making no profits and could not pay its regular outgoings from its revenues. He was party to the same communications with Mr Martin, and was himself arranging the regular cash injections. Mr Bell also clearly stated in his oral evidence that the Business was making no profits. Mr Bell accordingly knew that the Prague Profitability Representation which he made – personally and by endorsing what Mr Martin said – was untrue. Both he and Mr Martin acted dishonestly in that regard. They made these representations knowingly as part of their effort to offload onto Ivy a failed business.

(iv) Intended inducement

475. The representations which I have concluded were made were each made with the intention that Ivy would rely on them. Having read and heard the evidence, I have no doubt that the Defendants wished to sell their loss-making business onto Ivy, and sought to do so by persuading Ivy that it was in fact profitable.

(v) Actual inducement

476. Mr Copans' written evidence indicated that he relied on the representations made, both in August 2018 and at the Prague Meeting on 1 October 2018. Specifically in relation to the August discussions, he said he *"wanted Barry's confirmation on these numbers and the methodology, assumptions and rationale"*. I refer below to his evidence about the Prague Meeting.

477. In cross-examination on behalf of Mr Bell, Mr Copans rejected Mr Martin's suggestion that he placed no reliance on the information Mr Martin had provided:

> "You know very little about this [the VIP cash] part of the business?
>
> A. That is correct.
>
> Q. Nor know anything about how to control it or maintain the existing numbers?
>
> A. That is correct.
>
> Q. What did you mean by that?
>
> A. I meant at the end of the day we were -- I was working on the numbers and I was interested in the numbers that Barry provided to me. I was relying on what the business could do and I was relying on what Barry provided as to the potential sustainability of that business and maintaining those numbers and growing the VIP business.
>
> Q. The truth is you knew that you had nothing and you weren't relying on anything. You were making decisions based on nothing.
>
> A. That is not correct. I was provided information for certain parts of the year for the VIP business and I used those numbers to get to my number. So I was relying on the information and the numbers provided to me by Barry -- by me from Barry regarding the VIP numbers."

and similarly in cross-examination by Mr Martin:

> "Q. Even after being a complete waste of time you sent a new offer over?
>
> A. Yes, because I still believed that your numbers were correct. You had given me the information.
>
> Q. Yes.
>
> A. At that stage, I could only believe that they were correct, but everywhere I turned to try and get the information, there was a different story as to why that information wasn't accessible. Now, as I mentioned to Mr Solomon, the due diligence is not a negative exercise. When we do a due diligence we go in there with a positive mind frame. We are there to make sure that we take, if I have to simplify it in accounting terms, we agree and can we just tick everything off and this agrees to the back end, this agrees to the bank statements, this agrees to the affiliates schedule and off we go. Every acquisition that I have done -- that I've done, more than two days was adequately sufficient irrespective of the platform that the business was on. And a big part of that always went into the fact that we trusted the person

> putting the information together. The person was not – maybe that was my mistake that I trusted you and that I trusted that the numbers were correct. But when I went there, nothing tied up and there was different excuses for every part of the information, but at that stage I had no reason to doubt that you were selling me a basket case, as my lawyer pointed out. So I was still interested and I still believed that your numbers were correct, but we would have to find a different way to verify them. So we went a completely different route and based on the information that the limited information we had for 2018, we reconstructed the financial statements to come to what we believed the EBITDA was based on the information we had been given by you.
>
> Q. You go on to in paragraph 13 and say the entire pack was in disarray?
>
> A. Yes, it was.
>
> Q. Yes. So why -- if that was the case, why didn't you walk away at that point?
>
> A. Because we still had certain information whereby the information we were given me were able to verify and make some extrapolated judgment calls. Now, at that stage, we weren't buying the business because the accounting pack was a mess. We still believed that the numbers were correct. We believed that where you put that information together, if we spent enough time it would be accurate. I had no reason to doubt that you were lying to me. Subsequently I found out by, I don't know if it was your open submissions or somewhere, that you were doing a sales job and you even admitted to manipulating the numbers. Now, I trusted that the information was correct. I never went into the due diligence to try and catch you out. So I was doing the best job based on the information I had and I had no reason to think that these numbers were fabricated or manipulated."

478. In cross-examination on behalf of Mr Bell, Mr Copans was asked about a Skype message exchange between him and Mr Watt on 26 May 2019, during the course of which Mr Copans had expressed anger about, among other things, liabilities of the business which had not been disclosed. Mr Watt referred to a suggestion that Mr Martin and Mr Bell were already operating another brand, to which Mr Copans expressed amazement and then commented *"I knew he was full of shit and lying on a lot of things but if that's the case, I am flabbergasted".* Mr Copans gave this oral evidence in cross-examination:

> "That's what you always thought, isn't it?
>
> A. Yes.

Q. So you knew, as I suggested just now, that you couldn't ever trust what Mr Martin was telling you?

A. No, that's incorrect on a lot of things. That's – I did not specify what I meant. I never under any circumstances for 1 minute thought that the information he was providing me in terms of the factual figures of the historical part of the business he was lying on.

Q. What did you think he was lying about?

A. He's a salesman. He was trying to convince us to do the deal. He was selling us that if we buy this business he will smash it out the park.

Q. So you knew that was a lie?

A. No, it wasn't a lie it was a sales -- it was a sales pitch to get us to buy the business.

Q. You realised that was just a sales pitch?

A. No, he's a confident man and he's pretty convincing.

Q. I'm just trying to ask you what your evidence is, Mr Copans. I asked you what it was Mr Martin was lying about. You said not the figures, just the other stuff, the sales pitch. Then I said so you thought he was lying about smashing it out of the park and you said no to that. So what is it you thought he was lying about?

A. It's a very general term "smash it out the park" which means this business is going to succeed. So it's – it can be many different things, but it has a positive connotation which, in my understanding, is that if we came on board this business would fly.

Q. What's the answer to my question?

A. Can you ask the question again, please?

Q. I've asked it twice already. I will ask it once more and then I am going to move on and simply make submissions you are refusing to answer.

A. Okay.

Q. What was it you thought Mr Martin was lying about?

A. At this stage, I thought he was lying in terms of what the potential of the business would be in the future.

> Q. What specifically had he told you about the potential of the business that you knew to be a lie?
>
> A. It wasn't specifically a lie. It was very unachievable, unattainable estimate with no proof, as we had no base -- we had no evidence or no historical data in particular markets to base that on.
>
> Q. You knew, didn't you, statements of Mr Martin's like "you are going to smash it out of the park" were simply lies?
>
> A. No.
>
> Q. You knew that his apparent confirmation of your EBITDA figures of 1.6 was simply lies?
>
> A. I had no idea at the time that he was lying."

479. Mr Bell suggests that the Skype message shows that Mr Copans did not rely on anything Mr Martin told him, including Mr Martin's assertions about the business's potential, and that his oral evidence was inconsistent, incoherent and untruthful. I reject those suggestions. Mr Copans' evidence, which I accept, that was that he perceived Mr Martin as being a salesman, and is likely to have taken with a pinch of salt Mr Martin's enthusiastic comments about the business's future potential; but had no reason to disbelieve, and relied on, what Mr Martin had said about the business's current performance.

480. Similarly, I accept Mr Hooja's oral evidence, consistent with the written evidence I quote in § 65 above, that Ivy was not merely interested in the 21Bet brand and that it was important to Ivy that the business was already profitable:

> "Q. The truth was the deal wasn't really determined by financials at all, was it? You were buying a business based on its gaming revenue and potential. You were buying a brand really more than anything else?
>
> A. That is incorrect.
>
> Q. The value of the brand came from the structure that was in place including the database and Mr Martin driving it forward?
>
> A. That is incorrect because we made the offer based on the EBITDA and the only reason we wanted to do this deal is we wanted a UK brand which is not a negative cash flow business. We didn't want it to start with negative cash flow and paying the operational expenses and hence -- sorry.
>
> Q. No, no, I interrupted you.
>
> A. And hence we looked for a business which was profitable in the first place and the overall idea was that we take our --

> marketing expertise and inject funds into marketing and grow the business.
>
> Q. EBITDA wasn't even mentioned in Prague, was it?
>
> A. Yes, it was mentioned."

Mr Copans also gave oral evidence, which I accept, to the same effect.

481. Mr Bell submits that the Prague Representations were in any event not relied on because Mr Copans acknowledged, as quoted earlier, that *"[t]he EBITDA from the prior numbers and financials was not a specific topic of conversation as this had already been agreed…"*; and that Ivy would have entered into the SPA on the same terms even had no representations been made in Prague.

482. However, Mr Copans also said in his evidence that *"the idea was to have what was essentially a brainstorming session as to how to get to a reasonable, acceptable amount of the purchase price which all parties were happy with",* and (as quoted earlier) that the whole basis of the meeting was the Business's profitability. The representations made at the Prague Meeting thus played an important part in the process of Ivy satisfying itself that the contemplated terms of purchase were appropriate. Mr Copans in cross-examination expressly rejected the suggestion made to him that nothing that Mr Martin or Mr Bell said at the Prague Meeting made any difference to whether Ivy bought the Business. Mr Hooja similarly stated that Ivy definitely relied on representations made by Mr Bell. I do not accept that Ivy would necessarily have contracted on the same terms even without the Prague Meeting; and, even if it would have done, the representations made at the Prague Meeting (by both Mr Martin and Mr Bell) remained significant because they influenced Ivy to persevere in the course of action already in contemplation (see § 365 above).

483. I also consider that Mr Copans relied on Mr Martin's statement by Skype on 1 November 2018 that the Business was currently making profits commensurate with £1.8 million per annum. That statement was made in response to Mr Copans' specific query about what EBITDA targets the other prospective bidder was expecting. Although the specific reason for the query was to compare that bidder's offer with Ivy's, Mr Martin's answer is bound to have provided reassurance to Mr Copans that the current EBITDA based on which Ivy had put forward its own bid remained realistic. Moreover, Mr Martin in my view intended the statement to have that effect, as part of his consistent strategy of giving Ivy to understand that the Business was profitable. Further, since Mr Martin's statement was evidently active in Mr Copans' mind, Ivy is entitled to benefit from the presumption referred to in § 366 above.

484. Mr Bell also suggests that any representations made were overtaken by events and not relied on. I have already considered and rejected the argument that the representations were overtaken by events. I am satisfied that Ivy was still relying on the representations when it executed the SPA.

485. Mr Bell submits that Ivy's evidence was unclear as to who actually made the decision to proceed with the purchase, pointing out that the evidence of Mr Hooja and Mr Copans was in some respects confusing or self-contradictory about various individuals' roles, and did not clearly identify who took the decision. Mr Bell highlights, for example,

that Mr Watt gave evidence that he reported back to Mr Amit Jain of Cascade Global and said in his written evidence that Mr Jain was the person who made the decision to release SPA consideration funds to Mr Martin; however, neither Mr Watt nor anyone else giving evidence on behalf of Ivy was able to explain what Cascade Global was, or what their relationship with Ivy was, nor who was the decision maker at Ivy in relation to the SPA; further, Mr Watt said "*I have no idea whether Mr Jain was the decision maker or not*", and that he left it to Mr Jain to decide who was the decision maker.

486. This is a somewhat unattractive point in circumstances where the Defendants advanced no positive case on this point in their statements of case, and nor was it raised in their openings. In any event, however, I am not persuaded by it.

487. First, Ivy is entitled to benefit from the presumption referred to in § 366 above. Secondly, and in any event, I infer as a matter of fact that, whoever the ultimate decision-maker was, Ivy was induced by the representations made to proceed and to do so on the terms it did. It is clear from the evidence that Mr Copans and Mr Hooja were given the job of investigating the purchase proposition and negotiating the terms of any deal. Mr Copans referred in his witness statement to internal discussions of the matter (e.g. *"We continued to discuss the matter internally …")*, without specifying who was involved in the discussions, and Mr Hooja in his original affidavit similarly stated that "*ITL*", i.e., Ivy, entering into the SPA and valued the business in reliance on and as result of what Mr Martin had said and the information he had provided. It is overwhelmingly likely that the decision-maker acted on the recommendations made by Mr Copans and/or Mr Hooja, which in turn were induced by the Defendants' misrepresentations; and I conclude that that is what happened.

(vi) Agency: liability under the SPA

488. In case I am wrong in my conclusion that Mr Bell himself made the Prague Profitability/Sustainability Representation (directly and/or by manifestly approving Mr Martin's making of that representation), I shall consider whether, alternatively, Mr Martin acted as Mr Bell's agent in himself making the General Representations and the Prague Representations.

489. That issue itself arises on the alternative bases that Mr Bell (a) was or (b) was not a party to the SPA as seller thereunder of his admitted 50% beneficial interest in the shares in the companies comprising the Business. It is logical therefore to be begin by considering whether or not Mr Martin had authority to, and did, bind Mr Bell to the terms of the SPA. That issue is also central to the question of whether Mr Bell can have any liability to Ivy under the warranties in the SPA.

490. The starting point is that the negotiations for the sale of the Business to Ivy were conducted in the context of Mr Martin and Mr Bell each owning a 50% beneficial interest in the shares in the companies comprising the Business, as all parties (Ivy, Mr Martin and Mr Bell) knew. Ivy submits that the only mechanism by which Mr Bell's interest could have been sold to Ivy is by Mr Martin acting as his agent; there is no other way that the transfer could have happened. Ivy draws attention to parts of the hearing before the Court of Appeal in November 2020 (on Ivy's application for permission to amend), at which Henderson LJ asked *"How on earth would his beneficial interest pass without some form of agency?"* and Arnold LJ similarly asked *"how does the beneficial interest pass from your client to Ivy unless there is an*

agency?" In response, Mr Bell's leading counsel said there was a triable issue as to *"whether or not Mr Martin had authority, actual or ostensible, to deal with his shares as if he was the 100 per cent beneficial owner of all those shares"*, and submitted that *"[i]t is not enough simply for Mr Martin to be able to deal with Mr Bell's shares. Mr Martin has to have had an agency agreement in place to enable him to enter into the agreement on behalf of his principal, and we say that is a distinct difference"*. Peter Jackson LJ observed that he was not sure he understood the difference.

491. I have already outlined in § 13 above the conclusions reached in the Court of Appeal's judgment. As part of its judgment, the court also noted that:

i) since Mr Bell's 50% beneficial interest in the shares was known to Ivy before the SPA, this case is more accurately described as involving a disclosed, rather than an undisclosed, principal (§ 18);

ii) Mr Bell admitted that Mr Martin kept him updated at a high level on the sale of the Business, and expected as a 50% shareholder to receive his share of the proceeds (§ 2);

iii) the fact that, despite his beneficial interest, Mr Bell was not named in the SPA creates an obvious inference that Mr Bell did not want to be named in the SPA, and it is relevant to inquire why the parties were prepared to contract on that basis;

iv) that is a matter to be determined based on factual material known or reasonably available to all the contracting parties at the time (§ 26) and such material would be admissible as showing the genesis and aim of the transaction (citing *Merthyr (South Wales) v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526) (§ 27);

v) Mr Bell had a cogent case that clause 15.12 in particular (the provision excluding third party rights and obligations, quoted in § 188 above) excluded his liability, but there was a real prospect that when it was construed in the light of the relevant and admissible factual matrix the court would conclude that it does not do so: the clause does not in terms exclude liability arising by virtue of Mr Bell being the principal of a party who has entered into the SPA as his agent; and had the parties intended to exclude such liability, it would have been easy for the SPA to have said so (citing *Filatona* § 90) (§ 28); and

vi) it was necessary to investigate the facts before reaching a conclusion as to the meaning and effect of the recitals (§ 32).

492. Ivy submits that Mr Martin must have been dealing with the shares as Mr Bell's agent in order for his 50% beneficial interest to pass to Ivy under the SPA and that, in any event, that is supported by the evidence. Ivy alleges that there was an express conferral of authority since on Mr Bell's own evidence he had "*lost interest in 21Bet entirely*" by 2018 and he told Mr Martin "*just to get on with a sale if that is what he considered best*". That is also how Mr Martin understood the situation:

> "That's true, isn't it, that Mr Bell said to you if you want to sell the business you, Barry, get on with it?

> A. Yeah, probably. It was pretty much all down to me to get the business sold."

493. Alternatively, Ivy submits that Mr Bell impliedly authorised Mr Martin to deal on behalf of both of them, as shown by the following matters:

i) The deal which Mr Martin was negotiating was not only for his own benefit, but also for Mr Bell's benefit, as the sale was the means by which Mr Bell and Simplify stood to recover at least some of the monies they had lent to the Business; and Mr Bell said in his first witness statement that "*… as a 50% shareholder, I expected to receive my share of the balance of the sale proceeds*".

ii) Mr Martin plainly appreciated at the relevant time that the two people who stood to gain from the SPA were himself and Mr Bell: in his email to Mr Bell on 11 February 2019, Mr Martin explained that he did not feel comfortable having Richard Hogg and Milos Markovich named on the contract because "*they won't be benefitting financially from the deal*". He told Mr Bell that, in his view, it was "*only right for you and I to be on the contract*".

iii) The contemporaneous documents show that Mr Martin kept Mr Bell up to date about how the negotiations were progressing and, whenever Ivy revised its offer, Mr Martin discussed it with Mr Bell: see the documents summarised in sections (D)(8)-(19) above (see, e.g., §§ 75, 76, 81, 95, 104-108, 147, 178 and 182 above). (The Claimant is in my judgment right about that, and I do not accept Mr Bell's evidence to the effect that he "*stayed out*" of the negotiations and that Mr Martin "*just told me when the deal was completed*".)

iv) Mr Bell's oral evidence was that he was "*frustrated*" that he was not being "*kept in the loop any material degree*" about the negotiations. He was not in fact kept out of the loop at all, but the fact that Mr Bell wanted to be kept in the loop, and the fact that he thought that Mr Martin ought to be keeping him in the loop, demonstrates that Mr Bell appreciated that the negotiations were being carried out by Mr Martin on behalf of both of them.

v) Mr Martin sent Mr Bell drafts of the SPA on 29 January, 7 March and 13 March 2019, indicating that he expected Mr Bell to look at them.

vi) When Mr Martin emailed Mr Bell about wanting Mr Bell to be named as a party to the SPA, Mr Bell's response was: "*Will have a look mate*". It is likely that Mr Bell did in fact look at the drafts of the SPA that had been sent to him.

vii) As noted earlier, Mr Martin told Ivy that he needed Mr Bell's blessing before the deal could be agreed, and I have concluded that he did.

viii) The fact that Mr Martin and Mr Bell must have agreed how the sale proceeds would be shared between them supports the view that the deal had been negotiated by Mr Martin on behalf of them both.

ix) Also as noted earlier, Mr Martin told Ivy that any post-contractual amendments to the SPA would need Mr Bell's blessing, which further supports the view that

the negotiations in relation to the SPA had been carried out by Mr Martin on behalf of himself and Mr Bell.

494. As to why Mr Bell was not named in the SPA, Ivy submits that:

i) The evidence shows that Mr Copans was told by Mr Martin that Mr Bell's involvement in the Business was kept "*in the shadows*" and that Mr Bell insisted on not being named anywhere near the business "*officially*". Mr Watt was similarly told that Mr Bell did not want to be named on the deal.

ii) There is no evidence that Ivy ever specifically asked for Mr Bell to be named as a party to the SPA. Although his second witness statement included a claim that Mr Martin told him Ivy had asked for Mr Bell to be named as a party to the SPA, in oral evidence Mr Bell said "*I wasn't invited at any stage by Ivy or by Mr Martin formally to come and be party to the agreement*"; and Mr Copans said that he had no recollection of Ivy asking for Mr Bell to be named as a party.

iii) There is evidence that Mr Martin had wanted Mr Bell to be named as a party to the SPA, as noted earlier, and it is to be inferred that a discussion between Mr Bell and Mr Martin did take place, and that Mr Bell refused to be named as a party, but there is no evidence as to the reason for his refusal.

iv) Mr Bell's evidence was contradictory: he said in oral evidence that he had refused to be a party because he did not stand to benefit from the SPA, or (at other times) that he was never asked to be a party, whereas in his witness statement he said it was because he did not know enough about the Business.

v) The reality is that Mr Bell did not want to be named as a party to the SPA because he preferred to be kept in the shadows, as was communicated to Ivy by Mr Martin. This is also the obvious inference and is also supported by what Mr Martin said to Fans Unite in January 2019 when he suggested that "*as a matter of cleanliness*" it would be better to omit Mr Bell's name from any deal.

vi) The fact that Mr Bell was not going to be named as a party to the SPA because he wanted to stay in the shadows forms part of the factual matrix which the court can and should take into account when construing the SPA.

495. Ivy submits that, having regard to the factual matrix, the terms of the SPA are not sufficiently clear and unambiguous to exclude a claim against Mr Bell (or found an estoppel). It argues that:

i) The factual case for liability is stronger here than in *Filatona*, where neither party was transferring beneficially owned assets. Here, Mr Bell was 50% beneficial owner of the Business, and it would be absurd if Ivy would have been left with no remedy had Mr Bell decided not to transfer his beneficial interest after all.

ii) The words "*nothing in this Agreement*" in clause 15.12 of the SPA do not purport to exclude liabilities arising at common law.

iii) Mr Bell is in any event not properly to be regarded as a "*third party*" for the purposes of the SPA.

iv) The recitals are not sufficiently clear to prevent Mr Bell being sued under the SPA, and in fact say nothing about whether Mr Martin was acting as Mr Bell's agent or whether Mr Bell can be sued under the SPA.

496. Mr Bell submits that:

i) The emails from February 2019 in which Mr Martin suggested that he and Mr Bell replace Messrs Hogg and Markovic as selling shareholders, followed by Mr Martin alone appearing as seller in all subsequent drafts and the final SPA, show that Mr Bell made clear to Mr Martin that he was not prepared to sign any warranties (as, Mr Bell said, his solicitor had also told Mr Martin).

ii) Mr Bell's evidence was that he specifically told Mr Martin that he wanted nothing to do with the SPA.

iii) That is inconsistent with any suggestion that Mr Bell authorised Mr Martin to enter into the SPA or give the warranties as Mr Bell's agent.

iv) Ivy was well aware that Mr Bell was not prepared to be a party to the SPA, and it entered into the SPA on that basis. For example, Mr Watt confirmed that he had informed Mr Jain that "*Mr Bell did not wish to be a party to the contract*", that they both understood he was not to be a party, and recollected that Mr Jain was "*content to proceed on the basis that Mr Bell was not a party to the contract*".

v) Ivy itself, when it commenced these proceedings and sought a freezing order, also evidently did not regard Mr Bell as a party to the SPA, having joined him only later. Mr Hooja's claim that he believed Mr Bell to be a party to the SPA was unexplained and contrary to his earlier written evidence. Further, Mr Copans' oral evidence was that Mr Martin "*mentioned to me that it would be easier to get the deal over the line if we just did the deal with Barry and he would pay Mr Bell*", and that:

> "At the end of the day, as long as we did the deal and whether it was Barry or Paul, it was not my issue that Paul never got his money. We were going to pay whoever the party was to the deal and what Barry and Paul did after that was not really my issue."

As to this last point, based on Mr Copans' evidence, it is necessary to point out that the first of the two statements quoted above is incomplete. What Mr Copans said was:

> "A. I always knew we were contracting with both parties.
>
> Q. Then why didn't you say that?
>
> A. Because it's normal in this type of business to contract with one party and with -- I trusted Barry that he was acting on behalf of him and Paul and he mentioned to me that it would be easier

> to get the deal over the line if we just did the deal with Barry and he would pay Mr Bell himself."

497. In considering these matters, I begin with the terms of the SPA and then how they should be assessed in the light of the factual matrix evidence.

498. The SPA's terms included:

i) an absence of any reference to Mr Bell, including from the definition of "*Shareholder*";

ii) recitals stating that Mr Martin was the 100% beneficial owner of the shares in the companies comprising 21Bet, and that no other person had any rights in or to them; and

iii) the exclusion of third party rights and obligations in clause 15.12.

The SPA also included a restrictive covenant imposed on the "*Shareholder*", in clause 9.6, which Ivy accepts is binding only on Mr Martin.

499. Provisions (i)-(iii) above indicate that, despite it having previously been known that Mr Bell was the beneficial owner of 50% of the shares, the parties agreed to contract on the basis that he would not be a party to the contract. The recitals to the effect that Mr Martin was the 100% beneficial owner of the companies at the time he entered into the SPA would be consistent with Mr Bell having previously assigned his own beneficial interest to Mr Martin. (I note in parentheses that any such assignment would presumably have had to be in writing and signed, by reason of section 53(1)(c) of the Law of Property Act 1925, though this point was not argued before me.) No evidence was adduced of any such assignment – or any other form of disposition or release of Mr Bell's beneficial interest – having actually occurred, nor that the parties to the SPA were aware of any such disposition having occurred. Indeed, neither of the Defendants advanced any positive case, whether in statements of case or submissions, as to what happened to Mr Bell's beneficial interest. Mr Bell took the position that it was *"unnecessary for Mr Bell to have to explain how beneficial title could have transferred in the absence of agency"*, and that the SPA could simply have contained a lacuna, adding only that:

> "… it is possible to explain the transfer on the basis that the parties' objective intention was that Mr Bell's interest would be transferred to Mr Martin who would sell it on to Ivy as principal. Even if no such agreement was in fact (or at least subjectively) reached between Mr Bell and Mr Martin, it appears that Ivy may have understood that it would be."

500. What assistance does the factual matrix provide when assessing the meaning and effect of the recitals to and substantive terms of the SPA? The evidence I have already referred to indicates that Ivy was told that Mr Bell had a 50% beneficial interest in the shares in the companies; and that each of Mr Copans, Mr Hooja and Mr Watt were told (directly or indirectly by Mr Martin) that Mr Bell did not wish to be a party to the SPA because he preferred his interest to remain hidden; and that they (subjectively) considered that Ivy was buying the shares from both Mr Martin and Mr Bell. Further,

Mr Martin made clear to Ivy that Mr Bell's approval was needed of whatever agreement Mr Martin made for the sale of the shares to Ivy. Mr Jain was told that Mr Bell did not wish to be a party to the SPA, and was content to proceed on that basis.

501. In these circumstances, had the SPA simply failed to mention Mr Bell, it would have been possible to conclude that Mr Bell was nonetheless a disclosed and identified principal whose rights and obligations were not excluded by the terms of the contract.

502. However, the SPA – particularly in the recitals – went further, setting out as an agreed basis of contracting that Mr Martin was selling as 100% beneficial owner of the shares and that no-one else had any interest in them. That was further reinforced by clause 15.12. Those statements are expressed in unequivocal and unambiguous terms. Ivy submits that the recitals do not say anything about whether Ivy is entitled to sue Mr Bell under the SPA, nor anything about whether Mr Martin was acting as Mr Bell's agent. However, if Mr Martin was selling as full legal and beneficial owner of the shares, there was no reason for Mr Bell to be a party to the SPA.

503. The admissible factual matrix indicates that the parties to the SPA understood that Mr Bell was not willing to be party to the SPA because he wished his involvement to remain hidden. They also knew that, unless anything had changed by the time the SPA was signed, the statements in the recitals did not reflect the actual position, since Mr Bell had a 50% beneficial interest. However, in the absence of any real room for doubt about the meaning of the statements in the recitals (reinforced by clause 15.12), I am driven to the conclusion that Ivy was willing to, and did, contract with Mr Martin on the basis that the matter of Mr Bell's beneficial ownership would be sorted out between Mr Martin and Mr Bell, and that Ivy were in any event willing to proceed on that assumption; in other words, that this is an example of parties agreeing to contract on a particular basis whether it be true or not.

504. As a result, I conclude that Mr Martin did not conclude the SPA as agent for Mr Bell, and that Mr Bell is not a party to it.

(vii) Agency: authority to make representations

505. It is next necessary to consider whether Mr Martin had Mr Bell's authority to make the representations he did even in circumstances where Mr Bell did not become a party to the SPA. Mr Bell accepts that it is theoretically possible for a person to be granted authority to make representations on another's behalf, but not to enter into the ultimate agreement on their behalf, though he says on the present facts that would be most unlikely. In principle such a situation must be possible. Mr Bell personally could (and, I have earlier held, did) make a direct representation to Ivy about the condition of the Business, for which he can be liable in deceit, regardless of whether Mr Bell was party to the SPA as a selling shareholder. Equally, there is no reason in principle why Mr Bell could not make such a representation through an agent, Mr Martin.

506. Mr Bell submits that on the present facts, however, that would be most unlikely. In particular, Mr Bell says, the reason he was not party to the SPA was that he was not doing the deal: it was Mr Martin's deal. Further, even if the SPA was beneficial to Mr Bell or those connected with him, or his shares might be transferred as a result, such matters did not and could not of themselves confer authority on Mr Martin to make representations on behalf of Mr Bell.

507. I am, however, unable to accept those submissions on the facts. Because Mr Bell was a 50% beneficial owner of the business, the sale to Ivy was in commercial substance very much his deal. It was his at least as much as it was Mr Martin's transaction: arguably more so, since in addition to his beneficial interest Mr Bell was concerned to ensure that as much as possible was repaid to the Simplify companies whose funds he had arranged to be advanced to 21Bet, as well as (even on his case) having personally lent money to the Business. It remained Mr Bell's deal in substance regardless of the mechanism ultimately selected (at a late stage, and after the key representations had been made) by which Mr Bell's beneficial interest would pass to Ivy. On any view, the passing of Mr Bell's beneficial interest, even if not strictly speaking effected by the terms of the SPA, was intricately connected with the SPA. Whether Mr Bell's interest was expected to pass pursuant to, or collaterally to, the SPA has no real bearing on Mr Bell's direct commercial interest in the transaction: not merely as a transaction between third parties further down a chain, but as the transaction which would give rise to and define the consideration that Mr Bell would receive for his various interests in the Business. Moreover, as I have already found, Mr Bell's approval was needed, not merely for whatever collateral arrangement Mr Bell may have made with Mr Martin, but for the terms on which Mr Martin agreed the SPA itself; and Mr Martin was expected to, and did, keep Mr Bell regularly updated (virtually on a blow by blow basis) on his negotiations with Ivy.

508. Further, it is not merely by reason of the above factors that Mr Martin had Mr Bell's authority to make representations. Mr Bell's own written evidence was that:

> "I told [Mr Martin] just to get on with a sale if that is what he considered best and get the debts paid off. The priority was repaying [Simplify Business Limited]."

In my judgment that amounted, particularly when seen in context of the matters I refer to above, to an express conferral of authority on Mr Martin to negotiate the sale of the Business and to make whatever representations Mr Martin considered appropriate in that connection. Mr Bell knew that he could not realise his personal interests in the Business or obtain repayment for Simplify without Mr Martin making representations to Ivy in order to persuade them to pay a substantial price of the Business, and he authorised Mr Martin to do whatever was necessary in that regard.

509. Accordingly I conclude that Mr Bell is jointly liable as principal for the representations that Mr Martin made to Ivy, as well as for the representation which I have already held Mr Bell personally made directly to Ivy.

510. That conclusion of course applies *a fortiori* if, contrary to the conclusion I have reached earlier, Mr Martin had Mr Bell's authority to bind him to the SPA.

(4) Loss and damage

511. Ivy seeks £2.95 million, which is the sum that it paid by way of pre-payment for 21Bet, together with the sum of £250,000 which it claims to have subsequently invested in 21Bet in attempting to keep it afloat.

(i) Principles

512. As set out by Jacobs J in *Vald Nielsen* at § 484, *Smith New Court Securities Ltd. v Citibank N.A.* [1997] AC 254 ("***Smith New Court***") is the leading case relating to damages for deceit in the context of contracts of purchase. In that case, the Court of Appeal had proceeded on the basis of the law as laid down in a series of cases at the end of the 19th Century, namely that:

> "where a fraudulent misrepresentation has induced the plaintiff to enter into a contract of purchase, the measure of damages is, in general, the difference between the contract price and the true market value of the property purchased, *valued as at the date of the contract of purchase*" (p.261 per Lord Browne-Wilkinson, emphasis in original).

513. Lord Steyn affirmed this in the House of Lords:

> "It is right that the normal method of calculating the loss caused by the deceit is the price paid less the real value of the subject matter of the sale." (p.284)

514. While it was made clear in *Smith New Court* that the general rule may be departed from in order to give adequate compensation for the wrong done to the claimant, no submissions were made by Ivy in the present case to the effect that the relevant date was anything other than the date of the SPA.

(ii) Application

515. Ivy claims, as damages for fraudulent misrepresentation, amounts equal to:

i) the £2.95 million pre-payment it made on 3 April 2019 in anticipation of Completion under the SPA, and

ii) the £250,000 which it put into the Business by the end of June 2019 in an effort to keep it afloat.

516. That claim proceeds on the footing that the Business as purchased had no positive value. The Defendants contend that it in fact had a value substantially in excess of £500,000.

517. The experts agreed that, as the Business was loss-making, using the valuation methodology implicit in the SPA (based on EBITDA) the Business would have had no value as at the date of the SPA.

518. Mr Davidson considers that the Business was worthless on any basis, given that it had no UK income, was making losses outside the UK, had no cash or cashflow, and had gross liabilities of at least £3.152 million and no goodwill. As discussed in section (F)(3) below, on one view it is inappropriate to treat as liabilities, for these purposes, debts which were planned to be, and were, paid off from the proceeds of the sale to Ivy. Those include the money owed to Alan Spence and to Simplify/Mr Bell. On any view, however, the Business had no net assets (subject, perhaps, to the point discussed below about certain intangible assets).

519. Mr Donaldson agrees that based on an EBITDA valuation, the Business was worthless as at the date of the SPA. Nonetheless, he states that he would have expected Ivy to attribute value to the Business. He states in his report:

> "10.11 However, given that goodwill was being established within the 21Bet brand by way of:
>
> (a) trademarks;
>
> (b) licences; and
>
> (c) customer lists;
>
> I would expect the Business to have some value in relation to these intangible assets.
>
> 10.12 I would normally expect intangible assets to be valued on their anticipated future cashflows, which would require the preparation of forecasts for a number of years into the future that could be tested and then discounted for risk.
>
> 10.13 I am not aware that such forecasts exist and therefore I am not in a position to prepare such a valuation; however, I would have expected the Claimant to attribute value to the Business's intangible assets."

In principle the experts agree that a business, particularly an early-stage tech business, can make a trading loss and yet be hugely valuable, if other information indicates that future profits will be made. Absent any such expectation, a business is likely to have little or no value.

520. Mr Davidson points out, in response, that all the evidence from the Business as at the date of the SPA is that it had no future cashflows (or income), however generated, as demonstrated by the fact that it had had no trading income in the UK in the four months before the SPA, and received no trading income in the UK in the two months following the SPA. Furthermore, it had had negative cash flow in the UK from business activities throughout the whole of its history prior to the SPA and continued to have negative cashflow in the UK following the SPA in excess of £200,000 in less than two months. At the same time, throughout the period of trade, the Business had been loss-making in its non-UK activities. Thus, the business had no goodwill as at the date of the SPA. As at the date of the SPA, the Business had been materially loss-making and had had substantial negative cash flows for more than two and a half years. In all these circumstances, the Business had no goodwill, and if it did have identifiable intangible assets within the generality of goodwill, these had no value either.

521. Mr Donaldson responds, in turn, that although both experts agree that the Business was loss-making, even the most basic due diligence should have exposed that the Business did not make a profit. Consequently, he concludes that Ivy must have identified a value in the Business that they were willing to pay for, and that value would have existed regardless of the position regarding the warranties. This forms the basis of his alternative conclusion regarding the intangible assets. He also points out that the

Business's performance after the date of the SPA is not strictly relevant to its value as at the date of the SPA. He repeats that he has seen no evidence that would enable him to value the Business's anticipated future cashflows, but maintains that that does not mean such an exercise would be impossible.

522. Mr Donaldson's reasoning as summarised in the preceding paragraph proceeds on the basis that Ivy must have realised the Business was currently loss-making, and saw some value in it despite that fact. However, the evidence does not support that view. Ivy did not realise the Business was loss-making. On the contrary, they relied on the representations made to them that it was profitable. There is no evidence that they perceived the Business to have a value over and above that which they arrived at based on its EBIDTA. Further, there was no cogent reason to believe that the Business could, as at the date of the SPA, be said to have any positive future anticipated cashflows, and certainly none on which a particular value can be placed.

523. In conjunction with the argument based on intangible assets/future cashflows, the Defendants rely on evidence given by Mr Hooja, in his affidavit in support of the freezing order, to this effect:

> "As to the second basis, 21 bet is currently worth (in my estimate) nil and is a loss-making business. Had it not been for the competing business of Premier Punt and the use of 21bet's customer database, it could have been worth approximately £500,000. In addition, as mentioned above, Premier Punt has made NGR (net gaming revenue) of EUR 494,337.03 for the period from January to May 2019. No doubt further profit has been earned since for which Premier Punt and/or Mr. Martin and Mr. Bell should account. On the third basis, the true value of 21bet and a proper purchase price, had its true liabilities and profits been known, was, I estimate, nil."

524. The Defendants submit that (a) Mr Hooja is wrong to consider that the competing business of Premier Punt or the alleged use of 21Bet's customer database in fact caused any loss to the Business, and (b) it therefore follows from Mr Hooja's £500,000 estimate that the Business was in fact worth at least £500,000 as at the date of the SPA. Mr Hooja was by this stage aware of the alleged misrepresentation, breaches of warranty and conspiracy with Premier Punt. Further, since the alleged diversion of business to Premier Punt of €494,337 for January to May 2019 was lower than Mr Hooja's £500,000 estimate of the value of the Business, Mr Hooja must (it was suggested) have attributed a significant positive value to the Business in any event.

525. I conclude in section (F)(5) below that the evidence does not establish what, if any, business was diverted to Premier Punt. Even on that footing, however, I do not accept the Defendants' contentions. Mr Hooja's £500,000 figure was evidently no more than an estimate of value (in terms of share value) diverted to Premier Punt. Even if he was wrong about such diversion of value, it does not follow that the Business in fact had a positive value. Further, the Defendant's comparison of the €494,337 Premier Punt revenue for January to May 2019 with Mr Hooja's £500,000 valuation estimate does not compare like for like. If Premier Punt was taking business from 21Bet at the rate of €494,337 every 5 months, that might well have affected 21Bet's value by £500,000. It is simply not possible to infer from Mr Hooja's evidence that the Business had a value

of £500,000, or any other positive value, at the date of the SPA; and Mr Hooja was clear in his evidence (as quoted above) that he considered it to have no value.

526. I conclude that the Business was valueless as at the date of the SPA, and that Ivy is accordingly entitled to damages for deceit on that footing.

(5) Deceit: conclusions

527. Ivy's claims in deceit succeed against both Mr Martin and Mr Bell. It is entitled to damages on the basis that the Business, on which it spent the sums identified in §511 above, was in fact valueless as at the date of the SPA.

(F) CLAIMS UNDER THE SPA

(1) Introduction

528. As set out above, Ivy alleges two categories of breach of the SPA. First, Ivy alleges that Mr Martin and Mr Bell breached warranties contained in clauses 7.18 and 7.26 of the SPA. Secondly, Ivy alleges that Mr Martin breached the non-compete covenant in clause 9.6 of the SPA.

(2) Whether Ivy can claim against Mr Bell under the SPA

529. For the reasons set out in section (E)(3)(vi) above, I have concluded that Mr Bell was not a party to the SPA, and he is not liable under it. Any claims for breach of warranty lie only against Mr Martin.

(3) Breach of warranty claims

530. Ivy alleges breach of warranties 7.18 and 7.26 of the SPA. Ivy's and Mr Bell's experts were agreed that these warranties were breached. Mr Martin denied breach of warranty in his Defence without giving reasons.

531. For ease of reference, I repeat the text of these warranties below:

> 7.18 Each Company has no liabilities, claims, or obligations of any nature, whether accrued, absolute, contingent, anticipated, or otherwise, whether due or to become due, that that Company cannot pay when due and which are or could become a Lien against or otherwise have an adverse effect on any of the assets or the business of that Company.
>
> …
>
> 7.26 A schedule including each of the Companies' assets and liabilities as of February 28th, 2019 (the "Financial Statements") is attached hereto as Schedule 7.26. The Financial Statements have been prepared in accordance with generally accepted accounting principles. The Financial Statements give a true and fair view in all material respects of the financial condition of the Companies as of the date indicated. Since February 28, 2019, the operations and business of each of the Companies have been

> conducted in all respects only in the ordinary course of business, and none of the Companies has entered into any transaction which was not in the ordinary course of its business and no event has occurred which has or which might cause an adverse effect on either of the Companies and/or their business."

532. The experts called by Ivy and Mr Bell, Mr Davidson and Mr Donaldson, agree that both warranties were materially false. Based on the expert evidence, Mr Bell accepted (at least in his written opening) that the warranties had been breached, though he took issue with Mr Davidson and Ivy about the extent of the breaches. The experts agreed in relation to warranty 7.18 that without continued support from Simplify, the Business was unable to meet its liabilities as and when they fell due. That was undoubtedly the case, as shown by the history set out in section (D) above.

533. Mr Davidson says that is all the more so given the true level of liabilities he found to exist (see below). To the extent that those liabilities were planned to be, and were, paid off from the proceeds of sale, I am not persuaded that they should be taken into account when deciding whether warranty 7.18 was breached. It was made clear to Ivy, for example in an email and draft SPA sent to Messrs Copans and Watt on 12 February 2019, that a proportion of the sale proceeds were going to be used to pay off Mr Spence and "*Barry's investor*". Warranty 7.18 applies only to liabilities etc. that *"are or could become a Lien against or otherwise have an adverse effect on any of the assets or the business of that Company"*. That will not be the case in relation to those liabilities.

534. While on this topic, I should record that I accept Mr Hooja's evidence that he personally did not know about the Spence debt, though his original affidavit was in fact inaccurate in stating that Ivy did not know about it. Mr Watt's written evidence was that Mr Martin did not mention the Spence debt to him, and that Mr Watt did not know why Mr Martin seemed to regard it as being 'outside' the deal. Mr Watt accepted in cross-examination that the 12 February 2019 email indicates that Mr Martin did in fact mention the Spence debt to him. I accept Mr Watt's oral explanation that he did not realise his witness statement was wrong on this point when he wrote it, bearing in mind that the email was sent in anticipation of a call in which Mr Watt did not participate and he did not go through the SPA in detail at that time. Mr Watt ought to have corrected this point, if only as part of his oral examination in chief. I have taken this point into account in assessment of his evidence, though as indicated earlier my overall assessment is that his evidence was honestly and fairly given.

535. In any event, as I note below, there were other liabilities found by Mr Davidson to exist, over and above those which were disclosed to Ivy in Schedule 7.26 or paid off from the sale proceeds. Whether or not account is taken of those additional liabilities, it is clear that the Business had liabilities which it was unable to pay as they fell due and which could have an adverse effect on its constituent companies' assets or business.

536. In relation to warranty 7.26, Mr Davidson concluded that:

i) the warranty that the Business had net current liabilities of only £52,000 and total liabilities of £149,000 was manifestly and materially false. Liabilities were extensively understated and some of the assets were overstated. He identified that the Business had liabilities of at least £3.152 million;

ii) the warranty that the Financial Statements had been prepared in accordance with GAAP was manifestly false: the financial statements included none of the basic requirements of financial statements prepared under GAAP;

iii) the warranty that the financial statements gave a true and fair view in all material respects of the financial condition of the companies was also materially false, in particular due to the lack of a profit and loss account, a balance sheet stating the fair value of assets and liabilities, or Notes to the accounts; and

iv) the warranty that since 28 February 2019 no event had occurred which had or which might have caused an adverse effect on either of the companies and/or their business, was materially false. In fact, since 28 February 2019:

a) CSS had received no trading income;

b) CSS had continued to borrow heavily from Simplify/Mr Bell;

c) a claim was issued against Aureate in the High Court on 27 March 2019 for a debt in excess of €125,000;

d) CSS had received a demand from HMRC for an outstanding debt of approximately £47,000; and

e) the Business had continued to sink further into insolvency in March 2019.

537. Mr Donaldson agreed that the warranties given at § 7.26 were not accurate, and that the financial statements had not been prepared in accordance with GAAP and did not give a true and fair view of the financial position of the Business.

538. As to the level of liabilities, Mr Davidson includes in his £3.152 million figure certain liabilities that were paid off from the process of sale. I understand the division of the sale proceeds to have been as set out in a spreadsheet attached to an email from Mr Martin to Mr Bell of 4 April 2019. It included £694,962 to be paid to Mr Spence, £47,211 to HMRC for PAYE, £87,223 to "*various affiliates*" and £496,040 to other creditors. There was also reference to a payment of £500,000 to Abensons for Mr Martin (see § 195 above) and a payment of unspecified amount to SBL as a loan repayment. Mr Bell's evidence was that Simplify was repaid £1.1 million.

539. It is difficult to identify precisely which of these payments Mr Davidson included in his figure, but it appears that his figure does include (of the above items) the £694,962 to be paid to Mr Spence, £47,211 to HMRC for PAYE, £496,040 to other creditors and £863,063 of *"Shareholder loan – PB".* Those sums total £2,101,276. Net of them, Mr Davidson's figure of £3,151,908 would become £1,050,632, meaning that liabilities were understated by approximately £901,000 compared to the figure of £149,026 given in Schedule 7.26. (Conversely, Mr Davidson's figure does not include certain liabilities to casino providers, Digitain, Income Access and "*affiliates*" which were disclosed to Ivy as part of Schedule 7.26 in the total sum of £39,071, but I leave those to one side for present purposes.)

540. The Defendants submit that warranty 7.26 should not be regarded as having been breached to the extent that liabilities were planned to be, and were, paid off from the sale proceeds, bearing in mind that the purpose of the warranty (as explained by Mr Davidson in cross-examination) was to tell the buyer what assets and liabilities they might expect when they acquired the Business. However, warranty 7.26 is expressed in terms of the companies' assets and liabilities as at 28 February 2019 (sc. 31 March 2019), and contains no relevant qualification. Strictly speaking, therefore, even liabilities to be paid off from sale proceeds count when deciding whether the warranty was breached, albeit different considerations may well arise when assessing damages for the breach.

541. The Defendants also take issue with the fact that Mr Davidson place reliance on Aureate's 2018 filed accounts, whilst also adjusting those accounts by reference to the 2017 accounts by increasing the figures for affiliate costs, licence fees, platform services and research. Mr Davidson noted that those costs totalled €838,335 in the 2017 accounts but only €74,391 according to the 2018 accounts, despite the fact that (for example) one of Aureate's main affiliates (Catena Operations Limited) issued a claim form on 27 March 2019 claiming unpaid fees of €125,471: an amount which did not appear in the list of liabilities disclosed to Ivy in Schedule 7.26. Mr Davidson concluded that these four areas of costs should be adjusted by €440,000 in aggregate. In my view he was correct to do so. The Defendants object that to the extent that Mr Davidson did rely on the 2018 filed accounts, he was wrong to do so since he had previously concluded they were wholly unreliable, and (the Defendants suggests) are likely to have overstated transaction costs and understated revenue (in the light of payments into Aureate's Satabank account). I have already considered those matters in §§ 255-265 above. I do not consider any of them to undermine Mr Davidson's assessment of the liabilities of the Business as at 31 March 2019.

542. Mr Davidson also found that the financial statements overstated some of the assets, at £96,000, because:

i) None of the companies owned Office Assets said, in Schedule 7.26, to amount in total to £36,774. The accounts of Tristate recorded fixed assets of £642, and not £4,291. The UK bank statements did not include any money spent on Office Assets.

ii) Following the acquisition, no funds were found to exist in any payment wallets whereas Schedule 7.26 referred to a total sum of £31,543.

iii) FSB was wrongly shown as a debtor, owing the Business £5,686. This was not true. The Business owed FSB £67,328, excluding the security deposit of £25,000 (as to which it was unclear whether the deposit was an asset of the Business, or of Viktra Business, in liquidation): and Mr Davidson included the former sum in his list of liabilities.

In effect, therefore, Mr Davidson considered the assets to be overstated by about £74,000. I accept that evidence.

543. Thus, even leaving out of account liabilities to be paid off from sale proceeds, the assets were overstated by £74,000 and liabilities understated by £901,606 (§ 539 above), resulting in the overall net liabilities been understated by about £975,000.

544. For these reasons, I conclude that both warranties 7.18 and 7.26 were breached.

(4) Breach of non-compete covenant claims

545. Ivy alleges breach of the non-compete covenant at clause 9.6 of the SPA.

(i) Principles

546. The legal issues which arise revolve around the enforceability of clause 9.6.

547. Three questions have to be decided when considering the enforceability of a covenant in restraint of trade. First, the court must decide what the covenant means when properly construed. Secondly, the court should consider whether the party relying on the covenant has shown on the evidence that it has legitimate business interests requiring protection. Thirdly, once the existence of a legitimate protectable interest has been established, the covenant must be shown to be no wider than is reasonably necessary for the protection of those interests. (See *TFS Derivatives Ltd v Morgan* [2004] EWHC 3181 (QB); [2005] IRLR 246 §§ 36-38 per Cox J).

548. If a covenant goes further than is reasonably necessary to protect a legitimate business interest, even in a business sale agreement, it is void and will not be enforced (*Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 549). Specifically in relation to non-poaching covenants, Robert Walker J in *Dawnay, Day & Co Ltd v D'Alphen* [1997] IRLR 285, a business sale agreement case, described the covenant there as "*indefensible*" (§77) and referred to the law's wariness "*of any restriction on a worker's capacity to earn their living as they choose, even if the restriction is imposed indirectly (that is, on a potential employer or recruiter)*". The Court of Appeal upheld this part of the decision, stating:

> "The clause can be regarded as objectionable because it restricts not only rights of the former employee to recruit staff for his new business, but also the opportunities of the remaining employees to learn about future employment possibilities for themselves." (§ 47)

549. The principles were summarised in *Cavendish Square Holdings BV v. El Makdessi* [2012] EWHC 3582 (Comm) as follows:

i) The restraint must go no further than reasonable for the protection of the interest of the party seeking to rely on it.

ii) The question of reasonableness is to be assessed as at the date of the agreement, including a reasonable assessment of the future.

iii) For a restraint to be reasonable in the interests of the parties, it must afford no more than adequate protection to the party in whose favour it is imposed.

iv) A restraint may be enforced when the covenantee has a legitimate interest, of whatever kind, to protect, and when the covenant is no wider than is necessary to protect that interest.

v) The two questions for the Court are therefore: (i) what are the interests which it is legitimate for the Claimant to protect? and (ii) is the protection taken through the relevant clause no more than is reasonably necessary to protect those interests?

vi) The law distinguishes between covenants in employment contracts and covenants in business sale agreements. There is more freedom of contract between buyer and seller than between master and servant, because it is in the public interest that the seller should be able to achieve a high price for what he has to sell. The quantum of consideration may enter into the question of the reasonableness of the covenant.

vii) Even in the business sale context, however, if a covenant goes further than is reasonably necessary to protect a legitimate business interest, it is void and will not be enforced.

viii) The Court should be slow to strike down clauses freely negotiated between parties of equal bargaining power, recognising that parties are often the best judges of what is reasonable as between themselves. However, the court's deference to the parties is not absolute. The mere fact that parties of equal bargaining power have reached agreement does not preclude the court from holding the agreement bad where the restraints are clearly unreasonable in the interests of the parties.

550. Ivy bears the burden of showing that the covenant goes no further than was reasonable for the protection of its business (see *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, 733 (HL)).

551. Industry practice as to restrictive covenants is of little assistance: the court's task is to determine reasonableness for itself (see *East England Schools v Palmer* [2014] IRLR 191 § 96).

552. In *Tillman v. Egon Zehnder Ltd* [2020] AC 154, the Supreme Court clarified the test for when an offending/unenforceable part of a covenant can be severed from the remainder. It held at §§ 84-87 that the two key questions are: (1) is the unenforceable provision capable of being removed without the necessity of adding to or modifying the wording of what remains (the "*blue pencil test*"); and (2) would the removal of the provision generate any major change in the overall effect of the restraints in the contract? (adding that "*It is for the employer to establish that its removal would not do so. The focus is on the legal effect of the restraints, which will remain constant, not on their perhaps changing significance for the parties and in particular for the employee."*) If the answers to these questions are respectively "*yes*" and "*no*", then the covenant can be severed and the offending words deleted.

(ii) Application

553. The first question is whether the clause 9.6 restrictive covenant is valid. The substantive part of the clause reads:

> "The Shareholder shall not, unless agreed to by the Purchaser, directly or indirectly, by themselves or through any affiliated or

> associated Person, in any role whatsoever, anywhere in the world for a period commencing on the Effective Date and ending 2 (two) years from the end of the Third Earn-out Period: (i) participate, assist or otherwise be directly or indirectly involved or concerned, financially or otherwise, as a member, director, consultant, adviser, contractor, principal, agent, manager, beneficiary, partner, associate, trustee, financier or otherwise in any activity which is identical, similar or otherwise competes with the Business; (ii) interfere or seek to interfere, directly or indirectly, with any relationship between the Purchaser and/or the Companies and any client, customer, employee or supplier of any business related to the business of any of the Companies and/or the Purchaser; (iii) solicit for employment, or hire, any employee or consultant of any of the Companies and/or the Purchaser. Nothing in this Article 9.6 shall derogate from the applicable non-compete provisions in any employment agreement of a Shareholder. If the foregoing provision shall be held, for any reason, illegal or unenforceable in any respect, the scope of such provision shall be deemed narrowed down so as to make it legal and enforceable under applicable law."

554. The Defendants submit that:

i) Ivy has adduced no evidence in support of the proposition that the covenant is reasonable and protects any legitimate business interest, and cannot properly advance such propositions without evidence. Mr Hooja's statement in oral evidence that clauses such as this (even lasting as long as 5 years) are always included in sale and purchase agreements of this kind does not establish reasonableness or a factual basis for the restrictions in issue here.

ii) The introductory wording is very broad, and applies to Mr Martin "*directly or indirectly*".

iii) Clause 9.6(i) prohibits any involvement, in whatever role, in any activity which is identical, similar or otherwise competes with the Business. Accordingly, the prohibition applies not only to activities which are the same as the Business, but those which are merely similar. There is no requirement that such "*similar*" activities be competitive with the Business. Such a prohibition would prevent even an indirect *de minimis* financial involvement in a similar business, e.g. by taking a minority shareholding in a competitor business. That is far too wide, as illustrated by the holding in *TFS* that:

> "It seems to me, reviewing the evidence, that no evidence whatsoever was put forward by the witnesses called on behalf of TFS to justify the extension of the restriction on an employee to business activity which is not only competitive with but is also 'similar to' a relevant business. I regard these words as unreasonably wide and, therefore, unenforceable." (§ 64)

iv) Clause 9.6(ii) prohibits any interference with any relationship of the Purchaser or Companies with "*any client, customer, employee or supplier of any business*

related to the business of any of the Companies". This clause makes no distinction between suppliers based on importance, so it would catch even general office suppliers (such as of tea and coffee, or copy paper).

v) Clause 9.6(ii) would also apply if Mr Martin had a *de minimis* shareholding in a publicly listed competitive company which sought to interfere with the Business' client relations.

vi) Clause 9.6(ii) applies to "*any client, customer, employee or supplier*" at any date during the currency of the covenant, so it would prohibit interference with such people/entities even if they were gained by the Companies or Ivy as clients/customers etc. only after the date of the SPA and Mr Martin had no knowledge that they were even clients/customers etc. of the Companies or Ivy.

vii) Clause 9.6(iii) prohibits solicitation or hiring of any employee or consultant of the Companies and/or Purchaser. There is no limitation on the seniority of such employees or consultants, nor any requirement that they hold any confidential information, nor any requirement that Mr Martin need even have known them or had any contact with them. Mr Martin would be prevented from recruiting even the most junior office cleaner, even if he had never met that person while he worked there.

viii) Clause 9.6(iii) applies to any employee or consultant of the Companies or Purchaser, at any date during the currency of the covenant, so such an employee or consultant could have been recruited after the date of the SPA, and after the termination of Mr Martin's relationship with Ivy. Mr Martin need not even have known that the individual was an employee or consultant of Ivy to fall foul of this prohibition.

ix) The normal justification for non-compete clauses is that they protect the confidential information of the business. This clause prohibits even an indirect *de minimis* financial involvement in a competing (and non-competing) activity. That has nothing to do with protection of confidential information, but is purely a prohibition on competition. Further and in any event, prohibiting any indirect *de minimis* shareholding in a competing entity is also plainly unreasonably wide.

x) The 2-year period of the restraint applies to each element of the clause. The first element, at 9.6(i) is a bare and broad non-compete clause. The second and third elements at 9.6(ii) and 9(iii) can be described, respectively, as non-interference with clients and non-poaching of employees. The latter two restraints are plainly less invasive than the former, yet there is no attempt made to distinguish between the length of protection required. Two years is plainly an excessive period for a non-compete provision, especially given the width of the restriction at clause 9.6(i) . Ivy has made no attempt to explain or justify this period in respect of any of the restraints.

xi) Moreover, the 2-year period runs from the end of the third earn-out period, i.e. 5 years from completion (which, on Ivy's case, has still not occurred).

xii) Ivy, which bears the burden, has failed to plead or prove that the clause can be saved by blue-pencilling, including by adducing evidence as to the factual basis for doing so.

xiii) Ivy's contention that blue-pencilling the words "*or indirectly*" does not solve the problem it has identified with clause 9.6(i). Those words appear not only in clause 9.6(i) but also in the introductory words of clause 9.6. Even if the words were removed from both places, the prohibition against being "*involved … financially*" would still purport to prohibit having on a minority shareholding in a competitive business. Moreover, the words "*by themselves or through any affiliated or associated Person, in any role whatsoever*" would also still cover indirect activity. Further, such changes would not affect the other unreasonable aspects of the clause referred to above.

555. Ivy submits that:

i) It was plainly reasonable and in Ivy's legitimate interests to prevent Mr Martin from setting up a rival business to 21Bet, to interfere in the Business, poach its customers, or solicit its employees.

ii) From Ivy's perspective, the plan was for Mr Martin to continue working for the Business to enable it to grow, with funding and marketing assistance from Ivy (as set in Mr Copans' evidence). That was a legitimate interest for Ivy to protect, which would obviously be fundamentally undermined if Mr Martin were simultaneously competing with the Business and poaching key staff/customers.

iii) Ivy agreed to make significant fixed and earn-out payments to Mr Martin in the first three years post-acquisition, and to pay him a salary of £150,000 per year. Preventing Mr Martin from setting up a competing business was obviously reasonable given the future sums that Ivy had committed to pay Mr Martin under the SPA.

iv) Ivy had a legitimate interest in protecting what it perceived to be (before the true state of the Business became clear) the goodwill of the Business. An online gambling business depends on its customer base, and so it would plainly be legitimate to restrict Mr Martin's ability to poach that customer base for a rival business.

v) The only point made in Mr Bell's Defence as to why the covenant is unenforceable was that "*there is no legitimate business interest for Ivy to prevent even a de minimis indirect financial involvement in a business which is similar to the Business*". However, if (as may be the case) it would not be reasonable to prevent Mr Martin from taking a minority shareholding in a competitor business, the words "or indirectly" could be blue-pencilled out.

556. I would agree with Ivy that the considerations summarised above in principle gave it a legitimate interest in reasonable restrictions that would prevent Mr Martin from setting up a competing business or poaching key staff or customers from 21Bet. I would also agree that there is no fixed rule requiring witness evidence to be adduced in support of the reasonableness of a restriction: the transaction documents themselves and/or other contemporary documents before the court may provide sufficient basis on which to

conclude that a legitimate interest existed and that a particular restriction was reasonable in the circumstances.

557. On the other hand, quite apart from the problem of indirect interests in the form of a minority shareholding in a competing business (which might be capable of cure by blue pencilling), the objections raised by the Defendants referred to in § 554(vii), (viii), (x) and (xi) above, about the classes of employees and consultants concerned and the 5-year duration of the covenant, raise serious concerns. Ivy has not sought to address these either in evidence or in terms of potential narrowing of clause 9.6 pursuant to the blue-pencil principle (or the contractual equivalent incorporated into clause 9.6 itself). I leave on one side the problem of completion potentially not having occurred, which may not have been foreseeable when the provision was drafted. Even without that feature, a covenant lasting as long as 5 years (and in each of its aspects) is a serious imposition that in my view would require specific justification. The same applies to the potential application of clause 9.6 to employees or consultants however insignificant their role at 21Bet and even if they joined the Business after its sale to Ivy. It is possible that the covenant could be saved by more radical blue-pencilling, subject to potential issues about whether such changes would involve a major change to the effect of the covenant. However, it is not the function of the court to seek to rescue a covenant, or parts of it, in ways which have not been put forward by the party relying on the clause and which have not been the subject of argument (still less of evidence). In all the circumstances I am not persuaded that Ivy has discharged the burden of showing that clause 9.6 was reasonable.

558. In case I am wrong in that view, I go on to consider, fairly briefly, the questions of breach and (later) loss, on the footing that the covenant was valid if narrowed down in the way mooted by Ivy i.e. by the deletion of the words "*or indirectly*".

559. Ivy alleges that Mr Martin breached the covenant in that:

i) Premier Punt was a competing business to 21Bet, which Mr Martin was running prior to the SPA and which he continued running after the SPA had been entered into;

ii) Mr Martin specifically targeted the Business's customers in establishing Premier Punt, and interfered with employees of the Business whilst they were still working for it by having them perform work for Premier Punt (for example, Mr Bull); and

iii) employees of the Business were poached to join Premier Punt. Alex Drummond and Ashleigh Martin moved across to Premier Punt, and Harry Bull was working for Premier Punt whilst still employed by the Business. Given his role in Premier Punt, the obvious inference is that Mr Martin solicited these employees to take up roles within Premier Punt.

560. In my judgment the communications referred to in paragraphs 284 above provide cogent evidence that Mr Martin during the months prior to the SPA set Premier Punt up as a competing business, poached members of staff from 21Bet and made use of the 21Bet customer database for Premier Punt's benefit. I do not accept Mr Martin's explanation that he was merely assisting his daughter. Regardless of whether Mr Martin himself had a financial interest in Premier Punt, he was actively involved in

setting up and running the new business. Further, it is very likely that these activities continued after the SPA was signed, and thus placed Mr Martin in breach of clause 9.6: apart from the poaching of staff. The reason for the latter proviso is that the evidence summarised earlier tends to suggest that Mr Bull, Mr Drummond and Ms Martin had already been poached before the SPA was signed, and at any rate there is no evidence of any specific persons being poached afterwards.

(5) Loss and damage

(i) Breach of warranty

Principles

561. There was no dispute between the parties that the principles to be applied as to damages for breach of warranty are as follows.

i) The measure of damages for breach of warranty in a share sale agreement is the difference between the value of the shares as warranted and the true value of the shares: *Ageas (UK) Ltd v. Kwik-Fit (GB) Ltd* [2014] Bus LR 1338 § 14.

ii) The general rule of thumb is that the warranty true figure is the same as the purchase price, on the basis that the purchase price after an arm's-length negotiation between two commercial parties is good evidence of the market value of the company: *Ageas* §14; *Sycamore Bidco v. Breslin* [2012] EWHC 3443 (Ch) § 391; *Bir Holdings Ltd v. Mehta* [2014] EWHC 3903 (Ch) §§ 55-56.

iii) As for warranty false, where the warranty is that a company's accounts gave a true and fair view, the value 'as is' means the value of the company with the correct figures in the accounts: *Sycamore* §§ 397-398.

562. In my view, though, a degree of caution is required as to proposition (ii) above. In *Sycamore Bidco*, the court took the amount the claimants paid to represent the value the company would have had on a 'warranty true' basis *"[s]ince no-one suggested that that the claimants had overpaid"*. Different considerations may arise where, as here, significant misrepresentations were made and relied on as to profitability quite separately from any breach of warranty. In *Ageas*, it was common ground that the value of the shares as warranted was the price the claimant had paid. In *Bir Holdings*, the joint expert's opinion that the price paid was a fair reflection of the open market value of the business in its condition as warranted was based on his agreement with the buyer's valuer's approach, founded on a multiple of earnings: supported by the fact that the parties, who were at arm's length, had used it as the starting point for their negotiations and arrived at a price derived from it. Again, different considerations may well arise where, quite apart from the warranties, the basis on which the target business has been valued is based on false assumptions relevant to valuation e.g. as to earnings.

Application

563. The 'warranty true' position would have been that:

i) the Business had no liabilities that it could not pay when due, apart from the liabilities to be paid off from the proceeds of sale; and

ii) the Business's net liabilities would have been approximately £53,000 as shown in Schedule 7.26 (in contrast to the actual position with net liabilities around £1 million even ignoring liabilities to be paid off from sale proceeds: § 543 above).

564. The experts for Ivy and Mr Bell agree as follows.

i) Neither warranty 7.18 nor warranty 7.26 includes an express warranty as to annual profitability.

ii) Warranty 7.26 includes an express warranty as to the level of recent-month UK income with FSB, in that the FSB NGR for the three months to March was estimated to be a loss of £19,314.32. However, in the absence of any further information, other than simply what might be inferred from warranty 7.26, it is probably impossible to arrive at a meaningful valuation of the business on a warranty true basis.

iii) One out of several possible inferences one can draw from the net liability position set out in Schedule 7.26 is that the Business made a loss of £52,000 from the date it commenced trading to 31 March 2019. However, understanding (whether or not by implication) that a business has made a trading loss since it commenced trading of £52,000 does not in itself indicate the value of a business, particularly in the absence of other relevant financial information.

iv) A business, particularly an early-stage tech business, can make a trading loss yet be hugely valuable if other information indicates future profits will be made. Of course, in the absence of any expectation of future profits, a business is likely to have little or no value.

v) It is a legal matter whether, and to what extent, a correct understanding of what was warranted in 7.18 and 7.26, and what that says about the warranted value of the Business on a warranty true basis, includes any information about the Business other than what is expressly included in those two paragraphs and the attached numbers.

565. However, Mr Davidson goes on to value the Business on a 'warranty true' basis taking account of the representations made as regards profitability. He does so because, first, he considers that from a numerical and valuation position, the specific warranties only have meaning and context when taken together with both general and specific information known otherwise about the Business to the recipient of the warranties, at the SPA date. Thus it is only on this basis that the Business can be meaningfully valued on a warranty true position. Secondly, Mr Davidson notes that there was, in any event, no profit information expressly included in the warranty, meaning that there is, *per se*, no way of arriving at a warranty true valuation of the business without taking account of what else the recipient of the warranties would have known about the Business in the course of negotiations, including receipt of the Representations.

566. In that context, Mr Davidson says, the main information provided as to profitability, which is one of the main drivers of value, is that set out in and around the

Representations, i.e. that the business was making an annual EBITDA of £1.6m. Thus, Mr Davidson reasons, the combination of an EBITDA of £1.6m (or c .£1m, allowing for the computational error) and minimal net liabilities of £52,000 supports the value of the business on a warranty true basis in the amount of the consideration paid or payable, per the SPA, of £4.75 million.

567. Mr Davidson adds that an inferred historical loss of £52,000, particularly in the absence of other information, is insufficient in itself to indicate value as, in itself, it tells you nothing about what future profits might be. Nor does it tell you about how the Business performed even in the past with sufficient particularity to assist in understanding what future performance might be. For example, if the implied position is taken as an overall loss for the Business for the period of trade to 31 March 2019 of £52,000, then one example of particularity is that, but for a loss of NGR made with FSB in February 2019 of £115,000, the Business would have made a profit for the year of £63,000, and there might be a specific reason why that loss was made in February 2019. Mr Davidson says that, if one is considering a valuation of the Business relying on such implied information, it would be relevant that, but for one bad month, the rest of the year made a profit even in the first year.

568. Mr Donaldson, by contrast, takes the view that the 'warranty true' valuation can take account only of the information implied by the warranty, i.e. an implied loss of £52,000, based on which any future maintainable earnings would at best be nominal and the Business would accordingly have had only nominal value (excluding any value Ivy might attribute to it based on its brand etc.)

569. Ivy supports Mr Davidson's approach on the basis that:

i) it is consistent with the general rule of thumb in the authorities that the purchase price equals the warranty true figure;

ii) it is also consistent with the warranty in clause 7.25 that "*the sale of the Shares pursuant to this Agreement is for consideration negotiated on arm's length terms, and in the opinion of the Shareholder such price reflects the fair market value of the Shares*": thus the parties entered into the SPA on the express basis that the seller considered the purchase price to reflect the fair market value of the shares, and inherent in that valuation was that the Business had an EBITDA of c.£1.6 million;

iii) it is also consistent with clause 7.28, where the seller warranted that no document, information or statement provided to Ivy by the seller in relation to the sale of the Business *"contain[s] any untrue statement of a fact or omit to state a fact (i) necessary in order to make the statements contained herein or therein not misleading, (ii) required for providing a true an[d] accurate status and situation of the Companies, and (iii) related to the transactions contemplated hereby and/or in order to allow [Ivy] to make a decision as to whether to enter into this Agreement"*: thus, Ivy submits, when valuing the Business on a warranty true basis, the valuer has to assume that the representations made to the effect that the Business had an EBITDA of £1.6 million were true;

iv) applying common sense, the object of the exercise when considering the warranty true position is to value the Business on the basis that what Ivy was being told about the Business was correct. Given that starting point, it would be very odd to take the warranties in isolation and simply ignore the background to the financial statements and what Ivy was being told about profitability. This is particularly so in circumstances where there is no bright line distinction between (a) the representations as to profitability, and (b) the financial statements – both concerned the financial condition of the Business, and one of the reasons why the representations as to profitability were false is because the Business had massive, undisclosed liabilities that were not included in the financial statements;

v) as Mr Davidson explains in the Joint Statement, there is no sensible way of valuing the Business purely on the basis of the financial statements (and the warranty that the Business could meet its liabilities as they fell due), because that information could lead to several different potential conclusions. Some information regarding profitability is necessarily required (beyond what can be inferred from the financial statements), and it is logical to use the information that formed the entire basis of the valuation of the Business actually undertaken at the time for those purposes; and

vi) there is no evidence to support Mr Donaldson's view that, assuming that the warranties in the SPA were true, Ivy was still purchasing an almost worthless business. Mr Donaldson proceeds on the basis that, because the Business had made a small net loss for the relevant period of trading per the financial statements, it would have no prospects of future profitability. However, for a relatively new tech business, that contention is unsustainable.

570. I am unable to accept those submissions, save that I agree that the fact that the Business had net liabilities of £53,000 as at 31 March 2019 did not of itself indicate that the company had no prospect of profits and so was worthless (see §§ 465-466 above). The problem with the approach taken by Ivy and Mr Davidson on this point is that, by introducing information extraneous to the warranties alleged to have been breached, they in substance convert them into warranties as to the represented profitability of the Business. The profitability was not expressly warranted, and to the extent that warranties 7.25 or 7.28 might implicitly contain such a warranty, no claim has been advanced in this litigation based on breach of those warranties (apart from a claim for breach of warranty 7.28 that was deleted by way of amendment). I do not consider it correct in principle to convert, in effect, a warranty as to assets/liabilities into a warranty of profitability by arguing that the Business would have needed to be more profitable than it in fact was in order to end up with the warranted level of assets or in order to meet its liabilities as they fell due. Even if that approach were correct in principle, it is not possible to deduce from the warranted net liabilities of £53,000 that the Business would (had that been the true liability position), or from the warranted position of being able to meet liabilities as they fell due, have had an EBITDA and value commensurate with the price Ivy paid. Indeed, as quoted in § 466 above, Mr Davidson said in cross-examination that nothing in Schedule 7.26 told him what the performance of the Business had been.

571. In the particular circumstances of this case – with no warranty of any profit and loss statement or information but only warranties as to assets and liabilities – I consider that

it cannot be shown that the Business would have had any value, or any particular value, even if the overall net liabilities had been the warranted £53,000 instead of the actual £1.05 million, and/or even if it had been able to meet its liabilities as they fell due. It follows that no damages are recoverable for breach of warranty.

(ii) Breach of non-compete covenant

Principles

572. In *Morris-Garner and another v One Step (Support) Ltd* [2019] AC 649, Lord Sumption observed that:

> "The ordinary measure of damages for breach of a non-compete covenant is the value of the business profits which the claimant would otherwise have made but which it has lost as a result of the defendant's unlawful competition, discounted in the case of future profits for accelerated receipt." (§ 105)

573. There is authority for the proposition that, when faced with difficulty in quantifying loss (including where this is caused by the defendant preventing the claimant from having access to relevant evidence), the court must do the best that it can rather than declining to award any damages: see, e.g., *One Step (Support) Ltd v. Morris-Garner* [2019] AC 649. The court in §§ 37 and 38 of that case cited a statement in *Chitty on Contracts* that *"Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence"*; and noted that assessing the effect of a breach on a business's profits or value often involves what Lord Shaw in *Watson, Laidlaw & Co v Pott, Cassels & Williamson* [1914] Supreme Court (HL) 18, 29-30 described as *"the exercise of a sound imagination and the practice of the broad axe"*.

Application

574. Ivy submits as follows:

i) During the period January to May 2019, while competing with the Business, Premier Punt made NGR of €494,337.03.

ii) Upon entering into the SPA, Ivy had to inject a further £250,000 into the Business between April and the end of June 2019. Those monies were needed to meet the existing and ongoing liabilities of the Business, in just the same way that, prior to the SPA, Simplify had had to inject monies into the Business.

iii) It is a reasonable assumption that, but for the asset-stripping and, in particular, the targeting by Premier Punt of 21Bet's best customers and employees, the cashflow of the Business in the period immediately following the SPA would not have been quite as bad as it turned out to be.

iv) Accordingly, Ivy is entitled to damages of £250,000 or such lesser amount as the court sees fit, on the basis that, but for the conspiracy and the diversion of revenue from the Business to Premier Punt, the Business' cashflow position

would have been better than it in fact was, and there would not have been a need for such a significant injection of cash from Ivy.

575. The experts called by the Claimants and Mr Bell agreed that, based on the limited information available on Premier Punt's trading, it generated NGR of €494,337 (equating to about £436,770) from January to May 2019. 93 days of that period was before the SPA and 58 days after. The experts are unable to say whether any of the revenue was diverted from the Business, or whether it was spread evenly over the 151-day period. Mr Davidson notes that if it did accrue evenly, the NGR earned after the SPA was £167,766. If that NGR was diverted from the 21Bet Business, and if the Business continued to bear its overheads while not earning this income, the Business could be said to have suffered a loss of £167,766 as a result of the diversion.

576. The Defendants make the point that there is no evidence that Premier Punt's NGR did represent a diversion of business from 21Bet, nor of any resulting loss of profit (as opposed to revenue), nor that the NGR accrued evenly over the relevant period: gaming revenues tend to fluctuate wildly.

577. There is in my view a further difficulty. Even if Premier Punt's revenue did accrue evenly over the period, and even if it was wholly or partly derived from the poaching of 21Bet customers, employees and/or data and/or from Mr Martin's involvement in the Premier Punt business, it would be necessary to form a view as to whether (and, if so, to what extent) the revenue derived from poaching carried out after the SPA was executed. That would be a difficult exercise in circumstances where key employees were poached before the SPA, and there is no evidence on which to reach any informed view as to what customer data may have been poached after, rather than before, the SPA. It would be unsurprising if the 21Bet database had been provided to, and was already in use by, Premier Punt by the time of the SPA, and no evidential basis for deciding to what extent (if at all) it continued to be used post SPA. In all these circumstances, even applying a 'broad axe', I do not consider that the court can properly reach any conclusion as to how much, if any, NGR or profit 21Bet is likely to have lost as a result of (necessarily post SPA) breaches of clause 9.6, nor that Ivy has clearly suffered substantial loss as a result of such breach. I therefore conclude that Ivy has not proven loss.

(6) Claims under the SPA: conclusions

578. For the reasons set out above, Ivy's claims for breach of warranty and for breach of the non-compete covenant fail.

(G) UNLAWFUL MEANS CONSPIRACY

(1) Introduction

579. Ivy alleges that Mr Martin and Mr Bell conspired to:

i) make fraudulent misrepresentations to Ivy regarding 21Bet; and

ii) breach the non-compete covenant in clause 9.6 of the SPA.

(2) Principles

580. The test for unlawful means conspiracy is set out in *Kuwait Oil Tanker Co SAK v. Al Bader* [2002] 2 All ER (Comm) 271 (CA):

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so." (§ 108)

581. The principles applicable to the different elements of the tort are set out in detail in *Lakatamia Shipping Co Limited v. Su* [2021] EWHC 1907 (Comm) §§ 76-106. I briefly summarise the requirements for each element below.

(i) Combination

582. The following principles were set out in *Lakatamia* in relation to the nature of the combination required for a claim in conspiracy:

i) The combination must be to the effect that at least one of the conspirators will use unlawful means (§ 830).

ii) It is unnecessary, in order for a combination to exist, that it be contractual in nature or that it be an express or formal agreement (§ 83).

iii) It is enough for liability to arise that a defendant be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. However, the conspirators do not need to have exactly the same aim in mind (§ 85).

iv) Direct evidence of the combination is not essential. It is also unnecessary for the claimant to pinpoint precisely when or where it was formed (§ 86).

v) Participation in a conspiracy is infinitely variable and may be active or passive. The courts recognise that it will be rare for there to be evidence of the agreement itself (§§ 86-87).

583. It is necessary to look at all the particular facts of the case to establish whether there was a combination and whether someone participated, actively or passively, in the conspiracy. Being aware that someone was committing a potentially unlawful act, but (simply) not taking steps to stop it, may not suffice to demonstrate a combination, but it all depends on the circumstances, and in particular the position of the individual concerned: *Lakatamia* § 96.

584. Counsel for Mr Bell added also referred to the principle that to establish a conspiracy to commit deceit it is necessary to establish that deceit was committed and that it was part of a concerted action taken pursuant to the agreement: *ERED* § 381.

(ii) Intention

585. The intention to injure the claimant need not have been the defendant's main or only purpose in order for liability to arise. This element will be satisfied simply where the gain to the conspirators is necessarily at the expense of loss to the victim: *Lakatamia* § 91.

(iii) Knowledge

586. The parties appeared to agree that, as found by Arnold and Phillips LJJ in *The Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300 §§ 139 and 171, "*knowledge of the unlawfulness of the means employed is not required for unlawful means conspiracy*".

587. To this counsel for Mr Bell sought to add the proposition that the defendant must know all the facts which make the transaction unlawful (relying on *The Racing Partnership*), and that the requirement for knowledge of all the facts that make a transaction unlawful must necessarily include knowledge of any contractual provision the breach of which is alleged to constitute the unlawful means.

588. The first part of this proposition cannot be controversial. Having surveyed the key decisions on the question, Arnold LJ found in *The Racing Partnership* that "*what the authorities do require is that the defendant should have knowledge of all of the facts which make the means unlawful*" (§ 141). I also agree that the second part of the proposition logically follows: where the unlawful act relied upon is a breach of contract, it is a necessary ingredient of the tort that the defendant had knowledge of the contractual provision that it was conspiring to breach. Hence in *The Racing Partnership,* Arnold LJ held in the context of misuse of confidential information:

> "A point which I would emphasise is that the judge did not merely find that SIS was not aware of any contractual *prohibition* upon the Tote supplying it with Raceday Data … the judge found that SIS knew that the Tote had no contractual *entitlement* to supply it with Raceday Data, particularly for fixed-odds betting purposes." (§ 99)

589. "*Blind-eye*" knowledge will be sufficient: *The Racing Partnership* § 159. Blind-eye knowledge requires a suspicion that certain facts may exist, and a conscious decision to refrain from taking any step to confirm their existence: *Group Seven & Ors v Nasir* [2019] EWCA Civ 614; [2020] Ch 129 §§ 59-60.

(iv) Unlawful means

590. A breach of contract can constitute unlawful means: *The Racing Partnership* § 148. The tort of deceit may also constitute unlawful means: *ERED* § 380, citing *London Allied Holding v Lee* [2007] EWHC 2061 (Ch) § 252.

(3) Application

(i) Conspiracy to make fraudulent representations

591. As Ivy accepts, there is no direct evidence to prove the alleged 'combination' or 'agreement' that Mr Martin should use fraudulent misrepresentations in selling the Business to Ivy. However, it submits there is strong circumstantial evidence that an 'agreement' or 'combination' to lie to Ivy about the figures must have been reached, in all likelihood during one of their regular meetings or telephone calls, because:

i) the contemporaneous emails show that the Defendants knew that there were "*holes*" in the numbers which they had given Ivy, that the numbers did not "*stand up*", and that, once Ivy took control of the Business and saw the true position no further sums would be paid under the SPA (not even the guaranteed minimum payments);

ii) the Defendants knew full well that the Business was failing and that Ivy would not purchase the Business for anywhere near £2.95m if it had been told the truth; and

iii) the Defendants had every reason to lie to Ivy about the financial state of the Business.

The inference Ivy invites the court to draw is that presenting Ivy with misleading financial information, and generally lying about the profitability and sustainability of the Business, was part of a plan which the Defendants had hatched as a means of offloading the Business onto Ivy.

592. The Defendants submit that there is no evidence which supports Ivy's case. Further, they highlight the following cross-examination in which it was put to Mr Martin and rejected:

> "Q. You came up with a plan between you and Mr Bell didn't you that you would put forward figures which were not true, which you knew that Ivy would struggle to disprove; that was your plan, wasn't it?
>
> A. Mr Bell had zero input into any of the numbers or figures or ongoing due diligence that was carried out by Ivy.
>
> [….]
>
> Q. At some point during one of your meetings or during one of your telephone conversations you and he discussed the fact that there was only one way, one way that you would be able to flog this business to Ivy and that's by making up the VIP figures?
>
> A. I will say again, Mr Bell had absolutely zero input into any of the due diligence that was carried out by myself and Mr Copans and his extrapolated numbers."

593. I have concluded in §§ 104 and 107 above that the Defendants' emails on or about 27 August 2018 show that both Mr Martin and Mr Bell knew there was risk that once Ivy had control of the Business, it would see that the Business was not as it had been represented to be: the concern relating not merely to future performance but also what Ivy were being told about current performance. I have also concluded that, at the Prague Meeting, both Mr Martin and Mr Bell made the Prague Profitability Representation, and that Mr Martin (at least) made the Prague EBITDA Representation.

594. Even if I am wrong in my conclusion that Mr Bell made the Prague Profitability Representation, I consider that the circumstances as a whole give rise to the inference that Mr Bell and Mr Martin must have agreed that Mr Martin would, in order to sell the Business, make representations to Ivy to the effect that the Business was profitable (being representations which both Mr Martin and Mr Bell knew would be untrue). I draw that inference from the combination of:

i) Mr Bell's leading role in the Bell/Martin relationship as a whole (as evidenced by the email correspondence set out earlier, and consistently with the Business's dependence on funding arranged by Mr Bell);

ii) Mr Bell's close interest in and control over Mr Martin's conduct of the sale process in general;

iii) the 27 August 2018 emails (showing both Defendants recognising that Ivy was being given numbers which, at the very least, could not be shown to be true);

iv) the course of events at the Prague Meeting: at which Mr Martin again represented the Business as being profitable (which both Defendants knew it was not) and in which Mr Bell was also an active participant, even if – contrary to my earlier findings – he did not personally make any representation;

v) the financial interest which both Defendants had in divesting themselves of the Business; and

vi) the fact that (as both Defendants must have known) it would be difficult to sell the heavily loss-making Business for any significant price without leading the seller to believe that it was profitable.

595. There was thus a conspiracy to persuade Ivy to buy the Business, for a substantial sum, by making false representations about its profitability, which (as the Defendants knew) would be injurious to Ivy. The misrepresentations which Mr Martin and Mr Bell made were made pursuant to that conspiracy. Accordingly, the Defendants are jointly liable on this basis for each of the misrepresentations which the other made.

(ii) Conspiracy to breach non-compete covenant

596. I consider this topic fairly briefly, since I have already concluded that the covenant has not been shown to be lawful, and that Ivy has not proven any loss to have flowed from its breach.

597. Ivy alleges that Mr Bell and Mr Martin *"wrongfully and with the intent to injure [Ivy] conspired and combined together to commit unlawful acts and use unlawful means,*

namely … to induce the Claimants to enter the [SPA] when [Mr Martin] was in breach of the [SPA] and/or to breach the Non-compete covenant". This is particularised by the allegation that Mr Martin *"advised [Mr Bell] of and involved [Mr Bell] in his plan to set up Premier Punt, necessarily as a competing business with 21Bet, and in the specific context of the negotiations with and offer of [Ivy] to buy the Business"*. It is also alleged that Mr Bell was involved with Mr Martin in planning the purchase of Incentive, and that the operation of that business was being carried on by Mr Martin and/or for the benefit of Mr Martin and/or Mr Bell.

598. The allegation of a conspiracy to induce Ivy to enter the SPA when Mr Martin was in breach of it makes little or no sense, since Mr Martin could be in breach of the SPA only by reason of activities undertaken on or after its execution.

599. Mr Bell makes the point that the further allegation, of advising/involving Mr Bell in the context of the SPA negotiations, cannot succeed since it does not involve any alleged wrongdoing by Mr Bell after the date of the SPA. Ivy responds that:

i) the combination or agreement (evidenced in part by pre SPA communications and activities) was that, when the time came, Mr Martin would breach any non-compete covenants which were included in the sale agreement; and

ii) in any event, Mr Bell's involvement in and assistance to Premier Punt continued after the date of the SPA.

600. As to (i) above, I conclude in § 588 above that in order to be liable for conspiracy to breach a contract, a defendant must know of the contractual provision in question. In principle a defendant can in my view be liable for conspiracy if, at the time of the agreement or combination, he knows that activities agreed to be undertaken at a future date will be in breach of a contractual provision expected by then to be in force.

601. In the present case Mr Bell was sent drafts of the SPA on 29 January and 7 March 2019. However, the 29 January draft showed Messrs Hogg and Markovic as the seller, and it appears to have been decided only in mid to late February that Mr Martin would be the seller (and hence bound by the restrictive covenant). The draft sent to Mr Bell on 7 March showed Mr Martin as the seller and included the covenant. Although Mr Bell denied having looked at it, and said he would have left it to his lawyers to do so, I consider it more likely than not that he did learn (from reading it or from his lawyers) that it contained a non-compete covenant to which Mr Martin would be subject.

602. However, the evidence of Mr Bell's involvement in the planning and setting up of Premier Punt, as summarised in section (D)(24) above, spans the period from August 2018 to December 2018, but includes little or no evidence of specific activities by Mr Bell in either February or March (or the first few days of April) 2019.

603. It is true that Mr Bell received on 1 and 20 March 2019 the sales plan for Incentive referred to in § 314 above, which included a reference to a "*Premier Punt Go Live*" date of 28 February. Incentive, though, was a distinct business from Premier Punt. Incentive holds the licence for the platform on which companies such as 21Bet and Premier Punt operate, and makes its money by taking a cut of the revenue from the underlying business. Incentive provides services to businesses, whereas 21Bet and Premier Punt provide (or provided) gaming facilities to members of the public.

Undoubtedly there was seen to be some synergy between having an interest in Incentive and the operation of Premier Punt. However, I do not accept Ivy's suggestion that one can infer from Mr Bell's ongoing interest in Incentive that he was necessarily continuing to be involved in Premier Punt.

604. In these circumstances, whilst it may well be possible to infer an agreement between Mr Martin and Mr Bell that Mr Martin should proceed with setting up Premier Punt, and that Mr Bell would assist in various ways, that agreement is most likely to have been made well before 7 March 2019 and thus before Mr Bell could have known that Mr Martin was to be subject to a restrictive covenant.

605. As to Ivy's second point, that Mr Bell continued to be involved in and assist Premier Punt after the date of the SPA, there is no such pleaded allegation. On the evidence, it is apparent that Mr Bell provided some temporary office space for Premier Punt's operating company, AXL, in June/July 2019. At best, therefore, Ivy might (arguably consistently with its pleaded case) invite the inference that the agreement to set up and operate Premier Punt was a continuing one, likely made in late 2018 but still continuing into March 2019 and thus into a period when Mr Bell knew Mr Martin was going be subject to a restrictive covenant in the SPA. However, that would amount to an extension of the concept of unlawful means conspiracy to a case where (so far as the evidence shows) at the time the agreement was formed the relevant defendant did not know the planned activity to be undertaken would in due course become unlawful, and the defendant made no new agreement and took no further step pursuant to the agreement in the relevant period (here 7 March to 4 April 2019) after becoming aware that the proposed future activity would in due course become unlawful. I would be inclined to the view that the unlawful means tort does not extend to such a case, though would note that the point was not the subject of specific argument before me. However, in view of my findings on the issues of lawfulness of the covenant and proof of loss, it is unnecessary to express any concluded view.

(4) Loss and damage

606. In relation to the claim of conspiracy to defraud, Ivy seeks £2.95 million, which is the sum that it paid by way of pre-payment for 21Bet, together with the sum of £250,000 which it subsequently invested in 21Bet in attempting to keep it afloat.

607. As to conspiracy to breach the non-compete covenant, Ivy makes the same claim as it does against Mr Martin for breach of that covenant: but it is unnecessary to consider that aspect further since I have already found no loss to have been proven.

(i) Principles

608. In assessing damages in a conspiracy claim, the court is concerned with the counter-factual of what on the balance of probabilities would have happened had there been no conspiracy: *Capital for Enterprise Fund a LP, Maven Capital Partners UK LLP v Bibby Financial Services Ltd* [2015] EWHC 2593 (Ch). In terms of the quantum of compensatory damages, Dillon LJ stated in *Lonrho Plc v. Fayed (No.5)* [1993] 1 W.L.R. 1489, 1494B that "*A plaintiff in a civil action for conspiracy must prove actual pecuniary loss, though if he proves actual pecuniary loss the damages are at large, in the sense that they are not limited to a precise calculation of the amount of the actual pecuniary loss actually proved*".

(ii) Application

609. It was not suggested that Mr Martin would have made them anyway, of his own volition, and I see no basis on which to reach any such conclusion. The natural conclusion is that the conspiracy was causative of the misrepresentations themselves, which were made pursuant to it, and which in turn led Ivy to buy the Business and shortly afterwards to put in the further £250,000 of funding in order to try to save it. The damages for conspiracy are accordingly the same as for the deceit itself.

(5) Conspiracy claims: conclusions

610. Ivy's claim for conspiracy to make fraudulent representations succeeds. Its claim for conspiracy to breach the non-compete covenant fails.

(H) OVERALL CONCLUSIONS

611. Ivy's claims for deceit succeed against both Defendants, on the basis of direct liability, agency (in the case of the representations made by Mr Martin) and conspiracy. Ivy's other claims do not succeed.