Neutral Citation Number [**2021] EWHC 325 (Ch)**
IN THE HIGH COURT OF JUSTICE **HC-2017-002379**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice Rolls Building,
Fetter Lane, London EC4A 1NL
Date: 18 February 2021

Before:
ANDREW LENON Q.C. (sitting as a Deputy Judge of the Chancery Division)

B E T W E E N:

KINGS SECURITY SYSTEMS LIMITED

Claimant

and

(1) ANTHONY DOUGLAS KING
(2) STEPHEN JOHN JAMES EVANS

Defendants

APPROVED JUDGMENT

Paul Downes QC and **Joseph Sullivan**
(instructed by **Teacher Stern LLP**) for the Claimant.

Christopher Newman and **Fiona Whiteside**
(instructed by **Walker Morris LLP**) for the First Defendant.

Hearing dates 1 – 8, 14 –15 December 2020, 18 February 2021

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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30 on 18 February 2021.

Contents

I. INTRODUCTION

1. This judgment follows the trial of the claim brought by the Claimant ("KSSL") against the First Defendant ("Mr King"), its former Chief Executive Officer, and of the counterclaim brought by Mr King against KSSL.

2. KSSL is a security and surveillance business based in the North of England which was established in the 1960s by James King, Mr King's father. Prior to December 2013, KSSL was a family business, owned and run by the King family. Mr King became Chief Executive Officer of KSSL in 2005, having previously worked for the business in other roles.

3. In late 2013, KSSL ran into financial difficulties. It obtained funding from outside investors acting through a company called Primekings Holding Limited ("Primekings")

which acquired a majority shareholding in KSSL's parent company Kings Solutions Group Limited ("KSGL"). The King family became minority shareholders.

4. Following the investment by Primekings, relations between the King family and the two representatives of Primekings on the board of KSSL soured. In 2015, Mr King and other members of the King family brought proceedings in the Chancery Division against Primekings and its representatives claiming rescission of the agreements under which Primekings had acquired its shares and invested in KSGL ("the Misrepresentation Proceedings"). The Misrepresentation Proceedings were brought on the basis that the agreements with Primekings had been procured by fraud, duress and an unlawful means conspiracy.

5. The trial of the Misrepresentation Proceedings was listed for 20 days before Marcus Smith J in May 2017. On day 10 of the trial, following cross-examination of the Kings' witnesses, the Kings discontinued the claim, apologised to the defendants and agreed to pay their costs on the indemnity basis. Marcus Smith J ordered £1.7 million to be paid on account.

6. After the conclusion of the Misrepresentation Proceedings, Mr King and KSSL entered into a settlement agreement under which it was agreed, amongst other things, that Mr King's employment was terminated and that KSSL would make an *ex gratia* payment to Mr King of £70,000 ("the Settlement Agreement"). Soon afterwards, however, the board of KSSL became aware of information suggesting that Mr King had been misusing company funds and KSSL purported to rescind the Settlement Agreement. One of the transactions which came to light in the course of the board's subsequent investigations was an arrangement under which Mr King had between 2015 and 2017 obtained the use of a Range Rover Vogue motor vehicle ("the Range Rover") from KSSL's fleet supplier, TCH Leasing (a trading style of T.C. Harrison 1960 Limited) ("TCH"), and which, unknown to the board, had been funded by KSSL ("the Range Rover Transaction").

7. In these proceedings, which were started in August 2017, KSSL is claiming that the Range Rover Transaction constituted a bribe by TCH and gave rise to breaches of duties on the part of Mr King as a director and employee of KSSL. It seeks damages and other relief including rescission of the Settlement Agreement. The claim against the Second

Defendant ("Mr Evans"), its former Chief Operating Officer, was that he dishonestly assisted with Mr King's breaches of duty and that he himself received the use of a second Range Rover in exchange for KSSL paying more to TCH for the use of certain Skoda vehicles. KSSL's claim against Mr Evans was settled in August 2018 with Mr Evans admitting his wrongdoing, apologising for his actions and paying compensation to KSSL.

8. Mr King denies that the Range Rover Transaction was a bribe, that it entailed any breach of duty or that KSSL is entitled to rescind the Settlement Agreement. He contends that he was unaware that KSSL was funding his use of the Range Rover, and that this was arranged by Mr Evans without his knowledge. Mr King is counterclaiming £70,000 pursuant to the Settlement Agreement together with damages for the tort of abuse of process. This counterclaim is put on the basis that the KSSL's predominant purpose in bringing these proceedings, on which it has incurred some £2.5 million in costs, is an improper one, namely to enable Primekings to acquire the King family's minority shareholding in KSGL at an undervalue and/or to damage Mr King's reputation and his ability to find alternative employment. In response to the counterclaim, KSSL questions whether the tort of abuse of process still exists in English law but, if it does, it denies that these proceedings were brought for any improper purpose or that Mr King has pleaded or proved any recoverable loss.

II. THE WITNESSES

9. KSSL called ten witnesses, listed below, all of whom gave evidence from the witness box with the exception of Mr Pownall and Mr Pashley who gave evidence by video link. Mr King gave evidence himself but did not call any other witnesses.

(1) Barry Stiefel

10. Mr Stiefel has been a non-executive director of KSSL since 2013. He has spent most of his professional life working for the Kirsh Group in senior management positions.

11. He clearly takes his responsibilities as a director seriously. He made clear that when a decision might give rise to a conflict of interest, he recused himself from the decision-making process. Mr Stiefel said in his witness statement, and I accept, that he has a

strong moral sense and sets himself high standards of integrity. He was clearly very upset at being accused of fraud and criminal wrongdoing by Mr King in the context of the Misrepresentation Proceedings and incensed by what he considered to be Mr King's dishonesty in connection with the Range Rover Transaction and his subsequent refusal to acknowledge his wrongdoing. Mr Stiefel did not attempt to conceal the contempt he now feels towards Mr King. Despite these strong personal feelings, I consider that Mr Stiefel was a reliable and honest witness.

(2) Robin Fisher

12. Mr Fisher is also a non-executive director of KSSL. His background is similar to Mr Stiefel's. He is an experienced businessman and the founder and managing director of Prime Interaction Limited ("Prime") which invests in UK security sector with finance provided by the Kirsh Group. Like Mr Stiefel, he was clearly angered by the allegations made against him in the Misrepresentation Proceedings and by Mr King's conduct. I consider that he was a reliable and honest witness.

(3) Geoffrey Zeidler

13. Mr Zeidler has been a non-executive director of KSSL since September 2015 and chairman since May 2016. He has wide experience as a company director in various commercial sectors including the private security industry and acted as Chairman of the British Security Industry Association. He was an impressive witness with a clear sense of his responsibilities as a director and chairman of KSSL. Unlike Mr Fisher and Stiefel, he was not personally involved in the Misrepresentation Proceedings. He gave considered and dispassionate evidence about Mr King's performance as Chief Executive Officer, the termination of Mr King's employment and the reasons for bringing these proceedings. When it was put to him in cross-examination that he was seeking to give false evidence so as to retain his job, he made it clear that he has independent means and does not need the remuneration he is paid by KSSL. He had no reason to give false evidence and, in my assessment, he did not do so.

(4) Robert Forsyth

14. Mr Forsyth is the Chief Executive Officer of KSSL. He was appointed on 25 May 2017 in succession to Mr King and gave evidence about the investigations into the allegations of unauthorised expenditure by Mr King and Mr Evans. He was an honest and credible witness.

(5) Mark Pownall

15. Mr Pownall was the Chief Financial Officer of KSSL from April 2014 to December 2017. His evidence dealt with, amongst other things, his knowledge of the arrangements with TCH relating to the Range Rovers.

16. I consider that Mr Pownall was an honest and reliable witness. He has no ongoing connection with KSSL or Primekings and has no motive to lie. The fact that in 2017 and 2018 he sent texts supportive of Mr King and critical of the majority shareholders does not affect the credibility of his evidence in support of KSSL's claim. It was clear from his own evidence and the evidence of Mr Zeidler that Mr Pownall is a man who dislikes conflict. He had been close to Mr King and sought to maintain a friendly relationship with him. There was no basis for the submission that Mr Pownall gave evidence supportive of KSSL's claim because he was scared of Primekings and its representatives.

(6) Stephen Evans

17. Mr Evans was an important witness in relation to the central question of Mr King's knowledge of the profit share element of the Range Rover Transaction with TCH.

18. Mr Evans joined KSSL as a senior accounts manager in 2002 and was appointed as a director in 2004. He was a close colleague and friend of Mr King for over 15 years. They described each other as "brothers". The closeness of their relationship was evidenced by other witnesses and from the tone and content of the voluminous text messages exchanged between them. Mr Evans gave evidence in support of the Kings' case at the trial of the Misrepresentation Proceedings.

19. I accept that there were grounds for doubting Mr Evans credibility as a witness. He was summarily dismissed by KSSL on the ground that he had concealed from the board unauthorised expenditure by members of the King family. In the settlement agreement reached with KSSL in August 2018 he admitted the wrongdoing alleged against him in these proceedings. His assertion in his Defence (paragraph 15.7) that Mr Pownall was aware of the arrangements with TCH regarding the Range Rover leased to Mr King was incorrect.

20. I consider nevertheless that Mr Evans' evidence concerning Mr King's knowledge of the payment arrangements underlying the Range Rover Transaction was honest and reliable. Mr King alleged in his witness statement that Mr Evans is fearful of the threats and intimidation that he will have received from those controlling KSSL. There was no credible basis for this suggestion. Mr Evans had no reason to lie or falsely to implicate his friend. His evidence in relation to the Range Rover Transaction was consistent with the statements he made to Mr King in private text messages.

(7) Paul Pashley

21. Mr Pashley was formerly the procurement manager of KSSL. His evidence concerned his reporting of a request made to him by Mr Evans to conceal the use of private phones used by members of the King family and paid for by KSSL. Mr Pashley had no reason to lie in support of KSSL (indeed, he gave evidence that he recently left his position at KSSL due to what he considered to be poor treatment by his line manager) and did not do so.

(8) Emma Shaw

22. Ms Shaw has been a non-executive director of KSSL since May 2016. She has held a number of directorial positions in the security industry. Alongside Mr Zeidler, Mr Stiefel and Mr Fisher, she was responsible for the decision-making relating to these proceedings. She gave her evidence in a straightforward manner and I consider that she was a reliable witness.

(9) Jacob Telemacque

23. Mr Telemacque has been employed by KSSL as fleet manager since 2016, reporting to Mr Evans. In his witness statement he said he was told by Mr Evans in 2015 that the two Range Rovers were personal vehicles to Mr King and Mr Evans and that he only discovered that the rental for Mr King's Range Rover was being paid for by the profit share arrangement in 2017 after Mr King's departure. I consider that Mr Telemacque was an honest witness who was seeking to assist the court.

(10) Kelly Fisher

24. Ms Fisher is the human resources director for KSSL She gave mostly uncontentious evidence about the circumstances of Mr King's departure from KSSL. I consider that she was a reliable witness.

Anthony King

25. Mr King's main witness statement is a lengthy document setting out his case that he was innocent of any wrongdoing or dishonesty in connection with the Range Rover Transaction and that these proceedings are part of a vendetta masterminded by Primekings and its representatives who wish to ruin him out of revenge for the Misrepresentation Proceedings.

26. His evidence in cross-examination, which lasted two and half days, was mostly concerned with the Range Rover Transaction. The main thrust of his evidence was that Mr Evans misled him as to the payment arrangements underlying the transaction; he believed that Mr Evans had skilfully negotiated for him a personal lease which did not involve any impropriety and which had nothing to do with KSSL.

27. After considering Mr King's evidence, together with the documentary evidence and the evidence of Mr Evans, I have come to the conclusion that Mr King was aware of how the Range Rover Transaction was being funded by KSSL and of the impropriety of the transaction. Mr King came across as an intelligent individual with an eye for detail. His evidence as to his belief that Mr Evans had simply managed to negotiate a "great deal" with TCH at a token level of rental was inherently implausible. The private texts

exchanged between Mr King and Mr Evans in 2017 are of particular relevance to the assessment of Mr King's credibility. They provide confirmation that Mr King was aware of the funding arrangements. Mr King's attempts in his evidence to reconcile these texts with his case that he was unaware of those arrangements were unconvincing. In short, I do not regard Mr King's evidence in relation to the Range Rover Transaction as reliable or honest.

III. THE FACTS

28. KSSL was incorporated by Mr King's father, James King, in 1971. Initially, its business consisted of installing television aerials. Later it moved into the provision of security services and grew substantially. It now provides a wide range of security services to site operators across the UK, including major retailers and a number of police forces. Mr King joined KSSL as an apprentice after leaving school at the age of 17, He became a director of the company in 1999 aged 30 and Chief Executive Officer in 2005, aged 36.

29. Prior to the Primekings investment in December 2013, KSSL was a family company. The shares in KSGL were owned as to 20% by each of Mr King's parents and Mr King and as to 40% by the JPK No. 1 Discretionary Settlement (a family trust for Mr King and his family). Members of the King family worked for the business in various capacities. Mr King and his family had, as sole shareholders in KSGL, used company assets to make private purchases and to pay private bills for things like holidays, school fees and Christmas presents. There was no clear distinction between company assets and family assets.

The 2013 investment

30. By late 2013 KSSL was in serious financial difficulties. It had gross tax liabilities of over £2.5 million, overdrawn directors' loans in excess of £550,000, and trade creditors exceeded £5.2 million. According to the information memorandum produced on behalf of KSSL, KSSL was seeking an initial £2 million to £2.5 million equity investment to replenish its balance sheet and fund future growth.

31. In November 2013 Mr King and his father were introduced to the Kirsh Family Office, the investment wing of Nathan Kirsh, a South African billionaire. They met Mr Fisher and Mr Stiefel, who both represented the Kirsh Group, and Peter Swain, an associate of Mr Fisher, in London to discuss the possibility of the Kirsh Group investing in the Kings group. Mr Fisher had heard that KSSL was in need of investment and believed that KSSL was a good business and quality brand that fitted with the growth strategy of his company Prime.

32. A completion meeting took place on 18 December 2013. What happened at that meeting was subsequently the subject of the Misrepresentation Proceedings. Prior to the completion meeting, the Primekings representatives had proposed acquiring 60% of the shares in KSGL, KSSL's parent company, but at the meeting insisted that the deal change from the previously negotiated 60:40 split to 76:24. Mr Fisher's evidence was that the change was necessary because of concerns about KSSL's financial situation; he wished to ensure that Primekings was in a position to pass special resolutions if necessary as they were taking all the financial risk. It was, however, agreed that once the business had stabilised and certain EBITDA targets had been met, the Primekings stake would dilute to 60%. The perception on the part of the Kings family appears to have been that the change to the terms of the deal had been unfairly forced on them.

33. Under the terms of the agreements entered into on 20 December 2013:

(1) Primekings acquired a 76% shareholding in KSGL, paying £750,000 for the shares owned by Mr King's parents, an additional £1m for the subscription of 1,507 additional shares in KSGL and £4.25 million by way of deferred consideration.

(2) The deferred consideration was split into two parts:

i. Mr King's parents would receive up to £1 million per annum for each of the three years ending respectively March 2015, March 2016 and March 2017, the amount depending upon the extent to which the EBITDA targets had been achieved. This 'earn out' mechanism was achieved by allotting to Mr and Mrs King 3 B shares, one of which was redeemable at the end of each of the relevant years. The redemption price was £500,000 per share if the EBITDA targets were met and a proportionally lower figure if they were not and, in any

case, only in the event that the business had distributable reserves from which to make such payment;

ii. In addition, when it was determined that the business was in a position to do so, KSGL would pay £1.25 million to Mr King's parents either by way of dividend or a loan to be recouped from dividends subsequently declared.

34. Ki Finance SARL (the finance arm of the Kirsh group) also agreed to lend KSSL £3 million by way of working capital. It was also agreed that other than Mr King, all King family members should resign and cease to work for KSGL or any group company.

35. After the transaction, James and Susan King resigned as directors and were replaced by Mr Fisher and Mr Stiefel as non-executive directors. Mr King entered a three-year employment contract.

36. On 19 December 2013, thinking that the transaction had closed, Mr Stiefel sent an email to Mr King and his father welcoming them into the Kirsh group. James King replied on 4 January 2014 in a lengthy email in which he expressed his unhappiness about the changes to the deal at the completion meeting. At a lunch meeting with Mr Stiefel on 15 January 2014, James King complained about feeling forced to sign the deal they did rather than a deal providing for a 60:40 split. Mr Stiefel explained the reasons for the change and that the shareholding would revert to 60% when the business had stabilised.

2014

37. In the first quarter of 2014, KSSL's cash flow remained tight. It was agreed that Primekings would invest a further £1.1 million in the first quarter. In June 2014 Mr Fisher and Mr Stiefel agreed that, although the contractually agreed conditions had not been met, Primekings' shareholding would be reduced to 60% and the £1.25m deferred consideration would be paid in a number of tranches, the final payment of £650,000 being made on 31 March 2015.

38. In emails to Mr Fisher on 3 and 4 July 2014 Mr King expressed his gratitude for the acceleration of the shareholding change. On 3 July 2014, he wrote "*I will give you a big*

kiss when I say [sic] you though, thank you for doing this for me and my family". He appreciated that Mr Fisher and Mr Stiefel had authorised the shareholding change well ahead of the mechanism provided for in the contractual documentation. On 4 July 2014 he wrote "*Had a good meeting with Barry and feel like I've turned a new page. The meeting was not about me trying to understand where Barry was coming from, but about me admitting to myself where I was coming from. I went to see him to apologise for my mistrust and constant analysing of what angle is being played and why. I apologised for unknowingly resenting that I had lost Kings and feeling that you had taken it from me, when in fact you saved my business and saved me. You are my trusted partners and friends and I thank God for bringing you into my life…*".

39. As this email indicates, there was simmering resentment on the part of the Kings towards Primekings. In an email to Mr Stiefel sent nearly a year later on 19 December 2014 with the subject "*Disappointed*", James King referred to "*that terrible night of the eighteenth of December 2013 when Anthony and I were bludgeoned into signing an agreement that broke all of our hearts.*" He went on to complain that "*you have become Task Masters over our son and you are making him serve you with rigour, I see him just as stressed now through not ever being able to please you both, especially when he is feeling obligated to see his mother and father be paid their money.*" Mr Stiefel replied on 2 December 2014, saying that the email was uncalled for, that the Kirsh group had rescued the Kings Group from insolvency and that he objected to the "*Task Masters*" comment, pointing out that Mr King had the support of Mr Fisher and himself and that Mr King's stress was the result of his wanting to please his parents as he probably felt responsible for the dire situation of KSSL in December 2013.

2015

The launching of the Misrepresentation Proceedings

40. By the start of 2015, KSSL's finances were in a stronger position. It was submitted on behalf of KSSL that this optimism encouraged the Kings to launch the Misrepresentation Proceedings in order to regain ownership and control of KSSL. In an email to Mr Evans dated 29 April 2015 (shortly before the proceedings were launched) Mr King wrote, "*Just need to get rid of Barry and Robin and we will have an amazing fun future xx*".

41. On 31 March 2015, the day on which the final part of the deferred consideration was paid to James and Susan King, pre-action protocol letters were sent by the Kings' solicitors, DWF, to Mr Stiefel, Mr Fisher and Mr Swain. The letters alleged that the agreements under which Primekings acquired shares in and invested in KSGL were procured by fraudulent misrepresentation, economic duress and conspiracy on the part of Mr Stiefel, Mr Fisher and Mr Swain. At the heart of the claim was an allegation that during a telephone call made at the completion meeting Mr Swain misrepresented the content of a meeting he and an independent consultant, Alison Lord, had held that day with GE Capital (at that time KSSL's invoice financing provider) so as to give the impression that the business was in a more financially precarious position than the actuality. The letters went on to accuse Mr Stiefel, Mr Fisher and Mr Swain of committing criminal offences under section 89 and 90 of the Financial Services Act 2012 and reserved the right to report them to the Financial Conduct Authority and/or the Police without further notice.

42. The Misrepresentation Proceedings were launched in mid-July 2015 against Mr Swain, Mr Fisher and Primekings as defendants. The Kings sought rescission of the investment agreements and damages. Although Mr Stiefel was not joined as a defendant, it was said in the Particulars of Claim that the claimants suspected that he may also have known about and participated in the deception of the claimants. Subsequently in the course of his evidence at the trial Mr King said that Mr Stiefel was complicit in the alleged fraud.

43. The defendants contended that the claim was hopeless and that the extremely serious allegations advanced by the Kings should never have been made. It was their case that there was no conspiracy, no misrepresentations and no loss. Mr Swain had accurately set out what GE Capital had told him, which was that unless a deal was done to invest in KSGL, it (GE Capital) would not advance further funds to the business which was well known to the Kings in any event. It was the defendants' case that the Kings were not tricked into agreeing the deal and they did not suffer any loss by reason of the deal in any event: on the contrary, entry into the deal saved the business which would otherwise have entered into a formal insolvency process resulting in the Kings losing the value of their shareholdings and calls on personal guarantees they had given.

44. The issues raised in the Misrepresentation Proceedings are not relevant to these proceedings and I make no findings in relation to them. What is of some relevance, in

the context of Mr King's counterclaim, is the fact that Mr Stiefel and Mr Fisher were clearly very upset and annoyed by the allegations made on behalf of the Kings which they regarded as unfounded. Mr Stiefel's evidence in his witness statement was as follows:

"68. Robin, [Mr Fisher] Mr Swain and I had been wrongly accused of allegations of the most serious kind: fraud amounting to criminal conduct. I took that attack on my reputation very seriously indeed. I personally value my honesty and integrity more than anything in my life. I have spent my whole career on the simple principle of total honesty and integrity. I therefore found the accusation of criminal activity particularly objectionable."

In cross-examination:

Q. Mr Stiefel, before the break I was asking you do you accept that if you issue a claim against someone in the High Court alleging that they have taken a bribe, then realistically they are going to find it very difficult to get a job in the security industry whilst that claim is on foot? Do you accept that?
A. If it is publicly known, yes. …
Q. What Mr King says is that he is obliged to disclose that fact to anybody who he wants to work with. You can see why that would be the case, can't you?
A. Yes. No different to how I felt in the fraud case when I got a letter before action. I had my whole career at the age of 70 or 68 thrown into turmoil by allegations that I was going to be reported to all the various authorities in the UK. I didn't feel good about that either, but it did not stop him.

(Transcript day 1 pages 139 -140)

The Audi A7

45. At the time of the Primekings' investment, Mr King drove an Aston Martin which was provided to him by KSSL as a company car. The Primekings representatives considered this to be too extravagant and costly a vehicle in light of the financial distress the business was in and required Mr King to obtain a more reasonably priced vehicle. He complied with this instruction and began driving an Audi A7, which he bought on finance using part of a car allowance of £850 per month provided to him by KSSL. Mr King was unable to give evidence as to the monthly payments he was making for the Audi A7. He initially denied making monthly payments at all, claiming that he had purchased the vehicle "outright" but subsequently admitted that he made monthly

finance payments in respect of the vehicle. It seems likely that the payments were approximately £480 per month as Mr Evans sent Mr King a quotation in that sum for a personal lease for an Audi A7 in January 2014.

46. In 2015, Mr King was looking to obtain a more luxurious vehicle than the Audi A7, which he referred to disparagingly as an "accountant's car" in an email to Mr Evans. Mr Evans spoke to him in February 2015 about the possibility of TCH providing him with a better car.

47. In March 2015, in anticipation of being provided with a new vehicle, Mr King took steps to obtain a valuation for his Audi A7. He initially had it valued by the website We Buy Any Car at £27,610 in March 2015. He emailed this quotation to Mr Evans on 24 March 2015 who suggested that, instead of selling the vehicle privately, Mr King could sell it to KSSL. Mr King replied the same day, stating, *"Yeh, that could be a better way of doing it, I could sell it for 30k then instead.*" In cross-examination, Mr King stated for the first time that he could recall obtaining another valuation suggesting that the "face value" of the vehicle was £30,000.

> A. And so the actual face value of the [car] was 30, which I what I felt okay I can actually get the face value.
> Q. Where did you get the face value from?
> A. I think I must have googled it and got the actual face value –
> Q. You don't mention that in your email, do you?
> A. It hasn't got my Google history in here, no.
> Q. So you -- do you remember doing this now?
> A. No, I don't remember doing it. I'm just surmising as to how I came to that valuation, but obviously We Buy Any Car is a depressed or subsidised lower value valuation from We Buy Any Car.
> Q. It's the market value bought on the terms that We Buy Any Car buy on?
> A. Absolutely, which is a lower value than the actual value of the car. Obviously they want to sell it on for a profit.
> Q. We can debate that up hill and down dale. You had a valuation of 27 and you believe now, but you don't remember, that you found another value at around about 30?
> A. I believe I must have had a reference point somewhere for £30,000, yes, of what the actual value of the car
>
> (Transcript day 5 pages 40 - 41)

48. On 15 April 2015 Mr King emailed members of KSSL's executive board, of which Mr King was chairman and the other members of were all his subordinates, to declare a "*personal interest in a transaction between the business and myself*". He was proposing to sell it for £34,000. He did not disclose to the executive board the lower valuation (or valuations) he had received and did not disclose the transaction at all to the main board as he ought to have done consistently with his duties of disclosure as a director. Mr King's attempt in cross-examination to justify his conduct was unconvincing:

> Q. You have a duty of disclosure you were aware of that, weren't you?
> A. I wanted to make sure I was being -- being open about the transaction, yes.
> Q. If you are going to disclose, you have to disclose all the relevant facts don't you?
> A. I -- I didn't think to disclose that, it was a depressed value and I didn't think to disclose it.
> Q. Or the value that you told us just now at 30,000, you didn't disclose that either did you?
> A It was open to any of those directors to Google it and find out if I was selling it at the right price and it was an appropriate thing to do, which is why I declared it.
> Q. Was that your view at the time, it was wasn't your duty to disclose it was their duty to go find out?
> A. Mr Downes, I tried to do my best. I was learning as [best] I could and as fast as I could and I tried to do my best to be open about the transaction I was doing. (Transcript Day 5, page 39)

The Range Rover Transaction

49. KSSL leased a fleet of motor vehicles for use in its business from TCH. Mr Evans managed KSSL's relationship with TCH from around 2010, with the assistance of the Fleet Administration Assistant, Jacob Telemacque.

50. The terms on which KSSL leased motor vehicles from TCH were contained in various documents/discussions, including a letter dated 3 August 2010 (the "August 2010 Agreement"). The August 2010 Agreement provided for a profit-sharing arrangement under which, in broad terms, KSSL would share 50/50 annually any profits made by TCH on the resale of vehicles which had been leased by TCH to KSSL and subsequently returned by KSSL to TCH. The amount of the profit share would depend on the number of vehicles and the prices which they could command on resale. The profit share

fluctuated from one year to the next as illustrated by the level of KSSL's profit share for 2015, 2016 and 2017 which turned out to be £31,402.55, £4,635.14 and £4,628.78.

51. On 4 February 2015, Mr Evans emailed Ken Buckley, head of sales at TCH, to ask if there was any news on the profit share value for KSSL. Mr Buckley responded the next day to inform Mr Evans that it appeared from initial estimates that KSSL would receive a cheque for around £11,000 in respect of the profit share relating to vehicles returned to TCH in 2014. On the same day Mr Evans responded to Mr Buckley to ask if the profit share could be used to fund a vehicle for the use of Mr King.

"I still want to try and do something for Anthony on a Range Rover so perhaps this could go towards funding the vehicle instead of a cheque."

52. Mr Evans' evidence, which I accept, was that he discussed this proposal with Mr King, with whom he was working side-by-side on a daily basis and that there were a number of conversations between them about the particular car that Mr King wished to obtain. These conversations took place in the office of KSSL and/or by telephone. The reference to "still" wanting to try and do something suggests that there had been previous discussions between Mr Evans and Mr Buckley about a Range Rover. Mr Evans' evidence was that he and Mr King had looked to source Range Rovers for their use previously and had both used Range Rovers for a period in late 2012/early 2013.

53. On 9 February 2015 Mr Evans emailed Mr Buckley to ask if the profit share amount had been confirmed and proposed to Mr Buckley that in return for a Range Rover Vogue put into KSSL as a "long-term demo" for 24 months, KSSL would make TCH a solo supplier for the next 24 months and TCH could keep the rebate.

"*I have a proposal for you. If Kings make TCH a sole supplier for the next 24 months and you keep the rebate this year and next would you be prepared to put a Range Rover Vogue into Kings as a long-term demo for 24 months.*
The mileage would be about 8000 per annum."

54. Following a chasing email from Mr Evans on 23 February 2015, Mr Buckley replied by email on the following day, explaining that they were still working out the numbers on his proposal. Mr Buckley explained that the rental value for the "*most basic*" Range Rover was "*circa £1200 pm*".

"*Sorry for the slow response Steve, I've looked at a 24 month contract at 8,000 pa on the most basic vehicle, Range Rover Diesel Estate 3.0 Tdv6 Vogue 4Dr Auto, which has an on the road price of £74k. The rental on this is circa £1200 pm which means I would need to have circa £29,000 available from the overall profit share over the 2 years to make it work. I am working with Chris to try and make a prediction for vehicles returned in 2015, as soon as I've finished that exercise I will be in a position to let you know if it's financially viable to achieve this.*
I'll come back to you as quickly as I can."

55. On 12 March 2015 Mr Buckley emailed Mr Evans to explain that the agreement needed to be over 3 years for it to work for them. Mr Buckley had not sought to negotiate such a deal previously but wanted to see whether Mr Evans would be open to such a proposal.

"*If you could accept a 3 year sole supply arrangement we would be quite happy for any surplus in the 3rd year to be either refunded or reserved for another 3 year demonstrator program?*

This will be the first time we have ever done anything like this and at the moment we are just trying to define how we would actually account for the vehicle, but I'm confident we can come to a solution over the next few days, so if you can let me have your thoughts on a 3 year lease/sole supply arrangement I'm sure we can get moving on this fairly quickly?"

56. At this time, Mr Evans was working side-by-side with Mr King on a daily basis. They were close friends. I accept Mr Evans' evidence that he informed Mr King during conversations in the office of KSSL and/or by telephone in February or March 2015 that he had explored with TCH the possibility of (i) TCH providing a Range Rover for Mr King's business and personal use and (ii) KSSL funding the Range Rover by allowing TCH to retain any profit share for the current and subsequent years in the annual sum of about £10,000. Mr Evans cannot remember the precise words either of them used but he was certain that Mr King knew that the Range Rover would be funded by KSSL's profit share. He also discussed with Mr King the agreement that TCH would be KSSL's sole supplier for a period of 36 months.

57. On 22 March 2015, Mr Evans emailed Mr Buckley a link to a demo car that Mr King had seen in the Farnell Land Rover Garage which Mr King used to drive past on his way to and from work. Mr King had told Mr Evans he had seen this particular vehicle and it was the type of Range Rover he wanted, which is why Mr Evans sent the link to

Mr Buckley. Mr Buckley replied on 30 March 2015 saying that he would "*prefer to go down the new vehicle route, does Anthony have a colour preference?*".

58. Mr Evans chased Mr Buckley on 7 April 2015 as to whether he had managed to source a new car (for Mr King). Mr Buckley replied the next day, 8 April 2015, saying that stock was "non-existent". He also attached a draft letter dated 7 April 2015 for Mr Evans' signature and return. This letter confirmed the agreement reached for TCH to supply a "Range Rover Vogue 3.0 Tdv6 4dr Auto in Black with Privacy Glass" for a period of 36 months. The letter included the following:

> "*The cost of this vehicle will be funded by your profit share agreement over the next 3 years and in return for this addition to our standard contractual terms we require you to agree, by signing this agreement, to allow TCH Leasing to be your sole supplier for vehicle contract hire/leasing/fleet management for a 3 year period. This is subject to the current fleet size as at the end of March 2015 and option to benchmark process with industry competitors*
>
> *The vehicle will be invoiced to the driver Mr Anthony King on a short-term monthly rental contract*."

59. Mr Evans emailed Mr King later on the same day (8 April 2015) with the message:

> "*Couldn't find a stock car for you but will be July delivery but it will be black with privacy glass*".

60. At the same time, he forwarded Mr Buckley's email to Mr King about the non-existent stock together with the preceding email exchanges with Mr Buckley going back to 24 February 2015 but not including the draft letter dated 7 April 2015 from Mr Buckley. Mr King was on the train travelling from London to Leeds when he received the email. He replied from his Blackberry as follows:

> "*That's fine, more than happy with that. Happy to pay a bit more for a good spec*."

Mr Evans responded:

> "*The vogue is fully loaded anyway. Will pick up brochure to confirm but think they have everything as standard.*"

61. The subject heading of the email exchanges between Mr Buckley and Mr Evans was "*Re: Profit Share*". When Mr Evans forwarded the emails to Mr King on 8 April, the subject line was blank. Mr Evans does not recall deleting those words from the subject line and cannot think why he would have done so. His evidence was that he did not remove the words in order to mislead Mr King.

Q. You say at paragraph that you forwarded that e-mail to Mr King on the same day: "... and as the documents show the subject heading of the e-mail exchanges was 'profit share', when I forwarded the e-mail the subject line is blank. I do not recall deleting those words and I cannot think why I would have done that. I confirm that I did not remove the words to mislead Mr King." That is your evidence?
A. Correct.
Q. I want to suggest to you that that is wrong and you did remove the words to mislead Mr King?
A. No. Mr King knew the vehicle was being funded by a profit share.

(Transcript Day 2 pages 77 – 78)

62. Mr King's case was that Mr Evans removed the words "*Profit Share*" in order to hide from him the fact the Range Rover would be funded by profit share and that he had every motive to do that because he enjoyed his reputation as a "great negotiator" and wanted praise from Mr King for that, which, according to Mr King, he in fact in due course received in an email dated 29 April 2015: in answer to the question whether his boys liked the car, Mr King's answer was "*They love it. So proud. Thank you bro*".

63. Whilst there is no obvious explanation for the removal of the words "*Profit Share*", I accept Mr Evans' evidence that they were not removed in order to conceal them from Mr King. If his intention had been to mislead Mr King by concealing the profit share arrangement, he would not have forwarded, as he did, the chain of emails in which he had negotiated the arrangements for the Range Rover with TCH which make clear the profit share arrangement and which have "*Profit Share*" as their stated subject.

64. Mr King's evidence was that he did not notice those emails, as he read Mr Evans' email on his Blackberry telephone and did not scroll down to the other emails. Assuming in Mr King's favour that he did not read the forwarded emails, Mr Evans could not have known that he would not read them. The fact that Mr Evans forwarded the emails to Mr King with no attempt at concealment strongly suggests that the arrangements had been

openly discussed between them. The different explanations put forward by Mr King as to why Mr Evans would have wanted to conceal the profit share from him (because he wanted praise from Mr King for his skills as a negotiator or because he wanted to do something nice for him but did not want him to know the details because he knew that Mr King was honest) are unconvincing given their close friendship. Moreover, I consider that if Mr Evans had deliberately concealed the profit share from Mr King for either of these reasons, he would, as Mr King's friend, have admitted this privately in their text messages, or publicly in his Defence in these proceedings but he did not do so.

65. Mr King's evidence was that he understood the provision of the Range Rover to be by way of a "long term demo" vehicle enabling the customer to evaluate the vehicle. I do not consider it plausible that Mr King believed that this was the arrangement given that, as noted above, he was informed of the true nature of the arrangement by Mr Evans. It is also inherently unlikely that a luxury car would be provided as a "demo" vehicle free of charge on a long-term basis. Mr King's evidence that he failed to realise that the provision of the Range Rover would cost TCH anything was evasive.

Q. Do you accept that even to provide you with a Range Rover for a year will cost TCH something?
A. I've no idea, not in a demonstrator vehicle, no, because it could be that that's free issue from Range Rover.
Q. Are you seriously saying that a vehicle even held as a demonstrator couldn't be either sold or usefully employed elsewhere for a whole year?
A. I have no idea whether TCH had something parked up spare, I have no idea what the arrangements were. As I say, that conversation didn't really go any further anyway. And like I've said in my witness statement, I didn't really give it that much thought.
Q. It's just not plausible, Mr King, I suggest to you, to think that the use of a car even if it's just a demonstrator for a year doesn't cost TCH something?
A. I've no experience of the motor trade at all, I can't comment on that.
Q. Just a matter of common sense.
A. A matter of common sense, I can't comment on it.

(Transcript Day 5 page 55-56)

66. The assertion in Mr King's witness statement that he told Mr Evans that "*everything needs to be above board*" and that he needed to pay something towards the hire of the vehicle indicates an awareness that the arrangement with TCH might not be appropriate and that there must have been a cost to TCH in providing the vehicle. His reluctance to

accept in cross-examination that there must have been a difference between the £100 charge and the cost to TCH was implausible:

Q. You knew, you've told us, it must have cost TCH more than that?
A. I don't think I considered it, but, yes, I accept I knew I was getting a great deal; I didn't know how they were going it but I just knew I was getting a great deal.
Q. Yes, so at the time if you had thought about it you would've realised that you were getting a car at less than it cost TCH?
A. Well, I didn't know if it was costing less than TCH, but I just knew I was getting a great deal.

(Transcript Day 5 page 64 – 65)

67. On 11 April 2015 Mr Evans emailed Mr Buckley explaining that he had found a Range Rover for Mr King at a dealership in Huddersfield and asked him to contact the dealer. On 12 April 2015, following a call with him, Mr Evans emailed Mr Buckley with amendments to the draft letter dated 7 April which Mr Buckley had provided for his agreement. The amendments included a provision that the Range Rover would be "*rented to the required driver on a short-term personnel [sic] monthly rental contract at a token rental not exceeding £100 per month*". This token £100 charge was included for tax purposes and was intended by Mr Evans and Mr King to give the impression to the HMRC, if need be, that the car was a private arrangement rather than a company car even though in reality the bulk of the cost was being paid by the company.

68. The covering email also referred to Mr Evans' plan to arrange for his own Range Rover to be provided by TCH at KSSL's expense:

"*Once we have this one sorted I'm looking to do a 2nd vehicle for myself on similar terms but will look to cover your costs by increasing the rental of the 10 skodas we have on order by the required amount to cover the vehicle cost and run for the same contact [sic] term as these vehicles*."

69. On 13 April 2015 Mr Evans emailed Mr Buckley to confirm the position following his amendment to the letter.

"*... Just to confirm you will be invoicing him £100 per month: Think this will cover the £3000 option of the extras too over the term so good with you guys too. ...*"

70. Mr Evans could not recall any specific discussion with Mr Buckley about the amount of the £100 plus VAT per month payment, although he noted from the email that he referred to this amount covering the optional extras on Mr King's Range Rover. It is not clear what the "*optional extras*" were, given that the car was previously described by Mr Evans as "*fully loaded*", but there is no credible basis for concluding that Mr Evans had agreed to the provision of extras behind Mr King's back.

71. On 14 April 2015 Mr King emailed Mr Buckley a copy of the letter agreement dated 7 April which he had now signed. Mr Evans did not recall receiving an actual breakdown from TCH for the monthly cost of the Range Rover but estimates that it was approximately £1,243.52 plus VAT which was the cost of his nearly identical Range Rover.

72. On or about the same date Mr Evans signed a Short Term Rental Agreement between TCH and KSSL in respect of the Range Rover. Mr King was specified as the main driver and the rental rate was said to be £100 per month. The value of the vehicle was recorded as £76,680.

73. Mr King picked up the Range Rover from the garage in Huddersfield on 29 April 2015.

74. In an email to KSSL employee Jacob Telemacque dated 30 April 2015, Mr King said that the First Range Rover was not a company car, and in a further email of the same date from Mr Evans to KSSL's insurance brokers, Mr Evans said the First Range Rover was a private rental to Mr King.

75. On 5 May 2015 Mr Evans chased Mr Buckley again for the contract in Mr King's name. On 18 May 2015, Mr Buckley sent Mr Evans two draft agreements in respect of the Range Rovers that Mr King and Mr Evans had. The subject heading of that email was "*FW: Kings Agreements*". The email read:

"*Hi Steve, apologies for the delay but please find attached agreements in yours and Anthony's name for the Range Rovers. Please can these only be used internally, as technically we don't currently do personal hires/leases. Regards*".

76. Mr Evans then forwarded Mr Buckley's email together with the draft agreement in Mr King's name to Mr King that same day (18 May 2015) The covering email read as follows:

"Anthony Just so everything is above board and off Kings, can you sign and scan this back to me so I can put into place with TCH for your car. This gives you the direct contact with TCH then".

77. When Mr Evans forwarded this email to Mr King he made two changes. First, he changed the subject heading from "*Kings Agreements*" to "*Agreements – Personnel Rentals*" by which he meant "Personal Rentals". Second, he amended the email chain below to delete the sentence "*Please can these only be used internally, as technically we don't currently do personal hires/leases*". Mr Evans did not remember making that change. The only reason he could think was to reflect that the agreements attached were put in their personal names for tax purposes. Mr King's case is that it is to be inferred from the changes that Mr Evans did not want Mr King to know that TCH did not 'do' personal leases because he did not want Mr King to know about possible wrongdoing. I do not accept this explanation. In addition to the evidence that Mr King was told about the profit shares, so that he had nothing to hide from Mr King, if Mr Evans was seeking to hide the truth from Mr King, he would not have forwarded the email in which Mr Buckley used the subject line "*King's Agreements*" but would have altered the subject line on that email too.

78. Mr Evans' use of the words "*just so everything is above board and off Kings"* suggests that, without the signed agreement, the arrangement would not be "above board" and would involve KSSL. If Mr King believed that the arrangement with TCH was a purely personal contract, as he now contends he believed, there would have been no need to ensure that the arrangement was "*above board*" and there would have been no need to mention "*Kings*".

79. The Master Agreement is not in the form of a personal contract for the lease of a vehicle to an individual. It is a Master Agreement setting out terms between TCH and a commercial leaser of multiple vehicles. It is headed "Master Agreement". It does not contain any term for the hire of the Range Rover. It does not set out the rental payments or mention the Range Rover. Mr King contends that he did not read the contract when

he signed it and so did not realise that it was not in the form of a personal lease agreement.

Q. Can you think of anywhere in this document it says the term of this agreement?
A. I'm not sure it's in there, and that's only because I've looked at it afterwards.
Q. I can't see it in there anywhere the term of the agreement?
A. I agree with you, it's not in there.
Q. Nowhere in this document does it say it's £100 a month?
A. Agreed.
Q. Even a cursory look at the document without reading the detail we can see it contains none of the usual information one would expect with a hire contract of this sort?
A. He simply sent the document, I printed it off, signed it, sent it straight back. I'll be honest, I didn't even look at it.

(Transcript day 5 pages 92 – 93)

80. I consider that this is implausible. Mr King is, as already noted, an intelligent individual with a keen eye for detail, as his main witness statement and much of his oral evidence demonstrated. Even if Mr King did not read the Master Agreement in detail, it is implausible to suggest that he did not notice that it is not a personal lease agreement. If he had genuinely believed that he had a personal lease agreement, I consider that he would have raised with Mr Evans the issue as to why the agreement was in an inappropriate form.

Terms of the Range Rover Transaction

81. The Range Rover Transaction resulting from the exchanges set out above was, in summary, a tripartite arrangement on the following terms:

(1) TCH agreed to provide Mr King with the Range Rover for 36 months;
(2) KSSL agreed that TCH could retain KSSL's profit share and that TCH would be its sole supplier for car hire, leasing and fleet management for three years;
(3) Mr King agreed to pay TCH rental of £100 per month.

82. It was implicit in the arrangement that TCH would be liable to make up any shortfall between the rental that it would normally have charged for the Range Rover and the

income from KSSL's profit share plus the £100 per month payable by Mr King and that it would be entitled to keep any excess, in the event that the profit share plus £100 rental was more than the anticipated rental. Although it was originally suggested by TCH that KSSL could retain the excess in the third year, ultimately this does not appear to have been agreed.

Mr King's authorisation of Mr Evans

83. KSSL's case is that Mr King authorised Mr Evans to enter the Range Rover Transaction with TCH on his behalf. This is disputed by Mr King who asserts that he did not know about the use of the profit share to cover the costs of rental and thought that he was entering a personal contract with TCH.

84. Mr Evans' evidence (which I accept) in his third witness statement in response to Mr King's profession of ignorance on this point was follows:

"*I understand that Anthony's defence in this matter is that he did not know that KSSL was effectively paying for his Range Rover and that he thought it was personal to him. When I found out about this I was extremely surprised by the position he has taken; it is not true. I am certain that he knew that KSSL had forfeited its profit share to cover the costs of the car: as I have explained, we discussed this before he took the car on. Apart from the fact we had discussed KSSL forfeiting its profit share to cover the costs, £100 per month is obviously not remotely reflective of the actual costs of the type of vehicle he had which would have been more like in excess of £1,200.*" (paragraph 36)

85. Mr King knew that Mr Evans was arranging for TCH to supply him with a Range Rover and that Mr Evans was proposing that KSSL's profit share would be used to cover the cost of the Range Rover. Moreover, Mr King must have realised that £100 per month did not cover TCH's costs and that the Master Agreement did not reflect the terms agreed by Mr Evans. It is be inferred from these facts that Mr King assented to Mr Evans entering the Range Rover Transaction on his behalf and impliedly authorised him to do so.

Mr Pownall's knowledge of the Range Rover Transaction

86. KSSL accepts that its directors were aware of the existence of the Range Rovers used by Mr King and Mr Evans. Mr King's case goes further and alleges that Mr Pownall knew that Mr King was paying £100 per month rental to TCH. This allegation is based on:

(1) The fact that, as stated in Mr Pownall's witness statement, Mr King told him that Mr Evans had negotiated a great deal for him with TCH. He emphasised that it was a personal lease to him and he said that it showed what a great negotiator Mr Evans was;

(2) Mr King's evidence that he discussed with Mr Pownall the tax implications of paying £100 per month to TCH;

(3) Mr Telemacque's evidence that he passed an invoice for £100 plus VAT from TCH for Mr King's Range Rover to Mr Pownall;

(4) The assertion of Mr Evans in his Defence that Mr Pownall knew about the arrangements with TCH.

87. Mr Pownall's evidence, which I accept, is that he did not know any details of the arrangements between Mr Evans, Mr King and TCH. He knew no more than that the Range Rovers were rented from TCH on favourable terms negotiated by Mr Evans. His evidence was that:

(1) The Range Rovers appeared in the KSSL car park in 2015, causing some disquiet among staff that Mr King and Mr Evans had been able to acquire such high-end vehicles if their pay increases were in line with other staff. Mr Pownall knew that they had received bonuses and was surprised that Mr King and Mr Evans appeared to have chosen to spend their money on the cars.

(2) On a car journey in mid-May 2015 Mr King, who was very fond of cars, described all the features and added extras in the car. He told Mr Pownall that Mr Evans had

negotiated a great deal for him, a personal lease, and that this showed what a great negotiator Mr Evans was.

(3) Later, in May 2016 Mr Pownall asked Mr Evans about the cars for the purpose of filing HMRC P11D tax forms and was told that they were on private leases i.e. not company cars. He was not told about the £100 per month payments and he did not discuss Mr King's personal tax affairs with him other than to recommend an adviser to assist Mr King. Mr Pownall thought that it was unlikely that he saw any invoice relating to the Range Rover.

88. Mr Pownall was adamant in cross-examination that he did not know the details of the transaction:

> Q. Now, Mr Evans says -- he has given evidence this morning -- in his defence that you were fully aware of the arrangements made between TCH and Mr Evans in respect of the first Range Rover. Do you agree with that? A. No, that is absolutely and totally incorrect.
> Q. You say that Mr Evans is lying about that?
> A. I am saying that he is mistaken. I did not know anything about the arrangements that he had for those Range Rovers. I was never consulted about that and it was something that Steve Evans negotiated with the leasing company and I have no knowledge of it at all.
> Q. What I want to suggest to you is that you did know and you knew expressly about the concept of profit share, didn't you? A. No, I did not.
>
> (Transcript Day 3 page 125)

2016 - 2017

The appointment of Mr Zeidler

89. Mr Zeidler was appointed as a director (non-executive) on 29 September 2015 and as Chairman in May 2016. The relationship between Mr Zeidler and Mr King was acrimonious from the start. Mr King raised various objections to his appointment which Mr Zeidler addressed. Mr Zeidler thought that Mr King's opposition stemmed from a concern that, as an experienced commercial manager, he would be able to challenge

him on managerial matters and from the fact that he had been proposed by Messrs Stiefel and Fisher.

90. During 2016 and 2017 Mr Zeidler and Ms Shaw began to have doubts about Mr King's ability to run a Company with external investors. They considered that Mr King did not understand the responsibilities and duty of care that he owed to the other shareholders and debt providers, had little understanding of finances and that, although he paid "lip service" to the board, his management of the Company was as if he and his family still owned the business. Mr King disputes that these concerns had any valid foundation. It is not necessary for me to make findings as to whether the concerns about Mr King were justified. I am satisfied that they were genuinely held.

91. By March 2017 the position was coming to a head. Mr Zeidler emailed Mr King on 9 March about outstanding sales, revenue forecasts and asked for information to be provided by 17 March. On 10 March Mr King emailed Mr Zeidler in which he said:

"…my focus is very much now on not working together and finding a way to end this miserable and dysfunctional board and relationship. I've made that position clear today to Barry as well privately and my 100% focus will be on separation. …"

92. On 16 March 2017 Mr Zeidler sent Mr King an email complaining about Mr King's refusal to work with the rest of the board and the absence of an agreed budget. In an email in response dated 23 March 2017 Mr King said:

"*The reality is we are heading for a divorce but you seem to suggest I should be planning a strategy to buy the house and name the kids still*"

93. The issue of Mr King's performance and the appropriate way forward for KSSL was discussed with the non-executive directors at meetings on 14 March 2017 and 21 March 2017. Mr Zeidler assumed that in the event Mr King lost the Misrepresentation Proceedings, he would leave of his own accord and, in the event that chose not to leave, he would need to be removed in light of his conduct to date.

The collapse of the Misrepresentation Proceedings

94. The trial of the Misrepresentation Proceedings was listed for 20 days before Marcus Smith J in May 2017. On 15 May, day 10 of the trial, following cross-examination of the Kings' witnesses, they discontinued the claim, made a public apology (through their Counsel) in Court and agreed to pay indemnity costs to the defendants. The apology included an acceptance that the Kings had "got it wrong" and that this had unfortunately soured their relationship with the defendants and the Kirsh interests. The apology continued: "*This claim made serious allegations, but those allegations and the assault on the reputations of those involved are unreservedly withdrawn.*" Marcus Smith J made an order requiring payment of £1.7m on account of those costs.

95. Since the conclusion of the Misrepresentation Proceedings Mr King's stance with regard to the alleged misrepresentations which were the subject matter of the Misrepresentation Proceedings has changed again. The King family now contend that they were wrong to discontinue the Misrepresentation Proceedings. This has led to two further sets of proceedings. First, a commercial court claim against their own lawyers who acted for them in the Misrepresentation Proceedings in which they allege, amongst other things, collusion between their legal representatives and the legal representatives acting for the defendants and, second a Commercial Court claim against the defendants in the Misrepresentation Proceedings, their solicitors and Counsel alleging a fraudulent conspiracy to procure the discontinuance of the claim. They have also presented a section 994 petition against Primekings, Mr Fisher, Mr Stiefel and Mr Zeidler in which they allege, inter alia, that the respondents have engaged in a campaign against them by which they seek wrongfully to appropriate their shares in KSGL ("the Section 994 proceedings").

Aftermath of the Misrepresentation Proceedings

96. At a board meeting of KSGL on 17 May 2017 Mr Stiefel reported on the outcome of the Misrepresentation Proceedings, noting as follows:

"The Kings family's biggest asset is the company Ordinary & B shares, chances are that RF's shareholdings is likely to go up with the family losing some shares and Primekings increasing its shareholding. The downside of winning is that it increases responsibility, with 500+ families to think about, there is a lot of work to be done to get on track. A further cash injection may be needed as there is too much time spent on

managing cashflow. Information will need to be supplied to determine this. …The B shares only have value when there is cash and the family will get value out of that. It is not a case of victors taking the spoils and losers taking the toil at all."

97. At a board meeting of KSSL on the same day Mr Stiefel stated as follows;

"… up to the resolution of the court case there was a residual thought that things might go the other way, things will move forward dramatically now it is out of the way. There is the possibility of the shareholding increasing to 75-80%, which increases responsibility. We will look back at this moment in time as an inflection point."

98. On the same day, at a meeting attended by Mr Zeidler, Ms Shaw and Mr King, Mr King's departure from the business was discussed. Following that discussion, the parties entered into the Settlement Agreement dated 19 May 2017.

99. Mr King alleges that when discussing his departure from the business, Mr Zeidler stated that if the parties did not reach agreement, KSSL would investigate Mr King's mismanagement and that this would inevitably result in his dismissal. Mr King alleges that he asked, *"what mismanagement?"* to which Mr Zeidler replied, *"we'll find something"*. Mr King relies on this alleged threat to support his claim that this claim was issued for improper purposes.

100. Mr Zeidler does not recall the precise words he used and in particular whether or not he used the precise words "*we'll find something*" but accepts that it is possible that these words were used. He denies that this was a threat to manufacture or concoct material against Mr King. He says that it would not have made a lot of sense for him to have said "*we'll find something*" as the various issues had already been communicated to Mr King. When Mr King asked Mr Zeidler to identify the specific mismanagement to which he was referring, Mr Zeidler recalled telling Mr King that, if an agreement was not reached, KSSL was likely to undertake a full investigation which Mr Zeidler expected would set out sufficient evidence to dismiss Mr King.

101. Whatever the precise words used by Mr Zeidler, I am satisfied that he genuinely believed that KSSL would have no difficulty in establishing sufficient grounds for Mr King's dismissal. I reject Mr King's contention that the words used by Mr Zeidler indicated that KSSL was prepared to concoct allegations of mismanagement and/or other impropriety against Mr King, come what may.

The Settlement Agreement

102. The Settlement Agreement between KSSL and Mr King was entered into on 19 May 2017.

103. Under the terms of the Settlement Agreement KSSL agreed:

(1) to make an *ex gratia* payment of £70,000 less PAYE deductions to Mr King;

(2) to release Mr King from any claims under clause 10 of his employment contract which arose as a result of actions of which the board of KSSL or any group company had knowledge of as at the date of the Settlement Agreement;

(3) to pay Gordons LLP, Mr King's legal advisers, £2,000 plus VAT;

Mr King agreed to a 12 month non-compete provision in return for the payment by KSSL of £5,000.

104. Clause 10.1 of Mr King's employment contract provided:

> "*Where any losses are sustained in relation to the property or monies of the Company, client, customer, visitor or other employee, during the course of your employment caused through your carelessness, negligence, recklessness or through breach of the Company's rules or any dishonesty on your part, the Company reserves the right to require you to repay a part of, or the total amount of, the said losses, either by deduction from salary or any other method acceptable to the Company. The Company may also require you to repay any loans, damages, expenses or any other monies paid or payable by the Company to any third party for any act or omission for which the Company may be deemed vicariously liable on your behalf*."

Mr Pownall's knowledge

105. Mr King's case is that, by the time of the Settlement Agreement, Mr Pownall knew about the actions giving rise to the claims in these proceedings and that his knowledge is to be imputed to the board. In addition to the matters referred to at paragraph 86 above, Mr King relies in support of this case on:

(1) a reference in an email from Mr Zeidler on Friday 26 May 2017 to an ‘amnesty’ which had been granted; it was suggested that the amnesty was offered to Mr Pownall because Mr Pownall knew about the arrangements between Messrs King and Evans and TCH;

(2) the fact that on 13 June 2017 Mr Pownall forwarded to Katie Campbell Mr Telemacque's internal denial that he knew about the arrangements and said interesting', to which she responded 'yep!';

(3) the fact that in November 2017, on the day before he left KSSL, Mr Pownall arranged for a search to be made for emails in his mailbox referring to ‘profit share’.

106. Mr Pownall had no recollection of any reference to an amnesty in 2017. Mr King had asked him not to mention the fact that his father’s Porsche was owned by KSSL and on 30 May 2017 he provided Mr Zeidler a list of expenditure of which the board may have been unaware. He was, however, adamant that he had no knowledge of the detail of the Range Rover Transaction. Mr Pownall and Ms Campbell wondered whether Mr Telemacque had known more than he was letting on, hence the email exchange on 13 June 2017. A search for relevant documents was made of everybody’s emails, not just his.

107. I conclude that by the time of the Settlement Agreement Mr Pownall knew, as he did in 2015 - 2016, only that Mr King claimed to have the use of the Range Rover on a personal lease with TCH. He did not know about any details of the Range Rover Transaction.

Discovery of unauthorised expenditure

108. Shortly after the Settlement Agreement was entered into, information came unprompted to Mr Zeidler’s attention concerning unauthorised expenditure by Mr King and this led to further investigations.

109. On the evening of 22 May 2017, Mr Zeidler received a call from Mr Pownall, informing him that the Porsche used by James King, Mr King’s father, was owned by KSSL, not

by James King personally, and that KSSL was paying for two vans supplied to a church established by the King family. Mr Pownall had previously (in February or March) indicated to Mr Zeidler that he was aware of things that "would upset him more", but at the time he refused to clarify what those might be. Mr Zeidler assumed that this was the information that Mr Pownall had referred to previously. He told Mr Pownall that it was his responsibility to bring matters to the attention of the board and that if he did not do so this would amount to gross misconduct. He repeated this advice in an email dated 29 May 2017.

"*… I asked you to identify to me any other spending that was not directly related to the business and where it was unclear as to whether it was authorised or not. To have ignored that direct request would have been gross misconduct. As such, you should not consider yourself to have done anything inappropriate — including "directing" me towards any issue. …*"

110. Mr King alleges that Mr Pownall was threatened with dismissal if he did not disclose all he knew about Mr King to the board and that this was improper. Mr Pownall denied that any such threat was made and said that he agreed with what Mr Zeidler said in the email above. Mr Pownall suggested to Mr King in a text message that he had been threatened with gross misconduct but, as he explained in his witness statement, he did this so that Mr King would not hold anything against him personally.

111. On 23 May 2017, following his conversation with Mr Zeidler the night before, Mr Pownall emailed Mr Zeidler a list of further areas to consider following Mr King's departure. Mr Zeidler forwarded that list to Mr Forsyth (KSSL's newly appointed CEO following Mr King's departure).

112. In view of the investigations into possible unauthorised expenditure, KSSL decided that it would pay the £5,000 to Mr King, which it did on 31 May 2017, but that it would withhold the payment of £70,000 (less PAYE) pending further investigations.

113. The evidence of the non-executive directors, on which they were not challenged in cross-examination, was that, had they known about the Range Rover Transaction and other unauthorised expenditure discovered after the Settlement Agreement, they would not have approved of KSSL entering into the Settlement Agreement.

Summary dismissal of Mr Evans

114. On around 31 May 2017 Mr Forsyth called Mr Zeidler to say that he had just been informed by Mr Pashley, the Company's Procurement Manager, that Mr Pashley had been asked by Mr Evans to conceal certain information relating to unauthorised expenses, in particular, mobile telephones, on KSSL's account used by Mr King's family members.

115. As a result of the disclosure by Mr Pashley to Mr Forsyth, Mr Forsyth then met with Mr Evans and dismissed him for gross misconduct.

Discovery of the Range Rover Transaction

116. In the period 6 June 2017 to 13 June 2017 the arrangements concerning the Range Rover transaction came to the attention of KSSL's board, as follows.

(1) On 6 June 2017 Mr Pownall sent an email to Mr Fisher and Mr Stiefel in which he listed matters which had come to light since the previous week. He wrote, "*I do not yet have an answer to the question as to whether the leases for the Range Rovers were at arm's length. I have asked the leasing company to contact me to discuss.*" Mr Pownall contacted Mr Buckley at TCH to tell him that he was taking over from Mr Evans, working alongside Mr Telemacque. Mr Buckley told Mr Pownall that TCH needed the Range Rovers back if Mr Evans and Mr King had left as they were leased by TCH and briefly explained the details of the arrangements. Mr Pownall was taken back by what he was told. It was clear to him that Mr Buckley understood that the arrangements were improper and that because of Mr Evans' dismissal the fact of the arrangement would soon be revealed. Later on the same day (6 June 2017), Mr Pownall reported this conversation to Mr Zeidler.

(2) On 8 June 2017, Mr Pownall emailed Mr Zeidler to say that he had spoken to Mr Buckley again who had confirmed the Range Rovers provided to Mr King and Mr Evans were provided on a "permanent demonstration" basis, that TCH would not normally enter into such an arrangement but there was sufficient in the "profit

sharing arrangement" to allow TCH to make an acceptable return on the main vehicle fleet. Later on 8 June 2017, Mr Pownall emailed Mr Zeidler and other members of the board to explain that he had asked TCH for details of what a Range Rover would cost on an arm's length basis.

(3) On 13 June 2017, Mr Zeidler received an email from Mr Pownall forwarding an email that Mr Telemacque had received from TCH explaining that the Range Rover provided to Mr King was "…funded via your [KSSL's] profit share". Later that day Mr Zeidler was forwarded another email from Mr Telemacque which explained that he (Mr Telemacque) had been unaware of the arrangement relating to the Range Rovers and that he had been told by Mr Evans that it was part of his director's remuneration package; Mr Telemacque said that he would ask TCH for a forecast of what profit share should have been paid to KSSL. Mr Fisher replied, *"Will be interesting to see what we have overpaid*".

(4) On 14 June 2017, Mr Zeidler received an email from Mr Pownall with a revised schedule of unauthorised expenses, which at that point included the insurance costs for Mr King's Range Rover and estimated monthly lease costs.

117. I am satisfied that, prior to the disclosures referred to above, the board of KSSL (with the exception of Mr King and Mr Evans) did not know any of the details of the Range Rover Transaction.

Settlement offer to the Kings

118. On 9 June 2017 a meeting took place between Mr King's parents and Mr Stiefel and Mr Fisher at which they were told about the expenditure which had come to light. On the following day Mr King sent an email to Mr Stiefel in which Mr King accepted that he had paid less than the cost of hire of the vehicle and expressing contrition for his actions but claiming that he did not know how the balance of the cost had been paid.

119. In an email dated 13 June 2017 the Primekings representatives made a without prejudice offer to settle with Mr King on the basis that their costs excluding VAT

would be agreed in the sum of £2.7 million to be satisfied by the transfer to Primekings of the shares in KSGL owned by members of the King family and the family trust ("the King Family Shares"). The Primekings representatives also offered to pay to each of James and Susan King the sum of £1,000 per month for 5 years. This was intended as a clean break but the offer was not accepted by the Kings.

120. On or about 21 June 2017 charging orders were obtained over the Kings' homes and the King Family Shares (made final in August 2017) by way of enforcement of the costs order in the Misrepresentation Proceedings. The charging orders were followed by Part 8 proceedings which were commenced on 27 October 2017 in which Primekings sought an order for sale of the King Family Shares. Mr King alleges that in the Part 8 proceedings KSSL attempted to obtain the King Family Shares at an undervalue. This is denied by KSSL. The Kings subsequently paid the amount of the on-account costs order and the Part 8 proceedings were discontinued.

Mr King's texts

121. Following Mr King's departure from KSSL, he was in regular contact by text with Mr Evans. He was also in contact by email with representatives of KSSL by email in connection with the Range Rover Transaction. Mr King's case is that, in the course of these communications, he came to understand the true nature of the Range Rover Transaction. That case is not borne out by the texts which indicate that Mr King was already aware of the profit share arrangement and aware that the Range Rover Transaction was not an above-board personal lease with TCH, unconnected with KSSL.

122. The texts and emails include the following:

(1) On 5 July 2017, Mr Evans texted Mr King and told him he was returning his (Mr Evans') Range Rover to TCH. It appears that the car had in fact already been collected by TCH on 30 June. The reason given for returning was that he did not want to pay insurance on two cars (this may have been a true reason, given that there is no evidence that TCH had as yet asked for the car back). Mr King replied to Mr Evans (by text),

"*Do TCH want my car back then, have they said anything*?".

This text indicates Mr King's recognition that, since his role at KSSL had ended, TCH might want the vehicle back. This is at odds with Mr King's case that he believed that he had the use of the Range Rover pursuant to a personal lease with TCH. In cross-examination, Mr King was unable to give a satisfactory explanation.

Q. You've told his Lordship you believed this is a perfectly above-board personal lease for £100 a month?
A Yes.
Q. Nothing to do with KSSL. Why are you concerned that they might want the car back? You're paying the rental, what's the problem?
A. I can't recall why I said it, I mean but I'm obviously thinking: do TCH want my car back?
Q. Yes, because you knew perfectly well this was not above-board, didn't you?
A No I didn't know

(Transcript, Day 5, page 109)

(2) On 25 July 2017, Mr Pownall emailed Mr King asking him to arrange for the return of the Range Rover to TCH as soon as possible. Mr King replied the same day:

"*God Bless you Mark*".

Again, this is a strange text for Mr King to have sent if he genuinely believed that he had an above-board personal lease with TCH. TCH had no reason to ask for the return of the Range Rover. Mr King sought to explain away this text as a piece of sarcasm, sent at a time when Mr King was on holiday with his family. I consider that if Mr King had really believed that he had the Range Rover pursuant to a genuine above-board personal lease, he would have responded by refusing to return the vehicle or at least have set out his position to Mr Pownall. Mr King's evidence that he did not need to do so because Mr Pownall already knew about it is implausible.

(3) Following receipt of Mr Pownall's 25 July 2017 email, Mr King texted Mr Evans as follows:

"Just been told by Mark to return my car to TCH".

Mr Evans asked if Mr King had received a call and he confirmed that it had been done by email. Mr King commented:

"that's between TCH and me, it's up to TCH to cancel it".

Mr King's evidence was that this email shows that he believed he had a legitimate personal contract with TCH. I accept that Mr King believed that he had a personal contract with TCH but not that it was legitimate. He does not explain why he appears to have accepted that TCH might have a right to cancel the contract.

(4) Following an exchange of texts, Mr King asked Mr Evans:

"Have TCH said anything to you?" and then wrote:

"Unless they cancel the car Kings can't touch it".

Again, Mr King appears to recognise that KSSL has an interest in the vehicle, which it would not have had if the only contract was a personal one between Mr King and TCH.

(5) Mr Evans' response to these messages was as follows:

"Only that Kings what [sic] *them to look at the profit share but with all the vehicles that went back etc in past 12 months and also devalued used car market there is no money to share so they are providing the car for nothing basically which is perhaps why they want it back or Kings is pressuring them to get it back !!! I hear your dad gave the Porsche back last week. Have they let him keep the Mercedes still."*

(6) Mr Evans' reference to KSSL's profit share indicates that Mr King was aware of the use of the profit share to fund the Range Rover albeit that they incorrectly believed that the profit share had turned out to be zero and so the total cost (save

for Mr King's £100 per month) was in fact being met entirely by TCH. Mr King did not respond to this text with any expression of surprise or any question regarding the references to the profit share. In cross-examination Mr King was unable to give a coherent explanation as to how this text was consistent with his case that he was unaware of the use of the profit share. He sought to minimise the impact of the text by saying that he was on holiday when he received it and it was the evening time but it is clear that he read the text since he did reply to the final part of it, saying,

> *"They made them pay £2500 for mums car or asked her to hand it back"*.

(7) Later in the same text chain on 25 July 2017 Mr King wrote:

> *"My contract is a personal contract though isn't it. If I let Kings influence handing it back it looks like it was a benefit in kind and we will be taxed. Or it looks like a bribe. X"* and then,
>
> *"Sorry talking about the car, just need to try and keep it a couple of more months and hand it back on my terms nothing to do with Kings"*.

(8) Here again, Mr King's concern that the car might be seen as a benefit in kind and his wish to return the car on a basis that did not involve KSSL are difficult to reconcile with Mr King's case that he believed he had a personal lease with TCH which had nothing to do with KSSL. These texts are also significant in showing Mr King's awareness that the Range Rover Transaction looked like a bribe, notwithstanding his payment of £100 per month to TCH. Again, in cross-examination Mr King had no credible explanation for the texts and his explanation in cross examination for the reference to "bribes" (as harking back to a letter from KSSL's solicitors) was inconsistent with the explanation in his witness statement (which was that he was mindful of comments made about "bribes" at the meeting his parents had had on 7 June 2017).

(9) In response to Mr Pownall's email of 1 August 2017 chasing up the return of the Range Rover Mr King deployed the personal contract argument:

"*Hi Mark I have a personal contract in place with TCH and pay them personally for this vehicle, if they wish to cancel this contract then they need to contact me direct to let me know and the reason why*."

Mr Pownall replied the same day as follows:

"*Hi Anthony, The lease is actually in the name of Kings Security Systems Limited – please see attached. We have to return the vehicle to TCH. Can this please be done as soon as possible*"

(10) Mr Pownall attached the Short Term Rental Agreement dated 29 April 2015 signed by Mr Evans. It appears that this email came as a surprise to Mr King who was unaware of the Short Term Rental Agreement. Mr King's text message to Mr Evans following his receipt of Mr Pownall's email was as follows:

"The cars are in the name of Kings!" and *"I thought we had personal contracts"*.

To which Mr Evans responded:

"They can't be nothing was signed for them. We had the personnel monthly rental invoice."

(11) Mr Evans was incorrect to say that nothing had been signed for the Range Rover on behalf of KSSL as he freely admitted in his next email:

"To be honest didn't notice this as the time but more important its £100 a month as per agreement…"

and then:

"*Also you can show you have been paying it and been invoiced"*

Contrary to Mr King's case, these texts do not, in my view, show that Mr Evans was attempting to mislead Mr King. Mr King replied by email:

"Yep agreed, makes it messy for them (Kings)

I could have sworn I remember signing an agreement though, must have done for them to set us up on their system personally as a client.".

(12) In cross-examination Mr King was unable to explain the words "makes it messy for them" (which he did not mention in his witness statement):

Q.Why do you think it's good that it makes it messy for Kings, what's that about?
A. I'm not sure I can recall
Q. Look at your email.
A. I know.
Q. "Yep, agreed, makes it messy for them."
A. I'm not sure I can recall.
Q. It's because you knew full well that the personal lease document was a sham and you are seeking to obfuscate?
A. If I knew it was a sham, why would I be asking Steve to confirm I've got one?
Q. In other words, Steve, you did get that document sorted didn't you, that would give the appearance of propriety, that's what you're concerned about?
A. No.
Q. You can think of no explanation as to why you are taking some delight in the fact that the situation is messy for Kings?
A. I can't remember why I wrote that at the time.

(Transcript Day 5 page 134)

(13) There was then an exchange of texts with Mr Evans on 1 August 2017 concerning the lease documentation.

Mr King: *"My customer number at TCH is K0066 what was yours"*
Mr Evans: *"EO102 so its name as letter"*
Mr King: *"So set up as private clients then!!!"*
Mr Evans: "*Yeap as per invoices!!!"*.

These texts were concerned with the personal lease documentation. They do not indicate that Mr Evans was misleading Mr King as to the profit share arrangement.

(14) Mr King responded to Mr Pownall by email the same day. He wrote:

"*Hi Mark*
I wasn't aware of this as I didn't set this up.
I get invoiced directly to my home from TCH and so I believe there is a mistake here in who is the customer. Otherwise I would have simply been

paying back/reimbursing Kings on a monthly basis and not paying TCH direct.
I will contact TCH and arrange to have this transferred into my name asap."

(15) On 7 August 2017 Mr Pownall chased again by email for the return of the vehicle to TCH. He wrote, in that email,

"*The fact is that Kings have been paying for the lease since 2015 and continue to do so. The amount you are paying is only a nominal sum.*"

(16) This email undermined Mr King's and Mr Evans' belief that the profit share had turned out to be zero so that KSSL had contributed nothing to the cost of rental. Mr King forwarded the email to Mr Evans and wrote:

"Morning bro How can they say Kings were paying for our cars ???"

In his response to Mr Pownall's email, Mr King wrote:

"*Hi Mark I was not aware that Kings were also being invoiced for my vehicle as stated below, can you please provide copies of these invoices so I can take this up with TCH. I have no knowledge of this at all. I have my own unique customer number with TCH as did Steve*"

(17) This email appears to be an attempt to obfuscate in that Mr Pownall's email had not referred to invoices and, as Mr King knew, there were no invoices because the KSSL's contribution was made by means of the profit share, not cash payments.

(18) Mr Pownall responded by email the same day. At this stage Mr Pownall was under the impression that both Range Rovers were funded by increased prices for the Skodas:

"Hi Anthony,
What has happened here is that Steve set up an arrangement with TCH such that Kings is paying more for its existing fleet in order to fund the two Range Rovers. As long as you still have the vehicle the company is incurring additional costs which will be reduced when the vehicles are returned."

(19) Mr King forwarded this email to Mr Evans the same day with the following covering message.

> "*FYI*
> *Do you think Ken [Mr Buckley of TCH] has admitted this?"*

These words (which Mr King does not mention in his witness statement) are significant. Mr King does not ask Mr Evans whether what was said by Mr Pownall was true or confront Mr Evans as to why the arrangement was dishonest and different from the arrangement Mr King now claims he believed to have been in place. Again, Mr King's evidence in cross examination failed to give a credible explanation:

> Q."Do you think Ken has admitted this?" Those are not the words of an innocent man are they, Mr King?
> A. Those are -- I'm asking Steve, do you think TCH have, without his knowledge and my knowledge, been actually putting something on top of their invoices to actually fund the Range Rovers?
> Q. Not: is this true? That's assumed. Has Ken Buckley admitted it? You knew it was true, didn't you?
> A. No, I didn't know it was true.
> Q. What you're concerned about here is how the evidence is coming out, weren't you?
> A. I didn't know it was true and I'm concerned about some of the things that have been said, absolutely.
> Q. Why did you say -- why were you worried about whether Ken Buckley had admitted it?
> A. Because I'm wondering whether Ken Buckley or TCH have been loading up the cost of our vehicles on top of invoices without our knowledge.
> Q. But Mr Evans knows the truth, doesn't he?
> A. That's why I'm asking him.
> Q. Why don't you ask him: is this true?
> A. Well, I'm saying: is this what Ken's been doing?
> Q. No you're not –
> A. I am --
> Q. -- you're assuming it's true and asking if Mr Buckley has actually held his hands up and admitted it?
> A. Well, I am assuming Mark's not lying to me, so with Mark actually making these statements to me in his email, I'm saying is this what Ken has been doing?
> (Transcript Day 5 pages 144-145)

(20) In his response to Mr King's email, Mr Evans pointed out that Mr Pownall was incorrect insofar as Mr King's Range Rover was concerned since that was funded not by the Skoda uplift but by the profit share, which Mr Evans still believed to have been zero. He wrote:

> *"Yours was funded by their profit share scheme that was zero and no profit so basically, they are funding for free and the amount you pay direct so Kings aren't paying for it.*
>
> *I think its TCH that is pushing for it back if I'm honest as the profit share that was in place has cost them money."*

(21) This text indicates that Mr Evans believed he was reminding Mr King of something he already knew. Contrary to Mr King's case, Mr Evans was not seeking to hide the true arrangements from him. Mr King did not express any surprise at the information contained in the email even though on Mr King's case this was the first time that the profit share arrangement had been drawn to his attention. Mr King alleges in his witness statement that, after receiving Mr Pownall's email, he had a telephone conversation with Mr Evans in which Mr Evans explained the profit share arrangement. I do not accept that evidence. Had such an important conversation taken place I would expect it to be reflected in the text communications, which it is not.

(22) Moreover, the sequence of the texts and emails is revealing. Mr Pownall's email referring to the arrangement set up by Mr Evans (paragraph (18) above) was sent at 16:56. Mr Evans's email, referring to the profit share arrangement (paragraph (20) above) was sent some twenty minutes later at 17:16 as Mr King accepted in cross-examination. Yet in Mr King's reply to Mr Pownall, which is timed at 4:35pm but must have been sent at 17:35 (as Mr King also accepted), Mr King gave the impression that he was yet to discuss the contents of Mr Pownall's email with Mr Evans:

> *"...Hi Mark I will contact Steve also, as I find this very hard to believe."*

(23) Mr King's witness statement also sought to give the impression (consistently with this email) that when he sent it he had not yet conferred with Mr Evans in

connection with Mr Pownall's earlier email, although he had in fact done so. He had no explanation as to why he had created this false impression.

(24) In an email later on 7 August 2017, Mr Pownall informed Mr King that he had spoken to Mark Hammond, the managing director of TCH, who had confirmed that the Range Rover was not subject to a private lease and that Mr King was paying only a token contribution towards the cost of the vehicle with KSSL bearing the bulk of the cost. Mr King forwarded the email to Mr Evans with no request for an explanation or expression of any surprise, he simply asks,

"Do you know this Mark?"

It is to be inferred that Mr King wants to know whether Mr Evans has a relationship with Mr Hammond, presumably because he wants to know whether Mr Hammond knows about the Range Rover Transaction.

(25) Mr Evans stated in reply:

"Only met him once years ago. As they are making a loss on the returned vehicles I reckon that is why they are pushing"

(26) Mr King spoke to Mr Hammond on 8 August 2017 and reported back on his conversation to Mr Evans:

"Just spoke to Mark at TCH, really nervous on the phone and scared to say too much.
It was obvious there was not enough money in profit share scheme to cover the car and it's actually cost TCH money and not Kings."

Mr Evans replied:

"I know so how can Kings say they are paying for them. Gaynor has chased me for that certificate again"

Mr King responded:

"Exactly !! All they can say is if there was £4k in the profit share then they have lost out on that. They would have to show what the profit share was, its more than likely TCH lost out not Kings."

(27) These texts further indicate that Mr King is clearly well aware of the profit share arrangement and that this has come as no surprise to him. Mr King appears to believe that Kings will not have lost out or only up to £4,000. Mr King had no credible honest explanation for these texts in cross-examination and maintained that he was still unaware of any impropriety.

(28) In an email dated 8 August 2017 Mr King sought to give Mr Pownall the false impression that he had only just learned of the profit share agreement in connection with the Range Rover.

"*Hi Mark*

I have managed to now speak to both Steve and Mark to get a proper understanding of this.

Your comment that the company is in some way paying more for the existing fleet is not true, no additional charges were added or invoiced to Kings to cover my car.

It is in fact costing TCH money and the scheme that Steve put in place without my knowledge has not worked for TCH, Kings has in fact suffered very little if anything in the way of financial loss.

I was not aware of the scheme that Steve put in place with TCH, the details were kept from me and from you and I am not entirely sure Mark at TCH new either. I have arranged with Mark that I will return the car within the next 7 days."

.

(29) Later, after receiving the Particulars of Clam, Mr King texted Mr Evans to say:

"*They've got your emails between you and TCH*"

which suggests that he already knew about the emails. Mr King at no stage expressed surprise at what Mr Evans was alleged to have done which is what

was to be expected if he had been kept in ignorance of the profit share arrangements.

(30) The text exchange between Mr Evans and Mr King following the filing of Mr Evans' Defence confirms that Mr King was aware of the profit share arrangement at all material times. On 13 October 2017, Mr King wrote:

"I don't understand, you've said in your statement I was fully aware of everything".

This suggests surprise on Mr King's part that Mr Evans had said in his Defence that Mr King was aware of the profit share arrangement.

Mr Evans replied:

"You was aware we used the profit share to fund etc but like you said the other day at the time didn't take a lot of attention to it. Also I've said I signed the actual letter for yours and you didn't know the contents of the agreement.

There is also an issue with Kings bribery act that's its incorrect apparently and is a massive problem for Kings they are going to use in the next stage.

I have only told the truth on this and this is why Walker Morris I think separated us as it's the same I told them. I asked Alistair to check with your lawyers that everything was covered off.

Bro there is nothing in there that isn't true I promise you"

(31) There was no reason for Mr Evans to lie to Mr King about Mr King's knowledge, given that this was a private text between friends. He refers to a conversation they had "the other day" in which Mr King had acknowledged that he knew about the profit share agreement albeit he had not paid the point a lot of attention. Mr King himself accepted that there had been such a conversation. Mr King did not challenge what Mr Evans said in the text message. He claimed in cross-examination that he did not challenge this because he immediately took advice from his lawyers who told him to be very careful in his communications with Mr Evans. This explanation is implausible given the closeness of his

relationship with Mr Evans. In any event, Mr King and Mr Evans did subsequently message each other to discuss each other's defences.

(32) The fact that Mr King continued to have dealings with Mr Evans on a friendly basis, including planning to go into business with him, further undermines his current case that he had by this stage discovered that Mr Evans had misled him and betrayed his trust in connection with the Range Rover Transaction.

Meeting with TCH

123. On 21 July 2017 a meeting took place at KSSL's offices between Mr Forsyth and Mr Pownall on behalf of KSSL and Tony Coar and Mark Hammond on behalf of TCH to discuss the issue of the Range Rovers provided to Mr King and Mr Evans. The meeting was held on an agreed "without prejudice save as to costs and subject to contract" basis, at TCH's request.

124. Mr King relies on the meeting to establish either that KSSL accepted an offer by TCH to pay compensation of £60,000 to £70,000 with the result that KSSL has not suffered any loss as a result of the Range Rover Transaction. He contends, in the alternative, that TCH made an offer to pay this amount which KSSL did not accept and thereby failed unreasonably to mitigate its loss.

125. Before the trial, KSSL applied for directions as to the disclosure of documents relating to the meeting. It contended that the documents were privileged from disclosure because of the without prejudice nature of the meeting.

126. Miles J held that the documents were admissible under the second and sixth exceptions to the without prejudice rule as identified in *Unilever v Procter & Gamble Co* [2000] 1 W.L.R. 243. It was necessary to see the without prejudice documents in order to determine whether (i) a concluded agreement had been reached at the meeting with TCH and (ii) whether KSSL had failed reasonably to mitigate his loss in its conduct of negotiations with TCH. Following Miles J's order, further disclosure was given and further witness statements dealing with the meeting were served.

127. Mr Forsyth's evidence about the meeting was, in summary, that after he had set out

KSSL's position and TCH had responded, there was a discussion about the potential way forward to resolve the matter and avoid legal action. He wanted to make sure that all KSSL's losses were covered, which he estimated to be about £54,000 as well as to ensure that there was some kind of gesture of goodwill from TCH by way of a financial payment. TCH eventually put forward an offer of around £65,000 but on the basis that TCH was excluded from any legal action and also that TCH's name did not come up in any other legal action. The meeting ended on the basis that Mr Forsyth would get back to them. Mr Coar emailed after the meeting as follows:

"*It was good to meet with you and Mark today. I believe that we had a productive and positive meeting. Just to confirm, we will await to hear from you regarding the proposals in principle we discussed today once you have discussed further with your shareholders. ...*"

128. Mr Forsyth prepared a detailed note of the meeting for the board. This recorded, amongst other things, that he had made clear at the meeting that the discussions were about options to move forward and that nothing discussed on that day would be binding. Mr Forsyth remembers telling Mr Zeidler, Mr Fisher and Mr Stiefel that he thought the deal offered by TCH was as good as they were going to get, by which he meant that he did not think that TCH would budge on the sum offered.

129. On 26 October 2017 Mr Forsyth emailed Mr Fisher, Mr Stiefel and Mr Zeidler to remind them of the outstanding position but that the general view at the time was that any decision would be parked until the outcome of the litigation against Mr King and Mr Evans was known.

"*Just as a reminder I had negotiated the below settlement with TCH back in July at £65k listening to the legal view the other day it struck me as perhaps we need to close this out with TCH — I am not sure what the view is here but we wanted to remind you that we have not officially communicated back as yet to them. The other point is that as our fleet shrinks we may become less valuable and our negotiation position may weaken.*"

130. It is clear from the contemporaneous documents referred to above and the witness evidence that no concluded agreement was reached with TCH regarding compensation for the Range Rover Transaction.

131. Mr Zeidler explained in his witness statement why he considered that the proposal from TCH to compensate KSSL in the sum of £65,000, on the basis that KSSL's loss was £54,000, was not acceptable. At the time the offer was made, KSSL did not know the full extent of the financial consequences of the arrangements between Mr Evans, Mr King and TCH. He believed that the loss suffered by KSSL was greater than the figure of £54,000 and that it comprised (i) the profit share due to KSSL totalled £40,666.47 and (ii) the payment of an additional £39,900 by KSSL to fund Mr Evans's Range Rover; and (iii) the incremental cost of the exclusivity provided to TCH, limiting KSSL's ability to negotiate improved prices on its fleet in the sum of £73,728. He was also concerned about the tax implications of KSSL's financial assistance for the provision of the Range Rovers. The evidence of Mr Fisher and Mr Stiefel was similarly to the effect that they were concerned that TCH's offer did not cover all the losses incurred by KSSL. Mr Stiefel also considered that it was important to pursue Mr King and Mr Evans in order to demonstrate internally and externally that their behaviour would not be tolerated.

Initiation of the current proceedings

132. On 13 August 2017, after receiving notice of his removal as a director from KSSL, Mr King wrote to the KSSL board, quoting from the Bible and stating that his father was ill in bed. In his response, Mr Stiefel stated:

> "*You (and your Dad/mother) have brought all of this onto yourselves... Maybe the following needs reflecting on?*
>
> *Hosea 8:7 ……They have sown the seed, now reap the whirlwind*".

Mr Fisher (to whom the email was forwarded) replied to Mr Stiefel: "*Great reply!*".

Mr Stiefel did not dispute in cross-examination that the '*whirlwind*' was a reference to these proceedings.

133. The Claim Form was issued two days later on 15 August 2017. The decision to initiate the present claim was taken by KSSL's non-executive directors. After the claim had

been filed, it was decided that Ms Shaw and Mr Zeidler would have the overall lead on the claim.

134. KSSL did not send a pre-action protocol letter to Mr King. Mr Zeidler's evidence was that he took the view, based on his experience of Mr King's conduct, that sending such a letter and engaging in a pre-action process would be a waste of time and money as KSSL could see no honest defence to the claim and wanted to pursue it as quickly as possible. I accept that these were genuine reasons for not sending a pre-action protocol letter and that a pre-action protocol letter would probably not have caused Mr King to react any differently to the claim to the way in which he reacted after the issue of proceedings, which was to put forward what I have concluded was a false case. That does not, however, excuse the failure to send a letter.

135. On 31 August 2017 Mr King emailed Mr Stiefel pointing out that for KSSL:

> *"to issue a High Court action against Steve and I, without even trying to discuss it with us first, or trying to resolve and investigate the allegations, knowing that neither of them had the personal funds to defend such an expensive action, suggested that no consideration has been given for us to have the ability to defend ourselves and that KSSL brought this action relying on that fact they did not have the personal funds to be able to defend it and so place more pressure on myself, the King family and Mr Evans*."

136. Later that day Mr King received an eight-page letter before action intimating a further claim for around £400,000 in respect of his usage of an American Express card, mobile phones used by his family members, and insurance for personal vehicles. After the complaints in the letter were responded to by Mr King's solicitors on 13 October 2017, no further action was taken. Mr Zeidler accepted that KSSL was at some point advised that "*This won't stand up to court scrutiny*.".

IV. KSSL'S CLAIMS

137. The endorsement on the Claim Form reads as follows:

> "The claim relates to bribes received by the Defendants from the company from which the Claimant hires its fleet of vehicles ("TCH"). The First Defendant received the use of a Range Rover from TCH in exchange for which the Company (acting through the Second Defendant) agreed to forego various contractual payments from TCH and

agreed that it would use the services of TCH exclusively for three years. The Second Defendant received the use of a Range Rover from TCH in exchange for the Claimant agreeing to pay more for the hire of certain vehicles than it would otherwise. The Claimant was unaware of these bribes and contractual arrangements.

The Claimant claims declaratory relief; damages and/or equitable compensation; an account and enquiry and an order revesting in the Claimant any profits and benefits which accrued to the Defendants as a result of the bribes; an indemnity; rescission of the settlement agreement further to which the First Defendant's employment was terminated and restitution of sums paid further to that agreement and interest whether compounded or not further to the Court's equitable jurisdiction or section 35A of the Senior Courts Act 1981."

138. The Amended Particulars of Claim set out the duties owed by Mr King to KSSL pursuant to section 172, 175, 176 and 177 of the Companies Act 2006 ("the 2006 Act") and his contractual duties which included:

(1) A duty to carry out his duties faithfully, diligently and competently, to the best of his ability and without detriment to the company or any group company;
(2) A duty to comply with the company's rules, regulations, policies and procedures from time to time in force including those set out in the company staff handbook. The staff handbooks in force at the relevant times included a prohibition on the acceptance of bribes;
(3) A duty to comply with the company's anti-corruption and bribery policy and related procedures;
(4) A duty to report his own wrongdoing and any wrongdoing or proposed wrongdoing of any other employee or director of the company and any group company to the board immediately upon becoming aware of it;
(5) A duty not to offer, promise, give, request or agree to receive or accept any bribes in the course of his employment.

139. Paragraph 43 of the Amended Particulars of Claim set out Mr King's breaches of duty as follows:

"Mr King breached his fiduciary, statutory and contractual duties to KSSL by authorising Mr Evans to enter into the agreement dated 7th April 2015 and the First Rental Agreement with TCH on KSSL's behalf in respect of the First Range Rover and by gaining the use of the First Range Rover as follows:

(a) Mr King did not act in good faith or in the best interests of the Company: the Company received no benefit in exchange for TCH retaining KSSL's part of the Profit Share further to the agreement between KSSL and TCH set out in the letter of 7th April 2015, and it did not benefit from the three-year period of exclusivity in respect of TCH's services. The Company did not benefit from the First Rental Agreement. Mr King benefitted personally from both agreements.

(b) Mr King placed himself in a position in which his personal interests conflicted with those of the Company: it was not in the Company's interests to exchange the Profit Share and exclusivity in respect of the hire of its fleet of vehicles for Mr King's private use of the First Range Rover.

(c) Mr King received a benefit from TCH in the form of use of the First Range Rover in his capacity as director of the Company.

(d) Mr King failed to declare to the Company any interest in the transaction under which KSSL agreed to exchange its Profit Share and exclusivity in respect of the supplier of its hire vehicles for the hire of the First Range Rover.

(e) Mr King accepted the use of the First Range Rover from TCH, which was a bribe: it was an inducement made to Mr King as a director of KSSL in circumstances where TCH knew Mr King was a director. The provision of the First Range Rover to Mr King and/or the terms on which it had been provided was not known by KSSL (acting through its board of directors and/or shareholders).

(f) Mr King failed to comply with the Company's anti-bribery policy as set out in paragraph 2.8.5 of the KSSL Staff Handbook.

(g) Mr King failed to report his own wrongdoing and/or that of Mr Evans to the board of directors of KSSL immediately upon becoming aware of it.

140. The Amended Particulars of Claim also set out grounds for rescission of the Settlement Agreement, namely that it was induced by Mr King's misrepresentation by silence that neither he nor Mr Evans was in breach of his fiduciary, contractual or common law duties to KSSL.

Mr King's defence

141. Mr King's grounds of defence to the claim, as advanced at the trial, were in summary, as follows:

(1) The alleged bribe is denied. In order to constitute a bribe, a benefit must be received from a third party, not the agent's principal. It must relate to the recipient's position as agent, there must be some possibility of conflict of interest and it must be secret. None of these elements are present in the present

case. Mr King benefitted at the expense of KSSL not TCH and KSSL knew about the arrangements with TCH.

(2) The alleged breach of fiduciary duty is denied. No viable claim short of bribery has been pleaded. Only benefits provided by a third party have the capacity to engage the fiduciary duties codified in section 175 and 176 of the 2006 Act.

(3) The principle in *Re Duomatic Limited* [1969] 2 Ch 365 applies. The board of directors and Primekings were sufficiently aware of Mr King's Range Rover and/or acquiesced in the Range Rover Transaction such that it would be inequitable for them to deny that they had given their approval to his conduct.

(4) Even if the Court considered that Mr King was otherwise liable for breach of duty, he acted honestly and reasonably and ought fairly to be excused pursuant to section 1157 of the 2006 Act.

(5) The claim was settled under the terms of the Settlement Agreement dated 19 May 2017. The Settlement Agreement was not validly rescinded.

(6) KSSL has not suffered any recoverable loss. It either accepted the offer of compensation made by TCH or failed unreasonably to accept TCH's offer.

(7) The damages claim is denied.

V. ISSUES ARISING OUT OF THE CLAIM

142. The main issues arising out of KSSL's claim are accordingly as follows:

(1) Did the Range Rover Transaction constitute a bribe?

(2) Did the Range Rover Transaction give rise to breaches of fiduciary duty by Mr King?

(3) Was the Range Rover Transaction authorised by KSSL's shareholders?

(4) Ought Mr King fairly to be excused pursuant to section 1157 of the 2006 Act?

(5) Was KSSL's claim settled under the terms of the Settlement Agreement or was the Settlement Agreement rescinded?

(6) Should KSSL's damages claim be reduced by the sum agreed or offered by TCH in compensation?

(7) What damages are recoverable by KSSL?

Issue (1) Did the Range Rover Transaction constitute a bribe?

143. In his closing submissions Mr Downes put the claim of breach of duty at the forefront of KSSL's case rather than the claim of bribery which features prominently in the Claim Form. This was on the basis that the breach of duty claim is the more straightforward claim. I agree that it is more straightforward. I also note that (i) KSSL is not in practice claiming any monetary relief in respect of bribery over and above what is claiming for breach of duty, (ii) given my conclusions with regard to breach of duty, it is not necessary for me to determine the bribery claim as a separate cause of action; (iii) TCH are not a party to these proceedings and are not in a position to respond to the bribery claim (and would not be bound by my conclusions). KSSL did not, however, resile from the bribery claim and I propose to address it first.

144. In *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573, Slade J defined a bribe as follows:

> "For the purposes of the civil law a bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person's agent."

145. A bribe was succinctly defined by Leggatt LJ in *Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries* [1990] 1 Lloyd's Rep 167 at 171, as:

> "A commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal."

146. In *Fiona Trust v Privalov* [2010] EWHC 3199 (Comm), Andrew Smith J elaborated on the test for determining whether a payment or other benefit is a bribe, as follows:

> "73. The reason that the law so protects a principal if his agent receives a bribe is that he is entitled to be confident that the agent will act wholly in his interests, and the test for whether a payment or other benefit or promise amounts to a bribe depends upon whether it puts the agent in a position in which his duties to his principal and his interest might conflict. Accordingly:
>
> (i) It is not necessary that the bribe be given in connection with a particular transaction or series of transactions. The possibility of a conflict between duty and interest might be created by a bribe paid to an agent in order to influence him in favour of the person paying it generally and not directed to any particular matter or intended to influence him in relation to a particular transaction. In the Fiona action the claimants have sought to link payments made to Mr. Privalov and Mr. Borisenko and arranged by Mr. Nikitin to particular schemes about which they complain, but, as I shall explain, I conclude that they have not established connections of this kind. This does not mean that they are not entitled to rely upon the payments as bribes. If a secret payment is made to an agent, it taints future dealings between the principal and the person making it in which the agent acts for the principal or in which he is in a position to influence the principal's decisions, so long as the potential conflict of interest remains a real possibility: see *Daraydan Holdings v Solland*, [2005] Ch 115 at para 132.
>
> (ii) The law recognises that some gifts or benefits are too small to create even a real possibility of a conflict of interest and so too small to be treated as a bribe. The defendants say that some benefits that Mr. Nikitin is said to have provided to Mr. Skarga and Mr. Izmaylov were of insufficient value to be bribes, and were only what Gorell Barnes J called in *The Parkdale",* [1897] P 53, 58-9 "a little present". It is a question of fact depending on the circumstances of each case where the line is to be drawn between "a little present" and a bribe, and so unsurprisingly there is little guidance about this in the authorities, but the test, as I understand it, is whether it is sufficient to create a "real possibility" of a conflict between interest and duty: *Imageview Management v Jack*, [2009] 1 Lloyd's Rep 436 para 6 per Jacob LJ. It is not whether such a conflict is actually created.
>
> (iii) If a payment is made to an agent that creates a real possibility of this kind, it does not make "any difference whether the surreptitious profit was gained as a pure gift or for services rendered or for any other reason": *Keogh v Dalgety & Co Ltd.*, (1916) 22 CLR 402, 418. An agent might have a conflict between his interest and his duty as a result of being

rewarded for "moonlighting" for a person engaged in transactions with his principal."

147. In *Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3586*, at [106], Christopher Clarke J held as follows:

"A bribe encompasses not just a payment of money but the conferring of any advantage or benefit, and may be an actual benefit or merely the promise of a benefit held out by the payer or an expectation of one."

148. Mr Newman submitted, by reference to section 170 (3) of the 2006 Act (which provides that the general duties specified in sections 171 to 177 "are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director"), that the tort of bribery has been replaced, as far as company directors are concerned, by the general duties. As Mr Downes pointed out, if this were the effect of section 170(3) it would mean that, in a case of a bribe paid to a company director, the liability of the briber and the liability of the bribed director would be governed by different rules. In the absence of clear words, I do not consider that this was the intention of the legislator. Even if the effect of section 170(3) is to substitute the general duties for the tort of bribery, as Mr Newman contends, section 170(4) provides that "the general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties." The law relating to bribery therefore remains relevant. Advancing a separate cause of action in bribery where there are grounds for claiming a breach of section 176 of the 2006 Act may, however, add nothing more than colour.

(i) Benefit from TCH

149. The Range Rover Transaction is significantly different from the bribery transactions described in the authorities cited above in that the benefit received by the agent (Mr King), being the use of the Range Rover for a token rent of £100, was largely paid for by the agent's principal (KSSL), not by the alleged briber (TCH).

150. It was common ground between the parties that, in order for a benefit to constitute a bribe, it must come from the briber. The briber must do something giving rise to a "real

possibility of a conflict of interest". If a third party does no more than provide an agent with an asset on arm's length terms, there may be no risk of an agent feeling any sense of obligation to the third party so that the possibility of a conflict of interest may not arise.

151. Mr Newman submitted that in the present case TCH ensured that all its costs were met by KSSL via the profit share and via Mr King's monthly rental; TCH did no more than provide the Range Rover for which it was paid the market rate. Therefore, he submitted, TCH did not jprovide any relevant benefit to Mr King. He referred to the email from Mr Buckley to Mr Evans dated 24 February 2015 (paragraph 54 above) showing that TCH calculated the profit share which it stood to receive before agreeing to the transaction. He submitted that TCH "drove a proper bargain".

152. I accept that if all that TCH agreed to do was to supply a Range Rover fully paid for by KSSL/Mr King, the Range Rover Transaction might not have constituted a bribe. But Mr Downes submitted that TCH did provide a benefit to Mr King by (i) assuming the risk that the profit share might not cover the ordinary rental costs for the vehicle and (ii) breaching its own procedures in providing a "personal" (as opposed to corporate) lease. With regard to the cost risk borne by TCH, he referred to the fact that KSSL's profit share for 2014 was £11,000 whereas the ordinary rental cost of providing the Range Rover for the three year period covered by the Range Rover Transaction, based on Mr Buckley's estimate, was about £13,200 per annum (i.e. £1,200 per month less Mr King's contribution of £100). The profit share payable for the three year period turned out to be £40,666.47 (i.e. £13,555.49 per annum).

153. There is no direct evidence from TCH as to its calculation in April 2015 of the likely profit share during the three-year period covered by the Range Rover Transaction. I am nevertheless satisfied that TCH did provide a benefit to Mr King in the respects contended for by Mr Downes. It assumed a material risk that the profit share would leave a shortfall and provided a personal lease which it would not normally have done. Furthermore, the fact that TCH required Mr Evans to agree to exclusivity for three years indicates that TCH considered that it was providing a benefit for which it expected to be rewarded.

154. A further argument raised on behalf of Mr King was that the Range Rover was a company car rather than a personal benefit. KSSL did not challenge Mr King's evidence that the Range Rover was used 85% for business purposes. However, I reject the argument that it was not a personal benefit. KSSL had no interest in providing Mr King

with a luxury vehicle as opposed to cheaper alternative. This was clear from the way in which Mr King's car allowance was structured in his contract of employment, giving him an annual contribution of £850 per month to be spent at his discretion, as Mr King accepted in cross-examination.

(ii) Conflict of interest

155. Mr King, as the Chief Executive Officer of KSSL, was clearly in a position to influence the relationship between TCH and KSSL. The Range Rover Transaction personally benefitted Mr King and gave rise to a real possibility of a conflict of interest. Mr King's evidence in cross-examination that he did not have significant influence over all areas of KSSL's business and did not even have even potential influence over the relationship between KSSL and TCH was implausible:

> Q. In terms of executive control, I suggest to you, you had significant influence over all areas of the business?
> A. No, you run a company as a board. You make board decisions as to how to run a company.
> …
> Q. You had significant influence over all areas of the business, what is wrong with that?
> A. I don't think there is anything wrong with that. I am saying I had directors that worked alongside me and we ran the company together.
> Q. Do you agree with me that you had significant influence over all areas of the business?
> A. No, I wouldn't agree that I had that, no.
>
> (Transcript Day 4 pages 137 – 138)

> Q. Would you accept that you had potential influence?
> A. Did I have a potential influence?
> Q. Yes.
> A. Not in the relationship with TCH directly, no.
> Q. You won't even accept you had potential influence?
> A. That would have been stepping in between Steve and Jacob."
>
> (Transcript Day 4 page 156)

(iii) Secrecy

156. The Range Rover Transaction was not known about by the board of KSSL (see paragraphs 86 - 88, 107 and 117 above).

157. In these circumstances, I conclude that the Range Rover Transaction gave rise to a bribe received by Mr King. As noted above, I have reached this conclusion without hearing from TCH. My findings in relation to the bribery claim are relevant to my consideration of the claim for breaches of the general duties to which I now turn.

Issue (2) Did the Range Rover Transaction give rise to breaches of duty?

(i) Mr King's duties

158. Sections 172, 175, 176 and 177 of the 2006 Act include the following provisions:

> **172 Duty to promote the success of the company**
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.
>
> **175. Duty to avoid conflicts of interest**
>
> (1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
> (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
> (3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.
> (4) This duty is not infringed–
>
> (a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or
> (b) if the matter has been authorised by the directors.
>
> **176 Duty not to accept benefits from third parties**
>
> (1) A director of a company must not accept a benefit from a third party conferred by reason of–
>
> (a) his being a director, or
> (b) his doing (or not doing) anything as director.
>
> (2) A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate

177 Duty to declare interest in proposed transaction or arrangement

(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

(2) The declaration may (but need not) be made– (a) at a meeting of the directors, or (b) by notice to the directors in accordance with– (i) section 184 (notice in writing), or (ii) section 185 (general notice).

…

(5) This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question. For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware. (6) A director need not declare an interest– (a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest; (b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware);

159. Under Mr King's employment contract, he was required (amongst other things) to:

(1) comply with the KSSL's anti-corruption and bribery policy which prohibited the acceptance of any bribe or other inducement;

(2) report his own wrongdoing and any wrongdoing or proposed wrongdoing of any other employee or director of KSSL (therefore including Mr Evans) to the board immediately on becoming aware of it.

(ii) Breach of duty

160. Mr Newman's main argument in response to the breach of duty claims was that KSSL's claims were in substance claims in respect of the misappropriation of company property; he contended that a misappropriation of company property does not entail a breach of fiduciary duty because no third party is involved; a claim might have been brought for unauthorised expenditure in breach of Mr King's employment contract but such a claim was not pleaded. Mr Newman referred to KSGL's 2016 accounts in which the cost to KSSL of the Range Rover Transaction was treated as unauthorised remuneration.

161. I do not accept this submission. The fundamental rule underlying fiduciary duties is that a fiduciary is not allowed to put himself in a position where his interest and his duty conflict; see *Snell's Equity* (34th Ed) para 7-018. As held by Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch. 1 at 18:

> "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal."

162. A misappropriation of company property by a director would *prima facie* give rise to a conflict between the director's duty to the company and his personal interest, even though no third party is involved. If a fiduciary is misappropriating the assets of their principal, it is self-evident that they are not acting with single-minded loyalty, regardless whether a third party is involved. Similarly, participation in an arrangement under which company property is being misappropriated for the director's benefit would give rise to a conflict of interest. Whilst sections 175 and 176 of the 2006 Act require the involvement of a third party, sections 172 and 177 do not. Mr Downes referred to *JJ Harrison (Properties) Ltd v Harrison* [2003] BCC 729 as an example of a case in which a misappropriation of assets is treated as giving rise to breaches of fiduciary duty. This analysis is not affected by how the misappropriation was treated in KSGL's accounts. Contrary to Mr King's case, the claim for breach of duty is satisfactorily pleaded in the Amended Particulars of Claim.

163. I consider that the Range Rover Transaction entailed the following breaches of duty on the part of Mr King.

(1) By entering the Range Rover Transaction, which was for his own benefit and not that of KSSL but was at KSSL's expense, Mr King failed to act in good faith and in the best interests of KSSL, contrary to his duty under section 172.

(2) By accepting the Range Rover from TCH, Mr King accepted a benefit in his capacity as a director of KSSL contrary to his duty under section 176. As noted above in the context of bribery, the Range Rover was a benefit to him in that TCH

assumed the risk of a shortfall on the profit share and agreed exceptionally to a personal lease. It was a luxury car for which he paid a token rent. It was not used by him solely for company purposes. KSSL had no interest in his having a luxury car as opposed to a less luxurious alternative. He received that benefit in his capacity as a director of KSSL. TCH was KSSL's fleet supplier. There was a clear nexus between the granting of the benefit and the fact that he was a director of KSSL in a position to influence the business.

(3) Mr King failed to avoid a situation vis a vis TCH in which he had an interest that conflicted with the interests of KSSL, contrary to his duty under section 175.

(4) By failing to declare the nature and extent of his interest in the transaction, he acted contrary to his duty under section 177. There were KSSL board meetings on 2 April 2015 and 5 May 2015 at which he ought to have disclosed his interest but he failed to do so.

(5) By receiving a bribe and failing to report his own wrong doing, Mr King acted contrary to KSSL's anti-bribery policy and in breach of his contractual duties owed under his employment contract.

Issue (3) Was the Range Rover Transaction authorised by the shareholders of KSSL?

164. It was contended on Mr King's behalf that his general duties have effect subject to any rule of law enabling KSSL to give authority to anything that would otherwise be a breach of duty and that authority was given pursuant to the principle of implied unanimous shareholder consent under the *Re Duomatic* principal. It was contended that the board and all of the shareholders of KSSL were sufficiently aware of the Range Rover that they informally consented to the arrangement and/or ratified it.

165. As I have found, there is no evidence that, with the exception of Mr King and Mr Evans, the board or the shareholders were aware of the Range Rover Transaction prior to June 2017. There was no implied authority.

Issue (4) Were KSSL's claims within the scope of the Settlement Agreement?

166. It was contended on behalf of Mr King that KSSL's claim was settled pursuant to the Settlement Agreement. This was on the basis that:

(1) Clause 10.3 of the Settlement Agreement reads as follows:

> *"The Employer [KSSL] agrees to release the Employee [Anthony King] from any claims under clause 10 of the Employment Contract between the parties dated 20 December 2013 ("the Employment Contract") which arise as a result of actions of which the board of the Employer or any Group Company have knowledge as at the date of this Agreement."*

(2) The claims in these proceedings are claims under Clause 10 of the Employment Contract. Clause 10 provides for the recovery of losses sustained during the course of Mr King's employment caused through his carelessness, negligence, recklessness or through breach of the Company's rules or any dishonesty on his part;

(3) The board of KSSL, through Mr Pownall, was aware of the actions giving rise to the claims by 19 May 2017;

(4) It follows that the claims have been released.

167. KSSL's response is as follows:

(1) The claims for breach of fiduciary duty and breaches of sections 172 to 177 of the Companies and the claim for a declaration are not claims under clause 10 of the Employment Contract;

(2) The board of KSSL was not aware of the claims.

(3) It follows that the claims have not been released.

168. As to the first point, I consider that, contrary to KSSL's case, the terms of Clause 10 of the Employment Contract (see paragraph 104 above) were sufficiently broad to encompass all the claims in these proceedings.

169. As to the second point, the board was not aware of the claims by 19 May 2017.

170. It follows that KSSL's claims have been not been settled pursuant to Section 10.3 of the Settlement Agreement, irrespective of whether the Settlement Agreement has been validly rescinded.

Issue (5) Has the Settlement Agreement been rescinded?

171. Although I have found that the Settlement Agreement, correctly construed, does not apply to Mr King's claims in these proceedings, it is nevertheless necessary to consider whether it has been rescinded. This is because KSSL is relying on its purported rescission as the basis for claiming restitution of the sum of £5,000 which it paid to Mr King pursuant to clause 11.2 of the Settlement Agreement on 31 May 2017.

172. KSSL's case is that it is entitled to rescind the Settlement Agreement on the following grounds:

(1) Mr King owed a fiduciary and contractual duty to disclose his own wrongdoing and that of Mr Evans to KSSL.

(2) Mr King failed to report his own wrongdoing and that of Mr Evans at meetings of the KSSL board of directors on 2 April 2015 and 25 May 2017 or at any other time. He thereby represented by silence that neither he nor Mr Evans had committed any wrongdoing. Further, the standard agenda for KSSL board meetings includes an item entitled "Declaration of conflict of interest and any fraud concerns". When Messrs King and Evans confirmed at board meetings in respect of this item that there were no conflicts of interest or fraud concerns, they made representations to the KSSL board that they had not breached their fiduciary, contractual and common law duties to the Company. Those representations were false.

(3) There are no bars to rescission which is an appropriate remedy.

173. Mr King contends that the rescission claim should be dismissed on the following grounds:

(1) There was no actionable misrepresentation by Mr King. There was no wrongdoing to disclose.

(2) KSSL did not rely on the alleged misrepresentation. KSSL had its own reasons for entering into the Settlement Agreement which it would have done irrespective of what was said by Mr King

(3) Rescission is not available because:

i. KSSL affirmed the Settlement Agreement after it knew about the Range Rover Transaction;

ii. counter-restitution would have to be given as a condition of rescission being granted and this is not possible because Mr King's employment claims are now out of time;

iii. the rights of Gordons LLP to receive payment would be defeated.

174. The issues arising in connection with the claim to rescission are therefore:

(1) Was there a misrepresentation?
(2) If so, did it induce the Settlement Agreement?
(3) Is there a bar to rescission?

(i) Misrepresentation

175. Silence does not ordinarily amount to a positive misrepresentation but it can do so where the misrepresentor has a positive duty of disclosure in connection with the matter about which he has remained silent. In *Conlon v Simms* [2008] 1 WLR 484, Jonathan Parker LJ stated, at para 130:

"Non-disclosure where there is a duty to disclose is tantamount to an implied representation that there is nothing relevant to disclose"

176. Similarly, in *Ross River v Cambridge City Football Club* [2008] 1 All ER (Comm) 1028 Briggs J stated at para 194:

> *"*Although silence as to the material facts is not in general capable of constituting a misrepresentation, it may do so where the defendant is under a positive duty of disclosure, for example when negotiating a species of contracts regarded as *uberrimae fidei*, or where an existing relationship between the parties, such as a fiduciary relationship, imposes an obligation of disclosure."

177. As a fiduciary with a duty to act in good faith towards KSSL to promote the success of KSSL pursuant to section 172 of the 2006 Act, Mr King was under a duty to disclose to the board his own wrongdoings see *Item Software (UK) Limited v Fassihi* [2004] EWCA 1244. He was under a similar duty pursuant to his Contract of Employment to disclose any conflicts of interest or fraud concerns, including details of the Range Rover Transaction, of which the board was unaware. By not making any disclosures, Mr King impliedly represented that he had not committed any breaches of duty, conflict of interest or fraud concerns. That representation was untrue.

(ii) Inducement

178. The test for inducement of non-fraudulent misrepresentation is a "but for" test. Where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered the contract (or at least not on the same terms) but for the misrepresentation; see *Chitty on Contracts* (33rd Edition) para 7-039. It is not necessary that the misrepresentation be the sole cause which induced the representee to make the contract, provided it was one of the inducing causes; *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459, *Chitty* (ibid) para 7-038.

179. KSSL's case at the trial was that Mr King's misrepresentation was fraudulent in that he failed to disclose the arrangements concerning the Range Rover knowing that they should have been disclosed. The test for inducement of fraudulent misrepresentations is a looser one: was the misrepresentee materially influenced by the misrepresentation in the sense that it had *some* impact on his thinking? see *Chitty* at para 7-040 and *Ross River* at para 202. Thereafter, inducement is presumed; see *BV Nederlandse Industrie Van Eiprodukten v Rembrandt Entreprises Inc* [1920] Q.B. 551 at para 25.

180. The evidence of KSSL's non-executive directors Mr Stiefel, Mr Fisher, Ms Shaw and Mr Zeidler was that, if they had known about the underlying arrangement relating to the Range Rover, they would not have signed off on the Settlement Agreement and no agreement to pay any sums would have been forthcoming. That evidence is inherently plausible. It would be surprising if KSSL would have been willing to pay Mr King a substantial severance payment if they had been told that the hire of Mr King's Range Rover had been secretly funded by KSSL for two years. I reject Mr King's case that (in substance) such was the determination of KSSL to remove Mr King from the business in order to punish him and to leave him without remedies for unfair dismissal that no other factors operated on their minds. This evidence establishes reliance, even on the stricter test for non-fraudulent misrepresentations.

(iii) Bars to rescission

181. The right to rescind a voidable contract is lost when the party entitled to rescind, with knowledge both off the facts giving rise to the right to rescind and of the right to rescind itself, unequivocally manifests an intention to affirm once free from the effects of the vitiating factor; see *O'Sullivan, Elliott and Zakrzewski, The Law of Rescission* (2nd Ed) para 23.39, *Peyman v Lanjani* [1985] 1 Ch 457. Although the Court of Appeal decision in *Peyman v Lanjani* was concerned with a right to terminate a contract for breach of condition, rather than a right to rescind a voidable contract *ab initio*, the Court's reasoning indicated that the same knowledge of rights is required in both contexts. The decision has been subsequently treated as authority for the principle that affirmation of a voidable contract requires full knowledge of the right to choose to affirm or rescind; see *Chitty* (ibid) para 7314, *Moore Large & Co Ltd v Hermes Credit & Guarantee plc* [2003] 1 Lloyds Rep IR 315d.

182. Mr King contends that KSSL affirmed the Settlement Agreement by the following:

(1) The payment of £5,000 to Mr King pursuant to its terms on 31 May 2017;

(2) The payment of £2,000 plus VAT to Gordons LLP, Mr King’s lawyers, pursuant to its terms on 30 June 2017;

(3) The service of Points of Defence dated 18 April 2019 by Mr Stiefel, Mr Fisher, Mr Zeidler and Primekings in the Section 994 proceedings which positively rely on the terms of the Settlement Agreement;

(4) Continuing reliance by KSSL on the fact that Mr King's employment was terminated on 19 May 2017 included in its statutory accounts filed for the year ended 31 October 2016 which stated: "On 19 May 2017 the employment contract of Chief Executive Officer Anthony King came to an end", letters from KSSL and its solicitors to Mr King dated respectively 26 August and 31 August 2017 and a P45 dated 29 August 2017 (received by Mr King by post) with the "leaving date" stated as "19/05/2017".

183. In my judgment, none of the matters raised by Mr King amounted to affirmation.

(1) As at 31 May 2017, when it paid the £5,000 to Mr King, KSSL did not know about the Range Rover Transaction.

(2) By 30 June 2017, when it paid £2,000 plus VAT to Gordons LLP, the board knew of the facts relevant to the Range Rover Transaction but I am not satisfied that it knew of the right to rescind. Mr Zeidler's evidence in his witness statement, which I accept, was that KSSL only became aware of the right to rescind shortly before service of the Particulars of Claim.

(3) The Points of Defence in the Section 994 proceedings were filed on behalf of the Primekings representatives, not KSSL and are therefore not capable of constituting affirmation by KSSL. I understand that the Respondents have in any event made clear in draft Amended Points of Defence submitted to the Petitioners in 2019 that their reliance on the Settlement Agreement is necessarily conditional upon that Settlement Agreement remaining valid, which is a matter for this court.

(4) The two letters and P45 form did not amount to unequivocal representations as to the validity of the Settlement Agreement. Those documents recognised the termination of Mr King's employment and are consistent with the Settlement Agreement but it would, in my judgment, be wrong to regard them as amounting to an unequivocal manifestation of an intention to proceed with the

implementation of the Settlement Agreement. Mr King's employment by KSSL had come to an end and would have come to an end irrespective of the Settlement Agreement, given the breakdown in the relationship between Mr King and KSSL. The ending of Mr King's employment was a state of affairs which existed independently of the Settlement Agreement and recognition of that state of affairs could not reasonably have been understood as affirmation of the Settlement Agreement.

184. It is a bar to a claim for rescission that *restitutio in integrum* is impossible; see *O'Sullivan, Elliott and Zakrzewski* (ibid), para 18.01. The requirement is that the defendant should be put back into substantially the same position it was in at the time the contract was entered into. Mr King contends that there cannot be *restitutio in integrum* because any employment claims that he might have had at the time of the Settlement Agreement, and which were compromised under the Settlement Agreement, would be out of time.

185. The evidence indicates that Mr King chose not to pursue his employment claims after he was aware of KSSL's rescission (or request for rescission) of the Settlement Agreement and before those claims became time-barred. It follows that any loss of employment rights flowed from this decision rather than from the Settlement Agreement. He could have made a reference to ACAS to extend time for any employment claim at any time before 18 August 2017. He received the Particulars of Claim in the present proceedings, in which the claim for rescission is set out, on 16 August 2017. He sent a text message to Mr Evans on 18 August 2017 noting the rescission claim and expressing pleasure that, because the Settlement Agreement had been rescinded, he considered that this would mean he would be able to work with Mr Evans. He confirmed in cross-examination that he was receiving legal advice at the time and that he deliberately decided not to proceed with any employment claim on the basis of that legal advice:

"Q. You deliberately decided not to bring an employment claim didn't you?
A. Well, that would've been on legal advice"
(Transcript Day 6 page 42)

186. Even if this were not the case, I accept KSSL's submission that equity does not require *restitutio in integrum* to be precise. It is willing to give appropriate undertakings to the Court to enable any employment claims to be addressed. This would ensure that justice is done and remove any possible objection to rescission on the ground that *restitutio in integrum* is impossible.

187. Rescission is also barred where innocent third parties have acquired rights which would be defeated if the contract were set aside; see *O'Sullivan, Elliott and Zakrzewski* (ibid) para 20.01. Mr King contends that Gordons LLP's entitlement to and receipt of £2,000 plus VAT under the Settlement Agreement means that the rights of an innocent third party would be affected by the rescission.

188. Those rights would only be affected by rescission if KSSL sought recovery from Gordons LLP of the £2,000 plus VAT paid to it. KSSL has indicated that is does not intend to do so and is prepared to give an undertaking to that effect if necessary.

Appropriate remedy

189. Where a contract has been induced by misrepresentation, a party may rescind at common law or may seek rescission at equity from the Court; *Snell's Equity* at paras 15-011 and 15-012. As Longmore LJ stated in *Salt v Stratstone Specialist Ltd* [2015] 2 CLC 269 at para 24, "The normal remedy for misrepresentation is rescission…This remedy should be awarded if possible…". Whilst equitable rescission is a discretionary remedy, it should be granted unless there is a bar to rescission.

190. KSSL has established that Mr King's misrepresentation induced it to enter into the Settlement Agreement. There are no bars to rescission. I therefore consider that KSSL is entitled to rescind the Settlement Agreement and to repayment of £5,000.

Issue (6) Should Mr King be excused pursuant to section 1157 of the 2006 Act?

191. It is Mr King's case that, if he was in breach of duty as a director, he should be relieved of liability pursuant to section 1157 of the 2006 Act on the ground that he acted honestly and reasonably and, having regard to all the circumstances of the case, he ought fairly to be excused.

192. Given my findings as to Mr King's knowledge of the profit share arrangement and the impropriety of the transaction vis a vis TCH, there is no basis for the application of section 1157. Mr King did not act honestly and reasonably and there are no grounds upon which he ought fairly to be excused from liability.

Issue (7) Should KSSL's damages claim be dismissed or reduced by reason of TCH's offer of compensation?

193. As set out at paragraphs 123 – 131 above, at the meeting on 21 July 2017 between representatives of KSSL and TCH, KSSL was offered compensation of £65,000. Mr King's position is that as a result KSSL has suffered no recoverable loss because, the offer was more than amount claimed by TCH. By failing to accept TCH's offer, KSSL failed unreasonably to mitigate its loss.

194. KSSL submits that Mr King's argument is contrary to the principle that a victim of a tort has an absolute right as to which of two tortfeasors it recovers compensation. The fact that KSSL chose to sue Mr King rather than accept TCH's offer therefore has no bearing on its claim against Mr King.

195. The principle that a claimant is free to choose from which of two tortfeasors to recover compensation for a loss for which they are both liable, without regard to the doctrine of mitigation, was first established in *The Liverpool (No 2)* [1963] P 64. The facts of that case were that two vessels, the *Liverpool* and the *Ousel*, collided in the port of Liverpool. The Harbour Board had a statutory right to recover the cost of removing the wreck of the *Ousel* from its waters both from the owners of the *Liverpool*, who had been responsible for the collision, and from the owners of the *Ousel*. The sum for which the owners of the *Ousel* were liable was limited to £10,000 by reason of limitation of liability provisions available to those owners under the Merchant Shipping Acts. As against the owners of the *Liverpool* the prospects of recovery were stronger as her limitation fund was larger and was expected to pay about 30% i.e. closer to £20,000. The Harbour Board preferred to sue the owners of the *Liverpool*. The issue arose as to whether the Harbour Board was required to give credit for the sum tendered by the owners of the *Ousel*. The Court of Appeal held that it was not. Harman LJ giving the

judgment of the Court of Appeal held that, in claiming against the owners of the *Liverpool*, the Harbour Board was not required to give credit for the amount it could recover from the owners of the *Ousel*. Harman J's reasoning can be found at page 82:

"Let it be conceded that if the Board had recovered the £10,000 from the *Ousel* under its statutory power that would have been satisfaction pro tanto of the damages; still the fact is that the Board has not recovered this sum, and, in our judgment, there is no duty upon it to do so. It is true that at the trial of the issue the *Ousel* owners declared themselves ready to pay and in fact tendered the money, which is now on deposit with stakeholders, but we cannot see that this makes any difference, for the tender has never been accepted.

… this case, in our judgment, has nothing to do with the duty to mitigate. It concerns the Board's legal rights, and no duty rests on it at the demand of a tortfeasor to satisfy part of the damages by resorting to another tortfeasor; still less by resorting to an innocent party made liable merely by statute.

If it were otherwise there would be no necessity for the Law Reform (Married Women) and Tortfeasors Act, 1935, and the law about contributions between tortfeasors, for any tortfeasor could oblige the creditor to sue the other debtors in order to alleviate his burden."

196. The rationale for the principle was explained by Rix LJ in *Haugesund Kommune v Depfa Bank* [2011] EWCA Civ 33 at para 40:

"In my judgment, the principle in *The Liverpool* is not in doubt. If it were otherwise, no claimant with remedies against more than one defendant could ever get judgment against either, for each defendant could play off the claim against him by referring to the claim against the other. And where the claimant has sued only one out of a number of possible defendants, the litigation before the court would become embroiled in satellite litigation involving the alleged position relating to other parties. It is rather for the defendants involved to bring contribution or other similar proceedings against each other, or for the sole defendant to implead other parties if it is thought prudent to do so."

197. The principle is set out in *McGregor on Damages* (21st Edition):

"A claimant need not take steps to recover compensation for his loss from parties who, in addition to the defendant, are liable to him for the same loss

9-094 This is an undoubted principle and it is a principle which, strictly speaking, stands on its own feet independently of mitigation. It is mentioned here largely

> because it quite often becomes associated with mitigation in the minds of both judges and commentators. On this matter *The Liverpool (No 2)* is the central case. It was in this case that Harman LJ made the first clear statement of the principle, pointing out that otherwise it would have been unnecessary for the legislature to make provision for contribution and indemnity between joint and several tortfeasors. Indeed *The Liverpool (No 2)* goes as far as to show that, even if the third party offers payment of the amount for which he is liable, the claimant is not required to accept it in mitigation."

198. This passage was approved by Bryan J in *Natixis v Marex* [2019] 2 Lloyd's Rep 431 in which it was held that a claimant had not been obliged to take any steps to recover compensation for its loss from third parties who, in addition to the defendant, were liable to it for the same loss.

199. Whilst it might appear that the rationale for the principle given by Rix LJ (the avoidance of satellite litigation involving issues as to the liability of an alleged joint tortfeasor) does not apply to a situation where compensation has actually been offered by a joint tortfeasor, it is clear from the facts of *The Liverpool (No 2)* itself that the principle does apply to such a situation. This is confirmed in the passage from McGregor. The application of the principle to an offer of compensation avoids the need to consider, in this case, potentially complicated issues as to whether it was reasonable not to accept TCH's offer given that it was made in settlement of TCH's potential liability not only in relation to the Range Rover Transaction, but also in relation to Mr Evans's Range Rover.

200. It follows that TCH's offer of compensation is irrelevant to the assessment of KSSL's loss.

Issue (8) What remedies is KSSL entitled to?

201. KSSL is claiming damages to compensate it for the losses it has suffered by reason of Mr King's breaches of duty, comprising (i) the lost profit share in the sum of £40,666.47 and (ii) the cost of insuring the Range Rover in the sum of £2,126.25. I am satisfied that KSSL is entitled to damages for the lost profit share.

202. Mr King contends that KSSL was obliged to insure the Range Rover even if it was a benefit obtained in breach of duty and/or a bribe. This argument rests on clause 20.5.1 of his Employment Contract which states:

> "*The Company will … pay you an allowance of £850 per calendar month (the "Car Allowance") on condition that you provide a car for your use for business purposes in order to perform the duties of your employment. The Company will ensure that the vehicle is insured on its fleet policy"*

KSSL submits that Mr King was not entitled to require KSSL to insure his Range Rover pursuant to clause 20.5.1 because it was not a vehicle "provided" by Mr King (under clause 20.5.1 or at all). It was a vehicle provided partly by KSSL, partly by TCH.

203. In my judgment, Mr King did "provide" the Range Rover in the sense of making it available for business purposes, irrespective of how it was paid for. It follows that KSSL was obliged to pay the insurance on the car and is not entitled to recover the cost of insurance by way of damages.

204. As set out above under Issue 5, KSSL is also entitled to rescission of the Settlement Agreement and to repayment of the sum of £5,000.

VI. MR KING'S COUNTERCLAIM

205. Apart from a claim for payment of £70,000 pursuant to the Settlement Agreement, which cannot succeed given my decision as to the rescission of the Settlement Agreement, Mr King is counterclaiming damages on the basis that KSSL has committed the tort of abuse of process, as recognised in *Grainger v Hill* (1838) 4 Bing N.C. 212, by commencing and pursuing these proceedings for collateral and improper purposes.

206. These purposes are alleged to be:

(1) to enable its ultimate controlling parent company, Primekings, to obtain the shares in KSGL held by Mr King and the family trust, together with the B shares held by Mr King's parents at a gross and/or very substantial undervalue, by using these proceeding to place stress, distraction, financial and emotional pressure on Mr King whilst simultaneously pursuing charging orders and

subsequently Part 8 Proceedings against him, his parents, and the trust for the sale of the King Family Shares; and/or

(2) to inflict serious and gratuitous damage to Mr King's reputation, with the intention of thereby preventing him from obtaining any other employment commensurate with his experience and/or competing in future with KSSL's business, by using these proceedings to provide a platform for the purpose of publicising the allegations against Mr King herein as widely as possible.

207. Mr King's pleaded claim is that he has incurred the costs and expenses of defending the claim and damage to his reputation. There is also a claim for aggravated and exemplary damages.

KSSL's response to the Counterclaim

208. KSSL's case in response to the Counterclaim is, in summary, as follows.

(1) It is questionable whether the *Grainger v Hill* tort still exists as it has not been successfully invoked since the Judicature Acts. The case should now be seen as an instance of malicious prosecution, in which the pursuit of an unjustifiable collateral objective was evidence of malice, rather than as a separate tort.

(2) In any event, KSSL did not commence or pursue these proceedings for collateral and/or improper purposes. The decision by KSSL to initiate and pursue these proceedings was taken by KSSL's non-executive directors with the full knowledge of the executive directors in the best interests of KSSL for the proper purposes of seeking compensation from both defendants for the losses suffered by KSSL, vindicating KSSL's rights, protecting KSSL's reputation and showing that KSSL would not tolerate behaviour of the kind perpetrated by the defendants.

(3) Mr King has not pleaded or proved any recoverable loss.

VII. ISSUES ARISING OUT OF THE COUNTERCLAIM

209. The issues on the Counterclaim are accordingly:

(1) Is the *Grainger v Hill* tort of abuse of process still recognised in English law and, if so, what are the elements of the tort?

(2) Does the evidence establish that KSSL committed the tort?

(3) Has Mr King pleaded or proved any recoverable loss?

Issue (1): Is the Grainger v Hill tort still part of English law?

210. The facts of *Grainger v Hill*, in which the tort of abuse of process was first recognised, were, in summary, that the claimant had mortgaged his vessel to the defendant with the mortgage debt payable after a year. In the meantime, the claimant was to retain the register of the vessel in order to pursue his voyages. Before the date for repayment of the debt, the defendants, who were concerned about the sufficiency of their security, decided to get hold of the ship's register and for this purpose brought assumpsit proceedings against the claimant, threatening him with arrest unless he could provide bail or the ship's register. The claimant gave up the register and repaid the loan. He subsequently sued for the loss caused by his inability to carry on business because of the defendants' conduct. The defendants applied to non-suit the abuse of process claim on the ground, amongst others, that it had not been established that the original proceedings had been determined against them.

211. The Court of Exchequer Chamber dismissed the non-suit on the grounds that it was immaterial whether the defendant's proceedings had been determined and whether or not it was founded on reasonable and probable cause. Proof that the defendant's proceedings had been found to be without reasonable or proper cause would be essential elements for an action for malicious arrest or malicious prosecution but the claim in this action was for abusing the process of the law. The abuse consisted of applying the process of law for the ulterior purpose of obtaining by duress the ship's register, to which the defendants had no claim and which was not within the scope of the court's process.

212. A similar conclusion was reached in *Gilding v Eyre* (1861) 10 CBNS 592, although *Grainger v Hill* was not mentioned. The defendant brought proceedings in order to extort money which he knew had already been largely paid by the claimant under an

earlier judgment. The Court of Common Pleas rejected the defendant's contention that the abuse of process claim was not sustainable because the original proceedings had not terminated in the claimant's favour.

213. *Goldsmith v Sperrings Ltd* [1977] 1 WLR 478 is the first of a series of cases in the modern era in which the *Grainger v Hill* tort has been considered. Sir James Goldsmith brought proceedings against wholesale and retail distributors of the magazine, alleging libel. The distributors applied to strike out the proceedings as an abuse of process on the ground that the claimant's purpose in pursuing the action was not to protect his reputation but to destroy the magazine by cutting off its retail outlets. The application failed. The majority of the Court of Appeal (Scarman LJ and Bridge LJ) were not satisfied on the facts that the claimant's purpose was other than to vindicate his reputation.

214. Lord Denning MR held as follows (page 489C):

> "In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer."

215. Bridge LJ held as follows in relation to the concept of "collateral advantage" in the context of the tort of abuse of process (503F):

> "In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired by product of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it. But on the view I take of the facts in this case the question does not arise and it is neither necessary nor desirable to try to lay down a precise criterion in the abstract."

216. In *Digital Equipment Corporation and another v Darkcrest Ltd* [1984]1 Ch 512 Falconer J dismissed an appeal against the striking out of paragraphs in a Counterclaim which alleged that the proceedings, in which an Anton Piller order had been obtained on misleading evidence, were an abuse of process Falconer J questioned whether the *Grainger v Hill* tort had "passed into desuetude and disappeared" but held that, even assuming such a cause of action existed, the present claim was distinguishable on the facts as no question arose of the claimant seeking to abuse the process of the court for the purpose of obtaining property to which it had no right or any other improper purpose.

217. In *Broxton v McClelland and another* [1995] EMLR 485 Drake J had struck out a libel claim as an abuse of process on the basis that the claimant's objective was to secure the defendant's financial ruin. The Court of Appeal allowed the appeal against the strike out. Simon Brown LJ (with whom Nourse LJ and Waite LJ agreed) held as follows:

> "Rather than cite at length from these authorities, I propose instead to set out what I believe to be the central principles emerging from them:
>
> 1) Motive and intention as such are irrelevant (save only where "malice" is a relevant plea): the fact that a party who asserts a legal right is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point. As was said by Glass JA in *Champtaloup -v- Thomas* 1976 2 NSWLR 264,271 (see *Rajski -v- Baynton* 1990 22 NSWLR at p 134):
>
> "To impose the further requirement that the donee [of a legal right] must be actuated by a legitimate purpose, thus forcing a judicial trek through the quagmire of mixed motives would be, in my opinion, a dangerous and needless innovation."
>
> 2) Accordingly the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the Court's processes are being misused to achieve something not properly available to the Plaintiff in the course of properly conducted proceedings. The cases appear to suggest two distinct categories of such misuse of process:
>
> i) the achievement of a collateral advantage beyond the proper scope of the action - a classic instance was Grainger -v- Hill where the proceedings of which complaint was made had been designed quite improperly to secure for the claimants a ship's register to which they had no legitimate claim whatever. The difficulty in deciding where precisely falls the boundary of such impermissible collateral advantage is addressed in Bridge LJ's judgment in *Goldsmith -v- Sperrings Limited* [1977] 2 ALL ER 566,[1977] 1 WLR 478 at page 503 D/H of the latter report

ii) the conduct of the proceedings themselves not so as to vindicate a right but rather in a manner designed to cause the Defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.

3) only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to prevent a Plaintiff from bringing an apparently proper cause of action to trial. In my judgment even if one were here to impute to the Plaintiff the motivation of her maintainer, this would not be so clear and obvious a case as to justify striking it out at this stage."

218. In *Speed Seal Ltd v Paddington* [1985] 1 W.L.R. 1327, the Court held that a counterclaim in which the defendant alleged that proceedings for breach of confidence had been brought for the purpose of damaging the defendant's busines provided an arguable case of abuse of process for which permission to amend should be granted.

219. In *Land Securities plc and others v Fladgate Fielder* [2010] Ch 467 the Court of Appeal dismissed a strike out of a claim which asserted that the defendants' dominant purpose in bringing judicial review proceedings in connection with the grant of planning permission to the claimant had been to put pressure on the claimant to assist in the relocation of their business. Etherton LJ, with whom Moore-Bick LJ and Mummery LJ agreed, carried out a comprehensive review of the authorities, noting that *Grainger v Hill* itself and *Gilding v Eyre* were the only two recorded cases in which a claim of this nature had succeeded, both cases involving compulsion by arrest and imprisonment to achieve a collateral advantage. Etherton LJ concluded that there was no basis for extending the tort to judicial review or to a claim for pure economic loss beyond the heads of damage that must exist for the tort of malicious prosecution, that is to say, injury to the person, the costs of defending maliciously brought proceedings and damage to reputation.

"73. … What, in my judgment, emerges clearly from the authorities is that the tort is not committed by a person who institutes proceedings with a genuine interest in, and an intention to secure, their successful outcome, even if the claimant's motives are mixed and they hope that they may also achieve an objective not itself within the scope of the proceedings."

220. Moore-Bick LJ observed that, although rarely applied, the principle in *Grainger v Hill* has never been seriously doubted but that the tort of abuse of process now has a much reduced role following the abolition of arrest in support of civil proceedings and the

introduction of a power to award costs when it is in the interests of justice to do so. Mummery LJ was hesitant about placing too much reliance on *Grainger v Hill*, without doubting the correctness of the decision on its facts, as a good guide to the shape of a tort for abuse of process by an application for judicial review.

221. In *JSC BTA Bank v Ablyazov and others* (No 6) [2011] 1 WLR 2996 the defendants applied to stay the proceedings on the basis that they were being pursued by the bank for a collateral purpose, namely to damage the defendant's reputation, diminish his wealth and assist his elimination as a political opponent of the president of Kazakhstan. Teare J addressed the issue of whether a claimant who has two purposes for commencing proceedings, one legitimate and the other illegitimate, commits abuse of process by commencing the proceedings. In *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 469 it had been suggested that if the predominant purpose was illegitimate the proceedings would be an abuse whereas in *Goldsmith v Sperrings Ltd* Bridge LJ had indicated that they would not be. Teare J preferred the approach of Bridge LJ: if one of two purposes is legitimate, the claimant should in principle be entitled to proceed with his claim, so avoiding the need to embark upon the difficult exercise of establishing which of two purposes is the claimant's predominant one. Teare J therefore concluded on the facts that, even though it was arguable that the President of Kazakhstan had caused the directors of the claimant bank to bring the proceedings predominantly for the collateral purpose alleged by the defendants, the application for a stay could not succeed because the bank had a legitimate reason for bringing the proceedings, namely to recover the assets which it alleged the defendant had misappropriated.

222. In *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17 the defendant insurers had brought proceedings in fraud with the predominant intention of destroying the claimant professionally. The Privy Council agreed with the first instance judge that, since it was not alleged that the defendants intended to achieve his destruction other than through the initiation and successful prosecution of the action, the action had not been brought for a purpose other than that for which it was intended.

223. Lord Wilson held as follows:

> "63. What is an improper purpose? A helpful metaphor suggested by Isaacs J in the High Court of Australia in *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35, 91, is that of a stalking-horse:
>
> If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim on which the court is asked to adjudicate they are regarded as an abuse of process for this purpose . . ."
>
> The metaphor aids resolution of the conundrum raised by the example of a claimant who intends that the result of the action will be the economic downfall of the defendant who may be a business rival or just an enemy. If the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall or some other disadvantage to the defendant or advantage to himself by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper."

224. On the question of whether a subsidiary legitimate purpose negatived abuse even if the predominant purpose was illegitimate, Lord Wilson disagreed with Teare J on the ground that his conclusion failed to allow for the ease with which a claimant with a predominantly improper purpose can point to a legitimate purpose, however slight (para 65).

225. Lord Wilson's conclusion was as follows:

> "79. Sagicor did not commit the tort of *abuse of process*. Henderson J found that the predominant factor which led Sagicor to allege fraud and conspiracy against Mr Paterson had been Mr Delessio's obsessive determination to destroy him professionally. But he did not proceed to find that Mr Delessio intended to achieve Mr Paterson's professional destruction other than through the initiation and successful prosecution of the action. One can only speculate why, in that he was aware that Mr Purbrick's reports were not a proper basis for the allegations, Mr Delessio anticipated that the action would succeed. But Mr Jacob failed in his attempt to persuade the Court of Appeal that the judge should have found that Mr Delessio, and thus Sagicor, had no intention of bringing the action to trial. In the absence of a finding of that character Mr Delessio's purpose cannot be regarded as outside the scope of the action." 226. In *Willers v Joyce* [2018] AC 779, the claimant brought proceedings seeking damages for malicious prosecution following the discontinuance of earlier proceedings brought by the defendant against the claimant for fraud. The judgments of the Supreme Court are mainly concerned with the scope of the tort of malicious prosecution, which it was held, extended to civil proceedings, but they also include observations on the *Grainger v Hill* tort. Lord Toulson (delivering the majority judgment) queried whether the tort existed as a separate cause of action at all (albeit without finally deciding the point):

> "25. *Grainger v Hill* has been treated as creating a separate tort from malicious prosecution, but it has been difficult to pin down the precise limits of an improper purpose as contrasted with the absence of reasonable and probable cause within the meaning of the tort of malicious prosecution. This is not entirely surprising because in *Grainger v Hill* itself there plainly was no reasonable or probable cause to issue the assumpsit proceedings, since the debt was not due to be paid for another ten months as the lenders well knew. It might be better to see it for what it really was, an instance of malicious prosecution, in which the pursuit of an unjustifiable collateral objective was evidence of malice, rather than as a separate tort. … It is unnecessary to express a firm view on this point, but Grainger v Hill does at any rate illustrate the willingness of the court to grant a remedy, in what it regarded as novel circumstances, where the plaintiff had suffered provable loss as a result of civil proceedings brought against him maliciously and without any proper justification."

227. Since *Willers v Joyce*, the continued existence of the tort of abuse of process (as distinct from that of malicious prosecution of civil proceedings) has been recognised by Nugee J in *Holyoake v Candy* [2017] EWHC 3397, para 413.

228. The following propositions can be extracted from these authorities.

(1) The tort is recognised as part of English law although a claim based on the tort has only succeeded in two reported cases: *Grainger v Hill* in 1838 and *Gilding v Eyre* in 1868. In a number of recent cases, its usefulness has been doubted in view of the Court's powers to control abuse of process and the overlap of the tort with the tort of malicious prosecution but they do not firmly decide that the tort no longer exists.

(2) The tort of abuse of process is committed when legal proceedings are brought for an ulterior purpose which is not within the proper scope of the legal process, e.g. for the purpose of extorting the defendant's property.

(3) The tort can be committed irrespective of whether the legal proceedings in question were determined in the defendant's favour.

(4) The bringing of legal proceedings for the purpose of achieving the natural consequences of the litigation, such as a defendant's financial ruin, is not an improper purpose.

(5) Motive and intention, e.g. the personal antagonism of a claimant towards a defendant, are in themselves irrelevant.

229. There are conflicting authorities on the question of whether the tort can be committed where the claimant has mixed purposes. It was submitted on behalf of Mr King that I should follow the approach of the Privy Council in *Crawford v Sagicor* and hold that the tort is committed if the predominant purpose is improper rather than the contrary approach of Teare J according to which a proper purpose negatives an improper one. Given my findings on the facts, both approaches lead to the same result and it is not necessary for me to choose between them.

Issue (2): Does the evidence establish that the proceedings were brought for an improper purpose?

230. KSSL does not suggest that the purposes of the proceedings alleged by Mr King (namely the enabling of a purchase by Primekings at an undervalue of the King family shares and/or the causing of gratuitous damage to Mr King by permanently damaging his reputation and employment prospects) are other than improper purposes. The issue to be determined is therefore whether the evidence establishes that the proceedings were either or both of these purposes.

Matters relied on by Mr King in support of the first alleged purpose

231. Mr King relied on the following allegations in support of his case that the purpose of KSSL in issuing this claim was to pressurise the King family into giving up their shares at an undervalue:

(1) Primekings always intended to obtain the King Family Shares, as was made clear by the terms of the settlement offer made on 13 June 2017 (paragraph 119 above) and board minutes on 27 March 2018 which record Mr Zeidler as reporting on the Part 8 proceedings and noting that

"*It is expected that PKH will hold 100% of the shares by the end of April. Once resolved it would be possible to restructure the capital base of the company for an extra capital injection, the Cougar & Securenett proposition all become*

possible. Presently PKH are being asked to take 100% of risk for 60% of the business."

(2) Since the consistent goal was to get the shares, it is a reasonable inference that this was the specific goal of those controlling KSSL when sanctioning the spending of money on preparing and issuing a claim on 15 August 2017. The only possible upside in that regard was the obtaining of the King Family Shares. Mr King was known to be 'cash' impecunious at the time. KSSL knew that there was an offer of cash available from TCH at the date of issue in excess of the realistic value of the claim. Mr Pownall had also pointed out that KSSL could "self-help" by deducting money from the £70,000 payable pursuant to the Settlement Agreement. All these options were turned down.

(3) The sum now being sought was admitted by Mr Zeidler to be comparative 'chicken feed' to KSSL and was much less than KSSL's irrecoverable costs from very early in the case.

(4) KSSL has employed numerous pressure tactics including internal investigation aimed at finding dirt on Mr King, immediately following an assurance on 17 May: "we'll find something" threats to Mr Pownall, defaulting on the Settlement Agreement, sending an 8 page letter of claim, obtaining a charging orders over the shares and then seeking to obtain them at an undervalue in the Part 8 proceedings, exerting costs pressure, most obviously with a statement in KSSL's accounts that the costs were £1,227,000 up to 30 July 2019 and then with an attempt to raise the budget at the PTR by £630,000.

(5) The lack of notice of these proceedings given to Mr King, someone the directors were in regular contact with at the time, was only consistent with an intended 'shock' effect, which would only be desirable in case issued to create pressure.

(6) Mr Stiefel's phrase 'reap the whirlwind' (paragraph 132 above) is not a phrase that would be used to describe proper process; it would be used by someone to describe something anticipated to be improper and oppressive.

(7) The proper purpose of the proceedings contended for by KSSL (namely the objective of establishing the truth) is not borne out by the conduct of KSSL in

relation to these proceedings. Mr Zeidler described the fact that Mr King had obtained funding enabling him to be properly represented was the 'most unfortunate' aspect to how the claim developed. Witness statements have been drafted by KSSL's legal team without regard for the truth, witnesses have been pressurised into not giving evidence in support of Mr King or to give false evidence. The truth could have been best established by talking to Mr King, but KSSL did not want the truth. Mr Zeidler on 1 November 2018 told Mr Volpe that: "*Our preferred outcome of the search is to show that AK did receive the forwarded e-mails*".

(8) There is a considerable body of circumstantial evidence KSSL is willing to misuse Court proceedings as a tool to achieve its commercial goals. These include:

(a) Trying to dissuade VSG from hiring Mr King (a commercial decision) KSSL by threatening legal process to achieve entirely collateral commercial objectives;

(b) During the trial KSSL's counsel asking Mr King if he wished to 'change' the evidence he gave to Marcus Smith J which can only have been to gain a collateral advantage for use in other proceedings;

(c) Claiming privilege in respect of the TCH offer in an attempt to ensure that the Court did not know about it;

(d) Intimating to Master Cousins that he might be reported to the Judicial Conduct Investigation Office if he did not issue his judgment;

(e) Writing to AIG, who were funding Mr King's legal costs, warning them that they might be held liable for the costs of the proceedings with the aim of making AIG believe that it was not in its commercial interests to continue to fund the Defence of Mr King;

(f) Through Counsel, pressurising witnesses into changing their answers, for example Mr King being repeatedly asked 'yes or no' if he had influence, and Mr Pownall being asked six times whether there could be other reasons why KSSL did not accept the TCH offer;

(g) Through Counsel, intervening to stop particularly damaging answers emerging, in particular during the cross-examination of Mr Pownall.

232. In my judgment these allegations fall far short of establishing that these proceedings have been brought for the purpose of enabling Primekings, through pressure on Mr King, to obtain the King Family Shares at an undervalue. This is for the following reasons.

233. First, the fact that in 2017 Primekings and its representatives were interested in acquiring the King Family Shares does not support the inference that the purpose of these proceedings was to enable that objective to be achieved, still less to be achieved by obtaining the shares at an undervalue. Following the collapse of the Misrepresentation Proceedings, Primekings and its representatives had the benefit of a costs order in their favour in the sum of £1.7 million with detailed assessment to follow, which they were entitled to enforce. They quite understandably proposed to satisfy that liability by obtaining a transfer of the Kings' only substantial asset apart from their homes, namely the King Family Shares. Having sought unsuccessfully to reach a settlement agreement on terms that the shares were transferred, they obtained a final charging order over the King Family Shares on 3 August 2017. By the time these proceedings were started on 15 August 2017, they were therefore in a position to bring Part 8 proceedings to obtain an order for sale of the shares. The current proceedings were not needed in order to enable Primekings to obtain the King Family Shares and did not further that objective in any way.

234. Second, whilst there is no doubt that costs spent by KSSL on these proceedings, which I understand are in the region of £2.5 million plus VAT, are grossly disproportionate to the relatively small amount at stake, this does not support the contention that the proceedings were brought for the purpose of obtaining the King Family Shares. The evidence of KSSL's witnesses, which I accept, was that when the claim was launched it was anticipated that the claim would be relatively straightforward and swift to resolve. Once the costs had increased substantially, KSSL was not prepared to discontinue and expose itself to an adverse costs order. The costs of proceedings have been significantly increased by Mr King's counterclaim. The willingness of KSSL to spend such large sums on the proceedings and the failure to accept TCH's offer of compensation indicates that these proceedings were not brought for the predominant purpose of obtaining compensation but not that they were brought for the improper purposes alleged by Mr King.

235. Third, the criticisms made of KSSL's conduct of these proceedings do not provide any real support for Mr King's case that KSSL's predominant purpose in bringing the proceedings was the improper one alleged.

236. As already noted, I accept Mr King's contention that KSSL ought to have sent a pre-action protocol letter. There was no good explanation for its failure to do so. I do not, however, believe that KSSL was thereby attempting to put additional pressure on Mr King. I accept that a pre-action protocol letter was not sent for the reasons put forward by Mr Zeidler (paragraph 134 above).

237. KSSL accepts that it should not have resisted disclosure of the Master Lease document after it was requested, without the need for Mr King to make a specific application for disclosure. There has been no satisfactory explanation for its delay in providing disclosure. That said, I consider that Mr King overstates the importance of the Master Agreement. The Master Agreement does not provide powerful support for Mr King's case that he had a personal lease. It is not in the form of a personal lease. It sets out terms between TCH and a commercial leaser of multiple vehicles and does not mention the Range Rover or the hire charges. The document is consistent with an intention to conceal the true arrangements with sham paperwork. The fact that the document was eventually disclosed is at odds with the suggestion that KSSL was intent on concealing it and misleading the court.

238. The letter to AIG threatening a third-party costs order, though misguided, was not improper. I do not accept that KSSL's intention was to frighten AIG into stopping funding Mr King's defence rather than to indicate that KSSL would seek to hold AIG responsible for its costs.

239. The letter to the Court seeking an assurance as to when Deputy Master Cousins' judgment would be ready, with a threat to report to the Judicial Conduct Investigation Office, was also inappropriate but it was not, in my view, improper and it does not support the inference which Mr King seeks to draw as to the purpose of the proceedings.

240. The assertion that KSSL's witness evidence was deliberately drafted in order to mislead the court is a serious allegation for which there is, in my judgment, no valid foundation. Mr Newman's closing submissions refer to various discrepancies between the witness statements and the oral evidence. Such discrepancies are commonplace and come

nowhere close to showing an intention to deceive on the part of the witnesses or KSSL's solicitors. Similarly, the assertion that witnesses had been pressured not to give evidence or to give false evidence was unsubstantiated. There was no basis for the serious assertion that Mr Pownall had been "put under pressure to give false evidence" other than the fact that his evidence was critical of Mr King whereas, as a colleague, he had been supportive. Mr Evans denied Mr King's claim that he had been asked to lie by KSSL's solicitors. The criticisms of the way in which cross-examination had been conducted by Mr Downes were similarly unfounded.

Second alleged purpose: to damage Mr King's reputation

241. Mr King relies on the following allegations in support of his case that the predominant purpose of KSSL in issuing this claim was to ruin his reputation and employment prospects:

(1) KSSL intended that Mr King would not be in a position to defend the claim (it is common ground he was known to be impecunious) and intended to use a bribery declaration obtained by default to ruin Mr King's ability to work in the market.

(2) Even if he did not 'fold' immediately, third parties could be told 'honestly' about the claim, in the knowledge that such third parties would assume that such a serious claim (seeking a declaration that a bribe had been taken) would only have been brought in a responsible fashion following the most anxious of scrutiny of the evidence (something that, according to Mr King, KSSL knew had not happened).

(3) The intention to damage his ability to work is clear from a number of pieces of evidence, including:

(a) communications with VSG, a potential employer in relation to which Mr Zeidler noting that "*the Bribery charge would colour their perception if it was considered serious"*:

(b) Board minutes on 27 February 2018 recording Mr Stiefel as stating (with reference to the industry body Association of Security Consultants ("ASC") – *"a reference should be given with it being honest and alerting those receiving it of the litigation."*

(c) a letter to Mr King from KSSL's solicitors dated 8 March 2018 threatening to injunct Mr King for breaching the restrictive covenants in the Shareholder and Subscription Agreement entered into with Primekings and KSGL dated 20 December 2013.

242. Again, these allegations fall far short of establishing that these proceedings were brought for the purpose of ruining Mr King's employment prospects.

243. It is clear that KSSL intended to hold Mr King to the restrictive covenants in his Shareholder and Subscription Agreement as it was entitled to do. It does not follow that the purpose of these proceedings was to interfere with his employment prospects.

244. If KSSL's predominant purpose in bringing these proceedings had been to ruin Mr King's reputation and employment prospects, I would have expected it to seek to generate media interest in the proceedings. It is not suggested that it has done so. In fact, it appears to have gone out of its way not to publicise the proceedings in order not to damage its own reputation. According to a board minute dated 30 November 2018, it was agreed that, should anyone ask about the claim, they should be referred to Mr Zeidler and any comments kept neutral and minimal. It is Mr King who has sought to generate media interest in the proceedings. In December 2019 he contacted a documentary maker at ITV to make a programme about the dispute with KSSL who attended one of the hearings and is, according to Mr King, now waiting to see how the proceedings end.

245. There is no evidence that KSSL used the legal proceedings to interfere with Mr King's employment prospects with VSG. The note of the meeting between Mr Zeidler and VSG shows that he drew VSG's attention to Mr King's restrictive covenants.

246. I do not consider that the board's decision to give him an "honest" reference alerting ASC to the litigation remotely supports the inference that the proceedings were brought

in bad faith knowing that there was no valid claim against him in order to ruin him. The letter from KSSL's Solicitors sought quite legitimately to hold Mr King to his restrictive covenants.

247. Mr King's case as to the supposedly improper purposes imputed to KSSL in bringing these proceedings is further undermined by the open offer to settle the proceedings contained in letters dated 9 June and 23 June 2020 from KSSL's solicitors. The offer was along the same lines as the offer made to and accepted by Mr Evans, namely a payment in respect of KSSL's damages claim, a contribution to KSSL's costs and an open acceptance, with hindsight if necessary, that the transaction should have been the subject of disclosure/board approval i.e. not involving Mr King in having to acknowledge any conscious impropriety. This offer was not accepted by Mr King. In the absence of a settlement, the proceedings have been brought to a conclusion, which in itself counts heavily against a finding of an abuse as observed by Lord Wilson in *Crawford v Sagicor* (paragraph 220 above).

KSSL's actual purposes

248. KSSL contends that its actual purposes in bringing these proceedings were to obtain compensation, to vindicate KSSL's rights as against Mr King and Mr Evans and to protect KSSL's reputation in the security industry by publicly demonstrating that KSSL would not tolerate conduct of the kind perpetrated by them.

249. I accept that those purposes played some part in KSSL's decision to bring the proceedings although, as noted above, it must have been obvious to KSSL from early on that the irrecoverable costs of the litigation would dwarf any compensation it was awarded and that if recovery of compensation was KSSL's main objective, it would have accepted the compensation offered by TCH and discontinued the proceedings.

250. It is clear to me that, aside from these purposes, the anger felt by Mr Stiefel and Mr Fisher towards Mr King, as a result of what they considered to be the unfounded allegations made against them in the Misrepresentation Proceedings, compounded by anger at what they considered to be his dishonesty and failure to accept responsibility for his actions, must have influenced KSSL's decision to bring these proceedings and also had an effect on the combative, sometimes over-combative, manner in which the

proceedings have been conducted. As the authorities cited above make clear, however, motive and personal antagonism are in themselves irrelevant to the question whether proceedings have been brought for an improper purpose.

Issue (3): Has Mr King proved any recoverable losses?

251. Given my conclusion that Mr King has failed to establish that these proceedings were brought for an improper purpose, issues of recoverable losses fall away. Had it been necessary to determine those issues, I would have given directions for a separate assessment of damages as Mr King's damages claim has not yet been particularised in detail and the damages claim has not been the subject of disclosure.

VIII. CONCLUSION

252. Mr King is liable to pay KSSL the sum of £45,666.47. Mr King's counterclaim is dismissed.