



Neutral Citation Number: [2022] EWHC 2306 (Ch)

Appeal Reference: CH-2021-000171

Claim No. IL-2020-000059

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

CHANCERY APPEALS (ChD)

On appeal from the order of Deputy Master Marsh [2021] EWHC 1226 (Ch) - Claim No. IL-2020-000059

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

8th September 2022

Before :

MR JUSTICE EDWIN JOHNSON

Between :

JOHN LOBB S.A.S

**Appellant/
Defendant**

and

JOHN LOBB LIMITED

**Respondent/
Claimant**

Huw Davies QC and Jaani Riordan (instructed by DLA Piper UK LLP) for the
Appellant/Defendant
Ian Mill QC and Hollie Higgins (instructed by Clintons) for the Respondent/Claimant

Hearing date: 5th July 2022

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The time and date for hand-down are deemed to be 10.00am on 8th September 2022

Mr Justice Edwin Johnson:

Introduction

1. This is my reserved judgment on the hearing of the appeal of John Lobb S.A.S against an order of Deputy Master Marsh (“**the Order**”) made on 23rd February 2022. The Order was made pursuant to a judgment handed down by the Deputy Master on 24th May 2021 (“**the Judgment**”). By the Order, and for the reasons set out in the Judgment, the Deputy Master dismissed the application of John Lobb S.A.S for summary judgment and/or an order striking out the Claimant’s Particulars of Claim in this action (“**the Application**”). Permission to appeal was granted by Roth J by an order made on 8th February 2022.
2. At the hearing of the appeal the Appellant/Defendant (John Lobb S.A.S) has been represented by Huw Davies QC and Jaani Riordan. The Respondent/Claimant (John Lobb Limited) has been represented by Ian Mill QC and Hollie Higgins. I am most grateful to all counsel for their helpful written and oral submissions. In this context I should mention that I have also had the benefit of a transcript of the hearing of the appeal, which has been of immense value to me in preparing this judgment.
3. In this judgment I will refer John Lobb S.A.S as “**the Appellant**”, and to John Lobb Limited as “**the Respondent**”. It should however be kept in mind that the Respondent is the Claimant in the action in which this appeal has been made, and that the Appellant is the Defendant. I will refer to the Deputy Master as “**the Judge**”. References to the paragraphs of the Judgment are given as [J1], for paragraph 1 of the Judgment, and so on. Italics have been added to quotations in this judgment.

The parties

4. The Respondent is a family owned company incorporated under the laws of England and Wales on 19th September 1972. The Respondent, on its own description, operates a world famous luxury goods business making hand-made made-to-measure footwear. The business was founded in Sydney, Australia in 1849 by John Lobb, great great grandfather of the current generation of the Lobb family who run the business. The business moved to London in 1866, and began trading from premises in Regent Street. The business was incorporated into the Respondent, in 1972, by Eric Lobb, who appears to have been the driving force behind the business, steering the business through the difficult years of the Second World War and, following the War, redeveloping the business. On incorporation the shares in the Respondent were held by Eric Lobb. The shares are now held by various members of the Lobb family.
5. A full account of the early history of the business is set out in the evidence of the various members of the Lobb family who provided witness statements in response to the Application. It is not necessary, for the purposes of the Application, to go into this history, but it is an interesting account of the historical development of a luxury footwear business.

6. The Appellant was incorporated by Eric Lobb under the laws of France in 1946. I assume, although this is not entirely clear from the evidence which I have read, that this was for the purpose of developing the John Lobb business in France, operating from Paris where the business appears to have had a branch.
7. In 1976 the majority of the shares in the Appellant was sold by Eric Lobb to the Hermes Group; the French luxury goods business (“**Hermes**”), so that Hermes acquired control of the Appellant. The sale included the rights in a trade mark registered in France by Eric Lobb which protected the Appellant’s products. Since then the Appellant has operated or continued to operate its own luxury footwear business. The history and nature of the relationship between the business of the Respondent and the business of the Appellant since 1976 is the subject of a certain amount of dispute in this action.

The relationship between the parties since 1976

8. My account of the relationship between the parties since 1976 is confined to what is sufficient to set the scene for what I have to decide in this appeal. Given that I am concerned with an appeal arising in respect of an application for summary judgment or for a striking out order, it is neither necessary nor appropriate either to set out a full account of this relationship or to try to resolve disputed questions of fact.
9. As from 1976 there appears to have been collaboration between the businesses of the Respondent and the Appellant. The Respondent’s evidence is that there were good relations between Eric Lobb and Jean Louis Dumas of the Dumas family, who owned Hermes. In particular the Appellant operated, or continued to operate, its business selling footwear under the John Lobb name. In addition to this Hermes commenced an operation registering trade marks around the world, in order to protect the John Lobb brand.
10. In order to regularise this collaboration, the Respondent and the Appellant, together with Eric Lobb, entered into a written agreement on 9th March 1992, which became known as the Radlett Agreement. I will use the same expression to refer to this agreement. Clause Ten of the Radlett Agreement identified that it was “*entered into for a period of 15 (fifteen) years at which time its operation shall be reviewed by John Lobb Limited and John Lobb SA*”. Clause Ten did not specify a start date for this period of 15 years. Clause Nine of the Radlett Agreement, which was concerned with financial matters, stated however that the Agreement was entered into from 9th March 1992. It therefore seems reasonable to take 9th March 1992 as the intended start date of the period of the Radlett Agreement.
11. The other principal provisions of the Radlett Agreement can be summarised as follows:
 - (1) There were a number of recitals to the Radlett Agreement. Amongst other matters the recitals recorded that the property rights in the Trade Mark in France were “*ceded*” by Eric Lobb to the Appellant pursuant to an agreement between the parties dated 24th May 1976, in consideration of the payment of a percentage of the Appellant’s turnover for the years between 31st March 1976 and 31st December 1985. The Trade Mark was defined to mean the trade mark John Lobb deposited and registered in France. The recitals also recorded the registration of the Trade Mark in other countries, and recorded the costs incurred by the

Appellant in this respect. The recitals then set out the desire of the parties to continue to collaborate. The final recital was in the following terms:

“John Lobb Limited and John Lobb S.A. desire to extend existing agreements including the Sale Agreement and Amending Agreement to the manufacture, promotion and sale of products described in classes and categories of the Trade Mark already registered throughout the world”

- (2) Clause One then gave the Appellant the right to the manufacture, promotion and sale of ready-to-wear footwear under the Trade Mark throughout the world. This was however subject to the terms of the Radlett Agreement which included, by Clause Two, the agreement of the Appellant not to manufacture made-to-measure hand-made footwear in the UK under the Trade Mark. By Clause Two the Appellant assigned *“to John Lobb Limited any rights which may have accrued to John Lobb S.A. in the United Kingdom by its acquisition of the Trade Mark in made-to-measure hand-made footwear”*.
 - (3) Clause Three permitted the Respondent to manufacture accoutrements under the Lobb trade name, with the consent of the Appellant, such consent not to be unreasonably withheld.
 - (4) By Clause Four the Appellant agreed to continue the protection of the Trade Mark where necessary and to extend the protection of the Trade Mark to the trade name Lobb when called upon to do so by the Respondent and to bear the costs of that protection.
 - (5) By Clause Five the Appellant agreed to make annual payments to the Respondent which were expressed to be *“In consideration for extending the Sale Agreement and the Amending Agreement and other agreements in accordance with the terms and conditions of this agreement herein set out”*.
 - (6) Clauses Six to Nine contained financial provisions supplementary to Clause Five. It should be noted that the provisions for payment to the Respondent were subject to a variation in 1997. This arose out of the acquisition by Hermes of Edward Green and Company Limited, a UK footwear manufacturer. The sums payable to the Respondent were increased to take account of the increase in turnover resulting from this acquisition.
 - (7) Clause Ten prescribed the term of the Radlett Agreement, as noted above.
 - (8) Clause Eleven provided that the Radlett Agreement was governed by and construed in accordance with the law of England and Wales.
12. Negotiations commenced between the parties in late 2005 concerning the nature and terms of the relationship between the parties which was to follow the Radlett Agreement. There is a good deal of dispute between the parties concerning these negotiations. For present purposes it is however only necessary to record two events.
13. First, on 3rd March 2006 the Appellant’s solicitors, DLA Piper Rudnick Gray Cary UK LLP, sent a letter to Hermes which contained advice *“in relation to your rights of ownership and use of the trade mark JOHN LOBB”*. This letter was copied to the Respondent as part of the negotiations. The essential advice given by this letter (**“the DLA Letter”**) was summarised in the penultimate paragraph of the letter in the following terms:
- “As I said at the outset whilst there have, over the years, been a number of agreements and discussions between the parties Hermes International’s ownership of the trade mark JOHN LOBB is well documented. John Lobb Limited has received proper consideration for the acquisition by Hermes of those*

exclusive rights and Hermes is entitled to continue to use, exploit and protect those rights as any trade mark owner would be.”

14. Second, on 6th March 2008 the Appellant and the Respondent did enter into an agreement regulating their future relationship, which was described as an “*AGREEMENT relating to John Lobb Name and Trade Mark*”. The shareholders in the Respondent were also parties to this agreement. It is this agreement (“**the 2008 Agreement**”) which is the central subject matter of this action.

The 2008 Agreement

15. The 2008 Agreement and its construction are at the heart of this action and this appeal. As such it is necessary to set out its provisions in some detail. I shall use the present tense in referring to and discussing the terms of the 2008 Agreement, but I do so without prejudice to the Respondent’s case in the action, which is that the 2008 Agreement was void from the outset, and thus does not exist as an enforceable agreement. I have already noted that the 2008 Agreement was entered into between the Appellant, the Respondent, and the shareholders in the Respondent. So far as I am aware, no point is taken in the action, by either party to the action, concerning the position of the shareholders in relation to the Respondent’s claims.
16. The first section of the 2008 Agreement is headed “*BACKGROUND*”, and contains a number of provisions, with a letter for each provision, which appear to operate as recitals to the 2008 Agreement. I will refer to these provisions as Recitals. Recitals A-C provide as follows:
- A The Sale Agreement (24 May 1976) and Amending Agreement (28 October 1980) have dealt with the sale of the trade mark John Lobb registered in France on 12 June 1975.*
 - B In accordance with further agreements the John Lobb/Lobb (word mark and / or with device) trade mark was registered, for its protection, in various countries around the world by JLSA [the Appellant] (“the Mark”).*
 - C JLL [the Respondent] and JLSA have fully cooperated to maintain and develop a mutual business built on the Trade Mark and trade name Lobb with a view to ensuring that standards continue into the future.”*
17. Recitals D-F then summarise matters in relation to the Radlett Agreement, in the following terms:
- D Under the Radlett Agreement (9 March 1992):*
 - (i) it was agreed, inter alia, that JLSA would manufacture, promote and sell ready to wear footwear and other classes and categories of products described in the registered designations of the Mark throughout the world;*
 - (ii) JLSA agreed not to manufacture made to measure footwear in the UK and assigned to JLL any right that may have accrued to JLSA in made to measure hand made footwear by its acquisition of the Mark in the UK;*
 - (iii) JLL was given the right to continue to use the Mark in the UK on accoutrements such as belts, cases, shoe cloths, polish and other accessories connected with their business;*
 - (iv) JLSA agreed pursuant to its ownership of the Mark to continue protection of the Mark where necessary.*

- E In consideration of the Radlett Agreement payments were made by JLSA to JLL, which were later varied by the Supplemental Agreement (26 September 1997), when JL&Co. were bound to the terms.*
- F The Radlett Agreement came to an end of 9 March 2007 to be reviewed by JLSA & JLL.”*

18. Recital G then deals with ownership of the Mark. The Mark is defined in Recital B to mean the John Lobb (word mark and/or with device) trade mark registered, for its protection, in various countries around the world by the Appellant. Recital G provides as follows in relation to the ownership of the Mark:

“G JLSA is the legal and beneficial owner and registered proprietor of the Mark throughout the world and has all the rights in the Mark save in respect of the rights enjoyed by JLL as set out in clause 1 below. A schedule of the Mark currently owned by JLSA is attached at Appendix B”

19. Clause 1 deals with the ability of the Respondent to use the Mark in its UK business. Clauses 1.1 and 1.2 provide as follows:

“1.1 JLSA hereby agrees that JLSA's previous agreement to permit JLL's exclusive right to use the Mark in relation to its UK business in made to measure hand made Products ("JLL Products") continues subject to the terms of this agreement.

1.2 JLSA agrees that JLL may also continue to use in the UK the Mark on products ancillary to the JLL Products which (for the avoidance of doubt) include solely shoe care trees, shoe care products, belts, cases and riding boot accessories ("Ancillary Products").”

20. Clause 1.3 contains the following acknowledgment and agreement on the part of the Respondent in relation to ownership and use of the Mark:

“1.3 JLL acknowledges JLSA's ownership rights in the Mark and agrees that it will only use the Mark in relation to its UK business operated from 9 St James Street, London SW1 (or such replacement premises in the UK as JLL may in its absolute discretion decide to operate from) (the “JLL Premises”) and only in relation to JLL Products and Ancillary Products. JLL agrees not to open any business outside the UK under or by reference to the Mark or to expand its UK business using the Mark beyond JLL Premises (other than in the normal course of its business conducted from there) provided always that:

1.3.1 JLSA acknowledges JLL's right:

1.3.1.1 to continue, subject to the provisions of clause 1.3.2.1, soliciting orders for its UK business operated from the JLL Premises through marketing and fitting trips outside the UK; and

1.3.1.2 to continue responding to unsolicited orders from outside the UK through the sale of JLL Products and Ancillary Products from the JLL Premises.

1.3.2 JLL agrees that:

1.3.2.1 when fitting trips are undertaken outside the UK, details will not be displayed on the JLL website or in any other kind of promotion or advertising. Direct contact with customers and potential customers will continue as usual.

In accordance with the terms of this clause 1.3 JLL will not arrange these events in venues where JLSA has an outlet or concession or in such venues that are adjacent to any JLSA boutique, outlet or concession, and or in Madrid, Dubai, Qatar and Moscow.

1.3.2.2 2 it will continue to support JLSA made to measure and ready to wear activities around the world and in the UK through its activities at the JLL Premises.”

21. Clause 1.4 then contains the agreement of the Appellant not to use the Mark in the UK, in the following terms:

“1.4 JLSA agrees not to use the Mark in the UK in relation to made to measure hand made products provided that this shall not prevent JLSA from responding to orders from the UK for such products made in its Paris premises.”

22. The remainder of Clause 1 contains further ancillary provisions dealing with the use of the Mark.

23. Clause 2 contains provisions for collaboration between the parties, including financial obligations on the part of the Appellant, as follows:

“2.1 JLL and JLSA are committed to the preservation of the quality and standards associated with the use of the Mark around the world.

2.2 The parties have, and will continue, in relation to their respective businesses to promote the Mark and associated goodwill, and in support of this objective JLSA agrees that it will offer assistance to JLL.

2.3 JLSA’s assistance pursuant to the provisions of clause 2.2 will be at JLSA’s discretion and agreed with JLL from time to time. JLSA agrees that it will, for a period of 5 years (“the Initial Payment Term”) make annual payments of £65,000. At the end of the Initial Payment Term JLSA will agree to make annual payments for a further 5 years (“the Second Payment Term”) in the sum of £35,000 per annum.

2.4 JLSA will pay JLL on the signing of this agreement the sum of £21,294.58 representing the remaining amount due to JLL under the Radlett Agreement.

The first annual payment under this agreement for the period March 2007 to March 2008 will be paid on or before 10 March 2008 and on or before the 10 March in each subsequent year of the agreement. JLSA does not require the payment to be put towards any particular marketing activity and accepts JLL’s assurance that it will be used in the general best interests of the Mark.”

24. It will be noted that clause 2 provided for annual financial payments to be made by the Appellant to the Respondent. By clause 2.3 these payments fell to be made over two consecutive periods of five years. I use the past tense because the ten year period over which these payments were to be made has now expired. By clause 2.4 the first annual payment fell to be made in respect of the period from March 2007 to March 2008. By reference to the provisions of clause 2.4 the final annual payment of £35,000 fell due for payment on or before 10th March 2017.

25. Clause 3 deals with the protection of the Mark, in the following terms:
 - “3.1 As owner of the Mark as set out hereto in Appendix A, JLSA shall (at its absolute discretion) carry out the registration and renewal of the existing and future trade marks, subject as regards the latter to the possibility of achieving effective protection thereof,
 - 3.2 For the purposes of the maintenance and/or defence of the Mark, JLSA shall remain sole judge of the measures to be taken and will bear the costs of filing, renewal and defence of the Mark. JLL shall however be obliged, at its own cost, to give JLSA any reasonable help and assistance it may request.”
26. Clause 4 contains certain dispute resolution provisions.
27. Clause 5 deals with the term of the 2008 Agreement and other matters. By Clause 5.1 the 2008 Agreement is expressed to commence on 9th March 2007 and to continue without limit of time, subject to a right of termination, in Clause 5.4, vested in the Appellant in the event of a change of control of the Respondent to a party or parties outside the Lobb family. Clause 5 also contains pre-emption provisions, at Clause 5.2 and 5.3, which apply, respectively, in the event of an intended sale of shares in the Respondent outside the Lobb family and in the event of an intended sale of shares in the Appellant outside the Hermes group of companies.
28. Clause 6 provides for the 2008 Agreement to be governed by and construed in accordance with the laws of England and Wales. The parties submit to the exclusive jurisdiction of the English Courts, subject to an obligation to use reasonable endeavours to resolve problems through discussion at senior management level.
29. There are five appendices/annexes to the 2008 Agreement. I need mention only Appendix B which sets out a list of trade marks registered in various countries, which are headed “*John Lobb SA Trademark Portfolio*”.
30. In the remainder of this judgment references to Recitals and Clauses are, unless otherwise indicated, references to the Recitals (as I have characterised them) to and the Clauses of the 2008 Agreement. I will use the expression “**the Trade Marks**” to mean, unless otherwise indicated, the portfolio of trade marks and their registrations and rights which are defined as the Mark in Recital B. I will use the expression “**the French Trade Mark**” to refer to the John Lobb trade mark as it is registered in France, property rights in which, it is accepted, were “*ceded*” by Eric Lobb to the Appellant in 1976.
31. At [J16] the Judge recorded that the parties operated under the terms of the 2008 Agreement without there being any issue between them about its effect or validity for a period of 9 years. I am not sure that the reference to 9 years is quite correct. I have seen a formal letter of claim, dated 19th April 2017, which was sent by the Respondent’s solicitors (Clintons) to the Appellant’s solicitors (DLA Piper UK LLP). The letter of claim set out the grounds of challenge to the validity of the 2008 Agreement, and asserted that the 2008 Agreement was void on the basis of common mistake. The letter refers to previous correspondence between August and November of the previous year. I assume therefore that the validity of the 2008 Agreement was

first called into question by the Respondent at some stage in 2016. The evidence of the members of the Lobb family who are directors of the Respondent is that they first began to investigate the position in relation to the 2008 Agreement at some stage after 2013, which was when Nicholas Lobb, who was and is a qualified solicitor, joined the family business. The evidence of Nicholas Lobb is that the directors first consulted with the Respondent's current solicitors (Clintons) in 2015, and that Clintons had formally been instructed to act for the Respondent by January 2016.

32. What is clear is that, following their entry into the 2008 Agreement, the Appellant and the Respondent dealt with each other for some years on the basis that the 2008 Agreement was valid, with annual payments being made and accepted pursuant to the provisions of Clause 2. The exception to this was the last annual payment of £35,000, which fell due for payment on or before 10th March 2017. This payment was tendered by the Appellant, but returned by the Respondent. The payment, which I believe is in the form of a cheque, is being held by the Appellant, pending the outcome of this action.
33. For the sake of completeness I should also add that, in oral submissions, Mr Mill drew my attention to a letter from the Respondent's solicitors dated 31st July 2017. This letter was not in the appeal bundle. In that letter the Respondent's solicitors accepted that, if the 2008 Agreement was found to be void from the outset, the Respondent would have to give credit for the payments which it had received, but that the Appellant would equally have to give credit in respect of a sum fairly to be paid for the Appellant's use of the Trade Marks after the expiration of the Radlett Agreement. The letter went on to assert that the chances of the latter sum being assessed by a court at a figure less than the former sum (the payments received by the Respondent under the 2008 Agreement) were "*slight in the extreme*".

The claims in the action

34. The Respondent commenced this action by claim form issued on 22nd May 2020. The Respondent's case in the action is that the 2008 Agreement was void from the outset (ab initio) on the basis of common mistake. Further to this case the Respondent says that it is the beneficial owner of the Trade Marks, with the exception of the French Trade Mark. This case is now pleaded in Amended Particulars of Claim, which have been amended pursuant to a permission granted by the Order. There is no material difference, as between the Particulars of Claim and the Amended Particulars of Claim, in terms of the pleaded case of common mistake. I will however make reference to the Amended Particulars of Claim in this judgment.
35. In terms of the common mistake alleged by the Respondent, paragraph 26 of the Amended Particulars of Claim states as follows:
"26. Paragraphs 21 and 22 above are repeated. Accordingly, the 2008 Agreement was entered into by both the Claimant and the Defendant on the basis of a fundamentally mistaken and commonly held belief as to the ownership rights in the John Lobb Marks."
36. Accordingly, the alleged common mistake which is relied upon is "*a fundamentally mistaken and commonly held belief as to the ownership rights in the John Lobb Marks*". The John Lobb Marks are defined in paragraph 4 of the Amended Particulars

of Claim, and I understand this definition to comprise the same portfolio of trade marks which I am referring to as the Trade Marks.

37. In order to have a better understanding of the alleged mistaken and commonly held belief it is necessary to go back to paragraph 20 of the Amended Particulars of Claim, which deals with the DLA Letter. Paragraph 20 is in the following terms (the bold print is not added):

“20. The DLA Letter contained the following material assertions of fact (emphasis added where relevant):

- a. In 1975 Eric Lobb began negotiating with Hermès for the sale to Hermès of a majority of the shares in the Defendant. Part of that agreement was to be the acquisition by Hermès of the rights to the Trade Mark **throughout the world**;*
- b. In March 1976, the agreement for the purchase of the shares was signed and Eric Lobb confirmed that, before he received any payment for the shares, he would transfer **the trade mark rights** to Hermès/the Defendant;*
- c. Consideration for the transfer of **the trade mark rights** was instalment payments calculated as a percentage of turnover payable over a number of years from 1976 to 1985;*
- d. Between 1976 to 1992, the Defendant, **exercising its acquired trade mark rights**, applied for registered protection for the Trade Mark around the world;*
- e. In 1992, Eric Lobb, the Claimant and the Defendant entered into a further agreement **with the aim of confirming the Claimant’s right to use the Trade Mark only for the manufacturing and commercialisation of made-to-measure hand-made footwear and confirming the Defendant’s exclusive rights to everything else.**”*

38. It is then alleged, in paragraph 21 of the Amended Particulars of Claim, that the DLA Letter contained fundamental errors of fact. The alleged errors of fact are pleaded in the following terms:

“21. The DLA Letter therefore contained fundamental errors of fact. In particular:

- a. It asserted that in 1975/1976 Eric Lobb agreed to transfer to Hermès, and did so transfer, the right to protect and exploit the Trade Mark throughout the world (i.e. to assign to Hermès/the Defendant the entire worldwide goodwill and reputation in the John Lobb name built up by the predecessors in title to the Claimant over a period exceeding 125 years);*
- b. This assertion was and is manifestly false, having regard (in particular) to the term of the 1976 Agreement set out at paragraph 8b above. All that Eric Lobb was agreeing to transfer in terms of trade mark rights was the registered French mark, which the Defendant required in order to conduct the French based business which it was (in substance) acquiring;*
- c. Accordingly, it was also incorrect that the consideration (payable under the 1976 Agreement) was for “the trade mark rights” as asserted and described in that letter;*

- d. *It was also incorrect that the Defendant applied for registered protection for the Trade Mark “exercising its acquired trademark rights”. It did so in the circumstances set out in paragraphs 11 and 12 above;*
- e. *The characterisation of the 1992 Agreement was fundamentally incorrect. The Claimant repeats paragraphs 7 to 16 above.”*

39. Paragraph 22 of the Amended Particulars of Claim then makes the following assertion:

“22. Accordingly, any agreement subsequently made between the parties to the 1992 Agreement which reflected this wholly inaccurate series of factual assertions and which assumed the Defendant’s ownership of the John Lobb Marks would not be one which accorded with the intention of the parties as set out in paragraph 16 above, but would be one which assumed a fundamentally different and false set of factual and legal premises – in particular as to the ownership of the John Lobb Marks outside France.”

40. Paragraphs 23 and 24 of the Amended Particulars of Claim then assert that the 2008 Agreement was just such an agreement, in the following terms:

“23. The written agreement between the parties hereto dated 6 March 2008 (“the 2008 Agreement”) was just such an agreement. Thus, in particular:

- a. *By preamble D (iv), the Defendant agreed pursuant to its ownership of the John Lobb Marks to continue the protection of the John Lobb Marks where necessary;*
- b. *By preamble G, the Defendant was stated to be the legal and beneficial owner and registered proprietor of the John Lobb Marks throughout the world and had all the rights in those Marks save in respect of the rights enjoyed by the Claimant as set out in Clause 1 of that Agreement;*
- c. *By Clause 1.3, the Claimant acknowledged the Defendant’s ownership rights in the John Lobb Marks and agreed that it would only use those Marks in relation to its UK business operated from 9 St James’s Street, London SW1 (or any replacement UK premises which it might choose) and only in relation to hand-made made-to-measure footwear and in relation to ancillary product (limited to shoe trees, shoe care products, belts, cases and riding boot accessories);*
- d. *By Clause 3.1, the Defendant as owner of the John Lobb Marks would at its absolute discretion carry out the registration and renewal of the existing and future marks.*

24. There were further material provisions of the 2008 Agreement as follows:

- a. *By Clause 5, that the term thereof would be “without limit of time” except for the right of the Defendant to terminate the Agreement in the event of a change of control of the Claimant of a specified character;*
- b. *By Clause 2, certain payments were to be made on an annual basis by the Defendant to the Claimant in relation to the first 10 years of the term of the Agreement. Such payments:*
 - i. *Amounted in total to £500,000;*

- ii. *Were specified as being in respect, not of royalties, but of the Claimant's efforts in promoting the John Lobb Marks and associated goodwill;*
 - c. *No further payments were to be made by the Defendant to the Claimant beyond the end of that 10 year period;*
 - d. *By Clause 6, the 2008 Agreement was to be governed by and construed in accordance with the laws of England and Wales, and the parties to it submitted to the exclusive jurisdiction of the English Courts.*
- A copy of the 2008 Agreement is at Annexe 5 to these Particulars of Claim."*

41. The Respondent's case is that it only agreed to enter into the 2008 Agreement because it believed to be true and accurate the assertions made in the DLA Letter and the assertions made in the course of discussions by representatives of the Appellant as to the ownership of the Trade Marks; see paragraph 25 of the Amended Particulars of Claim.
42. Essentially therefore, the Respondent's case is that the Respondent and the Appellant entered into the 2008 Agreement on the basis of a fundamentally mistaken and commonly held belief as to the ownership rights in the Trade Marks. Essentially, that mistaken and commonly held belief was that the Appellant owned the Trade Marks, on the basis and for the reasons set out in the DLA Letter and in subsequent negotiations. The true position, so the Respondent contends, is that the beneficial ownership in the Trade Marks was in fact vested in the Respondent, with the sole exception of the French Trade Mark.
43. The principal relief sought in the action is declaratory relief, comprising a declaration that the Respondent is not bound by the terms of the 2008 Agreement on the basis that it is void from the outset (ab initio) for common mistake, and a declaration that the Respondent is beneficially entitled to the ownership of the Trade Marks, including their registered protections, with the exception of the French Mark. I was told that it was common ground between the parties that if the Respondent cannot succeed in its claim for a declaration that the 2008 Agreement is void for common mistake, then the claim for a declaration of the Respondent's beneficial ownership of the Trade Marks also falls away.
44. The Appellant has filed a Defence in the action, denying the Respondent's right to any of the relief claimed, on the various grounds set out in the Defence.
45. I should mention, for completeness, that the Particulars of Claim also pleaded that it was an implied term of the 2008 Agreement that it could be terminated upon reasonable notice, and that the letter of claim from Clintons, dated 19th April 2017, had given such reasonable notice. This implied term argument was not however pursued by Respondent, and has now been removed by the amendment of the Particulars of Claim. Accordingly, and if the Respondent is wrong in its case that the 2008 Agreement is void for common mistake, the position is that the 2008 Agreement continues.

The Application

46. The Application was made by application notice dated 4th August 2020. The relief sought by the Application was (i) an order striking out what were then the Particulars of Claim, pursuant to CPR 3.4(2)(a), on the basis that the Particulars of Claim disclosed no reasonable grounds for bringing the claim, or alternatively (ii) summary judgment against the Respondent on the whole of the claim pursuant to CPR 24.2(a)(i), on the basis that the Respondent had no real prospect of succeeding on the claim and that there was no other compelling reason why the case should be disposed of at a trial. Consequential on this relief an order for the dismissal of the claim and costs was also sought.
47. The Application was supported by a witness statement of Ruth Hoy, of the Appellant's solicitors. The witness statement identified that the Application was brought on three grounds. The first ground was contractual estoppel; essentially an argument that it was not open to the Respondent, now, to resile from its express acknowledgments in the 2008 Agreement that the Appellant was the legal and beneficial owner of the Trade Marks throughout the world, and held all rights in the Trade Marks, save only for the rights granted to the Respondent by Clause 1 in respect of the UK. The second ground was limitation, on the basis that the Respondent's claim to rescind the 2008 Agreement was statute barred. The third ground was that the implied term pleaded in the 2008 Agreement was bound to fail, with the consequence that the 2008 Agreement was not terminable on reasonable notice.
48. As I have noted above, the Respondent did not maintain its argument that the 2008 Agreement was subject to an implied term which permitted its termination on reasonable notice. Accordingly the Judge recorded, at [J11], that the relevant parts of the Claim Form and what were then the Particulars of Claim should be struck out.
49. For its part, the Appellant accepted, for the purposes of the Application, that the Respondent had a real prospect of establishing that there could be no contractual estoppel arising out of the 2008 Agreement which would have the effect of precluding an argument that the 2008 Agreement was void for mistake; see [J21]. Instead, and in addition to its argument based upon limitation, the Appellant argued that the Respondent was unable to establish certain of the required elements for its case that the 2008 Agreement was void for common mistake.

The Judgment

50. Taking the elements of the Judgment in reverse order, the Judge dealt with the limitation argument in the latter part of the Judgment, at [J42] to [J52]. The Judge concluded, at [J52], that the Appellant was unable to show that the Respondent's case on limitation was bound to fail. The Judge concluded that the Respondent had a real prospect of showing that the claim for a declaration that the 2008 Agreement was void on the basis of common mistake was neither founded on the 2008 Agreement nor based upon a cause of action in the sense in which that expression is used in Section 5 of the Limitation Act 1980. There is no appeal against this part of the decision of the Judge.
51. The most relevant part of the Judgment, for the purposes of the appeal, is to be found at [J22] to [J41], where the Judge dealt with the Appellant's argument that the Respondent could not establish certain of the elements required to make out its case that the 2008 Agreement was void for common mistake. In order to understand the argument in support of the appeal it is necessary to set out the Judge's reasoning in some detail.

52. The Judge started by making reference to the judgment of the Court of Appeal, which was delivered by Lord Phillips MR (as he then was) in *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* [2002] EWCA Civ 1407; [2003] Q.B. 679. In this judgment I will be making extensive reference to the judgment of the Court of Appeal in *Great Peace*. It is convenient to refer to the judgment in *Great Peace* as containing what was said by Lord Phillips. It should however be kept in mind that the judgment was the judgment of all three members of the Court of Appeal (Lord Phillips MR, May and Laws LJ).
53. In the judgment in *Great Peace* Lord Phillips summarised the required elements of a claim based upon common mistake in the following terms, at [76]:
- “If one applies the passage from the judgment of Lord Alverstone CJ in Blakeley v Muller & Co 19 TLR 186, which we quoted above to a case of common mistake, it suggests that the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.”*
54. I will refer to the first element identified by Lord Phillips (meaning the requirement, at (i), that the parties have entered a contract under a shared and self-induced mistake as to the facts or law affecting the contract) as **“the First Element”**, and so on for each of the other numbered elements set out in [76].
55. As the Judge recorded, at [J23], the argument of the Appellant was that the claim was bound to fail, because the Respondent could not establish either the Second Element or the Fourth Element, as identified by Lord Phillips. As the Judge also recorded, if this was correct, the Respondent’s claim to beneficial ownership of the Trade Marks (excluding the French Trade Mark), which was consequential upon the 2008 Agreement being void, also fell away.
56. The Judge then went on to refer to the summary of the law provided by the editors of Chitty on Contracts, 33rd Edition, Volume 1, at 6-015, which is in the following terms:
- “Where the mistake is common, that is shared by both parties, there is consensus ad idem, but the law may nullify this consent if the parties are mistaken as to some fact or point of law which lies at the basis of the contract. In summary, if: (i) the parties have entered a contract under a shared and self-induced mistake as to the facts or law affecting the contract; (ii) under the express or implied terms of the contract neither party is treated as taking the risk of the situation being as it really is; (iii) neither party was responsible for or should have known of the true state of affairs; and (iv) the mistake is so fundamental that it makes the “contractual adventure” impossible, or makes performance essentially different to what the parties anticipated, the contract will be void.”*

57. The Judge's view was that there were marked differences between the summary of Lord Phillips and the summary provided in Chitty, at 6-015. As the Judge stated, at [J25] and [J26]:

"25. There are marked differences between the two formulations and particularly the way in which the second and fourth elements are described.⁴ The second element is described in relation to the allocation of risk, rather than there being no warranty, and the fourth element is described, in the alternative to impossibility of performance, by reference to the contractual adventure being essentially different to that which was anticipated.

26. *Chitty goes on to set out paragraph [76] in the judgment of Lord Phillips in The Great Peace at 6-35 and this is followed in 6-36 to 6-51 with a detailed analysis of each of the elements. It is clear from the analysis that the editors of Chitty do not accept the formulation by Lord Phillips as being a complete summary of the doctrine of common mistake."*

58. The Judge then referred to the decision of Mr McDonald Eggers QC, sitting as a Deputy High Court Judge, in *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* [2018] EWHC 1348 (Comm); [2018] 4 W.L.R. 97. The Judge quoted the following analysis of the law, by the Deputy Judge in *Triple Seven*, at [76]:

"76 Drawing these considerations together, the elements of a common mistake which has the effect of rendering the contract based on that common mistake void are as follows:

- (1) There must have been, at the time of the conclusion of the contract, an assumption as to the existence of a state of affairs substantially shared between the parties.*
- (2) The assumption itself must have been fundamental to the contract.*
- (3) That assumption must have been wrong at the time of the conclusion of the contract.*
- (4) By reason of the assumption being wrong, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the conclusion of the contract; alternatively, the contract must be impossible to perform having regard to or in accordance with the common assumption. In other words, there must be a fundamental difference between the assumed and actual states of affairs.*
- (5) The parties, or at least the party relying on the common mistake, would not have entered into the contract had the parties been aware that the common assumption was wrong.*
- (6) The contract must not have made provision in the event that the common assumption was mistaken."*

59. At [J28] the Judge made the point that the fourth element identified by the Deputy Judge provided for two alternatives. The first alternative was that, by reason of the common assumption, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the conclusion of the contract. The second alternative was that the contract was impossible to perform having regard to or in accordance with the common assumption. The Judge then went on to identify the essential point made by the Deputy Judge as being that there must be a fundamental difference between the assumed and the actual states of affairs. As the Judge commented, at the end of [J28]:

“If that test is right, then the claimant has no difficulty meeting it. The difference between the defendant having the entire legal and beneficial ownership of the Marks and the claimant having beneficial ownership of all the Marks other than those registered in France is stark.”

60. The Judge then turned directly to deal with the Appellant’s argument that the Respondent could not establish the Second Element or the Fourth Element. The Judge took the Second Element first. After making reference to other parts of the judgment of Lord Phillips in *Great Peace* and to Steyn J (as he then was) in *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 W.L.R. 255, the Judge reached his conclusion, at [J35] and [J36], in the following terms:

“35. As it seems to me, it is not possible to construe the 2008 Agreement as containing a warranty by the claimant that the defendant is the legal and beneficial owner of the Mark, or for the contract be taken to allocate the risk in the event that the assumption is wrong. The common understanding is clear from Recital G and clause 1.3. The contract does not go on to specify what is to happen if that understanding proves to be wrong.

36. It is impossible to conclude that the claimant’s case on this point is bound to fail and the claimant has a real prospect of showing that there is no allocation of risk between the parties about how the 2008 Agreement is to operate if the common understanding proves to be wrong.”

61. The Judge then turned to the Fourth Element. At [J37] the Judge recorded the following concession on the part of the Respondent:

“37. I turn to the second element that Mr Davies says is absent. Mr Mill accepts that the contract was not impossible to perform. The defendant has made substantial payments to the claimant which it has accepted, the defendant has continued to take steps to protect the Marks and the parties together have respected the operation of the agreement that leaves the UK market to the claimant. If it is the case that impossibility of performance is a sine qua non, then it must follow that the claim is bound to fail.”

62. The Judge however took the view, at [J38], that the test was not simply one of impossibility of performance. He took the view that the test may also be that performance is essentially different to that common assumption. On that basis, the Judge concluded that the Respondent was unable to show that the Appellant’s case in relation to the Fourth Element was bound to fail. As the Judge said, at [J38] and [J39]:

“38. It is clear, however, that impossibility of performance may need to be measured against the common assumption; the test may also be that performance is essentially different to that common assumption. If that is the test, the defendant is unable to show that the claimant’s case with regard to the second element that is relied upon is bound to fail. The defendant is also unable to establish, were it to be necessary to do so, that the claimant’s case in this regard has no real prospect of success.

*39. I do not accept that the essential elements of the doctrine of common mistake can be reduced to the formulation provided by Lord Phillips. It is clear there is disagreement about the way in which the constituent elements of the doctrine should be formulated and disagreement about its doctrinal basis. The elements of the doctrine cannot be taken to have been entirely settled by the Court of Appeal in *The Great Peace*.”*

63. The Judge went on to add that he did not see the points of law which had arisen in this context as being suitable for summary determination. In this context the Judge made these observations, at [J40]:
- “(1) *It is necessary for the 2008 Agreement to be construed in its admissible context. Although part of the story has been provided, and the court has been taken to communications between the parties, there are many unresolved issues that cannot be dealt with by making assumptions in favour of the applicant. The doctrine of mistake, as it seems to me, needs to be applied in this case against findings of fact at a trial.*
- (2) *The doctrine of mistake, even if it is properly seen as a settled doctrine, is likely to apply in different ways depending upon the precise assumption that is relied upon.*
- (3) *I do not consider the doctrine is sufficiently settled to enable the court to take two of the elements that are described in the judgment of Lord Phillips MR at paragraph [76] in *The Great Peace* and simply apply them as if they were part of a statute. The approach adopted to the doctrine in *Chitty* and the judgment of Mr McDonald Eggers in *Triple Seven v Azman Air* suggest that the law is continuing to refine and develop.”*
64. The Judge rounded off this part of the Judgment with his view that the case warranted a trial in any event, even if the Appellant was right in its submissions on *Great Peace*. As the Judge explained, at [J41]:
- “41. *Finally, even if the defendant were to be right in its submissions based upon the analysis set out in the judgment of Lord Phillips MR in *The Great Peace* this is a case that warrants a trial. It matters not whether this is seen as an application of the principle derived from *Hughes* or the second limb of CPR rule 24.2. The claimant’s case may not be a strong one (I express no view about this one way or the other) and it may fail at a trial. It is, however, a case that is unsuitable for summary disposal on the defendant’s first ground.”*
65. The reference to *Hughes* was a reference to *Hughes v Richards (t/a Colin Richards & Co)* [2004] EWCA Civ 266; [2004] P.N.L.R. 35, which was cited by the Judge in a footnote to [J18]. The case concerned a claim in professional negligence against a chartered accountant arising out of the setting up of a trust. The trust was set up by Mr and Mrs Hughes, on the advice of the accountant, for the benefit of their children. The accountant applied to have the relevant actions against him struck out or dismissed on a summary basis. The application failed at first instance, and an appeal to the Court of Appeal was dismissed. The essential reasoning of Peter Gibson LJ (with whose judgment the other members of the Court of Appeal agreed) was that the claim concerned an area of law which was uncertain and developing, that there were significant disputes of fact in the case, and that it was important that a decision should be made on the claim on the basis of the actual facts found at trial, rather than on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the application.
66. The Judge then went on to deal with the Appellant’s case on limitation, in respect of which he also concluded that it had not been demonstrated that the Respondent had no real prospect of success.

67. In the result the Judge concluded that the Application fell to be dismissed. The Judge did not formally separate out, in his reasoning and conclusions, the application for summary judgment and the application to strike out. In stating each of his conclusions however the Judge did say (i) that the Appellant had failed to demonstrate that the Respondent had no real prospect of success on the relevant part of its case, and (ii) that the Appellant had failed to demonstrate that the relevant part of the Respondent's case was bound to fail. The test of bound to fail was the test which the Judge was applying to the Application, so far as it was an application to strike out; see [J18]. It is clear therefore, in the light of the Judge's reasoning and conclusions in the Judgment, that the Judge dismissed the Application both on the basis that the case was unsuitable for summary judgment and on the basis that a strike out order was not appropriate.

The grounds of appeal

68. The grounds of appeal, as they are set out in the Grounds of Appeal attached to the appellant's notice, can be summarised as follows:
- (1) The Judge went wrong in his approach to the doctrine of common mistake by failing to apply correctly the elements of the doctrine, specifically the Second Element and the Fourth Element, as set out by the Court of Appeal in *Great Peace*.
 - (2) In any event the Judge was wrong, at [J35], to construe the 2008 Agreement as containing no warranty that the relevant state of affairs (the Respondent's sole ownership of the legal and beneficial interests in the Trade Marks) existed. As a result the Judge was wrong in concluding, at [J36], that Recital G and Clause 1.3 did not deal expressly with the parties' rights and obligations concerning the subject matter to which the alleged mistake related. The Judge should have construed these provisions as covering the field of the mistake and warranting the agreed state of affairs.
 - (3) The Judge was wrong to reason, at [J40] and [J41], that the 2008 Agreement could not be construed on an application for summary judgment or strike out, when it gave rise to a short point of law and construction, which was capable of being determined in the absence of any dispute, for the purposes of the Application, about the relevant matrix of fact and/or on the basis of the facts alleged by the Respondent.
 - (4) The Judge was wrong, at [J40(3)], to regard the doctrine of common mistake as being insufficiently settled. The relevant aspects of the doctrine were clear and readily capable of application to the agreed facts before the Court.
 - (5) At [J39] and [J40] the Judge misunderstood the Fourth Element as being concerned with something less than impossibility of performance of the contractual adventure, and instead treated this element, at [J38], as asking whether "*performance is essentially different to that common assumption*".
 - (6) The Judge was wrong not to apply the decision in *Great Peace* as a whole. In particular, the Judge was wrong, at [J38], to approach the performance of the 2008 Agreement on the basis that the character of performance was any different, still less essentially or fundamentally different, depending on either party's subjective understanding of who held the beneficial ownership of the Trade Marks.
 - (7) The Judge should not have assumed, at [J28], that the Respondent had "*no difficulty meeting*" a test as to whether there was "*a fundamental difference between the assumed and actual states of affairs*". Properly directed, the Judge

ought to have concluded that, even if all of the facts alleged by the Respondent were proved, the performance of the 2008 Agreement was rendered neither impossible nor fundamentally or essentially different to what was contemplated by the parties and was able to be, and was, performed.

- (8) If the Judge had correctly applied the law of common mistake, properly directed, he would have been bound to conclude that there were no reasonable grounds for the Respondent to bring the claim for rescission of the 2008 Agreement and should either have struck out the claim pursuant to CPR r 3.4(2)(a), or should have concluded that the Respondent's claim had no realistic prospects of success and was suitable for summary disposal under CPR r 24.2.

The jurisdiction relevant to the Application

69. Before coming to my consideration of the grounds of appeal, and the written and oral arguments of counsel in the appeal, it is useful to remind myself and to have in mind certain key principles which govern the approach of the court to applications for summary judgment and/or a striking out order. I start with applications for summary judgment.

70. CPR 24.2 provides as follows:

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

(a) it considers that—

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

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

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

71. At [J18] the Judge made reference to the well-known summary of the principles relevant to the consideration of an application under CPR 24.2 in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch). In his judgment in that case Lewison J (as he then was) said as follows, at [15]:

“15. As Ms Anderson QC rightly reminded me, the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:

i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 2 All ER 91 ;

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

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

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

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment,

but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550 ;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63 ;”

72. At sub-paragraph (vii) in [15] Lewison J concluded his identification of the relevant principles by explaining the approach to be taken where short points or law or construction arise in the context of a summary judgment application:

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

73. In *ICI Polymers v TTE Trading* [2007] EWCA Civ 725 Moore Bick LJ provided the following guidance, in a case where a summary judgment application raises a short point of construction. In that case the judge at first instance had declined to decide a short point of construction on an agreement. Moore-Bick LJ said that the judge had been wrong to decline the deal with the point. At [12] to [14] Moore Bick LJ said this:

“12. In my view the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.

13. *In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.*
14. *Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.”*
74. Turning to the application to strike out, CPR 3.4(2)(a) provides as follows:
“(2) *The court may strike out a statement of case if it appears to the court—*
(a) *that the statement of case discloses no reasonable grounds for bringing or defending the claim;”*
75. As the Judge correctly pointed out, at [J19], there is a distinction between CPR 24.2 and CPR 3.4(2)(a). In the case of CPR 3.4(2)(a) the focus is on the relevant statement of case; in this case the (now Amended) Particulars of Claim in this action. The investigation is solely concerned with whether the facts pleaded in the relevant statement of case disclose reasonable grounds for bringing or defending the relevant claim. In the case of CPR 24.2 the court can have regard to the relevant case which is the subject of the summary judgment application as a whole. In addition to this there is the second limb of CPR 24.2, which gives the court the ability to refuse a summary judgment application where there is some other compelling reason for disposing of the relevant case or issue at a trial.
76. There is one other obvious, but important point to add, in the context of both limbs of the Application. In the case of the strike out application, it has to be assumed, for the purposes of the strike out application, that the pleaded facts are correct. In the case of the summary judgment application there is, in theory, more flexibility. In theory, a court can resolve a disputed question of fact on a summary judgment application. As Lewison J has explained in *Easyair*, the court is not obliged to take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents. If however the court is to venture into disputed questions of fact, it must take account not only the evidence actually placed before it on the application for summary judgment, but also the

evidence that can reasonably be expected to be available at trial. In the present case therefore I approach matters, unless otherwise indicated and for the purposes of this appeal, on the basis that the Respondent's evidence, which I have read in full, is correct in what it says as to the facts of this case.

77. I turn now to my discussion of the grounds of appeal. I find it convenient to adopt the following course:
- (1) I start by considering, in the context of the application for summary judgment, the grounds of appeal as they relate to the Judge's decision in relation to the Second Element; that is to say the requirement, as identified by Lord Phillips in *Great Peace*, that "*there must be no warranty by either party that that state of affairs exists*".
 - (2) I will then consider, again in the context of the application for summary judgment, the grounds of appeal as they relate to the Judge's decision in relation to the Fourth Element; that is to say the requirement, as identified by Lord Phillips in *Great Peace*, that "*the non-existence of the state of affairs must render performance of the contract impossible*".
 - (3) I will then consider, again in the context of the application for summary judgment, the grounds of appeal as they relate to what I will refer to as the Judge's residual reasons, at [J41], for refusing summary judgment.
 - (4) I will then consider the position in relation to the application to strike out.
78. I should mention that the arguments in the appeal were extensive, and involved extensive reference to legal authorities. It is not necessary, in this judgment, to make express reference to every argument and every legal authority. It has all been taken into account, whether or not the subject of express reference in this judgment.

Discussion – the Judge's decision in relation to the Second Element

79. The first requirement for a claim to avoid a contract on the basis of a common mistake, as identified by Lord Phillips in *Great Peace* (the First Element), is a common assumption as to a state of affairs. In the present case the alleged common assumption, which I must assume to have existed for the purposes of this appeal, was "*a fundamentally mistaken and commonly held belief as to the ownership rights in the John Lobb Marks*"; see paragraph 26 of the Amended Particulars of Claim. Both parties believed the state of affairs to be that the Appellant was the legal and beneficial owner of the entirety of the portfolio comprising the Trade Marks ("**the Assumed State of Affairs**"). The true state of affairs, at least so far as the Application and the appeal are concerned, was that while the Appellant held the legal title to the Trade Marks, the beneficial interest in the Trade Marks, with the exception of the French Trade Mark, was vested in the Respondent ("**the True State of Affairs**").
80. The essence of the Judge's reasoning in relation to the Second Element can be found at [J35], which I have already set out. The Judge did not think it possible to construe the 2008 Agreement "*as containing a warranty by the claimant that the defendant is the legal and beneficial owner of the Mark*"; in other words a warranty that the Assumed State of Affairs actually existed. Equally, the Judge did not think it possible for the 2008 Agreement to be taken as allocating "*the risk in the event that the assumption is wrong*"; in other words the 2008 Agreement could not be taken as allocating the risk in the event that the Assumed State of Affairs turned out to be incorrect. The Judge considered that the common understanding was clear from Recital G and Clause 1.3,

but he took the view that the 2008 Agreement “*does not go on to specify what is to happen if that understanding proves to be wrong*”; see the last sentence of [J35].

81. Ultimately there was little or no dispute between counsel as to the legal principles relevant to what Lord Phillips identified as the Second Element in *Great Peace*. There were however considerable submissions in the skeleton arguments for the appeal, by reference to the case law, as to what is required of a contract before it can be said to have made provision in relation to an assumed state of affairs sufficient to preclude a claim to avoid the contract on the basis of common mistake as to that assumed state of affairs. It was also the Appellant’s case, on various grounds, that the Judge had misdirected himself as to the law. For these reasons it seems to me that it is necessary to identify the legal principles relevant to what Lord Phillips identified as the Second Element, before I come to consider directly the reasoning of the Judge.
82. The appropriate starting point seems to me to be *Associated Japanese Bank (International) Ltd v Credit du Nord SA* 1989 1 W.L.R. 255. The case concerned a claim under a guarantee agreement, whereby the defendants had guaranteed to the plaintiffs the obligations of a Mr Bennett under an agreement for the sale and leaseback of four textile compression packaging machines. Mr Bennett turned out to be a fraudster, and the machines did not in fact exist. The defendants sought to avoid their obligations under the contract of guarantee on various grounds, including an argument that the guarantee agreement was void from the outset on the basis of common mistake. The argument based on common mistake succeeded. In dealing with common mistake Steyn J (as he then was) said this, at 268B-C:
- “It might be useful if I now summarised what appears to me to be a satisfactory way of approaching this subject. Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake.”*
83. This extract was cited with approval by Lord Phillips in *Great Peace* at [80], where Lord Phillips said this, before citing the extract from the judgment of Steyn J which I have just set out:
- “That doctrine fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality.”*
84. At [81], [84] and [85] Lord Phillips had this to say on the question of whether one party or the other had undertaken responsibility for the assumed state of affairs:
- “81. In William Sindall plc v Cambridgeshire County Council [1994] 1 WLR 1016, 1035 Hoffmann LJ commented that such allocation of risk can come about by rules of general law applicable to contract, such as “caveat emptor” in the law of sale of goods or the rule that a lessor or vendor of land does not impliedly warrant that the premises are fit for any particular purpose, so that this risk is allocated by the contract to the lessee or purchaser.”*

“84. Once the court determines that unforeseen circumstances have, indeed, resulted in the contract being impossible of performance, it is next necessary to determine whether, on true construction of the contract, one or other party has undertaken responsibility for the subsistence of the assumed state of affairs. This is another way of asking whether one or other party has undertaken the risk that it may not prove possible to perform the contract, and the answer to this question may well be the same as the answer to the question of whether the impossibility of performance is attributable to the fault of one or other of the parties.

85. Circumstances where a contract is void as a result of common mistake are likely to be less common than instances of frustration. Supervening events which defeat the contractual adventure will frequently not be the responsibility of either party. Where, however, the parties agree that something shall be done which is impossible at the time of making the agreement, it is much more likely that, on true construction of the agreement, one or other will have undertaken responsibility for the mistaken state of affairs. This may well explain why cases where contracts have been found to be void in consequence of common mistake are few and far between.”

85. It is clear from these extracts that Lord Phillips did not regard what he had identified as the Second Element as being confined to the question of whether one party or the other had given a warranty that the assumed state of affairs existed. As Lord Phillips explained, at [84], the question was whether one or other party had undertaken responsibility for the subsistence of the assumed state of affairs or, putting it another way, whether one party or the other had undertaken the risk that it might not prove possible to perform the contract. Such an undertaking of responsibility might come about in different ways; such as by the application of a principle of general law such as caveat emptor or by some express or implied provision of the contract sought to be avoided.

86. This point was brought out by Leggatt J (as he then was) in *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2017] EWHC 2928 (Comm). At [62] Leggatt J made reference to *Associated Japanese Bank*, in the following terms:

*“62. Thus, the doctrine of mistake can only apply if there is a gap in the contract. If the parties have expressly or impliedly agreed what is to happen if they turn out to have been mistaken about the matter in question – in other words, if the risk of the mistake has been allocated by their contract – there is no scope for the doctrine. As Steyn J said in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 at 268:*

‘Logically, before one can turn to the rules as to mistake ... one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary.’”

87. As Leggatt J then explained, at [63]:

*“63. One way – although not the only way – in which the risk of a mistake may be contractually allocated is by one party warranting that the relevant state of affairs exists. So, for example, in *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377 the defendant sold to the claimant the wreck of an oil tanker, stated to be lying on a certain reef. Unknown to either party, the*

tanker did not actually exist (nor did the reef). Before the High Court of Australia an argument that the contract was void for mistake failed because the court held that the defendant had impliedly warranted that there was a shipwrecked tanker. The non-existence of the tanker was not therefore a state of affairs for which the contract failed to provide.”

88. As Leggatt J went on to point out, at [64], the risk of a mistake is usually allocated by the contract to one of the parties:

*“64. The main reason why pleas of mistake seldom succeed is that the risk of a mistake is usually allocated by the contract to one of the parties. Plainly, there is no room for the doctrine to operate if the contract states expressly what is to happen if the relevant assumption proves to be false. It may be harder to determine whether the contract impliedly allocates the risk. To take one of the examples given by Lord Atkin in *Bell v Lever Bros* [1932] AC 161 at 224: ‘A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy.’ In practice in such a case the answer is likely to be found through construction of the contract. If the authorship of the picture is part of the description of the goods so that the seller has impliedly warranted its attribution, the risk will lie with the seller. If on the other hand there is no such warranty, the ordinary inference based on the principle of *caveat emptor* would be that the buyer is taking the risk.”*

89. Further authorities relevant to the question of what is entailed by the Second Element were cited to me, but the above authorities seem to me to be amply sufficient to illustrate the essential question to be asked in relation to the Second Element. The essential question is whether one party or the other has undertaken responsibility for the existence of the assumed state of affairs. As the authorities demonstrate, there are various ways in which such an undertaking of responsibility can come about. One is not simply asking whether one party or the other has warranted, in the strict sense of this word, the existence of the assumed state of affairs. It is also clear that the Court of Appeal, in *Great Peace*, did not regard the Second Element question as being so confined.
90. With the above analysis in place, I return to the Judge’s consideration of the Second Element, which was briefer than his consideration of the Fourth Element. At [J25] the Judge noted what he referred to as marked differences between description of the Second Element in *Great Peace*, at [76], and the description of the Second Element in *Chitty*, at 6-015, where the relevant question is framed as whether, under the express or implied terms of the contract either party is treated as taking the risk of the situation being as it really is. In my view there is no such marked difference. If one considers the totality of what Lord Phillips said in relation to the Second Element question in the judgment of the Court of Appeal in *Great Peace*, it is quite clear that Lord Phillips did not mean to say, in his characterisation of the Second Element question at [76], that the question was confined to whether a warranty, in the technical sense of the word, had been given as to the existence of the assumed state of affairs. In relation to the Second Element I see no difference between the commentary in *Chitty*, and what was said in *Great Peace*.
91. I am doubtful however that this caused the Judge to ask himself the wrong question in relation to the Second Element. At [J34] the Judge cited what Lord Phillips said in

Great Peace at [80] and [84], which I have set out above. At [J35] the Judge effectively asked himself the question whether the 2008 Agreement contained a warranty by the Respondent that the Appellant was the legal and beneficial owner of the Trade Marks or whether the 2008 Agreement could be taken to allocate the risk in the event that the Assumed State of Affairs turned out to be wrong. Given that the Judge clearly had in mind what Lord Phillips had said in [80] and [84], it seems to me that the Judge's formulation of the question he had to answer was not wrong in law.

92. Where I part company with the Judge is in his answer to that question or, putting the matter another way, in the Judge's application of the relevant legal principles to the 2008 Agreement. The Judge appears to have accepted that the common understanding (the common understanding as to the Assumed State of Affairs) was clear from Recital G and Clause 1.3, but that there was no warranty or allocation of risk because the 2008 Agreement "*does not go on to specify what is to happen if that understanding proves to be wrong*"; see the last sentence of [J35].
93. In my view, and with due respect to the Judge, this reasoning is flawed. It is quite true that the 2008 Agreement did not specify, in terms, what was to happen if the common understanding, namely that the Assumed State of Affairs existed, turned out to be wrong. In his oral submissions, for the Appellant, Mr Davies accepted that this was the case. Mr Davies made it clear that his submission was that the relevant provisions of the 2008 Agreement impliedly allocated to the Respondent the risk of the common understanding as to the Assumed State of Affairs turning out to be wrong.
94. It seems to me however that it is quite clear from the authorities that an allocation of risk between the parties, sufficient to prevent avoidance of the contract on the basis of common mistake, can still be found in the relevant contract in a situation where the contract does not spell out, in terms, what is happen if the relevant assumed state of affairs turns out to be wrong. Clear statements to this effect can be found in the extracts which I have cited from *Associated Japanese Bank*, *Great Peace*, and *Dana*. I refer in particular to what Leggatt J said in *Dana*, at [64]. As Leggatt J explained, it may be harder to determine whether the contract impliedly allocates the risk. It is certainly not impossible to find such an allocation of risk simply because the relevant contract does not say, in terms, what is to happen if the relevant assumption proves to be false. As Leggatt J also noted in *Dana*, at [64], and as other judges have noted in the authorities cited to me in this appeal, one of the reasons why the doctrine of common mistake is only rarely invoked successfully is because the relevant contract usually contains, or general principles of law usually supply, an allocation of risk to one of the parties to the contract, in relation to the risk of an assumed state of affairs turning out to be wrong.
95. In saying what he said in the last sentence of [J35], the Judge may have based himself upon the formulation of the Second Element question provided by the Deputy Judge in *Triple Seven*, at sub-paragraph (6) of [76]. I do not read what the Deputy Judge said, at [76(6)], as meaning that the Second Element question is confined to the question of whether the relevant contract has made express provision for what is to happen if the assumed state of affairs turns out to be incorrect. I think that the Second Element question is correctly expressed as whether the relevant contract allocates to one of the parties the risk of the assumed state of affairs turning out to be wrong; which I take from what was said in *Associated Japanese Bank*, *Great Peace*, and *Dana*. I do not

however read the Deputy Judge as saying something different to this. If, contrary to my impression, the Deputy Judge in *Triple Seven* intended to say that the Second Element question entailed something different to this, I respectfully disagree.

96. With this initial point in mind, I turn specifically to the terms of the 2008 Agreement. As the Judge noted, at [J35], the common understanding in the present case is clear from Recital G and Clause 1.3. It seems to me however that the position, on analysis of the 2008 Agreement, can be seen to go considerably further than a simple statement of the common understanding as to the Assumed State of Affairs.
97. I start with Recital G. Recital G recites, as an agreed part of the “*Background*” to the 2008 Agreement, that the Appellant is the legal and beneficial owner and registered proprietor of the Trade Marks throughout the world and has all the rights in the Trade Marks, save for the rights enjoyed by the Respondent as set out in Clause 1. This is unequivocal. The Appellant is identified as the legal and beneficial owner of the Trade Marks.
98. One then comes to the terms of the contract agreed between the parties. Clause 1 deals with the future trading relationship between the parties and starts, at Clauses 1.1 and 1.2, with the Appellant agreeing to continue with its previous agreement to permit the Respondent to have the exclusive right to use the Trade Marks in relation to its UK business, to the extent set out in Clauses 1.1 and 1.2. This is then continued into Clause 1.3, with a limitation on the location of the UK business and the products in respect of which the Respondent was and is permitted to use the Trade Marks.
99. The net effect of Clause 1 was to licence the Respondent to use the Trade Marks in its UK business to the extent and on the terms set out in Clause 1. The nature of the rights granted to the Respondent by Clause 1 assumed however a relationship between the parties whereby the Appellant was the licensor, and the Respondent was the licensee. This in turn assumed that the Appellant owned the Trade Marks, and was thus in a position to licence the use of the Trade Marks to the Respondent. These assumptions might have been left unexpressed in the 2008 Agreement, but they were not. Instead, and in the opening part of Clause 1.3 the Respondent specifically, and in terms acknowledged the Appellant’s ownership rights in the Trade Marks.
100. What is meant by the reference to these “*ownership rights*” in Clause 1.3? This seems perfectly clear to me. I do not accept Mr Mill’s submission that this reference is vague or unspecific. The Respondent was acknowledging the ownership rights which had already been set out in Recital G; namely that the Appellant was the legal and beneficial owner and registered proprietor of the Trade Marks throughout the world and had all the rights in the Trade Marks, save for the exceptions set out in Clause 1. I am bound to say that I would have regarded the reference to “*ownership rights*”, in the context of Clause 1, as quite clearly referring to the legal and beneficial ownership of the Trade Marks, even in the absence of Recital G. The 2008 Agreement does however contain Recital G, which seems to me to put beyond argument, so far as the matter might be considered arguable, what is meant by the reference to “*ownership rights*”.
101. The next question is why the acknowledgment of ownership rights, on the part of the Respondent, appears at the beginning of Clause 1.3, given that the parties had already recited the ownership position in Recital G. The answer to that question, as a matter of

construction of the 2008 Agreement in general, and Clause 1 in particular seems to me to be obvious. The Respondent was being required to agree, in terms, that the Appellant did indeed own the Trade Marks; in other words that the Assumed State of Affairs did in fact exist. By this means the parties secured the assumption which underlay Clause 1; namely that the Appellant was in a position to licence the use of the Trade Marks to the Respondent in the manner set out in Clause 1. As I have said, the parties might have left this assumption unexpressed. Instead, the Respondent was required to acknowledge that the Assumed State of Affairs was correct. As such, it seems to me that the risk of the Assumed State of Affairs turning out to be wrong was allocated to the Respondent. To use the language of Steyn J in *Associated Japanese Bank*, the first part of Clause 1.3 constituted a condition precedent to the 2008 Agreement pursuant to which the Respondent bore the risk of the Assumed State of Affairs turning out to be wrong.

102. Mr. Mill made the point that there will be many cases where the parties expressly refer to the substance of their shared assumption in the relevant contract, without that reference amounting in any way to an agreement as to their respective rights and remedies in the event that the assumption proves wrong. By way of example Mr Mill referred to *Associated Japanese Bank*, where the relevant guarantee agreement stated that the guarantee was provided “*in consideration of your leasing four textile compressing packaging machines*”. This did not amount to an allocation to any party of the risk of the machines not existing. I accept this point in principle. I accept that it is a question of construction of the relevant contract whether the contract contains an express or implied allocation of risk which precludes a claim of common mistake. I also accept that mere reference to the subject matter of a contract which does not in fact exist may not be sufficient to amount to such an allocation of risk. I do not however see the present case as falling into this category. The present case is very different, for the reasons which I have just set out. The Respondent gave an express acknowledgement of the ownership rights which underpinned the scheme of the rights granted by Clause 1. It is in fact instructive to compare and contrast the relevant wording of the guarantee agreement in *Associated Japanese Bank*, as set out at 261A-C of the WLR report, with the relevant wording of the 2008 Agreement, in Recital G and Clause 1. The wording is significantly different, and seems to me to bring out the point that the wording of the opening part of Clause 1.3 is very much more than a passing reference to the Assumed State of Affairs.
103. I do not therefore accept the submission of Mr Mill that the combined effect of Recital G and Clause 1.3 amounted to “*nothing more than an express statement or embodiment of the parties’ mistaken assumption as to JLSA’s title (and by necessary implication JLL’s lack of title) in the Lobb Marks – the subject matter of the 2008 Agreement*” (paragraph 42 of the Respondent’s skeleton argument for the appeal). This seems to me to disregard the obvious function of the opening part of Clause 1.3, in the context of Clause 1.
104. Mr. Mill also made a series of points specifically on Clause 1.3. It is not necessary to go through all these points individually, because the essential argument of Mr Mill, which I have already rejected, was that there is nothing in Clause 1.3 to suggest that the parties were thereby allocating to the Respondent the risk of the Assumed State of Affairs turning out to be wrong. I do not agree, for the reasons which I have given. I mention specifically the following points made by Mr Mill.

105. Mr Mill did seek to argue that there was significance in the point that in the opening part of Clause 1.3 what is given by the Respondent is an acknowledgment. In other parts of Clause 1 there is reference to agreement, but not in this instance. Mr Mill relied upon this difference in language to support his argument that Clause 1.3 was merely setting out the Assumed State of Affairs, rather than dealing with the consequence of the Assumed State of Affairs turning out to be wrong. As Mr Mill put this point in oral submissions; the factual assumption underpins what follows. This however seems to me to bring out a key feature of Clause 1.3, which is that the acknowledgement in the opening part of Clause 1.3 does indeed underpin the scheme of rights in Clause 1. It is there to ensure that the factual underpinning of the scheme is confirmed by the Respondent to exist. As such, I do not think that it can be treated as a mere recitation of the Assumed State of Affairs. Nor do I think that it can be treated as, to take a phrase adopted by Mr Mill in his oral submissions, mere evidence of the common assumption.
106. I accept Mr Mill's point that the parties could have included in the 2008 Agreement words of disposition which provided for any interest in the Trade Marks which the Respondent might hold to be transferred to the Appellant. Such a provision would have ensured that the Assumed State of Affairs became the true state of affairs. I do not think however that the non-adoption of this course by the parties means that Clause 1.3 could not have the effect of allocating to the Respondent the risk of the Assumed State of Affairs turning out to be wrong. Nor do I regard this as a telling or material point in the construction of Clause 1.3.
107. Drawing together all of the above discussion, I reach the provisional conclusion that Mr. Davies, for the Appellant, is right in submitting that the 2008 Agreement, by the combined operation of Recital G and Clause 1.3, impliedly allocated to the Respondent the risk of the Assumed State of Affairs turning out to be wrong. For the reasons which I have set out, my provisional conclusion is that the Judge was wrong in the conclusion which he reached, in relation to the Second Element, at [J35].
108. I describe this as a provisional conclusion because there is also the argument that I should not, in advance of a trial and in advance of hearing all the evidence in the action, be making decisions on the construction of the 2008 Agreement and, in particular in this context, upon the true meaning and effect of the acknowledgement of ownership rights in Clause 1.3. This was an argument which commended itself to the Judge, who set out a series of reasons, at [J39], [J40] and [J41] why he did not consider it appropriate to resolve the points of law raised by the Application.
109. I do not think that any of these reasons were good or sufficient reasons to decline to decide the application for summary judgment, so far as it was concerned with the Second Element. Taking in turn the reasons identified by the Judge, I comment as follows:
- (1) The Judge's reasoning at [J39] seems to me to have been misconceived. The Judge appears to have considered that there was a question mark over the correctness of the formulation of the Elements provided by Lord Phillips in *Great Peace*, at [76]. At least so far as the Second Element was concerned I do not think that there is any such question mark. I agree with Mr Mill that what was said by Lord Phillips at [76] is not to be read as a statute. As I have also

explained earlier in this judgment, it is clear, if one reads the entirety of what was said by Lord Phillips in the judgment of the Court of Appeal in *Great Peace*, that he was not confining his definition of the Second Element only to cases where a warranty, in the strict sense of the word, was given. I do not discern any conflict between the *Great Peace* and later authorities, in terms of the identification of the Second Element question. As such, I do not think that there was, or is any difficult or unresolved question of law raised by the Application, so far as it concerned the application for summary judgment in relation to the Second Element. As such, I disagree with the Judge that the question of construction of the 2008 Agreement which was raised by the Application, so far as it concerned the application for summary judgment in relation to the Second Element, was unsuited to summary disposal.

- (2) There are certainly cases where it is unwise to make a decision on the construction of an agreement and/or on a question of law, without a full factual investigation. I do not see the present case as such a case. It seems to me that it is perfectly possible, as I have done, to decide the question of construction in relation to the Second Element on the assumption that the factual matrix is as the Respondent contends.
- (3) The assumption which I have made in the present case is that the factual matrix is as the Respondent contends. That said, the present case seems to me to be one, at least so far as the Second Element question is concerned, where the exercise of construing the 2008 Agreement is not one which is fact sensitive. The relevant provisions of the 2008 Agreement seem to me to speak for themselves.
- (4) I agree with the Judge that one should not take what was said by Lord Phillips in *Great Peace* at [76], and apply those words as if they were a statute. For the reasons which I have set out, it seems to me to be misconceived to regard the present case as one where it is appropriate to carry out an exercise of that kind. Equally, and for the reasons which I have set out, I do not see the present case as one where, at least in relation to the Second Element, the law is continuing to refine and develop. It seems to me that *Associated Japanese Bank, Great Peace, Dana* and other authorities cited to me give a clear explanation as to what is required of a contract, in terms of allocation of risk in relation to an assumed state of affairs, if the contract is to be taken as precluding a claim to avoid the contract on the basis of common mistake.
- (5) At [J41(3)] the Judge identified this area of the law as continuing to refine and develop. I assume that the Judge had in mind what was said in *Hughes*; as to the importance of deciding cases involving such questions of law and involving significant disputes of fact on the basis of the actual facts found at trial, rather than on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the application. I do not agree that the present case falls into the *Hughes* category. As I have said, I do not think that the relevant law is correctly described as continuing to refine and develop. Nor do I see significant, or any disputes of fact in the present case which affect the answering of the Second Element question.
- (6) At [J41] the Judge appears to have had in mind, so far as the Application was for summary judgment, the question of whether there was some other compelling reason for a trial. I will come back to this question, in relation to the Judge's decision on both the Second Element and the Fourth Element, later in this judgment.

110. In oral submissions Mr Mill urged upon me the argument that I should not be attempting to resolve difficult questions of construction in relation to the 2008 Agreement without the benefit of all the evidence. The difficulty with this submission seemed to me to be this. I was unable to discern what gap in the evidence there was which might affect my construction of the 2008 Agreement. Nor was I able to discern what evidence might reasonably be expected to turn up at trial which might affect my construction of the 2008 Agreement. As I have said, the provisions of the 2008 Agreement seem to me to speak for themselves. I have approached the construction exercise on the assumption that the factual matrix is as the Respondent contends, but I was unable to see any relevant conflict of evidence in the case or any unexplored issue of fact which would have affected my construction of the 2008 Agreement. In terms of the factual background the only really relevant point, as it seemed to me, was one which was agreed between the parties and was obvious; namely that the 2008 Agreement was put in place to regulate the future relationship between the parties, following the expiration of the term of the Radlett Agreement.
111. I can illustrate this point by reference to a matter which was the subject of factual dispute before the Judge and in the skeleton arguments for the appeal. The Appellant contended that the 2008 Agreement contained the compromise of a dispute over the rights to the Trade Marks. The Respondent denied this. As I have already recorded, the Respondent's evidence was that, by the time the 2008 Agreement came to be entered into, the directors of the Respondent had come to accept the Appellant's position; namely that the Appellant owned the Trade Marks. The Judge thought it more likely than not that the Respondent was right on this factual issue; see [J12(1)]. The Judge also considered, quite correctly in my view, that it was not appropriate to go further into this factual issue.
112. In oral submissions Mr Davies accepted, realistically and sensibly in my view, that the appeal had to be considered on the basis that the Respondent was right on this factual issue. I have therefore made my decisions on the appeal on this basis, which is the factual basis most favourable to the Respondent. What I cannot see, either in the context of this factual issue or any other factual issue and at least so far as the Second Element is concerned, is what further factual investigation is required before the court is able to venture into the construction of the 2008 Agreement, and Clause 1.3 in particular. Indeed, I add the point that I do not consider that my construction of Clause 1.3 is affected at all by this factual issue. My construction is the same whether the 2008 Agreement was compromising a dispute over ownership of the Trade Marks or, as I have assumed, reflecting the mistaken and common belief of the parties that the Assumed State of Affairs was correct.
113. In summary, and at least so far as the Second Element is concerned, I see the present case as falling within the scope of what was said by Moore Bick LJ in *ICI Polymers*. The Application, so far as it concerns the application for summary judgment in relation to the Second Element, gives rise to a short point of construction. I am satisfied that I have before me all the evidence necessary for the proper determination of this point of construction, and that the parties have had an adequate opportunity to address the point in argument. As such, it seems to me that I should grasp the nettle and decide the point of construction.

114. Drawing together all of the above discussion I conclude that the Respondent has no real, or indeed any prospect of succeeding in its claim to avoid the 2008 Agreement on the basis of common mistake. I reach this conclusion on the basis that, as a matter of construction of the 2008 Agreement, the risk of the Assumed State of Affairs turning out to be wrong was allocated to the Respondent.
115. Subject therefore to the question of whether there is some other compelling reason for the claims in this action to be disposed of at a trial, to which I shall come, the Appellant is entitled to summary judgment against the Respondent.

Discussion – the Judge’s decision in relation to the Fourth Element

116. As with my consideration of the Judge’s decision in relation to the Second Element, I think that it is necessary to start by identifying the legal principles relevant to what Lord Phillips identified as the Fourth Element.

117. By way of reminder, Lord Phillips characterised the Fourth Element as a requirement that “*the non-existence of the state of affairs must render the performance of the contract impossible*”. As however with Lord Phillips’ characterisation of the Second Element, it is clear that Lord Phillips did not consider that the Fourth Element question could only be framed in terms of impossibility. At [89] Lord Phillips turned to consider the decision of Steyn J in *Associated Japanese Bank*. After recording the basic facts of the case Lord Phillips cited Steyn J’s summary of the relevant law (at page 268E-H of the WLR report). That summary included the following characterisation of the Fourth Element by Steyn J (underlining added):

“Fourthly, and this is the point established by Bell v Lever Bros Ltd [1932] AC 161, the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. While the civilian distinction between the substance and attributes of the subject matter of a contract has played a role in the development of our law (and was cited in speeches in Bell v Lever Bros Ltd), the principle enunciated in Bell v Lever Bros is markedly narrower in scope than the civilian doctrine. It is therefore no longer useful to invoke the civilian distinction. The principles enunciated by Lord Atkin and Lord Thankerton represent the ratio decidendi of Bell v Lever Bros Ltd.”

118. Steyn J’s summary of the relevant law, including the part which I have just quoted, was approved by Lord Phillips at [91] and [92] in the following terms:

“91. The detailed analysis that we have carried out leads us to concur in this summary, subject to the proviso that the result in McRae’s case can, we believe, be explained on the basis of construction, as demonstrated above. In agreeing with the analysis of Steyn J, we recognise that it is at odds with comments that Lord Denning MR made on more than one occasion about Bell v Lever Bros Ltd [1932] AC 161 to the effect that “a common mistake, even on a most fundamental matter, does not make a contract void at law”. As to this Steyn J said [1989] 1 WLR 255 , 267:

“With the profoundest respect to the former Master of the Rolls I am constrained to say that in my view his interpretation of Bell v Lever Bros Ltd [1932] AC 161 does not do justice to the speeches of the majority.”

92. We share both the respect and the conclusion. We shall shortly consider in some detail the effect of Lord Denning MR’s treatment of the decision in Bell v

Lever Bros Ltd .”

119. In this context it is important to note that when Lord Phillips came to frame the question which the Court of Appeal had to answer in *Great Peace*, he characterised that question in the following terms, at [94] (underlining added):

“94. Our conclusions have marched in parallel with those of Toulson J. We admire the clarity with which he has set out his conclusions, which emphasise the importance of a careful analysis of the contract and of the rights and obligations created by it as an essential precursor to consideration of the effect of an alleged mistake. We agree with him that, on the facts of the present case, the issue in relation to common mistake turns on the question of whether the mistake as to the distance apart of the two vessels had the effect that the services that the Great Peace was in a position to provide were something essentially different from that to which the parties had agreed. We shall defer answering that question until we have considered whether principles of equity provide a second string to the defendants' bow.”

120. When Lord Phillips did return, at [162], to the question which he had deferred from [94], he characterised the question in terms of impossibility of performance (underlining added):

*“162. We revert to the question that we left unanswered at paragraph 94. It was unquestionably a common assumption of both parties when the contract was concluded that the two vessels were in sufficiently close proximity to enable the Great Peace to carry out the service that she was engaged to perform. Was the distance between the two vessels so great as to confound that assumption and to render the contractual adventure impossible of performance? If so, the defendants would have an arguable case that the contract was void under the principle in *Bell v Lever Bros Ltd* [1932] AC 161 .”*

121. In reaching the final conclusion of the Court of Appeal, at [165], Lord Phillips stated this conclusion in the following terms:

“The fact that the vessels were further apart than both parties had appreciated did not mean that it was impossible to perform the contractual adventure.”

122. As can be seen, the test which the Court of Appeal actually applied in *Great Peace* was framed, at different points in the judgment delivered by Lord Phillips, both as a test of essential difference and as a test of impossibility of performance. It seems reasonable to assume that the Court of Appeal did not see any material difference between these two tests.

123. The question of whether there was a difference between these two tests was considered by Neuberger LJ (as he then was) in *Kyle Bay Ltd t/a Astons Nightclub v Underwriters Subscribing under Policy No. 019057/08/01* [2007] EWCA Civ 57; [2007] 1 CLC 164. In this case the insured claimant sought to set aside or re-open a compromise of an insurance claim which it had reached with the defendant underwriters, on the basis of mistake and misrepresentation. The insurance claim was settled on the erroneous basis that the policy was not declaration-linked, but was on a gross profits basis and was thus subject to average. The claim failed, and an appeal to the Court of Appeal was dismissed. So far as mistake was concerned, the test applied by the Court of Appeal was whether the mistake rendered the subject matter of the contract essentially and

radically different from the subject matter which the parties had believed to exist. The Court of Appeal considered that the mistake as to the nature of the insurance policy did not have that effect.

124. In his judgment, at [20] and [21], Neuberger LJ summarised the issue in the case and made reference to the test of impossibility of performance which can be found in *Great Peace*:

“20. On this issue, the facts are simple and were not in dispute before the Judge. The settlement for the claimant's business interruption claim against the defendant underwriters was settled at about £205,000 on the common assumption that the Policy was not declaration-linked, whereas it was so linked, and, had the parties been aware of this, they would (I assume for present purposes) have settled at a figure about 50% higher.

21. As the Judge said, the leading modern case in which the circumstances in which a common mistake can vitiate a contract were considered was the decision of this court in Great Peace Shipping Ltd -v-Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407, [2003] QB 679 . Relying on what Lord Phillips of Worth Matravers MR (giving the judgment of the court) said at paragraphs [73] to [76], the Judge held that the proper test to apply in this case was whether the mistake in question rendered the contract in issue “impossible of performance” (the expression also used by Lord Phillips when ultimately formulating the critical question in the Great Peace case itself at paragraph [162]). At least on the face of it, it seems difficult to quarrel with the Judge's view that, if that is the right test, it was self-evidently not satisfied here.”

125. Neuberger LJ then recorded, at [22] and [23], the main argument put for the claimant, which was that the impossibility of performance test was inappropriate in a case of this kind:

“22. Mr Butler, who appears for the claimant, runs as his main argument the contention that this test was inappropriate in a case such as this; his alternative argument is that the test, if properly applied, was in any event satisfied here. I should in this context refer to the decision of this court in Brennan -v- Bolt Burdon [2004] EWCA Civ 1017, [2005] QB 303 . In that case, a personal injuries action was settled on the common assumption that the claim form had been served out of time, and a subsequent decision of this court showed that that assumption was wrong. The claimant unsuccessfully sought to impeach the settlement.

23. In paragraph [22] of his judgment, Maurice Kay LJ gave three reasons why the Great Peace decision gave rise to difficulties for the claimant, the first of which was that it was “quite simply not a case of impossibility of performance. The compromise has at all times remained performable ...”. Sedley LJ, however, was more concerned about the application of the “impossibility of performance” test in cases of common mistake of law — see at paragraphs [60] to [61]. At the end of paragraph [59], he had identified the “difficulty ... in seeing how the effect of [a common mistake of law ... on an agreement by which litigation is compromised] can be equated with the impossibility of a contractual venture”. The third member of the court, Bodey J, did not discuss this aspect.”

126. Neuberger LJ did not however think it necessary to resolve the apparent tension between the tests of impossibility of performance and essential and radical difference.

As he explained, at [24] and [25]:

“24. In my opinion, it is unnecessary for us on this appeal to decide which view is preferable. Indeed, I suspect that ultimately, the two approaches may essentially amount to the same thing. If the doubts of Sedley LJ are justified, then, as Mr Butler argues, the right test is that propounded by Steyn J in Associated Japanese Bank (International) Ltd -v- Credit du Nord SA [1989] 1 WLR 255 . In a passage at p. 268F, cited and expressly approved in the Great Peace case at paragraphs [90] and [91], Steyn J said that, in order to vitiate a contract, “the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist”. He justified this at p. 268E on the basis that “the law ought to uphold rather than destroy apparent contracts”.

25. It appears to me that, by approving Steyn J's observations and by applying the “impossible to perform” test, this court in the Great Peace case must have considered that the two approaches amounted to much the same thing. In practice, the concept of impossibility of performance, at least in a case such as this, can be said to raise an issue of definition: if one defines the contract as the assessment of compensation under a declaration-linked policy, then it is, at least in a sense, impossible to perform if both parties negotiate on the basis that the policy is not declaration-linked. It seems to me, therefore, that there is much to be said for applying, as Mr Butler argues we should, Steyn J's test in the Associated Japanese Bank case in the instant case.”

127. It is also useful to look at the actual conclusion reached by Neuberger LJ, applying the essential and radical difference test, at [26]:

“26. In my judgment, applying that approach, the mistake in this case did not render what the parties believed to be the “subject matter of the [Settlement agreement] essentially and radically different” from what it actually was. The parties correctly believed that they were settling a business interruption claim resulting from a fire at certain premises at which the claimant ran a night club; they made no mistake as to the period of interruption or the estimated level of gross profit, or indeed any other mistake about the claim or the nature of the cover, save that they assumed that it was on the gross profits basis, rather than on the declaration-linked basis. The difference between the actual and assumed subject matter of the settlement can in my view certainly be characterised as significant, but it is not an “essential ... and radical ...” difference.”

128. In *Dana*, Leggatt J treated the two different formulations of the test as having received judicial approval, and cited *Kyle* as authority for the proposition that the two formulations may essentially amount to the same thing. As Leggatt J said, at [65]:

*“65. The second reason why most arguments of mistake fail is that the doctrine only applies if the mistake is sufficiently fundamental. Two different formulations of this requirement have been approved. One is that the mistake in question has rendered the contract ‘impossible of performance’. The other is that the mistake ‘must render the subject-matter of the contract essentially and radically different from the subject-matter which the parties believed to exist’. The two approaches may essentially amount to the same thing: see *Kyle Bay Ltd (t/a Astons Nightclub) v Underwriters subscribing under Policy No 019057/08/01 [2007] EWCA Civ 57; [2007] 1 CLC 164, paras 24-25.*”*

129. It seems to me that the effect of these authorities is that the test which falls to be applied, in relation to the Fourth Element identified by Lord Phillips, can legitimately be framed in two alternative ways; as a test of impossibility of performance or as a test of essential and radical difference in the subject matter of the relevant contract. It also seems to me that there is not, and is not intended to be a material difference between these two tests. As Leggatt J pointed out, the second reason why most arguments of mistake fail is that the doctrine of common mistake only applies if the mistake is sufficiently fundamental. I take from this that the test of essential and radical difference does not constitute a materially less stringent version of the test than impossibility of performance.
130. It also seems to me that it is important not to get too enmeshed in a debate as to what differences, if any, may exist between the two formulations of the test. As Neuberger LJ pointed out in *Kyle*, at [25], the concept of impossibility may come down to an issue of definition. If the subject matter of the relevant contract is essentially and radically different from what it was believed to be, one might also expect the relevant contract to be impossible of performance, at least in the sense of performance in accordance with the assumed state of affairs. Ultimately one comes back the same question. Is the relevant mistake sufficiently fundamental either to render the contract impossible of performance or to render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist? The only point I would add is that it seems to me to be sensible to retain the word “*radically*” in the second formulation of the test. This word was combined with “*essentially*” by Steyn J in his formulation of the test in *Associated Japanese Bank*, but is often omitted in subsequent formulations of this test. I do not think that the word “*radically*” is unnecessary verbiage. It serves to bring out the point, which emerges from all of the authorities which I have cited above; namely that the test is a stringent one.
131. The other particular point which I draw out of the authorities which I have referred to above, is the importance of a careful analysis of the relevant contract and of the rights and obligations created by it, as an essential precursor to consideration of the effect of an alleged mistake. This point was emphasized by Lord Phillips in *Great Peace*, at [94]. In order to determine whether the contractual adventure, as it was characterised by Lord Phillips, has become impossible of performance, and in order to determine whether the subject matter of the relevant contract has been rendered essentially and radically different, it is necessary to carry out a careful analysis of the relevant contract and the rights and obligations which it created.
132. In this context Mr Mill drew my attention to what Neuberger LJ said in *Kyle* at [27]:
- “27. I suspect that it is normally not easy to say precisely why a difference such as there is in this case is not, or indeed is, radical and essential. If that is right, this case is no exception to the norm. However, it seems to me that the following factors strongly drive one to the conclusion that the difference in this case was not radical or essential. In conceptual terms, once one appreciates what was correctly assumed or agreed (as discussed in the preceding paragraph), it is hard to say that if one corrects the one aspect which was wrongly assumed, it would radically and essentially alter the nature of the contract. What was wrongly assumed was a detail, albeit a significant detail, of the basis on which the Policy was written: it did not go to the validity of the Policy, the parties, the property or nature of the business, or even the nature of the risks covered. In addition, if it is*

appropriate to look at the matter in commercial terms (as I believe it is in this case at any rate), although the claimant received some 33% less than it should have done, which is a significant, even a substantial, reduction on its entitlement, I do not think it can fairly be characterised as an “essentially or radically” different sum from its entitlement.”

133. In oral submissions Mr Mill drew my attention to the opening part of this paragraph in support of his argument that a decision in relation to the Fourth Element required a careful analysis of all the relevant circumstances, and that it was not appropriate or possible to carry out that exercise in the present case on a summary judgment application. I will come back to the question of whether the exercise can be carried out in the present case on a summary judgment application. In principle however I accept the point made by Mr Mill, to the extent that a decision in relation to the Fourth Element does require a careful analysis of all the circumstances relevant to the identification of the contractual adventure.
134. With the above analysis in place I turn to the Judge’s consideration of the Fourth Element. I start with a point I have already made, in my discussion of the Judge’s consideration of the Second Element, At [J25] the Judge noted what he referred to as marked differences between the description of the Fourth Element in *Great Peace*, at [76], and the description of the Second Element in *Chitty*, at 6-015. The point made by the Judge was that the Fourth Element was described in *Chitty*, in the alternative to impossibility of performance, by reference to the contractual adventure being essentially different to that which was anticipated. In my view there is no marked difference of description of the kind referred to by the Judge. As I have explained, the Court of Appeal clearly approved, in *Great Peace*, Steyn J’s formulation of the Fourth Element question as being whether the mistake rendered the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist.
135. Moving on to [J28] and the Judge’s consideration of the decision of the Deputy Judge in *Triple Seven*, the Judge referred to the essential point made by the Deputy Judge as being that there must be a fundamental difference between the assumed and actual state of affairs. This was significant because the Judge then went on to make the point that if that test was right, the Respondent had no difficulty meeting it. As the Judge commented, in the final sentence of [J28]:
- “The difference between the defendant having the entire legal and beneficial ownership of the Marks and the claimant having beneficial ownership of all the Marks other than those registered in France is stark.”*
136. It seems to me that the Judge did go wrong in his reasoning at [J28], in the following manner. The Judge cited the formulation of the law provided by the Deputy Judge in *Triple Seven*, at [76]. The Judge described that formulation as being different in its emphasis to that of Lord Phillips in *Great Peace*. To the extent that this matters, I am not convinced that there is such a difference in emphasis. The relevant point for present purposes however is that in sub-paragraph (4) of his analysis in *Triple Seven*, the Deputy Judge identified the Fourth Element question in the following terms:
- “(4) By reason of the assumption being wrong, the contract or its performance would be essentially and radically different from what the parties believed to be the case at the time of the conclusion of the contract; alternatively, the contract*

must be impossible to perform having regard to or in accordance with the common assumption. In other words, there must be a fundamental difference between the assumed and actual states of affairs.”

137. Save for the last sentence of this sub-paragraph it seems to me that what the Deputy Judge was saying was consistent with the alternative formulations of the Fourth Element question which can be found in the authorities I have referred to above. So far as the last sentence of this sub-paragraph is concerned, I read it as simply bringing out the stringency of the test. Returning to the Judgment however, at [J28], the Judge appears to have treated this last sentence as identifying the Fourth Element question, so that the question becomes whether there is a fundamental difference between the assumed and actual states of affairs. I do not think that this is a correct formulation of the Fourth Element question and if contrary to my impression, the Deputy Judge in *Triple Seven* intended this to be a correct formulation of the test, I respectfully disagree. The Fourth Element question is not a simple comparison of the assumed and actual states of affairs. Such a formulation of the question seems to me to divert attention from the essential exercise which has to be carried out, which is a careful analysis of the relevant contract, in order to determine (i) whether the relevant contractual adventure has become impossible of performance, or (ii) whether the mistake has rendered the subject matter of the relevant contract essentially and radically different from the subject matter which the parties believed to exist.
138. On the face of it therefore, it seems to me that the Judge formulated the wrong question or test, in [J28], in relation to the Fourth Element.
139. The Judge returned to consideration of the Fourth Element at [J37]. The Judge recorded an acceptance by Mr Mill that the 2008 Agreement was not impossible to perform. I assume that the Judge meant by this that it was accepted that the mistake which the parties must be assumed to have made in the present case did not render the 2008 Agreement impossible to perform. As such, the Judge concluded that if the test was impossibility of performance, and nothing else, the claim in common mistake was bound to fail.
140. The Judge then went on, in [J38], to say that impossibility of performance may need to be measured against the common assumption, and that the test “*may also be that performance is essentially different to that common assumption*”. Applying that test, the Judge concluded that the Appellant could not show that the Respondent’s case with regard to the Fourth Element was bound to fail. In my view the Judge did not apply the correct test in arriving at this conclusion. I say this for two reasons.
141. First, the Judge appears to have treated the test of essential difference, which he applied, as being materially different to, and materially easier to satisfy than the test of impossibility of performance. While the authorities establish that there are two alternative formulations of the Fourth Element question or test, my own analysis leads me to the conclusion that whether the test is impossibility of performance or essential and radical difference in the subject matter of the contract, the test is still a stringent one. The two alternative formulations of the Fourth Element question seem to me to be interlinked. As Neuberger LJ noted in *Kyle*, if the subject matter of a contract is essentially and radically different to what it was believed to be, it may well be perfectly

possible to say that the contract is impossible to perform by reference to its assumed subject matter.

142. Second, I think that the Judge's formulation of the test was wrong. I do not think that the Fourth Element test is whether "*performance is essentially different to that common assumption*". The alternative test to impossibility of performance is whether the relevant mistake renders the relevant subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. The difference in wording may be said not to be significant, but in my view it matters, because of the importance, in the present case, of concentrating upon the subject matter of the 2008 Agreement, and asking the question whether the mistake which the parties must be assumed to have made as to the ownership of the Trade Marks had the effect of rendering that subject matter essentially and radically different from the subject matter which the parties believed to exist. In order to answer that question it is essential to examine what the parties agreed to do under the 2008 Agreement.
143. The Judge's conclusion, at [J38] appears to have been derived from the comparison which he made, at [J28], between the Assumed State of Affairs and the True State of Affairs. In my view, and for the reasons which I have explained, I think that the Judge's approach, in relation to the Fourth Element, went wrong in law. As such, I do not think that the Judge's reasoning or conclusion, so far as the Fourth Element question was concerned, can be supported.
144. Given this conclusion it seems to me that it is necessary for me to carry out my own analysis of whether the Appellant is right to submit that the Respondent's claim has no real prospect of success because the Respondent cannot satisfy the Fourth Element test. By the Fourth Element test I mean the two alternative formulations of this test which emerge from the authorities; namely whether the mistake as to ownership of the Trade Marks which the parties must be assumed to have made either (i) rendered the contractual adventure constituted by the 2008 Agreement impossible of performance, or (ii) rendered the subject matter of the 2008 Agreement essentially and radically different from the subject matter which the parties believed to exist.
145. The starting point is the agreed, and obvious fact that the 2008 Agreement was put in place to regulate the future relationship between the parties, following the expiration of the term of the Radlett Agreement. From there it is necessary to examine the 2008 Agreement, and determine what it was that the parties agreed to do in that relationship.
146. Mr Mill, as one would expect, characterised the 2008 Agreement as an agreement whereby the Appellant granted a limited licence to the Respondent to use the Trade Marks, when in fact the Respondent actually owned the Trade Marks. The common mistake of the parties in this respect therefore deprived the 2008 Agreement of its very purpose. Mr Mill submitted that the present case was effectively on all fours with cases of mistaken title, where a vendor accidentally sells land to a purchaser which the vendor already owns. In this context Mr Mill referred me to the case of *Cooper v Phibbs* (1867) LR 2 HL 149, a case where the plaintiff entered into an agreement to take a lease of a fishery from the defendants, in the belief that the defendants were the owners of the fishery, when in fact the fishery belonged to the plaintiff. It was held by the House of Lords that the plaintiff was entitled to have the agreement set aside, on the basis that it had been entered into by the parties by reason of a mutual mistake as to the

ownership of the fishery. Mr Mill cited this case as good authority for the common law proposition that a contract may be void for common mistake where A agrees to transfer to B something to which B is already entitled. This analysis of the status of the decision, as an authority on the doctrine of mistake in common law, is supported by the subsequent treatment of this case in *Bell v Lever Bros Ltd* [1932] AC 161 (Lord Atkin at 218 and Lord Thankerton at 235-236) and in *Great Peace* (Lord Phillips at [126]).

147. In this context I was also referred, in the submissions of the parties, to certain legal materials dealing with the nature of ownership of trade marks. In particular I was referred to the negative nature of the rights arising on the registration of a trade mark. It is not necessary for me to go into this particular point, because I understood it to be common ground that, as with other forms of property, one party may hold the legal title to a trade mark on trust for another party. As such, there is no obstacle to proceeding on the basis that the True State of Affairs, which has to be assumed for the purposes of the Application and this appeal, was that the Appellant held the Trade Marks, with the exception of the French Trade Mark, on trust for the Respondent.
148. If the 2008 Agreement is correctly characterised by Mr Mill as being on all fours with an agreement in a mistaken transfer of title case, such as *Cooper v Phibbs*, then it seems to me that Mr Mill's argument has merit, or at least sufficient merit to establish a real prospect of success in relation to the Fourth Element. It seems clear to me however that the 2008 Agreement cannot be so narrowly characterised. Indeed, the 2008 Agreement seems to me to have been something very different. In order to demonstrate why this is so, it is necessary to revisit the detail of the 2008 Agreement.
149. Clause 1 contains a relatively complex set of provisions concerning the ability of each party to use the Trade Marks. So, by Clause 1.1 the Respondent's exclusive right to continue to use the Trade Marks in relation to the Respondent's UK business in the JLL Products (as defined) is continued. Clause 1.2 extends the same agreement to Ancillary Products (as defined).
150. Clause 1.3 then contains the agreement of the Respondent that it will only use the Trade Marks in relation to its UK business, in the terms and subject to the restrictions set out in Clause 1.3. Clauses 1.3.1 and 1.3.2 deal with the ability of the Respondent to operate outside the UK and include, at Clause 1.3.2.2, an obligation to support the Appellant's made to measure and ready to wear activities around the world and in the UK through the Respondent's activities at the JLL Premises (as defined). In exchange for all this, and by Clause 1.4, the Appellant agrees not to use the Trade Marks in the UK, subject to the exceptions in Clause 1.4. Clauses 1.6 and 1.7 then contain further provisions regarding the way in which the Trade Marks are used. In particular Clause 1.7 imposes restrictions upon what use the Appellant can make of certain forms of the Trade Marks. Parallel restrictions are then imposed upon the Respondent by Clause 1.8. Finally, Clause 1.9 contains a consent by the Appellant to the Respondent marketing and promoting its products, provided that such material does not suggest any link between the Appellant and the Respondent.
151. Clause 1 effectively contains a scheme of rights and restrictions, which regulate for the future the use which each party can make of the Trade Marks. Both parties are granted rights to use the Trade Marks. Both parties accept restrictions on their use of the Trade Marks.

152. Clauses 2.1 and 2.2 address the question of future co-operation between the parties, in relation to the preservation and promotion of the Trade Marks and their associated goodwill. In particular, the Appellant agrees, by Clause 2.2 to offer assistance to the Respondent in support of this objective. Clauses 2.3 and 2.4 then set out the Appellant's obligations, in terms of payments to be made to the Respondent. It is interesting to note, in terms of the purpose of these payments, that the final part of Clause 2.9 is in the following terms:
"JLSA does not require the payment to be put towards any particular marketing activity and accepts JLL's assurance that it will be used in the general best interests of the Mark."
153. Clause 3 imposes obligations on the Appellant, at its own discretion, to deal with the maintenance of the Trade Marks, in terms of their registration, renewal, maintenance, and defence.
154. Clauses 5.2 and 5.3 contain mutual rights of pre-emption, in the event of a sale of shares outside, respectively, the Hermes group and the Lobb family.
155. The 2008 Agreement thus contains a suite of rights and obligations, largely relating to the future use of the Trade Marks, but including other matters such as the Appellant's payment obligations in Clause 2, and the mutual pre-emption rights in Clause 5.
156. The next step is to apply the two alternative formulations of the Fourth Element test or question to this suite of rights and obligations. It is clear that the exercise of these rights was not rendered impossible by the mistake as to ownership which the parties must be assumed to have made. It is clear that compliance with these obligations was not rendered impossible by the mistake as to ownership. Indeed, so far as impossibility of performance was concerned, I did not understand Mr Mill to contend that the mistake as to ownership rendered performance of the contractual adventure impossible. By reference to [J38], the position was the same before the Judge.
157. This leaves the question of whether the mistake as to ownership rendered the subject matter of the 2008 Agreement essentially and radically different from what the parties must be taken to have believed that subject matter to be.
158. Looking at the suite of rights and obligations contained in the 2008 Agreement I find it impossible to see how the subject matter of the 2008 Agreement was rendered essentially and radically different to what the parties must be taken to have believed it to be.
159. The subject matter of the 2008 Agreement was not the equivalent of a transaction comprising a transfer of title to property. The 2008 Agreement regulated the future business relationship between the parties principally, but not exclusively, in relation to the future use of the Trade Marks. The subject matter of the 2008 Agreement is not easily reduced to any brief words of description, because it contains a suite of rights and obligations, ranging from rights and obligations concerning the use of the Trade Marks, through financial rights and obligations, to rights and obligations of pre-emption. So far as the subject matter of the 2008 Agreement can be reduced to brief words of description, the subject matter of the 2008 Agreement was concerned with the

regulation of the future business relationship between the parties, including their respective spheres of operation.

160. There are various ways in which this can be illustrated. All of the provisions of the 2008 Agreement have been and remain perfectly capable of operation by reference to the True State of Affairs (meaning the state of affairs which must be assumed to be the true state of affairs for present purposes). If one considers whether the mistake of the parties has robbed the 2008 Agreement of its essential purpose, the answer seems to me to be in the negative. The essential purpose, or more accurately the essential purposes of the 2008 Agreement can still be served, by reference to the True State of Affairs. The subject matter of the 2008 Agreement, comprising the suite of rights and obligations contained therein, is still intact, notwithstanding that the Assumed State of Affairs has turned out to be wrong.
161. In his oral submissions Mr Mill made the point that the Respondent would never have signed up to the terms of the 2008 Agreement if it had not been mistaken as to the ownership position. This of course is not the test. The subjective intentions of the parties are not relevant in this context. The point does however seem to me to throw an important light on the application of the essential and radical difference test. By reference to the True State of Affairs, the negotiating landscape, when the 2008 Agreement was being negotiated, should have been one where the Respondent had, to the knowledge of the parties, the beneficial interest in all of the Trade Marks save for the French Trade Mark. By reference to the Assumed State of Affairs, the negotiating landscape, when the 2008 Agreement was being negotiated, was one where the parties believed the Respondent to have no interest in the Trade Marks. These two negotiating landscapes are commercially very different, but I cannot see that they involve the essential and radical difference required by the Fourth Element test. By reference to each negotiating landscape it would have been perfectly possible for the parties to have arrived at versions of the suite of rights and obligations which appear in the 2008 Agreement in essentially the same form. What would, or might have been different, if the negotiations had been conducted by reference to the True State of Affairs, was the division of the rights to use the Trade Marks, which in turn might have had a knock on effect on other provisions of the 2008 Agreement. By way of example the payments to be made pursuant to Clause 2 might have been increased or decreased, depending upon who got what, in terms of the rights to use the Trade Marks.
162. In oral submissions Mr Davies at times appeared to suggest that there was no reason why the Appellant, if it had only the legal title to the Trade Marks, could not have licensed their use to the Respondent, as beneficial owner. These submissions seemed to me to go too far. I can see the point, stressed by Mr Mill in his oral submissions, that by reference to the True State of Affairs, the parties were in a very different relationship, so far as the Trade Marks were concerned, when they negotiated the terms of the 2008 Agreement. By reference to the True State of Affairs, and with the exception of the French Trade Mark, the relationship between the Appellant and the Respondent was one of trustee and beneficiary. That relationship would, I accept, have created a very different negotiating landscape. What I do not accept is that it would have rendered the subject matter of the 2008 Agreement, namely the regulation of the future business relationship between the parties including their respective spheres of operation, essentially and radically different from what the parties believed it to be.

163. The relevant point is that, by reference to the True State of Affairs, there was not, in my judgment, an essential and radical change in the subject matter of the 2008 Agreement. Essentially the same suite of rights and obligations, possibly in terms more generous to the Respondent, could perfectly well have been negotiated by reference to the True State of Affairs. Putting the matter another way, and adopting the language of Neuberger LJ in *Kyle*, at [27], if one corrects the aspect of the 2008 Agreement which was wrongly assumed, it did not radically and essentially alter the nature of the 2008 Agreement.
164. Mr Mill referred me to the coronation case of *Griffith v Brymer* [1903] 19 TLR 434 as an example of a case where a contract was held void for common mistake, notwithstanding that the contract was, in one sense at least, still perfectly possible of performance. The case concerned a contract for the hire of a room from which to view the procession for the coronation of Edward VII. At the time when the agreement was made, and without the knowledge of the parties, the decision had been made operate on the King, with the result that coronation procession was cancelled. The report of the case is fairly brief, but does contain the following account of the reasoning of the judge, Wright J:
- “The agreement was made on the supposition by both parties that nothing had happened which made performance impossible. This was a missuposition of the state of facts which went to the whole root of the matter.”*
165. Mr Mill pointed out that, on the facts of this case, the contract of hire was still perfectly capable of performance. The room was available and could still be paid for and occupied at the contracted time. The only difference was that no coronation procession would pass by. Mr Mill’s point was that this qualitative difference in the subject matter of the contract was perfectly capable of being sufficiently fundamental to the contract to allow the contract to be rendered void on the basis of common mistake.
166. I accept that a mistake as to the quality of the thing contracted for may be capable of rendering a contract void for common mistake, but *Griffith v Brymer* seems to me to bring out the need for the mistake to be one which renders the subject matter of the contract essentially and radically different from what it was believed to be. In that case the whole purpose of the contract was to provide the plaintiff with a room to view the coronation procession. In the absence of the coronation procession, as the report of the decision of Wright J makes clear, the whole purpose of the contract was defeated.
167. Ultimately, it seems to me that the present case falls on the same side of the line as cases such as the decision of the majority of the House of Lords in *Bell v Lever Bros Ltd* (entry into severance agreement which mistakenly provided for substantial compensation payments in circumstances where the employees could have been dismissed without compensation), *Great Peace* (mistake as to the location of a ship) and *Kyle* (mistake as to the basis on which an insurance policy was written). Equally, the present case seems to me to fall on the opposite side of the line to cases such as *Associated Japanese Bank* (mistake as to the existence of the goods in respect of which the contract of guarantee was made), *Cooper v Phibbs* (agreement to lease property already owned by the intended lessee), and *Griffith v Brymer* (mistake as to the taking place of the event for the purpose of viewing which the relevant premises were to be hired).

168. Drawing together all of the above discussion, I reach the provisional conclusion that the Judge was wrong in the conclusion which he reached, in relation to the Fourth Element question, at [J38]. In my view the Respondent cannot satisfy what I have described as the Fourth Element test, in either of the alternative formulations of that test which emerge from the authorities.
169. I describe this conclusion as provisional because there is, again, the argument that I should not, in advance of a trial and in advance of hearing all the evidence in the action, be making decisions on the application of the Fourth Element test to the facts of this case. As Mr Mill submitted, I should not be making decisions of this kind without knowledge of all the surrounding circumstances. As with the Judge's decision on the Second Element question, this argument commended itself to the Judge in the context of his decision on the Fourth Element. As I read [J39], [J40], and [J41] the reasoning of the Judge in those paragraphs was intended to apply equally to the Fourth Element question as it applied to the Second Element question.
170. I can take this question of suitability for summary judgment more quickly in relation to the Fourth Element because I have considered the Judge's reasoning in detail in my discussion of the Second Element question. For the reasons which I have already set out in this judgment, I do not think that any of the reasons given by the Judge at [39]-[J41] were good or sufficient reasons to decline to decide the application for summary judgment, so far as it was concerned with the Fourth Element. Taking in turn the reasons identified by the Judge, I comment briefly as follows:
- (1) The Judge's reasoning at [J39] seems to me to have been misconceived. The Judge appears to have considered that there was a question mark over the correctness of the formulation of the Elements provided by Lord Phillips in *Great Peace*, at [76]. As with the Second Element, and so far as concerns the Fourth Element, I do not think that there is any such question mark. The alternative formulations of the Fourth Element test, as I have characterised this test, seem to me to emerge clearly from the authorities. As such, I disagree with the Judge that the Fourth Element question was unsuited to summary disposal.
 - (2) As I have already said, there are cases where it is unwise to make a decision on the construction of an agreement and/or on a question of law, without a full factual investigation. I do not see the present case as such a case. It seems to me that it is perfectly possible, as I have done, to decide the question of construction in relation to the Fourth Element on the assumption that the factual matrix is as the Respondent contends.
 - (3) As with the Second Element question, I do not see the Fourth Element question as a fact sensitive question. It seems to me to turn on analysis of the 2008 Agreement. Indeed, in the case of both the Second Element question and the Fourth Element question it seems to me, if I had been persuaded by Mr Mill's arguments, that logic would have required a final decision on those questions in favour of the Respondent. I have some difficulty in seeing how, as a matter of logical reasoning, one could have arrived at a result where it was appropriate to say that no decision should be made on each question one way or the other.
 - (4) As I have said, I agree with the Judge that one should not take what was said by Lord Phillips in *Great Peace* at [76], and apply those words as if they were a statute. For the reasons which I have set out, it seems to me to be misconceived to regard the present case as one where it is appropriate to carry out an exercise of that kind. Equally, for the reasons which I have set out and as with the Second

Element, I do not see the present case as one where, in relation to the Fourth Element, the law is continuing to refine and develop.

- (5) In my discussion of the Second Element question I have already dealt with what the Judge said at [J41(3)], where he identified this area of the law (including both the Second Element question and the Fourth Element question) as continuing to refine and develop. I do not agree, for the reasons which I have already set out in my earlier discussion. I do not think that the relevant law is correctly described as continuing to refine and develop. Nor do I see significant, or any disputes of fact in the present case which affect the answering of the Fourth Element question.
- (6) At [J41] the Judge appears to have had in mind, so far as the Application was for summary judgment, the question of whether there was some other compelling reason for a trial. As I have said, I will come back to this question, in relation to the Judge's decision on both the Second Element and the Fourth Element, later in this judgment.
171. Turning to Mr Mill's submissions on the question of whether I was in a position to decide the Fourth Element question, those submissions seemed to me to suffer from the same difficulty as existed in relation to the equivalent submissions in relation to the Second Element. It seems to me that the determination of the Fourth Element question depends upon a careful analysis of the terms of the 2008 Agreement. I was, again, unable to discern what gap in the evidence there was which might affect my analysis of the 2008 Agreement. Nor was I able to discern what evidence might reasonably be expected to turn up at trial which might affect my analysis of the 2008 Agreement. Again, the provisions of the 2008 Agreement seem to me to speak for themselves. So far as the factual matrix may be relevant, I have approached the construction exercise on the assumption that the factual matrix is as the Respondent contends, but I was unable to see any conflict of evidence in the case or any unexplored issue of fact which would have affected my analysis of the 2008 Agreement. In terms of the factual background the only really relevant point, as it seemed to me, was the starting point for my analysis; namely that the 2008 Agreement was put in place to regulate the future relationship between the parties, following the expiration of the term of the Radlett Agreement. That starting point, quite apart from being obvious, was an agreed factual matter between the parties
172. In summary I see the present case, so far as it concerns the Fourth Element and as with the Second Element, as falling within the scope of what was said by Moore Bick LJ in *ICI Polymers*. The Application, so far as it concerns the application for summary judgment in relation to the Fourth Element, gives rise to a short point which seems to me to require no more than a careful analysis of the terms of the 2008 Agreement. I am satisfied that I have before me all the evidence necessary for the carrying out of this analysis, and that the parties have had an adequate opportunity to address this analysis in argument. As such, it seems to me that I should grasp the nettle and decide the Fourth Element question.
173. Drawing together all of the above discussion I conclude that the Respondent has no real, or indeed any prospect of succeeding in its claim to avoid the 2008 Agreement on the basis of common mistake. I reach this conclusion on the basis that, on analysis of the 2008 Agreement, the Respondent is unable to demonstrate that the mistake as to the Assumed State of Affairs, which the parties must be assumed to have made for the

purposes of the Application, either (i) rendered the contractual adventure constituted by the 2008 Agreement impossible of performance, or (ii) rendered the subject matter of the 2008 Agreement essentially and radically different from the subject matter which the parties believed to exist.

174. Subject therefore to the question of whether there is some other compelling reason for a trial, to which I shall come, the Appellant is entitled to summary judgment against the Respondent on this basis, in addition to the entitlement to summary judgment which exists by reason of my decision on the Second Element.

Discussion – the Judge’s residual reasons for refusing summary judgment

175. In referring to the Judge’s residual reasons for refusing summary judgment I have in mind what the Judge said at [J41], where he made reference to the second limb of CPR 24.2. I assume that the Judge considered that the case was one where there was a compelling reason for the action to go to trial.
176. I can take this part of the Judge’s decision shortly. In so far as the Judge was saying that the action was unsuitable for summary judgment for the reasons set out in the earlier parts of the Judgment, I do not agree, for the reasons which I have given in this judgment.
177. Beyond this I can see no other compelling reason for this action to go to trial. To the contrary, in circumstances where the Respondent’s claim can be seen at this stage to have no real prospect of success it seems to me that it would be wrong to allow the action to continue and to require the parties to proceed to an expensive trial. The present case seems to me to be a good example of the type of case, identified by Moore Bick LJ in *ICI Polymers*, where the court can and should grasp the nettle and decide what needs to be decided at the summary judgment stage.
178. There is one other matter which I should mention in this context, for the sake of completeness. CPR 24.2 confers a discretion on the court as to whether to grant summary judgment on the relevant claim or issue. The court “*may*” grant summary judgment. In some cases this may mean that the appeal court, even if it disagrees with the decision of the first instance court, should not interfere with that decision on the basis that the decision fell within the legitimate scope of the discretion of the first instance court. I do not think that the present case is such a case, and the appeal was not argued on this basis. Given the basis on which I have disagreed with the decision of the Judge on the summary judgment application, I do not think that the decision of the Judge can be defended as lying within the legitimate scope of his discretion.

Discussion – the application to strike out

179. As I have already said, the Judge dealt with the application to strike out, pursuant to CPR 3.4(2)(a), as part of his reasoning on the summary judgment application. It is clear, in the light of the Judge’s reasoning and conclusions in the Judgment, that the Judge did not consider that a strike out order was appropriate. Indeed, at [J41], the Judge appears to have taken the view that a strike out order was not appropriate because the case was not suitable for summary disposal.
180. In oral submissions Mr Davies treated the two limbs of the Application as indistinguishable. He submitted that if I accepted his arguments, it was as appropriate

to strike out as it was to grant summary judgment.

181. I do not think that this is the correct approach to the strike out application. For the purposes of the summary judgment application I am entitled to look at the case as a whole, subject to the limitations imposed by the nature of a summary judgment application. In the case of the strike out application it is only the jurisdiction to strike out under CPR 3.4(2)(a) which is relied upon. In oral submissions Mr Davies confirmed that the strike out application was not made on the basis of the jurisdiction under paragraph (b) or paragraph (c) of CPR 3.4(2) or on the basis of the inherent jurisdiction of the court. In these circumstances it is necessary to focus on the case pleaded in the Amended Particulars of Claim. The relevant question to be answered is whether the Amended Particulars of Claim disclose reasonable grounds for bringing the claim that the 2008 Agreement is void on the basis of common mistake. Putting the matter another way, the relevant question is whether the Amended Particulars of Claim, taken at face value, plead a viable claim that the 2008 Agreement is void on the basis of common mistake.
182. In the course of his oral submissions Mr Davies did take me to the Amended Particulars of Claim, but not for the purposes of demonstrating that they failed to plead a recognised cause of action. Rather, Mr Davies was seeking to bring out what he said were difficulties in the Respondent's case on the Second Element and the Fourth Element. I did not understand Mr Davies to be submitting that the pleading of the case was deficient. His case, which I have accepted, was that if one looked at the facts of the case (accepting the Respondent's version of those facts), and construed the 2008 Agreement, it could be seen that the Respondent had no real prospect of establishing its case that the 2008 Agreement was void from the outset on the basis of common mistake. While the point is academic, given my decision on the summary judgment application, it does not seem to me to follow from my decision on the summary judgment application that the pleaded case in the Amended Particulars of Claim also falls to be struck out pursuant to the jurisdiction in CPR 3.4(2)(a).
183. In my view neither the Particulars of Claim nor the Amended Particulars of Claim are deficient in their pleading of the claim based upon common mistake. It seems to me that the Respondent has adequately pleaded its case that the 2008 Agreement was void from the outset, on the basis of the common law doctrine of common mistake. The problem with the Respondent's case is that, even at the summary judgment stage, it can be seen to have no real prospect of success, once one considers the facts of the case (accepting the Respondent's version of those facts) and construes the 2008 Agreement. In order to reach this conclusion however, it is necessary to go beyond the pleaded case.
184. Although this conclusion is strictly academic, given my conclusion on the summary judgment application, it seems to me that the Judge was right to decline to strike out the Respondent's claim pursuant to CPR 3.4(2)(a). The Judge's reasons for refusing the strike out order were the same reasons as he relied upon for his decision to refuse summary judgment. It follows from my reasoning in this judgment, that I do not agree with the Judge's reasons; either as reasons for refusing the strike out order or as reasons for refusing summary judgment. That said, and for the reasons which I have just set out, I think that the Judge did reach the correct result on this part of the Application.

Summary of my conclusions

185. In summary, my conclusions on the appeal are as follows:

- (1) For the reasons which I have given, I conclude that the Respondent has no real, or indeed any prospect of succeeding in its claim to avoid the 2008 Agreement on the basis of common mistake.
- (2) I reach this conclusion for each and both of the following two reasons:
 - (i) As a matter of construction of the 2008 Agreement, the risk of the Assumed State of Affairs turning out to be wrong was allocated to the Respondent, with the result that the claim that the 2008 Agreement was void from the outset on the basis of common mistake cannot succeed.
 - (ii) As a matter of construction of the 2008 Agreement the mistake of the parties as to the Assumed State of Affairs did not either (a) render the 2008 Agreement impossible of performance or (b) render the subject matter of the 2008 Agreement essentially and radically different from the subject matter which the parties believed to exist. As such, the claim that the 2008 Agreement was void from the outset on the basis of common mistake cannot succeed.
- (3) I consider that there is no other compelling reason why the Respondent's claims in the action should be disposed of at a trial.
- (4) I therefore conclude that the Judge was wrong to dismiss the Application, so far as the Appellant sought summary judgment against the Respondent.
- (5) I therefore conclude, also, that the Appellant is entitled to summary judgment against the Respondent.
- (6) Although this is academic, on the basis of my conclusions on the summary judgment application, I conclude that the Judge was right to dismiss the Application so far as the Appellant sought an order striking out the Respondent's claim pursuant to CPR 3.4(2)(a). I reach this conclusion without agreeing with the Judge's reasons for refusing to make a strike out order.

The outcome of the appeal

186. The outcome of the appeal is as follows:

- (1) The appeal is allowed, on the basis that the Judge was wrong to dismiss the Application so far as the Appellant sought summary judgment against the Respondent.
- (2) I will set aside paragraphs 1, 2 and 3 of the Order.
- (3) I will make an order for summary judgment against the Respondent on the whole of its claims in the action.
- (4) I will make an order for the dismissal of the Respondent's claims in the action.

187. I will hear the parties, as necessary and to the extent that the same cannot be agreed, on the terms of the order to be made consequential upon this judgment.

