Case No: HC-2014-000049

Neutral Citation Number: [2016] EWHC 91 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 22/01/2016

Before :

MR JUSTICE NEWEY

- -

Between :

(1) GREENRIDGE LUTON ONE LIMITED	**Claimants**
(2) GREENRIDGE LUTON TWO LIMITED	
- and -	
KEMPTON INVESTMENTS LIMITED	**Defendant**

- -
- -

Miss Joanne Wicks QC (instructed by **DAC Beachcroft LLP**) for the **Claimants**
Mr Mark Warwick QC and Miss Camilla Chorfi (instructed by **Philip Ross**) for the **Defendant**

Hearing dates: 22, 23, 26, 27 and 28 October 2015

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Judgment

Mr Justice Newey :

1. This case arises out of a contract which the claimants entered into in 2013 for the purchase from the defendant, Kempton Investments Limited ("Kempton"), of a property known as Wigmore Place. According to the claimants, they rescinded the contract and are entitled to the return of their deposit and damages. Kempton, however, denies any liability and maintains that the contract came to an end when it accepted the claimants' repudiation of it.

Narrative

2. Wigmore Place comprises three office buildings near Luton Airport. Some 79% of the office space is leased by TUI Northern Europe Limited, a subsidiary of TUI Travel plc, as the group's UK headquarters. Peverel OM Limited, a property management company, occupies another 13.5% of the office space. During the relevant period, two floors of one of the buildings were vacant.

3. In 1995, the freehold title to Wigmore Place was bought by Kempton. Kempton, an investment company beneficially owned by members of the Schlaff family, was incorporated in the Isle of Man and its directors are professionals based there. The day-to-day administration of its property portfolio is, however, conducted by Provewell Limited ("Provewell"), of which a Mr Shulem Aksler is the sole director and a shareholder. Mr Aksler has explained in a witness statement that Provewell was incorporated for the sole purpose of managing Kempton's property interests and that he is "at the centre of the decision-making process" and is responsible for delegating legal and professional matters to accountants and solicitors to deal with on his behalf.

4. In January 2013, Mr Aksler was informed that TUI had appointed a Mr Bob Smith, a service charge consultant with Lambert Smith Hampton, to investigate service charges at Wigmore Place. TUI was said to have "grave concerns over the management of the service charge over the past 5 years".

5. Mr Aksler referred the matter to a Mr Ranbir Singh Bains, who explained to Mr Smith that he had dealt with service charge queries for many years. Mr Bains was at the time a solicitor with very considerable experience of conveyancing. He had practised as Bains & Co until February 2011, when the Solicitors Regulation Authority intervened in the practice. Although Mr Bains' practising certificate was automatically suspended at that point, it was restored within a few months, and by 2013 he was working as a consultant to a firm of solicitors called Blackstones. Mr Bains retired as a solicitor at the end of September 2013, was adjudged bankrupt on his own petition in October 2013 and was struck off the Roll of Solicitors in May 2014 following a hearing before the Solicitors Disciplinary Tribunal in March 2014. He has, however, continued to work as a consultant for, among others, Provewell and a number of the other clients he had when a solicitor.

6. One of the allegations that the Solicitors Disciplinary Tribunal found proved involved dishonesty. The Tribunal said the following about this:

> "The Tribunal was satisfied that in transferring monies from the Mr D and Mr A ledgers for the benefit of AT Ltd [Mr Bains] had acted dishonestly by the standards of reasonable and honest

> people. Further, the Tribunal was satisfied to the required standard that in making the transfers, which he knew were unauthorised loans at the relevant time, [Mr Bains] knew that what he was doing was dishonest by the standards of reasonable and honest people. His use of other client money was grossly reckless … but the Tribunal was not satisfied to the required standard that he had been dishonest in that regard. The Tribunal was, however, satisfied to the highest standard that [Mr Bains] had been dishonest in relation to his use of money belonging to the Mr D and Mr A estates."

Mr Bains appealed that finding, but his appeal was dismissed by Holman J on 18 February 2015.

7. In February and April 2013, Mr Bains sent Mr Smith information in response to requests he had made. On 29 April, Mr Smith told Mr Bains in an email that he had "fully reported" to his clients and that "any matters from [here] on will be handled by them". On 30 April, however, a Mr Ian Spann of TUI wrote to tell Mr Bains that Lambert Smith Hampton had reported "a number of detailed concerns about specific elements of the [service] charge" and that they were still awaiting a formal response from Mr Bains on certain matters; Mr Spann asked that Mr Bains continue to deal with Lambert Smith Hampton on these issues. Mr Spann went on to say that he was "writing … directly on the issue of the Sinking Fund Management and the budgeting of capital works that would in normal circumstances be covered by such a fund". Mr Spann observed that the sinking fund stood to have a balance in excess of £1.3 million by the end of the year and that TUI did "not believe that this figure is either reasonable or appropriate". He continued:

> "It is important therefore that we have a clear and rational approach to the management of the fund including a review of relevant contribution rate and the times which would rationally be charged to the fund. We are also anxious to ensure that there is no double counting of the management fees charged as part of the service charge. It would be perfectly possible under the existing arrangements for a fee to be paid when the money is collected and then again when it is spent.
>
> Pending a formal response from you dealing with our concerns and bearing in mind the current level of the Fund we will not be making any further quarterly payments that reflect this element of the charge. This withholding is in accordance with the findings in *Concorde Graphics v. Andromeda (1982)* and reflects the fact of a formal dispute between your client and our tenant company. In terms of actual amount this means that we will be reducing the quarterly service charge payment by £109,900.
>
> One further point of detail which I would also like to draw to your attention is the unsatisfactory failure to provide annual budgets in time for review and discussion prior to any liability arising. This extends into the annual reconciliation which is not

> presented in a manner that is consistent with the presentation of the budget nor does it provide adequate detail to enable a proper review to be carried out of the expenditure incurred. We believe that this is both a reasonable and necessary requirement for compliance with the 'good estate management' covenant on the part of your client in dealing with the service charge …."

8. In the course of May 2013, Mr Smith sent Mr Bains several emails asking for information relevant to the service charges. On 29 May, Mr Smith told Mr Bains that, in the absence of a response, he saw "little alternative but to treat all the issue as a formal dispute". In an email to Mr Bains of 11 June, Mr Smith said that he had "no choice but to say that the issues I've raised are treated as a dispute, just as is the sinking fund about which TUI has written to you". On the following day, however, Mr Bains sent responses to both Mr Smith and Mr Spann. The email to Mr Smith referred to the enquiries appearing to be "never ending" and the hope that the matter would now be brought to a "complete conclusion". The letter to Mr Spann included these passages:

> "It obviously costs our clients a considerable amount of money and time dealing with queries in the first place and to have to repeat them every few years is most frustrating, time-consuming and expensive. Our clients do not understand what it is that you are hoping to gain by revisiting the same issues on multiple occasions. They have, in the past, tried to accommodate those requests without sounding too disgruntled. However it seems that you are now, once again, threatening to withhold monies properly due to our clients and, with the benefit of hindsight and our explanations, we trust that you will agree that it is quite an outrageous threat so far as our clients are concerned. For the avoidance of doubt, please be under no misapprehension, if any money is withheld then our clients will reluctantly take appropriate measures to enforce their legal rights without any delay and that may be very embarrassing indeed for TUI and its staff at Wigmore Place"
>
> and
>
> "We shall be grateful for your early confirmation that you accept the matter is now closed and that the service charge will be paid on time so that our clients do not have to start considering preparation for enforcement action."

9. Undeterred, TUI deducted £95,256.01 (representing some £79,000 plus VAT) from the quarterly payment it made on 24 June 2013. Mr Bains complained in an email of 1 July, in which he said:

> "Presumably these monies have been withheld because of your misconceived position regarding the operation of the sinking fund.

> Your misreading of the figures and the amounts does not transform the situation into a legal 'dispute'. Were that the case, any tenant could at any time simply query a figure and claim a 'dispute'.
>
> We have, of course, provided a detailed explanation to assist you, and so there can be no doubt.
>
> The withholding of these monies constitutes a serious breach of the tenant's covenants under the terms of the leases under which TUI [occupies] premises at Wigmore Place. Unless this breach is rectified immediately, our clients will, as we have previously advised you, be forced to take appropriate action. This will be most embarrassing and it really is the last thing that our clients wish to do."

10. Responding on 4 July 2013, Mr Smith commented:

> "The matter is in dispute by virtue of the decision in Concorde Graphics v. Andromeda Investments, and that prevents your client from levying distress."

Mr Bains, in turn, told Mr Smith on 5 July that he disagreed with his interpretation of the *Concorde Graphics* case and reserved the "right to distrain". He also said:

> "TUI has not through your firm or through Ian or through anyone else particularised with any clarity what it claims is in dispute and so the landlord is not able to provide any further assistance or clarification."

Mr Smith replied on 8 July:

> "You're the first solicitor to put that interpretation on it, but you're free to have your own opinion."

Also on 8 July, Mr Spann wrote:

> "I have seen your response to Bob which does nothing to resolve the dispute that has been clearly identified to you. And please stop issuing threats about distraint when we all know that your client is in the process of trying to dispose of his interest and that would be the last thing to facilitate a smooth transfer as it would absolutely highlight that there is a dispute in process.
>
> Confining yourself to the detail requested would be far more productive and much more in your clients interest."

11. When Mr Bains forwarded the relevant email to Mr Aksler, he replied:

> "I thought you finished in good terms with him on the phone?"

12. That same day, Mr Bains sent Mr Spann an email in which he provided responses to questions the latter had asked on 5 July and asked for confirmation that the money that TUI had withheld had been released. On 11 July, Mr Bains sought to satisfy Mr Spann on certain other points. Mr Spann, however, said:

> "Unfortunately there is one further point that has occurred to me in the interim. That is if the sinking fund is being held as you advise for undertaking the Eaton House and Lift projects which are fully provided for in the 2013 budget why is there not an allowance of at least say £500K from the fund towards those costs with an equivalent fall in the budget for the year?"

Mr Bains forwarded the email to Mr Aksler the next day with the explanation:

> "I decided not to send it to you yesterday evening as I thought you would worry unnecessarily!"

13. Mr Smith sent Mr Bains a lengthy letter on 16 July 2013. He said that Mr Spann would deal with the sinking fund and that he would "just deal with the other issues outstanding, in the hope we can try and settle this dispute without too much further delay".

14. On 17 July 2013, Mr Bains' daughter, who was a trainee solicitor with Blackstones, sent Mr Spann an email in which she asked for confirmation of the position. On 8 August, Ms Lorraine Bridges, TUI's general estates manager, sent Mr Bains an email in which she asked whether all the queries that Mr Smith had raised in his 16 July letter had been answered. Mr Bains replied:

> "Not as yet, I was admitted to hospital that evening for the rest of the week and am just getting back up to speed again. However Bob said all along that Ian was dealing with the sinking fund and all those queries were dealt with quite some time ago."

15. During the afternoon of 13 August 2013, Mr Bains sent Ms Bridges an email in which he asked to be updated on TUI's position urgently. The next morning, he sent Ms Bridges a further email in which he said:

> "I have still not heard from you and as this is most uncharacteristic of you I do hope all is well.
>
> Could you please confirm the position as soon as possible."

16. On 16 August 2013, Mr Spann wrote to Mr Bains again. He said:

> "I gather you were in touch with Lorraine earlier this week about resolution of payment or our retention from the quarterly service charge payment. This I think you are aware originated from the fact that we had not been supplied with any information on the current year's budget and in particular the provision for capital works and the potential utilisation of the

> retained Sinking Fund. I think I can say that those issues have now been defined satisfactorily with your help and I do not think that that is any further issue on that front.
>
> However I have discussed the matter of the retention with our Head of Property and he is of the view that until all matters that LSH sought clarification upon in Bob Smith's email of 16th July we will continue to retain the sum of £80K from the quarterly service charge payment."

17. That led Mr Bains to email Ms Bridges in these terms later that day:

> "I am appalled that after all this delay and after all these promises by Ian, he has come back moving the goalposts. This is not acceptable and will not be tolerated by my clients. This is clearly a case of TUI trying to interfere with my clients propose sale and my clients will hold TUI fully responsible for all the consequences of their unlawful action."

18. Mr Smith and Mr Bains exchanged emails on 20 August 2013. Mr Smith wrote:

> "It's now 5 weeks since I sent you my email of 16th. July, and things have gone very quiet.
>
> Are you working through the questions and intend to send me a reply soon, or are you now refusing to deal with the matter any further."

Mr Bains replied:

> "Despite oral and written promises from Ian Spann, the monies that were wrongly and unilaterally withheld but were promised to be released have still not been released. Your clients are consequently in breach of the terms of their leases.
>
> I wrote to Lorraine Bridges about the situation last week and so may I suggest that you liaise with her in the first instance."

Mr Smith responded:

> "At the risk of repeating myself, by virtue of the Concorde principle, a tenant is entitled to withhold money where a legitimate dispute is in progress. The trouble caused is well within the relevant parameters.
>
> Irrespective of that, it doesn't prevent you answering my legitimately raised questions, so I'll welcome the necessary questions without any further delay."

19. The correspondence resumed in October 2013, by which time TUI had withheld further money from its September payment. On 1 October, Mr Smith emailed:

> "Are you intending to respond to my questions? Seems a shame to have to operate the arbitration clause and get a third party to deal with this, when I'd hoped we could resolve it between the two of us."

Miss Bains replied on 3 October:

> "Mr Bains has taken a lot of time off work and was back in hospital in mid July. He has left Blackstones at the end of September. I can see from his computer that he had prepared a reply to your enquiries and I am enclosing a copy of it herewith. I think he was waiting for some enclosures referred to in his reply before he sent it but they have been received and so I am enclosing those as well.
>
> Our clients state that TUI have held back their contribution to the sinking fund once again from the September quarter and this is not acceptable. Our clients rights are reserved and they are now considering their options.
>
> I understand that TUI are aware that our clients have exchanged contracts for the sale of the property. In the circumstances our clients will now take action without further delay for the continuing breach of covenant."

Mr Smith's response of 7 October included this:

> "As I pointed out to Rana, by virtue of the Concorde Principle, my clients are fully justified to withhold payment while this major dispute is underway."

In a further email of 8 October, Mr Smith said that the information with which he had been supplied was helpful but that there was still information missing. Miss Bains replied on 9 October, "We will see what further information there is," but said too:

> "We do not agree that there is any dispute or that there has been a dispute. If you claim there is a dispute then as previously requested, you must particularise it."

Mr Smith wrote back on 14 October:

> "As for the dispute, take a look at the old correspondence. Our grievances, doubts, concerns etc. are all laid out."

20. By this point, TUI had instructed solicitors, Wright Hassall LLP. On 11 October 2013, Wright Hassall had stated in an email that an injunction would be sought unless they received confirmation that bailiffs would not be sent to Wigmore Place. Among other things, Wright Hassall said:

> "It appears that after some months of your firm failing to respond to requests for information from Mr Smith, you eventually sent some information to him on 3 October 2013.

> Mr Smith responded on 7 October and again on 8 October seeking further information. On 10 October 2013, we understand that Rana Bains (who you stated in your e-mail of 3 October had left Blackstones) telephoned Lorraine Bridges of our client and stated that if the withheld service charge was not paid immediately, bailiffs would be sent to the Property.
>
> It is clearly inappropriate for bailiffs to be sent to the property when the service charge is in dispute …."

Replying on 14 October, Miss Bains said that her father had contacted Ms Bridges "in his personal capacity as an adviser to Provewell", that Wright Hassall were "misinformed regarding a dispute" and that no arrangements had been made for bailiffs to attend Wigmore Place. In their response, Wright Hassall said:

> "… [I]t seems to us that service charge has been demanded and our client does not accept on the information available to it that the service charge should be paid. We consider this to be a dispute. Indeed a dispute has been referred to on at least 3 occasions in emails from LSH to yourselves …."

21. Mr Bains had prepared a draft reply to Wright Hassall's 11 October email that was much longer than the version that his daughter ultimately sent. The draft, which Mr Bains emailed to Mr Aksler, included these passages:

> "It has been [our] clients view for some time now that TUI have been deliberately trying to raise thoughtless 'enquiries' with a view to creating the impression that there is a dispute with the Landlord so that they can influence the sale of the property by our client"
>
> and
>
> "Our clients gained the very clear impression from the nature of the enquiries and Mr Bains' conversations with both Ms Bridges and Mr Spann that these enquiries were in fact being raised with the ulterior motive of adversing influencing our clients sale. Mr Bains has mentioned this to Ms Bridges on three occasions."

22. There was another flurry of emails in November 2013. On 12 November, Miss Bains wrote to Mr Smith:

> "It has now been sometime since we last heard from you. Have you received your clients further instructions and are there any enquiries outstanding?
>
> Is there any reason why the sinking fund contribution should remain outstanding? Could you please let me have your justification for the same as my clients are once again reconsidering the position."

The exchanges concluded with an email in which Mr Smith referred to there being "Still far more outstanding than has been seen" and other matters being with his client.

23. By now, Kempton had been seeking to sell Wigmore Place for quite some time. In anticipation of a purchaser being found, draft replies to commercial property standard enquiries (or "CPSEs") had been prepared much earlier in 2013. On 7 March 2013, Mr David Connick of Philip Ross, the firm of solicitors instructed by Kempton, sent Mr Aksler CPSE.1, CPSE.2 and CPSE.4 with some suggested replies and a request to "confirm or amend such of my replies as are within your ambit and complete the responses I have been unable to address". Mr Aksler having referred the matter on to Mr Bains, he emailed revised drafts of CPSE.1, CPSE.2 and CPSE.4 to Mr Aksler on 11 and 12 March. In one of his emails, Mr Bains said, "Please see replies to tenancy enquiries for you to check before sending on." In the other, he said:

> "… I am enclosing the further enquiries (about 50 pages!) which I have completed on your behalf as requested.
>
> Could you kindly read through the replies and check that they are correct. (I am sure you will)
>
> There are a few points that I will run through with you in the morning and I will need Kempton's VAT number."

24. As completed by Mr Bains and subsequently sent out to prospective purchasers, the CPSEs had the following features:

i) Towards the beginning, in a section headed "Interpretation", CPSE.1 stated:

> "5. In replying to each of these enquiries and any supplemental enquiries, the Seller acknowledges that it is required to provide the Buyer with copies of all documents and correspondence and to supply all details relevant to the replies, whether or not specifically requested to do so.
>
> 6. The Seller confirms that pending exchange of contracts or, where there is no prior contract, pending completion of the Transaction, it will notify the Buyer on becoming aware of anything which may cause any reply that it has given to these or any supplemental enquiries to be incorrect";

ii) The reply "None" was given in answer to enquiry 28 in CPSE.1, which read:

> "Except where details have already been given elsewhere in replies to these enquiries, please give details of any disputes, claims, actions, demands or complaints that are currently outstanding, likely or have arisen in the past and that:

(a) relate to the Property or to any rights enjoyed with the Property or to which the Property is subject; or

(b) affect the Property but relate to property near the Property or any rights enjoyed by such neighbouring property or to which such neighbouring property is subject";

iii) Enquiry 10.6 in CPSE.2 asked:

"In respect of service charge arrears at any Let Unit please:

(a) tell us what sums are currently due but are unpaid; and

(b) provide a schedule of all service charge arrears over the past three years".

The reply was:

"There are no arrears. The tenants pay regularly and the landlord has never had to take any action for recovery";

iv) Enquiry 10.8 in CPSE.2 asked:

"Except as already disclosed, have there been any complaints or disputes relating to the service charge?".

The reply was:

"There have been no complaints or disputes as such. From time to time TUI have raised queries on mainly historic issues. TUI have recently raised further enquiries";

v) Enquiry 14 in CPSE.2 asked:

"Except as already disclosed in replies to CPSE.1, please give details of:

(a) any disputes or complaints in relation to any current Tenancy, whether or not resolved; and

(b) any breaches or alleged breaches of covenant relating to any Tenancy, including details of any waiver whether express or implied".

The reply was:

"None so far as the seller is aware".

25. Allsop and Buchanan Bond were appointed jointly to market Wigmore Place. On 30 May 2013, Mr Connick sent the CPSEs (among other documents) to solicitors acting for a possible buyer. By early July, bids had been received from, among others,

Ediston UK Real Estate Unit Trust ("Ediston") and "Greenridge". The offer from Greenridge was slightly higher than that from Ediston (£14,625,000 as opposed to £14,600,000), but Kempton decided to proceed with Ediston. As Mr Jam Schlaff, one of Kempton's beneficial owners, explained, Allsop was concerned about whether Greenridge had the finance to carry through the purchase. Ms Emilia Keladitis, who was also providing Kempton with property advice, spoke in an email dated 12 July of "nervousness about offers reliant on bank debt, especially at the level of 50-60% LTV".

26. "Greenridge" is the brand under which a Mr Bikhu Bhuptani and a Mr Paul Simmons carry on a commercial real estate business. Various companies have been formed in connection with that business whose names include the word "Greenridge". The different entities are not parts of a formal group, but they all have Mr Bhuptani and Mr Simmons as shareholders and directors.

27. One reason why Mr Bhuptani and Mr Simmons were interested in buying Wigmore Place was that they hoped to enhance its value by agreeing an overriding lease with TUI. On 1 August 2013, Ms Bridges told Mr Simmons in an email that it looked like "Overiding Lease based on current lease term is a recommended option", though she was "waiting to hear outcome of appetite of FD to take this forward". On 8 August, Mr Simmons emailed draft heads of terms to Ms Bridges and said that Greenridge would "pay Tui Travel Plc an incentive amounting to £970,000 … payable upon completion of the proposed new lease, coupled with the transfer of the current sinking fund across to the proposed new Head Tenant".

28. Mr Bhuptani and Mr Simmons did not take "No" for an answer when told in July 2013 that Ediston's bid for Wigmore Place had been preferred to theirs. On 12 July, Mr Simmons complained to Kempton's agent in Luton that Greenridge's bid was not receiving due consideration. On 23 July, Mr Simmons told Mr Schlaff in an email that, "due solely to a personal contact", he was "able to increase the value of this asset to circa £18Million stc over the next 4 weeks" and said that he would welcome the opportunity to have a discussion. Following a number of telephone conversations and emails, on 9 August Mr Simmons sent Mr Schlaff heads of terms providing for the increased price of £16,250,000. On 12 August, a meeting took place. This was attended by Mr Simmons, Mr Aksler and Mr Moshe Russo, a lawyer based in Austria who advises the Schlaff family. At this stage, Kempton decided to proceed with Greenridge's offer for Wigmore Place. Later on 12 August, Mr Simmons emailed Mr Aksler and Mr Russo to say that he would send revised heads of terms and for confirmation as to when he could expect "a pack of legal documents including a contract".

29. In the meantime, progress had been made with the proposed sale to Ediston. On 16 July 2013, Mr Aksler confirmed to Mr Connick that he was instructed to submit a draft contract and "the supporting pack" to Ediston's solicitors, Freeth Cartwright LLP, and CPSE.1, CPSE.2 and CPSE.4 were evidently sent to Freeth Cartwright on about that date. In response, Freeth Cartwright said that they had not received a number of documents, including "Insurance information", "Service charge accounts for the last 3 years" and "Rental payment records for the last three years". Freeth Cartwright also said:

> "Please clarify what 'further enquiries' TUI have raised and what the nature of the historic ones were – CPSE2 reply 10.8 refers".

30. Mr Aksler asked Mr Bains to address Freeth Cartwright's various enquiries. A document Mr Bains prepared included this:

> "Insurance information – Shulem [Aksler] … will be able to supply this
>
> Rental payment records for the last three years – the tenants have been rarely, if ever late but Shulem will be able to confirm the precise dates."

Mr Bains did not separately address Freeth Cartwright's request for "Service charge accounts for the last 3 years". As regards the point raised on the reply to question 10.8 in CPSE.2, Mr Bains said:

> "the tenants are entitled to raise enquiries on the service charge, within six months after the landlord has supplied a certificate of expenditure from its accountants. On two occasions in the past, TUI have made some enquiries of a general nature relating to the information that was supplied. They were satisfied on each occasion. More recently, as part of an internal audit, they instructed a third party to raise enquiries and these were satisfactorily dealt with. Subsequently, TUI became aware of the proposed sale and raised some additional enquiries. These are being dealt with and no difficulties are anticipated. It is believed by the managing agents that the enquiries have been raised by TUI with a view to slowing down the proposed sale by the landlord."

31. Between 14 and 16 August 2013, Mr Simmons received a variety of documents relating to Wigmore Place, including CPSE.1, CPSE.2 and CPSE.4, via "Simon Walter Scott", a name used by a Mr Matthew Rimmer. Mr Rimmer had been sent the documents by Mr Aksler and asked to forward them to Mr Simmons once Mr Aksler's contact details had been removed. Mr Simmons explained in cross-examination that Greenridge appreciated that, as a result of rules relating to the conduct of solicitors, information would have to come to it via a source other than Philip Ross.

32. Locke Lord were instructed to act for Greenridge. On 14 August 2013, Mr Simmons forwarded to Mr Russo a request from Mr Daniel Polden of Locke Lord for, among other things, "Documents referred to in the replies to General, Tenancy and Leasehold CPSE Enquiries", including "the service charge and insurance information, service/maintenance contracts and VAT". On 15 August, Mr Aksler sent back, via "Simon Walter Scott", an email attaching service charge figures for 2009-2011. On the following day, Mr Simmons sent on to Mr Aksler an email in which Mr Polden had said:

> "The contract provides for a very significant retention (£600,000) out of the service charge and for 15 months after completion. I do not follow the reasoning for this not least as the Seller has produced audited service charge accounts until 2011 (we need the audited accounts for 2012 and management accounts for 2013 as well as all supporting documents, contracts, etc)."

Later that day, "Simon Walter Scott" sent Mr Simmons some service charge documents for 2010-2012 and a schedule showing amounts due and paid by TUI in respect of rent and service charge from September 2011 to March 2013. Mr Simmons responded by asking, "Can you confirm the June 2013 collection details?"

33. On 3 September 2013, Mr Bhuptani sent Mr Aksler an email in which he said that "management (service charge) accounts for the current financial year" were missing. Mr Aksler sent back comments from Mr Connick, who said "Broadly, whatever we have they can have".

34. Mr Polden proposed amendments to the draft contract. In particular, he put forward changes to clause 15, dealing with "service charges due under the occupational leases". Mr Polden's version provided for Kempton to supply not less than three days prior to completion a preliminary statement of the service charge position in respect of each occupier. Mr Connick altered the draft so that the statement would be due "within 24 working days of completion". On 10 September, Mr Polden replied:

> "My clients do not understand why your clients are reluctant to commit to providing a preliminary statement showing the sums paid by the tenants and also the sums expended by your clients through the service charge. The amendments made … is not acceptable …. Can you please, in any event, arrange for an up to date set of management accounts to be provided for the service charge for the total sums received during this year from the individual tenants, the total expended and the sums standing to the sinking fund/reserve fund …."

In his response, Mr Connick said that Kempton "will now agree to prepare a preliminary set of management accounts and produce them prior to completion". Mr Polden, however, pressed in another email of 10 September for "an up to date statement of the service charge account, showing the reserve/sinking fund as well as the position for the individual tenants".

35. On 11 September 2013, Mr Polden asked Mr Connick whether he yet had "the up to date service charge management figures". Mr Connick responded, "No".

36. On 12 September 2013, contracts were exchanged for the purchase of Wigmore Place by Greenridge for £16,250,000, with a deposit of £812,500 payable in two tranches. The claimants (to which I shall generally refer as "Greenridge") had been incorporated on 28 August 2013 for the purpose of the transaction. Mr Bhuptani and Mr Simmons were their only directors.

37. The contract ("the Contract") included the following terms:

i) Clause 3.1 provided for the conditions in Part 1 of the Standard Commercial Property Conditions (Second Edition) ("the Conditions") to be incorporated in so far as not inconsistent with, modified or excluded by other clauses in the Contract;

ii) Clause 8.1 stated that the "Seller" (i.e. Kempton) would sell the property free from incumbrances apart from, other things, "any matters, other than the Charge [i.e. a charge appearing in the charges register], disclosed or which would have been disclosed by the searches and enquiries which a prudent buyer would have made before entering into this contract";

iii) Clause 8.3 provided:

> "The Seller has made full disclosure of the matters referred to in clause 8.1 and the Buyer (in acknowledgment of such disclosure) will not raise any enquiry, objection, requisition or claim in respect of any of them";

iv) Clause 12.6 provided:

> "In the event that the Buyer fails to complete the Seller agrees that its rights shall be limited to the forfeiture of the Deposit but not to seek damages and/or specific performance against the Buyer";

v) Clauses 15 and 16 dealt with service charges. Among other things, clause 15.1 stated that Kempton was to supply the claimants not less than three days before completion with a preliminary statement "covering any period for which service charge and similar accounts have not been prepared as at completion or for which there is expenditure by the Seller by way of service charge or other recoverable expenses which is recoverable from the occupiers under the Occupational Leases but which has not been fully recovered on a final basis in accordance with the Occupational Leases". Under clause 15.3, if "Advance Payments" (defined by clause 15.2 to mean "all sums received by the Seller under the Occupational Leases as advance payments for service charge or other similar recoverable expenses") exceeded the expenses incurred by or on behalf of Kempton, the excess was to be paid to Greenridge. Clause 16.4 provided for Kempton to assign to the claimants all its rights to the "Arrears", i.e. "sums (excluding any service charge or other similar recoverable expenses …) payable to the Seller under the Occupational Leases on or before completion but which are not received three working days before completion";

vi) Clause 18.2 provided:

> "The Buyer acknowledges that in entering into this contract it does not rely on, and shall have no remedies in respect of, any representation or warranty (whether made innocently or negligently) other than those:
>
> (a) set out in this contract; or

(b) contained in any writing and provided to the Buyer by the Seller's or on behalf of the Seller"; and

vii) Clause 18.3 stated that nothing in clause 18 was to limit or exclude any liability for fraud.

38. Condition 9.1 of the Conditions is in these terms:

> "9.1 **Errors and omissions**
>
> 9.1.1 If any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate due to an error or omission, the remedies available are as follows.
>
> 9.1.2 When there is a material difference between the description or value of the property as represented and as it is, the buyer is entitled to damages.
>
> 9.1.3 An error or omission only entitles the buyer to rescind the contract:
>
> (a) where the error or omission results from fraud or recklessness, or
>
> (b) where the buyer would be obliged, to its prejudice, to accept property differing substantially (in quantity, quality or tenure) from that which the error or omission had led it to expect".

39. Kempton had kept Ediston as a second string to its bow. On 11 September 2013, Mr Connick sent Freeth Cartwright replies to enquiries they had raised and told them that he was working on a revision to the draft contract. The response to the enquiries included:

> "Insurance information – current schedule to follow
>
> Rental payment records for the last three years – to follow but rental payments are up-to-date and rarely, if ever, late"
>
> and
>
> "the tenants are entitled to raise enquiries on the service charge, within six months after the landlord has supplied a certificate of expenditure from its accountants. On two occasions in the past, TUI have made some enquiries of a general nature relating to the information that was supplied. They were satisfied on each occasion. More recently, as part of an internal audit, they instructed a third party to raise enquiries and these were satisfactorily dealt with. Subsequently, TUI became aware of

> the proposed sale and raised some additional enquiries. These are being dealt with and no difficulties are anticipated."

It is perhaps worth noting that the response omitted the sentence which followed in Mr Bains' draft ("It is believed by the managing agents that the enquiries have been raised by TUI with a view to slowing down the proposed sale by the landlord") (see paragraph 30 above).

40. That same day, Mr Connick told Freeth Cartwright that he had received instructions to deal with another party. On 13 September 2013, Mr Connick informed Freeth Cartwright that Kempton had exchanged contracts with the alternative purchaser but would meet Ediston's abortive fees should the sale to the other buyer proceed. In due course, Kempton made a payment of some £49,000 to Ediston on this basis.

41. On 13 September 2013, Philip Ross told Mr Chris Logan, TUI's head of property & portfolio change, in a letter that Kempton had "no objection to [TUI] communicating with [Greenridge] about matters relating to [Wigmore Place] and [its] occupancy of it should [it] wish to do so".

42. The negotiations with TUI for an overriding lease came to a standstill. On 22 August 2013, Mr Logan told Mr Simmons that TUI was "genuinely 'on board' with your proposal" and had "all board approvals required to proceed with our over-riding lease arrangement", but was concerned that it had "no assurances that Greenridge are the 'right' party to be dealing with". In a subsequent email of 28 August, Mr Logan said that TUI could not agree to proceed with heads of terms at that point "as it is still clear that there is a contract out with another party". On 20 September, Mr Logan told Mr Simmons that it was "TUI's position that it would not wish to commit to heads of terms for an overriding lease with any party until completion has taken place".

43. On 17 September 2013, Mr Connick had sent Mr Polden a number of documents including "Schedule of payments by TUI for rent and service charge". The schedule in question covered the period from September 2011 to March 2013. In an email to Mr Connick of 4 October, Mr Polden said:

> "Please ask your clients to extend the Schedule of payments apparently made by TUI from and including 29th September 2011 to 25th March 2013 so that it covers the payments due in June and September this year".

In a similar vein, Mr Polden said in a 16 October email to Mr Connick:

> "Also, can you provide an up to date schedule that details the rent for each/all of the occupational leases and sub-leases and also the on-account service charge that is demanded pursuant to those documents".

44. Mr Connick replied that evening:

> "A schedule of rent and on account service charge levels (quarterly figures) is attached. I trust this was the information you were asking for."

The schedule in question showed the rent and service charge *demanded*, not that *paid*. It did not therefore reveal the fact that TUI had withheld money.

45. A draft investment memorandum that Greenridge prepared in November 2013 noted that Wigmore Place had "highly committed tenants". It also included this:

> "The Property has been owned since the early 1990's by a family which, in the opinion of the Manager, has neglected to properly manage the asset and has not maintained a professional relationship with the occupiers, leaving significant opportunity for the Manager to improve the asset and make it more institutionally desirable."

46. Greenridge sought funding from Santander UK plc, which instructed Dundas & Wilson LLP to act as its solicitors and Lambert Smith Hampton to provide a valuation report in respect of Wigmore Place.

47. At 9.50 am on 10 December 2013, Mr David Williams of Lambert Smith Hampton emailed a draft valuation report to Mr Bhuptani. This put the market value of Wigmore Place at £16,445,000. A section of the draft report headed "Service Charge Provision" noted that some substantial works needed to be undertaken over the next 12 months, but said that (subject to the impact of service charge caps in the relevant leases) the cost of the works should be recoverable through the service charge. The draft also stated:

> "We understand from [Greenridge] that there is currently circa £800,000 in the service charge sinking fund and this should cover the cost of these works."

48. Before, however, the valuation report was finalised, Mr Williams asked Mr Bhuptani whether he was aware that there was a substantial service charge dispute between Kempton and TUI. Having heard that he was not, Mr Williams suggested that Mr Bhuptani should speak to Mr Smith, which Mr Bhuptani did. Mr Smith told Mr Bhuptani that TUI had been in dispute with Kempton for a prolonged period and had raised complaints about the service charge levied. Following this conversation, Mr Bhuptani sent Mr Smith an email at 2.56 pm on 10 December 2013 in which he referred to looking forward to seeing "the correspondence and details of the dispute with Kempton Investments".

49. At 4.19 pm on 10 December 2013, Mr Smith emailed Mr Bhuptani. He referred to sums totalling £4,564,1515.50 being in dispute and TUI's share of that amounting to £3,623,023.40, which, Mr Smith said, is "the maximum figure we're looking for, ignoring sinking fund". Mr Smith said the figure "could, and probably would be reduced if we had sufficient information to decide", but that there was "too much where it looks like a duplication of work, or work that was unnecessary, or nothing to do with the service charge". In a similar vein, Mr Smith said that while he was "sure there are figures within those disputed that could be accepted if they were just explained to us", he was also "sure there are figures that are just wrong". With regard to the sinking fund, Mr Smith said:

> "that too only appears in the year end figures. The last I saw of it, at year end 12/11, it stood at £626,655, and I was specifically told that this was to deal with the cooling towers, lift refurbishment, and common parts refurbishment. From what I've seen since these costs were put through, but without any being taken from the sinking fund. On top of that, the year end figures for 12/09 show that £60,435 was taken out of the sinking fund. It doesn't however, appear anywhere in the year end figures themselves, and I've been given no explanation as to where it went, so that's another £60,435 we'd like back."

50. On 12 December 2013, Mr Williams sent Mr Bhuptani an email in these terms:

> "Further to Bob's e-mail and our telephone conversation this issue has the potential to effect the value of the property by the total value of the claim.
>
> On the special assumption that the service charge issue is settled we are of the opinion that the value of the premises is in the region of £16,445,000. However, if it is proved that TUI have a case and are entitled to withhold service charge and sinking fund payments the value of the property could reduce to circa £11,880,000.
>
> The above figure is a domesday scenario however at this stage we have nothing more concrete to rely on in terms of a tangible number to get the dispute settled. I have reported to Santander on the basis of the special assumption at this stage and recommended that this issue is investigated by their legal advisors."

51. Three paragraphs were added to the valuation report. They read:

> "Notwithstanding the above we are aware that there is currently a major dispute between the vendor and the major tenant in the building TUI Northern Europe Limited and they are no longer making Service Charge payments or contributing to the sinking fund. The total value of the money currently in dispute is circa £3,600,000 although this is just TUI's share and should Peverel also dispute the service charge the total figure could rise to in excess of £4,500,000.
>
> We understand from the borrower that they have taken legal advice and are of the opinion that TUI will be forced to pay the outstanding money as otherwise they will be in breach of their lease.
>
> **We would strongly recommend that this position is verified by your legal advisors prior to draw down as this issue has the potential to have a detrimental effect on the value of the premises.**"

52. By now, Locke Lord had spoken to Mr Connick about TUI's "dispute" with Kempton. In an email to Mr Connick of 12 December 2013, Locke Lord observed that there appeared to have been material misrepresentation, by way of non-disclosure, to Greenridge. That same day, Mr Bains prepared an account of events that was sent to Mr Connick. Among other things, Mr Bains said the following:

> [Having referred to an email of 5 July 2013] "I did feel at the time that TUI were doing this with a view to spoiling my clients potential sale. I felt so strongly that I mentioned it to my clients and I also mentioned it to Lorraine Bridges, who assured me that this was not correct and soon as the queries relating to the sinking fund were dealt with, the retention that they had made would be released";
>
> "I spoke to Lorraine Bridges again and I mentioned that as we had done everything that had been required of the landlord/managing agents and we were not aware of any outstanding matters, there could be no dispute as we had never been given any particulars of the dispute …. The tenant had simply raised queries which we had answered or were in the process of answering. Lorraine however seemed more interested in the position of the *purchaser* of the property and asked numerous searching questions about the purchaser. I informed her that I had become aware that my clients had exchanged contracts but I was not dealing with that. I formed the opinion and I told her at the time, that TUI was trying to jeopardise my clients sale. She denied this. She indicated in no uncertain terms that they were not happy with Greenridge for some reason …. She said she would find out what was outstanding and holding up the release of the retention but instead it seems she asked her lawyers to write asking the landlord not to take action against them";
>
> "To date we have not received any particulars of any dispute and consequently I believe there is no 'dispute'. They have only raised enquiries and my clients have answered those. There has been no complaint of any over expenditure or wrongful expenditure or any complaint of that kind which could perhaps have constituted a dispute. No one has been able to particularise any dispute.
>
> I understand that TUI have been paying all their rent and service charge as normal. They have however withheld relatively small sums of money in respect of further sinking fund contributions and as a result, I understand the managing agents have prudently made adjustments to the plans for future expenditure, but there is still a substantial sums of money in the sinking fund which I would expect that the seller will account for to the purchaser in the usual way upon completion of the sale";

and

> "Despite Lorraine Bridges assertion to the contrary, I also have absolutely no doubt that the real reason for TUI retaining these sums of money is to try and spoil my clients sale to Greenridge. That is why both Bob Smith and Ian Spann were left in embarrassing situations by TUI, and despite all the various oral and written invitations for TUI to provide details of any alleged 'dispute' they have not done so."

53. On 13 December 2013, Mr Connick sent Locke Lord a copy of Mr Bains' account of events together with correspondence with representatives of TUI about the service charges for Wigmore Place. On 17 December, Mr Spann told Blackstones that TUI would be retaining "a further £79,000 from the quarterly service charge payment for the December Quarter giving us a total retention of £238K". On the same day, Ms Bridges confirmed to Mr Bhuptani in an email that there was "a dispute with Kempton on expenditure totalling in excess of £2.1M with no satisfactory answers to date", that there were also "queries in respect of budget and sinking fund" and that TUI had "withheld £79,380 x 3 quarters to take account of discrepancies in the service charge overall including the sinking fund".

54. On 23 December 2013, Mr Connick sent Locke Lord a notice to complete. On 10 January 2014, a second such notice was served, without prejudice to the first.

55. For its part, Greenridge remained keen to proceed with its purchase of Wigmore Place, subject to being supplied with further information about the service charge position. Mr Bhuptani explained in cross-examination, and I accept, that Greenridge "wanted to do the deal until the very end". Its perception, rightly or wrongly, was that Kempton was being "obstructive for no good reason" and that gave rise to "a great deal of concern". If, Mr Bhuptani said, Greenridge "had been provided with all the information, the matter would have been completed". For his part, Mr Simmons said:

> "The only driver we had at the time was to come to the bottom of it and try and elicit the information from the property managers that would allow us to make a decision."

56. On 22 January 2014, DAC Beachcroft LLP, whom Greenridge had instructed to act for it in this respect, sent Philip Ross a letter in which it claimed to rescind the Contract with immediate effect pursuant to Condition 9.1 of the Conditions. Mr Bhuptani described the letter in cross-examination as "a step to try and get the information". On 23 January, however, Philip Ross asserted that Greenridge had repudiated the Contract and said that Kempton was accepting such repudiation, with the result that the deposit Greenridge had paid was forfeit.

57. Greenridge issued the present proceedings on 17 April 2014. Shortly afterwards, on 23 May, Kempton sold Wigmore Place to two companies associated with Ediston for £15.6 million (i.e. £625,000 less than the price agreed with Greenridge).

Greenridge's case in brief outline

58. Greenridge seeks to recover both the £812,500 paid by way of deposit and damages.

59. Greenridge contends that it was induced to enter into the Contract by false representations to the effect that there were no service charge arrears and had been no complaints or disputes relating to Wigmore Place or, in particular, the service charge. It maintains, moreover, that Kempton's failure to disclose such matters means that clause 8.3 of the Contract was misleading or inaccurate and, further, that Kempton has breached the warranty for which clause 8.3 provided. According to Greenridge, Condition 9.1.3 of the Conditions is in point, both because the errors and omissions of which it complains resulted from "fraud or recklessness" (within Condition 9.1.3(a)) and because, were rescission unavailable, it "would be obliged, to its prejudice, to accept property differing substantially (in quantity, quality or tenure)" from that which the errors and omissions "had led it to expect" (so that Condition 9.1.3(b) applied). On that basis, Greenridge can, it says, rescind the Contract in accordance with Condition 9.1.3 and also obtain damages for misrepresentation and breach of warranty. Should, though, Condition 9.1.3 be held to be inapplicable, Greenridge asks for the return of its deposit under section 49(2) of the Law of Property Act 1925 ("the LPA"). It maintains, too, that it could recover damages pursuant to section 2(1) of the Misrepresentation Act 1967.

Issues

60. The issues that arise seem to me to include the following:

i) Were untrue representations made to Greenridge in the negotiations leading up to the Contract or in the Contract itself?

ii) Was Greenridge induced to enter into the Contract by any such misrepresentations?

iii) Are any such misrepresentations attributable to fraud or recklessness?

iv) Would Greenridge, had it had to complete, have been obliged, to its prejudice, to accept property differing substantially (in quantity, quality or tenure) from that which any errors or omissions had led it to expect?

v) If Greenridge was not entitled to rescind the Contract, should its deposit nevertheless be returned pursuant to section 49(2) of the LPA?

vi) Is Greenridge entitled to damages for breach of warranty and/or misrepresentation?

Issue (i): Were untrue representations made?

61. The CPSEs were supplied to Greenridge between 14 and 16 August 2013. By then, TUI had withheld £95,256.01 (inclusive of VAT) from its June payment of service charge. It was none the less stated in the reply to enquiry 10.6 in CPSE.2 that there were "no arrears" of service charge. Although this answer might have been correct when replies to the CPSEs were first prepared in March 2013, it was not accurate either when the CPSEs were given to Greenridge or (more importantly) at the date of the Contract. As, therefore, Mr Mark Warwick QC (who appeared for Kempton with Miss Camilla Chorfi) accepted, there was misrepresentation in at least this respect.

62. The replies to the CPSEs also denied the existence of "disputes" and "complaints". Thus, the reply to enquiry 28 in CPSE.1, which asked for details of "any disputes … or complaints that are currently outstanding, likely or have arisen in the past", was "None". While, moreover, the reply to enquiry 10.8 in CPSE.2 referred to TUI having "recently raised further enquiries" in relation to service charge, it also asserted that there had been "no complaints or disputes as such".

63. TUI had, however, repeatedly used the word "dispute". It featured in communications from Mr Spann of 30 April and 8 July 2013. Mr Smith referred to there being a "dispute" in communications of 29 May, 11 June, 4 July, 16 July and 20 August.

64. Further, TUI was claiming, and Kempton was denying, that it was entitled to make deductions from its service charge payments. On 12 June 2013 Mr Bains warned that Kempton would "take appropriate measures to enforce their legal rights" if money were withheld, and on 1 July Mr Bains said that TUI's withholding of money constituted a "serious breach of the tenant's covenants" which, if not remedied, would force Kempton to take "appropriate action". When the CPSEs were provided to Greenridge in August, Mr Bains had yet to respond substantively to queries that Mr Spann had raised on 16 July. On 20 August, Mr Bains spoke of money having been "wrongly and unilaterally withheld" in "breach of the terms of the leases".

65. Mr Warwick pointed out that the CPSEs referred to "further enquiries" from TUI and that there is no evidence from Mr Smith or anyone from TUI itself. He submitted that there is no adequate evidential basis for finding a dispute as to any particular sum at any date.

66. To my mind, however, the replies to the CPSEs were misleading in what was said about "disputes" and "complaints". The reference to "further enquiries" gave no indication of how matters in fact stood between Kempton and TUI. While Mr Bains may have felt that the "concerns" expressed by TUI were unparticularised and groundless, the correspondence reveals TUI and Kempton to have been at odds over, for example, whether TUI was justified in withholding money, whether Kempton was entitled to distrain and even whether the parties were in "dispute". That being so, TUI was not merely raising "further enquiries". Further, there was no need for Greenridge to call Mr Smith, Mr Spann or anyone else from TUI to give evidence. What matters is not so much how TUI subjectively saw matters, but the position it was taking vis-à-vis Kempton. In denying the existence of any "dispute" or "complaint", the CPSEs gave, in my view, a false impression.

67. Miss Joanne Wicks QC, who appeared for Greenridge, argued that clause 8.3 of the Contract contained a further misrepresentation. I agree. The clause stated that Kempton had "made full disclosure of the matters referred to in clause 8.1". Such matters will have included those which Kempton should have disclosed in response to the CPSEs. The reality, however, was that Kempton had not adequately disclosed certain such matters, viz. the existence of service charge arrears, "disputes" and "complaints".

68. Clause 8.3 operates as a warranty. I do not think, however, that will have prevented its first 13 words from amounting to a representation. In the context, it seems to me that clause 8.3 involved both a warranty and a representation (compare *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012]

PNLR 35, at paragraphs 132-134). In this respect, it is to be noted that Condition 9.1.1 of the Conditions refers to a statement "*in the contract*, or in the negotiations leading to it" (emphasis added).

Issue (ii): Reliance

69. At the end of Mr Bhuptani's cross-examination, it was put to him that his "action wasn't in reliance on [his] reading of these CPSEs". Mr Bhuptani rejected this suggestion, saying:

> "[O]f course we are reliant upon the CPSEs, Mr Warwick. We'd be a fool not to be. They are a very important document but, as I said to you, we seek counsel from our lawyers who will advise us on the contents and tell us what we should be careful about."

70. When Mr Simmons came to give his oral evidence, he was not challenged on the following passage from a witness statement:

> "In the replies to CPSEs, the Defendant had stated that there were no disputes and no arrears of rent, both of which were untrue. We had relied on the representations in those replies to CPSEs and the information provided in the pre-contract stage and therefore had not pursued the matter of payment of service charge contributions further (as we were not aware that there was any issue in that respect)."

71. The contemporaneous documentation bears out the evidence given by Mr Bhuptani and Mr Simmons. It shows, for example, that Locke Lord reviewed the CPSEs and requested materials relating to them, including service charge information. It is evident, moreover, that the Contract was drafted on the assumption that there were no arrears of service charge. Thus, clause 16.4 was limited to sums "excluding any service charge or other similar recoverable expenses", and clause 15 was tied to sums "*received* … as advance payments for service charge or other recoverable expenses" and did not extend to sums *due* in respect of such matters.

72. In the circumstances, it is unsurprising that Mr Warwick did not submit in closing that Greenridge had not relied on Kempton's representations. In any case, I find that Greenridge was induced to enter into the Contract by the misrepresentations that I have found proved.

Issue (iii): Fraud/recklessness

73. Condition 9.1.3 of the Conditions, which is quoted in paragraph 38 above, serves to limit the circumstances in which a buyer to whom misleading or inaccurate representations were made can rescind the contract. Rescission is to be available only where "the error or omission results from fraud or recklessness" or the buyer "would be obliged, to its prejudice, to accept property differing substantially (in quantity, quality or tenure) from that which the error or omission had led it to expect".

74. Having regard to Condition 9.1.3, a key question in the present case is whether the misrepresentations that I have found proved result from fraud or recklessness.

Legal principles

The meaning of "fraud" and "recklessness"

75. Both sides made reference to *Derry v Peek* (1889) 14 App Cas 337. In that case, Lord Herschell explained the meaning of "fraud" in the context of a claim for deceit in these terms (at 374):

> "fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief."

76. When deciding whether a representor had an honest belief in the truth of a representation, the focus is on whether he believed it to be true in the sense in which *he* (as opposed to, say, the representee or the Court) understood it. Thus, in *Akerhielm v De Mare* [1959] AC 789 Lord Jenkins (giving the judgment of the Privy Council) said (at 805):

> "The question is not whether the defendant in any given case honestly believed the representation to be true in the sense assigned to it by the court on an objective consideration of its truth or falsity, but whether he honestly believed the representation to be true in the sense in which he understood it albeit erroneously when it was made."

Aggregation of knowledge

77. "[T]he law does not recognise any conception of 'composite fraud', i.e. an action in fraud will not lie where a statement is made by an agent who honestly believes it to be true, merely because the principal, or another agent, knew the statement to be false" (Chitty on Contracts, 32nd ed., at paragraph 7-053).

78. Authority for this proposition is to be found in *Armstrong v Strain* [1952] 1 KB 232, where (in the words of the headnote) the Court of Appeal held that "there is no way of combining an innocent principal and agent so as to produce dishonesty". Each member of the Court endorsed the judgment of Atkinson J in *Anglo-Scottish Beet Sugar Corporation Ltd v Spalding UDC* [1937] 2 KB 607, who had said (at 625):

> "I cannot myself see how a principal can be held liable for fraud when there has been no element of fraud either on the

> part of himself or on the part of any one for whose acts he is responsible."

79. It is also relevant to note this passage from the judgment of Singleton LJ in *Armstrong v Strain* (at 244):

> "Difficulties may arise in a claim against a company which can only speak or act through its agents or officers, but if an officer of a company writes and represents that which is untrue when many other officers of the company know the true facts, it may well be found that he made the representation without belief in its truth, or that he made it recklessly, careless whether it was true or false. That must depend on the evidence."

The standard of proof

80. The standard of proof applicable in the present proceedings is the ordinary civil standard. It is, accordingly, incumbent on Greenridge to establish its case on the balance of probabilities. If and to the extent that what it alleges is inherently improbable, that is a factor to be taken into account when considering whether the event in question is more likely than not to have occurred.

81. Lord Hoffmann explained the civil standard of proof as follows in *Home Secretary v Rehman* [2003] 1 AC 153 (at paragraph 55):

> "The civil standard of proof always means more likely than not. The only higher degree of probability required by the law is the criminal standard. But ... some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."

82. In *In re B (Children)* [2008] UKHL 35, Baroness Hale pointed out that seriousness and probability need not be related. She said (in paragraph 72):

> "… there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is

> more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog."

83. Nonetheless, I think I should approach the allegations of fraud that Greenridge makes on the basis that what is alleged is inherently improbable.

The facts

84. While, as I have said, accepting that the replies to the CPSEs were inaccurate in what they said about service charges arrears (see paragraph 61 above), Mr Warwick denied that any misrepresentation was attributable to fraud or recklessness. Mr Aksler, he submitted, did not even know what the CPSEs said or that Greenridge had been sent them. On top of that, Mr Aksler was (Mr Warwick argued) told by Mr Bains, and accepted, that there was no "dispute" between Kempton and TUI. Had Mr Aksler been seeking to mislead Greenridge, Mr Warwick said, he would not have authorised Philip Ross to tell TUI that Kempton had no objection to TUI communicating with Greenridge (see paragraph 41 above).

85. As regards Mr Bains, Mr Warwick pointed out that the replies to the CPSEs were accurate when Mr Bains was involved in their preparation in March 2013 and contended that Mr Bains played no part in their deployment in the August. Mr Bains, Mr Warwick said, did not participate in the provision of the "legal pack" to Greenridge in the middle of August and was not aware of the form the replies to the CPSEs took at that stage. Mr Warwick drew attention to a passage in Mr Bains' oral evidence in which, in response to a suggestion that he had "deliberately and dishonestly failed to inform Philip Ross that the answers given [to the CPSEs] were no longer true", he said:

> "I prepared those replies in March, okay. They were absolutely accurate at that time. I did not have control as to when they were going to be sent out, to whom, so there is no way I would be responsible for those, absolutely not."

In any case, Mr Warwick argued, Mr Bains did not consider there to be a "dispute" with TUI.

86. On balance, I accept this last point. Mr Bains was insistent even in 2013 that there was no "dispute". He explained in the account of events that he gave in December 2013 that he believed there to be no "dispute" because Kempton had "not received any particulars of any dispute", and he had evidently expressed that view earlier in conversations with both Ms Bridges and Mr Aksler. That understanding is, moreover, reflected in the contemporary correspondence: for example, Mr Bains' email of 1 July (paragraph 9 above) and that from his daughter of 9 October (paragraph 19 above). In the circumstances, the assertions in the replies to the CPSEs that there were no "disputes" will have been true so far as Mr Bains saw matters. That being so, they will not be attributable to any fraud or recklessness on his part. Mr Bains honestly, if in my view erroneously, believed the relevant representations to be true in the sense in which he understood them.

87. Nor, I think, will Mr Aksler have been guilty of fraud or recklessness in this respect. It is apparent from his evidence that he was told by Mr Bains that there was no "dispute". During his oral evidence, Mr Aksler explained:

> "I asked [Mr Bains] at the time: do we have a dispute? Do we not have a dispute? He said a dispute means that they identify what the dispute is or they tell you that this amount that was spent is not correct, either you should not have spent it at all or it should not be so much. That is not what TUI are saying. So there was nothing. Just because they wanted to call it a dispute, Mr Bains explained it is not a dispute."

There is, as it seems to me, no good reason to reject this evidence or to conclude that Mr Aksler disagreed with the advice he was being given by Mr Bains. I accept, accordingly, that Mr Aksler honestly believed there to be no "dispute" with TUI.

88. To my mind, however, Kempton is on weaker ground in relation to service charge arrears. Taking Mr Bains' position first:

i) Throughout the period between the beginning of July 2013 and 12 September (when contracts were exchanged), Mr Bains will, in my view, have been aware that TUI had not paid its June quarterly payment in full. He referred to the fact that money had been withheld in, for example, emails of 1 July, 5 July and 20 August (paragraphs 9, 10 and 18 above). Given, moreover, his close working relationship with Mr Aksler, Mr Bains would have reckoned that he would have learned from Mr Aksler, if not otherwise, if TUI had made good the shortfall in its June payment. At one point during cross-examination, Mr Bains suggested that he would not necessarily have known "for sure" on 25 July whether TUI had paid, but he would at least have thought it highly likely that it had not done so. Certainly, he could not honestly have said that he believed there to be no arrears;

ii) As mentioned in paragraph 30 above, Mr Bains was asked to address points raised by Freeth Cartwright after they had been supplied with, among other things, the CPSEs. To undertake this exercise, Mr Bains will have needed to know whether the replies to the CPSEs had been changed since first drafted in March: apart from anything else, some of Freeth Cartwright's questions related to the answers given to particular enquiries. At this stage, therefore, Mr Bains can have been in no doubt that the replies to the CPSEs had not been altered in respects relevant to the present proceedings;

iii) In any event, Mr Bains will, I think, have realised that the replies to the CPSEs that had been prepared in March 2013 were unlikely to be changed in important ways without his being consulted. During cross-examination, Mr Bains said that "on a transaction generally [Mr Aksler] will leave [him] to make virtually all the decisions for him". Elsewhere, Mr Bains spoke of Mr Aksler being "totally reliant" on him;

iv) Mr Bains must, I think, have appreciated that both the replies to the CPSEs with which Freeth Cartwright had been supplied and the document that he prepared in response to their enquiries were misleading in what they said (and

did not say) about service charge arrears. He will have been aware that the reply to enquiry 10.6 in CPSE.2 had stated that there were "no arrears" of service charge even though that was not in fact the case. He will have known, too, that his document, far from correcting the replies to the CPSEs, made no reference to the fact that TUI was withholding money. It is, moreover, unlikely to be an accident that Mr Bains did not separately address Freeth Cartwright's request for "service charge accounts for the last 3 years";

v) If, as the matters mentioned in the previous sub-paragraph suggest, Mr Bains was prepared to allow Freeth Cartwright (and, hence, Ediston) to be misled about the existence of service charge arrears, it is the less improbable that he should have been complicit in Greenridge being similarly misled;

vi) Although Mr Bains was evidently in hospital during the week of 15 July 2013 (see paragraph 14 above), he said on 8 August that he was "getting back up to speed again" (paragraph 14). Since it includes reference to further enquiries of 1 August, the document in which Mr Bains addressed Freeth Cartwright's queries also indicates his ongoing involvement with matters relating to Wigmore Place, as do, for instance, the emails he sent on 13, 14, 16 and 20 August (paragraphs 15, 17 and 18) and his draft reply to Wright Hassall's 11 October email (paragraph 21);

vii) As an experienced conveyancing solicitor, Mr Bains would have appreciated that any prospective purchaser of Wigmore Place would be supplied with replies to CPSEs. As regards the sale to Greenridge, the emails that Mr Bains sent to Ms Bridges on 13 and 14 August 2013 (paragraph 15 above) strike me as significant. Having failed to respond since mid-July to points that Mr Smith had raised in his letter of 16 July, on 13 August Mr Bains asked to be updated on TUI's position urgently and the very next morning he chased for confirmation as to the position "as soon as possible". The chances are, as it seems to me, that Mr Bains had been told that Kempton had decided on 12 August to proceed with Greenridge and that the latter was asking for "a pack of legal documents". Mindful of the fact that that pack would need to include replies to CPSEs, Mr Bains wanted matters resolved with TUI;

viii) Mr Bains was clearly very much alive to Kempton's obligations to prospective purchasers. His perception was that TUI was trying to interfere with Kempton's sale plans by engineering a situation in which Kempton would have to make embarrassing disclosures to a potential purchaser. Thus, Mr Bains observed in his comments on Freeth Cartwright's questions that enquiries had been "raised by TUI with a view to slowing down the proposed sale by the landlord" (paragraph 30 above), on 16 August 2013 he accused TUI of "trying to interfere with my clients propose sale" (paragraph 17), and his December account of events stressed that he had "absolutely no doubt that the real reason for TUI retaining these sums of money" was "to try and spoil [Kempton's] sale to Greenridge" (paragraph 52). Further, during his oral evidence Mr Bains said that, as he saw things, TUI was trying to produce a situation in which Kempton was obliged to report to the proposed purchaser. He explained:

"I thought they would think that these sort of issues, if they created a dispute, a genuine dispute, then that would have to be disclosed and although they didn't say that and, in fact, when I challenged Lorraine Bridges to say, 'That's exactly what you're doing,' she denied it. She said, 'No, no, no, we wouldn't do that,' but … I could understand at the time why they were doing this. I do now understand exactly why they were doing it because they were trying to influence the sale and they did so successfully."

89. Turning to Mr Aksler:

i) Mr Aksler is very experienced in property matters. Kempton, whose affairs he manages, has a property portfolio that includes commercial and residential premises in London. He also has extensive property interests of his own. Although Mr Aksler explained that he had had little involvement with *selling* property and that the premises in which he is interested are residential, he will surely have known that pre-contract enquiries are made in the course of conveyancing transactions. After all, such enquiries are as much a feature of the purchase of residential property as they are a part of the sale of commercial property;

ii) In the context of Wigmore Place in particular, Mr Aksler can be seen to have been consulted about replies to the CPSEs in March 2013 (paragraph 23 above) and to have played a part in relation to information provided to Freeth Cartwright (see paragraphs 29 and 30). He also forwarded the CPSEs, among other things, to Mr Rimmer for onward transmission to Mr Simmons (paragraph 31) and supplied service charge details in response to a request for "Documents referred to in the replies to General, Tenancy and Leasehold CPSE Enquiries" (paragraph 32). While I can see that Mr Aksler may have trusted Mr Bains and Mr Connick to deal with the CPSEs to a considerable extent, I find it very hard to accept that he was unaware that Greenridge was being, or had been, given replies to the CPSEs. I have trouble, too, with Mr Aksler's evidence that he did not know that Freeth Cartwright were raising enquiries;

iii) In evidence, Mr Aksler stressed the extent to which he relied on Mr Bains and Mr Connick in relation to the CPSEs and said that he did not fill out the CPSE forms, check them or know what questions or answers were to be found in them. The evidence also suggests, however, that Mr Bains would speak to him about issues of concern. When sending Mr Aksler draft replies to the CPSEs in March 2013, Mr Bains said that he would run through certain points with Mr Aksler the next day (paragraph 23 above). During cross-examination, Mr Aksler emphasised the fact that Mr Bains kept in close touch with him;

iv) More specifically, there is evidence indicating that Mr Bains spoke to Mr Aksler about the potential implications of TUI's conduct for the sale of Wigmore Place. Mr Bains said in his December 2013 account of events that he had mentioned to his client that he felt that TUI was trying to spoil the sale of Wigmore Place (paragraph 52 above). For his part, Mr Aksler said that he recalled being told that it looked as if TUI wanted to be in control of the sale of Wigmore Place. Such discussions would, as it seems to me, naturally have taken place in the context of a conversation about the implications of the

CPSEs. After all, it was Mr Bains' thesis that TUI was trying to produce a situation in which Kempton was obliged to report to the proposed purchaser;

v) Various matters tend to suggest an unwillingness on Mr Aksler's part for Greenridge to be supplied with information from which it could discover that, contrary to the picture given by the replies to the CPSEs, TUI had withheld service charges. When Locke Lord first asked for service charge documents, Mr Aksler sent back figures for 2009-2011 (paragraph 32 above). After Mr Aksler had been pressed for 2013 materials, Mr Simmons was provided with information up to March 2013, and a request for confirmation of the June collection details met with no response (paragraph 32). Mr Bhuptani chased for service charge accounts for the current year at the beginning of September, and Locke Lord sought up-to-date service charge figures on 10 and 11 September, but nothing further had been forthcoming by the time contracts were exchanged, and a schedule that Mr Connick sent to Locke Lord on 17 September stopped at March 2013 (paragraph 32). After being pressed more than once for updated information, Mr Connick supplied a schedule showing sums demanded, not actual payments (paragraphs 43 and 44). In a similar vein, Mr Connick objected for a time to the contract obliging Kempton to provide a statement of the service charge position in advance of completion (paragraph 34);

vi) It is fair to note that Kempton ultimately agreed to the contract providing for a service charge statement to be supplied before completion and, too, that Kempton was prepared to authorise TUI to communicate with Greenridge. It may be, however, that Mr Aksler had come to think that service charge issues could be resolved by Kempton issuing a credit note in favour of TUI.

90. That brings me to a credit note that Kempton claims to have issued in favour of TUI. The credit note in question has been dated 1 November 2013 and provides for the service charges that TUI was due to pay in June and September of 2013 to be reduced by a total of £158,760 plus VAT (in all, £190,512). According to Mr Aksler, at the end of October 2013 he "reflected on the substantial amount already in the sinking fund and the anticipated works in future years" and "concluded that it wasn't necessary to pursue the sums that TUI had deducted and that the proper step to take was to issue a credit".

91. Miss Wicks understandably pointed out that the credit note does not fit well with some of the other evidence (for instance, the correspondence mentioned in paragraph 53 above) and that it did not feature in either Kempton's defence or Mr Aksler's main witness statement. Mr Warwick accepted that the credit note is something of a puzzle. While, however, the credit note may have been produced later than the date it bears, its reference number (0672) strongly suggests that it existed by 3 December 2013, when an invoice with the reference number 0673 was issued. It is, moreover, clear that the credit note was reflected in Kempton's VAT return for the quarter to the end of November, which had been submitted to the Isle of Man Government by 18 December.

92. In the circumstances, there can be no question of Kempton having concocted the credit note either in the course of these proceedings or even after Greenridge had been alerted to the existence of TUI's "dispute" with Kempton on 10 December 2013. The

existence of the credit note may, however, be significant in terms of explaining how Mr Aksler came to think that he could address TUI's withholding of service charge.

93. In the end, I have concluded that the likelihood is that in the period leading up to exchange of contracts, notwithstanding their evidence to the contrary, Mr Bains and Mr Aksler were both alive to the fact that the replies to the CPSEs stated that there were no service charge arrears when there in fact were. Working as closely together as they did, the chances are, I think, that Mr Bains and Mr Aksler discussed the problem between themselves. I imagine that they felt that TUI had no real grounds for complaint and, that being so, that a purchaser should not ultimately be prejudiced by the stance TUI was adopting. They may also have come to feel that the existence of arrears could be dealt with by issuing a credit note. The fact remains, in my view, that Mr Bains and Mr Aksler probably both lacked an honest belief in something that they each knew was being represented to Greenridge, viz. that there were no service charge arrears. It follows that the representation to that effect was made at least recklessly and, hence, that Condition 9.1.3(a) of the Conditions is in point. In other words, it seems to me that Greenridge is entitled to have its deposit returned because the untrue representation that there were no arrears of service charge resulted from fraud or recklessness.

Issues (iv) and (v): Substantial difference and return of the deposit under section 49(2) of the LPA

94. Given the conclusions I have already arrived at, I do not need to consider issue (iv) (Would Greenridge, had it had to complete, have been obliged, to its prejudice, to accept property differing substantially (in quantity, quality or tenure) from that which any errors or omissions had led it to expect?) or issue (v) (If Greenridge was not entitled to rescind the Contract, should its deposit nevertheless be returned pursuant to section 49(2) of the LPA?).

Issue (vi): Damages

95. Greenridge claims to be entitled to damages of £395,948 in respect of costs incurred in relation to its prospective purchase of Wigmore Place which have been wasted following the rescission of the Contract. The items in respect of which compensation is sought are listed in a witness statement of Mr Simmons. They comprise, in brief, the cost of obtaining a pre-acquisition condition survey; the cost of the valuation report that Lambert Smith Hampton prepared for Santander (for which, Greenridge maintains, it was responsible); costs associated with a document designed to facilitate the raising of equity finance; legal fees in connection with the setting-up of a trust structure for the proposed transaction; fees incurred in sourcing investors; fees payable to property management agents who were instructed to carry out work in preparation for Greenridge's acquisition of Wigmore Place; the cost of environmental screening reports; the cost of aerial photographs for promotional material; the cost of obtaining tax and regulatory advice; fees of Dundas & Wilson for which Greenridge was liable; the cost of a report on plant in Wigmore Place; fees for capital allowance valuers; and fees of Locke Lord. Mr Simmons has explained that, although the relevant invoices were addressed to three different Greenridge entities, it was ultimately the claimants who were liable for the various sums.

96. During cross-examination, Mr Simmons accepted that he was not in a position to say which of the invoices on which Greenridge relies had been paid. He maintained, however, that the position in relation to each invoice was either that it had been paid or that Greenridge was liable in respect of it. On that basis, I do not think it is fatal to Greenridge's claim that it is not apparent which of the invoices have so far been met. Greenridge will have sustained loss regardless of whether it has yet discharged the material liabilities.

97. Mr Warwick also criticised the documentary support for Greenridge's claim. While invoices might be available, other materials, Mr Warwick said, are not. Mr Warwick pointed out that in August 2015 Philip Ross had asked for additional disclosure but been rebuffed.

98. To my mind, however, the available evidence is sufficient to prove that the relevant costs have been incurred. Mr Simmons stated so in terms in a witness statement and he did not depart from that position during cross-examination. His evidence is, moreover, corroborated by a variety of invoices. It is true that Greenridge did not agree to give the additional disclosure that Philip Ross requested in August 2015, but its solicitors gave reasons for considering extra disclosure to be unnecessary and the matter was not pursued by way of an application to the Court.

99. Another submission put forward by Mr Warwick was to the effect that Condition 9.1 of the Conditions (set out in paragraph 38 above) prevents Greenridge from recovering damages. Condition 9.1.1 provides for "the remedies" available in respect of errors and omissions to be as follows. Condition 9.1.2 then states:

> "When there is a material difference between the description or value of the property as represented and as it is, the buyer is entitled to damages."

Mr Warwick contended that, in the circumstances, a buyer cannot be entitled to any damages unless there is "a material difference between the description or value of the property as represented and as it is"; the Condition creates a gateway through which a buyer must be able to pass if he is to qualify for damages. Further, Condition 9.1.2 serves, Mr Warwick argued, to limit any damages to compensation for the relevant "material difference".

100. On balance, however, I agree with Miss Wicks that Condition 9.1.2 does not preclude Greenridge from recovering the damages it seeks. What is at issue, on the facts as I have found them, is liability for fraud. Even if Kempton could in principle have excluded or limited any such liability (as to which, see e.g. Chitty on Contracts, 32nd ed., at paragraph 15-150), there is, in my view, no question of Condition 9.1 being sufficiently clear and unambiguous to achieve that end. After all, Condition 9.1.2 neither mentions "fraud" nor expressly states that damages are to be available only if and to the extent that the Condition applies; in fact, Condition 9.1.2, unlike Condition 9.1.3, does not feature the word "only".

101. In all the circumstances, it seems to me that Greenridge is entitled to the damages it claims as damages for deceit. I shall, accordingly, award damages of £395,948.

Conclusion

102. In my judgment, Greenridge is entitled to have its deposit returned to it and to damages of £395,948.