Neutral Citation Number: [2022] EWCA Civ 883

Case No: CA-2021-001824

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
BUSINESS LIST (ChD)
His Honour Judge Keyser QC (sitting as a Judge of the High Court)
[2021] EWHC 1135 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2022

Before:

LORD JUSTICE NEWEY
LADY JUSTICE ASPLIN
and
LADY JUSTICE WHIPPLE

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Between:

MDW HOLDINGS LIMITED	**Claimant/ Respondent/ Cross-Appellant**
- and -	
(1) JAMES ROBERT NORVILL **(2) JANE ROSEMARY NORVILL** **(3) STEPHEN JOHN NORVILL**	**Defendants/ Appellants/ Cross-Respondents**

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Hugh Sims QC and Jay Jagasia (instructed by **Blake Morgan LLP**) for the **Defendants/Appellants**
Andrew Ayres QC and Laurie Scher (instructed by **Morgan LaRoche Solicitors**) for the **Claimant/Respondent**

Hearing dates: 12 & 13 May 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:00am on 28 June 2022.

Lord Justice Newey:

1. This case raises issues as to how damages should be assessed for breach of warranty and deceit in the context of a share sale.

Basic facts

2. On 14 October 2015, the claimant, MDW Holdings Limited ("MDW") bought the entire issued capital of G.D. Environmental Services Limited ("GDE") from the defendants, James Norvill and his parents Jane and Stephen Norvill (together, "the Norvills"), for £3,584,224 pursuant to a share purchase agreement ("the SPA") of that date. By clause 6.1, the Norvills acknowledged that MDW was entering into the agreement in reliance on the warranties set out in schedule 5, which, by clause 6.2, the Norvills warranted to be true and accurate on the date of the agreement except as disclosed by a disclosure letter. Schedule 5 included, among others, warranties that GDE had conducted its business in accordance with all applicable laws and regulations (paragraph 5.1); that GDE held the requisite consents and was not in breach of any of their terms and conditions (paragraphs 6.1 and 6.2); that no proceedings against GDE had been threatened and there were no circumstances likely to give rise to any such proceedings (paragraph 9.2); that GDE's accounts showed a true and fair view (paragraph 18.1); and that GDE had complied with environmental laws and permits and there were no facts or circumstances likely to lead to any breach of any such law, to the revocation, suspension, variation or non-renewal of such a permit or to any claims, investigations, prosecutions or other proceedings (paragraphs 29.2, 29.3 and 29.4).

3. GDE's business involved the collection, processing and disposal of waste. The company dealt with both "dry" and "wet" waste. The latter comprised cess waste; non-hazardous waste, such as gulley waste; hazardous waste, such as waste from garage forecourts or interceptor tanks; and leachate, which is the ammonia-rich liquid run-off from landfill sites.

4. The operation of GDE's business depended on consents and permits from environmental regulators. GDE's primary regulator was Natural Resources Wales ("NRW") (before April 2013, the Environment Agency), which was the regulator of the waste industry. GDE was also subject to regulation by Dŵr Cymru Welsh Water ("DCWW") as the relevant sewerage undertaker. GDE held an environmental permit the relevant iteration of which was issued on 3 July 2012. It had also been granted a consent to discharge trade effluent into DCWW's public sewers subject to conditions set out in a variation dated 5 December 2012 ("the 2012 Consent"). Misleading either NRW or DCWW could constitute a criminal offence.

5. In his careful and detailed judgment, His Honour Judge Keyser QC, sitting as a Judge of the High Court, identified occasions on which the regulators had been supplied with false information by GDE prior to the date of the SPA. In paragraph 45 of his judgment, Judge Keyser QC ("the Judge") concluded that there had been "a culture of lying to the regulators when it was convenient to do so" in which Mr James Norvill had been complicit.

6. The Judge also found there to have been repeated and persistent breaches of the 2012 Consent in relation to the discharge of leachates. The Judge said in paragraph 147 of his judgment:

> "The truth is simply that GDE found itself unable to contain the levels of contaminants within the permitted levels and on occasion resorted to falsification in order to conceal this from NRW. What is also true is that GDE was unwilling to take steps that might have enabled it to comply with the 2012 Consent but at a commercial cost."

7. The Judge found, too, that GDE had improperly discharged cess waste directly into a public sewer via an inspection chamber known as "the magic hole". He considered the extent of this practice to have been exaggerated by MDW, however. He arrived at these conclusions in paragraph 171 of his judgment:

> "1) MDW's case on this issue has been considerably exaggerated. The practice of discharge of cess waste down the magic hole was not a daily occurrence and tankers did not queue up, as has been alleged.
>
> 2) It is improbable that there was more than occasional discharge of cess waste down the magic hole after 2012 ….
>
> 3) There were probably occasional discharges in 2013; these would have taken place if a tanker had been unable to discharge at a DCWW facility during working hours and were required for an early start the following day. Such discharges would have been in the evening or at weekends. I find on the balance of probabilities that the discharge of cess waste into the magic hole took place on occasion after October 2013 and in early 2014; one such occasional discharge may have prompted the investigation in February 2014. However, these occasions will have been very few. Any discharges while Mr Doe was still employed (that is, up to April 2014) were probably authorised; if any took place after that date (they may have done, but I am unable to find that they did) they were probably unauthorised by management personnel and unknown to them.
>
> 4) I find that the practice had no significant impact on GDE's financial performance or accounts in the two years immediately preceding the SPA."

8. There was a further finding that hard solids had occasionally been dug out of the very bottom of separator tanks and disposed of as dry waste. The Judge said this on the subject in paragraph 192(1) of his judgment:

> "This was an improper practice, because the hard solids ought to have been disposed of as hazardous waste. James [Norvill] … knew that it was improper. However, this practice was rare—it involved only the hard deposits that were not sucked up with the sludge, and the practice of manually digging them out was recognised as unsafe for employees and was carried out infrequently. The impact of the practice on GDE's financial performance cannot be quantified accurately but will have been minimal."

9. In the light of his factual findings, the Judge held that the Norvills had breached each of the warranties I mentioned in paragraph 2 above: see paragraphs 212-214, 216-221 and 243 of the judgment. The Judge also concluded that the Norvills had been responsible for untrue representations on which MDW had relied. The representations in question were made in "Due Diligence Index and Responses" provided to MDW and were to the effect that DCWW had agreed that consent levels were too low, that there was nothing to disclose with respect to breaches of discharge consents and that there was nothing adverse to disclose as regards DCWW sampling results: see paragraphs 251-252 of the judgment. The Judge found that Mr James Norvill knew that the relevant representations were being made, that he knew too that the representations in respect of breaches and DCWW sampling results were false and that, having left matters to Mr James Norvill, his parents also bore responsibility for his fraud, though themselves innocent of it: see paragraphs 260-262 of the judgment.

10. Overall, the Judge arrived at the following conclusions on liability:

> "277. The defendants are liable for breach of warranty in respect of:
>
> 1) The persistent and continuing breaches of the 2012 Consent concerning the discharge of leachate;
>
> 2) The false information provided to DCWW;
>
> 3) The disposal of hard solids from the tank bottom waste on the Dry Side;
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> 4) The disposal of cess waste down the magic hole;
>
> 5) The failure to disclose the misfeasances in respect of hard solids as pollution incidents;
>
> 6) The failure to disclose the misfeasances in respect of leachate, hard solids, cess waste, and provision of false information to DCWW as non-compliances with regulatory consents and permits;
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> 7) The threat of prosecution by reason of the breaches of the 2012 Consent;

> 8) The likelihood of revocation of the 2012 Consent by reason of those breaches.
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> 278. However, breaches of warranty in respect of cess waste and tank bottom waste were of no demonstrable significance, because it has not been proved that they had any causal relation to any loss and damage. Therefore, in short, the relevant breaches of covenant concerned only the discharge of leachate: the persistent discharge in breach of the 2012 Consent, the threat of prosecution for that reason, the likelihood that the breaches would result in revocation of the 2012 Consent, and the provision of false information to DCWW.
>
> 279. The actionable misrepresentations were those in the Due Diligence Index and Responses; there were no other actionable misrepresentations. They cover the same ground as the breaches of warranty. The misrepresentations constituted deceit on the part of James. Jane and Stephen are liable for the same misrepresentations, and to the same extent, on the basis of section 2(1) of the Misrepresentation Act 1967. They would also be liable in deceit because, although innocent themselves, they are liable for the fraud of their agent, James."

11. Turning to quantum, the Judge began by saying this in paragraph 280 of his judgment:

> "It is common ground that the proper measure of damages for breach of warranty is the difference between (a) the value of GDE on the basis that the warranties were true ('Warranty True') and (b) the actual value of GDE given that the warranties were false ('Warranty False'). No different measure has been suggested for any claim in respect of fraudulent or negligent misrepresentation, at least for the purposes of this case. I shall refer generally only to breach of warranty."

12. On this aspect of the case, the Judge had the benefit of expert evidence from two forensic accountants: Mr Seamus Gates, called by MDW, and Mr Geoff Mesher, called by the Norvills. Both acknowledged the "EV/EBITDA" method of valuation to be that more commonly used by professional business valuers. As the Judge explained in footnote 1 to his judgment, "EBITDA" is a shorthand for "Earnings Before Interest, Tax, Depreciation and Amortisation" and the "EV/EBITDA" method:

> "involves three stages: first, calculation of the level of maintainable EBITDA which could reasonably be expected to be achieved during the average year; second, application of a suitable multiple, so as to calculate capitalised earnings, giving what is sometimes referred to as the 'Enterprise Value' ('EV')

> of the business; third, deduction of net debt from the Enterprise Value".

13. The Judge found the "Warranty True" value of GDE to be £3,341,276: see paragraph 285 of the judgment. He observed that "[t]he price paid may be a guide but it can be no more than that" and, using the "EV/EBITDA multiplier approach", decided that it was appropriate to adopt a multiplicand (i.e. maintainable EBITDA) of £1,153,000 and a multiplier of 4.2. He added, "Both experts regarded the EBITDA multiplier that would be required to justify the purchase price as being on the high side and I see no reason therefore to accept it as the correct multiplier".

14. The Judge took the figures he used from evidence given by Mr Mesher. In a report dated 16 October 2020, Mr Mesher assessed the EBITDA to be used in valuation calculations at £1,153,000 (paragraph 3.18) and considered "an appropriate multiplier to use in the valuation of GDE to be around 4.2" (paragraph 4.20). After adjusting for net debt, Mr Mesher went on in paragraph 4.24:

> "I therefore consider that the equity value of [GDE] as at 14th October 2015 was £3.3 million. This is not dissimilar to, albeit slightly less than, the price actually paid for [GDE] of £3.5 million. Accepting that the market value to be the price paid, by my calculations, the resultant multiplier was in fact 4.34. This is not outside of a reasonable range and supports the contention that the price paid represented market value."

15. With regard to the "Warranty False" valuation, the Judge said in paragraph 287 of his judgment that, for reasons given by Mr Mesher, he considered the appropriate multiplicand to be £1,115,000. "This figure", the Judge explained, "reflects the additional costs that would have been incurred in the lawful operation of the leachate processing operations at the Site and, correspondingly, the reduced profits".

16. So far as the multiplier was concerned, the Judge decided that this should be reduced from 4.2 to 4. He explained this as follows:

> "288. … I consider that some reduction in the multiplier is appropriate to reflect reputational damage (or, as it has been put, 'the fragility of the goodwill') that the breaches were liable to cause to the company and the jeopardy that they occasioned to the future of the business. Both experts were ultimately in agreement that such a reduction could be justified in principle; they disagreed as to its justification and, if justified, its amount in this case. There is obvious reason to be cautious before discounting the multiplier at all. The effect of the breaches on the value of the business will primarily be reflected in the multiplicand; as the EBITDA would have been adjusted to reflect sustainable levels of profitability, a further qualitative adjustment to the multiplier would present a risk of double counting. The risk is real, but it is not a conclusive reason not to discount the multiplier, as Mr

Mesher accepted. An innocent accounting error that overstated the profits would be adequately and completely dealt with by a discount of the multiplicand. The breaches in the present case were of a different order, because they involved not only the running of a non compliant operation (which might be dealt with in the multiplicand) but the deceiving of the regulator in order to keep that operation afloat. The argument of [counsel for the Norvills] that no discount is appropriate because it is known that no risks to the business have been realised since the SPA is to be rejected, as it relies impermissibly on hindsight.

289. However, I consider that Mr Gates' suggestion of a 25% discount in the multiplier is greatly overstated. Mr Gates proposed a discount of that amount on the assumption that there had been systematic non-compliance across the three areas of the claim (cess waste, tank bottom waste, and leachate); the proposal was based on the view that, in those circumstances, 25% of the actual profits of GDE across the entire business (that is, including the Dry Side) were placed at risk because of the possibility of further concealed non-compliances. However, such past non-compliances as I find there to have been in respect of cess waste or tank bottom waste were either historic or very occasional, were not known to the regulators and were in my view very unlikely to become known by them, and (from a valuation point of view at the date of purchase) were unlikely to be continued or repeated by the new owners of the company; therefore I do not accept that they occasioned reputational damage that ought to be reflected in the valuation. Further, I am not persuaded that the breaches in respect of leachate and the misleading of the regulators created a genuine risk to the viability of the business of the Dry Side. Any discount would, in my view, properly relate only to the risks to the ongoing wet waste division, over and above the reduction in the leachate business. The change of ownership of the company would itself tend to minimise the risks of adverse consequences with the regulators. Again, I do not accept that it is justified to value a business on the basis of possible concealed breaches for which there is no evidence.

290. In my judgment, the discount of the multiplier is to be ascertained, as Mr Mesher suggested, by choosing a figure at an appropriate point within the range of acceptable multipliers for an EV/EBITDA valuation. Mr Mesher considered that the appropriate range was

> between 3.8 and 4.5; and, although the specific figures at either end of this range were suggested by a fairly limited examination of comparables, I accept his opinion as to range. Having regard to the matters that I have referred to above, I consider that the risk of 'reputational damage' is appropriately reflected by discounting the multiplier from 4.2 to 4."

17. The Judge continued in paragraph 291:

> "This line of reasoning would give a valuation as follows: £1,115,000 x 4 = £4,460,000 - £1,501,324: a total of £2,958,676. On this basis, the difference between the Warranty True valuation and the Warranty False valuation is £382,600, which by my reckoning is about 11.5% of the purchase price."

18. There is now no dispute about liability. However, both sides challenge the Judge's assessment of damages. By their appeal, the Norvills take issue with the Judge's reduction in the multiplier when calculating the "Warranty False" value. On the footing that that adjustment was erroneous, the Norvills contend that the damages should have been assessed at £159,600 rather than £382,600. For its part, MDW, while arguing that the Judge's assessment of damages for breach of warranty cannot be impugned, maintains by its cross-appeal that it should have been awarded a larger sum for fraudulent misrepresentation. The amount due in that regard, according to MDW, was £3,584,224 (i.e. the purchase price) less £2,958,676 (i.e. the "Warranty False" valuation) or, in other words, £625,548.

The appeal

19. The Norvills' central complaint is that the Judge reduced the multiplier when calculating GDE's "Warranty False" value to take account of a risk which, by the time of the trial, was known not to have materialised. Mr Hugh Sims QC, who appeared for the Norvills with Mr Jay Jagasia, pointed out that the Judge explained that the reduction reflected "reputational damage … that the breaches were liable to cause to [GDE] and the jeopardy that they occasioned to the future of the business". In the event, Mr Sims said, no such damage was caused: no prosecution was brought, GDE did not lose its permits and licences, and there was no suggestion of wider reputational harm to GDE's wet waste division. While accepting that damages fell to be assessed as at 14 October 2015, the date of the SPA, Mr Sims argued that it was incumbent on the Judge to have regard to how matters had turned out. By failing to do so, Mr Sims submitted, the Judge gave MDW a windfall which was inconsistent with the principle that an award of damages should put the innocent party in the position it would have been in had the contract been performed and, more specifically, with case law relating to the significance of contingencies. Mr Sims further contended that the Judge was inconsistent, since he *did* take account of post-SPA evidence when assessing the multiplicand to be used in the "Warranty False" calculation. In any case, Mr Sims said, the Judge's reduction in the multiplier was arbitrary, unreasoned and unjustified.

20. In support of his submission that the Judge was inconsistent in his approach to post-SPA evidence, Mr Sims pointed out that the figure of £1,115,000 which the Judge

used as the multiplicand when valuing GDE on a "Warranty False" basis reflected views of Mr Mesher to which the Judge referred in paragraph 139(4) of his judgment. The Judge explained in paragraph 139(4) that Mr Mesher had given evidence to the following effect:

> "On a Warranty False basis, the only relevant disposal costs could be those for leachate, on the basis that lawful operation of the Wet Side in the period 2013 to 2015 would have required sending approximately 60% of the leachate for processing by Tradebe Limited. This would result in an additional cost of approximately £38,400 p.a. (7,680 tonnes of leachate, at a cost of £5 per tonne). This would reduce the EBITDA multiplicand to £1,115,000 …."

21. Mr Mesher had said this on the subject in his report:

> "4.29 Mr Gates … notes that not all of the leachate was passed to Tradebe in the years 2016 and 2017. During 2016, 61% of the leachate was treated by Tradebe, and during 2017 54% was treated by Tradebe. One can therefore assume that the claim is such that around 60% of the leachate should have been treated by Tradebe in the year ended 2015. This would equate to 7,680 tonnes.
>
> 4.30 At a rate of £5 per tonne, the claimed base cost of processing the leachate through Tradebe in the year ended 31st October 2015 would have been £38,400. This is the figure that I consider reasonably represents the expected additional annual costs related to the breach of warranty on leachate disposal costs."

22. For his part, Mr Andrew Ayres QC, who appeared for MDW with Mr Laurie Scher, supported the Judge's reduction in the multiplier.

Legal principles

23. As Lord Blackburn noted in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, at 39, it is:

> "a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".

24. In contract, application of the principle involves asking what position the innocent party would have been in had the contract been performed. The point was

encapsulated in these terms by Parke B in *Robinson v Harman* (1848) 1 Ex 850, at 855:

> "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

It is on this basis that damages for breach of a warranty given on a sale of shares are determined by comparing the actual value of the shares with the value they would have had if the warranty had been true (as to which, see e.g. *Lion Nathan Ltd v C-C Bottlers Ltd* [1996] 1 WLR 1438, at 1441).

25. In tort, in contrast, damages aim to restore the status quo ante. Thus, damages for deceit, for example, seek to put the claimant in the position he would have been in, not if the representation had been true, but if it had never been made.

26. The differing measures of damages in contract and tort can be seen in this passage from paragraph 49-002 of *McGregor on Damages*, 21st ed.:

> "The tort of deceit needs careful handling as far as damages are concerned because in the great majority of cases the action induced by the deceit is the entering into a contract by the claimant, either with the defendant tortfeasor or with a third party, and it is important in such circumstances to stress the difference between a measure of damages based on tort principles and a measure of damages based on contract principles. Thus the correct measure of damages in the tort of deceit is an award which serves to put the claimant into the position the claimant would have been in if the representation had not been made, and not, as with breach of condition or warranty in contract, into the position the claimant would have been in if the representation had been true. In other words, if the claimant has been induced by the deceit to conclude a contract the claimant is not entitled, as would be the case in contract, to recover in deceit for the loss of the bargain."

27. "[A]s a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach": see *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, at 468, per Lord Wilberforce. In *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1987] 1 WLR 916, Bingham LJ said at 926 that this rule "should not be mechanistically applied in circumstances where assessment at another date may more accurately reflect the overriding compensatory rule". In the present case, however, it has always been common ground that damages should be assessed as at the date of the SPA.

28. There are, though, circumstances in which the Courts will take account of events subsequent to the date of assessment when determining contractual damages. In that connection, reliance has been placed on what has been called "the *Bwllfa* principle", which takes its name from the decision of the House of Lords in *Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426

("*Bwllfa*"). What was at issue there was the amount of compensation payable to mine owners under the Waterworks Clauses Act 1847 where undertakers had objected to the mine owners working coal near their waterworks. Lord Macnaghten, with whom Lord Shand concurred, said at 431:

> "The counter-notice by the undertakers following a notice of the mine owners under s. 22 does not operate to make a contract or to transfer property. It is not even a step towards a contract or a step towards expropriation. The undertakers acquire no property in the minerals. The property remains where it was. The mine owner is prohibited from working, and the undertakers are bound to make full compensation. That is all. If the question goes to arbitration, the arbitrator's duty is to determine the amount of compensation payable. In order to enable him to come to a just and true conclusion it is his duty, I think, to avail himself of all information at hand at the time of making his award which may be laid before him. Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark? The mine owner prevented from working his minerals is to be fully compensated—the Act says so. That means that so far as money can compensate him he is to be placed in the position in which he would have been if he had been free to go on working. Here it has been proved to demonstration that if he had not been interfered with he would have made between 5000l. and 6000l. I cannot understand upon what principle it is maintained that he should be content with half, and that that half is full compensation."

Likewise, Lord Robertson said at 432, "if, owing to the course of the procedure, the period required for the working out of the coal in question has come to be matter of history, then estimate and conjecture are superseded by facts as the proper media concludendi".

29. A similar approach was taken, without, it seems, *Bwllfa* being cited, in *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143 ("*Phillips*"). It was there alleged that a company which had since gone into liquidation had entered into a transaction at an undervalue and, hence, that relief was available under section 238 of the Insolvency Act 1986. One of the questions raised by the application was what, if any, value was to be attributed to a covenant given by a company referred to as "PCG" in a sublease dated 10 November 1989. Lord Scott, with whom the other members of the House of Lords agreed, valued the covenant at nil. Having observed in paragraph 25 that "PCG's covenant, which had been precarious at the outset, had become worthless by 23 February 1990 at the latest", Lord Scott said in paragraph 26:

> "[Counsel for the defendants] submitted that these ex post facto events ought not to be taken into account in valuing PCG's sublease covenant as at 10 November 1989. I do not agree. In valuing the covenant as at that date, the critical uncertainty is whether the sublease would survive for the four years necessary

> to enable all the four £312,500 payments to fall due, or would survive long enough to enable some of them to fall due, or would come to an end before any had fallen due. Where the events, or some of them, on which the uncertainties depend have actually happened, it seems to me unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened. Problems of a comparable sort may arise for judicial determination in many different areas of the law. The answers may not be uniform but may depend upon the particular context in which the problem arises. For the purposes of section 238(4) however, and the valuation of the consideration for which a company has entered into a transaction, reality should, in my opinion, be given precedence over speculation. I would hold, taking account of the events that took place in the early months of 1990, that the value of PCG's covenant in the sublease of 10 November 1989 was nil. After all, if, following the signing of the sublease, AJB had taken the sublease to a bank or finance house and had tried to raise money on the security of the covenant, I do not believe that the bank or finance house, with knowledge about the circumstances surrounding the sublease, would have attributed any value at all to the sublease covenant."

30. *Bwllfa* was followed, and *Phillips* cited, in *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] UKHL 12, [2007] 2 AC 353 ("*The Golden Victory*"). That case concerned a seven-year charterparty dated 10 July 1998 which, by clause 33, gave both parties the right to cancel if there were war between certain countries. In December 2001, the charterers repudiated the charter, and the owners accepted the repudiation a few days later. Subsequently, in March 2003, a war falling within clause 33 broke out. The House of Lords held, by a majority (Lords Bingham and Walker dissenting), that the outbreak of war fell to be taken into account in calculating the damages payable by the charterers and, accordingly, that the owners were not entitled to damages in respect of the period after March 2003.

31. Lord Scott said in paragraph 38 that the owners "are seeking compensation exceeding the value of the contractual benefits of which they were deprived" and that their arguments "offend the compensatory principle". Earlier in his speech, after referring to the "assessment at the date of breach rule", Lord Scott had said:

> "35. In cases … where the contract for sale of goods is not simply a contract for a one-off sale, but is a contract for the supply of goods over some specified period, the application of the general rule may not be in the least apt. Take the case of a three-year contract for the supply of goods and a repudiatory breach of the contract at the end of the first year. The breach is accepted and damages are claimed but before the assessment of the damages an event occurs that, if it had occurred while the contract was still on foot, would have been a frustrating event terminating the contract, e g legislation prohibiting any sale of the goods. The contractual benefit of which the victim of the

> breach of contract had been deprived by the breach would not have extended beyond the date of the frustrating event. So on what principled basis could the victim claim compensation attributable to a loss of contractual benefit after that date? Any rule that required damages attributable to that period to be paid would be inconsistent with the overriding compensatory principle on which awards of contractual damages ought to be based.
>
> 36. The same would, in my opinion, be true of any anticipatory breach the acceptance of which had terminated an executory contract. The contractual benefit for the loss of which the victim of the breach can seek compensation cannot escape the uncertainties of the future. If, at the time the assessment of damages takes place, there were nothing to suggest that the expected benefit of the executory contract would not, if the contract had remained on foot, have duly accrued, then the quantum of damages would be unaffected by uncertainties that would be no more than conceptual. If there were a real possibility that an event would happen terminating the contract, or in some way reducing the contractual benefit to which the damages claimant would, if the contract had remained on foot, have become entitled, then the quantum of damages might need, in order to reflect the extent of the chance that that possibility might materialise, to be reduced proportionately. The lodestar is that the damages should represent the value of the contractual benefits of which the claimant had been deprived by the breach of contract, no less but also no more. But if a terminating event had happened, speculation would not be needed, an estimate of the extent of the chance of such a happening would no longer be necessary and, in relation to the period during which the contract would have remained executory had it not been for the terminating event, it would be apparent that the earlier anticipatory breach of contract had deprived the victim of the breach of nothing."

32. Lord Carswell and Lord Brown expressed similar views to Lord Scott. Lord Carswell said in paragraph 66:

> "If the second Gulf War had not broken out by the time the arbitration was held, the arbitrator would have had to estimate the prospect that it might do so and factor into his calculation of the owners' loss the chance that the charter would be cancelled at some future date under clause 33. The loss which would have been sustained over the full period of the charter would then have been discounted to an extent which would have reflected the chance, estimated at the time of the assessment, that it would be so terminated. As events happened, however, the arbitrator did not come to assess damages until after the outbreak of war, when, as he found, the charterers would have

> cancelled the charter. The outbreak of the second Gulf War was then an accomplished fact, which was highly relevant to the amount of damages, and in my opinion the arbitrator was correct to take it into account in assessing the owners' loss. As Lord Robertson put it in the *Bwllfa* case, at p 432, 'estimate and conjecture are superseded by facts'."

Lord Brown said in paragraph 78, "the breach date rule does not require contingencies – such as the likely effect of a suspensive condition – to be judged prior to the date when damages finally come to be assessed".

33. *The Golden Victory* was the subject of consideration by the Supreme Court in *Bunge SA v Nidera SA* [2015] UKSC 43, [2015] 3 All ER 1082 ("*Bunge*"). Lord Sumption, with whom Lords Neuberger, Mance and Clarke agreed, expressed his agreement with the principle seen in *The Golden Victory*, commenting in paragraph 23:

> "There is no principled reason why, in order to determine the value of the contractual performance which has been lost by the repudiation, one should not consider what would have happened if the repudiation had not occurred. On the contrary, this seems to be fundamental to any assessment of damages designed to compensate the injured party for the consequences of the breach."

Lord Sumption also dismissed the suggestion that a distinction was to be drawn between a one-off sale and a contract for the supply of goods or services over a period of time, explaining in paragraph 22:

> "Where the only question is the relevant date for taking the market price, the financial consequences of the breach may be said to 'crystallise' at that date. But where, after that date, some supervening event occurs which shows that that neither the original contract (had it continued) nor the notional substitute contract at the market price would ever have been performed, the concept of 'crystallising' the assessment of damages at that price is unhelpful. The occurrence of the supervening event would have reduced the value of performance, possibly to nothing, even if the contract had not been wrongfully terminated and whatever the relevant market price. The nature of that problem does not differ according to whether the contract provides for a single act of performance or several successive ones."

Further, Lord Sumption said this in paragraph 21 about the reasoning in *The Golden Victory*:

> "The reasoning has to some extent been obscured by the focus on the implications of the so-called 'breach-date rule' and on the competing demands of certainty and compensation. The real difference between the majority and the minority turned on the question what was being valued for the purpose of assessing

> damages. The majority were valuing the chartered service that would actually have been performed if the charterparty had not been wrongfully brought to a premature end. On that footing, the notional substitute contract, whenever it was made and at whatever market rate, would have made no difference because it would have been subject to the same war clause as the original contract: see Lord Scott of Foscote at para [37], and Lord Brown of Eaton-under-Heywood at paras [76]–[78] and [82]. The minority on the other hand considered that one should value not the chartered service which would actually have been performed, but the charterparty itself, assessed at the time that it was terminated, by reference to the terms of a notional substitute concluded as soon as possible after the termination of the original. That would vary, not according to the actual outcome, but according to the outcomes which were perceived as possible or probable at the time that the notional substitute contract was made. The possibility or probability of war would then be factored into the price agreed in the substitute contract: see Lord Bingham of Cornhill at paras [22] and Lord Walker of Gestingthorpe at paras [45]–[46]. I think that the majority's view on this point was correct. Sections 50 and 51 of the Sale of Goods Act, like the corresponding principles of the common law, are concerned with the price of the goods or services which would have been delivered under the contract. They are not concerned with the value of the contract as an article of commerce in itself. As Lord Brown observed at paras [82]–[83], even if the charterparty rights could have been sold for a capital sum, this was not a proper basis for assessing loss, and an assessment which proceeded as if it were would 'extend the effect of the available market rule well beyond its proper scope'."

34. By the time *Bunge* was decided, attempts had already been made to rely on *The Golden Victory* in two share sale cases. In the earlier of them, *Ageas (UK) Ltd v Kwik-Fit (GB) Ltd* [2014] EWHC 2178 (QB), [2014] Bus LR 1338 ("*Ageas*"), the seller had given a warranty in respect of a subsidiary's accounts when selling the subsidiary. It subsequently transpired that the warranties had been breached in the treatment of an item known as "time on cover bad debt" (or "TOCBD"). In the event, however, the impact of TOCBD turned out to be less than had been anticipated at the date of breach, and the company which had insured the warranty liability ("AIG") maintained that regard should be had to that fact when calculating what it had to pay.

35. Popplewell J concluded in paragraph 35 that "[t]he *Bwllfa* approach, as applied in *The Golden Victory* … , supports the proposition that when assessing damages for breach of contract by reference to the value of a company or other property at the date of breach, whose value depends upon a future contingency, account can be taken of what is subsequently known about the outcome of the contingency as a result of events subsequent to the valuation date where that is necessary in order to give effect to the compensatory principle". Popplewell J went on:

> "In an appropriate case, the valuation can be made with the benefit of hindsight, taking account of what is known of the outcome of the contingency at the time that the assessment falls to be made by the court. This is so not merely as a cross-check against the reasonableness of prospective forecasting, as Staughton J regarded as permissible in *Buckingham v Francis* [1986] 2 All ER 738. It is so whatever view might prospectively be taken at the breach date of the outcome of the contingency."

36. Popplewell J added, however, two qualifications. The first was that the approach he had outlined "can only be justified where it is necessary to give effect to the overriding compensatory principle": see paragraph 37. The second was that "it is important to keep firmly in mind any contractual allocation of risk made by the parties": see paragraph 38. In that connection, Popplewell J said in paragraph 38:

> "Party autonomy dictates that an award of damages should not confound the allocation of risk inherent in the parties' bargain. It is not therefore sufficient merely that there is a future contingency which plays a part in the assessment. It is necessary to examine whether the eventuation of that contingency represents a risk which has been allocated by the parties as one which should fall on one or other of them. If the benefit or detriment of the contingency eventuating is a risk which has been allocated to the buyer, it is not appropriate to deprive him of any benefit which in fact ensues: it is inherent in the bargain that the buyer should receive such benefit."

37. On the facts, Popplewell J was not persuaded that the post-acquisition incidence of TOCBD should be used in valuing the subsidiary at the date of the acquisition. In the first place, AIG had "simply not shown that the conventional prospective approach of assessment at the breach date offends the compensatory principle or results in a windfall to [the purchaser]": see paragraph 49. Secondly, the contractual allocation of risk made it inappropriate to take account of post-acquisition experience. As to that, Popplewell J said:

> "50. The SPA was for a fixed price based on what Ageas [i.e. the purchaser] was prepared to pay, and [the seller] to accept, for a business which was thereafter Ageas's to do what it wanted with. There was no provision, as there sometimes is in such agreements, for any post acquisition adjustment of the price based on subsequent trading performance. Each party would have to determine an acceptable price based on forecasts reached prior to completion in what was a fast moving and competitive market facing new challenges in the grip of a major recession whose effect on customers remained uncertain. Upon completion, the contract was fully executed. The outcome of all the contingencies inherent in the forecasts were risks conferred on Ageas. If the business did better than the parties projected when calculating a price, that was for Ageas's benefit. If it did worse, that was its loss. The bargain embodied in the SPA was

> the allocation of risk to Ageas of any benefit or loss arising either as a result of the way Ageas chose to run the business or as a result of external influences on the success of the business.
>
> …
>
> 52. What happened to TOCBD after the acquisition was … part and parcel of the way Ageas chose to run the business following acquisition and the interaction between those business decisions and the effect of the market and macro-economic conditions on the business. Those contingencies are all matters which the parties agreed are for Ageas's risk. The incidence of TOCBD was just one element inextricably bound up with the way the business was run and the external influences on its success, and was subject to the same allocation of risk."

38. In the second case, *The Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB), it was again decided, applying principles derived from *Ageas*, that events since the date of breach should not be taken into account. In the course of his judgment, Blair J noted at paragraph 185:

> "For the avoidance of doubt, it is not suggested that the mere fact that shares sold in breach of warranty later recover their value because the business in fact does well has any effect on quantum assessed as at the date of breach. Any such argument would be insupportable, not least because the buyer is entitled to the benefit of the upside, having taken the risk of the downside."

39. There was also reference to *Ageas* in *OMV Petrom SA v Glencore International AG* [2016] EWCA Civ 778, [2017] 3 All ER 157 ("*OMV Petrom*"), which, as Christopher Clarke LJ noted in paragraph 1, concerned the measure of damages for deceit. In *OMV Petrom*, the defendant ("Glencore") had contracted to sell particular grades of oil, but had in fact supplied a blend of oils which cost less and had created, or caused to be created, false documents which were designed to deceive, and did deceive, the purchaser. If the purchaser had known the true position, it "would probably have rejected the claim cargoes and purchased the relevant brand elsewhere": see paragraph 11.

40. When determining the value of what Glencore had supplied for the purpose of calculating damages, the trial judge had applied a discount on the basis that "any buyer invited to purchase a blend which contained obscure or unfamiliar components and with no history of their performance would have been looking for a further discount from the CIF price of the components because of the range of uncertainties that came into play when buying an unknown blend as opposed to a recognized grade": see paragraph 21. On appeal, Glencore challenged the discount on the basis which Christopher Clarke LJ summarised as follows in paragraph 31:

> "The discount is said to be wrong in principle. Its basis was that anyone buying one of the blends would want a substantial

> discount because of the risks of using an untried blend in a refinery. Use of such a blend could reduce the output of refined product below what would be expected of the relevant brand or affect the machinery of the refinery itself. At worst use of the blend might lead to a fire or, more likely, rust. But, in the events which happened, nothing untoward occurred. In those circumstances any discount is inappropriate. The measure of damages is the price paid less the benefit received being the real value of the goods. To make a deduction for risks which did not eventuate would be to attribute to the blends an unreal value and to compensate [the purchaser] for a loss which it might have suffered but did not. Moreover, if the crude supplied had had some effect on the machinery of the refinery [the purchaser] could have claimed against Glencore for that so that, effectively, Glencore was the guarantor of such risks."

41. Christopher Clarke LJ, with whom Black and Kitchin LJJ agreed, rejected the contention. He said in paragraph 40:

> "[T]hese cargoes were unique and had to be valued by a calculation of the total cif value of the component crudes discounted on account of the risks and uncertainties involved in buying these odd cargoes which were a mixture of crude oils, condensates and fuel oil. The amount by which the price paid exceeded a price calculated on that basis constitutes the measure of the buyer's loss, representing, as it does, the amount that he has overpaid on account of the seller's deceit. That loss arose when on account of the deceit he acquired the property, for which he had to overpay. The fact, if such it be, that, afterwards, none of the risks to which the discount related materialised cannot alter the fact that the buyer was induced to pay too much when he did so."

In paragraph 49, Christopher Clarke LJ said:

> "The valuation is to be carried out as at the bill of lading date, being the date upon which [the purchaser's] loss crystallized, and at which time any valuation would have to take account of the then risks. What happened after the bill of lading date does not affect the value of the blend *on that date*. A valuation without any discount would produce a figure which did not represent the market value at that date, at which time no one would have bought the blends without one."

42. Distinguishing *Ageas*, Christopher Clarke LJ said in paragraph 57 that he did not regard the trial judge's approach as inconsistent with the compensatory principle. He commented:

> "Whatever may be the position in relation to contractual claims not based on fraud, the duped buyer is entitled to compensation for the excessive price that he has paid which is to be

> determined as at the date when he acquired the property. To require the deceiver to make such compensation is consistent with a policy of discouraging intentional wrongdoing."

43. *OMV Petrom* chimes with earlier authority. In *McConnel v Wright* [1903] 1 Ch 546, the plaintiff had subscribed for shares in a company ("Standard") in reliance on a representation that the company held certain shares in another company ("Globe"). At the time, the Globe shares were not in fact held by Standard, but Standard acquired them subsequently. It was held that that transfer did not defeat a claim for deceit. Collins MR said at 553-554:

> "on the evidence as it now stands and the result of the learned judge's decision, it was not at all certain, at the time when the prospectus was issued, whether the Globe shares would be acquired or not. In point of fact they were not acquired till some time later, and therefore at the date when the prospectus was issued there was a misrepresentation, and damages might have been assessed there and then on the date on which this gentleman paid his money on the allotment of shares to him. That is clearly the time at which his damages must be assessed. He had paid his money, and he had got in return for it a property which did not contain the 200,000 Globe shares, in respect of which a profit of so large an amount is said to have been obtained. Therefore the position is this, and anybody assessing the damages will have to consider it: What is the difference between the value of the property as it was represented and the property without this large asset in it, having regard to the possibility, certainty, or uncertainty of that asset ever being in fact acquired? We now know, no doubt, that it was acquired afterwards; but that is not the material point. The damages have to be ascertained in view of the facts as they were at the time—in view of the central fact that this asset had not been acquired."

Similarly, Romer LJ said at 557-558:

> "[The defendant's counsel] say, True, the company had not these shares at the date of the allotment, but it acquired them a few days afterwards, and they ask the Court to say that that made good the representation. I need scarcely point out the fallacy of that contention. Unless they can establish that the risk which was run by this company, which had not got the shares at the date of allotment, and might never have got them, was unsubstantial, in my opinion that risk was not unsubstantial. The question has to be tried by looking at what was the true value of the shares, of course, at the date of allotment. To shew what was the value of the shares later on, after the company had got these 200,000 Globe shares, is not to the point, nor indeed is it relevant to inquire, because if one went on to inquire what was the condition of the shares some days later, when the 200,000 Globe shares were acquired, one ought also

> to inquire what were the other circumstances of the company at that time; for it would not follow of necessity that there were no other counterbalancing disadvantages at that later date. It must be pointed out that it is irrelevant to inquire into a state of circumstances after the date of allotment—that is to say, to inquire only as to one particular side of the matter. The proper inquiry is, What was the true value of these shares at the date of allotment? As I have pointed out, if the risk run was substantial, as I have said I think it was, then the shares were not worth what they were represented to be worth by the prospectus, which was the price paid for them by the plaintiff."

The third member of the Court, Cozens-Hardy LJ, said at 559:

> "It is not to the point, it seems to me, to allege that shortly afterwards the Globe shares were allotted. Subsequent events cannot be looked at for this purpose. There was a material risk at the date when the plaintiff acquired his shares that the statement would not be made good."

44. Returning to contractual principles, in *Classic Maritime Inc v Limbungan Makmur Sdn Bhd* [2019] EWCA Civ 1102, [2019] 4 All ER ("*Classic Maritime*") Males LJ, with whom Haddon-Cave and Rose LJJ agreed, distinguished *The Golden Victory* and *Bunge* on the basis that they had been concerned with anticipatory breach rather than actual breach. *Classic Maritime* concerned a long-term contract of affreightment providing for shipments of iron ore pellets. The claim related to the charterer's failure to provide seven shipments. At first instance, the judge found that the failure of the Fundao dam in Brazil had made it impossible for the charterer to perform the contract in respect of the third to seventh shipments, but also that the charterer would have defaulted on those shipments even if the dam had not burst. The Court of Appeal held that the bursting of the dam did not absolve the charterer from liability for substantial damages. Males LJ explained:

> "[80] Both *The Golden Victory* and *Bunge v Nidera* were concerned with the assessment of damages for an anticipatory breach by renunciation which required the court to value the innocent party's right to future performance, in the former case the right to performance of what was in effect an instalment contract with monthly hire payments and in the latter case the right to performance of a single supply of goods. In both cases the compensatory principle operated to reduce or extinguish the innocent party's claim for damages. That was because the value of the performance to which that party was entitled was adversely affected by events which occurred after the acceptance of the repudiation. However, the fundamental principle is clear.
>
> [81] The present case is not concerned with an anticipatory breach, but with actual breaches as a result of the charterer's failure to supply cargoes for each of the five shipments in issue. It is common ground that, subject only to cl 32, the charterer's

> obligation to supply cargoes was an absolute obligation (see *Triton Navigation Ltd v Vitol SA, The Nikmary* [2003] EWCA Civ 1715, [2004] 1 All ER (Comm) 698, [2004] 1 Lloyd's Rep 55). Thus the performance to which the shipowner was entitled, once it was determined that cl 32 did not provide the charterer with a defence, was the supply of cargoes. The value of that performance was the freights which the shipowner would have earned if the cargoes had been supplied less the cost of earning them. In principle, therefore, the comparison which application of the compensatory principle required was between (1) the freights which the shipowner would have earned less the cost of earning them and (2) the actual position in which the shipowner found itself as a result of the breach. It is now agreed that this comparison would result in a damages award of over US$19m.
>
> [82] The comparison which the judge carried out was different. It was between the shipowner's position if the charterer had been ready and willing to perform and the shipowner's actual position. The judge said at [146] that undertaking this comparison did not involve 'an impermissible sleight of hand' but I do not agree. The [charterer's] obligation was not to be ready and willing to supply a cargo in each case, but actually to supply one. The charterer was not in breach because it was unwilling to perform, but because it failed to do so, even if the reason why it failed to do so was because it was unwilling.
>
> [83] In the case of an anticipatory breach (ie a renunciation in advance of the time for performance), a party repudiates a contract if it demonstrates an unwillingness to perform, in which case (as in *The Golden Victory* and *Bunge v Nidera*) it may be necessary to consider whether, if it had not demonstrated that unwillingness, it would nevertheless have been excused from performance by later events. If so, that will affect the value of the rights which the innocent party has lost. But that is not so in the case of an actual breach, as in the present case. In the present case, where there is an absolute obligation to supply a cargo, whether the charterer was ready and willing to supply is neither here nor there. Nor is it relevant whether performance is impossible as (in the absence of a defence such as frustration or illegality) impossibility is not a defence: *Taylor v Caldwell* (1863) 3 B & S 826 at 833, (1863) 122 ER 309 at 312. The simple fact is that the charterer failed to do what it had promised to do and is thereby in breach."

45. I should also mention *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd* [1999] 2 Lloyd's Rep 423 ("*Senate*"), on which Mr Sims relied. That case arose from a share sale in which the vendor warranted the accuracy of some 1990 management accounts. It transpired that the accounts did not show a true and fair view because "rebate reserves" were overstated by £1.7 million. The vendor, however, argued that there was in fact no difference between the warranted figure and

actual profit, in part on the basis that a £750,000 overestimate of the 1989 rebate reserve was available to boost the 1990 profits: see paragraphs 10(c) and 38(B)(a). In that connection, Stuart-Smith LJ, giving the judgment of the Court of Appeal, said in paragraph 56:

> "Although the 1990 management accounts did not show a true and fair view because rebate reserves were overstated by £1·7m, in order to see if the plaintiff has suffered any loss and, if so, how it should be quantified, it is necessary to establish the actual profit for that year. Thus, if some credit or profit has been omitted which can properly be taken into account in the 1990 profit, the apparent loss is pro tanto extinguished or diminished. For this purpose, in our judgment, it is permissible to take into account hindsight to arrive at the actual figures."

46. Having quoted this passage, Popplewell J said in *Ageas* at paragraph 25:

> "I do not find it easy to understand from the report quite what hindsight was being referred to. In particular it is not apparent that what was meant by hindsight was the taking into account of matters which had not yet occurred at the time of the sale, rather than retrospective accounting treatment. Whilst para 60 addresses and dismisses a hindsight argument by reference to what was known or expected at the date of sale about actual payment of the 1990 rebates, para 57 appears to address the £750,000 overestimate of 1989 rebate reserve as giving rise to an understatement of profit in the 1990 accounts as a matter of accounting treatment. I have not therefore found this dictum of great assistance in resolving the current dispute."

47. I agree. Reading Stuart-Smith LJ's reference to it being "permissible to take into account hindsight to arrive at the actual figures" in its context, I do not think it is of any real help with the issues raised in the present case.

48. Reference to subsequent events to determine whether an event which was contingent at the date of assessment occurred must be distinguished from their use to cast light on events which had happened by the date of assessment. Take the present case. When assessing the multiplicand, it was relevant to consider the degree to which GDE's costs would have been increased if the company had disposed of all leachate lawfully in the period before GDE was sold to MDW. In that context, Mr Mesher relied on the extent to which leachate had been processed by Tradebe in the years immediately after the sale. Doing so did not involve application of the *Bwllfa* principle. What had happened since the SPA provided evidence as to how far GDE had increased its pre-SPA profits by the unlawful disposal of leachate and, thus, of GDE's maintainable EBITDA. That is quite different from invoking matters subsequent to the date of assessment in order to show that something that was then contingent did, or did not, happen in the event.

49. Drawing some of the threads together, it seems to me that the following can be said:

i) Where damages fall to be assessed in respect of an anticipatory breach of contract which was accepted, it is appropriate to consider what would have happened if the breach had not occurred and, in that context, events subsequent to the breach may be relevant;

ii) That principle has, however, no application where a party to a contract has, by failing to supply goods or services, committed an actual, rather than anticipatory, breach of contract;

iii) Further, where a claimant has been induced by deceit to buy something, the defendant cannot reduce its liability by showing that a contingency which served to reduce the value of the item at the date of assessment did not eventuate;

iv) There is a strong case for saying that, in general at least, the position should be similar in relation to warranties given on a share sale. Supposing the position to be that the true value of some shares is depressed by a contingency, someone buying them at a higher figure will have paid more than they were worth even if the contingency never happens. Events subsequent to the purchase cannot affect the value at the time of the transaction. The price of a share could typically be said to be a product of a number of contingencies. If a particular risk does, or does not, occur, the price may rise or fall, but that will not retrospectively change the value of the share at an earlier date. In *Bunge*, Lord Sumption thought that the minority in *The Golden Victory* had been wrong to focus on the value of the charterparty itself, as opposed to the chartered service which would have been performed, observing that sections 50 and 51 of the Sale of Goods Act 1891 and the common law were alike concerned with "the value of the goods or services which would have been delivered under the contract", not "the value of the contract as an article of commerce in itself". In contrast, a share sale relates to an existing asset which is recognised as "an article of commerce in itself";

v) If, none the less, there can be cases in which account can be taken of what happened subsequently as regards a contingency which existed on the date of assessment when determining what, if any, damages are payable for breach of a warranty on a share sale, they must be rare. They would doubtless involve situations in which the buyer might otherwise be said to have gained a "windfall", but the mere fact that the value of the relevant shares has increased since the date of assessment cannot demonstrate such a "windfall": it is inherent in the selection of a date of assessment that subsequent changes in value can fall to be disregarded. Still less could it be appropriate to categorise a post-assessment rise in value as a "windfall" if it were attributable to steps that the purchaser had itself taken since the transaction. Further, as Popplewell LJ said in *Ageas*, it would be "important to keep firmly in mind any contractual allocation of risk made by the parties"; and

vi) There is no similar bar on using events subsequent to the date of assessment to cast light on events which had happened by that date.

The present case

50. The Judge valued GDE on a "Warranty False" basis at £2,958,676. On the Norvills' case, the Judge ought to have arrived at a somewhat higher "Warranty False" figure. Either way, GDE was worth substantially more than its net assets excluding goodwill. The fact that purchasers would have been willing to pay a price in excess of the value of GDE's other net assets shows it to have had goodwill.

51. The Judge thought it appropriate to make a reduction in the multiplier used for his "Warranty False" calculations "to reflect reputational damage (or, as it has been put, 'the fragility of the goodwill') that the breaches were liable to cause to the company and the jeopardy that they occasioned to the future of the business". The Judge was essentially saying that a purchaser aware of how GDE had been conducting its business would not have been willing to pay as much for its shares or, expressed differently, would have thought the company's goodwill somewhat less valuable.

52. The Judge's approach was consistent with evidence given by both Mr Gates and Mr Mesher. Mr Gates explained that, in his view, "a systematically non-compliant business … would warrant a lower multiple as well [as a downward adjustment to profits]". For his part, Mr Mesher accepted that a "qualitative discount" to the multiplier could be appropriate. Expanding on this in oral evidence, he said:

> "let's say 25 per cent is the absolute maximum, or not necessarily the absolute maximum but a reasonable reduction in a business which is capable of being carried on but has really significant transgressions, you know, down to zero in a situation where there may be for example a series of minor issues or issues which for example haven't gone to prosecution and haven't been followed up in terms of enforcement action by the authorities. So there is, of course, a scale."

53. In the event, GDE did not suffer the damage that a well-informed purchaser might have feared at the date of the SPA. It remains the case, however, that the Judge was fully justified in lowering the multiplier as well as the multiplicand when working out what GDE was worth on a "Warranty False" basis. Had GDE disposed of all leachate lawfully, its profits would have been reduced with implications for the multiplicand. As, however, the company had behaved improperly, its value was diminished by more than the cut in the multiplicand would alone have implied. Purchasers knowing the truth would not merely have factored in the prospect of lower maintainable earnings, but have brought down what they were prepared to pay to take account of the misconduct. In other words, the fact that, as matters turned out, GDE did not experience reputational damage does not mean that the value of the company was not reduced in the way the Judge found as at the date of the SPA. While reputational damage could be said to have been contingent when the SPA was entered into, there was good reason for the Judge to decide that the value of GDE had already been depreciated. Put differently, there was an impairment to goodwill as at the date of the SPA.

54. That the Judge considered a downward adjustment to the multiplier as well as the multiplicand appropriate is entirely unsurprising. In fact, as Mr Ayres observed, it would have been remarkable if GDE's misbehaviour had not had such a consequence.

As a matter of common sense, a willing purchaser would not have been likely to pay as much for the company. On top of that, there is good reason to think that the fact that GDE did not in the event suffer the reputational damage to which its misconduct might have been expected to give rise is attributable to efforts which MDW made to put matters right after it had acquired GDE. In all the circumstances, the approach which the Judge adopted cannot fairly be said to give MDW a "windfall".

55. Further, there was, as I see it, no inconsistency between the Judge's use of post-SPA evidence when determining the multiplicand and his refusal to take into account post-SPA events when considering whether the multiplier should be discounted. The former involved using matters subsequent to the date of assessment to cast light on events which had happened earlier, which is legitimate.

56. It appears to me, therefore, that the Judge was right to disregard the fact that reputational risks did not in the event materialise when assessing damages on contractual principles. For good measure, the Judge held the Norvills to have been guilty of deceit as well as breach of warranty and cases such as *OMV Petrom* and *McConnel v Wright* show that where, as here, a claimant has been induced to buy something by deceit, it is no defence to demonstrate that a contingency which reduced value at the date of the assessment did not eventuate.

57. In short, the Judge was, in my view, correct when in paragraph 288 of his judgment he dismissed the "argument … that no discount is appropriate because it is known that no risks to the business have been realised since the SPA" as "rel[ying] impermissibly on hindsight".

Was the Judge's reduction in the multiplier arbitrary, unreasoned and unjustified?

58. Mr Sims said that, even if the Judge was justified in making some downward adjustment to the "Warranty False" valuation, the reduction in the multiplier from 4.2 to 4 was arbitrary, unreasoned and unjustified. Nowhere in the judgment, Mr Sims submitted, is there any analysis of why that particular cut was thought to be justified. It is to be remembered, Mr Sims argued, that the change in the multiplier was applied to the whole of the multiplicand, not just such of it as was attributable to GDE's wet waste division, let alone only that part of that division's business which dealt with leachate. In the circumstances, the Judge needed to give specific reasons for choosing to lower the multiplier by 0.2 rather than a different figure, or not at all.

59. To my mind, however, the Judge was fully entitled to reduce the multiplier to the extent he did and explained the basis for doing so adequately. The Judge noted in paragraph 290 of his judgment that "the discount of the multiplier is to be ascertained, as Mr Mesher suggested, by choosing a figure at an appropriate point within the range of acceptable multipliers for an EV/EBITDA valuation" and that "Mr Mesher considered that the appropriate range was between 3.8 and 4.5". The Judge followed the course which Mr Mesher had proposed and selected a multiplier within Mr Mesher's range. Further, it can be seen from paragraph 289 of his judgment that the Judge had well in mind factors limiting the significance of GDE's misconduct and, from paragraph 291, that the Judge considered the overall effect which the reduction in the multiplier would have on the "Warranty False" valuation. It is not easy to identify what more the Judge could usefully have said. At any rate, he said enough.

Conclusion

60. I would dismiss the appeal.

The cross-appeal

61. Noting in paragraph 280 of his judgment that "[n]o different measure has been suggested for any claim in respect of fraudulent or negligent misrepresentation", the Judge assessed damages using what it was common ground was the proper measure of damages for breach of warranty, namely, the difference between GDE's "Warranty True" value and its "Warranty False" value. That approach would have been satisfactory, Mr Ayres said, if the Judge had accepted that the "Warranty True" figure equated to what MDW had paid for GDE's shares. In the event, however, the Judge found the "Warranty True" value to have been £242,948 less than the purchase price. That being so, Mr Ayres said, it became necessary for the Judge to differentiate between the tortious and contractual measures of damages. If the Judge had applied the tortious measure, as he needed to do, he would have increased the damages he awarded to £625,548, on the basis that what MDW had paid (viz. £3,584,224) had exceeded the "Warranty False" value (viz. £2,958,676) by that amount.

62. The issues arising from these submissions and Mr Sims' response to them can be addressed under the following headings:

  i) Is it open to MDW to contend for anything other than the contractual measure?

  ii) Implications of the tortious measure

  iii) The present case

Is it open to MDW to contend for anything other than the contractual measure?

63. Mr Sims argued that paragraph 280 of the judgment reflected the reality. MDW had not contended for anything other than the contractual measure of damages before the Judge, and, so Mr Sims submitted, it should not be allowed to do so in this Court.

64. However, it is plain that MDW alleged misrepresentation as well as breach of warranty. Thus, paragraph 1.3 of the amended particulars of claim stated that MDW's claim was for "breach of contractual warranty, and for negligent misrepresentation, and … for damages for fraudulent misrepresentation" and MDW's skeleton argument for the trial began, "This is the trial of C's claim for damages for breach of warranty, misrepresentation, and deceit". Later in the skeleton argument, this was said about quantum in paragraph 115:

> "The well-established measure of damages in breach of warranty claims is the difference between (WV) the value of the shares if the warranties had been complied with (what C would have obtained if the contract had been performed), and (TV) the true value of the shares (what C in fact obtained) at the date of purchase:
>
> 115.1 The measure of damages in tort is the difference between (P) the price actually paid by C for the shares

in reliance on the representations, and (TV) the true value of the shares, plus any recoverable consequential losses after the purchase.

115.2 C does not seek consequential losses, and both parties have proceeded on the basis that (P) the price actually paid by C and (WV) the value of the shares if the warranties had been complied with are the same.

115.3 So there is no relevant distinction here between the quantum of damages sought by C for breach of contract and in tort. C seeks the difference between P and TV."

65. That the price which MDW paid for GDE's shares was taken to be the same as the value which the shares would have had if the warranties given in respect of them had been true is confirmed by the expert evidence. Mr Mesher said in his report that it was "unlikely that the market value of the Company as at 14th October 2015 is anything other than that which was actually paid" (paragraph 4.9) and referred elsewhere in his report to support for "the contention that the price paid represented market value" (paragraph 4.24) and to "the market value of £3.5 million" (paragraph 4.32). Likewise, Mr Mesher said when giving oral evidence at the trial that the figure of £3.3 million which he had arrived at by an objective valuation was "close enough to 3.5 million to support the overall value", while Mr Gates described the figure in the SPA as "a market value".

66. In written closing submissions, it was explained in paragraph 1.8 that MDW "does not suggest that the measure of loss in this particular case is different from the contractual measure". However, it can be seen from paragraph 151, which replicated paragraph 115 of MDW's skeleton argument for the trial, that MDW saw no relevant distinction between the contractual and tortious measures of damages because "both parties have proceeded on the basis that (P) the price actually paid by C and (WV) the value of the shares if the warranties had been complied with are the same". The premise is borne out by the Norvills' written closing submissions, which stated at paragraph 133 that the experts "were agreed on the Warranty True figure of £3.5m and so the difference between them was assessing the Warranty False figure".

67. In the event, the Judge found that MDW had paid more for GDE than its value on a "Warranty True" basis. The Judge concluded in paragraph 285 of his judgment that GDE's value on a "Warranty True" basis was £3,341,276, £242,948 less than the purchase price. As Mr Ayres explained, it was that (unexpected) development which led MDW to distinguish in this Court between the tortious and contractual measures of damages.

68. In the circumstances, I can see no objection to MDW relying on the tortious measure of damages before us. It always alleged misrepresentation and at trial both summarised what it said the effect of the tortious measure of damages was and explained why it saw no relevant distinction between the tortious and contractual measures on the facts. A potential distinction having emerged as a result of the Judge differing from what had been common ground at trial, it must be legitimate for MDW

now to contend that the tortious measure entitles it to a higher figure than it was awarded by the Judge on contractual principles.

69. Mr Sims suggested that MDW had taken the risk that the Judge would find that it had paid more for GDE than its "Warranty True" value. At trial, however, neither the Norvills nor the Judge alerted MDW to the possibility of a departure from the shared assumption that "the price actually paid by [MDW] and … the value of the shares if the warranties had been complied with are the same".

Implications of the tortious measure

70. In keeping with what had been said in MDW's skeleton argument and written closing submissions at the trial, Mr Ayres argued that the measure of damages in tort is "the difference between (P) the price actually paid by C for the shares in reliance on the representations, and (TV) the true value of the shares, plus any recoverable consequential losses after the purchase" and that, since MDW has not sought consequential losses, it is entitled to the difference between the price it paid and the "Warranty False" value of GDE's shares.

71. Mr Ayres cited in support of his submissions *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 ("*Smith New Court*"), which, as Lord Browne-Wilkinson observed at 260, raised for the first time in the House of Lords "the question of the correct measure of damages where a plaintiff has acquired property in reliance on a fraudulent misrepresentation made by the defendant". At 266-267, Lord Browne-Wilkinson concluded that the following principles apply when assessing the damages payable where a plaintiff has been induced by fraudulent misrepresentation to buy property:

> "(1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

For his part, Lord Steyn said at 284 that "the normal method of calculating the loss caused by the deceit is the price paid less the real value of the subject matter of the sale" and went on:

> "There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants. The analogy of the assessment of damages in a contractual claim on the basis of cost of cure or difference in value springs to mind. In *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] A.C. 344, 360G, Lord Mustill said: 'There are not two alternative measures of damages, as opposite poles, but only one; namely, the loss truly suffered by the promisee.' In an action for deceit the price paid less the valuation at the transaction date is simply a method of measuring loss which will satisfactorily solve many cases. It is not a substitute for the single legal measure: it is an application of it."

72. Mr Ayres stressed Lord Browne-Wilkinson's third and fourth propositions and Lord Steyn's reference to a plaintiff being "entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants". He also relied on a passage at 283 where Lord Steyn said that "it is not necessary in an action for deceit for the judge, after he had ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred".

73. In the circumstances, it is clear that, where a claimant has been induced by deceit to buy property in circumstances where he would not otherwise have bought it, the damages will normally be no less than the difference between the price paid and the real value of the property. Should the claimant have suffered consequential losses, a higher figure may be payable.

74. What, however, if the claimant, had he known the truth, would not have pulled out of the transaction entirely but would rather have negotiated a better price? Can it still claim price paid less true value? Or should the damages be price actually paid less what the claimant would have paid but for the deceit?

75. At first sight, Lord Steyn's rejection of the need to "embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred" might be thought to resolve the question. I do not think it does, however. Lord Steyn made the remark in the course of the following discussion of Hobhouse LJ's judgment in *Downs v Chappell* [1997] 1 WLR 426:

> "[Hobhouse LJ] enunciated the following 'qualification' of the conventional rule, at p. 443:
>
> > 'In my judgment, having determined what the plaintiffs have lost as a result of entering into the transaction—their contract

> > with Mr. Chappell—it is still appropriate to ask the question whether that loss can properly be treated as having been caused by the defendants' torts, notwithstanding that the torts caused the plaintiffs to enter into the transaction.'
>
> That led Hobhouse L.J., at p. 444, 'to compare the loss consequent upon entering into the transaction with what would have been the position had the represented, or supposed, state of affairs actually existed.' The correctness of this proposition in a case of deceit was debated at the bar. Counsel for Citibank in whose interest it was to adopt this proposition felt some difficulty in doing so. In my view the orthodox and settled rule that the plaintiff is entitled to all losses directly flowing from the transaction caused by the deceit does not require a revision. In other words, it is not necessary in an action for deceit for the judge, after he had ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred. The rule in deceit is justified by the grounds already discussed. I would hold that on this point *Downs v. Chappell* was wrongly decided."

Lord Steyn was thus addressing whether it was appropriate to ask what a claimant would have done if the false representation had been *true*, not whether it is relevant to inquire into what the claimant would have done if the representation had not been made. In this respect, I agree with the comments of Leggatt J in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321 at paragraph 217(2).

76. It is also to be noted that, when *Smith New Court* was before the House of Lords, it was not in issue that the claimant would not have bought the relevant shares but for the misrepresentations which were found proved. At first instance, the defendants had argued that "[i]f without the misrepresentation [the plaintiff] would still have bought the shares but at a lower price the measure of damages is the amount by which they have overpaid, ie the difference between the two prices" (see [1992] BCLC 1104, at 1133-1134). However, Chadwick J, the trial judge, held it to be "impossible to be satisfied, on the balance of probabilities, that an offer … at 78p per share [i.e. the price which the plaintiff would have offered] would have been accepted" (see 1134) and so "approach[ed] the question of damages on the basis that, without the relevant misrepresentation, [the plaintiff] would not have bought the … shares" (see 1135).

77. In *Smith New Court*, Lord Steyn noted at 280 that "[f]or more than 100 years at least English law has adopted a policy of imposing more extensive liability on intentional wrongdoers than on merely careless defendants". In a similar vein, Lord Mustill recognised at 269 that "in a case of fraud there are good reasons for departing in some respects from the ordinary rules". Even so, the better view seems to me to be that, in a case where it is apparent that a claimant would have proceeded with a transaction at a lower price had there been no deceit, damages should be assessed by reference to the difference between what the claimant would have paid and what it did pay.

78. In *Smith New Court*, Lord Browne-Wilkinson took as "the starting point" the passage from *Livingstone v Rawyards Coal Co* in which Lord Blackburn said that the "general rule" is that "you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation". To similar effect was Lord Steyn's emphasis on there being "in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendants". Where the claimant would not have entered into the relevant transaction at all but for the deceit, it makes sense that damages should be fixed by reference to the difference between purchase price and real value. Supposing, on the other hand, that the claimant would still have bought, but for less, putting it in "the same position as [it] would have been in if [it] had not sustained the wrong" or giving it "a sum representing the financial loss flowing directly from [its] alteration of position under the inducement of the fraudulent representations" would seem to require it to receive the difference between the actual price and what it would have paid.

79. Support for that view is to be found in *McGregor on Damages*. When discussing the damages payable for deceit in circumstances where the claimant contracted to buy shares, the authors say in paragraph 49-010 that "[t]he normal measure of damages is the purchase price of the shares less their actual value, if any, at the time of acquisition". However, they add in footnote 38:

> "This measure is based on the very likely assumption that had the claimant known the true facts he would never have bought the shares. Were it possible to show, as the defendants tried unsuccessfully to show at first instance in *Smith New Court Securities v Scrimgeour Vickers* [1992] B.C.L.C. 1104, that in the absence of the representation the claimant would have been able to buy, and would have bought, the shares but at a lower figure, then the measure would become the difference between the price the buyer paid and the price he would have paid. This appears to be implicitly accepted in the judgment at first instance in *Smith New Court*: see at 1133i to 1135b; the point is not touched upon in the Court of Appeal ([1994] 1 W.L.R. 1271) or in the House of Lords ([1997] A.C. 254)."

<u>*The present case*</u>

80. The Judge made a finding in paragraph 274 of his judgment that MDW "was induced to enter into the SPA by the misrepresentations in the Due Diligence Index and Responses". He did not make any finding as to what MDW would have done had it known the truth, but Mr Ayres pointed out that the Judge had before him a witness statement from Mr Mark Hazell, a director of MDW and its majority shareholder, in which this was said in paragraph 21:

> "At the time the company [i.e. GDE] was purchased, there wasn't a reason for us to doubt the information supplied and integrity of the company. If I had such reason, I would not have

> sanctioned the offer to purchase the company and would have dropped it. I have usually got a good instinct for these sort of things but there was nothing that came out during the due diligence and the reports from the acquisition team to put me off and the team were happy that everything seemed to be in order and GDE was a promising proposition."

81. When, however, Mr Mark Hazell made his statement, MDW's allegations against the Norvills were not limited to those which the Judge held to have been made out. I agree with Mr Sims that, without more, we cannot infer from Mr Hazell's statement that he would necessarily have decided against buying GDE even at a reduced price had he appreciated the matters which the Judge considered to have been proved. In this connection, Mr Sims reminded us with some justification of the dangers of "island hopping" to which Lewison LJ made reference in *Fage UK Ltd v Chobani UK Ltd* at [2014] EWCA Civ 5, [2014] FSR 29, at paragraph 114.

82. As I understand it, Mr Mark Hazell was not challenged on paragraph 21 of his witness statement in cross-examination. At the time, however, there would have been no reason to do so. Both sides were assuming that GDE's "Warranty True" value was the same as the amount MDW had paid for its shares. On that basis, damages stood to be assessed as the difference between the price and the "Warranty False" value. The Norvills could not improve their position by establishing that, had it been aware of GDE's misconduct, MDW would have bought at a lower figure rather than abandoning the transaction entirely.

83. In the circumstances, Mr Ayres rightly accepted that we are not in a position to say what course MDW would have taken if it had known the facts. There is, moreover, some reason to think that, supposing MDW still to have been interested in buying GDE, it might have been prepared to pay more than GDE's "Warranty False" value to secure the company. On the basis of the Judge's findings, after all, the £3,584,224 which MDW paid for GDE exceeded its worth on a "Warranty True" basis by £242,948. Moreover, it may possibly have made commercial sense for MDW to "overpay" because of synergies between GDE's business and that of MDW. In that connection, Mr Mark Hazell spoke of GDE having "strong synergies with MDW's transport, logistics capabilities and history of large scale bluechip and government contracts" and Mr Oliver Hazell said that it had been suggested to him that he should investigate GDE as a possible acquisition "given company synergies".

84. All in all, it seems to me that, while it may very well be the case that MDW would not have contemplated buying GDE at all if it had had knowledge of the previous misbehaviour, we cannot rule out the possibility that it would still have been prepared to purchase, would have offered a sum in excess of GDE's "Warranty False" value and would have had that offer accepted. That being so, we are not, I think, in a position to decide what damages should be paid applying the tortious measure and there is no viable alternative to remitting that matter to the Judge. It will be for him to determine whether, had it known the truth, MDW (a) would not have bought GDE, in which case damages should be assessed at £625,548 (i.e. the difference between the £3,584,224 purchase price and the "Warranty False" value of £2,958,676) or (b) would, despite GDE's past misconduct, have both made and had accepted an offer for the company, in which case damages should be assessed by reference to the difference between that offer and the £3,584,224 it in fact paid.

85. Mr Sims suggested that MDW would not be entitled to damages of £625,548 even if it would not have purchased GDE had it known the truth on the basis that, as indicated by Lord Browne-Wilkinson's third proposition in *Smith New Court*, MDW would have to give credit for all benefits it had received from its acquisition of GDE and, given the synergies between the businesses of MDW and GDE, those benefits went beyond the "Warranty False" value of GDE. I cannot accept this. I can see nothing in the authorities to indicate that, when assessing the damages that would be due to MDW in respect of the Norvills' deceit, it could be appropriate to give the Norvills credit for anything more than the market value of the shares they sold. That is especially so since, as Andrews LJ noted in *Tuke v Hood* [2022] EWCA Civ 23, [2022] 2 WLR 983, at paragraph 58, the authorities demonstrate that "a deliberate wrongdoer is not to be rewarded for the fruits of his own deceit".

<u>Overall conclusions</u>

86. I would dismiss the appeal and, accordingly, decline to set aside the existing judgment against the Norvills for £382,600 by way of damages. I would also, however, allow the cross-appeal to the extent of remitting to the Judge the question whether MDW is entitled to additional damages for deceit.

Lady Justice Asplin:

87. I would dismiss the appeal and would allow the cross-appeal, remitting the question of whether MDW is entitled to additional damages for deceit, for all the reasons given by Newey LJ.

Lady Justice Whipple:

88. I agree.