Neutral Citation Number: [2018] EWHC 669 (Ch)

Claim No: HC14F02532

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 27/03/2018

Before :

Kelyn Bacon QC
(sitting as a Deputy Judge of the High Court)

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Between :

(1) COLIN ALI
(2) MELANIE DAVIS
(3) OWAIN GOLDING
(4) IAN McGREAVY **Claimants**

- and -

ABBEYFIELD V.E. LIMITED **Defendant**

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Brie Stevens-Hoare QC and Ebony Alleyne (instructed by **Owen White**) for the **Claimants**
Nigel Jones QC and Edward Rowntree (instructed by **Geldards**) for the **Defendant**

Hearing dates: 5–8, 11–13 and 20 December 2017

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Approved Judgment

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

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KELYN BACON QC

Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):

Introduction

1. The Claimants are individuals who, in the course of 2007 and 2008, entered into joint venture agreements ("JVAs") with the Defendant ("VE") to establish and run Vision Express stores in Southport (Colin Ali), Llandudno (Melanie Davis and Owain Golding) and Macclesfield (Ian McGreavy). Their experience was not a happy one. All three stores were loss-making, and in 2012 and 2013 the Claimants terminated the JVAs. The Claimants then brought the present claims against VE saying that they were induced to enter into the JVAs as a result of fraudulent or alternatively negligent misrepresentations made to them by one of VE's business development managers, Richard Higginbottom.

2. In particular, the Claimants say that Mr Higginbottom fraudulently or negligently misrepresented the likely performance of their stores, in terms of the number of daily eye tests that they could expect to carry out, the conversion of those tests into spectacle sales, the average performance of VE's new JV stores, the usual time that it would take to repay the overdraft on a new store and move into profitability, and the existence and location of previous failed JV stores. On these grounds the Claimants seek the rescission of the JVAs and/or damages.

3. VE denies that most of the representations were made; says that if they were made they were materially correct in any event; denies that the representations were fraudulent or negligent; and counterclaims against each of the Claimants in relation to the overdrafts outstanding in relation to each of the three joint ventures ("JVs") when they were terminated by the Claimants.

Witnesses

4. Since the case turns largely on disputed issues of fact, it is appropriate to start with some general comments about the witness evidence on those issues.

5. There were six witnesses for the Claimants: Mr Ali (the first Claimant), his wife Ruth Ali, Ms Davis (the second Claimant), her partner Mr Golding (the third Claimant), Mr McGreavy (the fourth Claimant) and finally Stephen Bridge who is the JV partner for the Widnes Vision Express store. The main witness for VE was Richard Higginbottom, who no longer works for VE but was, at the relevant time, a business development manager at VE. In addition VE relied on witness statements from Dominic Clulow, VE's head of infrastructure and development, Stephen Mason, VE's finance manager, and Michael Flint, the current JV and property developer at VE.

6. With the exception of Mr Clulow, all of the witnesses were cross-examined. Mr Clulow's evidence was agreed subject to the provision of some small clarifications that are not material to this judgment. Mr Flint's evidence was also largely uncontroversial. Mr Mason's evidence was mainly directed to the monitoring of the financial performance of the JV stores, the way in which VE's overdrafts for its JV stores worked, and an explanation of the way in

which various average figures for the performance of VE's stores, put forward and relied upon by VE in these proceedings, were calculated. While the parties dispute the relevance of and conclusions to be drawn from that evidence, the factual basis of the main parts of Mr Mason's evidence was not disputed. The main factual disputes therefore arose as between the Claimants (and the two further witnesses for the Claimants, Mr Bridge and Mrs Ali) and Mr Higginbottom.

7. The difficulty with the evidence on the disputed factual issues is that it concerns events that took place in 2007 and 2008. It is therefore unrealistic to expect that the various individuals concerned will have, a decade later, precise independent recollections of the details of conversations that took place between them. I bear in mind, in particular, the comments of Leggatt J (as he then was) in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm), §§15–22. Unsurprisingly, therefore, there were some discrepancies in the evidence on both sides. I do not consider that small discrepancies and inconsistencies in the evidence as to (for example) the precise language that was used on particular occasions, or the way in which certain figures were calculated, a decade after those events occurred, are fatal to the credibility of the witnesses in question. The key question is whether the claims, in their substance, are supported by a sufficient body of cogent and credible evidence, having regard to the seriousness of the allegations of deceit, and the particular care that is needed in examining those allegations.

8. In that regard, I am assisted in this case by several factors:

   i) The first is that there is a great deal of documentary material, including not only notes taken by either the Claimants or Mr Higginbottom during some of the meetings between them, but also financial projections sent to the Claimants by Mr Higginbottom and presentations prepared jointly by Mr Higginbottom and the Claimants. That material speaks for itself; and I also consider that it is reasonable to rely on witnesses' recollections of the way in which those documents were completed, and in particular the role of the respective parties in preparing those documents. In addition, there are internal VE documents that provide some insight into VE's intentions and understanding of the process for the expansion of its JV network at the time, a process in which Mr Higginbottom played a central part.

   ii) Secondly, in this case there are six witnesses for the Claimants who, between them, give evidence of the process by which they were recruited as JV partners for four separate VE stores. What emerges from their evidence is a very similar picture of their dealings with Mr Higginbottom and the way in which he "sold" the JV concept to each of them. Contrary to VE's submissions, I do not regard the similarity of their accounts as indicating that their evidence was scripted or rehearsed. Rather, I consider that it is most likely that the evidence was similar because it was the truth.

   iii) Thirdly, the plausibility of the parties' differing accounts can be tested against what is known about their respective qualifications and

> experience, and the information to which they had access at the time. Mr Higginbottom is a qualified accountant and had worked as a finance manager at VE before moving into his business development role there. He had access to comprehensive performance data for VE's owned and JV stores and could request up to date average performance statistics to be prepared for him, The Claimants had all worked in the optometry industry for some years, but had no professional qualifications save for Ms Davis who was a qualified optometrist (as was Mrs Ali); nor, obviously, did they have access to the overall performance data for VE's stores. In that context, I find that it is entirely credible for the Claimants to maintain that they relied upon the information and projections that they were given by Mr Higginbottom.

9. Those factors contribute to my findings of fact below. As set out in the remainder of this judgment, on the material points on which the Claimants' evidence differed from that of Mr Higginbottom, I have consistently preferred the Claimants' account of events.

10. I now turn to the factual background to the claims.

VE's JV development and JV partner recruitment process

11. VE is a well-known company which provides eye tests and sells spectacles, contact lenses and associated products. Traditionally, it operated through stores that it owned, with store managers and optometrists employed by the company. In late 1995 it started to open a large number of new stores as JV stores rather than VE-owned stores. This continued until the end of 2000, when there was a hiatus in the JV programme, with only two new JV stores opened between 2000 and 2006 (one in 2001 and another in 2003). Instead, during 2005–6, VE opened various stores as franchises. In early 2006 VE decided to move back to the JV model. An internal presentation indicates that this was mainly because JV stores could be opened more quickly than franchise stores, and were expected to be more profitable to VE because VE could (among other things) charge higher fees to the JVs. The three stores in dispute in these proceedings were all in the new wave of JV stores that opened from late 2006 onwards.

12. During that period of expansion, VE started with the creation of a "hit list" of target locations identified as being suitable for a new VE store. A report was prepared for each target location, which contained demographic information and details of the estimated market size (in terms of optical spend) and expected VE store turnover. The location report would then form the basis of both the search for suitable premises and the recruitment of potential JV partners for that location. In some cases JV partners were recruited through open advertisements in (for example) optical magazines. In other cases potential JV partners were approached directly by VE.

13. Once a candidate had expressed interest in becoming a JV partner, VE had a selection process which in broad outline involved one or more meetings between the candidate and one of VE's business development managers, followed by a formal presentation made by the candidate to VE's JV approval

committee. Following that presentation, VE decided whether or not to accept the candidate as a JV partner for the new proposed JV store. Part of that approval process would involve VE considering what has been referred to as a "location score card" or "location approval report". This contained specific information about the proposed premises (including size and lease details), the competitors in the location (including their estimated sales), and comments on the local demographics and suitability of the location. This report was compiled jointly by VE's property and business development teams, and might also include some details that had been provided by the JV partner, such as the competitor details.

14. If approved, the new JV partner was required to invest a substantial initial sum in the store by way of a "director loan". VE also provided a loan to the JV (albeit that this was typically smaller than that of the JV partner). In addition, VE provided an overdraft facility which financed the remainder of the start-up costs. In every case the new JV partner was required to sign, alongside the JV agreement itself, a personal guarantee which covered not only the entirety of the overdraft but also VE's loan to the JV.

15. On 11 December 2006, Rosaleen Reed, a legal executive who was the VE company secretary, sent an internal email to (among others) Richard Higginbottom, expressing considerable concern at the speed of the recruitment of new JV partners, the procedures that were used, and the financial information that was given to those partners. Her email included the following comments in particular:

> "The speed with which we are pushing through new JV partners without the basic [principles] being followed is frightening.
>
> Whether we are dealing with existing partners wanting second stores or complete strangers coming forward as new partners, we MUST follow the same procedure for them all. We are currently approving partners without confidentiality letters nor application forms.
>
> ... In addition, the financial information prepared by Richard (which includes a 10 year projection) is also unprotected and sets us up for misrepresentation claims. Any financial information which we prepare (even if we are using figures provided by the partners) MUST be caveated. If not and we end up in a dispute with the partners, the document will, under the disclosure rules, need to be disclosed both to the court and the partners. In the absence of any disclaimer we have got nowhere to hide. If we say at year 10 the store will generate £x dividends and it does not do that and in fact goes seriously the other way, by not having disclaimers in all or financial and business information, we expose ourselves to risk and claims. We have got to put them in for our own protection.

> … In view of the speed of the new rollout, we need to get a process together and follow it every time. … Hal [VE's parent company] will expect us to do this because if we don't and in years to come we end up in litigation either as a result of getting out bad/weak partners or the partners themselves sue us for misrep, and we did not apply due diligence Hal will want to know why. Again it's our own protection."

16. That email was rather prescient, given the circumstances of the present claims.

The Southport, Llandudno and Macclesfield JVAs

17. The approval procedure outlined above was followed for all of the Claimants in the present case, with Mr Higginbottom as the VE business development manager who recruited all of them. The circumstances in which the four Claimants came to enter into JVAs with VE are, however, different in each case. The main facts are set out below.

Colin Ali – Southport

18. Mr Ali had worked as an optometry technician and optical manager since 1988. He was first introduced to Mr Higginbottom in 2001 when Mrs Ali, who is a qualified optometrist, explored whether she might take over the VE store in Bangor, in Northern Ireland. That proposal was not taken further, as Mr and Mrs Ali decided that they did not wish to take on the considerable debt that had by then accrued to that store. For similar reasons they also declined a further proposal from VE that Mrs Ali should take on the store in Altrincham. Mr and Mrs Ali then had no further contact with Mr Higginbottom until 2007, when Mr Ali approached VE to discuss the possibility of becoming a JV partner himself, together with a colleague, Paul Manton.

19. In an initial telephone conversation in mid-February 2007, Mr Higginbottom suggested to Mr Ali that Chapel Street in Southport would be a suitable location for a new JV store. This was a location that interested Mr Ali, because at the time Mrs Ali worked as an optometrist in the Southport branch of Boots, which was also in Chapel Street. Following that telephone call, Mr and Mrs Ali had two meetings with Mr Higginbottom in a coffee shop in Southport, on 22 February and 2 March 2007 respectively. Mr Manton did not attend the meetings with Mr Higginbottom and withdrew from the proposal in early March 2007, leaving Mr Ali to pursue the JV arrangement on his own.

20. During the first meeting Mr Higginbottom informed Mr Ali that a lease had already been secured for the Chapel Street premises. Mr Ali was aware, at the time, that there had been a VE store in Southport about 10 years previously, which had closed. There is a dispute about whether he discussed this with Mr Higginbottom. It is not disputed that there was considerable discussion at both meetings regarding the financial projections for the new store and, in particular, the expected number of eye tests that would be carried out each day. Mr and Mrs Ali's account of what exactly they were told by Mr Higginbottom in relation to these matters is, however, disputed, and I make relevant findings on this further below.

21. Following the 2 March 2007 meeting, Mr Higginbottom emailed Mr Ali a draft powerpoint presentation for Mr Ali to use at his formal presentation to VE's JV approval committee. The presentation included details of Mr Ali's experience and strengths, details of the demographics of Southport, an assessment of the competition in the form of other opticians already operating in Southport and the extent of the market share that the new VE store was anticipated to take from those competitors, and a detailed business plan comprising key performance indicators ("KPIs"), labour costs and 5-year financial projections. The KPIs included in particular the number of eye tests that were expected to be carried out per day, which was referred to as the eye examination rate or "EER", and the expected percentage of conversion of those eye tests into sales, which I will refer to as the "conversion rate". Some parts of the presentation had been completed by Mr Higginbottom; other parts had been left for Mr Ali to complete.

22. It is clear that Mr Higginbottom was encouraging Mr Ali to move quickly to secure the JVA for the Southport store. An internal email from Mr Higginbottom on 6 March 2007 referred to the timing of the formal presentation to the JV approval committee two days later, and commented that "I have pushed this through extremely quickly (less than 2 weeks from my 1st meeting with Colin!) due to the property situation in Southport. I am sure that Colin will be very well prepared even at such short notice." The reference to the "property situation" was a reference to the fact that VE had an option on the premises in Chapel Street and was under pressure to find a JV partner for that store.

23. Mr Higginbottom claimed that on 6 March 2007 he had another meeting with Mr Ali, at which he gave him a draft business plan and (he thought) also a document entitled "Financial Projections and Operational Information Report", which is dated 6 March 2007. Mr Ali says that he did not ever receive those documents, nor did he meet Mr Higginbottom at all on 6 March, since he was working full time (and indeed late) that day. I prefer Mr Ali's evidence on this point. Mr Higginbottom himself had no recollection of when or where the supposed 6 March meeting took place. He also accepted that it would have taken him over two hours to drive to meet Mr Ali that day. It is in my view entirely implausible that he would have travelled that distance simply to hand over two documents which (like the draft presentation) he could simply have sent Mr Ali by email. It is also odd that, if he did meet Mr Ali on 6 March, there was no mention of this meeting in Mr Higginbottom's internal email sent on the same day, which I have referred to above. Accordingly, I conclude that Mr Ali was not given the business plan or the financial projections document on 6 March; nor is there any evidence to indicate that either of those documents was sent to Mr Ali or given to him on any other day.

24. Mr Ali gave his presentation to VE's JV approval committee on 8 March 2007. The final version of the powerpoint slides predicted that the Southport store would achieve an EER of 10 tests a day, 7 days a week, with a total weekly turnover of £13,000 in the first year (equating to £676,000 over the year). The forecast was that this would increase year on year, rising to £17,847 per week in year 5 (equating to over £928,000 for the year). On that basis, the

business plan predicted that the store would become profitable by the end of year 3. A "sensitivity analysis" based on a 10% reduction in the anticipated sales figures showed profitability being reached by the end of year 5.

25. VE approved Mr Ali as a JV partner on the day of his presentation, and there were induction meetings on 24–25 April 2007. Mr Ali was required to invest £50,000 in the new store; VE contributed loans totalling £45,000. The Southport store opened on 22 June 2007, and Mr Ali signed the JVA documentation on the same day, in the newly-opened store.

Melanie Davis and Owain Golding – Llandudno

26. Prior to their JV with VE, Ms Davis was an experienced optometrist and Mr Golding was an optical technician. They both had some management experience, but this had been a very limited part of both of their jobs before 2007. In 2005/2006 they started to consider the idea of running their own optometry store, and were initially approved as JV partners with Specsavers. By chance, however, they were approached by VE at a trade show in 2007, and thereafter were contacted by Mr Higginbottom, who encouraged them to consider becoming the JV partners for the proposed new Llandudno VE store.

27. Ms Davis attended an initial meeting with Mr Higginbottom on 15 May 2007 in Llandudno, and both Ms Davis and Mr Golding had two further meetings with him, on 6 and 20 June 2007. As with Mr and Mrs Ali, there was discussion at the meetings of the financial projections for the new Llandudno store, including in particular the average EER per week for new VE JV stores, and the usual timescale within which the costs of setting up a new JV store would be paid back. Again, as with Mr and Mrs Ali, Mr Higginbottom disputes Ms Davis and Mr Golding's account of what they were told by him in those meetings, and I make relevant findings on this further below.

28. One point that should, however, be recorded at this stage is that Ms Davis' evidence was that Mr Higginbottom told them that they would need to make a quick decision as there were other prospective partners interested in the Llandudno store. Mr Higginbottom denied that, saying that VE was not, to his knowledge, speaking to anyone else about the Llandudno store. In cross-examination, however, it emerged that there were, in fact, other prospective JV partners interested in the Llandudno store, and Mr Higginbottom was not only aware of that at the time of his discussions with Ms Davis and Mr Golding, but had also (according to an internal email chain) booked in a meeting with them. While VE's documents indicate that the primary point of contact for those JV partners was Mr Higginbottom's colleague Mr Sweeting, there is no doubt that Mr Higginbottom was aware of their interest in the Llandudno store. That evidence therefore corroborates Ms Davis' account, and I find that Mr Higginbottom most likely did inform Ms Davis and Mr Golding of the interest of the other prospective JV partners, in order to encourage them to move forward quickly with their application for the Llandudno store.

29. On 24 May 2007 Mr Higginbottom emailed Ms Davis a "Detailed Business Plan Starter Questions" document, containing a number of statements about the average statistics for existing JV stores, including a statement that the

average EER for VE's JV stores was 65 per week in the first year. Subsequently, on 8 June 2007, Mr Higginbottom sent Ms Davis a detailed 10-year business plan for the Llandudno store, which assumed that the store would achieve an EER of 11 per day in year 1, producing a total weekly turnover of £10,672 in that year, thereafter increasing year on year.

30. Mr Higginbottom also gave Ms Davis and Mr Golding copies of the presentations made by other JV store partners. Ms Davis and Mr Golding said that Mr Higginbottom told them to copy the format of those presentations for their formal presentation, inserting their own personal information and details of the local competitors in Llandudno, as well as the figures that he had given them in the business plan. The final version of the presentation predicted that the Llandudno store would have an EER of 11 per day, 6 days a week, with a total weekly turnover of £11,017 in the first year (equating to £545,589 over the year). The forecast was that this would rise to £725,194 in year 5). On that basis, the business plan predicted that the store would become profitable by the end of year 4. A "sensitivity analysis" based on a 10% reduction in the anticipated sales figures showed profitability being reached by the end of year 5.

31. Ms Davis and Mr Golding gave their formal presentation to VE's JV approval committee on 27 June 2007, and were accepted as JV partners on the same day. They were each required to invest £40,000 in the new store; VE's loan contribution was £15,000. The JVA documentation was signed (but not dated) in early August 2007. It was subsequently dated by VE as 5 October 2007, which is the day that the Llandudno store opened. Ms Davis invested a further £4,500 in the store in 2008, bringing her total investment to £44,500.

Ian McGreavy – Macclesfield

32. Mr McGreavy began his career as an optometry lab technician, and advanced to become the store manager of various different VE stores (as well as, along the way, a David Clulow store). Between 2006 and 2008 he was the manager of the VE store in Bolton, which was a VE-owned store rather than a JV. While he was there, a VE regional manager encouraged him to apply to become a JV partner. Mr McGreavy first had a 15 minute meeting with a JV regional manager and a JV development manager in June/July 2007 in Macclesfield, which was proposed as a possible new store location. They then walked around the town together for 20 minutes looking at competing opticians. This was the first occasion that Mr McGreavy had visited Macclesfield, and was indeed (he said) the only occasion that he visited the town before the Macclesfield JV store opened.

33. Following that initial meeting Mr Higginbottom came on the scene. In September 2007 Mr McGreavy met Mr Higginbottom and was given a KPI document which contained average performance figures for VE's JV stores. Mr Higginbottom also provided Mr McGreavy with a draft presentation for his formal presentation to VE's JV approval committee, as well as financial projections indicating that the Macclesfield store would have annual sales in year 1 of £544,762, rising to £818,338 in year 5. As with the other Claimants, Mr McGreavy was required to complete the presentation with (in particular)

his own personal information and details of the local competition in Macclesfield. As with the other Claimants, there is a dispute as to what Mr Higginbottom told Mr McGreavy about the likely performance of the proposed JV, on which I make findings further below.

34. Mr McGreavy gave his formal presentation to the JV approval committee in or around October 2007, and was approved as a JV partner shortly afterwards. Some time after that, however, he became concerned that the financial projections in his presentation might not be achievable. He expressed his concerns to James Windsor, who was VE's business development director, and in May or June 2008 he had a meeting with Mr Windsor at the Bolton store. Mr McGreavy said that during that meeting Mr Windsor provided him with a document setting out revised financial projections, predicting a lower weekly turnover based on a 7.2 per day EER, and stating that the VE average EER during 2007 for the last 20 stores that had opened was 7.6 per day, with predicted and average conversion rates of 70%. The revised forecast year 1 sales were £490,000, rising to £736,500 for year 5. On 14 May 2008 Mr Higginbottom also emailed Mr McGreavy a revised financial projection document which was almost identical to the one that Mr McGreavy was given by Mr Windsor.

35. Mr McGreavy proceeded to sign the JVA for the Macclesfield store at the end of July 2008. His evidence, which was not disputed by VE, is that he was sent the documentation (including the personal guarantee) by VE's company secretary, Rosaleen Reed, and asked to sign and return it all to her within two days. The agreements are dated 1 August 2008, which is the day that the Macclesfield store opened. Mr McGreavy was required to invest £50,000 in the store; VE's loan contribution was a total of £45,000.

The terms of the JVAs

36. The JVAs for the three stores were in identical terms save for the amounts of the director loans and VE loans, which differed as between the Claimants. In all cases the shares in the JV were split 50/50 as between VE and the JV partners. While the JV partners were in all cases responsible for the day to day running of the JV business, they did so under the strict direction of VE as to operating procedures, and the products sold had to be purchased either from VE or by suppliers approved by VE. VE charged to the JV a set of fixed fees for setting up the new store, including fees for "Company Formation/Legal/ Business Plan", an initial training fee, and a fee for the design of the new store. In addition, VE charged annual fixed fees (for matters such as accounts managements and audit, property administration and IT support), and variable fees on a scale depending on net turnover.

37. All banking was provided centrally by VE through a single consolidated JV bank account, for which the notional accounts for each individual JV store were managed through a banking software package operated by VE, known as "CMM". VE allowed each JV store to operate an overdraft on its CMM account. That overdraft was the primary source of funding for the initial costs of setting up the new JV store (over and above the investments from the JV partners and the VE loans), and the ongoing costs of running the store

(including the fixed and variable fees charged by VE) in so far as those costs were not covered by the store's sales revenue. Interest was charged by VE on that overdraft.

38. In relation to the overdraft, clause 8.2.3 of each JVA provided:

> "subject to VEJV's prior written consent JVC may maintain a debit balance ('the Overdraft Facility') in JVC CMM Account up to a maximum amount to be agreed in writing by VEJV ('the Overdraft Limit'). The Overdraft Facility will be repayable on demand and VEJV may at any time withdraw such facility and/or make demand for immediate repayment of all sums owed to it thereunder. Subject to this any Overdraft Facility will be due for review annually on the anniversary of the date upon which it was made available to JVC."

39. Clause 15 of the JVAs contained a set of general provisions, including the following clause 15.13:

> "This agreement will supersede any previous agreement or understanding between the VEJV and the Investors. In this agreement the expression 'pre-contractual statements' includes written or oral pre-contractual statements or agreements, financial statements, profit projections, representations, warranties, inducements or promises whether or not made innocently or negligently. The Investors acknowledge that they have been told that if there are any pre-contractual statements which they consider have been made to them and which have induced them to enter into this Agreement the Investors are obliged to submit particulars thereof to VE so that any misconceptions or misunderstandings can be resolved after which an agreed form of any pre-contractual statements on which the Investors have relied may be annexed to and form part of this agreement. The Investors having been given the opportunity to provide to VE particulars of all such pre-contractual statements which they consider have been made to them which have so induced them to enter into this agreement will be deemed not to have relied upon any pre-contractual statements made or given or purportedly made or given by VE unless such a written statement is annexed hereto. This agreement therefore contains the entire agreement between the parties and accordingly no pre-contractual statements will add to or vary this agreement or be of any force or effect and unless such pre-contractual statements are either expressly provided in this agreement or in an annexure the Investors jointly and severally waive any right they may have to make any claim whatsoever in connection with any non-fraudulent pre-contractual statements. The Investors waiver contained in this clause will be irrevocable and unconditional but it is expressly provided that such waiver will not exclude any liability of VE for pre-contractual statements made fraudulently."

40. Each JVA attached a number of Appendices. Appendix A was a Service Agreement made between the JV company and each of the JV partners, which specified the JV partner's salary and his or her duties to the company. More importantly for present purposes, Appendix E to each JVA contained a guarantee under which the JV partners agreed to pay VE on written demand the whole and each part of the debt owed by the JV to VE, that debt being defined as including the JV's overdraft under the CMM banking arrangements.

41. None of the Claimants took legal (or any other professional) advice on the JVA documentation or any of its contents. Nor, according to their consistent evidence, were they at any time told by VE that they should take independent legal advice on the JVAs. Mr Higginbottom asserted in cross-examination that he "would have mentioned" to the Claimants that they should take advice on the financial projections. He later modified this to a claim that the Claimants "were fully aware" that they should have taken independent advice on the documents that they were signing. I do not accept either of these claims. Nothing in the contemporaneous documents, or any of the evidence of the Claimants, suggests that any of them contemplated that they should have taken independent legal advice on the content of the JVAs, or were told by Mr Higginbottom or anyone else at VE that they should take independent advice on any matter relating to the JVAs. Rather, it is clear that they simply relied on what they were being told by VE. Indeed, Ms Davis and Mr Golding thought that Ms Reed, who gave them the documents, was acting both for them and VE. Mr McGreavy (as mentioned above) received the documentation only two days before he was told that it had to be returned, so had very little time to seek legal advice even if he had thought of doing so.

The termination of the JVAs

42. The day after the Southport store opened, Mr Ali learned that the old VE store had been located two doors away from the premises of the new store. He discussed this with VE on several occasions, and in September 2007 asked for his investment to be returned. He was told that this was not possible. He therefore decided to persevere to make the best of the situation. He was assured by VE's JV operations director, Steve Scully, that his store would be successful if he listened to and followed VE's advice.

43. As time went on, however, Mr Ali became increasingly concerned at the low footfall of the store, and the fact that the store never did achieve the EER of 10 per day that had been predicted. At most, by 2012, there were only 7 tests a day, and on some days as few as 2 tests. That had a corresponding impact on the store's revenue, which was consistently significantly below the forecast figures. The annual revenue was at its highest £453,000 (in 2011). At repeated meetings with VE managers, Mr Ali complained about the Southport store and the information he had been given before entering into the JV.

44. Ms Davis and Mr Golding likewise did not achieve the EER of 11 per day that had been predicted for their first year of trading in the Llandudno store. During 2008 their average EER was around 6.8 per day, and their turnover was correspondingly considerably less than forecast in their business plan. By

the end of 2011 the annual revenue was only £420,000. Ms Davis and Mr Golding repeatedly raised their concerns with VE, complaining about the difference between what they had been told about the performance of VE's stores and the reality as they experienced it in Llandudno, but were told that there was nothing to worry about and that things would soon turn around. Like Mr Ali, they asked for their money back, and were told that VE never returned the investments of JV partners.

45. The Macclesfield store operated by Mr McGreavy was also unsuccessful. In its first year of trading its average EER was 5.5 per day, with an average conversion rate of only 65%. Even when Mr McGreavy offered free eye tests for the first 18 months to all new customers, the EER did not increase to the level set out in the revised projections. By the end of 2012, after over 3 years of trading, the turnover for the store for that year was £382,861, substantially below even the revised version of the year 1 forecast figures that had been provided to Mr McGreavy in May/June 2008. As with the other Claimants, Mr McGreavy discussed his concerns with VE regional managers and was told not to worry. He therefore felt that he had no choice but to continue with the JV. It was only when he met and spoke to Mr Ali that he decided to terminate the JV.

46. On 4 April 2012 Mr Ali's solicitors Owen White wrote to VE rescinding Mr Ali's JVA and setting out a claim for damages for misrepresentation. Similar letters were sent on behalf of Ms Davis and Mr Golding, on 23 August 2012, and Mr McGreavy, on 1 May 2013. VE responded in each case refusing to accept rescission, and instead treating the letters from the respective Claimants as being repudiations of their JVAs, which VE accepted. Proceedings were filed by the Claimants on 25 June 2014. On 19 December 2014 VE served a defence and counterclaim, counterclaiming under the guarantees in relation to each of the three JV companies, for the outstanding overdrafts and loans owned by each JV company to VE as at the date of the respective repudiations of the JVAs. VE's counterclaims were for £675,114.97 as against Mr Ali, £492,531.09 as against Ms Davis and Mr Golding, and £480,369.72 as against Mr McGreavy.

The issues

47. At the start of the trial there was an issue as to whether the guarantees were effective in relation to the debts owed by the JV companies to VE. The problem was that the JV companies were not themselves party to the JVAs; the Claimants therefore argued that they were not liable to repay the overdrafts under clause 8 of the JVAs, and there was therefore no liability of the JV companies for the guarantees to bite on. On that basis, liability under the counterclaims was denied, even if the claims failed. Early in the trial, however, the parties agreed that there was and remains a debtor-creditor relationship between VE and each of the three JV companies in relation to the overdrafts given to each company, and that the guarantees extended to the liability of the JV companies under those debtor-creditor relationships. It was therefore agreed that if any claim was dismissed, then VE would be entitled to judgment on the counterclaim against the relevant Claimant, and that the quantum of the counterclaim would need to be determined at a later date. It

was further agreed that if any claim succeeded in relation to the JVA then the respective Claimant would be entitled to the same relief in respect of the guarantee, and that the relevant counterclaim would therefore fall to be dismissed.

48. It was also agreed between the parties that I do not need to decide the various issues concerning rescission that were debated in the pleadings and skeleton arguments, since *de facto* rescission has already taken place, and if the Claimants succeed on the other issues the money claims are the same whether or not, as a matter of form, there is rescission or not. The only issue that would need to be "unwound" if there is no formal rescission of the JVAs is the question of the claimants' shareholdings in the respective JV companies, as to which the Claimants have all agreed to do whatever is necessary to transfer those shareholdings to VE following the trial regardless of the outcome of the respective claims and counterclaims.

49. On that basis, for the purposes of this judgment, the issues I have to determine are (i) whether there were fraudulent or negligent misrepresentations as alleged, (ii) whether any such misrepresentations were relied upon by the Claimants when deciding to enter into the JVAs, (iii) whether VE is entitled to rely on clause 15.13 or any other disclaimers, and (iv) – if it arises – what losses the Claimants suffered as a result of their entry into the JVAs.

Fraudulent and negligent misrepresentation – relevant legal principles

50. There was very little dispute as to the relevant legal principles. Starting with the fraud claim, which is the Claimants' primary case, a convenient summary of the elements of the tort of deceit is set out in the judgment of Jackson LJ in *ECO3 Capital v Ludsin* [2013] EWCA Civ 413, at §77:

> "What the cases show is that the tort of deceit contains four ingredients, namely:
>
> i) The defendant makes a false representation to the claimant.
>
> ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.
>
> iii) The defendant intends that the claimant should act in reliance on it.
>
> iv) The claimant does act in reliance on the representation and in consequence suffers loss."

51. The first of those elements is a test of *material* falsehood. As Christopher Clarke J put it in *Raiffeisen Zentralbank Österreich v Royal Bank of Scotland* [2010] EWHC 1392, §149, it is "not necessary for what was said to be entirely correct, provided it is substantially correct, and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimant to enter into the contract".

52. As to the second of those elements, it is common ground that making a "blind guess" will amount to recklessness: *Economides v Commercial Assurance* [1998] QB 587 at 598D-E. Another formulation is that of "indifference to the truth": *Angus v Clifford* [1891] 2 Ch 449, at 471. The representation is therefore either dishonest because it is known to be false, or it is dishonest because there is simply no belief in its truth. By contrast, if a false representation is made with a genuine belief that it is true, then that will defeat a claim in fraud, even if the belief was arrived at incompetently or unreasonably. The reasonableness of a belief may, however, be part of the relevant factual matrix in determining whether there was indeed a genuine belief that the statement was true. Lord Hughes observed in *Ivey v Genting Casinos* [2017] 3 WLR 1212, §74, that:

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held."

53. In the present case, in assessing whether or not Mr Higginbottom genuinely believed that the representations he made to the Claimants were true, I accept the Claimants' submission that it is necessary to have regard to (among other things) the information available to Mr Higginbottom and his capacity to understand that information.

54. Regarding the third and fourth elements of the tort of deceit, while the Claimants must prove that they were induced to enter into the JVAs by reason of the misrepresentations alleged, there is in law a rebuttable presumption that if a fraudulent misrepresentation is made, it is intended to be relied upon (*Goose v Wilson* [2001] 1 Lloyds Rep 189, §47). Furthermore, the misrepresentation need not be the sole cause that induced the Claimants to enter into the JVAs, provided that it played a "real and substantial part, albeit not a decisive part, in inducing the representee to act" (*Dadourian Group International v Simms* [2009] 1 Lloyds Rep 601, §99).

55. It is well established that an allegation of fraud or dishonesty must be specifically pleaded. Lord Millett in *Three Rivers v Bank of England (no. 3)* [2003] 2 AC 1, §186, observed that there "must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved". In the present case it is not said that the Claimants' fraud allegations are insufficiently pleaded or particularised. Rather, VE's case is simply that the allegations have not been proved.

56. In relation to the standard of proof in a case alleging fraud, VE relies on Lord Nicholls' observations in *Re H (Minors)* [1996] AC 563, at 586E, that:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that

> the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on a balance of probability. Fraud is usually less likely than negligence."

57. It was, however, common ground that the effect of the clarification of this statement by Baroness Hale in *Re B (Children)* [2009] 1 AC 11 is that there remains one standard of proof which is the simple balance of probabilities, and there is "no logical or necessary connection between seriousness and probability". In some cases an allegation of fraud may be so improbable that it will, in the words of Lord Millett in *Three Rivers v Bank of England (no. 3)* [2003] 2 AC 1, §181, "require evidence of the most compelling kind to establish". That was a case in which Lord Millett described the allegations of deliberate or reckless wrongdoing as both "implausible" and "scarcely credible". In other cases, however, the surrounding facts and circumstances may render an allegation of dishonesty entirely plausible. The issue is in all cases fact specific.

58. For the reasons I give below, the present case is not one in which the allegations of fraud are to be described as *prima facie* implausible, and I reject VE's arguments to the contrary. I do not, therefore, consider that this is a case where it is strictly necessary to apply the *Three Rivers* test of "evidence of the most compelling kind". Nevertheless, bearing in mind the inherent seriousness of any allegation of fraud, I have in any event considered whether the evidence of VE's knowledge or recklessness is clear and compelling, and as set out below I have reached my conclusions on that basis.

59. Turning to the Claimants' secondary case of negligent misrepresentation, section 2(1) of the Misrepresentation Act 1967 provides:

> "**Damages for misrepresentation**
> Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made the facts represented were true."

60. *Chitty on Contracts* (32nd edition) §7-076 points out that this is not "strictly speaking" liability for negligence, but for convenience endorses the terminology of negligent misrepresentation; I adopt the same approach. In a case in which a misrepresentation is said to have induced a contract, the effect of s. 2(1) is to relieve the claimant of the burden of proving that the misrepresentation was fraudulent. Instead, where the other elements of the tort are made out, liability will arise unless the representor can establish a reasonable belief that the facts represented were true.

61. In some cases the cause of action under s. 2(1) will render a claim in fraud unnecessary. In the present case, however, the fraud claim remains the Claimants' primary case because if the claims are made out on that basis then no issue under clause 15.13 of the JVAs will arise. By contrast if the claims can only be made under s. 2(1) of the 1967 Act then it will be necessary to go on to consider whether the claims are defeated by clause 15.13.

62. In relation to both fraudulent and negligent misrepresentation there is a distinction between statements of fact and statements of opinion. A statement of opinion is not a misrepresentation simply because it turns out to have been unfounded. But an opinion may be a misrepresentation if the representor does not actually hold that opinion. The classic example is the vendor in *Smith v Land and House Property* (1884) 28 Ch.D. 7 who described the occupier of a house as "a most desirable tenant", knowing that the description was unjustified given that the rent was in arrears. Similarly, a statement of opinion may impliedly (but falsely) represent that the maker of the statement has reasonable grounds for the opinion (*Barings Plc (In Liquidation) v Coopers & Lybrand* [2002] EWHC 461 (Ch), §§44–52). In either case the statement may give rise to liability for misrepresentation.

63. It is also necessary in this case to consider the meaning of some of the representations made by Mr Higginbottom. Adopting the approach set out by Toulson J in *IFE Fund v Goldman Sachs* [2007] 1 Lloyd's Rep 264, §50, the test is what a reasonable person in the position of the representee would have understood from the words in the context in which they were used. Similarly, in determining what (if any) implied representation was made the court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context.

64. One way of looking at that may be to consider Colman J's test in *Geest v Fyffes* [1999] 1 All ER (Comm) 672 (recently endorsed by the Court of Appeal in *Property Alliance Group v Royal Bank of Scotland* [2018] EWCA Civ 355) of whether, having regard to the relevant conduct, a reasonable representee would "naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it". This test may be particularly useful in cases where the misrepresentation is said to arise from a failure to disclose a material fact, including for example a material change of circumstances. In other cases, however, where the alleged implicit representation is a positive one (e.g. in this case the implied representations that Mr Higginbottom had reasonable grounds for the opinions that he proffered) the more straightforward and natural test is simply to ask whether a reasonable representee would have understood, from the relevant statements of opinion and in the context in which they were given, that Mr Higginbottom was also representing that he had reasonable grounds for those opinions.

65. Having established what a reasonable person would have understood the representation to mean or to imply, it is also necessary to show that the claimant did in fact understand the representation in the sense ascribed to it by the court: *Raiffeisen Zentralbank*, §87.

The representations in this case

The alleged misrepresentations

66. The Claimants rely on the following representations made to them by Mr Higginbottom:

to Mr Ali:

i) that in VE's opinion the Chapel Street premises was a very good location for a VE store;

ii) that there were no VE stores in the northwest region that were "at risk" in the sense of failing to meet their planned profits;

iii) that the average new VE JV store had an EER of at least 10 per day in the first year; and

iv) that in VE's opinion the new Southport JV store would achieve an EER of at least 10 per day in its first year of trading;

to Ms Davis and Mr Golding:

v) that it was usual for VE's JV partners to pay off their overdrafts within 5 years;

vi) that Southport was the only VE store that had failed or failed to reach its forecast profit;

vii) that in VE's opinion all new VE JV stores would have an EER of at least 11 per day or 66 per week in their first year of trading; and

viii) that in VE's opinion the Llandudno JV store would achieve an EER of at least 11 per day in its first year of trading;

and to Mr McGreavy:

ix) that the average new JV store had an EER of at least 7.6 per day over the first year;

x) that in VE's opinion the Macclesfield JV store would have an EER of at least 7.2 per day in its first year of trading;

xi) that the average new JV store had a conversion rate of at least 70% during the first year; and

xii) that in VE's opinion the Macclesfield JV store would achieve a conversion rate of at least 70% in its first year of trading.

67. In the case of all of the alleged representations of opinion, the Claimants say that either VE did not genuinely hold the opinions that were conveyed to them,

or that there was an implicit representation that there was a reasonable basis for those opinions, when in fact there was no such reasonable basis.

68. I will start by considering, for each of the representations set out above, whether they were in fact made to the relevant Claimants by Mr Higginbottom, if so how they should be understood and were understood by the Claimants (where that is disputed), whether they were true or false, and if they were false what Mr Higginbottom's state of mind was when he made the representations – in other words did he know that they were not true or was he reckless as to whether they were true or not? If not, and he honestly believed that the representations were true, did he have reasonable grounds for that belief? That will answer the question of whether there were fraudulent or negligent misrepresentations. I will then go on to consider whether, if there were misrepresentations, whether those misrepresentations induced the Claimants to enter into the JVAs.

Representation (i)

69. Mr Ali says that Mr Higginbottom repeatedly told him that VE had done extensive market research and that Chapel Street in Southport was considered to be a "very good", or "perfect", or "prime" location for a VE store. Mr Ali's evidence on this point was credible; Mr Higginbottom's denials were not. It is clear that VE was keen to find a JV partner for the Southport store, because of the lease that it had agreed (or agreed on option) for the Chapel Street premises. VE had already offered the store to Mr Bridge earlier in 2007, but he had discovered that this was next to the previous Southport store which had closed, and therefore declined that location (going on to become the JV partner in Widnes instead). Mr Higginbottom's email to his colleagues on 6 March 2007 makes clear that he had "pushed through" Mr Ali's appointment very quickly because of the property situation. Taking Mr Ali's evidence together with that context, I find that Mr Higginbottom probably did make a representation to the effect that the Chapel Street premises was, in his opinion, a very good location for a VE store.

70. It is not necessary to reach a conclusion on whether the notion of "very good" (which is the pleaded case) was conveyed by using the specific words "perfect" or "prime"; rather (as Mr Jones QC accepted) it is sufficient that Mr Higginbottom represented, in substance, that the location was very good. I consider, however, that it is likely that Mr Higginbottom did use the word "prime" in this context. Although he claimed that this was not the sort of language that he used, VE's location score card for Southport contains the comment that "Chapel Street and Lord Street have been the prime parallel retail pitches", and various location reports for other towns contain comments from Mr Higginbottom referring to "prime" locations.

71. Whatever the precise words used by Mr Higginbottom, it is clear he knew that the Chapel Street premises were not in a very good location. Mr Higginbottom accepted in cross-examination that he knew that the location was not prime or perfect, but was rather in a "slightly secondary" or "slightly off pitch" location that he considered was "good enough". I consider that those comments downplayed the extent of his knowledge. Ms Davis and Mr Golding said that,

during their second meeting with Mr Higginbottom on 6 June 2007, he told them that the old Southport store had failed because it was in a poor location, at the wrong end of the main shopping street. Neither of them was challenged on that point in cross-examination. Mr Higginbottom nevertheless denied their account, and said in his witness statement that he had told them that "the market it [the old Southport store] served at the time was not the same as the market which VE best operated in having regard to Southport's demographic profile." In his oral evidence, however, in response to a question as to how much of that explanation he had actually given to Ms Davis and Mr Golding, he was rather vague and claimed instead that "I don't think I would have gone into too much detail about it." Having heard that evidence, I consider it very unlikely that Mr Higginbottom gave the explanation that is set out in his witness statement, and very likely that his explanation was, rather, as described by Ms Davis and Mr Golding. That is further evidence that Mr Higginbottom knew full well that the Chapel Street premises were in a poor location in Southport.

72. Even if, however, I were to take no account of the evidence of Ms Davis and Mr Golding on this point, and simply accept at face value Mr Higginbottom's evidence set out above as to his knowledge at the time of his discussions with Mr Ali, there is in my view an obvious and material difference between "slightly off pitch but good enough" and "very good". VE, as Mr Higginbottom explained, had made a commercial decision to go with the "good enough" location because it was considerably cheaper to rent than an alternative better-located premises that VE had also looked at. There is no suggestion, however, that Mr Higginbottom explained any of this to Mr Ali at the time, or that he described the location to Mr Ali in the terms that he used in court.

73. Taking all of the evidence together, I find that Mr Higginbottom's representation that the new Southport store was, in his opinion, in a very good location was false, and he knew that it was false: he did not, in fact, hold the opinion that the Chapel Street location was a very good location for a VE store.

Representation (ii)

74. Mr and Mrs Ali both say that Mr Higginbottom stated, at the meeting on 2 March 2007, that there were no VE stores in the northwest region that were "at risk". Mrs Ali's evidence on the point is quite detailed: she says that Mr Higginbottom said that VE had learned a lot in the past and had a 99% success rate of turning "risk" stores into profitable stores, retaining the same JV partners. Mr Higginbottom accepts that if he had said that there were no stores at risk in the northwest region, that would have been untrue, and he would have known that it was untrue as he knew that there were in fact three stores at risk in the region at that time. His evidence was, however, that he did not make the statement alleged since Mr Ali never asked about this, and that the existence of at risk stores in the area was of "no relevance to opening a brand new store".

75. On this point the evidence comes down to Mr and Mrs Ali's word against that of Mr Higginbottom. I prefer Mr and Mrs Ali's account. It is, in my view, not only credible but indeed very likely that they would ask about other stores at risk in the area. They were aware of the concept from their previous dealings with VE in 2001, and it would be surprising – given that background – if they did *not* ask about the performance of other VE stores in the region. Mr Higginbottom's assertion that the existence of at risk stores in the region was irrelevant is contradicted by a VE presentation in October 2007 in which the performance of Mr Ali's Southport store was compared to the performance of the Boston and St Helen's stores. VE therefore clearly did consider the performance of other stores in the relevant region as being a relevant indicator of what a store in that region should be achieving. Mr Higginbottom's claims in this regard are, therefore, not credible.

76. On the assumption that Mr and Mrs Ali did ask about this, which I think they very probably did, I accept their evidence as to Mr Higginbottom's response. Their account is detailed, specific and entirely plausible. Notably Mr Higginbottom does not claim that he ever informed Mr and Mrs Ali that there were other stores at risk in the region – his story is simply that they never asked about this, which as set out above is a claim that I reject. I therefore find that Mr Higginbottom did indeed make the representation alleged by Mr Ali. That representation was untrue and he knew it to be untrue.

Representations (iii) and (iv)

77. Mr Ali says that Mr Higginbottom represented that the average new VE JV store had an EER of at least 10 per day in the first year, and that in VE's opinion the new Southport JV store would achieve an EER of at least 10 per day in its first year of trading. I will take these alleged misrepresentations together, because the evidence did not always make a clear distinction between them, and indeed it is apparent that the discussions regarding JV average figures were closely related to and informed the projections regarding the performance of the Southport store.

78. It is quite clear from the evidence that Mr Higginbottom did make both of these representations. Mr Higginbottom explicitly admitted that he gave Mr Ali averages based (or purportedly based) on other new stores, and in cross-examination he did not dispute that the average EER figure he gave was 10 per day. I note that a Detailed Business Plan starter questionnaire, which Mr Higginbottom said was agreed between him and Mr Ali, specified an even higher year 1 JV average EER figure of 83 per week. As for the Southport store itself, it is common ground that Mr Higginbottom made a set of handwritten notes during his 2 March 2007 meeting with Mr and Mrs Ali, which he left with Mr Ali and which specified an EER of 10 per day. As set out above Mr Ali's formal presentation to VE's JV approval committee predicted that the store would carry out 10 eye tests a day in the first year, and the projected turnover figures were calculated on that basis. Mr Ali said that these figures were given to him by Mr Higginbottom.

79. Mr Higginbottom claimed that these figures were driven by Mr Ali rather than him, and that he did not dictate to Mr Ali the figures that should be inserted

into the documentation. Those claims are not credible. Mr Ali had no idea what the average EERs of other new VE JV stores were, nor could he have predicted with any confidence what could be achieved in Southport; Mr Higginbottom, by contrast, had access to all of the very detailed performance and sales metrics that VE possessed in relation to all of its stores (which included, among many other things, details of the number of eye exams per day). It was also plain from Mr Higginbottom's oral evidence that he had been the source of the figures in Mr Ali's business plan and associated projections. He repeatedly stated that he was there to "guide and advise" Mr Ali and the other JV partners, that he was advising Mr Ali as to what he "believed was achievable in a location like Southport", and that he believed that an EER of 10 per day was achievable in Southport.

80. Indeed, Mr Higginbottom's own description of what happened was that he carried out an initial analysis of the achievable performance figures for any location and then sought to ensure that the joint venture partner was persuaded by those figures. He said, for example, that "I believed that 10 was achievable in Southport. What I needed to do was to make sure the potential joint venture partner who was working with Vision Express believed that 10 eye exams were achievable" and "we have got to make sure – we would do our analysis and make sure that we are happy with the location. It is then making sure that the joint venture partner believes in his/her own mind that that is an achievable target for that business." He made similar comments in relation to the Llandudno and Macclesfield stores. These comments confirm that the EER figure of 10 per day was a figure that Mr Higginbottom had decided upon before he met Mr Ali; it was not a figure that he took from Mr Ali.

81. It is not necessary to resolve the question of the extent to which other parts of Mr Ali's presentation to VE's JV approval committee were provided or drafted by Mr Ali as opposed to Mr Higginbottom. While it is clear that some parts of the presentation were Mr Ali's work and others were likely derived from Mr Higginbottom, the relevant question for the purposes of representations (iii) and (iv) is whether Mr Higginbottom was the source of the EER figures, notwithstanding Mr Ali's contribution to other parts of the presentation. The same point applies in respect of the other Claimants: in all cases, there is no doubt that they did contribute some information to their presentations for VE's JV approval committee, but it is not necessary to delineate the precise extent of those contributions. What is relevant is the source of the figures referred to in the pleaded representations.

82. I therefore find that Mr Higginbottom did represent that the average new VE JV store had an EER of at least 10 per day in the first year, and that the new Southport JV store would in his opinion achieve the same EER. Mr Ali says, and I accept, that the representation implied that there were reasonable grounds for VE's opinion as to the likely performance of the new Southport store.

83. I also consider that those representations were false. Mr Higginbottom admitted in cross-examination that he had "very limited" data available to him in 2007 as to the EER for a new JV store:

> "Q. So far as the eye exam rate is concerned, you were in a position to have some knowledge about what was a realistic eye exam rate for a new JV store in its first year?
>
> A. Very, very limited information. We had only opened, I think, two JV stores within a close proximity to Southport. So there was not much historical data to go on.
>
> Q. You did not tell Mr Ali that, did you?
>
> A. I don't think he asked."

84. When asked what, in that case, the basis for the 10 per day EER average figure was, Mr Higginbottom said that he did not know, but suggested that he would have looked at the figures for the Ashbourne and Redhill stores. Those, however, did not open until 28 February and 23 March 2007 respectively, so no meaningful information would have been available from those at the time of Mr Higginbottom's meetings with Mr Ali (indeed at the first meeting on 22 February 2007 neither of the stores had opened). The only other JV store that Mr Higginbottom could point to, from which he might have derived his information as to the average figures and/or the expected EER in Southport, was the Harborne store, but that store only opened in December 2006, a few months before Mr Higginbottom's conversations with Mr and Mrs Ali, so that again could not have provided Mr Higginbottom with average EERs for the first year of trading. Prior to the opening of the Harborne store, no JV stores at all had been opened since the middle of 2003 (Luton). The true position, therefore, was that Mr Higginbottom did not have, in 2007, any current figures for the EERs of VE's JV stores in their first year of trading that could have been used to produce the average and expected figures that he gave to Mr Ali.

85. In his witness statement, Mr Higginbottom relied on a set of average eye exam figures that were set out by VE in a letter from its solicitors Geldards to Owen White on 12 July 2013, in response to the letter before claim sent on behalf of Ms Davis and Mr Golding. Mr Higginbottom did not claim that he relied upon those figures at the time of his discussions with Mr Ali, but he said that those figures nevertheless with hindsight justified his representations to Mr Ali (and indeed the other Claimants), if those representations were made. The figures were prepared by an individual within VE who has since passed away, and the basis for the calculations was not entirely clear. Mr Mason was, however, able to give some helpful explanations as to how he thought that the calculations had been prepared. Having carefully considered those explanations, it is quite clear that the figures in that Geldards letter do not assist VE.

86. The average figures set out in the Geldards letter are calculated by cumulating three different data sets:

    i) The average eye exam figures for the year 2002 for 85 JV stores that had been opened on dates ranging from 1995 to 2001.

    ii) The average eye exam figures for 10 stores opened in the years 2003–2006. Eight of these were franchises, and the average figures given for

those were based on periods of between 17 weeks and a year. The only two JV stores in this group were Luton, which opened in 2003, and for which the figures appear to have been based on only its first 27 weeks of trading (to the end of 2003), and Harborne, which opened in December 2006, and for which 17 weeks of data were given (apparently the first 17 weeks of 2007).

iii) The average eye exam figures for the first weeks or months of trading for the VE stores (in total 10 JVs, two franchises) opened from January–October 2007. These averages were given for two alternative periods of time: January–April 2007 (encompassing only four stores which had opened by then) and January–October 2007 (encompassing all 12).

87. Most of the stores in the 2002 data set had been opened for some years before the sampled year. These were therefore not first year trading figures, but figures for what in most cases were established stores with a correspondingly established reputation and customer base. The fact that it might be inappropriate to take account of the performance data of these mature stores is a point that Mr Jones rightly acknowledged in his written closing submissions. A further reason for disregarding this 2002 data set is that it is in any event too historic to be regarded in any way as evidence of the performance of the new generation of VE stores opened from the end of 2006 onwards.

88. The third data set can also be disregarded, because even by the date of Mr Ali's formal presentation on 8 March 2007 the only stores in that group to have opened were the Redhill JV and the Weston Super Mare franchise stores, which had only opened on 28 February 2007.

89. The best evidence that VE had, at the time of Mr Higginbottom's representations to Mr Ali, was therefore the data from the JV and franchise stores that had been opened between 2003–2006. The average figures for those stores given in the Geldards letter are rather unsatisfactory, because with the exception of one of the franchise stores none of the proffered average figures cover a period of a year, let alone the stores' first year of trading. Indeed, for most of the stores in that data set the figures given span a period of only 17 weeks. The reasons for this were unclear, and absent a proper data set the figures cannot be regarded as reliable indicators of what VE's stores were achieving during the whole of their first year of trading. In particular, I note that figures covering the initial "honeymoon" period after a store has opened (during which the stores are engaging in heavy marketing and are often offering free eye exams) are likely to be higher than the overall average for the first year. A further problem with these average figures is that they all assume a 6 day week, whereas a number of VE stores are in fact open 7 days a week. Mr Mason accepted, when questioned about this, that if any of the stores in the data set had opened 7 days a week then the actual EER figures for those stores would be lower than the figures presented in the Geldards letter.

90. Even leaving aside these concerns, the figures in the Geldards letter indicate that the stores in question were not – for the time periods given in the second data set – achieving 10 eye exams per day. The average across the 10 stores,

using the figures given, was in fact only 8.08 eye exams per day. If Luton, which opened in 2003, is discounted as being too historic, and the average is taken over the other nine stores which opened in 2005–2006, the figure falls to 7.28 eye exams per day. In the case of Harborne, which was the only JV store in the group (as opposed to franchise stores) that was opened since 2003, the average figure given was 7.5 eye exams per day.

91. My conclusion is therefore that when Mr Higginbottom made representations concerning the average EER in the first year of trading of VE JV stores generally, and his expectations for the Southport store in particular, VE did not have any reliable information as to what any new JV store was, at that time, achieving by way of average EERs over the course of its first year. Furthermore, the evidence put before me as to the limited information VE did have about the performance of its recently opened stores (including franchise stores) indicated that those stores were achieving on average significantly below 10 eye exams per day. The only possible conclusion on the basis of the evidence before me is therefore that Mr Higginbottom's representations were false, and indeed materially so.

92. The remaining question is what Mr Higginbottom knew or believed at the time. His own evidence, extracted above, was that there was at the time "very, very limited information" and "not much historical data". Mr Higginbottom therefore quite clearly knew that the new JV stores that had been opened since 2003 were too recent to provide him with average first year trading figures. He was therefore driven to acknowledge that he must have based his figures on other stores, such as the franchise stores. But even on that basis the evidence before the court, as I have described above, shows that the average performance of the VE stores (including franchises) opened between 2003–2006 was significantly below 10 eye exams per day during the time periods covered by the figures. I therefore find that Mr Higginbottom must either have known that his representations were false, or at the very least was reckless as to whether they were true or false. There is no evidence capable of supporting the claim that Mr Higginbottom had any genuine belief in the accuracy of the figures that he was putting forward.

Representation (v)

93. Turning to the claims advanced by Ms Davis and Mr Golding, the first misrepresentation alleged was that it was "usual" for VE's JV partners to pay off their overdrafts within five years. VE admits that the representation was made by Mr Higginbottom in his meeting with Ms Davis on 15 May 2007, but says that the statement was true or at least not materially false. VE relies in particular on a table in the 12 July 2013 Geldards letter, showing that of the 11 JV stores opened between 2000 and 2003, the average (in the sense of the arithmetic mean) period for repayment of the overdraft was exactly five years.

94. I do not accept that the word "usual" in this context should be taken to have referred to an arithmetic mean. Ms Davis' consistent evidence was that she understood Mr Higginbottom's representation to mean that most of the stores would have paid back their overdrafts within five years, and that it would be unusual for a store not to repay within that period. In response to repeated and

rigorous challenge in cross-examination, she maintained that Mr Higginbottom did not refer to, nor did she understand him to be referring to, an average figure – for example:

> "A. I believed most, but I didn't break it down into a percentage or an average. I didn't believe that he was telling me an average, a numerical average, which could be anything, because there are different types of averages."

95. Ms Davis' interpretation of the word "usual" is, I consider, what any reasonable person in that context would understand. The position would have been different if Mr Higginbottom had shown Ms Davis and Mr Golding a table of figures and had made clear that he was talking about the average in the sense of the arithmetic mean. There is, however, no suggestion that he did so; quite the contrary, Mr Higginbottom's evidence was that his statement was simply "a conversation within the context of a meeting". In those circumstances the suggestion that a reasonable person should have understood the word "usual", used conversationally without mathematical elaboration, to mean an arithmetic mean, is wholly implausible.

96. If "usual" is understood in the way that Ms Davis understood it, which I find to be the correct interpretation, then the representation was indeed false. Six of the 11 stores in the Geldards letter failed to repay their overdrafts within five years. Nor, for those six, was the discrepancy a marginal one (for example a few days or weeks). The closest to five years that any of those six got was five years and eight months.

97. It is also apparent that the list of 11 stores in the Geldards letter did not include four further stores that had opened in 2000 and 2001, namely Warrington, Tunbridge Wells, Bournemouth and Stockton. In relation to those stores, it was apparent from Mr Higginbottom's cross-examination that although Bournemouth was a successful store which did (Mr Higginbottom thought) repay its overdraft relatively quickly and in any event within five years, Warrington did not ever pay off its overdraft and was converted to a VE-owned store in 2007. It appeared that the same was probably true of Tunbridge Wells, which was converted to a VE-owned store around the same time; and Stockton likewise does not appear to have repaid its overdraft within five years. The true position therefore appears to be that nine out of the 14 stores opened as JVs between 2000 and 2003 had failed to repay their overdrafts within five years. There was no good reason for excluding the details for these additional four stores from the Geldards letter.

98. In light of this information, Mr Higginbottom accepted in cross-examination that his representation was not true:

> "Q. You … knew that to say it was usual for the overdraft to be cleared in that time frame, was not true, did you not?
>
> A. It was not true, No, factually, it was not true."

A few minutes later he appeared to reverse his position, and said instead that his representation *was* true. I consider, however, that his first answer was the correct one.

99. I should add that even if VE's interpretation of the representation as referring to an arithmetic mean were to be accepted, the addition of the repayment periods for the four omitted stores would mean that the average figure was greater than five years, based on the Geldards table. In some additional questions asked by way of examination-in-chief, Mr Mason suggested that the figures in that table (or some of them) were wrong and that the calculated average repayment period should have been four and a half years. I was not, however, provided with any evidence or data supporting that recalculation, and I do not therefore consider that I can place any weight on this.

100. As to Mr Higginbottom's knowledge and belief at the time, he claimed that he did not know the true position at the time. But he accepted that he could have obtained the information, and his only explanation for not doing so was that he "had a good idea … from other owners within the organisation, when stores paid back." I do not accept that explanation. Mr Higginbottom did not merely get his information and knowledge of VE's business from anecdotal information relayed to him by other JV store owners. He had, as I have already said, very detailed performance data for all of VE's stores, including in particular the JV stores, and his professional background enabled him to interpret those data. His oral evidence also indicated that he had a good idea of what was going on in the various different JV stores (such as the four omitted from the Geldards list). In those circumstances I do not consider that Mr Higginbottom genuinely albeit mistakenly believed that most of the JV stores repaid their overdrafts within five years. Rather, I consider it highly likely that he either knew that the statement was not true or was reckless as to whether it was true or not.

Representation (vi)

101. Ms Davis and Mr Golding say that Mr Higginbottom told them in their meeting on 6 June 2007 that Southport was the only VE store that had failed. Ms Davis' evidence was that this statement was made in response to a question from her as to whether there had been any VE store closures. As with representation (ii), Mr Higginbottom accepts that if he had said that, it would have been untrue and he would have known that it was untrue; he maintained, however, that he was not asked that question and did not make the statement alleged.

102. I prefer Ms Davis and Mr Golding's account. As with the similar circumstances of representation (ii), I consider it both credible and likely that Ms Davis and Mr Golding would have wanted to know whether any previous JVs had failed. Ms Davis also gives a particular further reason for her request, which was that their initial JV pack from Specsavers had indicated that Specsavers had never had a JV store close. It is natural and probable that Ms Davis and Mr Golding would have wanted to know if the position was the same for VE.

103. Mr Higginbottom's contrary account, that Ms Davis and Mr Golding asked him specifically whether the Southport store had closed, is not credible. There is no reason why Ms Davis and Mr Golding would have asked such a specific question, not least because there is nothing to indicate that they would have known that the Southport store had closed in 1998, nine years before their discussions with Mr Higginbottom. Mr Golding's evidence was that he didn't even know where Southport was.

104. I therefore conclude that Mr Higginbottom did make this representation; it was untrue; and he knew that was untrue. In closing submissions, Mr Jones' main submission in this regard was that even if the representation was made it was not false or materially false because it was not intended to be, or in fact, relied upon by Ms Davis and Mr Golding. That elides the various elements of the tort of deceit. A representation may be false, but may not be actionable in the tort of deceit because it was not relied upon. I address the issue of reliance separately below.

Representations (vii) and (viii)

105. Ms Davis and Mr Golding say that Mr Higginbottom represented that, in his opinion, new VE JV stores would have an EER of at least 11 per day or 66 per week in their first year of trading; and that the Llandudno JV store would achieve the same EER in its first year of trading. The documents and projections that Mr Higginbottom provided to Ms Davis and Mr Golding, which I have described at paragraphs 30–31 above, make clear that Mr Higginbottom did indeed make those representations alleged. In those circumstances Mr Jones properly did not seek to argue that the representations were not made, but put his case on the basis that they were true and in any event were accepted and adopted by Ms Davis and Mr Golding as being accurate.

106. Starting with the question of whether the representations were true, both representations carried with them the implied representation that Mr Higginbottom had a reasonable basis for his opinions. But it follows from my conclusions in relation to representations (iii) and (iv) that there was no such basis. Even if I were to consider in VE's favour (and as I have done with Mr Ali) that the 2003–2006 data set in Geldards' letter of 12 July 2013 provides some indication of the performance of the JV stores, as I have set out above the figures in that data set showed that the average EER for those stores was well below 10 per day, let alone the 11 per day represented to Ms Davis and Mr Golding.

107. While Mr Higginbottom's discussions with Ms Davis and Mr Golding took place a few months later than his discussions with Mr Ali, the additional information that would have been available to him by then still did not support a figure of 11 eye exams per day. If, for example, the 2003–2006 data is cumulated with the January–April 2007 data for the four new stores (including one franchise store) opened in the first months of 2007, the average is only 8.67, and that in itself would need to be discounted since the initial performance of newly-opened stores is, as I have explained, likely to be better than their overall performance during their first year.

108. There are two further specific indicators of the falsity of the representations to Ms Davis and Mr Golding. First, on 8 June 2007, the same day on which Mr Higginbottom sent Ms Davis and Mr Golding a business plan for the Llandudno store specifying an average of 11 eye tests per day in year 1, he sent an updated template KPI document to his colleague Mr Sweeting, saying that he had "updated a few things" and asking Mr Sweeting to use that version going forward. That document specified 9.4 as the number of exams per day, and Mr Higginbottom repeatedly described this in his oral evidence as an "average" figure. Mr Higginbottom used that 9.4 figure in business plans for two further JV stores, Wrexham and Wells, which he sent to two other colleagues on the same day i.e. 8 June 2007. When cross-examined on this, he suggested that the 9.4 figure was an irrelevant part of those business plans, and that the more relevant figure was the total year 1 sales figure calculated on the basis of the cumulated projections. I accept that in relation to some of the business plans that Mr Higginbottom prepared he may well have focused on the total year 1 sales figure, and then used that to reverse-engineer the headline EER figure. Indeed, as set out below, it is probable that this was what happened for the Macclesfield store. In the case of the Wrexham and Wells business plans, however, I do not accept that explanation, given that the 9.4 per day figure used there was said to be an average figure, and was the figure used in Mr Higginbottom's template document.

109. The basis for the calculation of the 9.4 per day EER nevertheless remains unclear, and given the paucity of data available to VE at the time I do not regard this as decisive evidence of the performance of VE's new JV stores in 2007. What it does indicate, however, is that at the time that Mr Higginbottom was representing to Ms Davis and Mr Golding that new JV stores would achieve an average of 11 eye exams per day during their first year, and that the Llandudno store would also achieve that average figure, he had apparently concluded that the correct forecast to insert in his business plans for new stores (and the figure that he was also asking Mr Sweeting to use) was the significantly lower figure of 9.4 exams per day. There was, moreover, no particular reason to expect that Llandudno would do any better than the average store in VE's JV network. While Mr Higginbottom sought to rely on Llandudno's size as a potential justification for a higher than average EER, Llandudno is in fact significantly smaller than Wrexham for which Mr Higginbottom had used the 9.4 per day figure.

110. Secondly, I note that the other evidence before the court suggests that by the end of June 2007 VE's internal calculated average EER for new JV stores had in fact dropped below 9.4 per day. Ms Davis and Mr Golding rely on a KPI document produced for Melton Mowbray which contained a figure of 8.5 exams per day as the average EER for the "last 14 stores open" for the period January to June 2007. There are numerous other examples of KPI documents containing that 8.5 per day EER figure for that period, including the KPIs for Golders Green, Marlborough, Notting Hill, Swiss Cottage, Chesham and Chippenham. These documents provide further supporting evidence that by June 2007 the average EER across VE's new JV stores was significantly below the figure of 11 per day represented to Ms Davis and Mr Golding.

111. Taking all of the evidence together I conclude that representations (vii) and (viii) were materially false. I also find on the basis of the same evidence, and by reference in addition to what I have said about representations (iii) and (iv), that Mr Higginbottom must have known that these representations were false. My conclusion on this is supported, in particular, by the 8 June 2007 documents produced by Mr Higginbottom himself that used the EER figure of 9.4 per day, and his evidence that this was an average figure. Absent any explanation as to why the Llandudno store would have had a higher EER, I consider that he must have known that the 11 eye exam per day figure that he was giving to Ms Davis and Mr Golding, on the same day, was a significant overestimate.

112. Those conclusions are not undermined by VE's protestations that Ms Davis and Mr Golding accepted the figures that Mr Higginbottom gave them, and presented them as their own. Quite the contrary, that shows that Ms Davis and Mr Golding relied upon what they were told by Mr Higginbottom – which is not surprising given Mr Higginbottom's greater experience and the VE data to which he had access. As with Mr Ali, neither Ms Davis nor Mr Golding could possibly have known what the average EER across VE's new JV stores was, and it is quite clear that they used, in their presentation to VE's JV approval committee, the EER figures that Mr Higginbottom had given them for their forecasts for their own store.

Representations (ix) and (x)

113. Regarding Mr McGreavy, the first two alleged misrepresentations are that the average new JV store had an EER of at least 7.6 per day over the first year, and that in its opinion, for which it had a reasonable basis, the Macclesfield JV store would have an EER of at least 7.2 per day in its first year of trading. These figures are taken from the revised financial projections document sent by Mr Higginbottom to Mr McGreavy on 14 May 2008 and (Mr McGreavy says) also given to him in person by Mr Windsor in May or June 2008. Given that the financial projections document did indeed contain an EER figure of 7.6 per day as an average for the "last 20 stores open", and a figure of 7.2 per day as the projected EER for the Macclesfield store, Mr Jones did not seriously dispute that the representations were made. Rather, he focused his submissions on the contentions that the representations were true.

114. While Mr Higginbottom claimed, in cross-examination, that the 7.2 per day figure came from Mr McGreavy himself, I reject that suggestion as wholly implausible. The 7.2 per day figure was given in the projections that Mr McGreavy received from VE and there is no evidence whatsoever to indicate that Mr McGreavy provided that figure to VE rather than the other way round. Indeed Mr Higginbottom's witness statement stated explicitly that he had provided the forecasts in the revised business plan for the Macclesfield store, and that in that regard he had considered that the proposed store could achieve an average of 7.2 exams per day in the first year. The starting point, therefore, is that both representations were made by VE.

115. The 7.6 per day average figure given in the revised financial projections was described as relating to the period from January to December 2007. No more

recent average figure was given in the document; nor does VE suggest that Mr McGreavy was ever given a more recent average figure. The revised projections were, however, given to Mr McGreavy in May/June 2008 in response to a concern raised by him as to the current performance of VE's JV stores, and the achievability of the figures that he had previously been given by Mr Higginbottom. In that context, and given that no more recent figure was provided, I consider that a reasonable person would have understood that VE was representing that the average EER achieved during 2007 (which it had stated was 7.6 per day) continued to represent the current performance of the average new JV store. That is, moreover, precisely how Mr McGreavy understood that representation, according to his witness statement, and this part of his evidence was not challenged in cross-examination. Likewise the representation regarding the EER over the first year of trading for the Macclesfield store must be understood as implying that VE had a reasonable basis for that opinion when the representation was made.

116. The accuracy of both representations must therefore be assessed by reference to the information available to VE by May/June 2008. By that time (and by contrast with the position for the Southport and Llandudno stores) VE had opened numerous recent JV stores and did have data covering the first year of trading of at least some of the new wave of JVs. In that regard, VE relies on a letter sent by Geldards to Owen White on 23 July 2013, which sets out a table of figures for the average EERs during 2007 of the last 20 VE stores opened up to and including December 2007 (including three franchise stores). Those figures produce an average EER of 8.2 per day. A further table sets out average figures for the EERs during January to June 2007 for the last 20 VE stores opened up to that date, giving an average EER of 8.3 per day.

117. Against that, Mr McGreavy relies on a KPI document produced for the Melton Mowbray store, which gave an EER of 7 per day for the last 15 stores open during the period January to October 2007. He also relies on a further KPI document for an unnamed store, which specified an EER of 7.6 for the last 20 stores open during the period of January to December 2007, alongside a lower EER of 6.5 per day for the last 20 stores open during the period January to June 2008. (I note in passing that the figures of 7 per day for January to October 2007 and 7.6 for January to December 2007 are figures that feature on a number of the other KPI documents for other stores.) Ms Stevens-Hoare QC also highlighted a VE internal slide presentation headed "Vision Express JV – June 2008 reporting", which recorded a very negative outlook for the new VE JV stores by June 2008.

118. In considering which of this evidence is to be preferred, I note that the average calculations in the 23 July 2013 Geldards letter suffer from problems that are similar to the problems with the earlier Geldards letter that I have discussed above in relation to the other Claimants. Very few of the figures in the data sets used in the 23 July 2013 letter span a period of a year, with most of the figures covering periods of significantly less than a year; and as with the other Geldards letter all of the EER figures assume a 6 day week which may well not have been the case for all the stores. I therefore consider that the Geldards figures are likely to overstate the average EERs at the relevant times. Taking

that together with the fact that VE's contemporaneous documents consistently recorded the 2007 average EER as being 7.6 per day, I think that VE's contemporaneous 7.6 per day figure is the appropriate starting point for the position during 2007.

119. The evidence shows that during 2008 the performance of VE's stores deteriorated by comparison with 2007. VE's June 2008 slide presentation recorded that income from eye exams had fallen by 3.2% compared to June 2007, and that only one region in VE's network achieved growth compared to 2007. All of the recent new JV stores were forecast to breach their overdraft limits in 2008. Those observations and the other comments in that presentation make clear that sales were generally declining across VE's JV network by comparison with the previous year. Mr Higginbottom himself asserted in his witness statement that the figures at the end of December 2007 did not remain static, and that by early 2008 the figures coming through from the newly-opened stores showed that "recently started businesses were achieving lower EER". VE did not, therefore, have any basis for believing that the 2007 average EER continued to apply in May/June 2008. Indeed the unnamed store KPI document, which is the one KPI document I have seen that gives an average to June 2008, indicates that the average EER figure had by then reduced to 6.5 per day.

120. There is therefore little doubt that the average EERs for VE's new JV stores had, by May/June 2008, fallen below the 2007 average figures. The implied representation that the May/June 2008 average EER remained at or around the 2007 average EER, given as 7.6 per day, was therefore false. It is also quite clear that VE, and Mr Higginbottom, knew that the performance of its JV stores – and particularly its recently opened stores – had deteriorated during the first half of 2008, compared to the previous year, such that the 2007 performance figures were not representative of the performance of VE's JV stores by May/June 2008. Mr Higginbottom, therefore either knew that his representation to Mr McGreavy regarding the average EER was false, or at the very least was reckless as to whether it was true or not.

121. As for the 7.2 per day EER given for the Macclesfield store specifically, Mr Higginbottom's evidence was that there was "no scientific process" used to derive the EER for any given store, and that he would simply have looked at all the available data. The problem with that is that nothing in the evidence, or any of VE's submissions, sheds any light whatsoever on the basis for the calculation of 7.2 exams per day – an oddly precise figure, which (unlike the forecasts for the Southport and Llandudno stores) was specified as being lower than the average EER figure given in the financial projections.

122. Rather, it seems probable that the figure of 7.2 was simply inserted so as to force out the weekly sales figure that needed to be achieved, in order that the revised financial projections would continue to record repayment of the overdraft after five years (which was similar to the break-even point in the projections that Mr Higginbottom had previously given to Mr McGreavy in 2007). I reach this conclusion on the basis of Mr Higginbottom's evidence that he regarded the five year payback period as an absolute minimum performance target, and that his forecasts were framed so as to achieve that.

He first made this point in response to a question in cross-examination as to why he would have included the same EER figure in business plans for two very different stores (Wrexham and Wells):

> "A. … I would have just been interested at that point about the overall turnover and not necessarily how we got there. … I was just working out from this, what the break even or what the sales level needs to be in year one, for these two locations.
>
> Q. And you were working out, by putting in KPIs, how that might be achieved and forming a view about that, were you not?
>
> A. To force the figure out at the bottom that I believed could be achieved in these two locations. …"

123. A little later, in response to a similar question from the bench, Mr Higginbottom elaborated on this point, making clear that he was ultimately working to a five year payback period:

> "Because I was working out what you would need to do in year 1 as a weekly turnover and then it would add a growth level on to years two, years three, years four and year five, to have a pay back over a five year period. So that was really the starting point which was the absolute minimum."

124. Mr Higginbottom said that he did this for the purpose of VE's internal analysis and that he would not have done anything like this for a joint venture partner. I do not accept that his analysis was so confined, and I consider it very probable that this was precisely the basis for the forecast that he sent to Mr McGreavy. Indeed it is difficult to identify any other possible basis for the calculation of the specific figure of 7.2 exams per day. This does not, however, justify the figure of 7.2; quite the contrary, it indicates that the figure was an arbitrary one, inserted without any genuine belief in its accuracy. It is, moreover, revealing that Mr Higginbottom's colleague Mr Sweeting sent an internal email on 15 January 2008, noting that the KPI input sheet was overestimating weekly sales based on the number of eye exams, and commenting that "I understand that we discuss weekly sales rather than eye exams but it makes more sense to have an accurate figure for the partners to use based on eye exams." Mr Sweeting was therefore raising precisely the concern that the EERs given to JV partners were inaccurate, because the focus was on the overall weekly sales figures.

125. I therefore conclude that Mr Higginbottom did not in fact believe that the Macclesfield store would achieve an EER of 7.2 per day over its first year; nor was there any reasonable basis for that opinion. His representation in this regard was therefore false, and it follows from what I have said above that Mr Higginbottom either knew that it was false or was reckless as to whether it was true or not.

Representations (xi) and (xii)

126. I turn, finally, to the alleged misrepresentations made to Mr McGreavy that the average new JV store had a conversion rate of at least 70% during the first year, and that in VE's opinion the Macclesfield JV store would achieve a conversion rate of at least 70% in its first year of trading. Again, in both cases the figures were set out in the revised financial projections document given to Mr McGreavy by VE in May/June 2008. Again, therefore, it is clear on the face of the document that the representations were made. I reject Mr Higginbottom's suggestion that the figure for the Macclesfield store was provided by Mr McGreavy rather than by VE. There is no evidence suggesting that Mr McGreavy was the source of these figures rather than VE.

127. As with the other representations made to Mr McGreavy, I consider that the representations would be understood by a reasonable person as relating to the conversion rates at the time the representations were made, i.e. May/June 2008.

128. On the evidence before me, I do not think that there was a reasonable basis for saying that, as at May/June 2008, recently-opened JV stores had a conversion rate of 70%, and that the Macclesfield store could be expected to have the same conversion rate. Ms Stevens-Hoare relied on a diagram showing the conversation rate across the JV network, during the first 40 weeks of 2007, to have been below 70% for most of that period. Looking at the underlying data for that diagram, I note that the JV conversion rates over that period were mostly below the conversion rates for VE's owned stores. If anything, therefore, the diagram would appear to overstate the conversion rates for VE's JV stores.

129. The evidence also indicates that VE's conversion rates did not improve during the first half of 2008. Mr Higginbottom's own evidence was that the conversion rate for VE's total JV estate for that period was 67.4%. That is very similar to the conversion rate of 68% given in the unnamed KPI document that I have referred to above, for the last 20 stores open during the period January to June 2008. I also note that VE's June 2008 presentation includes the following comment on JV conversion rates: "DER 67.7% month, -1.1% v June 2007".

130. VE seeks to justify the 70% figures given by reference to the conversion rates achieved in the VE Bolton store where Mr McGreavy had worked previously. During 2007, the conversion rate there was 78.6%; during 2008 it was 74.6%. Self-evidently, the conversion rate in one selected store (which was, moreover, a VE-owned store) does not undermine a conclusion regarding the average conversion rates across VE's network, or for JV stores in particular. The suggestion that the conversion rate of an established VE owned store in Bolton could provide any indication of the expected conversion rate of a new JV store in Macclesfield is, moreover, inconsistent with Mr Higginbottom's repeated insistence that every location is different. Although Mr Higginbottom emphasised this in an attempt to downplay the relevance of average figures, I consider that this point goes more to the fact that the data from an individual store cannot simply be read across to another store. That is precisely why average figures provide important information for prospective JV partners.

131. It is noticeable that VE has never produced any analysis, in response to this claim, of the average conversion rates across VE's recently-owned JV stores, as at May/June 2008, despite the fact that it must have been possible for VE to extract this information. While that does not in itself imply that the representations were not true, it is a point that can properly be considered alongside the rest of the evidence. In short, the best evidence before the court indicates that the average conversion rate for VE's JV stores, whether taken as a whole or looking specifically at recently-opened stores, was between 67–68% during the first half of 2008. That was therefore below the 70% figure represented to Mr McGreavy, and VE has not produced any evidence showing that the 70% figure was, in fact, accurate. I therefore find on the evidence before me that the 70% average conversion rate figure was, by May/June 2008, not correct and overstated the actual average conversion rate of VE's JV stores.

132. In those circumstances, I also consider that there was no reasonable basis to predict that the Macclesfield store would achieve a conversion rate above the average at the time. While I accept the point that each store is different, I have not seen anything to suggest that there were any grounds for Mr Higginbottom to believe, in May/June 2008, that Mr McGreavy would achieve an above-average conversion rate in Macclesfield. Nor has Mr Higginbottom suggested, in his evidence, that he believed that Mr McGreavy would be more successful in his conversion rates in Macclesfield than the average VE JV store.

133. My conclusion is therefore that both representations were false. While the difference between the represented conversion rates (70%) and the conversion rates that were apparently being achieved in practice (67–68%) is not large, I consider that the difference is sufficient to be material in the circumstances of this case. That is because the conversion rate is an important figure that feeds into the rest of the calculations of the forecast year 1 revenue for a new JV store, and the year 1 figures are then increased by various percentages reflecting the forecast sales growth in the store, to produce the forecast figures for the subsequent years. That means that a small difference in the year 1 KPIs will translate into a more significant difference over the period of the business plan. That is relevant because Mr McGreavy was not merely looking at the likely performance of the JV store over the first year; rather, he was looking at a long-term investment and his evidence was that he had regard in particular to the five year projections. I have certainly not seen any evidence to suggest that, even if Mr McGreavy's business plan had been adjusted to record a lower conversion rate of 67–68%, the output difference in the five year projections would have been immaterial for the purposes of Mr McGreavy's discussions with VE.

134. Given the evidence set out above, which comes from Mr Higginbottom's own evidence and VE's internal documents, I also find that Mr Higginbottom either knew that the representations were false, or was reckless as to whether they were true or not.

General comments about VE's approach to the recruitment of new JV partners

135. As a final matter, in relation to the findings of misrepresentations, it is appropriate to comment on Mr Higginbottom's contentions that it would have damaged his reputation to recruit JV partners whose stores were unsuccessful, and that the risk borne by VE in relation to its JV stores meant that he had no incentive to lie to the Claimants. In similar vein Mr Jones submitted that it was illogical to assume that VE, which was investing time and money in establishing its stores, would have risked damaging itself by taking inappropriate premises and entering into JVs based on unachievable business plans.

136. Those contentions might have had more substance if there had been any evidence that these considerations led Mr Higginbottom to be cautious about the new JV partners he was recruiting, or led VE to exercise caution in its procedures for entering into new JV arrangements. But there was no such evidence. Instead, it is apparent from what I have said at paragraph 11 above that VE saw the opening of new JV stores as a considerable profit opportunity, not least through the higher fees that it could charge to the JVs, by comparison with franchise stores. Ms Reed's 11 December 2006 email shows that this led VE to "[push] through new JV partners" at a speed that Ms Reed described as "frightening", without proper procedures being followed.

137. A good example of this is the fact that Mr Ali met Mr Higginbottom for the first time since 2001, and for the first time as a prospective JV partner, on 22 February 2007, and was making his formal presentation to VE's JV approval committee less than two weeks later. I have also found that Mr Higginbottom put some pressure on Ms Davis and Mr Golding to make a quick decision. Mr Higginbottom asserted in cross-examination that "I wasn't ever keen to get anybody in" and "it is not in my nature to persuade people. I was never persuasive for these people to sign up". Given the evidence that I have set out in this judgment, I consider that those assertions were patently untruthful.

138. An earlier email from Mr Higginbottom to prospective JV partners for the Hastings store is also revealing as to his approach. In the context of advising the applicants how they should respond to questions regarding the KPIs and performance forecasts, Mr Higginbottom wrote this:

> "The questions will come from 2 areas – Steve Scully will [ask] loads of operational questions – KPI's etc which I know you will be fine with – just tell them what they want to hear! The questions from the FD will be very negative – concentrating on what if things go wrong – be positive when these are asked (without being overly confident!) and again tell them what they want to hear – cost reductions etc."

139. Mr Higginbottom said that this was not typical of the sort of advice that he gave to other JV partners, but I do not accept that. Mr Ali's evidence was that Mr Higginbottom told him that he should sell himself to the VE approvals committee, and that the committee was "less bothered about the figures." Ms Davis likewise said that Mr Higginbottom had coached them on the questions that the VE approvals committee would be likely to ask and the answers that they should give. That evidence is consistent with the picture of Mr

Higginbottom seeing it as his role to encourage prospective JV partners to sell themselves to VE by telling the VE approvals committee "what they want to hear", rather than encouraging the partners to scrutinise rigorously the figures that they were given by VE and to discuss their performance forecasts candidly with the VE approvals committee.

140. Mr Higginbottom accepted in cross-examination that things did not slow down after Ms Reed's December 2006 email. Nor is there any suggestion from VE that it became more careful about the accuracy of the information given to JV partners in the light of Ms Reed's email. As I have noted above, even in January 2008 Mr Sweeting was recording concerns about the accuracy of the EERs being provided to prospective JV partners. I therefore do not think that it is at all illogical or improbable that the Claimants were given the series of misrepresentations that they allege.

Interim conclusion

141. It follows from my findings above that I conclude that all of the alleged representations were made; they were all false; and they were all fraudulent in the sense that VE either knew that they were false or was reckless as to whether they were true or not. It will also be apparent from what I have said above that I consider the evidence of VE's knowledge or recklessness to be compelling. In the cases of representations (i), (ii) and (vi) there is, in fact, little or no dispute as to what VE and Mr Higginbottom did or did not know. In the cases of the other representations, while there is a dispute as to what Mr Higginbottom knew or believed at the time, I have reached my conclusions on the basis of the evidence that VE itself has given as to the information available to it (and to Mr Higginbottom in his role within VE) at the time, VE's own internal documents, and Mr Higginbottom's evidence as to the way in which his figures were constructed. In the light of all of that evidence I have no hesitation in rejecting VE's submissions that Mr Higginbottom genuinely believed his representations to be true.

142. I therefore do not need to consider the Claimants' secondary case of negligent misrepresentation. Had I needed to do so, I would have found (on the basis of the matters set out above) that even if Mr Higginbottom did genuinely believe his representations to be true, there were no reasonable grounds for such a belief in the case of any of the representations, for the purposes of s. 2(1) of the Misrepresentation Act 1967.

Reliance by the Claimants

143. As I have already said, in the case of fraudulent misrepresentations there is a rebuttable presumption that it is intended to be relied upon. VE has not rebutted that presumption in this case, and it is obvious that it did intend the Claimants to rely on all of the representations made to them. I also accept the Claimants' evidence that they did indeed rely on what they were told by Mr Higginbottom.

144. Mr Higginbottom's assertions that he did not intend the Claimants to "slavishly" adopt or copy his figures, and that the Claimants had to consider

the business plans and satisfy themselves that they were realistic and achievable, miss the point. I am sure that he did want the Claimants to believe that their business plans were achievable; but in forming that belief it is clear that all of them relied, centrally, on the figures that they were given by Mr Higginbottom, and it is equally clear that he intended them to do so. Indeed, given Mr Higginbottom's position within VE, the extensive information on the performance of VE's stores to which he had access, and his role in signing up the Claimants as JV partners, the proposition that Mr Higginbottom did *not* intend the Claimants to rely on what he told them is so highly improbable that it would require very compelling evidence indeed, of which there is none in this case.

145. It is true that some of the documents provided by VE to the Claimants did contain disclaimers. In particular, at the top of the detailed 10-year business models provided to Ms Davis and Mr Golding, for Llandudno, and Mr McGreavy, for Macclesfield, the following statement appears in miniscule script:

> "This document has been prepared on the basis of Vison Express's experience with existing Joint Venture Stores and may contain information provided by the prospective partner(s). However, in providing the information and data within, Vision Express are not warranting the accuracy of the information contained herein nor does Vision Express make any representation in connection with this document.
>
> Readers of this document must form their own opinions and should not rely on the statements made within the document and seek independent legal and/or financial advice as necessary."

146. However the detailed 10-year business models for those Claimants did not themselves contain the forecast EERs and conversion rates that are the subject of the alleged misrepresentations, and the documents which did contain those figures for Llandudno and Macclesfield were not accompanied by these disclaimers. In the case of Mr Ali, the disclaimer cited above was set out on the contents page of the "Financial Projections and Operational Information Report" that Mr Higginbottom claims that he gave Mr Ali on 6 March 2007, but I have already found that Mr Ali was not given that document. In those circumstances, I do not consider that the disclaimers on the few documents that I have referred to above demonstrate either that VE did not intend its representations to be relied on, or that the Claimants did not rely on those representations.

147. On the contrary, VE's internal documents demonstrate that VE understood, quite well, that its prospective JV partners would rely on the information that they were given regarding the likely performance of new JV stores. That is apparent from Ms Reed's cautionary email of 11 December 2006, warning of potential misrepresentation claims, and Mr Sweeting's email of 15 January 2008 which I have referred to above.

148. VE could of course quite reasonably have expected that all of the Claimants would, in addition to the information that they were given by VE, take account of their own experience in the optometry business, and indeed I am sure that the Claimants did so. That does not, however, mean that they did not rely on the representations they were given, since proof of reliance does not require the representee to suspend their own judgment entirely on the matter that is the subject of the representation. Rather, as I have set out above, what is required is that the representation should have played a real and substantial part in inducing the representee to act. I consider that in this case each of Mr Higginbottom's representations to the Claimants did play a real and substantial part in inducing them to enter into their JVs with VE.

Clause 15.13 of the JVAs

149. If I had concluded that the representations alleged by the Claimants were made negligently but not fraudulently, it would have been necessary to consider the effect of clause 15.13 of the JVAs. Since, however, that clause expressly states that it will not exclude VE's liability for fraudulent statements, it is inapplicable in the light of my conclusions above. Nevertheless, since both parties made submissions as to the interpretation and effect of the clause, and all of the Claimants were cross-examined as to their understanding of the clause in their respective contracts, I briefly set out the competing positions and my conclusions on those submissions.

150. The essence of the Claimants' case is that clause 15.13 is caught by s. 3(1) of the Misrepresentation Act 1967, which (as amended) provides as follows:

> "(1) If a contract contains a term which would exclude or restrict—
>
> (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
>
> (b) any remedy available to another party to the contract by reason of such a misrepresentation,
>
> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does."

151. Ms Stevens-Hoare submitted that clause 15.13 excludes VE's liability for misrepresentations, and does not satisfy the requirement of reasonableness. Mr Jones contended that the proper construction of clause 15.13 is that the parties were agreeing that no representations were being made at all. On that basis he argued that s. 3(1) is not engaged. He also submitted that the clause meets the reasonableness standard in any event.

152. I accept the submissions of Ms Stevens-Hoare that the effect of clause 15.13 is to exclude liability for any representations that were made, rather than

showing that no representations were in fact made. The issue, as Christopher Clarke J said in *Raiffeisen Zentralbank* at §310, is one of substance not form. In this case the clause on its face contemplates that there may be pre-contractual statements on which the JV partners "have relied". The fact that the clause provides an elaborate mechanism for agreeing the relevant statements with VE and thereafter annexing them – if agreed – to the JVA does not undermine that conclusion. I note in particular that the clause states that the investors acknowledge that "they have been told" about this mechanism for agreeing and annexing pre-contractual statements on which they have relied, notwithstanding the clear evidence that the Claimants were *not* told anything whatsoever about this provision. In those circumstances I agree with Ms Stevens-Hoare's submission, relying on *First Tower Trustees v CDS* [2017] EWHC 891 (Ch), §31 and *Government of Zanzibar v British Aerospace* [2000] 1 WLR 2333, pp 2347–8, that this is simply an attempt to rewrite history and exclude VE's reliance for non-fraudulent pre-contractual representations made to the Claimants.

153. It was common ground before me that the relevant factual context, including the relationship between the parties, is or may be relevant in elucidating the proper interpretation of the clause. Christopher Clarke J gives an example of this in *Raiffeisen Zentralbank*, at §§314–5. In the present case the wording of the clause is, in my view, sufficient; but it also seems to me that the conclusion that I have reached on that basis is supported by the fact that the Claimants were not sophisticated commercial parties negotiating terms of which they were fully aware, but were individuals who were presented with the JVA documentation by VE and had no input into the content of this clause.

154. It follows that clause 15.13 falls within the scope of s. 3(1) of the Misrepresentation Act 1967, and is therefore of no effect except in so far as it satisfies the requirement of reasonableness. The burden of proof lies on the person making the representation (here VE) to show that the clause was reasonable. As to that question, it was common ground between both parties that the guidelines in Schedule 2 to the Unfair Contract Terms Act 1977 are helpful albeit not strictly applicable. The matters set out in Schedule 2, which might be relevant in this context, include:

> "(a) the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
>
> …
>
> (c) whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
>
> (d) where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was

> reasonable at the time of the contract to expect that compliance with that condition would be practicable; …"

155. I consider that all three of these factors are relevant to the question of unreasonableness in this case, and that VE has not demonstrated that clause 15.13 was reasonable. VE was in a far stronger bargaining position than the Claimants, as is evident from the fact that it was the Claimants that had to apply to VE, had to be approved by the VE JV approvals committee, and ultimately had to sign the contracts that they were presented by VE. There is no suggestion at all that any of the terms of the JVAs were presented to the Claimants as being open for negotiation. It is also absolutely clear from the evidence, as I have already recorded at paragraph 41 above, that the Claimants neither took legal advice on the JVA documentation, nor were advised to do so by VE. Nor did VE at any stage draw their attention to the existence of clause 15.13, which was buried amongst a large number of detailed provisions in the various contractual documents that I have described above. The Claimants – none of whom had any legal qualifications – could not possibly have been expected to read through and understand the details of all the provisions in those contractual documents prior to signing the JVAs, and I unhesitatingly accept their evidence that they did not in fact read clause 15.13 at the time.

156. Mr Jones put to all of the Claimants that they did, now, understand the terms of clause 15.13. That misses the point. Whether or not a clause is reasonable for these purposes should not fall to be determined by the representee's understanding of a clause once it is brought to their attention in litigation (in the course of which, no doubt, the clause will have been explained by the lawyers). Rather, it is relevant to consider what the representee did understand or could reasonably have understood at the time, and I consider that the Claimants could not conceivably have been expected to identify clause 15.13 at the time they signed the JVAs, let alone understand its content and significance.

157. Nor do I consider that the mechanism set out in clause 15.13 of agreeing with VE each and every one of the pre-contractual representations that had been made to the relevant JV partners, and subsequently append the agreed representations to the JVAs, was a mechanism that could practicably have been complied with by the Claimants in any event, and VE has not identified any instance in which a JV partner has sought to do this.

158. For all of these reasons, had I needed to decide the point, I would have concluded that clause 15.13 was unreasonable for the purposes of s. 3(1) of the Misrepresentation Act 1967, and could not therefore be relied upon by VE to exclude its liability for the misrepresentations that are alleged by the Claimants in this case.

Quantum of loss

159. The final issue that I need to determine is the quantum of the Claimants' monetary claims against VE. The Claimants have put forward schedules of their respective claimed losses, and Mr Jones, in his written closing submissions, set out detailed submissions on the losses claimed in each case.

Ms Stevens-Hoare did not address those submissions until her reply, where the thrust of her response was that various points had not been put to the Claimants in cross-examination. While that does diminish the force of some of Mr Jones' criticisms, most of his objections concerned matters which I consider could properly be raised by way of submissions without putting every point to the Claimants in cross-examination. I turn to the respective claims with these comments in mind.

Mr Ali

160. Mr Ali's claim is for £206,230.32 plus interest, based on his sunk investment in the Southport JV, together with his re-mortgage arrangement fees and interest on the loan, loss of earnings plus interest, and an apparent claim for future loss of earnings.

161. I do not think that there is any basis to reduce the claim in relation to Mr Ali's sunk investment in the JV, amounting to £49,950, but I agree with Mr Jones' submission that the mortgage interest figure claimed should be reduced to take account of the fact that there is no explanation or evidence of the figure claimed, and it is likely that at least some of the loan will have been repaid. There is also the possibility that Mr Ali might in any event have pursued an alternative business venture, which would have required investment on his part. I therefore consider that it is appropriate to reduce the interest element of this part of the claim by a little over 40% to £10,000, as suggested by Mr Jones.

162. The claim for loss of earnings is based on an assumption that Mr Ali would both have remained at Costco and would have been put on a fast-track management programme. Given the possibility that neither of those would have been the case, I consider that it is appropriate to reduce the lost earnings claim by 40%. There is no evidence to justify any claim for future loss of earnings.

Ms Davis and Mr Golding

163. Ms Davis and Mr Golding's claim is for £388,388.82 plus interest, based on their sunk investments in the Llandudno JV, Mr Golding's interest payments on the loan taken to fund his share of the investment, claims by both Ms Davis and Mr Golding for loss of earnings plus interest, and an apparent claim for future loss of earnings.

164. As with Mr Ali, I consider that the claims for the sunk investments of (in total) £84,500 should not be reduced. Mr Golding's claim for interest is based on an agreement with his parents, who provided the loan for his share of the investment. That agreement provided for payments of interest at £200 per month for five years only, after which the capital was to be repaid in one lump sum. Mr Golding's evidence is that those payments stopped when the JVA was terminated, which was five years after the loan was given. The appropriate starting point for Mr Golding's interest claim is therefore £12,000 (£200 per month for five years). That should further be reduced to account for the probability (on the Claimants' own evidence) that Ms Davis and Mr

Golding would have gone into a JV with Specsavers if they had not gone with VE. I consider that a reduction of 50% applied to the £12,000 figure, as proposed by Mr Jones, is reasonable in these circumstances. The same reduction, for the same reason, should apply to the interest due on Ms Davis' part of the investment.

165. Regarding the lost earnings claims, Mr Jones points out that in December 2012, following the termination of the JVAs, Ms Davis and Mr Golding chose to purchase an alternative small optical practice, and have worked there ever since; on that basis he says that there should be no claim for loss of earnings beyond that point. I agree with that submission. Given that the Claimants chose to pursue that alternative business rather than seeking reemployment with their former employers, I do not think that VE can be held responsible for the fact that they earned less, on an ongoing basis, than they would have done as employees. *A fortiori* there is no basis for any claim for future lost earnings. I also agree with Mr Jones' submission that for the period prior to December 2012 the lost earnings claims of both Ms Davis and Mr Golding should be reduced to reflect the probability that they would in any event not have continued in employment but would have gone into an alternative JV. I consider that the appropriate reduction is 40%.

Mr McGreavy

166. Mr McGreavy's claim is for £152,407.08 plus interest, based on his sunk investment in the Macclesfield JV, together with his re-mortgage arrangement fees and interest on the loan, loss of earnings plus interest, and a claim for travel costs. Mr McGreavy does not make any claim for future loss of earnings.

167. As with the other Claimants, the claim for Mr McGreavy's sunk investment of £50,000 should not be reduced. It is also appropriate to award Mr McGreavy the full amount of the mortgage arrangement fee and interest paid by him on the loan, since there is no evidence to suggest that Mr McGreavy would have entered into another business if he had not gone ahead with the VE JV, and VE does not suggest otherwise. The travel claim is also not disputed.

168. That leaves the claim for lost earnings. A small reduction in this claim is appropriate to reflect the fact that the increase in Mr McGreavy's salary may not have been as substantial as claimed, and that there may have been other reasons for a change of his employment status. I consider that a reduction of 5% is appropriate in this case.

Interest on the claims

169. For all of the claims, interest will fall to be added to the figures for lost earnings. Interest is also due on Ms Davis' investments of – in total – £44,500 (subject to the reduction set out at paragraph 164 above). As agreed with the parties at the end of the trial, there will need to be further submissions on the appropriate rate(s) of interest, if that is not agreed.

Conclusion on the claims and counterclaims

170. In conclusion, I find that the Claimants have established all of the misrepresentations alleged; and I consider that those misrepresentations were fraudulent in the sense that VE either knew that they were not true or was reckless as to whether they were true or not. I also find that VE intended that the Claimants should act in reliance on the misrepresentations, and the Claimants did in fact act on those misrepresentations in entering into the JVAs with VE, in consequence of which they suffered losses.

171. The Claimants therefore succeed in their claims, and are entitled to damages on the bases that I have set out above. I will leave it to the parties to calculate the exact amounts. Since the claims have succeeded, the counterclaims are dismissed.