

Neutral Citation Number: [2021] EWHC 438 (Ch)

Case No: BL-2018-001756

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**BUSINESS LIST (CH)**

Birmingham Civil Justice Centre  
The Priory Courts, 33 Bull Street  
Birmingham

Date: 17 February 2021

Before :

**His Honour Judge Rawlings**

Between :

**Amicus Finance PLC (In Administration)**

**Claimant**

- and -

**Five Rivers 2 UK Limited**

**Defendant**

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**Turlough Stone** (instructed by **Brecher LLP**) for the **Claimant**  
**Marc Brown** (instructed by **UK Law**) for the **Defendant**

Hearing dates: **17<sup>th</sup> February 2021**

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**JUDGMENT**

**His Honour Judge Rawlings**  
(11:26 am)

**Wednesday, 17 February 2021**

Judgment by **His Honour Judge Rawlings**

## **BACKGROUND**

1. The claimant is Amicus Finance Plc, which is in administration (“Amicus”). In these proceedings Amicus seeks, as mortgagee, a possession order in relation to a freehold property at 80 Broad Street, Birmingham, (“the Property”) pursuant to a mortgage granted to it by the defendant. The defendant, Five Rivers (UK) Limited (“Five Rivers”) is the freehold proprietor of the Property. The Property includes a bar, a nightclub, and a residential part. The bar and the nightclub is operated by a company called Zara's Broad Street Limited (“Zara’s”) which occupies the Property for that purpose, under a lease granted to it by Five Rivers on 15th June 2015 (“the Lease”). I understand that the residential part is occupied, but I have no details of the occupant.
2. Mr Peter Sangha (“Mr Sangha”) is the sole shareholder and director of both Five Rivers and Zara's.
3. In June 2015, Five Rivers, acting through Mr Sangha as its director, applied to Amicus, which is a provider of short-term finance, otherwise known as bridging loans, for a loan of around £1 million (“the Loan”). The purpose of the Loan was to finance refurbishment or fitting out of the Property, and the Property was to act as security for the Loan.
4. Amicus’s charge, contained in a debenture dated 21 August 2015 (“the Debenture”) on the Property was to be a second charge because the Property was already subject to a first charge in favour of Punjab National Bank Limited.
5. In separate proceedings to these (which I will refer to as the Lease Proceedings”) between Amicus as the claimant and Five Rivers and Zara's, as defendants, it has already been found as a matter of fact by His Honour Judge Pearce that Five Rivers and Zara’s entered into the Lease on 15th June 2015 and that the Lease was not a sham. Amicus had asserted in the Lease Proceedings that the

Lease was a sham, or that in any event it was entered into after Five Rivers granted the Debenture to Amicus on 21st August 2015.

6. Mr Sangha says in these proceedings and said in the Lease Proceedings that he informed Mr Iain McCarrell (“Mr McCarrell”) of Amicus at a meeting at Amicus’s offices in London on 17 July 2017 (“the Meeting”) that Zara's was to occupy 80 Broad Street following refurbishment of the Property, and he referred to the Lease as having already been granted by Five Rivers to Zara's, and indeed he had a copy of the Lease with him which he showed to Mr McCarrell at the Meeting. Further, Mr Sangha says that Mr McCarrell told him not to worry about the Lease and that he did not want a copy of it. It is common ground that those present at the Meeting were Mr McCarrell, Mr Sangha and Mr Sangha’s then wife, Ms Basra.
7. That evidence was disputed by Mr McCarrell, in the Lease Proceedings and he disputes it in these proceedings. His evidence is that he does not believe that Mr Sangha did mention the Lease at the Meeting, nor that he told Mr Sangha not to worry about the Lease, although he fairly accepts that he cannot recall what was said at the Meeting. Mr McCarrell relies for his belief, upon his notes of the Meeting and an underwriting report and other documents that he prepared shortly after the Meeting to support his belief.
8. Amicus relies on the following documents in these proceedings as evidence that it was not told about the Lease, either at the Meeting (through Mr McCarrell) or otherwise and did not agree, expressly or impliedly, to advance the Loan, on the basis that the Lease existed and that it had no objection to it:
  - (a) on 13th June 2015 Mr Sangha, as director for Five Rivers, signed a document which is addressed to Amicus and is entitled "Enquiries as to Rights of Occupiers". In that document, Five Rivers gave a written warranty that the Property was vacant and that there was no lease or tenancy agreement in place in relation to it, and that no other company had any right to occupy the Property.

- (b) no mention was made of the Lease in response to requisitions on title. The report on title which was prepared by Amicus's solicitors records that “the borrower has told us that the borrower is in actual occupation of the whole of the Property, or will be entitled to occupy it, in either case, on an exclusive basis”;
- (c) the Loan Facility Agreement dated 21 August 2015 (“Loan Agreement”) signed by Mr Sangha on behalf of Five Rivers included a clause that Amicus must be satisfied, as a condition precedent, before the borrower may make any drawdown request and before the obligation of Amicus arises under the agreement [to advance the Loan] that the borrower (Five Rivers) represented that it has full vacant possession to the Property or it is subject to such leases and/or tenancies as Amicus may approve. Further, that the borrower will not grant, vary or accept the surrender of any lease, tenancy or right of occupation over the Property or agree to do any of the foregoing without Amicus’s prior written consent, which consent may be withheld in the lender's absolute discretion.
- (d) The Debenture granted by Five Rivers in favour of Amicus on 21st August 2015 contains certain representations and warranties, including that there was no overriding interest, and nothing had arisen, was being created or subsisting, which would create an overriding interest in the Property.
9. In his judgment in the Lease Proceedings, which was handed down on 30th November 2018, His Honour Judge Pearce preferred the evidence of Mr McCarrell and found that the Lease was not referred to by Mr Sangha at the Meeting.
10. Following the Meeting on 17 July 2015, after completion of Amicus's credit approval process, Amicus advanced the Loan of just over £1 million to Five Rivers after entering into the Loan Agreement on 21 August 2015.
11. The Loan Agreement provided that the Loan must be repaid by 20th May 2016. Five Rivers did not pay back the Loan or any part of it and Amicus appointed LPA Receivers over the Property on 30th

August 2016. Amicus says that, only following the appointment of LPA Receivers, was it informed for the first time of the Lease granted to Zara's.

12. It is said on behalf of Five Rivers that there were representations made by Mr McCarrell at the Meeting on 17th July 2015, after Mr Sangha told Mr McCarrell about the Lease, to the effect that Amicus had no difficulty with the Lease and that there has been a breach of that representation, because Amicus challenged the Lease in the Lease Proceedings and that, as a result of that, Five Rivers is entitled to rescind the Loan Agreement and Debenture and only repay to Amicus the amount of the initial advance.

### **REPRESENTATION**

13. Amicus was represented by Mr Stone; Five Rivers was represented by Mr Brown.

### **WITNESSES**

14. There were two witnesses for Amicus and one for Five Rivers.
15. For Amicus, Mr McCarrell, who attended the Meeting on 17th July 2015, he was at the time a loan underwriter employed by Amicus who took on the task of preparing a submission to Amicus's credit committee on the merits of Amicus advancing the Loan to Five Rivers. Mr McCarrell is no longer employed by Amicus, he left before Administrators were appointed to Amicus. Ms Mariya Vaslileva is Head of Amicus's redemptions department, she produces a redemption statement showing the amount required to redeem the Loan and gives evidence regarding the loss of a recording of the Meeting.
16. For Five Rivers, the only witness is Mr Sangha, he supports all aspects of Five Rivers case, in particular he gives evidence of what he says occurred at the Meeting on 17 July 2015.
17. Mr McCarrell signed a witness statement on 17th December 2020. He refers to being employed as an underwriter by Amicus. He adopts a witness statement that he made in the Lease Proceedings

18. In his witness statement in the Lease Proceedings, Mr McCarrell, deals with the receipt of the application form for the Loan; the Meeting that he had with Mr Sangha and Mr Sangha's then wife on 17th July 2015; the note that he made of the Meeting; and the underwriting report that he sent to the credit committee of Amicus on 19th July 2015. He says that, having considered his notes of the Meeting and the underwriting report that he sent to the credit committee, two days after the Meeting, he does not believe that Mr Sangha told him about or offered him a copy of the Lease. He explains that a recording of the Meeting, that he made, is not available.
19. In his witness statement of 17th December 2020 in these proceedings, Mr McCarrell deals with allegations made in Five Rivers' defence and counterclaim about the Meeting. He confirms that he noted the name Zara's in his underwriting report for the credit committee paper because it was a company associated with Mr Sangha and not for any other reason. He rejects Mr Sangha's suggestion that his reference (in error, he accepts) to Zara's holding the premises licence for the Property was intended to Zara's holding the Lease rather than the premises licence. He says that if, as Mr Sangha and Ms Basra said at the trial in the Lease Proceedings, he had been told by Mr Sangha about the Lease, during the Meeting on 17th July 2015, then he believes he would have taken a copy of the Lease and referred to it in the Underwriting report and would have referred the Lease to the valuers and solicitors who were acting for Amicus. Mr McCarrell says he had no reason to short-circuit matters by keeping quiet about the Lease, and that it is extremely unlikely that he would, as Mr Sangha asserted previously, have told Mr Sangha not to worry about the Lease, and let matters lie there.
20. Ms Vasileva, deals, as I have said with producing a redemption statement for the Loan and the loss of the recording of the Meeting, so far as she is able to do so.
21. Mr Sangha's evidence is contained principally in the defence and counterclaim that he has signed for Five Rivers. He has made a witness statement in these proceedings, but it was redacted as a result of an order of Marcus Smith J dated 28 January 2021, which removed from it certain evidence

that Mr Sangha appeared to wish to rely upon during the hearing before me, and left little behind which is not covered in Five River's defence and counterclaim.

22. Mr Sangha refers to the deaths, in 2016 and 2017, of his son, his mother and his father in quick succession. He accepts His Honour Judge Pearce's conclusion, in his judgment in the Lease Proceedings, that he was not the best of witnesses, but he put that down to the pressures that he was under at the time as a result of the deaths to which I have referred and business pressures. Mr Sangha points to the failure on the part of Amicus to produce the recording of the Meeting on 17th July 2015, which he suggests is deliberate concealment of evidence that would prove his case, that he did tell Mr McCarrell about the Lease at the Meeting, and he refers to the appointment of LPA Receivers.

## **THE ISSUES**

23. As to the issues that I need to resolve, there is an agreed list of those issues, the agreed list of issues is as follows.
- (a) at the Meeting on 17th July 2015, did Mr Sangha explain to Amicus that Five Rivers had granted the Lease to Zara's?
  - (b) did Mr McCarrell on behalf of the Amicus expressly represent to Mr Sangha that Amicus had no objection to the Lease, and Zara's occupation of the Property, pursuant to the Lease, and that the Lease did not affect the willingness of Amicus to advance the Loan?
  - (c) if those representations were made, were the representations untrue? Did Mr McCarrell and/or Amicus make the representations fraudulently or negligently? Did the representations induce Five Rivers to enter into the Loan Agreement and Debenture?
  - (d) is Five Rivers entitled to relief by reason of the alleged misrepresentations?
  - (e) is Five Rivers entitled to rescind or has it rescinded the Loan Agreement and Debenture over the Property?

(f) is Amicus entitled to possession of the Property? Should I grant a possession order?

(g) is Amicus entitled to a money judgment in respect of the sum outstanding under the Loan Agreement and, if so, in what sum?

(h) are these proceedings improperly constituted due to the LPA Receivers not being joined?

(i) is Five Rivers entitled to a declaration that its financial liability to Amicus is limited to the sum advanced, less payments already made by Five Rivers in respect of the Loan?

24. I dealt with issue (h) at the start of the trial, determining that these proceedings are properly constituted, notwithstanding that the LPA Receivers are not a party to them.

25. I am invited, in this judgment, to deal only with issues (a)-(e), leaving the remaining issues to be dealt with after counsel make further submissions, taking into account my judgment on issues (a)-(e).

26. Mr Stone asks me to deal with another issue, not included in the agreed list of issues. Mr Stone says that, in his judgment handed down on 30 November 2018, His Honour Judge Pearce, found as a fact that Mr Sangha did not mention the Lease at the Meeting between Mr Sangha and Mr McCarrell (and Ms Basra) on 17th July 2015. Mr Stone says that, as a consequence of that, Five Rivers is estopped, either by issue estoppel or because it would be an abuse of process, from asserting, as Mr Sangha does, that he did tell Mr McCarrell about the Lease at the Meeting.

27. I was addressed by both counsel on the question of whether I should deal with the question of issue estoppel/abuse of process first or determine issues (a)-(e) first (Mr Stone asks me to deal with issues (a)-(e), even if I decide issues estoppel/abuse of process in favour of Amicus).

28. Mr Stone submitted that I should determine first whether Five Rivers should be prevented from re-litigating the question of whether Mr Sangha told Mr McCarrell at the Meeting about the Lease. Mr Brown said I should deal with that, after determining issues (a)-(e).

29. I choose to deal with the question of issue estoppel and abuse of process first, as it appears to me to be the most logical order in which to deal with the issues, firstly deciding whether Five Rivers



should be allowed to raise an issue before going on to deal with the issues themselves, rather than dealing with the issues and then deciding whether Five Rivers is entitled to raise one of those issues. I do, however, bear in mind that it is peculiar that the submission made by Mr Stone that Five Rivers should not be entitled to raise issues (a)-(e) should be dealt with at the end of the trial in which those issues will be dealt with in evidence, and issues (a)-(e) will be decided by me, regardless of my decision on issue estoppel/abuse of process.

### **ISSUE ESTOPPEL AND ABUSE OF PROCESS**

30. Amicus issued the Lease Proceedings against Five Rivers and Zara's, seeking declarations that the Lease, on its face dated 15th June 2015, between Five Rivers and Zara's, by which Five Rivers purported to lease the Property to Zara's, was a sham and/or was entered into after 21st August 2015, the date of the Debenture.
31. The importance of those declarations to Amicus was that it, as mortgagee, would not be bound by the Lease in the event that it was either a sham or it was created after the Debenture. His Honour Judge Pearce heard that claim over three days in October 2018, and handed down his judgment on 30th November 2018.
32. One of the features of the evidence that Amicus relied upon as demonstrating, in the Lease Proceedings, that the Lease was not genuine, or had been executed after the Debenture, was that it was not mentioned at the Meeting on 17th July 2015 between Mr McCarrell acting for Amicus and Mr Sangha and his former wife, Ms Basra. Amicus's position was supported by a witness statement made by Mr McCarrell, as it is in this case.
33. Five Rivers and Zara's in the Lease proceedings asserted that Mr Sangha had told Mr McCarrell about Zara's operating from the Property and about the Lease. His Honour Judge Pearce, in paragraph 120 of his judgment, described the two hotly contested factual issues before him as being,

firstly, when the Lease was signed, and secondly, was the Lease mentioned in the Meeting on 17th July 2015?

34. His Honour Judge Pearce considered the issue of whether the Lease was mentioned in the Meeting first, and he found that Mr Sangha had not mentioned the Lease in the Meeting. He then went on to find that the Lease was, nonetheless genuine and had been signed on 15th June 2015. In making the second of those findings, His Honour Judge Pearce placed significant weight on the evidence of Ms Sherwin, who had signed the Lease as witness to Mr Sangha's signatures as director, on behalf of Five Rivers and Zara's.
35. Mr Stone says that Five Rivers' attempt to re-litigate the question of whether or not Mr Sangha told Mr McCarrell about the Lease at the Meeting offends two legal principles, which prevent him from raising that factual issue in these proceedings, namely issue estoppel and abuse of process. I will deal with issue estoppel first.

### **Issue Estoppel**

36. As to issue estoppel, Mr Stone says:

(a) even where a cause of action is not the same in the later action as it was in the earlier one, where some issue which is necessarily common to both was decided on the earlier occasion it is binding on the parties, per Lord Sumption in **Virgin Atlantic Airways Limited v Zodiac Seats (UK) Limited [2013] UKSC 46**;

(b) in determining which facts give rise to an issue estoppel and which do not, the test is whether the issue was fundamental to the previous decision or an essential part of the legal foundation of the judgment. Matters that were collateral or incidental to that decision cannot found an estoppel (**Phipson on Evidence at paragraph 43.31**); and;

(c) the principle which underpins the requirement that the issue was necessary to determine the previous case is that it cannot be right to bind a party to a finding of fact by a court, where there was

no need for that party to produce evidence to the contrary in that court (per Aldous LJ in **Kirin-Amgen Inc v Boehringer Mannheim GmbH [1997] FSR 289, 303**).

37. Mr Brown in contrast refers to the judgment of Rimer J (as he then was) in **Olympic Airlines SA (in liquidation) v ACG Acquisitions XX LLC [2014] EWCA Civ 821**, where at [53] Rimer J says:
38. "... an express judicial determination of a particular issue will not create an issue estoppel unless it was necessary and fundamental to the court's overall decision."
39. Mr Brown says that His Honour Judge Pearce had to decide in the Lease Proceedings when the Lease was signed and whether it was a sham. The question of whether the Lease was mentioned by Mr Sangha to Mr McCarrell at the Meeting on 17th July 2015 did not determine the matter one way or the other. It was the evidence of Ms Sherwin that His Honour Judge Pearce relied on in concluding both that the Lease was not a sham and that it was executed before the Debenture.
40. Mr Stone accepts that on a strict analysis, the question of whether Mr McCarrell was told about the Lease by Mr Sangha at the Meeting was not an essential ingredient to the judge determining whether the Lease was a sham, or whether it had been executed before the Debenture. But he says it was not a collateral or incidental to that decision because:
- (a) it was a key pleading block in Five Rivers' and Zara's case that the Lease was not a sham and that it had been executed on 15th June 2015, Five Rivers and Zara's case being that the Lease must have been signed before 17th July 2015 because Mr Sangha drew it to Mr McCarrell's attention at the Meeting on 17th July;
  - (b) His Honour Judge Pearce noted that the issue of whether Mr Sangha told Mr McCarrell about the Lease at the Meeting on 17th July was one of the two issues of fact he had to determine, and that the "factual finding as to the circumstances and timing of the signing of the Lease may be significantly influenced by a finding as to what was said at the Meeting."

- (c) His Honour Judge Pearce said that the determination of what happened at the Meeting would provide assistance in deciding the issue of when the Lease was signed, and he decided to determine the issue of what happened at the Meeting first;
- (d) The court should not adopt, says Mr Stone, a dogmatic, formulaic or mechanical approach to the question of whether an issue was sufficiently necessary or fundamental to found an issue estoppel. He refers to **Tinkler v Ferguson & Ors [2021] EWCA Civ 18** per Peter Jackson LJ;
- (e) Five Rivers and His Honour Judge Pearce regarded what happened at the Meeting on 17th July as an essential part of what needed to be decided in order to determine the validity of its defence; and
- (f) Five Rivers not only needed to lead evidence of what happened at the Meeting but it elected to do so as part of its defence. Therefore, having regard to Aldous LJ's test in **Kirin-Amgen Inc**, Five Rivers is bound by His Honour Judge Pearce's factual determination that Mr Sangha did not tell Mr McCarrell about the Lease at the Meeting on 17th July 2015.

### **Issue Estoppel-Discussion and Decision**

41. I find that issue estoppel is confined to determination of issues which are necessary to the decision, and which are fundamental to it, and without which it cannot stand.
42. I accept that Aldous LJ suggested in **Kirin-Amgen** that the justification which underlies the way in which issue estoppel is confined is that a party should not be bound to a finding of fact where that party had no need to produce evidence to contradict that fact, but that does not mean that the rule somehow becomes the justification for the rule. What is clear from the judgment of Aldous LJ in **Kirin-Amgen Inc** is that he confirmed that the rule is that “only determinations which are necessary to the decision which are fundamental to it, and without which it cannot stand, will found issue estoppel. Other determinations without which it would still be possible for the decision to stand, however definite be the language in which they are expressed, cannot support an issue estoppel.” In

saying that, Aldous LJ was quoting with approval from **Spencer, Bower and Turner, second edition, page 179.**

43. Ask to Mr Stone's assertion that Peter Jackson LJ suggested in **Tinkler v Ferguson** that the court should not adopt a formulaic or mechanical approach, in **Tinkler V Ferguson**, Peter Jackson LJ was concerned with abuse of process. As will become apparent, when I deal with abuse of process, abuse of process is a much wider and less closely defined than issue estoppel and I do not accept that Peter Jackson LJ's guidance, that the court should not adopt a formulaic or mechanical approach to abuse of process can be read across to issue estoppel.
44. In my judgment, although His Honour Judge Pearce considered that: determining whether or not Mr Sangha told Mr McCarrell at the Meeting on 17th July 2015 about the Lease was of importance to the question of whether the Lease was a sham and whether it was executed before the Debenture; was one of two hotly contested factual issues that he needed to determine; and he would determine it before he decided the issue of whether the Lease was a sham and when it was created, that is not sufficient to create an issue estoppel. This is because because deciding whether or not Mr Sangha told Mr McCarrell about the Lease at the Meeting on 17th July 2015, was not necessary or fundamental to HHJ Pearce's decision on the question of whether the Lease was a sham or was executed after the Debenture, nor was it part of the reasoning that led His Honour Judge Pearce to that conclusion, without which that decision could not stand. In fact, His Honour Judge Pearce found that the Lease was not a sham, and had been executed before the Debenture, in spite of finding that Mr Sangha did not mention the Lease to Mr McCarrell at the Meeting, and certainly not because of it. He accepted that the Lease was not a sham and had been executed before the Debenture, because he accepted the evidence of the witness to Mr Sangha's signature to the lease (i.e. Ms Sherwin) as to when she had applied her signature to the Lease. Therefore, I find that Amicus cannot rely upon issue estoppel.

## **Abuse of Process**

45. Mr Stone says that the authorities and principles derived from them on abuse of process were summarised in the judgment of Peter Jackson LJ in **Tinkler v Ferguson** at [26-35]. And they are as follows:

- (a) the court has an inherent power to prevent misuse of its procedures where the process would be manifestly unfair to a party to litigation, or would otherwise bring the administration of justice into disrepute among right-thinking people;
- (b) in cases where there is no res judicata (cause of action in estoppel) or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: firstly, the private interest of a party not to be vexed twice for the same reason, and the public interest of the State in not having issues repeatedly litigated;
- (c) to determine whether proceedings are abusive, the court must engaged in a close merits-based analysis of the facts, taking into account the public and private interests involved, and will focus on the crucial question, whether in all the circumstances, a party is abusing or misusing the court's process.
- (d) It may be an abuse of process where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issue should be re-litigated;
- (e) it will be a rare case where the re-litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process;
- (f) there is no hard-and-fast rule to determine whether abuse exists or not. The court is required to weigh the overall balance of justice, bearing in mind the overriding objective. However, where there is abuse, the court has a duty and not a discretion to prevent it; and
- (g) in summary, the power to strike out for abuse of process is a flexible power unconfined by narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in

the proper administration of justice, and can be deployed for either or both purposes. It is a serious thing to strike out a claim, and the power must be used with care, with a view to achieving substantial justice in a case where the court considers that its processes are being misused. It will be a rare case where the re-litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act.

46. Mr Brown says that: (a) Five Rivers' case, that Mr Sangha did tell Mr McCarrell about the Lease at the Meeting on 17th July 2015, is not abusive as a collateral attack on His Honour Judge Pearce's finding in the Lease Proceedings, and he refers to **Secretary of State for Trade and Industry v Bairstow [2003] EWCA Civ 324** at [38], where it was said a collateral attack on an earlier decision of the court may be, but is not necessarily, an abuse of process of the court; and (b) as Five Rivers was successful in the Lease Proceedings, it could not have appealed against His Honour Judge Pearce's finding regarding the Meeting, as appeals only lie against conclusions and not factual issues decided. Mr Brown refers to **Iraqi Civilians v Ministry of Defence [2018] EWHC 690 (QB)** per Leggatt J, as he then was.
47. Mr Stone says Amicus's case, that it is an abuse of process for Five Rivers to raise again the issue of whether Mr Sangha told Mr McCarrell at the Meeting about the Lease because:
- (a) if abuse can be found, per Peter Jackson LJ, where the parties are not the same in subsequent proceedings, then it can more easily be found where the parties are the same, as here;
  - (b) it is unfair for Amicus to be vexed twice on an issue that has already been determined by the court in its favour;
  - (c) allowing Five Rivers to raise the issue again in these proceedings runs counter to the public interest in the finality of litigation and brings the administration of justice into disrepute. Mr Stone says that Peter Jackson LJ at [73] of his judgment in **Tinkler v Ferguson**, a case where the parties were not identical, made the observation that a disinterested bystander who attended the hearing in

the first set of proceedings and then hearing in the second set of proceedings, "would surely wonder what public interest was being served by the re-litigation. In saying this, I accept that re-litigation of an issue is not without more an abuse. What makes it so in this case is that one party is making the same essential complaint about the same individuals."; and

(d) here the same witnesses (other than Ms Basra, who does not appear) are giving evidence at each of the trials about the same issue, and the disclosure of documents is the same.

48. Mr Brown's position is that it is not unfair to Amicus to have to deal with the same factual issue again, particularly in circumstances where Five Rivers sought to have the two sets of proceedings consolidated and heard together, but Amicus resisted that. There is no risk of the administration of justice being brought into disrepute, because the decision of His Honour Judge Pearce will stand whether or not a different decision is made in these proceedings on the factual question of whether Mr Sangha told Mr McCarrell at the Meeting about the Lease.

#### **Abuse of Process- Discussion and Decision**

49. In **Tinkler v Ferguson**, Mr Tinkler was an ex-CEO and substantial shareholder in Stobart Group Limited. Mr Ferguson was the chairman of that Group. There was a power struggle between them and Mr Ferguson won it, with Mr Tinkler being removed as a director and employee and Mr Ferguson being re-elected as chairman.

50. As part of that power struggle, Stobart Group, on the authority of four of its directors (including Mr Ferguson) had issued an announcement to the London Stock Exchange which contained an assertion that Mr Tinkler was trying to destabilise the Group, and set out details of Mr Tinkler's actions that led to that conclusion. Mr Tinkler issued proceedings against the four directors who had authorised the announcement, claiming it was defamatory and malicious. Stobart Group subsequently issued proceedings for declarations that the dismissal of Mr Tinkler as an employee and his removal as director were valid. Mr Tinkler counterclaimed for the reverse declarations.



51. The Stobart Group action was expedited and heard first by His Honour Judge Russen QC, who found for Stobart Group, determining ten issues, as part of which he found that Mr Tinkler had criticised the board's management to other major shareholders and encouraged them to support Mr Ferguson's removal, improperly disclosed confidential information and written to shareholders and employees inappropriately. He also found that, with one minor exception, the four directors had not breached their duties in connection with the issuing of the announcement.
52. Mr Tinkler abandoned the defamation part of his claim and proceeded on malicious falsehood only. The four directors he was suing applied to strike out the claim for malicious falsehood, on the ground that it was an abuse of process, because the issues decided by His Honour Judge Russen QC, meant that he could not succeed in that malicious falsehood claim.
53. The judge analysed the issues, and decided that His Honour Judge Russen QC's judgment on the issues he decided, left no prospect of Mr Tinkler succeeding in his claim for malicious falsehood, and the claim was struck out. On appeal, Peter Jackson LJ gave the lead judgment at the Court of Appeal and summarised the legal principles as I have already set out.
54. Peter Jackson LJ, in applying those principles, said that Mr Tinkler was essentially pursuing the same complaint in both proceedings. The fact that Mr Tinkler's proceedings had been started first did not lead to a different application of the principles. The judge should not have held it against Mr Tinkler that both actions were not heard together, and avoiding a party having a second bite of the cherry was a common circumstance in which abuse was found, but it was not the only one. The chance of inconsistent verdicts did not of itself amount to an abuse, but it was a factor amongst others. Whilst the judge had not specifically made a finding of manifest unfairness, it was clear that he had found the position to be unfair; and what, in Peter Jackson J's judgment, made it abusive was that Mr Tinkler was making essentially the same complaints about the same individuals as had already been determined by His Honour Judge Russen QC. It was in that context that Peter Jackson LJ said that an impartial bystander who had observed the Stobart Group trial and then wandering

into the Tinkler trial would have wondered what public interest was being served by the repetition of evidence and issues in the two trials.

55. Abuse of process, unlike issue estoppel, is not subject, to strict or formulaic rules, and the question of whether there is an abuse of process is fact sensitive and based on public and private interests, per Peter Jackson LJ in **Tinkler v Ferguson**
56. Had Amicus applied promptly in these proceedings, then, in my judgment, it would have been right to find that Five Rivers were abusing the process of the court by seeking to re-litigate the issue of whether Mr Sangha told Mr McCarrell about the Lease at the Meeting. I come to that conclusion for the following reasons:
- (a) The factual issue which His Honour Judge Pearce determined is exactly the same factual issue as was a central factual dispute in the Lease Proceedings before His Honour Judge Pearce, and is the central dispute in these proceedings: i.e. did Mr Sangha tell Mr McCarrell about the Lease at the Meeting? The parties are the same; the witnesses, apart from Ms Basra, who does not appear in these proceedings are the same; the documents are the same. Five Rivers and its sole director and shareholder, Mr Sangha, are attempting to have a second bite of the cherry on the issue of whether or not Mr Sangha told Mr McCarrell at the Meeting about the Lease, even if the cause of action is different;
  - (b) there is a danger of irreconcilable judgments on the issue if I find that Mr Sangha did tell Mr McCarrell about the Lease at the Meeting, even if it would not undermine the result in the Lease Proceedings, because His Honour Judge Pearce found that the Lease was genuine, and it had been executed before the Debenture in spite of, and not because of, his factual findings about the Meeting;
  - (c) in **Tinkler v Ferguson**, Peter Jackson LJ did not regard the fact, in those proceedings, that the Tinkler proceedings -- which it was sought to strike out -- started before the Stobard Group proceedings in which the first decision was made, to be a relevant factor. He also found that the

first instance judge was wrong to hold against Mr Tinkler the fact that the two proceedings were not heard at the same time; but there remained, he thought, sufficient reasons for striking out the Mr Tinkler's claim. Mr Brown's point that Five Rivers sought to have the two sets of proceedings heard together, and that Amicus successfully resisted that, does not seem to me, without more, to be a material factor against finding that there is an abuse of process in re-litigating the issue;

- (d) on its face, Mr Brown's point that Five Rivers could not appeal His Honour Judge Pearce's decision on the factual issue, because the trial went in favour of Five Rivers and Zara's, appears to be a powerful one. Why should Five Rivers be bound by a decision on an issue which it could not have challenged even if it wanted to? The guidance which Peter Jackson LJ gave in **Tinkler v Ferguson**, however, is that abuse of process is fact sensitive and the court must engage in examining the facts closely. To my mind, that means that I can and should ask the question as to whether Five Rivers realistically could have challenged His Honour Judge Pearce's finding, had that course been open to them. I do not consider that any such appeal (if available to Five Rivers) would have stood any real prospect of success, given that His Honour Judge Pearce's judgment was based on his findings as to the reliability of the evidence of Mr Sangha and Ms Basra against that of Mr McCarrell, against the background of the available documents which are the same documents as have been available to me. He rightly directed himself as to the fallibility of human memory, and concluded that Mr McCarrell's evidence and the various documents, which were before him and are before me, were compelling. In my judgment, Five Rivers therefore stood no realistic chance of overturning the factual finding, even if it was open to them to appeal it; and
- (e) the observations of Peter Jackson LJ in **Tinkler v Ferguson** as to an impartial bystander who observed the issue being tried on two occasions wondering what public interest was being served, would, on the face of it, apply in this case.

57. Having made those observations as to what I consider the position would have been, if this application had been made before trial (or at least a reasonable period before trial) I now turn to consider what the position is in this case, because Amicus is seeking to make its application after the trial.
58. When, at the pre-trial review, I observed that if I determined Amicus's application to strike out Five Rivers' Defence on the ground of issue estoppel/abuse of process, at the start of the trial, then, on the face of it the trial would not proceed, Mr Stone said he would ask me to decide the questions of issue estoppel/abuse of process at the end of the trial, after hearing all the evidence and to decide the case on its merits on the evidence presented to me at trial in any event.
59. This means that I am now in the position where the trial has taken place, and much of the abuse of process, in my judgment, that flows from redetermining an issue which was determined by His Honour Judge Pearce, has already occurred.
60. As to the private interests of Amicus in not being vexed on two occasions, I think Mr Stone fairly accepted that, as that has already happened, that was perhaps not a strong point in favour of Amicus.
61. As to the public interest of not having the court's resources wasted in deciding the same issue twice, the trial has already taken place, I will decide the issue anyway and the court's resources have therefore been spent.
62. As to the risk of irreconcilable judgments, that risk has been run, because I am to decide in any event, on the merits of the evidence heard by me, whether or not Mr Sangha told Mr McCarrell about the Lease at the Meeting.
63. The only point that it appears to me to remain is that Five Rivers is being allowed a second bite of the cherry; but that, in the context where all the time and expense of the trial has already been incurred, does not seem to me to be a sufficient reason to conclude that it would be an abuse of process to allow it that second bite of the cherry, where Amicus only wants this application to be determined after the trial has concluded, no doubt because it wants two bites of the cherry itself, one

to have a finding that it is an abuse of process, and second to have me determine the factual issue in any event. The impartial bystander will still have seen the same issue tried in both sets of proceedings.

64. For all of those reasons, because of the point in time at which this application is made, it seems to me that Amicus has not made out its case that it is an abuse of process for the index factual issue to be tried again.

### **THE WITNESSES AND WITNESS EVIDENCE**

65. Before I turn to deal with the outstanding agreed issues, I will say something about the three witnesses who appeared before me, my impression as to their honesty, credibility and reliability, and I also deal, where convenient now, with findings of fact based upon the answers those witnesses gave in cross-examination.

#### **Ms Vasileva**

66. Ms Vasileva, gave evidence as to the loss of the recording of the Meeting. It is she who signed the disclosure statement on 19th January 2018 in the Lease Proceedings, confirming that the recording has been lost. She was aware, she said, of instances where recordings have been lost in the past, although she described it as unusual. Her understanding was that the recording had not been saved before it was recorded over. She appeared to have that understanding from having spoken to the IT department.

67. As to the Debenture dated 21st August 2015, she was taken to that and accepted that there are clauses in the Debenture anticipating that, what Amicus would be getting, was a first charge, when in fact everyone understood it was only getting a second charge.

68. There is very little in Ms Vasileva's evidence which is of assistance to me in deciding the issues I need to decide. She was not present at the Meeting on 17th July 2015. Her evidence is only of assistance insofar as it goes to the question of why the recording of that Meeting is not available.

Nonetheless, I record that I found Ms Vasileva to be an honest and reliable witness, in relation to the matters she was able to deal with.

### **Mr McCarrell**

69. Mr McCarrell gives evidence as to the loss of the recording. His evidence is similar to that of Ms Vasileva, but in his case he accepted that he could not recall ever having requested access to a recording of one of his meetings, when he was employed by Amicus. He suggested that that was something that the redemptions team would ask for and not the underwriting team.
70. He had been concerned that the recording may not have been saved properly because it was recorded after hours on a Friday evening, and he sent an email to the IT department on 24th July 2015 to ask if the recording had been saved. He was unable to explain why he had not followed up that email, when it appears he had no reply, to ask again about the saving of the recording.
71. He likewise accepted that the Debenture wrongly anticipates Amicus having a first charge when it was understood by all, that it would have only have a second charge.
72. As to his note of the Meeting, it is only two pages long. He thought the meeting had lasted around an hour, and he said that he recorded what he was able to record during the course of the Meeting.
73. He relies for greater detail of what was said to him at the Meeting, upon the underwriting report which he submitted to Amicus's credit committee on Sunday, 19th July 2015.
74. As to whether Mr Sangha told him about the Lease at the Meeting, he could not recall whether he had. He was reliant on his two-page note and what was said in the underwriting report. If Mr Sangha, however, had told him about the Lease, then his instinct, he said, would have been to obtain a copy of it and ensure that it went to Amicus's solicitors and valuers, because he was aware that a lease may have an important effect on the value of the property which was to be Amicus's security and that there were legal considerations also to take into account.

75. Finally, Mr McCarrell said that there would be no benefit to him in trying to press ahead with the transaction and hiding the existence of the Lease in order to do so.
76. Mr Brown took Mr McCarrell to the underwriting report dated 19th July 2015. He took him to the section which refers to Zara's, which says that Zara's holds the premises licence. Mr Brown then took Mr McCarrell to a copy of the premises licence which showed that Five Rivers and not Zara's held the premises licence.
77. Mr Brown suggested to Mr McCarrell that what he had done was to conflate the Lease which Mr Sangha had told him about at the Meeting, with the premises licence. Mr McCarrell accepted that he did not know when a copy of the premises licence had been provided to him, although it does appear amongst the papers of Amicus. He could not recall the content of the Meeting. He had to accept that it was at least possible that he could have been told about the Lease, but he reiterated that he was sure that if he had been, then he would ask for the Lease to be provided to the solicitors and valuers instructed by Amicus; and not, as Mr Sangha alleged, just told Mr Sangha not to worry about it.
78. I am satisfied that Mr McCarrell was an honest witness doing the best he could to assist the court. He fairly accepted, as he does in his witness statements, that he could not recall what was said at the Meeting, and he was reliant on his two-page note and his underwriters' report to the Amicus credit committee.

### **Mr Sangha**

79. As for Mr Sangha, I will spend more time dealing with his evidence. He accepted that the loan particulars attached to the offer letter which was sent to him said that it was a condition precedent to the advance of the loan that Five Rivers had vacant possession of the Property, or that it was only subject to a lease which Amicus had approved.

80. Mr Sangha was questioned extensively about the completion and signature by him, on 30 June 2015 of a form entitled "Enquiries as to Rights of Occupation". Mr Sangha said that the form had been completed by Steve Harris of Central Finance, and that Mr Harris had brought the form to him to sign at his flat. Steve Harris is a broker that Mr Sangha approached to find sources of finance to fund the cost of Five Rivers fitting out of the Property, this led to Five Rivers being introduced to Amicus.
81. Mr Sangha accepted that the information completed on the form was not correct. Question 1(a), which asked for details of, inter alia, any company who now or hereafter would occupy the property, is answered "vacant". Questions 1(b) to (d), have "not applicable" entered next to them, including 1(d), which asked for copies of any lease. Question 2(b) which asked whether any company had entered into an arrangement under which it might have a right to occupy, also has "not applicable" written next to it.
82. Mr Sangha claimed that he had told Mr Harris about the Lease before Mr Harris came to see him with the form. He said he asked Mr Harris why the form had been completed to say "vacant", and Mr Harris told him that it was not a problem. Mr Harris asked him, "Do you want the Loan or not?" and Mr Sangha then signed the form.
83. I then asked Mr Sangha what he understood Mr Harris to mean by the words "Do you want the loan or not?" At first, Mr Sangha did not really attempt to answer that questions; he merely referred again to having told Mr Harris about the Lease before he met him. When pressed, Mr Sangha said that Mr Harris was "chirpy" about it, by which I understood him to mean that Mr Harris was in some way making a joke about whether he wanted the Loan or not.
84. In my judgment, Mr Sangha said that Mr Harris had said "Do you want the loan or not?" in some way to excuse his conduct in signing a document that he now acknowledges he knew at the time contained incorrect information, i.e., that he did not disclose the Lease in response to questions which specifically asked about leases and occupation of the Property.



85. He then realised on the face of it that the natural interpretation of what he had said Mr Harris had told him was, that if he disclosed the existence of the Lease in the Enquiries as to Rights to Occupy form, then Amicus would not, or at least may not, advance the Loan at all, and that he therefore needed to hide the existence of the Lease from Amicus, in order to get the Loan by signing the form with information in it which denied the existence of the Lease, and that Zara's had a right to occupy under it.
86. Mr Sangha then tried to downplay the meaning of the words "Do you want the Loan or not?" by suggesting that perhaps Mr Harris was only joking.
87. I am not convinced by Mr Sangha's attempt to explain away why he signed a document containing information that he knew was incorrect. He might have said that he simply signed it without reading it, but that was not his case; once he accepted, as he did, that before he signed it he spotted that it said "vacant", which he knew to be untrue, and he asked Mr Harris why the form contained that incorrect information, he was going to have difficulty in explaining why he then signed the form containing the information, that there was no lease and no company had a right to possession of the Property, when he knew that there already existed the Lease, in favour of Zara's which had been signed by him two weeks before he signed that form.
88. Mr Sangha's attempt to shift the blame to Mr Harris then ran up against the problem that if Mr Sangha elected to blame Mr Harris by suggesting that Mr Harris had put pressure on him to sign, to therefore justify or excuse him signing, that in turn, if true, would make it obvious to Mr Sangha that, in signing the form, he was representing to Amicus that there was no lease, and the reason why he was doing that was because Mr Harris had indicated to him that Five Rivers at least might not get the Loan if he disclosed the Lease to Amicus.
89. Mr Sangha's credibility did not improve when he sought to downplay the importance of the information contained in the Enquiries as to Rights of Occupation form by saying that he intended to tell Amicus about the Lease anyway, to correct the position in due course.

90. The Enquiries as to Rights of Occupation form was signed by Mr Sangha on 30th June 2015, and he did not meet Mr McCarrell until 17th July 2015. He accepted that no meeting had been arranged by 30th June 2015.
91. To explain why it was that he knew that he would have a subsequent opportunity to correct the position with Amicus, Mr Sangha said that Mr Harris had told him that he would have a meeting in person or by Skype with somebody from Amicus before the Loan was advanced; Mr Sangha said that, in order to demonstrate that he knew there would be an opportunity to correct the position, when he signed the form on 30th June 2015 containing the incorrect misrepresentations about there being no lease and no one having a right to occupy the Property.
92. That evidence makes no sense: why sign a form representing to Amicus that no one other than Five Rivers had a right of occupation, and that there was no lease, with the intention of subsequently telling somebody at Amicus that in fact there was the Lease in favour of Zara's, and, pursuant to the Lease, Zara's had a right to occupy the Property? How would that achieve anything?
93. If Mr Sangha thought that Amicus were prepared to consider lending with the Lease in place, then why sign a form saying that there was no lease and then tell Amicus later that there was one? That would be likely to cause Amicus to doubt the bona fides of its prospective borrower and put back any steps towards making the Loan.
94. If, on the other hand, as perhaps he was encouraged by Mr Harris to think, Mr Sangha thought that Amicus would not be prepared to consider lending with a lease in place, then why waste everybody's time and sign a false representation, in the expectation, if Mr Harris is right that Amicus would refuse to lend when it knew about the Lease, which Mr Sangha intended to tell Amicus about later?
95. Finally, when Mr Sangha was asked why he had signed a misleading document, Mr Sangha said that it was Mr Harris who was seeking to mislead Amicus and Mr Harris who was being dishonest and not him. That is an untenable position for Mr Sangha to take. He signed the form, he cannot

maintain that it was somehow Mr Harris who was misleading Amicus or Mr Harris who was being dishonest and not him.

96. On the basis of His Honour Judge Pearce's finding that the Lease was created on 15th June 2015, I find that Mr Sangha deliberately misrepresented the position to Amicus by signing the Enquiries as to Rights of Occupation form dated 30th June 2015 which represents to Amicus that Five Rivers had not granted any lease or right of occupation of the Property to any other party and Five Rivers was the sole occupant. I find that when he signed it, he did not intend to tell Amicus about the existence of the Lease at some later date before the Loan was completed, in order to correct the misrepresentations that he was making by signing the Enquiries as to Rights of Occupation form.
97. As to why Ms Basra was not appearing as a witness, Mr Sangha explained that, following the unfortunate suicide of their son in June 2016, Ms Basra had difficulties with mental health, and that therefore he had not asked her to provide evidence on this occasion.
98. Mr Sangha accepted, after being asked the question several times, that he did not tell Mr McCarrell that if Amicus did not agree to advance the Loan, then that was a deal-breaker so far as Five Rivers was concerned, and it would not proceed with the Loan.
99. As to the Meeting with Mr McCarrell on 17th July 2015 Mr Sangha:
- (a) said that he had told Mr McCarrell about the Lease and he had held the Lease up in the air to offer it to Mr McCarrell, but that Mr McCarrell had told him not to worry about it and he was not interested in taking a copy of the Lease; and
  - (b) was then keen to point out that there were two leases, the Lease and a fixtures and fittings lease, both in favour of Zara's, and he said he offered both of them to Mr McCarrell but he did not take them.
100. Mr Stone then took Mr Sangha to three documents created after the Meeting on 17th July, which he said demonstrated that Amicus did not know about the Lease: a draft letter dated 19th July 2015 to "Oakes" asking them to carry out a review of Amicus's proposed security and saying the Property

was untenanted, which was not sent but which was drafted by Mr McCarrell; an internal Amicus email of 21st July 2015 from Mr Weaver to Mr McCarrell, which talks about the approach of the valuer of valuing the Property as if it were tenanted, and querying why that approach was appropriate when it did not have a tenant; and a report on title from Amicus's solicitors, Brightstone, which said that the borrower has told us that the borrower has exclusive occupation.

101. As to the draft letter to Oakes, and the e mail from Mr Weaver, Mr Sangha suggested that Mr McCarrell had simply made a mistake in not recalling what Mr Sangha had told him on 17th July about the Lease.
102. As to the report on title, Mr Sangha asserting that Five Rivers' solicitor, Mr Mann, had been stupid in not telling Brightstone about the Lease when Mr Mann, had drafted it. He said he had told Mr Mann about the Lease being executed on 15th June 2015.
103. Mr Sangha then said that he had waived privilege in relation to Five Rivers' communications with Mr Mann. That ultimately led to Mr Brown saying that he wished to take instructions about that matter from Mr Sangha, and to Mr Brown confirming after lunch on the second day, that privilege in relation to Mann & Co's correspondence file relating to the Five Rivers' loan from Amicus had not been waived and had been asserted in its disclosure list.
104. As to the loss of the recording, Mr Sangha asserted in cross-examination that he believed that it had deliberately not been produced by Amicus and that, if it had been, it would have proved what he was saying about the Meeting.
105. My conclusion, having considered all of that, as to the honesty and reliable of Mr Sangha as a witness, regrettably is that he was neither honest nor reliable. In my judgment, he too frequently gave the answer that he thought would best benefit his case, whether or not it was true, only to backtrack on that answer when it appeared not to be the best answer to suit his case. The answers that he gave when questioned about the Enquiries as to Rights to Occupy form, to which I have referred, are good examples of that.

106. At other times, rather than answer the question which he was asked, he would often use the occasion as an opportunity to make points that he wished to make; for example, about the loss of the recording by Amicus and why that had occurred.

**ISSUE 1- DID MR SANGHA TELL MR McCARRELL ABOUT THE LEASE AT THE MEETING?**

107. Having made those points about witnesses, I turn to the first issue, which is whether or not Mr Sangha told Mr McCarrell about the Lease at the Meeting on 15th July 2017. The issue is put in that way, because Mr Brown, on behalf of Five Rivers, accepted that it was Five Rivers' case that the Lease was disclosed to Amicus only at the Meeting on 17th July 2015 between Mr Sangha, Ms Basra and Mr McCarrell at Amicus's offices in London, and it was at the Meeting that Mr Sangha was told by Mr McCarrell that Amicus had no objection to the Lease. The focus, therefore, for the purpose of deciding whether Amicus was told about the Lease is entirely upon the Meeting of 17th July 2015. If Amicus was not told at the Meeting about the Lease, then Five Rivers' claim necessarily fails.

108. In considering that issue, I am reminded by Mr Stone of what Leggatt J, as he then was, said in **Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm)** about the fallibility of human memory and his approach to deciding, in cases of commercial contracts, what was said at meetings. At [15-21] Leggatt J sets out a number of reasons why the recollections of witnesses are unreliable evidence of what was said at meetings. At [22], he says as follows: "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose -- though its utility is often disproportionate to its length. But its value lies

largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

109. I intend to adopt that approach, and I will comment upon the particular application of it to this case in due course. Adopting broadly that approach, I have no hesitation in concluding that Mr Sangha did not tell Mr McCarrell about the Lease at the Meeting, on 17th July 2015. I will now explain why I have come to that conclusion.

110. I start with the factual finding that I have already made, namely that, when Mr Sangha signed the Enquiries as to Rights of Occupation form on 30th June 2015, he deliberately misrepresenting to Amicus that no one other than Five Rivers had a right to occupy the Property and that there was no lease in force in relation to the Property (when the Lease had in fact been executed by him two weeks before). I have also found that Mr Sangha did not, contrary to what he said in cross-examination, intend to make good that representation by telling Amicus about the existence of the Lease at a later date, before the Loan was completed.

111. That finding makes it very unlikely, unless Mr Sangha for some reason had a change of heart, that Mr Sangha would tell Mr McCarrell about the existence of the Lease 17 days later on 17th July 2015, when he met with Mr McCarrell.

112. The evidence that Mr Sangha gave regarding, in particular, why he signed the Enquiries as to Rights of Occupation form on 30th June 2015, and his attempt to pass the blame to Mr Harris for the misrepresentations contained in that form, have led me to conclude that Mr Sangha did not give honest evidence to the court, and was an unreliable witness. I consider the evidence given by Mr

Sangha as to what he told Mr McCarrell at the Meeting on 17th July, having regard to those findings of him not being an honest or reliable witness.

113. If I had found that Mr Sangha gave honest and on the face of it reliable evidence generally, any honest recollection he had of the Meeting would be subject to the fallibility of his memory as referred to by Leggatt J in **Gestmin**, the fact that I have found that he was not an honest and reliable witness makes his evidence of what occurred at the Meeting even more unreliable.
114. In contrast, I found Mr McCarrell to be an honest witness who fairly accepted that he could not recall what was said at the Meeting, and who relied on his notes of the meeting and his underwriting report dated 19th July 2015 as setting out the material matters which Mr Sangha told him at the Meeting. There is no contemporaneous or near contemporaneous document relied upon by Mr Sangha. Mr McCarrell's documents are therefore the only contemporaneous documents, which record, or touch upon what was said at the Meeting.
115. Mr McCarrell's stated practice of always referring leases to valuers and solicitors instructed by Amicus, because he understood that leases could have a significant effect on the value of Amicus's security, and he understood that the existence of such leases could affect the legal position, makes perfect sense as a working practice for a banker experienced in preparing submissions to a credit committee to consider sanctioning a loan. I accept as a fact that it was Mr McCarrell's working practice to refer a lease, if he came across one, to valuers and solicitors instructed on the prospective loan on behalf of Amicus; and, as he said, that he would normally expect the borrower to be supplying that lease to the valuers or solicitors direct.
116. Acting, as Mr Sangha suggests Mr McCarrell acted in response to being told about the existence of the Lease, by simply telling Mr Sangha not to worry about it, and by not requesting a copy of it, would be wholly contrary to what I accept was Mr McCarrell's working practice when dealing with leases of properties over which Amicus was to take security.

117. Finally, in relation generally to the reliability and credibility of Mr McCarrell's evidence, Mr Brown sought to suggest that Mr McCarrell had some sort of interest in seeing that the Loan transaction was completed, or completed quickly, and therefore an interest in not raising issues about the Lease that might derail that process. It was Mr McCarrell's clear evidence that there was no incentive for him to take risks or cut corners by not dealing with any lease that he became aware of, in accordance with what I have accepted was his practice, and I accept that evidence.
118. Mr McCarrell's evidence as to his usual practice in dealing with leases, and the lack of incentive for him to cut corners by not following that practice, is evidence of weight in support of the conclusion that Mr McCarrell was not told about the Lease at the Meeting.
119. The only contemporaneous document as to what happened during the course of that meeting is Mr McCarrell's two-page note. This makes no mention of any lease. It is clear from Mr McCarrell's evidence, which I accept, that he was aware that if there was a lease on the Property it was an important factor, and therefore would be a factor that I would expect to be mentioned in his note. It is unlikely that he would have failed to include it in his note, if it was mentioned.
120. The underwriting report completed by Mr McCarrell two days later on Sunday, 19th July also does not mention any lease. Mr Brown suggested that the reference in the underwriting report to Zara's holding the premises licence was in some way Mr McCarrell mistakenly confusing the Lease he was told about by Mr Sangha, for the premises licence, particularly as the premises licence was in fact in the name of Five Rivers. I do not find that to be likely, because, whilst Mr McCarrell fairly accepted that it was possible that he had made that mistake, in doing so he was no more than acknowledging that he had no recollection of what transpired at the Meeting. As Mr Stone points out, the reference to Zara's is in the section of the underwriting report that deals with other companies of with Mr Sangha is as a director or shareholder. If Mr McCarrell had really been intending to refer to a lease, I would expect it to be in the section of the report dealing with key



information about the Property, as the existence of a Lease would be key information about the Property.

121. As with Mr McCarrell's two-page note, the underwriting report does not mention the Lease. Mr McCarrell knew the importance of the existence of leases to Amicus's lending decision. It is very unlikely that if Mr Sangha told Mr McCarrell at the Meeting, that there was a lease that Mr McCarrell would fail to mention it in the report to Amicus's credit committee completed two days later.

122. There are then three other documents created after 17th July 2015 which mention that there is no lease on the Property:

- (a) a draft letter prepared by Mr McCarrell to Oakes dated 19th July 2015, the same day as the underwriter's report, although it appears that this was not sent. Mr McCarrell explained that Oakes was used by Amicus to sense-check valuations they had received from valuers, and it appears that he had an intention to instruct Oakes, which he did not go through with. The draft letter clearly says there are no tenancies over the Property;
- (b) an email of 21st July 2015 from Mr Weaver (who, it appears, was part of the credit-sanctioning function for Amicus) to Mr McCarrell, in which Mr Weaver queries two aspects of the intended loan: firstly, it was a second charge over a commercial property; and, secondly, that if it was tenanted, he understood that a valuation could be based on actual rent, but he did not feel that it was right to be lending against an assumed rent roll where there was no tenant, and a fair amount of money would be spent before a tenant could be obtained. There is no email back from Mr McCarrell, or any suggestion of it, to Mr Weaver saying that in fact there was a lease, which I would expect to be his response to that email from Mr Weaver, if Mr McCarrell knew that the Lease existed; and
- (c) the report on title, prepared by Brightstone, Amicus's solicitors, which says that: "The borrower has told us that it has exclusive occupation of the property." It is fair to assume that that report

on title was based on the Enquiries as to Rights of Occupiers form, to which I have already referred, which was sent by Mann & Co to Brightstone, Amicus's solicitors, on 28th July 2015, as appears from a Mann & Co letter of that date.

123. Mr Sangha's suggestion that Mr McCarrell had simply forgotten what he told him about the Lease, at the Meeting, when preparing the draft letter to Oakes, and presumably when receiving and not responding to the e mail from Mr Weaver, seems highly unlikely.

124. As for Mann & Co, Mr Sangha said that Mr Mann had been stupid in representing to Amicus's solicitors that there was no lease when he had drafted the Lease himself on the instructions of Mr Sangha. Mr Sangha said in cross-examination that he had waived privilege in respect of Mann & Co's files, but, after Mr Brown took instructions, privilege was maintained and confirmed to have been always maintained.

125. What has been disclosed from the files of Mann & Co is correspondence sending out to Mr Sangha a draft lease between Five Rivers and Zara's, which Mr Sangha says -- and it appears His Honour Judge Pearce accepted -- is the Lease which was executed on 15th June 2015.

126. Mr Sangha has not, however, produced any document showing that he told Mr Mann that the Lease had been executed; nor has he chosen to waive privilege in Mann & Co's files relating to the Loan from Amicus. The letter of 28th July 2015 from Mann & Co to Brightstone sending the Enquiries as to Rights of Occupiers form clearly represents to Brightstone that Five Rivers was the sole occupant of the Property, and there was no lease in favour of any party.

127. To summarise Mr Sangha's position on the documents that are inconsistent with his having told Mr McCarrell on 17th July 2015 about the Lease is:

- (a) Mr McCarrell's two-page note of the Meeting is incomplete and should have referred to the Lease;
- (b) The underwriting report mistakenly referred to Zara's as holding the premises licence but should have referred to Zara's having the benefit of the Lease instead;

- (c) in writing the draft letter to Oakes dated 19th July, two days after the Meeting (at the same time as he completed the Underwriting report) referring to no tenancies, Mr McCarrell had forgotten what Mr Sangha had told him about the Lease;
- (d) Mr Weaver's understanding that there was no tenancy as set out in his email of 21 July 2015 was erroneous, and if Mr McCarrell did not reply to it to confirm the existence of the Lease, then this is because he had forgotten about the Lease that Mr Sangha told him about;
- (e) the report on title, it appears, is based on the Enquiries as to Rights of Occupiers form signed by Mr Sangha, sent by Mr Mann to Amicus's solicitors after the Meeting, and this referred to the borrower confirming that it had exclusive occupation. Mr Sangha says that Mr Mann was being stupid in representing that Five Rivers had exclusive occupation of the Property, by sending the form signed by Mr Sangha to Amicus's solicitors, when he knew about the existence of the Lease.

128. That series of errors by Mr McCarrell and Five Rivers' own solicitors about the existence of the Lease, which, according to Mr Sangha, they both knew existed, seems highly improbable.

129. Mr Brown relied on the following as supporting Mr Sangha's case that he had told Mr McCarrell at the Meeting about the Lease: (a) the Debenture refers to Amicus having a first charge but everyone knew that Amicus was to have a second charge, indicating that Amicus's documents are unreliable; (b) the failure of Amicus to produce the recording of the Meeting, should give rise to a strong inference that, had it been produced it, it would have supported Five Rivers' case; and (c) Mr McCarrell fairly accepted that he could not recall whether he had been told about the Lease at the Meeting, against that, Mr Sangha has a clear recollection that he did tell Mr McCarrell about the Lease, so Mr Sangha's evidence should be preferred.

130. As to the Debenture, it is true that this is drafted on the basis that Amicus is to have a first charge on the Property, and the borrower (Five Rivers) gives covenants to that effect. Mr Brown suggests that that means that Amicus's documents cannot be relied upon. But Mr McCarrell would have

nothing to do with the drafting of the Debenture, that is a standard form document; and it appears more likely that the mistake was in using a debenture which should only be used where Amicus is to have a first charge, rather than any fault in the document itself.

131. Mr McCarrell's note of the Meeting, underwriting report and draft letters to Oakes are not standard documents but bespoke documents. Therefore, any defect in Amicus's standard documents that there might be (of which I am not convinced) does not carry with it the implication that those bespoke documents are inaccurate.
132. Mr Sangha in his cross-examination, and Mr Brown in his closing argument, placed significant reliance on Amicus not producing a recording of the Meeting on 17th July 2015, as evidence that Mr Sangha had told Mr McCarrell about the Lease during the course of the Meeting. Mr Sangha took every opportunity to say during his cross-examination that the recording would have proved his case, and he explicitly said that he believed Amicus had hidden the recording so that Amicus could get its hands on the Property, which, he says is very valuable.
133. Mr Brown said in closing that the failure by Amicus to produce the recording creates a strong inference that Mr Sangha's case, that he told Mr McCarrell about the Lease at the Meeting, is correct, because; (a) the recording has not been produced; (b) the recording was or is under the sole control of Amicus; (c) if it was produced it would be likely to determine the issue of whether or not Mr Sangha told Mr McCarrell about the Lease; and (d) Amicus has not shown how it came to be lost. Mr Brown also said that Mr Sangha is unlikely to have asserted that he told Mr McCarrell about the Lease at the Meeting, if it were not true, because he knew that the Meeting had been recorded.
134. Mr Stone responds that it is wrong to suggest that Amicus should be presumed to be withholding the recording. The inability to recover it has been explained, so far as it reasonably can be, in the evidence of Ms Vasileva, who confirmed that the loss of the recording was an unusual but not an

exceptional circumstance. She suggested an explanation may be that the recording was not saved and was overwritten by other recordings.

135. Mr Stone also said that, once Mr Sangha became aware that the recording had been lost, because it was referred to as lost in Amicus's disclosure in January 2018, Five Rivers' position changed in the Lease Proceedings, from a general assertion that Amicus knew that Zara's was in the Property and that there was a lease, to a more specific allegation that Mr Sangha had told Mr McCarrell about the Lease during the Meeting (contained in his second witness statement, made in March 2018).

136. I pointed Mr Stone to a letter dated 23 December 2017 in which Mr Sangha's solicitors were chasing for a copy of the recording, and which asserted that Mr Sangha had mentioned the Lease at the Meeting and that was why the recording was important. Mr Stone suggested that by that time the “penny would have dropped”, in that Mr Sangha and his solicitors would have been aware, by then, that Amicus were having difficulty in producing the recording.

137. I do not consider that the failure of Amicus to produce the recording of the Meeting, does give rise to an inference that Mr Sangha's case, that he told Mr McCarrell about the Lease at the Meeting is correct. I accept that the production of the recording could well have determined the factual issue of whether Mr Sangha told Mr McCarrell at the Meeting, on 17th July 2015 about the Lease or not; however, an explanation has been offered as to why the recording is missing insofar as, in my judgment, it can be. Ms Vasileva and Mr McCarrell have both speculated as to why it may be the case that the recording is not available, but at the end of the day, if the recording has not been retained by Amicus, Amicus can only speculate as to why that is that case if its IT systems and circumstances do not allow it to say categorically why it does not have the recording (which is the substance of Ms Vasileva's evidence. If Mr McCarrell, as he believes he did, recorded the Meeting, then a failure by IT to save the recording following that Meeting for whatever reason seems a plausible explanation. I am satisfied that Amicus have offered such explanation as it can as to why the recording is missing.

138. It does not appear that in the Lease Proceedings, the defence of Five Rivers and Zara's and Mr Sangha's first witness statement were precise about when it was that Amicus was told about the Lease, and only in his second witness statement dated March 2018, did Mr Sangha say that it was during the Meeting on 17th July 2015, that Amicus had been told about the Lease.
139. However, in the letter of 23rd December 2017, that is around a month before Amicus disclosed that they could not recover the recording, in their list of documents, there was an assertion by Mr Sangha's solicitors that Amicus was told about the Lease during the Meeting, and the letter requested a copy of the recording.
140. I take Mr Stone's point that as the solicitors had for some time been pressing for the recording and it had not been produced, the penny may well have dropped, that Amicus may not be able to produce the recording of the Meeting, before that became its official position, in the disclosure statement made in January 2018.
141. In addition, given the documents that existed around the time of the loan transaction passing between solicitors, Mr Sangha was effectively only left with the option of asserting that Amicus would know about the Lease because he had told Mr McCarrell at the Meeting on 17th July 2015. There was really no other way or occasion upon which he could assert that Amicus were made aware of the Lease.
142. Given my findings that Mr Sangha gave dishonest evidence about the Enquiries as to the Rights of Occupation form, and shifted his evidence as he saw problems posed by his previous untruthful answers, I find it is entirely plausible that Mr Sangha would alight, by December 2017, upon the Meeting on 17 July 2015 as the only occasion when he could suggest that Amicus had been told about the Lease, and he hoped and had reason to hope, by that stage, that Amicus would be unable to produce the recording.

143. He really had no other choice at that stage, and whilst that would be a dishonest approach, given that I have already found that Mr Sangha gave dishonest evidence to this court, in order to try to advance Five Rivers' case, I see that as no bar to Mr Sangha pursuing that course of action.
144. As to Mr Sangha being the only person who could recollect what happened in the Meeting (out of him and Mr McCarrell) whilst I have regard to the guidance given by Mr Justice Leggatt, as he then was, in **Gestmin** about the fallibility of human memory, I am satisfied that Mr Sangha knows full well that he did not tell Mr McCarrell about the Lease at the Meeting, and he is not telling the truth about that, in order to avoid the consequences of him having concealed the existence of the Lease from Amicus.
145. I record, for what it is worth, that I make no adverse inference from the fact that Ms Basra did not provide a witness statement or give evidence in these proceedings. I take at face value what Mr Sangha said about her mental health, and not approaching her for that reason.
146. Finally, as Mr Justice Leggatt suggested in **Gestmin**, my final task is to step back and look at the plausibility of what is being asserted, and I find that Mr Sangha's case is totally implausible for the following reasons:
- (a) he signed the Enquiries as to Rights of Occupation form on 30th June 2015 representing that no one other than Five Rivers was entitled to occupy the Property, and that no lease had been granted. He did so after Mr Harris told him that if he wanted the Loan, he would have to sign the form to confirm that there was no lease, although he knew there was one;
  - (b) he knew that the form would be produced at some point to Amicus or its solicitors to tell them what rights of occupation there were in the Property. He must have known that information was of some importance to Amicus, otherwise he would not have to sign a form to confirm it, and Mr Harris would not, on his case, have told him that if he wanted the Loan, he would have to sign the form, and therefore misrepresent the position;

- (c) Mr Sangha says he intended, in the future, at a meeting with someone from Amicus, to correct the position by telling them that there was in fact the Lease in place, after Amicus had proceeded up to that point on the basis that there was no lease;
- (d) I have already said why that approach makes no sense at all from any perspective;
- (e) Mr Sangha says that, at the Meeting, he told Mr McCarrell about the Lease, and showed it to him. Mr McCarrell told him not to worry about it, or words to that effect, and was not interested in taking a copy of the Lease, although he took copies of other documents that Mr Sangha produced. This in spite of the fact (I find) that Mr McCarrell knew that the Lease could well have an important effect upon the value of the Property;
- (f) Mr McCarrell then failed to mention the Lease in his note of the Meeting, his underwriting report to Amicus's credit committee and when writing a draft letter to Oakes, because Mr Sangha suggests, he forgot about it. He also forgot it, according to Mr Sangha, when Mr Weaver sent him an email querying the basis of the valuation, Mr Weaver's query being based upon there being no tenancy;
- (g) Five Rivers's solicitor, Mr Mann, acted stupidly in forwarding the Enquiries as to the Rights of Occupation form, which Mr Sangha had signed, to Amicus's solicitors representing that there was no lease, when Mr Sangha had already told Mr Mann that the Lease which Mr Mann had forwarded to Mr Sangha in draft had been executed, although Mr Sangha, as I say, should have known, even on his case, that the form would be forwarded to Amicus at some point.

146, That is a totally implausible version of events, and for all of those reasons and the other reasons I have mentioned, I conclude that Mr Sangha did not tell Mr McCarrell at the Meeting on 15th July 2015 about the Lease. As that is the only occasion on which Five Rivers asserts that Amicus was informed of the existence of the Lease, it follows that the claim succeeds and the counterclaim fails, subject to points that may be made to me about whether a possession order should be made.