

Neutral Citation Number: [2017] EWHC 1341 (QB)

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/06/2017

**Before:**

**MRS JUSTICE MAY DBE**

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**Between:**

**Copthall Limited**

**Claimant**

**- and -**

**(1) Scorched Earth Services Ltd**

**And**

**(2) Stephen Margolis**

**Defendants**

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**Mr Philip Jones** (instructed by **Mackrell Turner Garrett**) for the **Claimant**  
**Ms Heather Rogers QC** (instructed by **Simons Muirhead and Burton LLP**) for the  
**Defendants**

Hearing dates: 14, 16 – 17, 20 - 21 March 2017

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**Judgment**

Mrs Justice May :

## **Introduction**

1. In July 2011, the Claimant (“Copthall”) invested \$4million in an independent film called Odd Thomas. The returns seemed very favourable. The film was in the process of being made in the US at the time, but filming had stalled for lack of funds.
2. Copthall alleges that the Defendants (respectively “Scorched” and “Mr Margolis”) procured its investment in Odd Thomas by deceit, alternatively that the release of Copthall’s funds from escrow by the film’s guarantor was brought about by the Defendants’ unlawful interference/procuring breach of contract between Copthall and the guarantor.

## **Parties to these proceedings**

### *Copthall and its advisors*

3. Copthall is a company incorporated in England and Wales, wholly owned by Bruce MacInnes and his wife. Mr MacInnes has for many years been involved in investment finance; he was and remains Copthall’s sole director.
4. Copthall’s legal advisors for the purposes of its investment in Odd Thomas were Sheppard Mullin Richter & Hampton LLP (“Sheppard Mullin”), US attorneys based in Los Angeles. The senior lawyer there was Robb Klein, assisted by Stacy Dollarhide. Mr MacInnes also received assistance from Perpetual Film Capital Advisors Limited (“Perpetual”), a company advising, as its name suggests, in relation to film investments.

### *Future, Scorched and Mr Margolis*

5. Scorched was a special purpose vehicle (“SPV”) incorporated by Future Films Ltd (“Future”) for the purposes of Old Thomas. Future is a company which in 2011 was active in the fields of film finance and production. The Second Defendant, Mr Margolis, was the principal director of Future, also of Scorched. Other relevant staff employed by Future at the material time were senior executives Patricia Jackson and Thomas Gardiner, together with Future’s in-house lawyer, Katrina Stagner.

## **Background - Independent film production and financing**

6. I take the following background from the long third witness statement of Mr MacInnes prepared for trial.
7. Independent films are so-called because they are produced largely or wholly separately from the major film production houses. The funding of independent films is typically from a variety of different sources, in contrast to films produced by the major film studios, which generally have recourse to their own internally available resources. The production of an independent film is generally done by an SPV incorporated for the specific purpose of making that one film.

8. Sources of funds for an independent film include bank loans secured against advanced sales (“pre-sales”) and tax credits, bridging or “gap” funding, distributor deposits and equity funding. To get funding for a \$multi-million film a producer will need to have in place a script, cast, director, detailed budget and, importantly, a reputable sales agent. A good sales agent, with a strong track record of selecting commercially attractive film projects, will be able to obtain binding commitments from distributors around the world in advance of production. Under these pre-sales contracts, distributors commit to making a guaranteed minimum payment, of which part is paid as an up-front deposit, with the balance of the committed sum payable upon delivery of the completed film. The producer will then use these commitments as security for a bank loan facility to cover the costs of making the film. In this way, the bank takes credit and payment risk on the distributors; the distributors take the commercial risk on the success (or otherwise) of the film.
9. As well as pre-sales, there are invariably opportunities for a production company to acquire tax credits, wherever in the world the independent film is being made: almost all governments want to attract film investment to secure the wider benefits to the economy that are believed to accrue from a successful film production environment. These anticipated tax credits provide a further source of security for bank loan and other financing.

*Film completion guarantee or “bond”*

10. There are standard conditions which banks apply to loan facilities before an agreement to fund will become binding. An important condition is that there should be a completion guarantee in place, underwritten by a major insurance company. These “completion bonds” typically protect not only the bank but also all other investors in the film. All independent films made in the US or UK having a bank as a lender will be “bonded”. There are companies whose business it is to arrange and provide such bonds.
11. Under the terms of the agreement for the bond the guarantor provides a guarantee to the beneficiaries that the film will be completed on budget in accordance with the agreed specifications (corresponding to specifications in the agreements with distributors). The guarantor is responsible for monitoring the production expenditure of the film and ensuring that the film is completed in accordance with the agreed budget and agreed specifications. If, for any reason, the film is abandoned and not completed then the guarantor is liable to pay the beneficiaries the cash amounts they have contributed to the production price. These amounts are agreed in advance and set out in the guarantee agreement. Likewise, if the funds put up for the film fall short, the guarantor is obliged to make good the shortfall so as to ensure that the film is made to specification.
12. As independent films frequently receive funding from a variety of different sources, it is usual for the funds which are provided to be held in escrow pending the date on which the final drafts of the agreements are all agreed. On that date, known as “financial closing” or simply “closing”, the parties’ signatures are released and the monies previously held in escrow are made available to the production account, to be paid in accordance with the budget and cashflow schedule. The guarantor’s role is critical and to this end is it generally the guarantor that acts as escrow agent. In the words of Mr MacInnes (at paragraphs 20-21 of his third witness statement):

“Each financier relies on the completion guarantor to acknowledge and confirm that funds have been advanced by each of the other financiers in accordance with the amounts set out in the completion guarantee agreement. This procedure ensures that the film should be fully funded in accordance with the contractually agreed budget and production price, before any party releases their signatures to all the agreements at financial closing...

In addition, in many cases certain expenditures may have been incurred by the production which contribute towards the approved budget before financial closing. The completion guarantor is responsible for confirming and acknowledging the cash amount which each financier represents as having contributed to the production as a “prior production advance”, and is expected to check the production accounts and wire transfer confirmations to confirm receipt of these funds, in the same way as the funds which it holds in escrow”

Amongst the many aspects of the production and financing included in the guarantee agreement is the final budgeted cost of production. This is known as the “strike price”. There will be no bond issued and thus no financial closing until the guarantor is satisfied that funding for the film is sufficient to meet the strike price.

#### **Future/Scorched involvement with Odd Thomas**

13. In 2010 Mr Margolis was approached by a producer with whom he had previously had some contact, Howard Kaplan. Mr Kaplan had formerly worked at a well-known independent film production company, Morgan Creek, but in 2010 was working as a producer on his own account. Mr Kaplan had obtained the rights to a novel called “Odd Thomas” written by Dean Koontz, a popular US author. Mr Kaplan sought Future’s involvement in the production; Mr Margolis was interested as the film had attracted interest from a leading Hollywood director and other well-known Hollywood figures.
14. Mr Kaplan’s production company, Fusion Films Inc (“Fusion”) had incorporated an SPV for the purposes of production, Two Out of Ten Productions Inc (“TOOT”).
15. Mr Margolis’ evidence was that Future’s involvement was organised through a structured deal relating to the provision of production services, of a type which was commonly used at that time. Scorched (Future’s SPV) contracted with Fusion to provide production services to the film. Scorched’s obligation to provide the production services was sub-contracted through a layer of further agreements on to another Future company, Stripe Light Services Ltd (“Stripe Light”). Stripe Light contracted with TOOT via a set of further agreements. These connected agreements between the Future companies and Fusion/TOOT are considered in more detail later in this judgment.
16. Future/Scorched provided funds to the production of Odd Thomas through this structure in three tranches in February, March and April 2011, some months before full financing was in place for the film and before the completion bond had been

issued. Future's investment monies were accordingly, as Mr Margolis pointed out, at greater risk than later investments made at the time of, and contingent upon, the issue of the completion bond.

17. Production of Odd Thomas started thereafter in May 2011 but by mid/end-June filming had stalled pending the conclusion of the full financing agreements for its completion. There was accordingly some urgency to achieve financial closing, so that filming could re-start.

#### **Copthall's investment in the production of Odd Thomas**

18. In June 2011 Mr MacInnes was approached by a business associate and friend, Ian Hutchinson, who informed him of an investment opportunity in connection with Odd Thomas. Mr Hutchinson knew of that investment opportunity through Perpetual, which had been approached by the US producer, Mr Kaplan, to seek further funding. Mr Hutchinson's company, Silver Reel Partners AG, had initially made an investment proposal but the producer had rejected it.
19. By the time Mr MacInnes was considering the investment opportunity for Copthall in June 2011, the proposed financing package for the provision of funding to Odd Thomas included a bank facility with City National Bank ("CNB") of \$12million. As security for this facility CNB had a stand-alone agreement with the producer entitling CNB to first call on the proceeds of pre-sales and tax credits totalling some \$16million. At that stage the film had not been pre-sold to distributors in the US or in various European territories including France and Germany ("the unsold territories").
20. Copthall was initially approached for a \$1.5million investment however Mr MacInnes believed the terms, which included a 15% premium/return in 3 months, to be sufficiently attractive to increase Copthall's offering to \$4million. Security for the investment appeared good: there seemed to be \$4million "headroom" remaining in the \$16million CNB security together with a first charge for Copthall over receipts from distributors in the unsold territories.
21. The completion bond for Odd Thomas was to be provided by International Film Guarantors Inc ("IFG") underwritten by Fireman's Fund Insurance Company (the two entities are collectively referred to in this judgment as IFG). Negotiations to agree the final form of all the financing, completion guarantee and other agreements continued through June and into July 2011. Financial closing for Odd Thomas occurred late on 6<sup>th</sup> July 2011/early on 7<sup>th</sup> July 2011 (depending upon which international time-zone the parties were in).

#### **The Financing agreements for Odd Thomas**

22. There was a multiplicity of connected agreements drawn up between the various parties for the financing and production of Odd Thomas, of which five are particularly relevant to the issues arising in this case:
  - (i) A Loan Agreement between Copthall and TOOT by which Copthall agreed to advance \$4million to the production. The loan was to be repaid within 90 days of the advance together with a premium of US\$600,000 if repaid within 30 days,

US\$700,000 if repaid within 60-90 days and US\$900,000 if repaid after 90 days. Copthall was to have a charge over presales and tax credits immediately behind the bank, and the value of this security after deduction of the bank loan would be no less than US\$4million. Copthall also obtained a charge over all the unsold rights to the film, in territories which included the US, UK, Germany excluding TV, Canada, Japan, France and others. Under clauses 3.3.5 and 3.16 of this agreement Copthall was entitled to call for any information or documents from TOOT or, through TOOT from any other party, relating to the deal.

- (ii) An Escrow Agreement between Copthall and IFG under which IFG agreed not to release any of the funds until all conditions to the effectiveness of the Completion Guarantee Agreement (below) had been satisfied.
- (iii) A Collection Account Management Agreement (“CAMA”) providing for the collection, administration and distribution of proceeds derived from the exploitation of Odd Thomas. TOOT, Copthall and Scorched were parties to the CAMA along with the other main funder, Leap Film Fund II (“Leap”) and IFG plus others not relevant for present purposes. Under the CAMA, Fintage Collection Account Management BV (“Fintage”) was to collect and pay out receipts according to an order of priority (known as the “waterfall”) set out in Appendix A to the agreement. Copthall was to be paid out first, after Fintage had recouped its fees and expenses. CNB was not a party to the CAMA as it had a separate agreement under which receipts from the contracted pre-sales and tax credits were to be paid directly into a separate account until CNB’s loan had been repaid, only then being diverted into the CAMA. Copthall was thus first in priority behind the bank.
- (iv) A Completion Guarantee Agreement (“CGA”) providing protection for the film’s financiers as described above. The beneficiaries of the CGA were CNB, Copthall, Leap and Scorched. The CGA identified the amounts that each party had either (i) already advanced to the production, (ii) placed in escrow to be released at closing, or (iii) in the case of CNB, had committed to fund in accordance with the cash flow requirements of the production budget. It also provided for the final sum required to deliver the film, being the strike price, of US\$22.676.21.
- (v) An Interparty Agreement (“IPA”), regulating the relationship between producer, investors (CNB, Copthall, Leap and Scorched) and IFG.

### **Subsequent events and issue of these proceedings**

- 23. Once the financing closed on 6/7 July 2011, the filming of Odd Thomas resumed. I was told that there were a number of calls made upon the IFG guarantee in the course of production, nevertheless the film was completed on time in accordance with the agreed specification. In the event, however, Odd Thomas was not the commercial success that had been hoped. I understood that some distributors had to be pursued through litigation to pay up under their pre-sales agreements; further that sales to the unsold territories were disappointing.
- 24. Copthall experienced considerable difficulty in recouping its investment and premium. Mr MacInnes made many trips to the US to attempt to discover what was happening with sales and distribution. There was litigation with sales agents and

others. Eventually, however, by September 2014, Copthall had succeeded in recovering its capital followed, later, by further sums.

25. Copthall issued these proceedings against the Defendants on 5 December 2014 seeking to recoup its costs and expenses associated with the exercise of retrieving its investment monies, together with damages for the delay in receipt thereof. Copthall also issued arbitration proceedings in the US against IFG seeking recovery of the same losses; I was told that Copthall has been unsuccessful in that arbitration.
26. It was common ground that the losses which Mr MacInnes alleges Copthall has sustained are recoverable from these Defendants only through an action in deceit/unlawful interference.

### **Issues arising for decision at this trial**

27. The dispute centres around a sum of \$1.4million which Copthall alleges the Defendants falsely represented was the actual cash sum advanced by Scorched to TOOT, net of fees and premia. Copthall's case is that, had it known that the actual cash sum being advanced by Scorched to the production was less than US\$1.4million, then it would not have invested and/or its \$4million investment held in escrow would not have been released. The false misrepresentation as to the nature of the \$1.4million figure is said to be the unlawful means by which the escrow agreement was interfered with.
28. By a subsequent amendment to the claim, Copthall alleges a further misrepresentation in connection with certain loan agreements forming part of the overall investment structure by which Future/Scorched advanced funds to the production. Copthall's case is that the Defendants represented falsely that these loan agreements had potentially valuable returns, whereas in fact, given the nature of the underlying agreements, the proposed returns were entirely illusory.
29. The Defendants deny any misrepresentations, or any unlawful interference with Copthall's escrow agreement. They accept that the actual cash sum advanced to the production by Scorched was not \$1.4million. Their case is that this figure was always understood to represent cash advanced together with fees and premia; further that, in any event, the actual cash sum which Scorched had advanced was immaterial to Copthall in deciding to invest as Copthall's interests were to be fully protected by the completion bond and by its position at the head of the CAMA waterfall. Scorched further denies that returns under the underlying loan agreements with its investors were illusory but says that, in any event, details of the underlying investment structures between Future and its investors were immaterial to Copthall in making its investment.

### **Deceit: fraudulent misrepresentation regarding the sum of \$1.4million**

30. The requirements of a case based upon fraudulent misrepresentation have been recently considered by the Supreme Court in *Hayward v. Zurich Insurance Co Plc* [2017] AC 142 where the court identified the following:

- (i) It must be shown that the defendant made a materially false representation which was intended to and did induce the representee to act to its detriment.
  - (ii) Materiality is itself evidence of inducement. A party who has practised deception to a particular end, which has been achieved “*cannot be allowed to deny its materiality or that it actually played a causative part in inducement*” (per Lord Clarke at paras 37 and 38, citing *Sharland v. Sharland* [2016] 1 All ER 671, per Lady Hale at para 32).
31. The necessary state of mind which must be shown is that the false representation was made knowingly, without belief in its truth, or recklessly, careless as to whether it is true or false: *Derry v. Peek* (1889) 14 AC 337.

### *The Scorched contribution*

32. The calculation of the total amount of the Scorched contribution to the production of Odd Thomas requires a consideration of the position under various agreements between Future companies on the one hand and Fusion/TOOT on the other (collectively referred to as “the Scorched Agreements”). These agreements comprise the following:
- (i) Three Head Production Services Agreements (“Head PSAs”) between Fusion and Scorched dated 21st February, 30<sup>th</sup> March and 27 April 2011.
  - (ii) PSC Production Services Agreements (“PSC PSAs”) having the same dates as the Head PSAs between Stripe Light (a Future entity) and TOOT.
  - (iii) A pair of Services Budget Agreements dated 25 February 2011, augmenting the services provided, and sums paid, under the February Head PSA and PSC PSA.
33. There is a diagram depicting the contractual relationships between the Fusion and Future companies, attached to this judgment. The Head PSAs regulate relations between Fusion and Scorched in the top half of the diagram. In the lower half lies the contractual relationship between Stripe Light and TOOT, governed by the PSC PSAs. The middle section depicts the web of investor contracts between Future’s investor clients and various Future companies. In opening Mr Jones took me through an example of the way in which monies fed through this complex middle layer of contracts. It is this middle layer which gives rise to the additional allegation of fraudulent misrepresentation, discussed further below.
34. The PSC PSAs and Head PSAs are to be read together as pairs of agreements. Payments made by Scorched to TOOT in February, March and April 2011 together with the various premia and fees accruing to Scorched appear from the agreements as follows:
- (i) The February payments: clause 6.1(a) of the PSC PSA dated 21 February 2011 provided for compensation in the form of payment of £172,500 by Stripe Light to TOOT by 26 February 2011. Under clause 6.1(b) Stripe Light also assigned by way of compensation all its benefit in receivables



under various loan agreements (as defined). A further sum of £252,233 payable to TOOT was added by a Services Budget Agreement dated 25 February 2011. Under the Head PSA Fusion agreed to pay to Scorched, as “services provider”, the fee set out in Schedule 2, being 125% of the services budget. The services budget was the USD equivalent (at exchange rate of 1:1.6) of £172,500. Thus Scorched received the equivalent sum which Stripe Light was to pay to TOOT, together with a fee of £43,125. In the same way, the Services Budget Agreement of 25 February added a further fee of £63,058.

- (ii) The March payment: clause 6.1 of the PSC PSA dated 30 March 2011 provided for compensation in the same way as before, by a sum of £221,591 payable by Stripe Light to TOOT by 31 March 2011 together with assignment of the benefit of various loan agreements. The Head PSA, also dated 30 March 2011 provided for payment by Fusion to Scorched of £276,989, equating to £221,591 plus a fee of 25% being £55,398.
  - (iii) The April payment: the pair of agreements were dated 27 April 2011 and were in similar terms as the March agreements. Under clause 6.1 of the PSC PSA Stripe Light was to pay TOOT £94,286 and assign the benefit of various loan agreements. Under Schedule 2 to the Head PSA Scorched was to be paid £117,858, being £94,286 together with a fee of 25% being £23,571.50.
35. Part of the March payments to TOOT were agreed to be paid direct to Future as Executive Producer (“EP”) fees under EP Agreements between TOOT and Future. Mr Jones submitted that these EP fees fell outside the definition of the Scorched Agreements contained in the CGA and IPA, being made pursuant to agreements between TOOT and Future, a company not mentioned in the definition sections of either contract. Ms Rogers’ response to this was to point out that, as the EP Agreements themselves made clear, the EP fees were to be taken from the overall sum paid to TOOT under the PSC PSA and paid at TOOT’s direction to Future. The overall sum paid to TOOT by Stripe Light was made pursuant to one of the Scorched agreements as defined, being the PSC PSA dated 21 February 2011 and linked Services Budget Agreement dated 25 February 2011.

### **Alleged representations concerning the sum of \$1.4m**

#### *(i) Clauses 3(j) and 4 of the CGA*

36. Copthall relies on the following express contractual terms:

#### *(i) Clause 3(j) of the CGA which provided that:*

*“[P]ursuant to that certain production services agreements and attached exhibits, each dated February 21, 2011, March 30, 2011 and April 27, 2011 (as the same may be further amended, restated or modified from time to time, the “Scorched Agreements”), between Fusion and Scorched on the one hand and Scorched and/or [Stripe Light] on the other hand, Scorched and/or Stripe Light has agreed, subject to the terms*

*and conditions thereof, to advance a sum to [TOOT] not exceeding \$1,400,000 (the “Scorched Contribution”) for the purpose of producing, completing and delivering the Picture.”*

- (ii) Clause 4 of the CGA providing:

*“Prior Production Advances. Prior to the date of this CGA, an aggregate of \$11,249,147 has been advanced toward the Production Price (the “Prior Production Advances”), composed of ... (ii) an amount of \$1,400,000 advanced by Scorched... Each of FFIC and IFG acknowledges that the Prior Production Advances have been made and shall be credited toward the Production Price”*

- (iii) Clause 16.1.1 of the IPA which provided that:

*“Scorched acknowledges for the benefit of LEAP, Copthall, and the Bank that, as at the date of this agreement, all conditions precedent to funding under the Scorched Agreement have been satisfied or waived and Producer and Scorched acknowledge that Scorched has advanced all funds agreed by Scorched thereunder in accordance with the terms set forth therein”.*

The “Scorched Agreement” was defined in the IPA as *“collectively, various production services agreements, between Producer and Fusion, on the one hand, and Scorched and/or Stripe Light Services Limited, on the other hand, in connection with the Film”*

37. Copthall’s case is that these contractual terms give rise to an express or implied representation that Scorched had advanced a net cash sum of \$1.4million to the production. Mr Jones submitted that it is possible for an express term also to be a representation (he referred me to the discussion in *Chitty on Contracts*, 31<sup>st</sup> Edn, at para 6-004). Ms Rogers did not take issue with this as a matter of principle, she argued that the terms in their context did not represent, whether expressly or impliedly, that the sum of \$1.4million was a net cash sum.
38. No point was taken arising out of the fact that the CGA and IPA are expressed on their face to be subject to California law. I have, therefore, applied the law of England and Wales to all issues arising in this case.
39. Mr Jones submitted that it was implicit in the contractual terms set out above that the sum of \$1.4m was a cash sum which had been advanced to the production to meet the strike price. He argued that this is what a reasonable person would have understood by the terms, or would have inferred from them, in their context. He pointed to the need for the film to be fully-funded as against the budget, and to IFG’s expressed concern that sums identified in the CGA should be net of fees and premia, as seen in emails from Arash Kiankooy of IFG to the parties on 27 June and 30 June 2011, and to a further email from IFG on 5 July 2011 shortly before closing.

40. Ms Rogers for the Defendants submitted that there is simply no scope for implying any representation as to the nature of the \$1.4m figure. She pointed to the entire agreement clause in the CGA and stressed that these were complex agreements where every line was pored over and considered over weeks of negotiations leading up to the final agreed forms. There was no room, she suggested, for any implication: the words used mean what they say and no more.
41. In my view context is all-important, given that the final forms of wording came after many weeks of negotiations in which multiple drafts of the various agreements were considered line by line many times by the parties' legal teams and advisors. There were in evidence pages and pages of bills submitted by Sheppard Mullin itemising the work done for Copthall in relation to the Odd Thomas financing deal from which the full extent (and cost) of the work on negotiating, scrutinising and finalising the draft documentation was apparent. The CGA alone went through at least 11 drafts before the final form emerged.
42. Mr Jones emphasised the stated position of IFG set out in its emails prior to closing: that its policy was to leave fees and premia out of account. It was for this reason, Mr Jones pointed out, that the fee due to Perpetual was deducted from Copthall's \$4million investment for the purposes of recording it in the CGA. This was also evident, he suggested, from the fact that the strike price represented the sum of the budgeted items required for the completion of the film, ie the actual cost exclusive of any parties' expected return on its investment.
43. I bear in mind that IFG, which was entitled to call for any information from any party, and to refuse to issue the bond if it was not satisfied with the information with which it had been provided, nevertheless proceeded to issue. A strike price worksheet, prepared in-house at IFG and sent round to the contracting parties at 4.31pm on 5 July 2011 indicated that the sum of \$1.4m was "subject to our [ie IFG's] verification". The next version of IFG's strike price worksheet simply noted the sum of \$1.4million as the Scorched contribution. Without any evidence to the contrary, I infer that IFG had by this time satisfied itself that the \$1.4million figure was properly to be taken as the value of the Scorched contribution to the production. Mr Jones suggested that IFG had also been misled by the Defendants but there was no evidence before me of that being the case; on the contrary in arbitration proceedings brought by Copthall against IFG in the US it appears to have been IFG's case (on which it was successful) that it had properly satisfied itself of the accuracy of the figures.
44. Furthermore, tracing through the evolving drafts of various agreements in the files before me (which themselves contain only a small selection of the full sequence) there are instances from which it is apparent that the \$1.4million figure was being put forward by Scorched for inclusion in the CGA as a gross, not net, figure:
- (i) In version 3 of the CAMA circulated with Scorched's comments on 24 June 2011 the figure of US\$1.4million put in as Scorched's recoupment sum was replaced with the sterling equivalent of £893,829. The sum inclusive of fees and premia would be expected to be used in the CAMA as this sets out the full sums to be recouped in the event that the film is abandoned (see my explanation above). In my view it would have been clear from this that that USD sum of \$1.4m was being equated with the sterling sum of £893,829.

Mr MacInnes in cross-examination accepted that if he had seen this email at the time then he “would have assumed that the \$1.4m plus premium may have been equivalent to that sterling sum”.

- (ii) Shortly after this, on 27 June 2011 Ms Stagner, in an exchange with IFG concerning what was to become clause 3(j) of the CGA, noted the following comment against the passage dealing with the Scorched contribution “£893,829 incl fees and premium; £783,543 cash contributed to-date for strike price”. Mr MacInnes in his evidence accepted that Ms Stagner was giving a sterling figure for the Scorched contribution.
- (iii) On 29 June 2011 Ms Stagner circulated comments on Exhibit A to the CAMA, dealing with the waterfall, including to Mr MacInnes: “\$1.4m agreed as number to be used to calculate the percentage share here but please see our comments to the main text of the CAMA where recoupment sums has to be defined as the US Dollar equivalent (at the prevailing rate) of £893,829 inclusive of fees and premium”. In his evidence Mr MacInnes said that this was not something that he saw or discussed at the time and he did not agree that the note drew an equivalence between the \$1.4m and £893,829 figures.
- (iv) On 30 June 2011 Arash Kiankooy, at IFG, sent an email circulating version 4 of the CGA. In the email, after noting that it was IFG’s standard policy not to bond premiums he went on “*Katrina, since currency fluctuations are excluded under the bond, the Scorched amount referenced in the CGA will be the US\$ amount the Production received at the time of the Scorched contribution. In the event of abandonment or a failure to effect delivery the Scorched payout will be a US\$ amount corresponding to the US\$ contribution.*” In v.4 there were blanks for the amount of the Scorched contribution, in response to which Ms Stagner replied the same day by email stating “*While we can confirm the GBP amounts contributed on our end in Feb, March and April (amounts inserted in my comments to the draft version 3 [noted at (ii) above]), please could you confirm the USD amounts credited to the production for our final verification*”.
- (v) Against v.4 of the CAMA, in comments circulated to all parties (including Mr MacInnes) on 30 June Ms Stagner noted “*Once all amounts are confirmed, the Scorched share should be calculated on the basis of a \$1.4m recoupment*”. In cross-examination Ms Rogers invited Mr MacInnes to agree that this comment was making it plain that the \$1.4m figure was a recoupment figure ie including all fees and premia, however he insisted that this was only dealing with the calculation of Scorched percentage share and refused to accept any equivalence between the \$1.4m figure used here and the same figure used elsewhere in the agreements. He did accept eventually, however, that a recoupment figure would be expected to include fees and premia.
- (vi) By 2 July 2011 it seemed that IFG were looking to the Producer, Mr Kaplan or one of his staff at Fusion, to provide final figures for the Scorched contribution. On that date Ms Stagner emailed Arash Kiankooy with annotations to v.6 of the CGA at IFG saying “*I understand you need*

*Production's input to confirm the dollar amounts. If it helps, the attached references the GBP amounts inclusive and exclusive of fees and applicable premium that we are able to verify on our end. We understand the point that the final bond will need to reference US dollar amounts".* The document attached repeated the note against the Scorched Contribution at clause 3(j) set out at (ii) above. Whilst Mr MacInnes in his evidence did not accept that Ms Stagner was giving a gross (not net) figure, he did accept that IFG was looking to the producer to verify the figures that were to go in, further that this was IFG's responsibility and not something that he or his advisors were looking to do themselves:

*"Q If you or your lawyers had wanted to seek verification you could have done it, could you not? You could have asked for any information or documents you wanted. That's part of your deal under the loan agreement that you are into with TOOT – pre-conditions...*

*"A. The mechanism by which these transactions are customarily concluded is that the bond company is responsible for verifying that each party's contribution is in accordance with the finance plan.*

*"Q. You rely on the bond company because Copthall will rely on the bond. That's what's going to happen, Mr MacInnes, isn't it? Copthall will rely on the bond.*

*"A. Yes, Copthall will rely on the bond and relies on the bond company to be undertaking that verification exercise."*

[Day 2, pp.191-2]

45. Confronted with the above indications of the \$1.4m figure being used as equivalent to the sterling sum of £893,829 and (in both cases) being obviously inclusive of fees and premia, Mr MacInnes was forced to suggest that IFG had not paid very much attention to the figures at the time. However when pressed he accepted that IFG, as the bond company potentially taking on a very significant liability post-closing, must have paid very close attention to the figures throughout the negotiation process.
46. I am satisfied that clauses 3(j) and 4 of the CGA, seen against this background, would not reasonably have been understood in the way contended for by Mr Jones. In any event clause 3(j) refers to a figure "not exceeding \$1.4million", pursuant to the Scorched agreements. As to clause 4 of the CGA, the reasonable reading of this clause in context is as a recording of IFG's acceptance and acknowledgement that an amount of \$1.4million "has been advanced" by Scorched "and shall be credited towards the Production Price". Mr Jones argued that, in the context of a reference to the "Production Price", this could only have been understood as a net cash sum, however I do not read it as restrictively as that, particularly not in circumstances where Ms Stagner had drawn attention to the figure as including fees and premia

(see above) and where IFG had itself apparently verified the sum. Moreover, as the wording makes clear, the clause was recording sums that had been advanced and had been credited, together with IFG's explicit acknowledgement that that was the case, against a background of weeks of negotiations.

47. I have concluded that Ms Rogers is right and that, in this context, there is no room for implying any further meaning beyond that which the terms themselves convey. In neither clause where the figure of \$1.4million is referred to (clauses 3(j) and 4 of the CGA) is it expressed to be a net cash sum, exclusive of fees and premia.

*(ii) Clause 16.1.1 of the IPA*

48. Clause 16.1.1 of the IPA records Scorched's acknowledgement that it had "advanced all funds agreed by Scorched [under the Scorched Agreement, as defined] in accordance with the terms set forth therein". I thought I understood Mr Jones in opening to suggest that this clause amounted to a representation that the second element of consideration passing to TOOT under clause 6.1 of the PSC PSAs (namely an assignment of the benefits under certain loan agreements, see para. 34 above) was of immediate value, rather than falling due in the future. In his closing, however, Mr Jones appeared to me to accept that this second element of TOOT's payment for services was a future benefit and thus of no relevance to a consideration of whether there was a misrepresentation concerning the \$1.4m figure.
49. Copthall also relied on clause 16.1.1 as the source of a representation that the loan repayments assigned to TOOT under clause 6.1 of the PSC PSAs provided a genuine, and not illusory, benefit. I discuss this further below.

*(iii) IFG balance sheet*

50. Copthall alleges a further representation as to the \$1.4m figure being a cash sum by reference to the final balance sheet produced by IFG on 6 July 2011 in which that figure is recorded as the contribution made by Scorched to the strike price. The final balance sheet was not drafted or signed by Scorched. Moreover the figure appearing in IFG's final balance was taken from a final account document prepared by Cindy Fujikawa, production accountant working for Howard Kaplan and Fusion. There was no evidence before me as to what discussions there may have been between Ms Fujikawa, or anyone else at Fusion, and IFG for the purposes of verifying that figure to IFG's satisfaction. It is indisputable that IFG must have been satisfied, however, as it proceeded to issue the completion bond.
51. I pressed Mr Jones to explain his case that the figure appearing in either IFG's final balance or Ms Fujikawa's production account was to be taken as a representation made by Scorched and/or Mr Margolis, given that neither document was apparently prepared, signed or otherwise explicitly approved by either defendant. Mr Jones referred me to a series of emails between key personnel at Scorched and to emails from Scorched to Howard Kaplan on the night before financial completion (these are set out in detail in the section dealing with the defendants' state of mind, below). He relied, in particular, on a short breakdown in tabular form prepared by Ms Stagner and sent through to Mr Kaplan (but not to IFG or any other party) making plain, he said, the distinction between the figures for net cash paid and the gross

sum inclusive of fees and premia. Mr Jones submitted that the failure of anyone at Scorched to send this table to IFG amounted to a deliberate attempt to confuse and deceive. He relied also upon the content of contemporary emails from Scorched personnel, referring to a “hole” in the film’s finances, contending that these were illustrative of an attempt deliberately to conceal a gap by putting forward the gross figure.

52. I do not read the emails in that way nor, in any event, do I conclude that Scorched or Mr Margolis is to be held liable to Copthall for the figure which Ms Fujikawa sent to IFG, or for IFG’s approval and adoption of that figure. IFG was looking to Fusion for final information regarding the amount of Scorched’s contribution (as Mr McInnes accepted, see above) in drawing up the final account for the purposes of determining whether or not the bond could be issued. To the extent that IFG’s final account could have constituted a representation to other lenders, including Copthall, as to the amount of Scorched’s cash contribution, the representation was in my view (i) made by IFG and (ii) to the limited effect that IFG had verified the figure to its satisfaction, with the result that it was prepared to issue the bond. It follows that the figures in IFG’s final balance sheet did not, in my view, amount to a misrepresentation made by the defendants.

*Alleged misrepresentation regarding underlying loan agreements*

53. Copthall alleges a representation implicit in clause 16.1.1 of the IPA to the effect that the benefit of the assignment of underlying loan agreements made by Stripe Light to TOOT in part-payment for the services provided under the PSC PSAs was a “genuine benefit”.
54. As the Scorched funding structure diagram (appended to this judgment) suggests, there were a layer of agreements sitting between the Head PSAs (Fusion/Scorched) and the PSC PSAs (Stripe Light/TOOT). Production services were sub-contracted down and on through this layer via agreements between companies within the Future group and a series of investors involving, inter alia, loans made to investors by two other Future companies, namely Dark Blaze Ltd (“Dark Blaze”) and Illuminatrix Ltd (“Illuminatrix”), with monies being advanced to Dark Blaze and Illuminatrix for this purpose by Stripe Light.
55. Mr Jones argued that an examination of the Head PSAs and PSC PSAs appears to provide for \$18m-worth of services for an upfront payment to TOOT of £690,000 (this sum being slightly higher, on the Defendants’ case), together with the assigned benefit of certain loans. Mr Jones pointed to the fact that, despite apparently falling due for payment in early 2016, none of the loans to investors has yet been repaid. Mr Margolis was unable to explain clearly in his evidence why this was the case, beyond asserting that repayments were contingent upon returns filtering down through the CAMA waterfall. Mr Jones submitted that in the light of this evidence, the second part of the consideration passing to TOOT under clause 6.1 of the PSC PSAs was, and was always known to be, valueless – “illusory”.
56. The layer of agreements sitting in the middle of the Scorched funding diagram are unquestionably “sophisticated”, as Mr Margolis described them. His evidence at trial was that this structure had been put together by solicitors (DLA Piper) and accountants (Mazars) for use in a previous Future film investment project. His

unchallenged evidence was that structures like this one were well-known to film financiers and their lawyers (he mentioned Robb Klein – the senior lawyer at Sheppard Mullin, Copthall’s US lawyers – in particular) at the time. These and other similar film investment programmes were in 2010/11 employed, by accountants and others, as opportunities for tax avoidance through sideways loss-relief. Mr Margolis’ evidence was that Future did not itself give tax advice to its investors in relation to this or its other film investment schemes, although he was aware that Future’s investors used their investments with Future in their tax-planning.

57. Notwithstanding Mr Jones’ repeated questions put to Mr Margolis on this point, the precise route by which the investment structure was to obtain repayments of the loans from the profits of the film via the CAMA waterfall (which was the gist of Mr Margolis’ evidence) remained opaque, at least to me. However given the (unchallenged) evidence that these complex agreements had been constructed by reputable lawyers and accountants I was unable to conclude that the assignments of the benefits under the loans were valueless, as Mr Jones argued. Mr Margolis’ repeated evidence was that there remained the possibility (I understood it to be an outside possibility only) that if the film was very successful there could be repayments made via funds trickling down through the CAMA waterfall. I remind myself that it is for the claimant to prove its case; I concluded that Copthall had failed to establish that the benefits accruing to TOOT under the assignment were “illusory”.
58. Even if I am wrong in this, however, I am quite satisfied that the intricacies of the middle layer of contracts depicted on the Scorched funding diagram and with them the value (or otherwise) of the assignments to TOOT of loan agreements under clause 6.1 of the PSC PSAs were not material to Copthall’s investment decision, see below.

#### *Materiality/Inducement*

59. For the reasons given above the Defendants did not, in my view, make any of the misrepresentations alleged against them. But even if they had I would have decided as a matter of fact that that they were not materially false and that Copthall was not induced thereby in deciding to advance monies itself to the production of Odd Thomas.
60. It is important to distinguish clearly between materiality to IFG in determining whether or not to issue the bond, and materiality to Copthall in determining whether or not to invest \$4million in the production. I am not persuaded, on the evidence, that the accuracy of the figure for Scorched’s contribution to the production appearing in the CGA/IPA and/or whether the sum referred to was a net or gross figure, was of any moment to Copthall in deciding whether or not to invest in Odd Thomas, still less the value of any future benefit accruing to TOOT under the loan agreements referred to in the PSC PSAs. These are the matters I have taken into account in arriving at my conclusion:
  - (1) By the time that the financing arrangements for Odd Thomas were being negotiated and concluded in June/July 2011, Future and Scorched’s



contribution was in the past, there was nothing more to come. The only relevance of the value given in the CGA of the services which Scorched had provided was to identify the sum which Scorched and Future would recoup from the bond company in the event that the film was abandoned. Mr Margolis in his evidence likened the situation to that of a construction project where the basement has been built but funds are needed for the remaining floors: there is no interest by then in the cost of building the basement as it is already there, the concern is with ensuring that there is sufficient funding to complete the remainder. Once the bond company had verified and acknowledged the value attributable to Scorched's contribution – in the final sentence of para 3(j) of the CGA – that was the end of its relevance to the deal.

- (2) Copthall's security was superior to Scorched's in that Copthall was at the top of the "distribution waterfall" provided for at Appendix A of the CAMA. No benefit from the film revenues could filter down to Scorched or any other Future company until after Copthall had been paid in full.
- (3) Mr MacInnes' evidence was that in deciding whether to invest in Odd Thomas he took no account of the likely commercial success, or otherwise, of the film. From his point of view, the issuing of the bond was the critical event securing the completion of the film:

*"Q. ...again your assessment of the position was that there was sufficient security from [pre-sales, tax credits and unsold territories] to mean that Copthall was going to get paid back*

*A. Yes.*

*Q. There is no question of your having taken the view that you, Copthall, will only get paid back if this film was a commercial success, that was never part of the thinking.*

*A. No, I did not view this investment as being significantly dependent on the commercial success of the film...*

*..*

*A...in terms of the additional sales, I felt comfortable that even if the film was not commercially successful, the value of those rights [ie first charge over unsold territories] was going to be sufficient to give me the security to deliver the return that was anticipated under the terms of the loan*

*Q. And obviously providing that there had been financial closing?*

*A. Indeed.*

*Q. Because nothing was going to happen until there was financial closing*

A. *Exactly.*

Q. *And part of the financial closing is the bond, the completion guarantee, the crucial part?*

A. *Yes.*”

[Day 2, pp.98 line 9-p.99 line 17]

[See also the extract from his evidence referred to at para 44(vi) above]

- (4) As might be expected in these circumstances, Copthall and its advisors (Mr Hutchinson, Perpetual, Sheppard Mullin), never raised any questions about, nor sought any documents concerning, Scorched’s contribution to the production. They left that to IFG. If IFG was satisfied, the bond would be issued and this, for an investor like Copthall, above Scorched in the CAMA waterfall, was what mattered. The terms of its loan agreement with TOOT entitled Copthall to call for any information or documents it wished from any other party to the deal. The Sheppard Mullin invoices, together with reams of emails in the trial bundles (which I was told were not by any means the full run generated during negotiations) evidenced the level of detailed scrutiny which Copthall and its advisors must have applied to the documentation. Yet nowhere was there a single question asked or document called for by Copthall or its advisors from, or about, Scorched or the amount of the Scorched contribution. The checklist being circulated by Copthall’s advisers in the days and hours before financial completion underscore this: nowhere is there any item regarding the amount of any individual contribution, there is just a single line item noting confirmation from IFG that the bond is effective. As Ms Rogers put it, once IFG were satisfied, the lenders like CNB, Copthall and Leap were satisfied; having IFG “on the hook” was all that the lenders were concerned about.
- (5) Although Mr McInnes in his witness statement and oral evidence asserted that if he had known that \$1.4million was not the sum in hard cash that Scorched had contributed to the production he would not have invested, he nowhere explained his thinking, beyond the fact that the strike price would not have been met if the sum of all the contributions had not been sufficient to meet the budgeted cost of the film, and the bond would not have been issued. But Copthall’s money held in escrow was never going to be released unless or until the bond was issued, accordingly the event of investment turned on that, not on the amount of the other contributions in general, or of Scorched’s contribution in particular. The risk, in other words, of there being a shortfall in funding was IFG’s once the bond was issued. If IFG was satisfied with the strike price and the funding for it, then the bond would issue, only then were Copthall’s monies to be released and the investment made. If IFG was not satisfied, then the bond would not be issued and Copthall’s monies would stay with Copthall. Either way, Copthall’s monies

were safe, or at least, in the event of the investment proceeding, as safe as the value of the underlying security.

- (6) The same considerations apply to the underlying scheme of loan agreements with Future's individual investor clients depicted in the middle layer of the Scorched funding diagram. This diagram together with copies of all the Head PSAs and PSC PSAs were sent to Robb Klein of Sheppard Mullin in a zipfile of documents attached to an email dated 25 June 2011. It was clear from the diagram and from the reference in the PSAs that payments from Stripe Light to TOOT consisted of (i) a cash sum and (ii) the benefit of future receivables under various loan agreements. Yet there was not a single question asked over the ensuing weeks about any aspect of that structure or the loan agreements which underlay it. If what Mr McInnes now says is right, that he had no experience of such tax avoidance arrangements then I would have expected him to have asked, or his lawyers on his behalf if they also lacked such knowledge. The fact that no request or query was raised at all suggests to me one of two things: either that Mr McInnes' advisers were very familiar with underlying tax avoidance structures and were happy with them; alternatively that they were not familiar and did not care to be. In either case, as Ms Rogers rightly submitted, the claim cannot succeed: either the position was not misrepresented or the matter was not material.

#### *Deceit - state of mind*

61. Fraud must be proved to the civil standard, but the balance for these purposes is appropriately weighted in terms of the strength of the evidence required: *H(Minors)*, *Re* [1996] AC 563 per Lord Nicholls at 586-7.
62. Mr Jones relied upon a series of internal emails between Future staff in the lead-up to closing. Ms Stagner, Future's in-house lawyer, was seeking to finalise the \$amount included as the Scorched contribution within the CGA. IFG was looking to Mr Kaplan to inform them of the amount received by the production from Scorched and Ms Stagner was liaising internally with her colleagues and externally with Mr Kaplan in an effort to achieve a resolution so that closing could proceed. The exchange included the following:
  - (i) Email of 2 July 2011 at 07.28 from Ms Stagner to Mr Gardiner, Ms Jackson and Mr Margolis: "*The latest draft of the bond was circulated a couple of hours ago, Our contribution is still not inserted along with the final number...I am concerned that any numbers I provide are consistent with what the production forwards*". She then set out three concerns – the number of transfers which Scorched had made to-date, the fact that some were made in sterling rather than dollars and the reinvestment amount associated with pre-production monies – before continuing "*we had agreed internally that the figure we quote to IFG would be the cash PV of the production plus the reinvested amount applicable to the pre-production monies from the February close*". Mr Margolis accepted in his evidence that there was concern to ensure that Scorched and Mr Kaplan's figures were consistent.

- (ii) Mr Gardiner's response at 07.59 was "*I think that now we have given every chance to Howard Kaplan to provide the numbers we... should provide them with our provisional figure, explaining the FX issue and ask them to put that number in, even if only in square brackets.*" It was put to Mr Margolis that Mr Gardiner had not even mentioned the issue as to the reinvestment amount in the email, Mr Margolis agreed and said that Mr Gardiner probably had not seen it as an issue: Scorched was entitled to that sum under the production services agreements he pointed out, and those agreements had been made available to all parties.
- (iii) In response to an enquiry ("*How are you?*") from Ms Jackson, Ms Stagner wrote at 0800: "*I am concerned about letting something out of the bag and being blamed if there is a hole in the cash available but at the same time we don't have a bond.*" Mr Margolis agreed that this revealed a concern both with consistency and with the fact that she might inadvertently reveal something, but repeated that it was the producer (Mr Kaplan) who was controlling the closing of the finance at this point and to whom IFG was looking to verify the amount of pre-production advances.
- (iv) Ms Jackson's response at 0803 to Mr Gardiner's email: "*I agree but if we do that, then as Katrina says they may realise about the premium that is due to us at production closing is not available and is a hole...We go round in circles.*"
- (v) Ms Stagner's email at 0819 to Arash Kiankooy at IFG: "*I understand that you need Production's input to confirm USD amounts for Scorched but if it helps, the attached references the GBP amounts (both incl and excl of the fees and applicable premia) that we are able to verify on our end. We understand the point that the Final Bond will need to reference USD amounts*". Ms Stagner attached to this email an annotated draft of clause 3(j) reading "*£893,829 incl fees and premium; £783,543 cash contributed to date for strike price*". Mr Margolis pointed out that the figure for cash was what Scorched regarded as a cash contribution as it included fees that had already accrued but which Scorched had allowed the production to retain. The important figure here, he pointed out, was the £893,829 figure, which equated to the \$1.4million value Scorched had agreed with Fusion as the value of the production services which Scorched had provided. He denied that Ms Stagner had written in this way to conceal a hole in the cash available, saying again that it was for IFG to check and verify the figures that Mr Kaplan's production company was providing. Howard Kaplan was not sending Scorched his production accounts, he pointed out, they could not know how he was running them or what they were showing for the values of services already provided. Mr Margolis repeated that all parties had seen copies of the production services agreements which expressly set out the cash payments which had been made together with the fees being charged.
- (vi) By email dated 6 July Mr Margolis sent through to Mr Kaplan a further copy of Ms Stagner's email of 30 June giving a breakdown of the sums which Scorched said were to be attributed to it as a pre-production advance. Mr Margolis said that he had simply re-sent the earlier email as Mr Kaplan had

not received it. Mr Kaplan had been asking for the numbers saying he had not got them earlier.

- (vii) Email from Mr Gardiner circulated to Ms Stagner and others at Future just after closing on 7 July “*We are just closing but I have reviewed the final form bond and we are in there at \$1.4million prior contribution! Well done Katrina*”. Mr Jones suggested to Mr Margolis that what Mr Gardiner was doing was congratulating Katrina for having successfully concealed a hole in the funds available to meet the strike price. Mr Margolis categorically denied this, pointing out that they had reached the final \$1.4million figure with Mr Kaplan and his lawyers entirely straightforwardly, never having concealed anything about how the figure had been arrived at. IFG had looked to Mr Kaplan to satisfy them of the value of the pre-production advances and had presumably been satisfied, as the CGA, including IFG’s acknowledgement at clause 3(j) was signed and the bond was issued.

- 63. Ms Stagner was not called as a witness. I was not satisfied, however, that the contemporary documentary evidence of internal discussion demonstrated dishonesty. Ms Stagner had set out Scorched’s position over many versions of the drafts as I have set out in para 44 above. Neither these nor the tone of the emails being exchanged close to closing are consistent with a fraud being collectively practised by Mr Margolis and senior employees, moreover I accept Mr Margolis’ evidence that Scorched had no reason to hide anything or deceive anyone. It was put to him that he had every motive to hide a shortfall in funding as his investment was at risk if the financing did not close – his response was that Future/Scorched had taken security at the time of the initial investments which would have enabled them, if necessary, to have taken over production from Mr Kaplan; there were many instances in the history of independent films where this had been done successfully Mr Margolis pointed out, *The English Patient* being one example.
- 64. I interpret the internal emails relied upon by Mr Jones as demonstrating, at their highest, that Ms Stagner and others at Future were concerned about the prospect of last-minute delay and derailment if IFG raised further queries with Mr Kaplan about the value to be placed on the services which Scorched had provided to-date, together with a desire not to say or write anything that might prompt such further enquiry. Ms Stagner seems, on the documents, to have been anxious not to volunteer points of detail in the calculation of the \$1.4million figure which might have given rise to further enquiry by IFG, but this was a long way from deceit on her part. The process of concluding financing for Odd Thomas was an arms-length transaction, where all parties were represented by teams of experienced lawyers and other advisors who were able to call for any further information they wished to have. The Scorched funding diagram and production services agreements had been circulated to all parties some weeks previously. Ms Stagner had drawn attention in succeeding drafts of the CGA to the difference between a net and gross figure for Scorched’s contribution. Seeking to avoid last-minute questions or calling down unwelcome focus by IFG on Mr Kaplan’s pre-production accounts was a very far cry in my view from seeking to misrepresent or deceive in the way that Copthall has alleged.
- 65. Mr Jones referred several times in closing to Mr Margolis’ evidence that the figure of \$1.4m which Fusion’s accountant put forward as the US dollar amount to be

attributed to the Scorched contribution, was an agreed or “morphed” figure. Mr Margolis used this description while answering questions about the EP fees which TOOT had agreed to pay to Future and which were taken out of the sums paid by Stripe Light to TOOT under the PSC PSAs (see above):

*“Q. ..the Scorched agreement, as defined in the CGA, do not include executive producer agreements do they?”*

*A. By the time that we...I agree...that we actually understated the number that we were due, so whether they were included or not included is a moot point I would say. We settled on accepting that \$1.4million was an appropriate amount for us to receive in the event that the film was abandoned, and the appropriate amount for us to sit in the waterfall should revenues come down to us, sufficient for us to be repaid.*

...

*Q. And that is how the figure of \$1.4million finds its way into things like the final strike price worksheet?”*

*A. Yes.*

...

*Q. We can agree, can we not, that [EP fees are] not included in the definition within the [IPA]?”*

*A. Well, by the time we come to the [IPA] we have a morphed number, and the morphed number....We settled on a number and that number is 1.4.”*

66. Mr Jones suggested that the “morphed number” to which Mr Margolis referred was further indicative of an intention falsely to misrepresent that the \$1.4million figure was a net cash figure, by concealing the truth from IFG and others in circumstances where only Scorched and the producer knew that it was an agreed overall figure inclusive of (some but not all) fees and premiums. I do not draw such a conclusion, given Ms Stagner’s indications throughout the negotiation process that the figure of \$1.4m, and its equivalent sterling sum of £893,829, was inclusive of fees and premiums (see para 44 above). In my view there had been clear indications on the face of the drafts circulating between the parties, and in emails to IFG, that the Scorched contribution had been finalised on an inclusive basis. Ms Stagner’s caution in the final hours before closing, seen against that background, was not a dishonest concealment of something which the other parties did not know or could not have found out, had they been sufficiently interested in doing so.

## **Unlawful interference**

67. In order to establish the tort of unlawful interference it is necessary to show that the defendant has used unlawful means with the object and effect of causing damage to the claimant: *OBG v. Allan* [2008] 1 AC 1 per Lord Nicholls at para 141 and Lord Hoffmann at para 62.
68. It follows from my conclusion that there was no misrepresentation as to the nature of the \$1.4million figure that there was no unlawfulness. There was in any event no evidence that the Defendants (or either of them) had acted with the object or effect of causing damage to Copthall. For these reasons the alternative claim of unlawful interference cannot succeed.

## **Mr Margolis – personal liability**

69. Given my decision that Copthall has not established deceit or unlawful interference on the part of Scorched, it follows that the claim against Mr Margolis personally must also fail. However had I been satisfied that Scorched had perpetrated a fraud against Copthall and others then I would have held Mr Margolis personally liable with Scorched. Mr Margolis was the director and orchestrator of Future's involvement on this project. He described himself in his evidence as only a "rainmaker" without knowledge of the detail, but it was evident, hearing him at trial, that he was very familiar with the cash sums, fees and premia due to Future/Scorched under the various agreements at the time. When he gave evidence of the "morphed" figure, it was clear that he had been involved in agreeing the appropriate sum with Mr Kaplan. The emails between Ms Stagner and others in the run-up to closing seek Mr Margolis' assistance in dealing with Mr Kaplan to confirm the final balance with IFG. It was Mr Margolis who signed all the agreements on behalf of Scorched. I have no doubt that Mr Margolis was at the heart of Scorched's involvement with Odd Thomas.

## **Damages**

70. For the reasons I have given above, the claims in deceit and unlawful interference have not, in my judgment, been made out. The issue of recoverable loss does not therefore arise. I shall, however, set out my conclusions on damages shortly, in case the matter should go further.
71. Although concepts of foreseeability and remoteness do not apply to damages for deceit the losses must nevertheless be shown to flow from the tort: *Smith New Court Securities v. Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254. In *East v. Maurer* [1991] 1 WLR 461 the approach to assessing damages in a case of deceit was described as a "jury assessment" (referring to *Doyle v. Olby* [1969] 2 QB 158).
72. With those principles in mind, had I found fraud, I would have concluded as follows on the various heads of loss claimed, set out at para 35 of Mr MacInnes' fifth witness statement.

- (1) \$153,371 as commissions and other sums paid to Outsider Pictures for selling OT distribution rights was not challenged and would have been recoverable.
- (2) \$744,118 was the total cost incurred by Copthall in bringing proceedings against IFG for an alleged failure of due diligence in verifying the sums advanced to TOOT. Copthall lost in those proceedings thus the cost claimed includes the sums payable to IFG for its costs. On a broad “jury assessment” approach it seems to me that these costs, even of a claim that was unsuccessful, would have been recoverable had fraud been proved.
- (3) The bills submitted by Copthall’s US attorneys would all have been recoverable, including the outstanding invoices that have not, as yet, been paid.
- (4) I am not satisfied that \$1,220,329 claimed by Copthall in respect of consultancy fees and expenses would have been recoverable. The consultancy agreement appointing Mr MacInnes as Copthall’s consultant is an interesting document: it is signed on behalf of Copthall by its director – Mr MacInnes – and on behalf of Mr MacInnes also as Copthall’s “consultant”. It has a choice of law clause (the law of England and Wales) and an arbitration clause, presumably in case of any dispute between Mr MacInnes (as sole director) and Mr MacInnes (as consultant). The appointment of Mr MacInnes as consultant by Mr MacInnes as director is self-evidently the very antithesis of an arms-length appointment. I had no evidence of what consultancy rates were generally in 2011-14 for this type of work; there was nothing to suggest that Mr MacInnes had sought to research appropriate charging rates. Moreover the sums apparently owed by Copthall to Mr MacInnes under the consultancy agreement have not only not been paid, but the alleged liability features nowhere in Copthall’s accounts. I can easily understand that Mr MacInnes personally incurred airline, hotel and other expenses in travelling to the States to pursue his investment (it was to all intents and purposes his \$4m investment, albeit made through the vehicle of his company) but I would not have been satisfied that all these expenses, with “consultancy fees” on top, were properly claimable by Copthall in these proceedings. Mr MacInnes personally has never been a party to this action: there has been no disclosure of his financial position or of his other activities insofar as they might have related to this case. Nor did he give any evidence of these matters. In those circumstances I would have found it difficult to have been satisfied that the figure for consultancy costs and expenses, which were really Mr MacInnes’ personal expenses, had been properly proved as a loss to Copthall, even on a jury-assessment basis. Whilst it is in principle obvious that some considerable time and trouble would have been spent chasing the \$4million capital and a reasonable return on that investment, I would not have been satisfied, on a balance of probabilities on the evidence I had, that this was Copthall’s loss.
- (5) Nor was I satisfied concerning the alleged alternative investment returns that it was said Copthall could have made during the period before its investment in OT was finally returned. On the evidence before me at trial, \$1.8million of the \$4million advanced by Copthall was a loan to Copthall by Mr MacInnes personally. I have referred above to the absence of any evidence

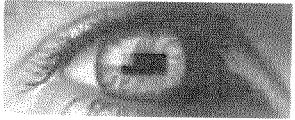


at trial of Mr MacInnes' personal financial situation: there was nothing before me to suggest that he could not have advanced monies to Copthall during the period of delay so as to have enabled Copthall to continue to make investment returns during that time. I would not, therefore, have been satisfied on the balance of probabilities that Copthall had shown a loss by reason of any delay in securing the return of its investment in OT.

## **Conclusion**

73. Ms Rogers suggested that Copthall's case against these Defendants had been "retrofitted" in the light of material which Mr MacInnes has subsequently uncovered through his arbitration against IFG in the US or via disclosure in this action. She submitted that the real cause of such losses as Copthall sustained in retrieving its capital and premium/return was the one given by Mr Margolis in his evidence, namely a failure by Mr MacInnes and/or his advisors properly to investigate and ascertain the value of the security before investing.
74. I found considerable force in the submission that the case had been manufactured to fit around facts that Mr MacInnes has subsequently discovered. From the outset this case appeared to me to be cloaked in an air of unreality: neither Scorched nor Mr Margolis solicited Copthall's investment in Odd Thomas; neither advised Mr MacInnes in relation to it. The film was completed on time and in accordance with the specification agreed with all parties; Mr MacInnes has fully recouped Copthall's investment. The fact that the film was not a commercial success had nothing to do with Scorched or Mr Margolis. The difficulties with distribution and distributors had nothing to do with Scorched or Mr Margolis and the delay in recoupment experienced by Mr MacInnes was likewise not attributable to anything done (or not done) by Scorched or Mr Margolis.
75. The only connection which Scorched/Mr Margolis had with Mr MacInnes/Copthall was as co-investors in the project, but even that link was in practice tenuous as Scorched's involvement with Odd Thomas was on very different terms and at a very much earlier stage in the process. Scorched had concluded its investment into the film some months prior to Mr MacInnes/Copthall even learning of the investment opportunity.
76. It can easily be seen that, in these circumstances, a claim in deceit against Scorched and Mr Margolis personally was the only cause of action affording Mr MacInnes/Copthall the necessary breadth of approach to the recovery of damage, without the restraints imposed by usual principles of causation/remoteness/foreseeability. Hence Ms Rogers' characterisation of the case as "deceit or bust", a description from which Mr Jones did not dissent. In truth, however, Mr MacInnes was not practised on unfairly or dishonestly by Mr Margolis, he took an investment decision expecting an easy return only to find that securing that return was a rather more tortuous process than he had anticipated. The reasons why the process was so difficult were not fully explored in the relatively short trial before me. I was not able confidently to conclude what the cause was of the additional trouble and expense which Mr MacInnes experienced, whether it was due to an inadequate assessment of the value of the security as Mr Margolis suggested, or to some other reason.

77. I am quite satisfied; however, that Copthall has not made out its claims in deceit or unlawful interference against these defendants, for the reasons which I have given.



# FUTURE FILMS PSA Structure Diagram

