



Neutral Citation Number: [2018] EWHC 619 (QB)

Case No: HQ16X00984

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2018

Before :

MR JUSTICE SOOLE

Between :

JILL JEHAN BARLEY

Claimant

- and -

GRAEME WILLIAM MUIR

Defendant

Ms Ruth den Besten(instructed by **Fieldfisher LLP**) for the Claimant
Mr Daniel Saoul (instructed by **Charles Fussell & Co LLP**) for the Defendant

Hearing dates: 11-14 and 18 December 2017

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

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Approved Judgment**Mr Justice Soole :**

1. This action arises from the Claimant (Mrs Barley)'s investment of £1.25 million in a company called Oxford Healthcare Solutions Limited (OHS) in two tranches of £625,000 in October 2011 and October 2012. She claims that her investment was induced by fraudulent misrepresentations made by the Defendant (Mr Muir), a director of OHS, to her husband and agent Mr Barley. OHS went into liquidation in July 2014 and was struck off the Companies Register in June 2015. It had never traded or generated revenue. Mrs Barley lost all her money.
2. By this action she claims damages for her loss in the tort of deceit; alternatively on the basis of breaches of warranty and other contractual terms contained in a Shareholders' Agreement which she, OHS, Mr Muir and others entered at the time of her first investment in October 2011. Further or alternatively she claims that Mr Muir is liable to her in equity and/or at law in the sum of £108,888.24 which was paid over by OHS to Mr Muir immediately upon her first investment. Mr Muir denies liability in every respect.
3. An important background feature of this case is that, prior to this dispute, there was a close friendship between the Barley and Muir families. They lived nearby in Surrey and met in 2010 through having children at the same school. This led to a good deal of mutual socialising. This included Mr Barley and Mr Muir meeting up on a fairly regular basis, at least in term time, for a weekly drink in the pub. The discussions between them about the proposed investment took place in this informal setting and through equally informal text messages written in what the parties described as a bantering style. This informality together with the passage of time have inevitably added to the difficulties of recollection of what was said and to the significance attached to particular remarks in the text messages.
4. Another significant feature is that Mr and Mrs Barley and Mr Muir all had professional backgrounds. Mrs Barley qualified and worked as a solicitor in Singapore. Mr Barley was a chartered accountant working with KPMG in Singapore. Having met there and then married in 1994, they returned to the UK with their 4 children in 2007. Mrs Barley had substantial personal wealth from her family. They accordingly each ceased work on their return and Mr Barley took on the responsibility of making and managing her investments. They describe themselves as cautious investors. Mr Barley was at all times in this matter acting as her agent and it is accordingly common ground that statements made by Mr Muir to Mr Barley were statements to Mrs Barley.
5. Mr Muir is a solicitor who specialised in corporate finance, working in that capacity for Norton Rose and Nomura International. Between 2003 and 2008 he was successively managing partner of Norton Rose's office in Dubai and managing partner for the Middle East. In 2008 he retired from private practice returned to the UK and began to pursue various business opportunities with former clients. One of these was Mr Neil Stafford.
6. The principal witnesses were Mr Muir and Mr Barley. At the heart of the action is a challenge to Mr Muir's honesty in his dealings with Mr Barley.

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7. In support of the challenge to Mr Muir's integrity in respect of the alleged and pleaded misrepresentations Counsel for Mrs Barley (Ms Ruth den Besten) relied on a number of other matters relating to his dealings with the business of OHS. One of these involved Mr Muir's admitted and repeated deceit of OHS' Finance Director Mr Kearney (and subsequently an accountant Ms Leckie) in relation to payments made to himself and to Mr Stafford immediately following Mrs Barley's first investment. She submitted that his conduct on other matters relating to OHS' business and his role in it, on which he was challenged in cross-examination, also demonstrated dishonesty and supported the case that the Court should reject his denial of dishonesty in his dealings with Mr and Mrs Barley. As to Mr Barley, Counsel for Mr Muir (Mr Daniel Saoul) did not suggest dishonesty on his part but submitted that his account was unreliable and had changed in significant respects.
8. For ease of understanding, much of the detail of these matters relating to credibility must be deferred until the narrative is complete. However I set out my general conclusions, based on all the evidence which I have read and heard.
9. In the face of his admitted deceit of Mr Kearney and Ms Leckie and the other matters to which Ms den Besten drew attention, I have had to approach Mr Muir's evidence with very great caution and watchfulness. Having done so, I am not persuaded that he was dishonest in his dealings with Mr Barley. I am satisfied that in every respect he had an honest belief in the truth of what he said to Mr Barley. Whilst in no way doubting the honesty of Mr Barley's account, where their recollections differ I have in almost every respect preferred Mr Muir's account.
10. I was also satisfied that the other witnesses who gave evidence (Mrs Barley; Mr Shergill; Dr Langford; Mr Sloss; Dr Alayoubi; and (by read witness statement) Mr Iosif Frangos) gave honest evidence to the Court.

Narrative

11. In the course of the narrative which follows I will set out my findings on matters which are in dispute. I follow that with further detail on my reasons for accepting and preferring Mr Muir's evidence. For the avoidance of doubt, whilst my findings are set out chronologically, they of course reflect my conclusions in the light of all the evidence and submissions.
12. I return to Mr Muir's pursuit of business opportunities following his return to the UK. One such opportunity involved a former Norton Rose client Mr Neil Stafford. In 2009 Mr Stafford approached him with a business proposition. This was to set up a company which would sell generic pharmaceuticals (predominantly in the Middle East), undertake diagnostic testing and carry out hospital and clinic management. His proposed vehicle at this time was a BVI company called Oxford Healthcare Limited (OHL).
13. Mr Muir was interested in the proposition. He had no relevant commercial experience in that field but initially took on a role which he described as 'in-house counsel'. The commercial business was largely conducted by Mr Stafford, assisted at a later stage by Mr Tom Finn. Financial matters were dealt with by Mr Douglas Kearney, an accountant whose role was described as Finance Director, who was subsequently assisted by Ms Julie Leckie. Mr Steve Jackman, who had previously worked for BAE

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Systems in the Middle East had a role which appears to have included the effecting of introductions for potential business.

14. In his identified capacity Mr Muir drafted a number of Memorandums of Understanding (MoU) for the purpose of joint ventures in the two areas of (i) pharmaceutical sales and (ii) diagnostic testing/hospital and clinical management. These included MoUs between OHL and Lloyds Pharmacy Limited (Lloyds) (the Lloyds MoU) and between OHL and a US company called Quest Diagnostics, Inc (Quest) (the Quest MoU).

Lloyds

15. Lloyds was a UK subsidiary of a German company called Celesio AG. Mr Muir drafted the Lloyds MoU in 2009. The overall purpose of the MoU was a joint venture for the sale of generic pharmaceuticals. On its face it was signed by Mr Stafford and Lloyds on 26 August 2009. The recitals and terms included statements that OHL had been granted a Contract which gave it the exclusive right to supply pharmaceutical products to all of the military hospitals in the UAE. In order to deliver that Contract (and others that it would procure in the region) Lloyds was identified as the joint venture partner of choice. The parties agreed to use their best efforts to agree 'definitive documents' for the purpose of setting up a 'Joint Venture Company' (JVC). The JVC was defined as 'the special purpose vehicle that will be set up by the Parties in order to fulfil the Contract'. The JVC was to be the 'sole conduit through which either Party will sell or supply pharmaceutical products in the MENA¹ Region'.

Quest

16. In around mid-2010 Mr Muir drafted the Quest MoU. On its face this is signed by Mr Stafford and Mr Robert Quinn of Quest and is headed with the date 'June 2010'. This recited an agreement to establish a JVC for the purposes of providing pathology and diagnostic laboratory testing in the MENA Region and the intention that the JVC will build and establish its own laboratory centres. The equity in the intended JVC was to be divided 80/20 in favour of OHL. The JVC was to be the parties 'sole conduit' for such business in the MENA Region. The parties agreed to negotiate 'definitive documents' and to do so 'in good faith (but not so as to imply any legal obligation to agree) and in a timely manner.'
17. Mr Muir drafted other MoUs, including one with an Oman trading company Bahwan Trading Company LLC ('Bahwan') and BAE Systems plc and another with Oxford University.
18. With the assistance of a firm of solicitors (BPE) OHS was made available as an off-the-shelf company incorporated in June 2010. The company name was changed to Oxford Healthcare Solutions Limited (i.e. OHS) in October 2010.
19. In 2010 Mr Stafford decided that OHS would seek funds through an Initial Public Offering (IPO) on the Alternative Investment Market (AIM) of the London Stock Exchange. For this purpose professional advisers were retained: Deloitte (for accountancy and tax matters), BPE and Slaughter and May (legal matters) and Brewin

¹ Middle East and North Africa

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Dolphin (corporate finance advisers). I do not accept Ms den Besten's submission that these advisers were retained merely to provide 'a veneer of respectability' to the enterprise.

20. Brewin Dolphin's engagement terms (28.11.10) included assisting with the 'commission, scope and review of legal, financial and other due diligence and working capital reports on the Company' and advising on the 'format and content of any presentations to be made to prospective investors'. The principal point of contact at Brewin Dolphin was the Managing Director of the corporate finance team, Mr Mark Brady.
21. In various documents prepared by Brewin Dolphin in 2010-2011, Mr Muir was described as 'Chief Operating Officer' or 'Group Commercial Officer': see e.g. its 'Directory of Parties' December 2010 and 18 January 2011; and draft AIM Admission document 28 January 2011.
22. BPE solicitors' engagement terms (12.1.11) included the services to 'draft, negotiate and advise on the relevant joint venture and operational agreements in respect of each of the Joint Ventures', namely with Lloyds and Quest.
23. As I accept, Mr Stafford suggested that in order to pay the fees of the various professional advisers he and Mr Muir should each loan OHS £100,000. Mr Muir agreed to make a loan of £75,000 and arranged for that sum to be paid to OHS by a company incorporated in Cyprus called South Horizon Trading Limited ('Horizon') which was indebted to him for consultancy work. The money was paid into the OHS bank account with HSBC on 27.1.11 but was otherwise unrecorded. That sum appears on the bank statement as the entire balance on the account. Mr Muir's account was supported by the read evidence of Mr Iosif Frangos a Director of Horizon. Mr Frangos did not know the precise terms agreed between Mr Muir and OHS for the payment of that money, but understood it to be for working capital purposes for a new venture that Mr Muir was undertaking.
24. The loan was not recorded in OHS documents or otherwise and relevant Warranties in the later 'Shareholders' Agreement' made no reference to it. When interviewed by the police in 2015 Mr Muir described the payment as an 'investment'. As will be seen, the evidence as to its repayment is complex and confused. However I am satisfied that Mr Muir paid this sum to OHS and did so by way of loan.
25. I accept Mr Muir's evidence that his loan was made on the basis of an agreement with Mr Stafford that it would be repaid when OHS raised money from external investments. I will discuss this further when dealing with the subsequent payment to him of £108,888.24.
26. A few days later the same amount was paid out from the account to Mr Stafford. I accept Mr Muir's evidence that he did not know, until the truth finally came out after the police intervention in 2015, that Mr Stafford had transferred that sum to himself and had made no loan on his own account.
27. In the same month BPE produced a first draft of the joint venture documentation for Quest (28.1.11) and subsequently for Lloyds (7.2.11). These were reviewed by Mr Muir who gave comments in respect of the Lloyds documentation.

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28. In February 2011 Mr Stafford sent Mr Muir some draft financial projections for OHS. Mr Muir understood these to have been prepared by Mr Kearney.
29. From about the middle of March 2011 Brewin Dolphin was involved in analysing, as part of its due diligence obligations, OHS' proposed business model and financial projections. During the period March to May 2011 Brewin Dolphin was raising questions with Mr Kearney and financial projections were produced.
30. In May 2011 Deloitte advised that it had succeeded in obtaining venture capital trust (VCT) clearance for OHS. This was regarded as important for institutional investors' tax purposes.
31. In May 2011 Mr Stafford and Mr Finn travelled to Oman with representatives of Lloyds and its parent company to meet Bahwan. The purpose of the trip was to agree the terms of trading into Oman using Bahwan as the local distributor. Mr Muir was informed by Mr Stafford that, as the joint venture agreement had not yet been finalised, trading would initially be conducted by Lloyds who would pay OHS 50% of the profits generated.
32. At the end of May 2011 Brewin Dolphin produced an 'information pack' to be shown to potential investors. It contained signed copies of the MoUs with Lloyds and Quest, financial projections for OHS and further statements about the progress with the intended expansion of the MoUs into full agreements. As to Lloyds, it stated that 'We have met with Pete Shergill, who is in charge of this project from Lloyds'; and noted that the UAE military contract referred to in the MoU was still under discussion. As to Quest, it had met its International Business Director Mr Quinn. It further stated that Mr Stafford had told prospective investors that he had been working on the project for 3-4 years and had spent £13.75m of his own money to fund the work, adding that it had 'confirmation from the Company's lawyers that they have documentary evidence from Neil Stafford's trustees that they have spent this sum of money over the last five years'; and that Mr Stafford had provided it with 'a breakdown of this expenditure between salaries, accommodation, travel, consultancy expenses, marketing and promotion, feasibility and legal expenses.'
33. Under the heading 'contracts of employment for the Directors', it stated that Messrs Stafford, Muir and Kearney 'will have full time service agreements with the Company'.
34. In June 2011, and with advice from Brewin Dolphin, it was decided to postpone the IPO indefinitely and to proceed only with 'seed finance' from institutional investors introduced by Brewin Dolphin. Mr Muir understood from Mr Stafford that this was a commercial decision.
35. On 19 June 2011 Mr Muir sent Mr Stafford a first draft of a Shareholders' Agreement; and sent a copy to Mr Brady the following day. He drafted it because the existing legal team had been stood down once it was decided not to pursue an IPO.
36. On 11 July 2011 an email of that date was purportedly sent jointly by Mr Stafford and Lloyds' Mr Shergill to Bahwan's Mr Trevor Fernandes in Oman. Its subject heading is 'Joint working presentation' and it reads:

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‘Trevor, I trust you and the team are well and that trading is going strong? Product has now left our facility and will be in Dubai on Thursday value £3.4 million, congratulations to all! Both Neil and myself would like to extend an offer to co-present the model to your senior team/Government in Oman if you so wish.

Pete Shergill & Neil Stafford’

37. Mr Shergill gave evidence that he believed this email to have been fabricated. He had worked for Lloyds between 2005 and 2012 and from August 2009 was director of clinical business development. In October 2011 he moved to the parent company Celesio AG to become head of strategic services. He was not involved with the signature of the MoUs in 2009. In 2011 he was involved with establishing a pharmaceutical supply chain for Lloyds in Oman. He would not have sent a joint email, nor would he have used such words as ‘product’ or ‘facility’ and 99.99% of the time he ended with ‘best regards’. Furthermore the proposal was to operate by way of wholesale distribution. Retail sales were not considered. Accordingly no shipments would have been made by Lloyds as part of such a network. If a JV had been set up, it would be a JV company in Oman, not Lloyds, doing the transactions. In June 2011 he travelled to Oman accompanied by Mr Stafford and other Lloyds’ employees to meet with Bahwan. He also attended a meeting with Mr Stafford Mr Muir and representatives from Roche in Oxford on 22 June concerning diabetes treatment. He recalled no further contact with Mr Stafford after 2011. Lloyds’ relationship with Mr Stafford/OHS died a natural death at the end of the year.
38. In cross-examination he was taken to a Lloyds pharmacy document headed ‘pharmacy opportunities in Oman’ whose pages included a ‘retail pharmacy layout’ and photographs of ‘high quality retail pharmacy formats’. He accepted that this document was last saved by his team on 11 July 2011 when working on a presentation. He considered it highly likely that he would have sent an email to Bahwan about the presentation. He agreed that his evidence that retail sales were not considered needed to be qualified. It was more accurate to say retail sales directly into Oman were not considered. He agreed that product going from a facility would be consistent with wholesale supply or indeed sales to retail outlets in Oman.
39. This disputed email was forwarded by Mr Stafford to Mr Brady, copied to Mr Muir, on 22 July with the words ‘Mark, Margins are 22%’.
40. I am conscious that I have heard no evidence from Mr Stafford. However, and having particular regard to Mr Shergill’s evidence as to words he typically would or would not use, I conclude that he prepared an e-mail to Bahwan on that date (11 July) and with its subject heading, but that the body of the message did not have his knowledge or authority and thus had been fabricated. That conclusion is of course consistent with the fact, as it later transpired, that there had been no such shipment.
41. Whilst dealing with Mr Shergill’s evidence, I add my conclusion that he was mistaken in his recollection when he said in cross-examination that he had not met Brewin Dolphin at any stage. I prefer the evidence of such a meeting in Brewin Dolphin’s information pack of May 2011.

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42. On behalf of Mrs Barley it is not suggested that Mr Muir or indeed Mr Brady knew or believed that the 11 July 'e-mail' had been fabricated. I accept Mr Muir's evidence that he believed its contents to be true.
43. Mr Brady was not called as a witness in this trial. Although Ms den Besten pointed to his absence, she did not ultimately submit that any adverse inference should be drawn; and in any event I see no basis to do so. As will be seen, the financial information subsequently provided to Mr/Mrs Barley, and to which Brewin Dolphin was party, included calculations which were based on shipments to the value of £3.4 million, a 22% margin and a 50/50 division thereof between OHS and Lloyds.
44. In the meantime, by e-mail dated 15 July 2011 to Mr Kearney (copied to Mr Stafford), Mr Brady advised that a number of institutional and private investors had expressed interest in subscribing for a total of £2.15 million in debt and equity in OHS. These included 'Artemis VCT' ('Artemis') in the sum of £600,000.
45. On 4 August 2011 Quest's Mr Quinn e-mailed Mr Stafford : '...I believe the teams are working well and we are making very significant progress. On timings we expect the Oxford joint venture to take over the MENA region by the end of the month in-line with the MoU.'
46. On 5 August 2011 Mr Stafford emailed Mr Andy Gray at Artemis that 'our trading will be in line with our forecasts and we are very presently surprised by the stock take up in the Middle East particularly in the notoriously difficult period of Ramadan. The teams are well-established in the region with Lloyds now seconding a senior Director to the JV who will move to Oman in September.'
47. These e-mails of 4 and 5 August were forwarded by Mr Stafford to Mr Muir, who replied 'Good emails...!' Ms den Besten points to the contrast between the 'e-mail' of 11 July and the e-mail of 5 August as to trading in Ramadan. She submits that this was at odds with any honest belief in the information as to trading; and that his comment 'good emails!' indicated a shared dishonesty with Mr Stafford. I do not agree. I consider that the comment was an expression of satisfaction with the progress identified in the e-mails of 4 and 5 August; and that his subsequent statement to Mr Barley in the critical e-mail of 21 September represented his honest belief.
48. On 26 August 2011 Mr Ian Wright of Silverwind Securities e-mailed Mr Brady in respect of a judgment of the DIFC (the judicial authority of the Dubai International Financial Centre) which had come to light. This involved a dispute between Mr Stafford's company Oxford Investment Managers Limited and an employee called Mr Leedham who had claimed unpaid salary. Mr Stafford and his company took no part in the proceedings beyond service of an unsigned defence. By judgment dated 21 March 2010 Justice David Williams had found for Mr Leedham and referred to Mr Stafford in strongly adverse terms which included reference to '... Similar fact evidence revealing a pattern of misleading and dishonest behaviour and broken contractual promises which is highly relevant to the defendant's claim that the claimant agreed to a permanent 50% reduction in his salary'. In the light of this judgment Mr Wright expressed his concern at sending anything on OHS to potential investors without a full understanding of the matter.

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49. Mr Brady's reply of the same date shows that he had previously discussed this with Mr Muir. The reply stated that Mr Stafford had been ill and unable to attend the hearing in person so that the decision had been made in his absence; that Mr Muir regarded the claim as the frivolous claim of a disgruntled ex-employee and the DIFC as an inappropriate forum in which to lodge a claim. He was quoted as stating that the contents of the identified paragraphs '(like most of the case) is a pack of lies!!'.
50. Mr Muir's evidence, which I accept, is that Mr Stafford had given him a very different account of the case, which was that Mr Leedham had agreed without objection to take a 50% pay cut until the relevant fund closed – which it never did – but had subsequently claimed that there was no such agreement. He had believed what Mr Stafford had told him.
51. On 30 August 2011 Mr Brady, at Mr Muir's request and copied to him, sent another prospective investor (Mr Tim Barlow) information about the 'pre-IPO fundraising process'. Amongst other things this stated that OHS 'has partnerships with global healthcare providers – Quest Laboratories, Lloyds Pharmacies and Roche plus also the University of Oxford. OHS is an equal (if not better) partner in each relationship – MoUs been in place since 2009, moving to contract for the IPO (if not before as we have started trading)' and that 'They have now shipped their first pharmaceuticals to Oman – two more planned for August and early September – so it is now trading entity (on a timescale set out last November).' The email attached updated financial projections and the 11 July email from Lloyds to Bahwan and referred to the structure of the fundraising as 'either straight ordinary shares (at an equity valuation of £30m) or a convertible loan note...'
52. The reference to 'two more planned for August' shows that this was based on a earlier draft. Mr Brady evidently believed OHS to have commenced trading.
53. On 31 August 2011 Artemis' general counsel e-mailed Mr Muir that its solicitors would be in touch shortly : 'I've told them to crack on and given them your contact details in the first instance'. Artemis would have been parties to the Shareholders' Agreement which Mr Muir was drafting.
54. On 9 September 2011 the solicitors BPE sent Mr Muir a draft Director's Service Agreement, based on the service agreement produced for Mr Finn, and sought his comments. Mr Muir replied on 12 September with a revised draft and on the same date was appointed a Director of OHS at a board meeting. His revised draft described the position as Group Commercial Director with a commencement date of 1 June 2011 at a salary of £216,000 and with provision for expenses.
55. On 12 September Mr Muir forwarded to Mr Robert Sloss, a friend since 1994 and with whom he had once shared a flat, Mr Brady's e-mail to Mr Barlow of 30 August. In October 2011 Mr Sloss invested, and duly lost, £100,000. Whilst his partiality in the present dispute was demonstrated by a text exchange between them, I accept his evidence of continuing trust in Mr Muir. However, of more significance to the issue of Mr Muir's integrity is the fact that he also supplied this evidence of actual trading to his old friend Mr Sloss.

Involvement of the Barleys

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56. In this month Mr Muir had begun discussions with Mr Barley about a possible investment by Mrs Barley. Mr Barley says that in September Mr Muir told him that OHS had a joint venture with Lloyds in respect of pharmaceuticals and would soon enter into a joint venture with Quest in respect of diagnostics. There was a limited opportunity for ‘friends and family’ to acquire a small equity interest. Mr Muir was very optimistic about the prospects of the company. Mr Barley said that he would not typically be interested in investment of this type, as it was naturally higher risk than blue-chip companies; but knowing and trusting Mr Muir he was prepared to consider investing.
57. On 19 September 2011 Mr Brady emailed Mr Stafford, copying in Mr Muir, in terms which again referred to actual trading by OHS. He stated ‘I was speaking to DG [David Green of Brewin Dolphin] late on Friday and he has asked if we can get Dougie [Kearney] to amend the financials to reflect actual trading to date and loan/new share money coming in this month and not last month. I think it should be a fairly quick job, but he thinks it will head off further queries from Andy [Gray/Artemis] – purely on the basis that when he (DG) saw the August numbers that I sent to him to forward it raised questions from him! Andy has asked for the up-to-date numbers as you know.’ Thus Mr Brady evidently believed that ‘actual trading’ had commenced.
58. On the same day there was a series of e-mails concerning financial disclosures in the pending Shareholders Agreement. BPE raised the issue, noting the risk that they would be required to warrant the information. Mr Muir forwarded this to Mr Stafford, commenting ‘...shall we just leave it (i.e. without any disclosure – as there is nothing to disclose right now) and sign after?’ Mr Stafford having agreed with that course, Mr Muir e-mailed BPE ‘Forget about the disclosure of the financials – we couldn’t warrant them anyway as they are only projections, but I agree it will raise further queries.’ I do not accept that these exchanges, particularly when set against Mr Brady’s e-mail of the same date, provide any basis to suggest that Mr Muir was thereby suggesting that there had been no actual trading.
59. At or about this time there was some discussion between Mr Muir and Mr Barley as to Artemis’ valuation of the business. On Mr Barley’s account Mr Muir told him that Artemis had valued OHS at £25m; that Brewin Dolphin had valued it at approximately £28-£29m and that Artemis had ‘done me a favour’ by valuing OHS at the lower figure. Mr Muir says that he told him that Artemis was willing to invest a certain amount of money for a certain amount of shares, which implicitly valued the whole business at around the figure of £25m. He did not suggest that Artemis had in fact carried out a formal valuation or that there was any valuation report.
60. On 21 September 2011 at 17.23 Mr Barley sent Mr Muir a text which included: ‘Not very promising from tax point of view but have not yet spoken to him.... Rather than just relying on you, any available useful document on the valuation?’
61. At 17.41 Mr Muir replied: ‘Hi Paul, I can send you the latest financial model – this formed the basis of Artemis’ valuation (I think the valuation is low on multiples calculation!).... Keep me posted on the tax advice – I’m sure there’s a way to do it!’.
62. There was confusion in Mr Barley’s evidence as whether the first reference to an Artemis valuation was before or after 21 September (cf. his 21.3.16 affidavit in

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support of the successful application for a freezing order and his witness statement 17.11.17). Whilst this was properly exploited in cross-examination, I consider its significance to be limited to the understandable difficulty of recalling conversations taking place five or six years before. It also reflected my general conclusion that Mr Barley's recollection of the order and detail of events was not good. I consider that the better inference from the 21 September texts was that the relevant discussion had preceded them.

63. Following a request by Mr Barley in 2017 Artemis confirmed that it had told the police that it '... did not undertake a valuation of the Company. As a prospective investor, we would have been provided with a proposed valuation by the Company and its advisers' (30.6.17). Ms den Besten also pointed to an e-mail dated 11.12.13 from another investor (Mr Raza Kanval) to Mr Stafford (copied to Mr Muir) which included 'Also we never received the valuation report produced by Artemis for the 25m valuation, please could you send us a copy as previously promised.'
64. I prefer Mr Muir's evidence as to what he said to Mr Barley. I am satisfied that he did not state or imply that Artemis had prepared a formal valuation of OHS. His honest belief, based on Brewin Dolphin's valuation and the level of investment which Artemis was proposing, was that it amounted to a valuation of £25m; and he so informed Mr Barley.

The 21 September e-mail

65. At 17.55 on 21 September Mr Muir followed the texts with an email to Mr Barley which is at the heart of the case of deceit. Headed with the subject 'Oxford updated model – final version' it read:
- 'Hi Paul, Here are the latest financials, July and August are actuals – there was no income in August (as planned) due to Ramadan. As you can see, we started trading in July and the Sept shipment is being loaded next week. The diagnostics side of the business comes on stream as soon as we have signed the JV agreement with Quest (which we plan to do as soon as possible after completing this finance round). Regards Graeme.'
66. The attached spreadsheet was headed with the company name and 'financial projections' dated 20 September 2011 and in 'Version 11'. This was the latest version of financial projections previously prepared by Mr Kearney and provided to prospective investors within Brewin Dolphin's information pack. The spreadsheet included within the 'consolidated profit and loss account' 'income', i.e. profit, from joint ventures (Lloyds) as July 2011- £382,000; August 2011 - £0; September 2011 - £538,000. The July figure was based on gross income of £3.4m; direct costs of £2.636m; and a 22% margin on the net figure of £764,000.
67. The financial projections showed employment costs (including Mr Muir at £216,000 pa) commencing 1 October 2011.
68. Mr Barley reviewed the spreadsheet and concluded that it in particular indicated
- '(a) retained profits of £5 million for the year ended 31 December 2011 and £18 million for the year ended 31 December 2012;

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(b) a consolidated profit and loss account showing profit from joint ventures of £382,000 in July 2011 arising from revenue of £3.4 million;

(c) income from the Lloyds joint venture of £538,000 for September 2011 from revenue of £4.6 million. This represented a 35% increase in revenue from July 2011. Revenue for December 2011 was projected to be £8.6 million (revenue almost doubling over 3 months);

(d) an anticipated profit stream from Lloyds of £2.9 million in 2011 and £11 million in 2012;

(e) revenue in October 2011 of £6.4 million and associated profit of £1.3 million from the diagnostic business increasing to revenue of £7.3 million and associated profit of £4.3 million in December 2011, respectively; and

(f) revenue of £88 million and associated profit of £17 million for the diagnostic business in 2012.’

(Witness statement para. 29).

He concluded that ‘not only was the business profitable, but it was on an upward trajectory, even before the expected joint venture with Quest’. As a qualified accountant he read the ‘actuals’ as ‘booked revenue’.

69. Mr Barley says that, based on this information and on his understanding from Mr Muir that Artemis had formally valued OHS at £25m and was intending to invest in OHS, he was satisfied that Mrs Barley should make the investment.
70. In a text the following day (22 September) at 9 a.m. Mr Muir stated ‘we are meeting Artemis to finalise docs at 11am (in Mayfair). We should be free for about 2 pm?’ Two hours later Mr Barley responded ‘all okay for 1pm. See you then...’
71. On that day (22nd September) a meeting duly took place at Mrs Barley’s property in One Hyde Park attended by Mr Stafford, Mr Muir, Mr Brady and Mr Barley. Mrs Barley was briefly there at the outset but then went shopping. Mr Muir contends that Mr Brady took Mr Barley through the information pack and otherwise confirmed what Mr Muir had been saying about the prospects. In his witness statement Mr Barley said that the purpose of the meeting was primarily for him to meet Mr Stafford ‘but also to get a sense of comfort about the business from Brewin Dolphin’. However he was not looking for Mr Brady to ‘sign off on the numbers’ provided by Mr Muir on 21 September. Mr Brady was not acting for him. In the course of a meeting lasting about an hour they had a ‘general, high-level chat about the direction of OHS and whether what it proposed to do was feasible.’ As a result of the meeting ‘I obtained comfort about the representations provided by Mr Muir. In other words, I was not told anything at the meeting that would suggest that the information I received from Mr Muir was in any way incorrect’. In cross-examination he described this as ‘negative assurance’.
72. Mr Barley acknowledged a degree of comfort from Brewin Dolphin’s involvement because he knew it to be a reputable firm with whom he had a prior relationship on

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family finances. However his decision to invest was based on the trust he had in Mr Muir and what he was told by him.

73. On 26 September Mr Andy Gray of Artemis asked Mr Brady for an explanation about the DIFC case. Mr Brady responded on 27 September at 8.50 in similar terms to the response to Silverwind, including the reference to ‘a pack of lies’. The same day at 18.39 Mr Muir texted Mr Barley ‘Issue with Artemis but nothing to do with the business’. Mr Barley says that in a subsequent telephone call Mr Muir led him to understand that Artemis had discovered that there was a dispute between Mr Stafford and a previous employee in Dubai; and that Mr Stafford had ‘failed to pass some sort of compliance box-ticking exercise’. He also ‘vaguely remember Mr Muir saying that Artemis had also become much more stringent in making investment decisions.’ Mr Muir says that he had been told by Mr Brady that Artemis’ withdrawal had nothing to do with OHS but was because Artemis’ own investment committee had placed a general moratorium on further investments. He duly passed this on to Mr Barley. He did not suggest that their withdrawal was connected to an employee dispute. Mr Barley wished to continue to invest.
74. At the same time Mr Barley was taking advice from solicitors Field Fisher Waterhouse LLP (Mr Nicholas Noble) on tax issues (including VCT and EIS relief) relating to the intended transaction. Texts between Mr Barley and Mr Muir on 26/27 September included Mr Barley’s request for a soft copy of the Shareholders’ Agreement as ‘taxman wants it’. On 4 October Mr Muir responded to queries raised by Mr Noble with an e-mail (copied to Mr Barley) which attached a letter dated 26 April 2011 from Deloitte to HMRC. The letter sought advance assurance for VCT relief and in particular stated that OHS was the only company in existence; that the intention was to set up two subsidiaries for the pharmaceutical and diagnostics ventures; and under the heading ‘Trading activities to be undertaken’ referred to the plans for business in partnership with Quest and Lloyds. Mr Barley states that he took comfort from the fact that OHS had taken advice from such a firm of accountants.
75. Mr Muir states that a few days later, at the beginning of October 2011, Mr Barley asked him about the second shipment of pharmaceuticals intended for September 2011. In consequence he spoke to Mr Stafford who told him that the second shipment had not gone and also that there was a problem with the first. That first shipment was in a warehouse in Dubai because of what Mr Stafford called ‘administrative issues’. However Bhawan was seeking to overcome the problem. He reported this back to Mr Barley. Given that this appeared to be a delay rather than a cessation of trading, Mr Barley told him that he nevertheless intended to invest.
76. Mr Barley denies all of this. There was no request by him for information about the September shipment nor was he given any further information about either shipment.
77. In challenging Mr Muir’s account generally, as well as specifically about the withdrawal of Artemis, Ms den Besten contended that Mr Muir in the knowledge of the DIFC judgment must have believed Mr Stafford to be dishonest and cannot have believed Artemis’ withdrawal to have had nothing to do with the business and/or its perception Mr Stafford.
78. Damning as was the DFIC judgment on Mr Stafford I am satisfied that Mr Muir did hold the belief that he expressed about the judgment and as to the reason for Artemis’

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withdrawal from the proposed investment; and continued to hold a favourable opinion of Mr Stafford. I am satisfied that Mr Stafford was a strong and persuasive figure and that, until further information came to light after his arrest, Mr Muir held an honest belief in his integrity.

79. I am also satisfied that Mr Muir held an honest belief in the truth of the information contained in the financial information attached to his e-mail of 21 September. In particular he believed that the joint venture with Lloyds had developed to the extent that actual trading had commenced with the July shipment and in the value provided to him; and so advised Mr Barley and Mr Sloss. I do not accept that such a conclusion is undermined by the fact that the Lloyds MoU was with OHL or that the envisaged further agreement with Lloyds had not yet been concluded. It is no way unusual for businesses to begin trading before contractual terms have been agreed. Mr Muir had at no stage suggested that any such agreement had been reached; nor did the e-mail of 21 September and its attachment or any other document supplied by Mr Muir so state or imply.
80. In this respect the Particulars of Claim also contend that the forwarding of the Deloitte letter of 26 April 2011 gave support to a misrepresentation that a joint venture agreement, i.e. beyond the MoU, had been entered with Lloyds. In my judgment the letter gives no such support. On the contrary, its forwarding is inconsistent with any wish to deceive.
81. As will be seen, the contention is also at odds with the terms of the Shareholders' Agreement entered on 5 October.
82. Furthermore, as evidenced e.g. by Mr Brady's e-mail of 30 August, Mr Muir's belief was shared by Brewin Dolphin who had been carrying out the required due diligence. As Mr Brady had noted from the financial information supplied to him, the identified July turnover was of £3.4m, the margin 22% and the split with Lloyds 50/50. The product of those figures (£374,000) is close to the spreadsheet figure of £382,000.
83. As to the figures for September and thereafter, these were financial projections based on calculations which had been prepared by Mr Kearney and reviewed by Brewin Dolphin in the course of their due diligence. I am equally satisfied that Mr Muir had an honest belief that they had a reasonable basis.
84. In respect of all these matters, I consider it inherently improbable that Mr Muir, faced with the meeting with Brewin Dolphin which took place on 22 September, would have sought to give misleading information which could be readily contradicted by the advisers who had carried out due diligence. I also conclude that it is more likely that the meeting with Brewin Dolphin involved a greater level of discussion, including consideration of the contents of the information pack, than Mr Barley now recalls. This potential for misrecollection is emphasised by the absence of any reference to this significant meeting (or to Brewin Dolphin at all) in Mr Barley's affidavit of 17 March 2016.
85. As to the dispute about a further conversation in early October, I again prefer Mr Muir's recollection. I think it inherently likely, from my assessment of his nature and character, that Mr Barley would have asked about the September shipment; and in any event I reject the contention that this is a story which Mr Muir has invented. I accept

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that Mr Muir then reverted to Mr Stafford and passed back to Mr Barley the further information which he had received and which he honestly believed to be true. In a relationship where their discussions on the proposed investment took place on an informal basis, I do not think it significant that there is no record in e-mail or text of these conversations. Whilst the further information was adverse, my conclusion is that the essential decision to invest had been made and that Mr Barley was content to proceed. I do not doubt that Mr Barley now believes there to have been no such conversation, but conclude that the passage of time and the intensity of his belief that he was deceived by his friend Mr Muir have removed this from his memory.

Shareholders' Agreement

86. On 5 October Mrs Barley signed the Shareholders Agreement and the linked option agreement to acquire the same number of shares (the 'Option Agreement'). On 6 October she duly paid over £625,000 for 25,880 OHS shares. The Shareholders' Agreement was between Mr Stafford, Mr Muir, Mr Kearney, Mrs Barley, Mr Sloss, Mr Jackman, Globaleye (BVI) Ltd and OHS. Recital (D) provided that the parties had agreed to conduct the business and affairs of the Group (defined as OHS and any subsidiary) and the relationship between each other on the terms and conditions of the Shareholders' Agreement.
87. At 18.02 that day Mr Muir emailed BPE solicitors to advise of the signatures and to attach copies. He noted that 'the main investor has also been granted an Option to purchase an additional 25,880 shares at the £25 million valuation' (the Option) and attached a copy of the Option Agreement.
88. Schedule 1 of the Shareholders Agreement shows that Mrs Barley's holding of 25,880 shares represented a 2.5% shareholding; and 5% in the event that she exercised her option. The figures in that Schedule match a document headed 'Valuation £25,000,000', based on 1,035,197 shares at £24.15 per share; and thus £625,000 for her shares.
89. By clause 2.3 *'The business of the Company is to act as a holding company for the Company's subsidiaries and Joint Ventures which will undertake the...Business...'*. 'The Business' was identified by reference to pharmaceuticals and diagnostics.
90. 'Joint Venture' was defined to mean *'a company (not being a subsidiary of the Company) all of the shares in which are held by the Company and a trade partner or partners of the Company and which carries on the Business or part thereof'*.
91. Clause 5 dealt with the management of OHS and will be considered later in the context of the claim of breach of contract.
92. The Shareholder' Agreement made provision in respect of EIS tax relief if the shares were determined by HMRC to be relevant shares. For that purpose OHS would ensure *'...that at all times after such determination (while [Mrs Barley] holds any Shares in the Company) the business of the Company and its subsidiaries are managed in such a way so as to enable the Shares in the Company to be and remain 'relevant shares' for the purposes of EIS relief'*: clause 20.7.

Warranties

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93. The Shareholders' Agreement contained warranties by OHS and the Managers (defined as Mr Stafford, Mr Muir and Mr Kearney) which included, as relied on by the parties :

1. The Group

The information set out in the Recitals to this Agreement and Clause 2 is true, complete and accurate in all respects.

...3. Activities

The Company has not been since its date of incorporation a party to, or liable in respect of, and none of the assets owned or used by the Company are affected by, any agreement, arrangement or obligation which was made otherwise than in the ordinary and usual course of business of the Company as carried on at the date of this Agreement and on arms length terms.

4. Subsidiaries

The Company does not have nor has it ever had any subsidiary nor does it have any beneficial interest in the shares or stock of any other company.

...7. Shareholders' arrangements

...7.2 There are outstanding : ...7.2.2 save in respect of the Convertible Loan Notes no debts owing by the Company to any Shareholder...'

8. Contracts

There are no joint ventures, partnerships or joint venture operations or consortium arrangements in force to which the Company is a party

...11. Borrowings

Save in respect of the Convertible Loan Notes, the Company has no outstanding borrowings, debentures, overdrafts or loans nor does it have any financial facilities outstanding or available to it.

12. Liabilities since incorporation

Since Incorporation, and save in respect of the Convertible Loan Notes, the Company has not assumed or incurred any material liability (including any contingent liability), which is not provided for in the Management Accounts otherwise than in the ordinary and normal course of business.

...14. Breach of contract

The Company is not in material breach of any agreement to which it is a party and, so far as the Warrantors are aware, there are no facts, matters or circumstances which are likely to give rise to any material breach.

15. Litigation

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The Company is not involved, and has not since its incorporation been involved, in any legal or administrative proceedings and no such proceedings are (so far as the Shareholders are aware) pending or threatened and so far as the Shareholders are aware there are no facts, matters or circumstances which are likely to give rise to any such proceedings.

16. Compliance with Laws

...16.1 The Company has conducted and is conducting its business in accordance with all applicable laws and obligations relating to the Company in the United Kingdom, and in all other countries in which it operates, in all material respects.

94. By clause 20 ('Warranties and Undertakings') :

20.1 As a condition of the Subscribers subscribing for Shares in the Company and acknowledging that the Subscribers are entering into this Agreement and subscribing for the Shares in reliance thereon, and that JB is entering into the Option Agreement, in reliance thereon, and may exercise her Option under the Option Agreement in reliance thereon, the Warrantors hereby jointly and severally warrant and undertake to the Subscribers in the terms set out in Schedule 6² (Warranties)

...20.3 Each of the warranties shall remain in full force and effect notwithstanding Subscription

20.4 The Warranties shall be given as at the date of this Agreement and are deemed to be repeated to JB on any date on which JB shall exercise her Option under the Option Agreement provided that JB shall have first given not less than 28 days' notice that she is seriously considering exercising such Option.

20.5 Each of the Warrantors hereby undertakes with the Subscribers that, after Completion, he will, upon becoming aware of any fact, matter or circumstance which he knows comprises or may comprise a breach of the Warranties, notify the subscribers hereof as soon as reasonably practicable.

95. The Shareholders' Agreement contained an entire agreement clause. As is common ground this did and could not exclude liability for a fraudulent misrepresentation by Mr Muir or any individual.

96. In relation to the parties' state of knowledge at the date of the Shareholders' Agreement, there was considerable focus at trial on 'warranty 8', i.e. that OHS was not party to any joint ventures. It is alleged that the investment was made on the basis of representations by Mr Muir to Mr Barley which included that OHS was party to a joint venture agreement with Lloyds.

97. In Mr Barley's 'freezing order' affidavit of 17.3.16, the section headed 'The Shareholders' Agreement' referred to some of the warranties but not no.8. The same section in his witness statement (16.11.17) added a reference to warranty 8, but stated '...this warranty was at odds with the representations made to me by Mr Muir as set out above, and neither I nor Jill had regard to it at the time (as I recall, I read the

² In fact Schedule 4

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warranty as stating that whilst OHS was not a party to joint venture agreements, the Subsidiaries were)'.

98. In cross-examination Mr Barley rejected the suggestion that this addition in his witness statement was an attempt to distance himself from warranty 8. As to subsidiaries he suggested that warranty 4 ('The Company does not have nor has it ever had any subsidiary...') was at odds with the description of OHS's business in clause 2.3.
99. There is evident confusion in the drafting of the Shareholders Agreement. The texts between Mr Muir and Mr Barley suggest, not unusually in such transactions, a good deal of last-minute redrafting. The consequence is an instrument which has internal inconsistencies. Although there was no direct evidence on the point, my inference from earlier documents (and notably the exchanges between Messrs Noble, Barley and Muir between 26 September and 4 October) is that the explanation for these references to joint ventures and subsidiaries was linked to the issue of EIS relief.
100. Whilst again not doubting the sincerity of Mr Barley's evidence in respect of warranty 8, I consider that it is the product of his retrospective attempt to determine his state of mind at the time when the Shareholders' Agreement was entered, and that it suffers from over-analysis.
101. In my judgment the best guide as to Mr Barley's state of knowledge as to joint ventures is provided by the Shareholders' Agreement. Warranty 8, which he admittedly read, was clear. If he had previously been led to believe that OHS had entered a joint venture agreement with Lloyds, the strong likelihood is that he would have queried this discrepancy. He knew that a joint venture agreement had not been entered with Quest; and there was nothing in the Shareholders' Agreement to suggest that joint venture agreements had been entered by any subsidiary of OHS.
102. As to statements made by Mr Muir to him, Mr Barley does not suggest that he was told that any joint venture agreement had been entered by a subsidiary of OHS. I do not accept his recollection that he believed that joint venture agreements had been entered with subsidiaries. I do not accept that Mr Muir told him that OHS had entered a joint venture agreement with Lloyds. As to Quest, Mr Barley was told what was true, namely that there was an intention to proceed to a joint venture agreement. However, as with Lloyds, that ultimately did not happen.
103. Mrs Barley entered the linked Option Agreement on the same date. This provided that the Option could be exercised at any time within 12 months from the date of the Option Agreement, by service of an Exercise Notice.

Payment to Mr Muir

104. Her money for the first tranche was received into OHS' solicitors account on 13 October 2011. On being notified of this by Mr Muir's text the following day ('Money has arrived!') Mr Barley replied 'you can now buy the Mini that Susie was talking about!'.
105. On the same day, pursuant to Mr Muir's instruction to OHS's solicitors the previous day, Mr Muir was paid £108,888 .24 by transfer from the solicitors' client account;

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and Mr Stafford was paid £109,088 .51. The payment to Mr Muir is the sum which Mrs Barley claims to have been in breach of trust or otherwise wrongful.

106. Mr Muir says that the payment to him comprised the repayment to him of his loan of £75,000 to OHS, 3 months arrears of net salary of approximately £11,000 per month and the balance for expenses on company business. As already noted, the repayment of his loan from outside investment had previously been agreed. As to salary, this related to his service agreement as Group Commercial Director at £216,000 pa. It was subsequently agreed between him and Mr Stafford that he should also receive 3 months back pay once that investment had been received. He made a rough calculation after deduction for tax and national insurance which produced a figure of £11,000 per month. He had previously told Mr Barley of the arrangement that his loan would be repaid upon receipt of external investment. This is disputed by Mr Barley who says that he first discovered this payment only after the police intervention in 2016.
107. In cross-examination Ms den Besten pointed to the financial projections attached to his e-mail of 21 September which showed his salary as commencing 1 October 2011 and to an e-mail to Mr Kearney of 3 November 2011 in which he requested payment of expenses of £1917.18 for September and October. He said that the agreement with Mr Stafford about payment of 3 months' salary was made after 21 September; and that the request for expenses may have related to items which he had forgotten.
108. As he acknowledges in his witness statement, Mr Muir did not tell Mr Kearney about these payments to himself and Mr Stafford. He says that he did so at Mr Stafford's request. Mr Stafford did not want Mr Kearney to know about the payments because in his view he did not deserve 3 months back pay. Mr Muir in consequence lied to and misled Mr Kearney : see his emails of 24 October, 3 November, 14 November and 20 December. In the latter he stated 'We are still waiting to receive £200k from investors, Paul Barley sent £550k (£625k is expected) and I have chased him for the balance – I don't want to hound him as he may be paying another £625k in March'. He then set out a list of payments that did not include the payments to himself or Mr Stafford.
109. He continued this deceit nearly two years later. In an e-mail dated 16 July 2013 to Mr Kearney and Ms Leckie of accountants Springfords LLP who had sought clarification of payments, Mr Muir repeated the falsity about the October 2011 payments ('£550k cash received from lawyers – this relates to an equity investment by Jill Barley, our principal investor'). He identified his total loans to OHS as £225,000. This comprised the initial £75,000 and a subsequent loan of £150,000 in 2012, to which I shall refer. He identified repayments totalling £155,000, the first of which he received in May 2012. Thus he made no reference to a repayment of £75,000 in October 2011 and contended that £70,000 remained outstanding. Mr Muir's explanation in cross-examination was that in July 2013 he had forgotten about the October 2011 repayment of £75,000 and that the confusion arose from a continuing dialogue with Mr Kearney as to whether he should be paid by way of salary or by repayment of loan. Ms den Besten submitted that this explanation was incredible; and that either there had been no repayment of the alleged £75,000 loan in October 2011 or he was trying to obtain its repayment for a second time.

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110. Likewise she submitted that the bank statements and a statement of accounts which he prepared as at 30 June 2013 could not be reconciled. The statement of accounts showed purported payments in 2012 of £55,000 to a company called United Zuhad of which (as will be seen) that company's Dr Alayoubi had denied receipt. The only inference was that there were no such payments and that it was a cover for payments to Mr Muir.
111. Against the admitted background of Mr Muir's repeated deceit of Mr Kearney (and then Ms Leckie) about the October 2011 payments, the wider challenge to his integrity, the absence of records of the loan and all these other points of detail, the challenge to his evidence on this point has required particularly close scrutiny.
112. However I am not persuaded that Mr Muir has given untruthful evidence to the Court. I accept that Mr Muir did make the original loan of £75,000; that there was an agreement between him and Mr Stafford that upon receipt of outside investment he would be entitled to its repayment; that there was a further agreement after 21 September that he would at that stage also be entitled to the 3 months back-salary; and that he made a rough calculation of the latter at a net £11,000 per month, together with a small sum for outstanding expenses. As to salary, I note that his revised draft service agreement had a commencement date of 1 June 2011.
113. I do not accept that his calculation of the total £108,888.24 is a dishonest attempt to construct a justification for a payment to which he was not entitled. I accept his evidence that in the admittedly dishonest e-mail of 16 July 2013 he had honestly forgotten about the October 2011 repayment of the £75,000 loan and that the position had been further confused by a continuing debate with Mr Kearney as to the form of his remuneration. Thus I do not accept that he was trying to obtain repayment of the loan for a second time; nor that the reference in his statement of account to payments to United Zuhad was entered for the purpose of a concealed payment to himself.
114. It is not in dispute that Mr Muir had previously told Mr Barley that he had put money in to OHS. Mr Muir says, and Mr Barley disputes, that he had referred to it as a loan. Here I think that Mr Muir's recollection is at fault. I think it more likely that he used the expression he also used in evidence, namely 'put in' rather than 'loan'. That was an honest and truthful description, as was his use of the word 'investment' to the police. The money had been needed as working capital for the business. I prefer Mr Muir's evidence that he told Mr Barley that he was to be repaid the money he had 'put in' once outside investment was received. Whilst acknowledging the caution to be exercised when taking account of informal and bantering texts, I consider that Mr Barley's text ('you can now buy the Mini that Susie was talking about') provides support for his knowledge of such an intended repayment.

Joint ventures

115. On 3 October 2011 an off the shelf company previously made available by OHS' solicitors BPE changed its name to OHS Diagnostics Limited. On 23 February 2012 another such company had its name changed to OHS Pharmaceuticals Limited. For this purpose Mr Muir had obtained the requisite permission from the General Pharmaceutical Council to use the word pharmaceuticals. These companies and their names reflected the two distinct areas of operation.

Approved JudgmentLloyds

116. Mr Muir says that he was told by Mr Stafford in November 2011 that he no longer believed Lloyds to be the best partner for OHS' proposed business model. One of the reasons for the delay in the shipments related to Lloyds' proposal to open a chain of branded pharmacies in Oman. However the Omani Government introduced a law designed to protect small pharmacies from competition from larger chains by prohibiting any new entrant into the market from establishing a chain of pharmacies. This greatly diminished the interest of both Lloyds and Bahwan in the proposed joint venture.
117. In the meantime Mr Stafford had been introduced to an Irish company, Fannin Ltd, which was a generic pharmaceuticals company. He considered that they would be a suitable replacement for Lloyds and could supply a wide range of products at a better price. Mr Muir says that he told this all to Mr Barley; and that he had told him by the end of 2011 that the venture had failed. Mr Barley disputes this. Mr Muir never told him that the Lloyds venture had failed. However by May 2012 he had inferred its failure.

Quest

118. On 10 October 2011 Mr Muir in response to a text enquiry from Mr Barley stated 'just had a meeting with them. All went well, although their CEO had to fly to California yesterday unexpectedly and he wants to be there when we signed the JV – very frustrating. Ironically, he's coming to London next week, so we can do it then!'
119. Mr Muir was subsequently informed by Mr Stafford that Quest's CEO Mr Mohapatra had been dismissed suddenly on 25 October and that the meeting would no longer take place. Mr Barley had otherwise noted Mr Mohapatra's departure and emailed Mr Muir that day '... Quest diagnostics have just gone up by 10% but say no major acquisitions planned and new CEO will be appointed. Hope he is not your main man!'
120. Mr Muir responded a minute later 'No, CEO was a bit insular – reluctant to look outside US, despite being from India originally...!' Mr Barley replied 3 minutes later 'Let's hope we get a pro outside USA cowboy'.
121. The proposed Quest joint venture ultimately went no further. Mr Muir again says that he kept Mr Barley in the picture and had by the end of 2011 told him that it had failed. Mr Barley disputes this; but again says that he had inferred its failure by May 2012.
122. Ms den Besten contrasts the true position with Lloyds and Quest and a draft note about OHS which Mr Stafford forwarded to Mr Muir for comment on 2 December 2011. This stated that OHS was structured around three divisions (pharmaceutical; diagnostics; primary care) and that in respect of pharmaceuticals 'Oxford Lloyds Pharmaceuticals Ltd is a Joint venture between OHS and Lloyds pharmacy... Hospital pharmacy management is a growing part of the business internationally... We also anticipate with the move to more home care for chronic disease management across the region our home care activities will continue to prosper...' As to diagnostics 'OHS and our joint venture partner Quest Diagnostics have come together to offer a unique solution to Governments, private hospitals and healthcare professionals. Whether this is one off esoteric test on a cancer tumour or a full scale

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build, manage and operate regional laboratory we are able to provide cost effective solution.’

123. This evidently gave a misleading picture of the state of the business; but the comments which Mr Muir provided were mere typographical and formatting revisions. In cross-examination he described these and similar documents as Mr Stafford ‘talking vicariously through his partners’. I return to this later on the general issue of credibility.
124. I have taken those matters firmly into account, as well as all the other material relied on to challenge Mr Muir’s integrity and reliability. However, in the context of their friendship, reasonably regular weekly meetings and their mutual interest in the success of the business, it is inherently unlikely that Mr Barley would not have asked how the joint ventures were going and have merely left it to inference. Indeed Mr Barley in cross-examination said of their meetings *‘Well, we would order food, we would have a drink and whatever, and usually we would talk about lots of other things first and towards the end of our meeting there I would probably ask him ‘So tell me about OHS. What is going on?’*
125. I am satisfied that these discussions must inevitably have included an update from Mr Muir on the joint ventures, and subsequently the other business opportunities. I accept that, whilst doubtless expressing himself in a relatively informal way, Mr Muir kept Mr Barley reasonably updated on each venture; and that by the end of 2011 he had told him that they had failed. That was of course a disappointment, but Mr Barley did not suggest that he had been misled, nor had he been. The focus thereafter was on other business opportunities for OHS.

Other business opportunities

126. In the meantime in 2011-12, further business opportunities were being pursued by OHS in Saudi Arabia, Libya and Bulgaria. It is necessary to consider the Saudi opportunities in particular detail.

Saudi Arabia

127. Mr Muir sent Mr Barley a text on 14 October 2011 that Mr Stafford was meeting representatives of the King Faisal Hospital group that day; and that he himself was meeting the Saudi ambassador the following week. On 21 November he texted Mr Barley that Mr Stafford was in Saudi Arabia.

SITCO/Fannin

128. In early 2012 Mr Stafford told Mr Muir that he wanted to enter the Saudi Arabian market, in partnership with SITCO Pharma (SITCO), a division of the Saudi Chemical Company (SCC), one of the largest pharmaceutical distributors in the country. He and Mr Stafford met with the general manager of SCC, Dr Al-Badr, in London in February 2012. In April 2012 they went to Riyadh and met Dr Al-Badr and SITCO’s Dr John Langford. There were further meetings in May. SITCO undertook a due diligence trip to Dublin in June 2012. Dr Al-Badr and Dr Langford came to visit Fannin, accompanied by Mr Stafford and Mr Muir. During the visit they agreed that OHS and Fannin would submit tenders in Saudi Arabia with SITCO’s assistance. A

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market in respiratory inhalers was identified. Efforts were made to obtain regulatory approval for Fannin products in Saudi Arabia.

129. OHS was about to send potential products to Saudi Arabia, as samples for the tender process. However in March 2013 the Saudi government suddenly changed the importation regulations governing the entry of medical samples into the country. Henceforth samples were not to be brought into Saudi Arabia which were not already registered. This disqualified OHS from being able to quote for a tender. SITCO has subsequently entered into an agreement with a Danish pharmaceutical company which had already commenced the registration process to have its products registered in Saudi Arabia and so did not face the same problem.
130. SITCO's Dr Langford gave evidence to this effect by video link. He has been its deputy general manager for distribution since it was established in 1990. He had met with Mr Muir at least 5 times in 2012 and 2013 for the purpose. In cross-examination he was taken to a number of documents from OHS in 2012 which contain statements to the effect that OHS was actively trading. Thus an email from Mr Stafford to him on 3 April 2012 : 'We would like to discuss the possibility of using Saudi as our manufacturing base...as our increased sales throughout Europe is placing pressure on our own capabilities'; and a presentation document headed 'Oxford Healthcare Solutions Partners in life' which contained under 'Investment Case' 'Partnered with global blue chip healthcare organisations'. The document identified 'our partners' as Quest Diagnostics, Lloyds Pharmacy, Roche and University of Oxford. He accepted that the draft agreement between SITCO and Fannin did not involve OHS but said that the position had not been finalised as he needed to figure out how OHS fitted it into it all.

VacuTrust

131. In early 2012 there was a further business opportunity in Saudi Arabia. A Saudi company in the Sahara Group, which manufactured blood draw tubes branded in the name VacuTrust, wanted to find markets. Mr Muir understood from Mr Stafford that these tubes were produced at a much lower cost than the main competitors. He and Mr Stafford visited the manufacturing facility in February 2012 and met Dr Iyad Alayoubi. He was agreeable in principle to entering an agreement whereby OHS would be the intermediary for sale of the products to medical equipment suppliers in the UK and Ireland. In April 2012 the Irish Ministry of Health approved the tubes.
132. A problem arose with funding the purchase of a first shipment of the tubes. The Sahara group indicated that OHS would have to pay upfront a sum understood by Mr Muir to be between £150,000 and £200,000. OHS did not have the funds to make such a payment.
133. In consequence he approached Mr Barley for the funds in May 2012. Mr Barley on behalf of his wife agreed to provide a loan of £200,000 for this purpose. However as result of advice from his tax advisers he said that he could not make a loan to OHS directly or indirectly. It was agreed that Mr Barley would make a loan to him personally. On Mr Muir's account, unchallenged in cross-examination, Mr Barley suggested that it would be better if his onward loan were not in the same amount, in order to avoid any connection between the loans. He agreed to that course. Mrs Barley duly loaned Mr Muir £200,000 and he then loaned £150,000 to OHS. These were paid

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as £25,000 on 30 May 2012 and £125,000 on 1 June 2012, and are supported by his joint bank account statement. The shipment was eventually made after delays during November 2012.

134. Evidence on this project was given by Dr Alayoubi. From June 2008 to February 2013 he was CEO of the Sahara Group company which produced the VacuTrust tubes. He was introduced to Mr Stafford and Mr Muir in early 2012. He met Mr Stafford and Mr Finn of OHS and some representatives from Fannin on 21 October 2012. OHS was the intermediary. At the meeting it was agreed that his company would supply 60 million tubes per year to the Ireland and UK market. The first shipment, of about 2 million tubes, was sent at the end of 2012. He was not aware of subsequent developments after his departure in February 2013.
135. Mr Muir says that he was subsequently informed that the tubes were not fit for their intended purpose. They included the wrong colouring for the EU market and all were too close to their expiry date to be sold into Irish or UK markets. The problem with the shelf life is confirmed by an email from Mr Stafford to Mohammed Edher of the Sahara Group dated 19 February 2013. Accordingly this project ultimately came to nothing.

Blood tests

136. The third opportunity concerned Dr Alayoubi and the company (United Zuhad LLC) which he set up after leaving the Sahara Group in 2013. Dr Alayoubi explained that foreign nationals working in Saudi Arabia needed to undertake medical testing including blood tests in order to get a work permit. The laboratories in those countries, including Ethiopia, were below standard and workers were arriving unfit for work. The plan was for his company and OHS to establish local laboratories with reliable testing for these purposes. This involved Quest, with OHS acting as the intermediary. Without OHS's involvement agreement could not have been reached.
137. An 'International laboratory testing agreement' was entered between United Zuhad, OHS and Quest in July 2013. However political issues in the target countries got in the way. In particular following a criminal incident involving an Ethiopian housemaid in July 2013 there was a prohibition on work visas being provided to Ethiopians. Further political problems including repeated changes of the Minister for Health in Saudi Arabia prevented the project going forward.
138. In cross-examination Dr Alayoubi was taken to Mr Muir's OHS balance sheet dated 30 June 2013 which identified expenditure comprising 'consultancy fee' payments to United Zuhad of £55,000 on each of 26 November 2012, 22 January 2012 (given its place in the list more likely 2013) and 22 February 2014 (more likely 2013). He denied that his company had received those or any payments from OHS.
139. On the limited information available, I cannot reach a conclusion on this disputed sum, save that I do not accept the contention that it was a cover for an illicit payment to Mr Muir.

Riyadh facility

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140. A further Saudi business opportunity was a potential management contract with Quest for a proposed facility in Riyadh. In May 2012 Mr Muir attended a meeting in Riyadh with the Saudi Deputy Minister for Health. Mr Stafford's plan was for OHS to own the laboratory with well-known companies such as Roche supplying equipment. A representative of Roche attended the meeting. For a variety of reasons the proposition was not commercially viable.

Libya

141. Business opportunities were also pursued by OHS in Libya without success. These were explored with the help, amongst others, of the Chairman of the all-party group of MPs for Libya. A particular complexity was that payments would have to be made by way of oil allocations rather than cash. After attempts to deal with that through Royal Dutch Shell, nothing ultimately came of the plan.

Updates

142. The Particulars of Claim refer to updates on these ventures given by Mr Muir, in particular to his text messages of 10 October (Quest), 14 October (Saudi Arabia), 25 October (Libya) and 21 November 2011 (Saudi Arabia); and in the first half of 2012.
143. Thus paragraph 20 contends that after the initial investment Mr Muir 'continued to update Mr Barley in respect of the purported business of OHS'. As particular examples 'but without limitation' are cited :

20.1 : Mr Muir's text of 10 October 2011 relating to a meeting with Quest : *'just had a meeting with them. All went well, although their CEO had to fly to California yesterday unexpectedly and he wants to be there when we signed the JV – very frustrating. Ironically, he's coming to London next week, so we can do it then!'*

From this 'It is reasonably to be inferred that Mr Muir thereby intended Mr Barley to understand, as he indeed understood, that the joint venture would be executed immediately' and that he subsequently said nothing to contradict this.

20.2 : Mr Muir's text of 14 October 2011 as to activity in Saudi Arabia : *'I'm meeting Saudi Ambassador next week. Just Neil meeting guys from King Faisal Hospital group today...'*

20.3 : Mr Muir's texts of 25 October 2011 as to a meeting and other activity relating to Libya : *'Just got out of meeting with guy from Shell...really wants to get involved...'; 'Not offering anything concrete yet, but want to keep talking and keen to come to Tripoli with us as part of the quasi-governmental delegation we are putting together'; 'We'll be going with Daniel Kawczynski – Conservative MP and Chairman of All Parties Parliamentary Group for Libya. He'll be championing our cause'.*

20.4 : Mr Muir's text of 21 November 2011 that Mr Stafford was in Saudi Arabia (*'Neil already in Saudi anyway'*) which was 'inferring and intending that Mr Barley infer as he in fact did, on the business of OHS';

20.5 : 'in the first half of 2012 Mr Muir informed Mr Barley that OHS was preparing a bid for government contracts for the supply of medicines in Saudi Arabia, and/or an

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opportunity to purchase blood draw tubes in Saudi Arabia for onward sale to the Health Service Executive of the Republic of Ireland;’

20.6 ‘in or about May 2012 Mr Muir informed Mr Barley that certain blood draw tubes had been shipped to the Republic of Ireland but were ultimately rejected because they were out of date, which issue OHS was discussing with its supplier.’

144. Paragraph 21 states that ‘...in or about May 2012 Mr Muir told Mr Barley that EIS relief would be available in respect of Mrs Barley’s investment in OHS, which relief was only available *inter alia* in the event that OHS was engaged in preparation to trade or trade and/or where such business was not conducted via joint venture agreements. Although Mr Barley thereby apprehended that the joint ventures with Lloyds and Quest must have failed, by reason of the matters set out above [*i.e. in para.20*] he nonetheless also understood that they had been superseded by other business opportunities of value to OHS.’

Mrs Barley’s second investment

145. It is submitted that these messages and oral communications amounted to an implied representation by Mr Muir that OHS was an active company engaged in revenue generating and/or valuable business; and that in consequence on 6 October 2012 Mrs Barley exercised her option and made a second investment of £625,000. Mr Barley says that he had by now inferred that the Lloyds and Quest joint ventures had failed; but understood that they had been superseded by these other business opportunities of value to OHS. I will return to these later.

The end

146. With the failure of these projects, OHS was evidently in a dire financial position. Furthermore Mr Muir had his own significant financial problems. Between September 2013 and April 2014 Mrs Barley made personal loans to him totalling £500,000 in order to help with his expenses in particular for his home mortgage and for school fees. Thus with the previous loan of £200,000 relating to the blood draw tubes, Mr Muir owed her a total of £700,000. Mr Muir ultimately repaid this total sum following the sale of his home in 2016.
147. On Mr Barley’s account it appeared to him towards the end of 2013 that none of these business opportunities had borne fruit. He was disappointed, but still hopeful that they would see a return on his wife’s investment. Not having been provided with accounts he made investigations at Companies House in the autumn of 2013. He was concerned to protect any tax benefit that might be obtainable. As he understood it, if the company stopped trading then EIS relief would be withdrawn; but if it was placed into liquidation the position would be protected. He mentioned this to Mr Muir at one of their lunches in October or November 2013. Mr Muir replied that Mr Stafford was intending to move OHS operations offshore and therefore would be interested in winding up the company. Mr Barley was keen to go down the route of liquidation and pressed for information. On 16 July 2014 Mr Muir supplied him with a copy of the Board Minutes of 11 July 2014 whereby it was resolved that the company should commence the process of voluntary dissolution. The minutes included the following statement ‘The Directors agreed that the Company was established to conduct a variety of healthcare operations, including selling pharmaceutical products into Saudi

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Arabia. It was noted that after several unsuccessful attempts, the Company had failed to secure a contract to supply pharmaceuticals. Furthermore, other potential businesses were taking far longer than anticipated to progress’.

148. By this stage Mr Barley had already assumed that the business had failed. From June 2014 he had met with Mr Muir much less frequently and when they did meet they did not discuss OHS at any length. He discovered only by a Companies House check that Mr Muir had ceased being a director on 13 June 2014.
149. Mr Barley was of course disappointed by what had happened, but put down the loss of the investment to bad luck in the business opportunities. OHS was ultimately struck off the register on 30 June 2015.

Police involvement

150. In May 2015 Mr Muir learned that Mr Stafford had been arrested by Thames Valley Police on suspicion of fraud. Mr Barley says that he was told by Mr Muir in the ‘summer of 2015’ that Mr Stafford was under investigation by the police. On 9 October 2015 Mr Muir was arrested and his IT equipment and mobile devices seized.
151. In the course of his police interview on 9 October 2015 Mr Muir spoke of soliciting investment in 2011 in terms that ;

‘...it’s a punt, it’s a risk there are no revenues the company has nothing coming in the reason we are coming to you for money is because we need money for day to day living...when we first brought on money from Paul [Barley] and others we were certainly hoping within the next eight months or so we would be bringing (sic) in revenues but for various reasons we didn’t and they didn’t materialise the way we wanted them’.

152. Ms den Besten points to the lack of any reference in these remarks to the ‘July shipment’. Mr Muir spoke of the ‘extremely stressful’ circumstances of the interview. When contrasted with the detailed review and analysis of the many documents produced and considered in the course of this trial, I did not find the (limited) references to the police interview to be of any real assistance.
153. On 11 October 2015 Mr Muir texted Mr Barley to tell them about his arrest. His outstanding loan of £700,000 was formalised into a written agreement in December 2015 and subsequently repaid from the sale of his house in 2016.
154. By email to DC Elaine Christopher dated 22 February 2016 Mr Barley asked ‘Do you have any more news for me? I am particularly interested to know if you have discovered anything more about the Lloyds JV and his knowledge of the ‘actuals’ as well as what happened to the blood draw tubes’. On the following day DC Christopher replied ‘I don’t have any more information for you I am afraid. Lloyds did not pay the money and state they did not have a Joint Venture with OHS and Mr Muir answered ‘no comment’ in interview. I have not been able to look any further into the blood draw tubes.’ On 3 March 2016 DC Christopher told Mr Barley that Mr Muir had confirmed in a police interview that OHS had never concluded any deals and had never realised any profit.’

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155. In the light of that information Mr Barley concluded that the information given to him by Mr Muir in the email of 21 September 2011 was false in material respects. These proceedings were issued on 17 March 2016.

Credibility

156. Before dealing with the individual allegations of fraudulent misrepresentation, I return to the rival submissions as to the unreliability of the evidence of Mr Muir and Mr Barley.
157. Ms den Besten first points to Mr Muir's admitted deceit of Mr Kearney in respect of the payments to himself and Mr Stafford in October 2011. He repeatedly lied about this at the request of Mr Stafford and was continuing to do so in July 2013 following a request for information from the accountant Ms Leckie.
158. He cannot have believed Mr Stafford to be a trustworthy person in the light (in particular) of the DIFC judgment. His suggestion that he believed it to be the lies of a disgruntled ex-employee and that he himself continued trust Mr Stafford was incredible.
159. Furthermore Mr Muir had allowed to pass uncorrected statements by Mr Stafford that he had invested some £14 million of his own money in OHS: see e.g. the Brewin Dolphin wish list which asked for 'details of £14m sunk in the business so far – what is this been spent on, where has the investment made and to?'; and Brewin Dolphin's information memorandum of May 2011 which recorded Mr Stafford's statement that he had spent about £13.75 million of his own money to fund the work on the OHS project. Mr Muir had seen both documents and accepted that he did not see how such a sum could have been sunk into the business. He agreed that there was a huge discrepancy between those figures and the £75,000 supposedly put in by Mr Stafford and that 'possibly' it was a concern he should have raised at the time.
160. The dishonesty of him as well as Mr Stafford was further exemplified by misleading documents produced by Mr Stafford as to the alleged activities of OHS which Mr Muir had seen and not questioned. These included a November 2011 presentation document which under the diagnostics section referred to an 'Exclusive relationship with Quest diagnostics in MENA' and to 'Revenue generating from June 2011'; the draft note about OHS prepared by Mr Stafford and supplied to Mr Muir for comment on 2 December 2011; documents sent by Mr Stafford to the Sahara Group (27 February 2012) and a management team summary (May 2012); and a website post drafted by Mr Stafford with input from Mr Muir. This described OHS in 2013 as '...a leading supplier of pharmaceuticals and medical products. The company has partnerships in place the number of the world's leading companies...' and that 'in Saudi Arabia, OHS's largest market, it is in partnership with the Saudi Chemical Company, through its wholly-owned subsidiary, Sitco...' and that 'OHS has formed a joint venture with the Al Mosa group, based in Riyadh... our joint venture company, OHS (Middle East) Ltd is the 50% stakeholder in the proposed Medical City in Riyadh.'

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161. Taken to these documents in cross-examination, Mr Muir's explanation of these statements was to the general effect that in using such language Mr Stafford was 'talking vicariously through his partners'. Ms den Besten submitted that this explanation was incredible and an example of Mr Muir 'making it up as he went along' and of his indifference to the truth of statements which he or Mr Stafford made about the business.
162. Furthermore Mr Muir's self-description as 'in-house counsel' was at odds, before his service agreement as Group Commercial Director in September 2011, with his earlier presentation as 'Chief Operating Officer' or 'Group Commercial Officer' in Brewin Dolphin documents; an e-mail request in July 2011 to be added as a Director; and the 1 June 2011 commencement date of his service agreement. In the course of the drafting of the service agreement in September 2011 he had asked to be identified as Chief Commercial Officer. Yet in his witness statement he said that 'My role in the business was never clear. Although the job title given to me by Mr Stafford was 'Commercial Director', I never knew what that really meant.'
163. On 31 January 2018, whilst this judgment was reserved, Ms den Besten supplied me the judgment of Green J, handed down on 20 December 2017, in Khakshouri v. Jiminez & ors [2017] EWHC 3392 (QB) which was said to provide further support for the contention that Mr Muir was willing to draft documents containing statements which he knew not to be true. In circumstances where Mr Muir was not a witness in that action and has not had the opportunity, then or in the present action, to answer the matters raised in that case, I accept Mr Saoul's response that it would not be right for me to take account of anything in that judgment.
164. As to Mr Barley, Mr Saoul made no direct challenge to his integrity but submitted in particular that his accounts suffered from over preparation and anticipation of questions; a playing down of the role of Brewin Dolphin (in particular at the meeting of 22 September), as demonstrated by the absence of any reference in his affidavit in support of the without notice application for a freezing order; and an unreliable revision of his account in respect of his understanding of 'warranty 8'.
165. As to Mr Muir, I have already indicated the very great caution which must be taken in respect of a witness who has admittedly and repeatedly lied to a colleague in OHS (Mr Kearney) in respect of the payment out of monies to him and to Mr Stafford in October 2011. The admission appeared in his witness statement and there was no attempt to diminish or excuse his serious wrongdoing.
166. As to the other matters I readily accept that they display a disturbingly casual approach to statements made by Mr Stafford in documents supplied to third parties as to OHS business. It is surprising and concerning that, as a Director of the company from September 2011, and at all times with the experience and status of a commercial solicitor, Mr Muir did not feel the need to suggest substantive revisions in the documents which were supplied to him for comment and which give a misleading impression of OHS' trading activity. Whilst I did not conclude that his explanation that Mr Stafford was 'talking vicariously through his partners' was dishonest, his response reinforced an impression of casualness in respect of documents prepared by Mr Stafford which added to the need for particular caution and watchfulness when assessing his evidence on the critical matters in issue.

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167. Mr Muir's evidence of his role within OHS displayed a similarly causal approach. Thus he was apparently content to be described in public documents as Group Commercial Officer at a time when (as I accept) he in fact saw his role as a form of in-house counsel until at least June or July 2011. Whilst I also accept his evidence that he was uncertain as to what Mr Stafford required of him in his role as Group Commercial Director, he was nonetheless willing to receive substantial remuneration for that post.
168. In all these respects, the assessment of Mr Muir's evidence must also look closely at his relationship with Mr Stafford and how he viewed him. Mr Stafford was evidently the central and dominant figure in OHS and its activities. Notwithstanding Mr Muir's title and salary as Group Commercial Director, I accept that he substantially left business matters to Mr Stafford and continued to trust him. As already indicated, this trust was unaffected by the DIFC judgment. As to the evidence of £13.5/14m allegedly invested by Mr Stafford, it is noteworthy that Brewin Dolphin had prepared its information pack on that same understanding.
169. The demeanour of witnesses is well recognised to be of very limited value in the assessment of credibility and reliability. Thus it is commonplace for a witness who gives evidence which, when tested against the contemporary documents, conflicting oral evidence and/or inherent probabilities, is unreliable, to have presented that evidence in a way which is calm and unshaken. However I record that Mr Muir throughout gave his evidence in a firm, straightforward and confident manner. Whilst acknowledging his dishonesty in his dealings with Mr Kenny and Ms Leckie concerning the monies paid to him in October 2011, he firmly denied any other dishonesty.
170. Mr Barley's manner as a witness was distinctly tense and anxious. He had evidently given a great deal of thought to the case and to his evidence and had the habit, which he acknowledged, of seeking to anticipate questions before they had been asked. I formed the impression that he was troubled by the whole circumstance of this claim and felt considerable responsibility for the loss of his wife's money. It evidently gave him no pleasure to have brought these proceedings but he had, in the light of what he was told by the police and his subsequent review of the documents as they emerged, formed the strong view that his former friend Mr Muir had knowingly deceived him. His memory of the chronology and detail of discussions with Mr Muir was, as he readily acknowledged, not particularly good. That is unsurprising given the passage of time and the nature and frequency of the informal discussions which he had with Mr Muir.
171. Whilst the potential availability of tax relief was of evident importance to him and his wife, I do not accept the submission that his/her motivation was dominated by that factor. Whilst Mr Muir's unchallenged evidence on the arrangements for the £200,000 loan in connection with the blood tubes demonstrated the importance which Mr and Mrs Barley attached to tax relief and raised real questions in my mind as to the propriety of the arrangement, in the absence of any examination of that question by either party, it would be wrong to draw any adverse inference against Mr or Mrs Barley or Mr Muir in that respect. I do not do so.
172. In assessing Mr Muir's credibility and reliability as a witness, I have given full weight to his admitted deceit of Mr Kearney and Ms Leckie and the other matters considered

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above. As to those other matters I remind myself that these were not pleaded allegations of dishonesty but were first, and quite properly, raised in cross-examination. They have caused me to scrutinise his account on the allegations of dishonesty in the present case with particular attention. Having done so I have ultimately been satisfied that his account of his state of mind at the time of the alleged misrepresentations to Mr Barley was honest; and that in almost every respect his recollection was better than that of Mr Barley. I am not persuaded that Mr Muir made any dishonest statements to Mr Barley and am satisfied that what he said he believed to be true.

Deceit : the law

173. The law is uncontroversial. Mrs Barley has to establish that Mr Muir made (1) a representation, which was (2) false, (3) dishonestly made, and (4) intended to be relied on and in fact relied on : see AIC Ltd v. ITS Testing Services (UK) Ltd ('The Kriti Palm') [2007] EWCA Civ 1601 per Rix LJ at para.251.
174. The dishonest representation must be clearly identified: AIC at para.254. Fraud must be distinctly alleged and as distinctly proved : Paragon Finance plc v. DB Thakerar & Co [1999] 1 All ER 400.
175. The standard of proof is the civil standard : see e.g. Re B [2009] 1 AC 11 per Lord Hoffmann at para.13.
176. The representation relied on must be one of fact. A statement of opinion will not suffice unless the deceit is in the fact that the opinion was not, or not honestly, held or in some further implicit dishonest misrepresentation of fact to be derived from the statement of opinion: AIC at para.255. A representation by a professional person in a position where he would be expected to have significantly greater knowledge of the facts represented than did the representee will or may carry an implied representation that the representor or has reasonable grounds for making the statement : see e.g. Barings plc (in liquidation) v. Coopers & Lybrand [2002] 2 BCLC 410 at [50]-[52].
177. Whether any and if so what representation has been made has to be 'judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee'...The reference to the characteristics of the representee is important. The court may regard a sophisticated commercial party who was told that no representations are being made to him quite differently than it would a consumer. In the case of an express statement, 'the court has to consider what a reasonable person would have understood from the words used in the context in which they were used'... The answer to that question may depend on the nature and content of the statement, the context in which it was made, the characteristics of the maker and of the person to whom it was made, and the relationship between them' : Raiffesen Zentralbank Osterreich v. Royal Bank of Scotland plc [2010] EWHC 1392 (Comm) per Christopher Clarke J at paras.80-82, citing MCI WorldCom International v. Primus Telecommunications Inc [2004] EWCA Civ 957 and IFE Fund SA v. Goldman Sachs International [2007] 1 Lloyd's Rep 264; [2007] 2 Lloyd's Rep 449.
178. As to implied representations, the court has to perform a similar task except that it has to consider what a reasonable person would have inferred was being implicitly

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represented by the representor's words and conduct in their context : Raiffeisen at para.83, citing IFE Fund per Toulson J at para.50.

179. As to falsity, it is not necessary for what was said to be entirely correct, provided it is substantially correct, and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimant to enter into the contract. The claimant must show that the difference between what was represented and the truth would have been likely to induce a reasonable person in its position to enter into the contract: Raiffensen at para.149.
180. As to dishonesty, fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false” : Derry v. Peek (1889) 14 App Cas 337 at 374; see AIC at para.256.
181. As to recklessness, ‘Not caring, in that context, did not mean not taking care, it meant indifference to the truth, the moral obliquity of which consists in a wilful disregard of the importance of truth...’ : Angus v. Clifford [1891] 2 Ch 449 at 471. This reflects Derry v. Peek where Lord Herschell stated that recklessness in this sense ‘...is but an instance of a statement made without belief in its truth... To prevent a full statement being fraudulent, there must, I think, always be an honest belief in its truth.’ (p.374); see also AIC at para.257. Throughout this judgment I have used the phrase ‘honest belief’ in this sense; and in reaching my conclusion have had this distinction between ‘not taking care’ and ‘indifference to the truth’ particularly in mind.
182. As to intent, it is possible to be fraudulent even by means of an ambiguous statement, but in such a case it is essential that the representor should have intended the statement to be understood in the sense in which it is understood by the claimant...or should have deliberately used the ambiguity for the purpose of deceiving him and succeeded in doing so: AIC at para.253; see also Goose v. Sandford [2001] Lloyd’s Rep PN 189 at para.41.
183. As to inducement/reliance, the misrepresentation need not be the sole or predominant cause of entering the contract. It is sufficient if it is one of the inducing causes : see e.g. Ross River v. Cambridge City Football Club [2007] EWHC 2115 (Ch) at [200].

‘Initial Misrepresentations’

184. I turn to the three alleged misrepresentations. Each is said to arise from the terms of Mr Muir’s e-mail to Mr Barley of 21 September 2011 timed at 18.55. Representation 1 : that ‘OHS had commenced trading in July 2011 and was a revenue-generating company; thus the financial data supplied was “actuals” and “we started trading in July and the Sept shipment is being loaded next week...” (para.11.1).

Representation 2 : that ‘OHS had entered into a joint venture agreement with Lloyds which was operative and from which OHS had received profit of £382,000 in July 2011’ (para. 11.2)

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Representation 3 : that ‘OHS understood that it would receive (inter alia) profit of £2,998,623 in 2011 and £11,435,956 in 2012 from the Lloyds joint venture, and profit of £4,307,989 for the 3 months to 31 December 2011 and of £17,026,621 from the Quest Joint Venture

185. These allegations are interrelated and need to be considered together. It is alleged that further support for those representations was provided in two ways. First, by the alleged statement by Mr Muir to Mr Barley in or about September 2011 that Artemis had valued OHS at £25m. Secondly, by the Deloitte letter dated 26 April 2011 but provided to Mr Barley in or about September 2011 (but, as I have held, on 4 October 2011). I consider these two matters first.
186. As to Artemis, I have preferred Mr Muir’s evidence on each of the matters relied on by Mr Barley. I do not accept that Mr Muir made a statement to the effect contended by Mr Barley that Artemis had made a formal valuation of OHS at £25m. On the contrary Mr Muir said what he honestly believed to be true, namely that the amount of Artemis’ proposed investment implied a valuation of £25m.
187. As is confirmed by his text of 27 September, I accept that Mr Muir told Mr Barley that Artemis’ withdrawal had nothing to do with the business. I accept Mr Muir’s account that he understood the reason to be a moratorium on investments and so advised Mr Barley. I infer that that was the reason given by Artemis, which was then passed on to Mr Muir. Whilst it may well be that Artemis’ concerns arising from the DIFC judgment had not been assuaged, I am satisfied that Mr Muir’s honest belief of the reason for withdrawal was that it was due to an investment moratorium, which had nothing to do with the business.
188. As to the Deloitte letter, for the reasons given above this provides no support for the alleged representation that OHS had entered a joint venture agreement with Lloyds (i.e. beyond the MoU); and its forwarding by Mr Muir to Mr Barley on 4 October 2011 is inconsistent with any wish to deceive.
189. The 21 September e-mail did contain a representation to the effect that OHS and Lloyds had commenced actual trading in July 2011; and was false. However I am satisfied that Mr Muir honestly believed it to be true, as evidently did Brewin Dolphin through Mr Brady.
190. The e-mail also contained a representation that OHS had an accrued right to receipt of £382,000 profit on the July trading (but not that it had received such sum); and was false. However I am again satisfied that Mr Muir honestly believed it to be true, as must have Mr Brady.
191. Conversely, I do not accept that Mr Muir made any statement or representation that OHS had entered into a joint venture agreement with Lloyds. The represented trading was against the background of the Lloyds MoU (contained in the Brewin Dolphin information pack) and which anticipated the parties (albeit then OHL not OHS) negotiating and entering an agreement. The fact of actual trading does not imply that any such further agreement had been entered; nor do I accept that Mr Barley so believed. The e-mail contained nothing to give that impression; and Warranty 8 (which he had read and considered) was in direct contradiction of any such belief.

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192. I do not accept that the e-mail or attached spreadsheet contained any representation to the effect that 'OHS understood that it would receive' the various figures contained in the projections of future profit in respect of Lloyds or Quest. The figures were no more than projections, which might or might not be achieved. I accept that Mr Muir had an honest belief that there was a reasonable basis for those projections. I do not accept that Mr Barley either had, or could reasonably have had, any belief that they were more than projections.
193. It follows that Mr Muir had no intention to deceive Mr/Mrs Barley in any respect.
194. As to actual inducement, I am not satisfied that the misrepresentations which I have identified in the 21 September e-mail and attachment were a material cause of the decision to invest. Those misrepresentations have to be considered in the context of the fact that there was no joint venture agreement with Lloyds; that Mr Barley did not believe there to be such an agreement; that Mr Barley had the subsequent and more significant discussion with Brewin Dolphin on 22 September; and that Mr Muir advised him of a problem with the July shipment and a delay with the September shipment. In all these circumstances I do not accept that the 21 September e-mail had the contemporary significance which Mr Barley has retrospectively attached to it. In my judgment, and notwithstanding their self-description as cautious investors, Mr and Mrs Barley essentially 'took a punt'.

The 'Implied Representation'

195. The claim is that 'By reason of the matters set out in paragraphs 8 to 11 [i.e. the 'Initial Representations'] and 20 to 21 above, Mr Muir impliedly represented that OHS was an active company engaged in revenue generating and/or valuable business' (POC para.22); that this was false since it never generated revenue (para.24.6); that Mr Muir must have known it to be false (para.25); and that in reliance thereon Mrs Barley in October 2012 executed the Option and invested the further sum of £625,000 (para.23). I have set out above the texts and other statements which are said to give rise to this implied representation.
196. In my judgment this claim is quite untenable.

First, there is no suggestion nor any basis to conclude that any of the statements referred to was untrue. On the contrary, as the evidence shows and I accept, they were honest and truthful accounts of the business opportunities which OHS was exploring.

Secondly, the matters to which they related were each no more and no less than 'business opportunities' which OHS was duly pursuing. Such opportunities would only have 'value' in the event that they developed into a commercial relationship.

Thirdly, and in consequence, there is nothing in the identified texts and information to give rise to the alleged implication that OHS was 'an active company engaged in revenue generating and/or valuable business' (POC para.22). On the contrary, the only implication was that OHS was actively pursuing a range of business opportunities in the hope that one or more of these might result in valuable business and the generation of revenue. This includes the Quest e-mail of 10 October 2011 which contained no misleading inference.

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Fourthly, Mr/Mrs Barley knew long before October 2012 that the Lloyds and Quest joint ventures had failed.

Fifthly, and in consequence, I do not accept that Mrs Barley's further investment was induced by any representation from Mr Muir. In this respect I also do not accept Ms den Besten's further or alternative argument that the second investment was induced by the matters relied on as Initial Misrepresentations. This follows from my earlier findings. The statements made by Mr Muir in September 2011 did not influence her decision to exercise the option to make a further investment.

197. My conclusion is that the claim of deceit does not succeed.

Liability to account and/or compensate

198. Mrs Barley then seeks payment to her of the sum of £108,888.24, namely the sum which Mr Muir arranged to be paid by OHS to himself immediately after she had made her first investment of £625,000.

199. The first basis of claim is that the purpose of her payment was for investment in the business; that the effect of the subsequent payment of £108,888.24 was to defeat the investment purpose to that extent; that in consequence such sum is held by Mr Muir on resulting trust for her, and should be repaid : POC para. 29.1.

200. I consider this basis of claim to be misconceived. Her payment was made to OHS' solicitors (BPE) for the purchase of the shares. Upon its receipt BPE held that sum on behalf of and to the order of OHS. In consideration of that sum Mrs Barley duly received the shares in OHS which she had purchased. Accordingly there was no failure of the purpose of her investment. If there were a subsequent unlawful payment by OHS to Mr Muir, any remedy would lie with OHS (or its liquidators) not Mrs Barley.

201. The second basis of claim is that the payment to Mr Muir was not bona fide in the best interests of OHS; was received by him knowing the same; and was paid/received in breach of his fiduciary and other duties as a director; and that he is liable to account to her in that sum.

202. In my judgment this claim fails on two bases.

First, in the light of my finding that the repayment of Mr Muir's loan and the payment of salary arrears and outstanding expenses were legitimate payments. The only potential revision would be as to the precise calculation of the net arrears after the statutory deductions.

Secondly, and in any event, any such claim would lie with OHS or its liquidators, not Mrs Barley.

203. The third to fifth bases of claim (money had and received; absence of consideration; compensation in equity) each must fail for the same essential reasons.

Breach of Shareholders' Agreement

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204. The claims fall into two categories : (i) breach of warranties (ii) breach of other provisions of the Agreement.

Breach of warranties

205. The loss claimed is the second investment of £625,000 in October 2012. Mrs Barley contends that ‘...had she been aware of the falsity of the aforesaid Warranties on or before 6 October 2012, she would not have exercised the Option’ : POC para.31.
206. Mr Saoul takes a preliminary point that Mrs Barley’s claim does not satisfy the condition of notice in Clause 20.4 of the Agreement, namely that *‘the Warranties shall be given as at the date of this Agreement and are deemed to be repeated to [Mrs Barley] on any date on which [she] shall exercise her Option under the Option Agreement provided that [she] shall have first given not less than 28 days’ notice that she is seriously considering exercising such Option.’* Clause 25 under the heading ‘Notices’ provides that *‘All communications between the Parties with respect to this Agreement shall be in writing and delivered by hand or sent by a reputable courier company to the address of the relevant party set out on page 1 of this Agreement...’*
207. No such written notice was given by Mrs Barley before she exercised her Option. Mr Saoul submits that the failure to satisfy that express condition is fatal to the claim.
208. Ms den Besten’s response is three-fold.

First, that clause 20.4 did not require notice in writing; clause 25 did not extend to clause 20.4; the parties generally communicated orally; and that oral notice was in fact given.

Secondly, that OHS waived any requirement of written notice by accepting the second investment.

Thirdly, that in any event the original warranties were ‘continuing and effective’, whether or not repeated pursuant to clause 20.4. In support she cites clauses 20.3 (*‘Each of the warranties shall remain in full force and effect notwithstanding Subscription’*) and 20.5 (*‘Each of the Warrantors hereby undertakes with the Subscribers that, after Completion, he will, upon becoming aware of any fact, matter or circumstance which he knows comprises or may comprise a breach of the Warranties, notify the Subscribers thereof as soon as reasonably practicable’*). She submits that, had the original warranties not been breached at the moment of entry into the Shareholders Agreement, Mrs Barley would not have made her first, nor therefore her second, investment.

209. My conclusions on these points are :

First, that clause 25 (headed ‘Notices’) does govern clause 20.4. Accordingly written 28-day notice was a condition of repetition of the Warranties.

Secondly, that OHS’ acceptance of the second investment did not constitute an unequivocal act amounting to a waiver of the condition for the repetition of the Warranties.

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Thirdly, that the original Warranties were ‘continuing and effective’ only in the sense that any breach continued to be actionable (subject to any limitation defence); but not in the sense of the Warranties being freshly renewed from day to day. The Warranties were given as at the date of the Shareholders’ Agreement and hence a breach could only arise on that date.

210. Accordingly the Warranties were not repeated and any claim for breach of warranty must depend on establishing a breach at the date of the Shareholders’ Agreement.
211. Furthermore, and as Ms den Besten accepted, the correct measure of damage in a claim for breach of warranty is to put the claimant in the position she would have enjoyed if the relevant warranty had been true. However in this case the loss is pleaded on a tortious basis, namely to put Mrs Barley in the position she would have enjoyed if she had been aware that the relevant Warranty was false. The contention is that, in those circumstances, she would not have made either investment. However, on the correct premise that the Warranties were true, there can be no such loss.
212. In Ms den Besten’s Closing Note, the claim for damages was put on an alternative basis that : ‘...had the warranties been true there would have been no payment to Mr Muir, nor indeed to Mr Stafford. Accordingly the measure of damages is – if not the full value of the Second Investment, then £217,986.75’. This is not the pleaded claim. In any event, this alternative confuses the position of OHS with the position of Mrs Barley.
213. In my judgment, it follows that Mrs Barley’s claim for substantial (as opposed to nominal) damages for breach of warranty must therefore fail in any event. For whether the focus is on breach of the original Warranties or upon a breach of Warranties repeated under clause 20.4, there is no basis to establish any loss by reference to the correct measure of damage.
214. I then turn to each alleged breach. These are pleaded on the basis that that the Warranties were ‘continuing Warranties’ (see POC para.30), i.e. as if freshly made from day to day. For the reasons just given, I do not accept this construction and thus consider breach by reference to the date of the Shareholders’ Agreement.

In breach of Warranty (1), at no material time were the Subsidiaries of OHS in fact engaged in business...Indeed, the subsidiaries identified...above filed only dormant accounts

215. That warranty provided : ‘*The information set out in the Recitals to this Agreement and Clause 2 is true, complete and accurate in all respects*’
216. Clause 2.3 included : ‘*The business of the Company is to act as a holding company for the Company’s subsidiaries and Joint Ventures, which will undertake (inter alia) the following business...*’
217. Clause 2 on its proper construction does not state that any subsidiary is doing business or indeed is in existence. On the contrary such construction is inconsistent with Warranty 4 that ‘The Company does not have nor has it ever had any subsidiary nor does it have any beneficial interest in the shares or stock of any other company’. Accordingly there was no breach of warranty 1.

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In breach of warranties (3) and/or (16), the payments to Mr Muir and Mr Stafford...were paid out wrongfully and otherwise in the ordinary course of business

218. These warranties were : *'The Company has not been since its date of incorporation a party to, or liable in respect of, and none of the assets owned or used by the Company are affected by, any agreement, arrangement or obligation which was made otherwise than in the ordinary and usual course of business of the Company as carried on at the date of this Agreement and on arms length terms.'*

and *'The Company has conducted and is conducting its business in accordance with all applicable laws and obligations relating to the Company in the United Kingdom, and in all other countries in which it operates, in all material respects.'*

219. As at the date of the Shareholders' Agreement these payments had not been made. Accordingly there was no such breach of warranty. In any event, the payment to Mr Muir comprised a lawful repayment of his loan and payment of salary and expenses, which were liabilities incurred in the ordinary and usual course of business.

220. In breach of Warranty (12)...no provision for the payments to Mr Muir and Mr Stafford...appeared in OHS' Management Accounts...'

This Warranty provides : *'Since incorporation, and save in respect of the Convertible Loan Notes the Company has not assumed or incurred any material liability (including any contingent liability), which is not provided for in the Management Accounts otherwise than in the ordinary and normal course of business.'*

221. As to Mr Muir, it again follows again that the liability to him arose in the ordinary and normal course of business. As to Mr Stafford, it appears that he had not made any loan to OHS. Accordingly there was no such liability to record. As to the balance of the payment to him, it has not been established that this was unlawful.

222. In breach of Warranty (14) and/or (15)...there were accordingly at all times subsequent to the Initial Investment circumstances which were known to Mr Muir to be likely to give rise to litigation and/or which comprised a material breach of the Shareholders' Agreement and the warranties contained therein.

223. These Warranties provided : *'The Company is not in material breach of any agreement to which it is a party and, so far as the warrantors are aware, there are no facts, matters or circumstances which are likely to give rise to any material breach';*

and

'The Company is not involved, and has not since its incorporation been involved, in any legal or administrative proceedings and no such proceedings are (so far as the Shareholders are aware) pending or threatened and so far as the Shareholders are aware there are no facts, matters or circumstances which are likely to give rise to any such proceedings'.

224. This allegation must fail on the primary basis that events and circumstances post-dating the date of the Shareholders' Agreement could not constitute a breach of warranty. In any event, there were no such circumstances known to Mr Muir which

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were likely to give rise to litigation and/or which comprised a material breach of the Shareholders' Agreement or its Warranties.

225. My conclusion is that there is no claim for breach of warranty. In the alternative, the damages for breach would be nominal only.

Breach of other obligations

226. The final claim is that Mr Muir was in breach of the provisions of the Shareholders' Agreement concerning (i) the appointment of independent non-executive directors and (ii) the provision of accounts and other information.
227. Clause 5.1 provided : *'The Company shall have a Board of up to 7 Directors, including at least 2 independent non-executive directors...'*
228. Clause 5.3(b) provided that *'The Board shall meet not less than six times in each year...The Board will keep written minutes of all its meetings and copies of all minutes will be provided to each Shareholder promptly after the meeting.'*
229. Clause 5.3(c) provided that *'The quorum for the transaction of business at a meeting of the Board shall require the attendance of not less than 3 Directors, including at least one non-executive director. No business may be transacted at a Board meeting unless a quorum is achieved.'*
230. Clause 15.1 provided *'The Company shall prepare and submit to the Board and the Shareholders the following information: (a) a copy of the Accounts no later than 90 Business Days after the Accounts Date; (b) quarterly unaudited management accounts within 60 Business Days after the end of the relevant quarter; (c) a schedule showing, within 60 Business Days at the end of each quarter, amounts paid by the Company or any of (sic) member of the Group to any of the Shareholders or any of their direct or indirect shareholders; and (d) deliver to JB at the same time as they are sent to the directors of the Company copies of all notices, agenda and accompanying board papers in relation to all Board meetings and the Minutes of all Board meetings as soon as they are available and, if JB shall so request by notice in writing, copies of all notices, agenda and accompanying board papers in relation to all board meetings relating to any (or all) members of the Group and the Minutes of all such board meetings as soon as they are available; (e) such further information as any of the Shareholders may reasonably require relating to the Business or the financial condition of the Group.'*
231. No non-executive directors were ever appointed. OHS filed only unaudited accounts for a dormant company (19 March 2012 and 19 May 2014) and total exemption small company accounts (2 August 2013). No such accounts or other accounts or documents were provided to Mrs Barley.
232. The contention is that, if non-executive directors had been duly appointed, Mr/Mrs Barley would have apprehended that OHS had been mismanaged, and in particular would have discovered the October 2011 payments to Mr Muir and Mr Stafford. If accounts and other documents had been duly supplied they would have discovered the true state of the business. In either or both events Mrs Barley would not have exercised the option and made the second investment of £625,000.

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233. Whilst Mr Saoul disavowed any such point, I do not see how failure to comply with these provisions (in contrast to the Warranties) can constitute a breach of contract by Mr Muir in his individual capacity. I conclude that the claim must fail on that first basis, but proceed to consider the other arguments which arise.
234. Mr Muir's evidence was that, although there had previously been consideration of candidates for non-executive roles, he and Mr Barley subsequently agreed that it was not necessary or cost-effective to appoint non-executive directors, or produce the accounts referred to, until the OHS business was fully established; and that the Shareholders' Agreement was thereby varied.
235. Mr Barley denies that there was any such agreement. Ms den Besten further points to clause 26.3 of the Shareholders' Agreement which provides that *'Any variation of this Agreement shall be binding only if it is recorded in a document signed by or on behalf of each of the Parties.'* Mr Saoul responds with authority which makes clear that such clauses do not oust the capacity of the parties to vary the terms of a contract by oral agreement : MWB Business Exchange Centres Ltd. v. Rock Advertising Ltd. [2016] EWCA Civ 553.
236. On balance I think it likely that there was at least an informal understanding from discussions between Mr Muir and Mr Barley in respect of non-executive directors and accounts. However, and although this point was not specifically taken, an agreement between just two of the several parties to the Shareholders' Agreement evidently cannot vary its terms.
237. In any event I am not persuaded that the likely consequence of the appointment of non-executive directors or the provision of accounts would have been a decision by Mrs Barley not to exercise the option and make the second investment. As I have found, the October 2011 payment to Mr Muir was lawful; and Mr Barley knew from the outset that Mr Muir was to be repaid what he had 'put in'. It is pure speculation as to whether the fact that Mr Stafford had not made a loan would have emerged by October 2012. Before the option was exercised in that month, Mr and Mrs Barley knew that the Lloyds and Quest joint ventures had failed. They knew of the various business opportunities which OHS was pursuing. They did not believe, and had no reason to believe, that those opportunities had ripened into revenue-generating business. In all those circumstances Mrs Barley made the second investment. I am not persuaded that she and Mr Barley would have had any different knowledge and/or acted otherwise if non-executive directors had been appointed or accounts and other documents supplied.

Conclusions

238. For all these reasons I conclude that this action must be dismissed.