



Neutral Citation Number: [2019] EWHC 3191 (QB)

Case No:HQ18X01600

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26 November 2019

**Before :**

**Ms Margaret Obi**  
(sitting as a Deputy High Court Judge)

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**Between :**

Mr Chong Sung Choi

**Claimant**

**- and -**

Mr Chan Mok Park

**First**  
**Defendant**

Ms Sook Kyung Park

**Second**  
**Defendant**

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**Mr Robin Kingham** (instructed by **Andrew & Law Solicitors Ltd**) for the Claimant  
The First and Second Defendant were present but were not represented

Hearing dates: 2 – 4 October 2019 & 7 October 2019  
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**Approved Judgment**

## **Ms Margaret Obi:**

### **Introduction**

1. This claim concerns an agreement in relation to commercial premises at 20 Eden Street, Kingston Upon Thames, KT1 1BB ('the Premises'). At the centre of the dispute is the precise nature of the agreement between the Claimant, Mr Choi and the First Defendant, Mr Park. Mr Choi and Mr Park have known each other socially, since working together in 2011, and are both restaurateurs. The Second Defendant, Ms Park, is not related to Mr Park. However, during the relevant period, they were a cohabiting couple. Mr Choi's primary complaint is that he entered into an agreement with Mr Park to rent the Premises, pending assignment of the lease by 31 May 2017, at the latest, as a consequence of false statements made by Mr Park and suffered financial loss. In response, Mr Park contended (amongst other things) that (i) he was not acting in his personal capacity when he entered into the agreement with Mr Choi, (ii) in any event, Mr Choi was aware that the agreement was an illegal sublet; not an assignment of the lease; and (iii) he simply expressed a willingness to assign the lease at some point in the future subject to payment of the rent.
2. How is it that two experienced businessmen find themselves in this predicament? The answer, according to Mr Choi, is that Mr Park was in financial trouble, and that this motivated him to exploit Mr Choi's trust, by inducing him to believe that the Head Lease had at least sixteen years remaining, when in fact Mr Park knew that the Head Lease had less than five years remaining.
3. Mr Choi's claim for loss and damages is brought on the following grounds:
  - i. Misrepresentation – A claim of fraudulent misrepresentation pursuant to section 2(1) of the Misrepresentation Act 1967;
  - ii. Breach of contract – A claim for breach of terms said to be implied into the agreement;
  - iii. Total failure of consideration – A restitutionary claim in respect of the payments made to the defendants;
  - iv. Quantum meruit – A restitutionary claim for the return of the value of works carried out by Mr Choi at the Premises;
  - v. Unlawful means conspiracy – A claim in tort.
4. The misrepresentation and breach of contract claims are brought solely against Mr Park. The total failure of consideration, quantum meruit and unlawful conspiracy claims are brought against both defendants. Mr Kingham's primary contention, during his closing submissions, was that Mr Park made false statements which amounted to misrepresentation and that if that claim was made out, it would not be necessary for the Court to consider the other grounds, save for unlawful means conspiracy. He submitted that Mr Park coordinated his actions with Ms Park to induce Mr Choi to enter into the agreement and that these actions amount to unlawful means conspiracy. There is no counterclaim.

### Procedural Matters

5. Mr Park and Ms Park were represented by the same legal representatives until shortly before the commencement of the trial. On 4 January 2019, during the pre-trial stage, Mr Choi's legal representatives filed and served an Amended Particulars of Claim. In response an Amended Defence was filed and served on 31 January 2019. An Amended Reply to Defence was filed and served on 14 February 2019.
6. On Day 1 of the trial Ms Park assisted Mr Park in making two separate applications for an adjournment. Ms Park stated that *she* was content for the hearing to proceed but assisted Mr Park to make his applications as she speaks better English. The applications related to Mr Park's limited ability to communicate in English and the absence of legal representation. Both applications were subsequently withdrawn on the understanding that an interpreter was present and would remain present for the duration of the trial and Mr Park could not afford to instruct new legal representatives. Both defendants subsequently confirmed that they were content for the hearing to proceed. After giving the defendants the opportunity to speak to the Personal Support Unit, they submitted a skeleton argument ('Skeleton Argument No.1') which outlined their defence to each ground of the claim. Both defendants had signed Skeleton Argument No.1.
7. On Day 2 the defendants submitted a further, more detailed, skeleton argument ('Skeleton Argument No.2'). Both defendants had signed Skeleton Argument No.2. In addition Ms Park made an application for the witness statement of Mr Kim to be admitted as hearsay evidence as he was in South Korea and it was believed, at that time, that he would not be available to give oral evidence. A Hearsay Notice had not been served and on that basis the application was opposed by Mr Kingham. I granted the application and gave brief reasons for doing so. The defendants subsequently confirmed that contact had been made with Mr Kim and that he would be available to give evidence.
8. On Day 3 Mr Kingham made an application to rely on HSBC and Barclays bank statements ('the bank statements'). Mr Kingham apologised for the lateness of the application which he attributed to the '*disorganised manner*' in which documents had been kept in a storage unit. He stated that, during the pre-trial stage, hard copies of the bank statements could not be located, and it was not possible to obtain access to the statements online as the accounts have since been closed. He informed the Court that Mrs Lee had been encouraged to sort through the storage unit and had found the bank statements copies of which were provided to the defendants on Day 2. I granted the application and gave brief reasons for doing so.

### Background

9. The dispute between the parties was acrimonious. There were allegations and counter-allegations of deceit and untrustworthiness, not least because the parties alleged that they had suffered significant financial harm or were at risk of such harm. Unsurprisingly, there were significant areas of dispute. However, there was also

substantial agreement. The matters which were not in dispute provide a useful framework for setting out the background circumstances:

### Agreed Facts

10. The following matters were either formally agreed during the pre-trial stage of these proceedings or it became apparent, during the course of the trial, that there was no material disagreement between the parties:
- i. Mr Choi was the proprietor of a restaurant known as ‘Soya’ in Weybridge, Surrey, which he ran with his wife - Mrs Lee.
  - ii. Mr Park was a director and shareholder of C&S Union Ltd (C&S), a company which was incorporated on 21 September 2012 and dissolved on 21 February 2017. C&S was established in order to run a restaurant business.
  - iii. In 2012 C&S acquired a lease (‘the First Head Lease’) of the Premises from SRF Eden Ltd (‘the Landlord’) which was due to run for 21 years (i.e. until the year 2033). C&S used the Premises to run a restaurant known as ‘Mino’.
  - iv. Ms Park bought a restaurant known as ‘Sakura’ in August 2015. She opened the restaurant in September 2015.
  - v. On 10 May 2016, C&S entered into a revised lease agreement (‘the Second Head Lease’). The Second Head Lease was prompted by a rent review undertaken by the Landlord in October 2015. As a result of the review, the rent payable under the First Head Lease increased from £65,500 plus VAT to £93,150 plus VAT. Under the provisions of the Second Head Lease C&S agreed to a reduction in the remainder of the term of the original lease from seventeen years to five years. This meant that the Second Head Lease would come to an end on 9 May 2021. In return the Landlord agreed to pay C&S £100,000. Mr Park was described as a guarantor in respect of the Second Head Lease.
  - vi. Clause 17.1 of the Second Head Lease states:  
*‘The Tenant [C&S] shall not assign the whole of this lease without the consent of the Landlord, such consent not to be unreasonably withheld.’*
  - vii. Clause 17.2 of the Second Head Lease states:  
*‘The Tenant [C&S] shall not assign part only of this lease.’*
  - viii. Clause 18.1 of the Second Head Lease states:  
*‘The Tenant [C&S] shall not underlet the whole of the Property except in accordance with this clause nor without the consent of the Landlord, such consent not to be unreasonably withheld.’*

- ix. In May or June 2016, Mr Choi, his wife Mrs Lee and Mr Park met at the *Sakura* restaurant. During the course of the meeting it was agreed that Mr Choi would pay £60,000 (referred to as the Premium) plus rent of £9,500 per month.
- x. A meeting took place on 10 August 2016 based on an a written agreement drafted by Mr Parks' daughter who, at that time, was a trainee solicitor. The agreement was signed by Mr Choi and Mr Park on 11 August 2016.
- xi. Mr Choi, having taken possession of the Premises, subsequently made some physical changes to the property and renamed the restaurant *Big Burger*.
- xii. Mr Choi was visited by the estate agents for the Landlord in April or May 2017. This was when the Landlord first became aware that Mr Park had sublet the Premises to Mr Choi.
- xiii. In July 2017 the Landlord took possession of the Premises to the exclusion of Mr Choi.

### Matters in Dispute

11. There were some areas of dispute which had no material impact on the key issues to be determined in this case. For example, Mr Choi stated that he met with Mr Park at the *Sakura* restaurant in May 2016, whilst Mr Park stated that it was at the beginning of June 2016. Another example was the disagreement with regard to the date Mr Choi occupied the premises. Mr Choi stated that he received the keys to the Premises and started building work on 22 August 2016. Mr Park stated that Mr Choi received the keys on 31 July 2016.
12. The significant matters which were in dispute are as follows:

### The Initial Approach and First Discussion

13. Mr Choi, in his witness statement, dated 20 March 2019, stated that in or around March 2015, Mr Park informed him that he wished '*to sell the Mino restaurant*'. According to Mr Choi, Mr Park informed him that the Premises had a seventeen-and-a-half-year lease, and that if Mr Choi was interested, he should get in touch. This was the 'initial approach'. Mr Choi stated that the idea appealed to him because he was looking for a property from which to start a new restaurant . He contacted Mr Park, and this resulted in a discussion taking place in or around June 2015. This was the 'first discussion'. Mr Choi stated that during the first discussion he offered Mr Park a premium of £60,000 for assignment of the lease. However, this was offer was rejected. Mrs Lee corroborated her husband's account. She stated in her witness statement that Mr Park initially wanted £200,000 for the premium. There was no suggestion that Ms Park was present. As no agreement could be reached the preliminary negotiations were aborted. It was pleaded in the Particulars of Claim that during the first discussion Mr Choi was given the opportunity to read the First Head Lease.

14. Mr Park denied that, on or around March 2015, he approached Mr Choi about assigning the lease of the Premises. He denied that any discussion took place on or around June 2015 and he denied that Mr Choi was shown or given a copy of the First Head Lease.

### The Second Discussion

15. Mr Choi stated, in his witness statement, that Mr Park approached him again, with regard to the assignment of the lease, in or around May 2016, approximately one year after the first discussion. This was the 'second discussion'. Mr Choi stated that during this discussion Mr Park did not mention that the lease had been reduced by agreement with the Landlord and throughout the negotiations it was his understanding that Mr Park was offering him the original lease with at least sixteen years remaining for a premium payment of £60,000. Mrs Lee was present during this discussion and corroborated her husband's account. Although there was no mention of the location of the meeting in the witness statements of Mr Choi and Mrs Lee, it became clear during the hearing that they accepted that it had taken place in the *Sakura* restaurant. There was no suggestion that Ms Park was present.
16. Mr Park stated, in his witness statement, that around the beginning of June 2016 Mr Choi and his wife turned up at the *Sakura* restaurant uninvited with two bottles of wine. He stated that he had '*just arrived*' at the restaurant so that he and Ms Park could go home together, but she had already left. According to Mr Park, Mr Choi explained that he planned to establish a chain of restaurants across the UK and was interested in taking over the Premises. Mr Park stated that he informed Mr Choi and his wife that he had a new lease which would expire in 2021 and that he did not have the Landlord's consent to assign the lease. He also informed Mr Choi that the seventeen year lease was valued at £230,000, and the 5 year lease was valued at £60,000. However, Mr Choi indicated that he was not concerned about the length of the lease because he expected to establish a successful business and recover the money he had invested within two years. Mr Park stated, that on behalf of C&S Union Ltd, he agreed that the Premises would be underlet to Mr Choi for £9,500 per calendar month and that the agreement would be kept secret from the Landlord. In addition, Mr Park stated that there was also an agreement that no alterations would be made to the interior of the Premises, the name board outside would remain the same and that if Mr Choi '*reliably*' paid the rent for a year (as it turned out the rental payments were sporadic) he would consider approaching the Landlord with a view to persuading him to assign the lease to Mr Choi. In his witness statement, Mr Park stated, *[w]e agreed to have a meeting again the following day in O'Neill's Public House in Kingston, near Mino.*

### Inspection of the Head Lease & Further Meetings

17. As stated in paragraph 13 above, it was pleaded in the Particulars of Claim that, during the first discussion, Mr Choi was given the opportunity to read the First Head Lease. However, in their witness statements, neither Mr Choi nor Mrs Lee, make any mention of reading or seeing the First Head Lease. During his oral evidence, Mr Choi stated unequivocally that he believed that, as of June 2015, the First Head Lease had seventeen

and a half years left to run, but he did not state that this belief was based on being given the opportunity to read or look over the First Head Lease.

18. There appears to be no dispute that after the first discussion a further meeting took place the next day at O’Neills Public House, Weybridge to discuss the terms of the agreement. However, Mr Choi and Mrs Lee make little or no mention of this meeting.
19. Leaving the alleged first discussion to one side, Mr Choi stated that on a number of occasions, he and his wife asked to see the First Head Lease, which they described as the ‘original documents’, but Mr Park insisted that they pay the holding deposit first. Mr Choi stated that, on more than one occasion, Mr Park informed him that he had been advised by his solicitors not to show him the original documents. He also stated that Mr Park promised that the lease would be assigned to him within five months ‘*without fail*’ and at other times stated that he would be going to Korea for good, due to his health, and would keep his promise by the time he left. According to Mr Choi, Mr Park made an urgent request for money due to his personal circumstances. This prompted Mr Choi to pay the holding deposit of £10,000 on 10 June 2016, even though he had not seen the original documents. Mr Choi stated that Mr Park subsequently made a further urgent request for money and he paid another £10,000. Mr Choi and his wife again asked to view the original documents and on this occasion Mr Park sent six photographs to Mrs Lee via Kakao Talk – an instant messaging application for smartphones. During his oral evidence, Mr Choi stated that he did not see the photographs but was informed by his wife, who had seen them, that they were not readable. Mrs Lee corroborated her husband’s account.
20. Mr Choi made no mention of any opportunities to review the Head Lease in his witness statement. However, during his oral evidence, when he was cross examined by Ms Park, he acknowledged that Mr Park showed him a copy of a lease. He stated that he cannot read English but can read figures and noted that there was reference to £100,000. He stated that he queried this with Mr Park, but the document was taken away from him, and he was not given the opportunity to look at it more closely. Mrs Lee corroborated her husband’s account. In her witness statement she stated that, around July 2016, they were shown the lease, ‘...*but [Mr Park] kept hiding it from our view. He flicked through the lease parts of it saying these were the relevant parts, but he didn’t allow either me or my husband see the lease for ourselves.*’ When she was cross examined by Ms Park she stated that her English is poor but she knows, ‘...*abc and 123.*’ The contract drafted by Mr Park’s daughter was signed at the solicitor’s office on 11 August 2016 (Mr Choi indicated in his witness statement that it was signed on 12 August 2016) and the day before i.e. on 10 August a meeting was held to finalise the terms of the agreement. Mr Choi made no mention of this meeting in his witness statement, but it was pleaded in the Particulars of Claim that the meeting took place at the *Costa Coffee* in New Malden. There was no suggestion that Mrs Lee was present at the *Costa Coffee* meeting. During Mrs Lee’s evidence, she referred to the meeting taking place at the Watchman Public House in New Malden. She stated in her witness statement that the lease that Mr Park brought for her husband to sign ‘*had to be changed due to errors*’. Mrs Lee was present the following day when Mr Park produced the amended contract. She stated that she asked Mr Park ‘*if everything had been done correctly*’ as her English was poor and her husband’s English was also limited.
21. It was pleaded in the Particulars of Claim that during the ‘*Costa Coffee*’ meeting Mr Park made the following oral representations:

- i. he had obtained the consent of the Landlord for (a) the underlease the Premises and (b) subsequent assignment of the lease;
  - ii. the leasehold to be assigned had a term of sixteen years remaining;
  - iii. the level of rent owed to the Landlord under the lease was £9,500 per month.
22. Mr Park acknowledged that on 27 June 2016, he sent Mrs Lee a text message attaching photographs of the Head Lease. However, he took issue with the suggestion that Mr Choi and Mrs Lee had asked to see the Head Lease on numerous occasions. He stated that Mrs Lee only asked to see it once and that request prompted him to send the text messages with the photographs attached. During cross examination, he stated that he was advised by his solicitor that subletting without the Landlords consent would be illegal. In the Amended Defence it was stated that the July 2016 meeting had taken place in the Oatlands Park Hotel. Mr Park denied that he had refused to allow Mr Choi and Mrs Lee to read the lease. It was asserted on Mr Park's behalf that they were provided with a copy of the Head Second Lease and that Mr Choi stated that he would take it to his solicitor so that it could be checked. In his witness statement Mr Park stated that Mrs Lee left the hotel after the discussion with regards to the lease and he stayed to discuss other matters with Mr Choi. Mr Park explained that he telephoned Ms Park to join him at the hotel as he planned to stay the night and when she arrived Mr Choi left. The Amended Defence stated Mr Choi subsequently informed Mr Park that he was '*...content with the Second Head Lease and also with the terms that had been agreed by the parties for the purpose of underletting the Premises to the Claimant.*' Mr Park accepted that a meeting took place on 10 August 2016 to finalise the terms of the agreement, but he stated that it took place at the Watchman Public House. He stated that Ms Park was not present, and he denied that he made the oral representations as set out in the Particulars of Claim.

#### The Two Versions of the Agreement

23. Although there was no dispute that an agreement had been signed and witnessed by a solicitor on 11 August 2016, there was a dispute as to which was the correct version of the agreement. The version relied upon by Mr Choi was signed by himself and Mr Park. The signatures were witnessed by a solicitor from a firm in New Maldon. Below the solicitor's printed stamp was a single clause handwritten in the Korean language. Mr Choi stated, during his oral evidence, that after they left the solicitor's office, he telephoned Mr Park and they met in the car park of the *Mino* restaurant. According to Mr Choi, he wrote the addendum whilst sitting in the car, which both he and Mr Park signed. The clause was translated into English and read as follows:

*'I, Chan Mock Park, agreed to transfer the shop lease which is in this document to Mr Chong Sung Choi by 31 May 2017.*

*'If I could not compliant this promise I will pay £120,000 [to Mr Chong Sung Choi.]'*

24. Mr Park relied on an unsigned version of the agreement. He acknowledged that the agreement had been signed and witnessed by a solicitor. However, he stated that he had lost the signed version about a month after it had been witnessed. Mr Park's version includes two pages of notes handwritten in Korean which were not translated. Mr Park



stated that these notes are in fact further additional clauses which were included in the agreement at Mr Choi's request when they met on 10 August 2016 at the Watchman Public House. He stated during his oral evidence that the clauses had to be handwritten because, neither he nor Mr Choi, had brought a computer with them. He stated that on the 'genuine' agreement, the solicitors stamp appears below the handwritten addendum. Mr Park denied that he had received a phone call from Mr Choi after attending the solicitor's office and denied that he had signed Mr Choi's version of the addendum.

25. Aside from the handwritten addendums and the presence of a signature on one and the absence of a signature on the other, there are a number of differences between the two versions of the agreement. In particular:
- i. Mr Choi's version is for a term of 4 years and 7 months, whereas Mr Parks' version is for a term of 5 years (in both cases the term appears to start on 10 August 2016).
  - ii. Mr Choi's version requires the lease deposit to be paid within 3 months of receiving the keys to the Premises, whereas Mr Park's version provides for a period of two months.
  - iii. Mr Choi's version states, '*Key taken at 21 of [sic] Aug end day 11PM*', whereas there is no provision for the delivery of keys in Mr Park's version.
26. In all other respects the two versions of the agreement are essentially identical. Both were entitled 'Commercial Lease Agreement'.

#### The Need for Secrecy and the 'no alteration' pact

27. Mr Park alleged that Mr Choi agreed to enter into a subletting agreement in full knowledge that the Landlord's consent was required but would not be sought. He stated that they agreed to keep the subletting agreement a secret from the Landlord during the first discussion. He also stated that he instructed Mr Choi to make no alterations to the interior of the Premises and to keep the same board outside so that it would not alert the Landlord to the fact that the Premises had been illegally sublet.
28. There was no mention of the need for secrecy or a 'no alteration' pact in Mr Choi's witness statement. The only reference to alterations was when he stated that at some point, when he confirmed to Mr Park that he would be undertaking some construction work on the Premises, Mr Park suggested that he should wait until after he had earned enough money through the business and had become well-established. The Amended Reply to Defence, stated that (i) there was no agreement to keep the underletting a secret from the Landlord; (ii) Mr Park was aware at all times that Mr Choi would be running a different business which would require renovation and refurbishment of the Premises; and (iii) Mr Park consented to the alteration of the interior of the Premises and the name board.

#### Payments to Mr Park

29. Mr Choi stated, during his oral evidence, that in total he paid Mr Park £101,500. This sum was made up of £60,000 for the premium and £41,500 in rent. Mr Choi and Mrs Lee referred to some of the payments that were made to Mr Park in their witness statements. However, with the benefit of the bank statements, Mr Choi and Mrs Lee were able to more accurately identify the dates they claimed payments had been made to Mr Park. Mr Kingham submitted that the oral evidence of Mr Choi and Mrs Lee together with the documentary evidence contained within the bank statements confirmed that the following payments were made:
- a. £10,000 cash paid in by Mrs Lee on 10 June 2016 followed by a £10,000 cheque issued to C&S Union Ltd which was paid on 15 June 2016;
  - b. £10,000 transferred to C&S Union Ltd on 18 July 2016;
  - c. £10,000 transferred to C&S Union Ltd on 12 August 2016;
  - d. £20,000 cheque paid out on 15 August 2016. The cheque was issued to C&S Union Ltd and a photocopy of the cheque dated 10 August 2016 was provided;
  - e. £9,500 transferred to C&S Union Ltd on 22 August 2016;
  - f. £10,000 paid in cash to Mr Park. Mrs Lee stated that she did not obtain a receipt;
  - g. £8,000 transferred to S Park on 22 December 2016;
  - h. £10,000 transferred to S Park on 30 December 2016;
  - i. £6,000 transferred to S Park on 2 February 2017;
  - j. £8,000 transferred to S Park on 23 March 2017.
30. Mr Choi stated that he made all of the above payments on the instruction of Mr Park, including the last four payments which were made to a personal bank account held by Ms Park.
31. There were two payments which could not be verified from the bank statements; payment (a) and payment (f). Mr Park disputed both of these payments.

### **Key Issues**

32. For reasons which will become apparent I determined that the key factual and legal issues should be confined to liability on the grounds of (i) misrepresentation, and (ii) unlawful means conspiracy.
33. The issues were not formally agreed. Mr Kingham in his closing submission invited me to conclude that in considering whether the claim for misrepresentation had been made out there was only one key issue to be determined: *Did Mr Choi know that the agreement he was entering into was unlawful because Mr Park had failed to obtain the Landlords consent?* In relation to the unlawful means conspiracy claim Mr Kingham

submitted that the key issue was whether the evidence of Mr Choi should be preferred to the evidence of the defendants.

34. Although there was no counterclaim the recurring theme from Mr Park and Ms Park was that they were the aggrieved parties. The most comprehensive articulation of the defendant's case was set out in Skeleton Argument No.2. The defendants submitted that (i) Mr Park is not the correct defendant because he was acting on behalf of C&S Union Ltd and Mr Choi was aware, or ought to have been aware of that; (ii) neither Mr Park nor C&S Union Ltd could grant a legal underlease without the consent of the Landlord and Mr Choi was aware that the Landlord's consent had not been obtained; (iii) Mr Park breached the terms of the agreement as he was expressly instructed not to carry out any works to the Premises and did not pay the rent on time; (v) Mr Choi was provided with the Second Head Lease (which confirms that the Head Lease was reduced to 5 years); (vi) the agreement relied upon by Mr Choi is a forgery; (vii) Ms Park was not a party to the agreement, any money she received was as an agent of C&S Union Ltd and the claim against her fails to particularise her alleged knowledge of Mr Park's unlawful conduct.
35. The matters raised by the defendants are dealt with and considered as part of my factual findings, and based on those findings, I determined the broader issues which I concluded to be as follows:
- i. Did Mr Choi know that the agreement he was entering into was unlawful because Mr Park had failed to obtain the Landlords consent?
  - ii. What role, if any, did Ms Park play?

### Legal Framework

36. This case fell to be decided almost exclusively on the facts; very few issues of law were involved. The burden was on Mr Choi to establish his claims on the balance of probabilities. The well-established law with regards to misrepresentation under the Misrepresentation Act 1967 and unlawful means conspiracy is set out below:

### Misrepresentation

37. Section 2(1) of the Misrepresentation Act 1967 provides:

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

*up to the time the contract was made the facts represented were true.”*

38. It is well-established that pursuant to s.2(1) Mr Choi must prove, that (i) he entered into a contract with Mr Park; (ii) the contract was entered into after a misrepresentation by Mr Park; (iii) as a result Mr Choi suffered loss; (iv) Mr Park would be liable in damages in respect of such loss had the misrepresentation been made fraudulently.

#### Unlawful Means Conspiracy

39. An unlawful means conspiracy occurs where: (i) two or more persons act together; (ii) to take action which is unlawful; (iii) with the intention to damage a third party (or they can reasonably foresee that their actions may cause damage to that third party); and (4) the third party suffers damage as a result.
40. Unlawful means conspiracy requires an agreement to act. Where misrepresentation is relied on as the unlawful means, this must necessarily require an agreement that a misrepresentation will be made.

#### Assessment of the Evidence

41. In *Gestmin SGPS SPA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), at [§16-20], Leggatt J (as he then was) observed that it is well-known human memory is unreliable, especially so when it comes to recalling past beliefs. At [§18], he concluded:

*‘... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.’*

42. It is in this way that I have approached the evidence in the present case. I proceeded with caution where there were matters which were contradicted by the documents or which were not documented.

### Documentary Evidence

43. Given that Mr Choi and Mr Park reached some form of an agreement with regards to the Premises without seeking legal advice in advance and without the benefit of a document drawn up by a fully qualified legal professional, it is perhaps not surprising that this case was not heavily documented. The documents that were provided consisted of:
- i. The two versions of the agreement;
  - ii. A letter from Mr Choi to Mr Park (translated from Korean into English) dated 20 June 2017 (setting out his complaint and the redress sought);
  - iii. Emails between Mr Choi and the estate agent (regarding the rent);
  - iv. Correspondence from the Landlords agent to C&S Union Ltd and from Mr Park's solicitor to C&S Union Ltd (relating to the rent review);
  - v. Kakao Talk messages between Mrs Lee and Mr Park (translated from Korean into English) from June 2016, December 2016, January 2017 & February 2017;
  - vi. Fund flow for *Big Burger Ltd*;
  - vii. The bank statements;
  - viii. Refurbishment agreements dated 19 August 2016 and 25 October 2016.
44. During the trial both parties focused a great deal of attention on the Kakao Talk messages ('the text messages'). The text communications between Mr Park and Mrs Lee were expected to remain private. Therefore, in my judgment, their expressions are likely to represent their beliefs and intentions accurately, particularly as the messages were sent well before these proceedings were contemplated. However, I bore in mind the possibility that one of them, or both of them, were seeking to mislead the recipient of the text messages, or to disguise their motives. I am satisfied that, on at least one occasion, this was indeed the case.
45. The bank statements confirm that money was transferred from Mr Choi to C&S Union before the written agreement was signed. The first payment was on 10 June 2016. Based on the text message from Mr Park to Mr Choi, dated 26 June 2016, it was clear that there was an agreement that the next payment would be paid on or before 10 July 2016. In that text message Mr Park attempted to persuade Mr Choi (who he referred to as '*Chief*') to make the second payment, or at least half of it, by the following Monday or Wednesday. Mr Park suggested that the request for early payment was made '*... because I reported to the Landlord already and I also have own finance plan (sic).*' In a follow up text message to Mrs Lee, again dated 26 June 2016, Mr Park stated that the earlier message had originally been sent to Mr Choi '*last Friday*'. Mr Park informed Mrs Lee that Mr Choi stated that he would be willing to discuss the matter but it would have to wait until after his trip to Korea. Mr Park went on to state in the text message: '*The reason why I sublet my restaurant to Chief is not because there is a problem but lots of money could be spent for your redecoration so I could help you save the cost by reducing the premium from £200,000 down to £60,000. Chief was like that he would be*

*prepared by mid of June, so I planned, and I am currently waiting as he advised that he do it earlier than 10<sup>th</sup> July. I am earning tens of thousands of sterling every month at this restaurant but the reason I hand over this place in a hurry is to focus on house construction fully. You shall anyway pay me so please help me get my plan achieved a bit...* Mrs Lee, in her response, suggested that the £10,000 would be 'available' after she had seen the document that her husband had requested 'yesterday'. A few minutes later she sent a further text message indicating that she could meet Mr Park in New Malden or Kingston. Mr Park replied at 17.28. He stated that he already had an appointment that evening but would be meeting with his solicitor in the morning and would make contact with Mrs Lee after he had received advice.

46. On 27 June 2016, Mr Park sent the photographs of the Head Lease. He stated, *'As I told you many times earlier regarding the contract between you, chief and I, I and my solicitor have same opinion over that. I cannot provide you whichever the original or a copy of the lease document. However, as I told you, I can check the most important part of it for you. And, please be careful indeed. I even did not tell my family. I only told them that I changed the type of business due to difficulties on the business. I earnestly ask you and Chief as such. I believe that the cause of the rumour is from employees working along. If I will be in trouble by that, I will definitely have an enormous loss. Please be attentive. Thanks. And, please transfer £10,000 to my company account by today...* In response Mrs Lee thanked Mr Park for the documents. She stated that she wanted to *'check this with [her] husband'* but he had already boarded his flight. She went on to state that she did not understand *'...why we even should not let my family know that we go under the rent contract and why such enormous loss could be incurred. Even, if we go under the sub-let contract, we will have to promote to those we know at least and people will know all the facts one day despite we would say that it is only new management.'* She concluded by stating that it would be impossible to transfer £10,000 that day as the money was in her husband's account. Mr Park responded the same day. He stated, *'Madam, it seemed that there was some misunderstanding about what I told you. Please do promoting to those you know that you do the new business. However, I would say that you should not tell that you go under the sublet contract. I requested you the money because I need it urgently.'*
47. The next series of text messages relate to December 2016 and January 2017. On 22 December 2016, Mrs Lee sent a message in which she stated *'[f]rom now on, I will manage our bank account so please contact me.'* Mr Park replied on the same day. He stated that he was reassured that Mrs Lee would be handling the finances and went on to state, *'...I only want you to make a payment in time so that I can pay the other side to focus on my own business fully.'* Later that day Mrs Lee confirmed that she had sent £8,000 to S Park. She included the name, sort code and account number in her text message. In his response Mr Park reminded Mrs Lee of the rent that was outstanding. He stated, *'The rent fee for October, November and December is £28,500 minus £8,000 so that £20,500.'* On 30 December 2016, Mrs Lee sent a text message apologising for not being able to make a payment. Mr Park responded on 6 January 2017, as follows: *'...I have no particular work to earn money but I am under pressure from many others to pay the rent. Sorry but please transfer.'* He sent a further text message on 21 January 2016, in which he stated, *'...Today is the rent payday. Do you have money?'* Mrs Lee apologised once again in her return email of the same date and indicated that she would make the payment by 5 February 2017. On 30 January 2017, Mr Park stated *'I am desperately struggling with the finance. Please transfer the money that you promised'*

*to do within this week by tomorrow. Because I need to pay by tomorrow to others by promising that it would be completed by the end of month so please help.'* Mrs Lee replied stating that she would make a transfer by 2 February 2017.

48. In a text message sent on 8 February 2017, Mr Park referred to a meeting which had taken place the day before. He complained that he had never received the rent on time. In her reply Mrs Lee stated, *'Many things are different from what you have told me. Please show me the original documents from now on and I will contact a solicitor to prepare for that...Previous owner received the rent cheap. It was the first time I heard that the landlord was changed. But, I heard from you that the lease [rent] was reduced. Obvious thing is we are not sub lessee, you surely know that. However, your name was on the contract as a landlord. We are the same lease holder tenants. I believe that it would be right to finalise this thing quickly and clearly since we feel uncomfortable each other despite we did this thing for the convenience for both party. I will prepare for that with a solicitor.'* The final text message is dated 11 April 2017, in which Mrs Lee apologises for a bounced cheque.
49. In my judgment the inferences which can be drawn from the documents, (in particular the agreement, bank statements and the text messages) and from the known facts are as follows:
- i. Mr Park's text message dated 26 June 2016, confirms that at some point he indicated that the premium was worth £200,000 but had subsequently agreed to reduce it to £60,000.
  - ii. Mr Park directed Mr Choi to pay the premium/rent into a C&S Union Ltd account referred to in the text message, dated 27 June 2016, as 'my company account'. The text message from Mrs Lee dated 22 December 2016 included the bank details of Ms Park. The natural reading of this text message is that Mr Park provided the bank account details and Mrs Lee included the details in her text to confirm that she had made the payment to the correct bank account.
  - iii. Mr Park was under some financial pressure in June 2016. He suggested during his oral evidence that he simply wanted to give Mr Choi and Mrs Lee the impression that he had to pay the Landlord so that they would pay the rent on time. However, Mr Park's text messages reveal that having received the first instalment of £10,000 on 15 June 2016 (as confirmed by the bank statements), he was keen to receive the next instalment earlier than had previously been agreed. He indicated that if the full amount could not be paid early, he would be willing to accept half. As the original text to Mr Choi was sent the previous Friday (i.e. 24 June 2016) an early payment in this context meant that he hoped to receive the money during the week commencing 27 June 2016. When Mr Choi stated that the matter would have to wait for him to return from Korea, Mr Park re-sent the text message to Mrs Lee approximately 48 hours later. There is a pleading tone to Mr Park's original text message to Mr Choi and an even more pleading tone in the follow up text to Mrs Lee. Furthermore, there is a degree of persistence to the request for early payment at a time when he did not know that the rental payments would become somewhat sporadic.
  - iv. There is a manipulative quality to Mr Parks text message of 26 June 2016. He suggested that he had entered into the agreement as a favour to Mr Choi and

Mrs Lee but at the same time wanted to focus on his own plans, which appeared to involve the construction of a house. His reference to ‘...*earning tens of thousands of sterling every month*’ when he was running the *Mina* restaurant suggests that he had made some sort of financial sacrifice. Mr Park also implied that Mr Choi had agreed to pay him earlier.

- v. Mr Park wanted the fact that a different business was to be run from the Premises to be a secret and indicated, in his text message dated 27 June 2016, that exposure would cause significant financial consequences. It is apparent from Mrs Lee’s response that, as of June 2016, she did not understand why the rental agreement had to be kept a secret and why a financial loss would be incurred if others found out about it. It is also apparent that after the ‘*rent contract*’ she anticipated that there would be a ‘*sub-let contract*’. Mr Park, in his reply, appeared to be more concerned by the use of the phrase ‘*sub-let contract*’. He stated that Mrs Lee should not tell anyone about the ‘*sub-let contract*’. He did not mention the ‘*rent contract*’.
- vi. Mr Park’s text message dated 26 June 2016, indicates that he anticipated that some ‘*re-decoration*’ work would be carried out the Premises by Mrs Lee and her husband.
- vii. Mr Park was of the view that, as of 22 December 2016, he was owed £20,500 made up of the rent for October, November and December minus the £8,000 Mrs Lee paid that day. He did not suggest at that time that there were any other payments outstanding.
- viii. Mr Park indicated in his text message, dated 27 June 2016, that the issue of inspection of the Head Lease had been raised ‘*many times*’. At the very least it had been raised more than once.

### Factual Witnesses

50. The trial bundle included a witness statement from Mr Park’s daughter Miss Kyu Won Park. She confirmed that she drafted the agreement but did not wish to be involved ‘*in such a complicated matter*’ after her father informed her that permission had not been obtained from the Landlord. The bundle also included a witness statement from Mr Sung Han. He stated that sometime in June 2016 Mr Choi and Mrs Lee attended the *Mino* restaurant where he was working as a manager and asked about the new lease. He stated that he explained that the new lease was for five years. He expressed the view that they appeared to know about the new five year lease before they asked about it. Neither Miss Park nor Mr Han were called to give evidence.
51. The live witnesses were heard in the following order: Mr Choi, Mrs Lee, Mr Kim, Mr Park and Ms Park. The evidence of Mr Kim was interposed to maximise the opportunity for his evidence to be heard by telephone as he was giving evidence from South Korea. In relation to the key witnesses and their oral evidence I make the following general observations:



- i. Ms Park addressed the Court competently in English. She was easy to understand and required linguistic assistance on very few occasions. All the other witnesses required the assistance of an interpreter. Ms Park was vigilant with regard to the translation from Korean to English and at times challenged the verbal translation of questions and answers and the written translation of the documents.
  - ii. In assessing the evidence I made appropriate allowance for the art of translation, where word choice, grammatical interpretation, and the infusion of tone and style can transform the meaning, even if the words themselves remain similar.
  - iii. I bore in mind that the fact that a witness has not told the truth or has been evasive in relation to one part of his or her evidence does not necessarily mean that the entirety of his or her testimony is to be completely disregarded.
52. Ultimately, given the nature of the factual issues, the Court had to decide whether to believe Mr Choi and his wife or Mr Park.

### Credibility of Key Witnesses

#### *Mr Choi*

53. Mr Choi affirmed and adopted his witness statement dated 20 March 2019. It was clear that his ability to speak, understand or read English was very limited. He explained during his oral evidence that although he cannot read English words, he can read numbers. Mr Choi did not, in my view, use the translation process as a means of evading giving a direct answer or of delaying his answers to any questions put to him. Despite the fact that he gave his evidence in Korean, I was able to form a clear view of his overall credibility from the answers he gave and the manner in which he gave them. His evidence demonstrated that he was not someone who was on top of matters of detail nor someone who kept detailed records. For example, his recollection of the sequence of payments made to Mr Park turned out to be inaccurate when compared to the bank statements that were not available when he prepared his witness statement. However, this was understandable given the passage of time. During cross examination, in the face of direct challenges to his honesty and integrity he remained courteous and composed.
54. At the heart of this case was the issue of trust. Mr Choi trusted Mr Park. During his oral evidence, he informed the Court that the agreement with Mr Park was conducted in the ‘*Korean way*.’ He explained that by that he meant that he shared a meal and a few bottles of wine with Mr Park during which the main details of the agreement were negotiated. It was clear from Mr Choi’s evidence that he regarded Mr Park to be a man of integrity. He had known him for a long time, and it was apparent that they lived within a small expatriate community. He was further reassured by the fact that the agreement was drafted by Mr Park’s daughter, who at that time was a trainee solicitor.
55. Mr Choi’s oral evidence was consistent with his witness statement, but there were significant omissions which only appeared in the Particulars of Claim or the Amended Reply to Defence. Although I accepted that Mr Choi’s version of events was

fundamentally based on a true and accurate account, as foreshadowed above, his evidence raised three specific areas of concern:

- i. Mr Choi did not expressly state in his witness statement that he had been given the opportunity to peruse the First Head Lease during the first discussion. The witness statement was obtained from Mr Choi after he had signed the Particulars of Claim on 4 January 2017. It was pleaded in the Particulars of Claim that he been shown the First Head Lease. However, during cross examination and re-examination, although Mr Choi was adamant that the First Head Lease had seventeen years left to run when he had the initial discussion with Mr Park, at no time did he state that he was confident of this because he had seen the Head Lease.
  - ii. There was no mention of the meeting that took place on 10 August 2016 in Mr Choi's witness statement. Therefore, there was also no mention of his assertion that the meeting took place in a *Costa Coffee* and that Ms Park was present. Reference to this meeting only appears in the Particulars of Claim and the Amended Reply to Defence signed by Mr Choi on 14 February 2017. It was pleaded in the Particular of Claim that Mr Choi met with both of the defendants at the *Costa Coffee* to discuss the terms of the assignment of the lease and the terms of the underlease pending the assignment. During Mr Choi's oral evidence, when cross examined about the location by Ms Park, he stated that the meeting took place at a *Costa Coffee* within a golf club in New Malden; not on the High Street. Mr Choi stated that although both defendants were present, Ms Park sat at a different table and did not join Mr Park and Mr Choi until the end of the meeting.
  - iii. In the Amended Reply to Defence, Mr Choi denied that there was a '*secret underletting agreement.*' He stated that the suggestion made by the defendants was '*was untrue in its entirety.*' However, during cross examination, Mr Choi acknowledged that around July 2016, Mr Park had asked him to keep the agreement secret. He stated that Mr Park told him to '*work as if you are the manager for the time being.*'
56. Omissions (i), (ii) and (iii) are significant. Although they do not undermine the entirety of Mr Choi's evidence, the inconsistency between his witness statement, the Particulars of Claim and his oral evidence undermined these aspects of his account and rendered his version of these events unreliable. Mr Choi may have been honestly mistaken about the location of the meeting on 10 August 2016, but I concluded that his assertion that Ms Park was present at that meeting was an attempt to bolster his case against her. On this issue I preferred Ms Park's clear, consistent and unambiguous denial that she had never been in a *Costa Coffee* in New Malden. Furthermore, when Mr Choi signed the Particulars of Claim, he knew that the assertion that there was no discussion about keeping the agreement a secret was untrue.

*Mrs Lee*

57. Mrs Lee affirmed and adopted her witness statement dated 20 March 2019. It was clear that her ability to speak and understand English was limited. She described her English

language skills as ‘*beginners level*’ and stated that in a written document she would only be able to check names and fees. During cross examination she was combative. She exhibited more than a little frustration and irritation in the face of what she clearly considered to be irrelevant questions.

58. In her witness statement Mrs Lee corroborated her husband’s witness statement in relation to the key events where she was either present or directly involved and gave her oral evidence in an assured manner. However, when she was cross examined by Ms Park, she appeared to conflate the meeting on 27 June 2016 with the meeting on 16 July 2016. Mrs Lee was referred to the text message dated 27 June 2016, in which she thanked Mr Park for the documents. Mrs Lee explained that she could not see the documents sent by text properly and asked to see the original. She went on to explain that Mr Park showed herself and her husband the Second Head Lease for ‘*for a few moments*’ but then took it back. She stated that she saw ‘£100,000’ was written on the document and when she queried this with Mr Park he replied, ‘*You don’t need to know about that.*’ At this meeting, Mrs Lee stated that Mr Park also showed her the alcohol licence and the A3 (nature of use) licence for the Premises. She stated that she thanked Mr Park for the documents he showed her. To the extent that Mrs Lee appeared to be suggesting that she thanked Mr Park in the text she sent on 27 June 2016 for the licence documents, that could not be correct because the meeting where she was shown those documents was at the Oatlands Hotel and did not take place until 16 July 2016. This aspect of Mrs Lee’s evidence was confusing, but I concluded that this was due to the manner in which the question was asked and the translation and was not an attempt by her to mislead the Court.
59. During re-examination Mrs Lee stated that she had sight of the Second Head Lease on only two occasions. The first occasion was when Mr Park showed it to Mrs Lee and her husband ‘*for a few moments*’ at the Oatlands Hotel in July 2016 and the second occasion was when the Landlord showed her the full document. Mrs Lee stated that she did not know if her husband had seen the Second Head Lease on more than those two occasions. She did not mention sight of the First Head Lease. Mrs Lee also described during her evidence that the meeting to finalise the agreement took place in the Watchman Public House.
60. Mrs Lee described the relationship that she and her husband had with Mr Park as ‘*very close*’. It was clear that she trusted him and was reassured that the agreement had been drafted by Mr Park’s daughter. Overall, I found Mrs Lee to be a reliable witness.

### *Mr Park*

61. Mr Park affirmed and adopted his witness statement dated 1 April 2019. He occasionally addressed the Court in English, but he predominantly spoke in Korean. Full allowance was given for the fact that, under pressure, he may occasionally have given an answer which did not accurately reflect what he wanted to say, but overall on the key issues in dispute his evidence was unreliable.
62. In contrast to the evidence of Mr Choi, which at its core was a true account, the fundamental aspect of Mr Park’s evidence was based on an untrue account. Not everything Mr Park stated was untrue. For example, Mr Park accepted that he did not

inform Mr Choi about the rent-free agreement with the Landlord and acknowledged that this was *wrong*. He stated that if Mr Choi had been made aware of the rent-free period, he *might not honour his promise* to pay the rent. He also acknowledged that he had been advised by his solicitor that the proposed agreement would be an illegal sublet. However, at times, he was clearly making his evidence up as he went along in response to the perceived difficulty in answering the questions in a manner consistent with his case; at other times, I formed the impression that he had deluded himself into believing his own version of events and on at least one occasion he tried to avoid answering the question by making a long rambling speech. He embroidered and supplemented statements his witness statements, or directly contradicted them. For present purposes I cite the following examples:

- i. Mr Park took issue with the suggestion that the conversation that took place in the *Sakura* restaurant was a *meeting* or that there had been a *discussion* about the lease. Mr Park's initial verbal description was of a spontaneous social encounter, during which the parties became *very drunk*. At this point he appeared to be oblivious to the fact that in his witness statement he stated that during his conversation with Mr Choi he was *...acting on behalf of C&S Union Ltd*, *...agreed that the Premises would be underlet without seeking permission from the landlord...*; *...agreed to keep our underletting agreement a secret from the landlord as required by clause 18 of the lease* was prepared to charge *...£9,000 per calendar month* and *...instructed him to make no alterations to the interior of the Premises and to keep the same board outside.*
  - ii. Mr Park also initially stated that he told Mr Choi and his wife that he originally had a seventeen year lease but had been given the option to accept a five year lease. Almost immediately he then stated that he did not mention that the lease had been shortened; he simply told them that the lease was due to expire in 2021.
  - iii. Mr Park was initially reluctant to accept that the increased rent caused him any financial concern. During cross examination, he had to be directed to his witness statement where he described himself as being *...in agony* and unsure that he would be able to continue his restaurant business.
63. Accordingly, I concluded that Mr Park's evidence could not be relied upon unless supported by agreed facts, documentary evidence or other evidence.

#### *Ms Park*

64. It was clear that she had a strongly held belief that Mr Park had been wronged by Mr Choi and Mrs Lee and that she had been unfairly caught up in the dispute. Her accusations of dishonesty were wide ranging and included allegations levied at Mr Choi's solicitors. Ms Park clearly accepted Mr Park's account of the events that took place and clearly felt intense loyalty towards him. Her blind loyalty was exposed during cross examination as she was initially reluctant to accept that Mr Park had any financial difficulty. She had to be referred to her witness statement where she had stated that he *...could not open any personal bank account due to his financial history* and that he *...was in a difficult financial situation.* Ms Park also stated in her witness statement that she had allowed Mr Park to use her bank account and *from time to time*. However,

it became clear when she was closely questioned about this arrangement, that she had specifically opened the bank account for Mr Park; not for her own personal use. In my judgment Ms Park was motivated by a desire to craft her evidence to promote Mr Park's case.

65. Although Ms Park supported Mr Park's case, she was not directly involved in the critical discussions or events. Much of the case against Ms Park was dependent on inferences being drawn about her state of knowledge and involvement. The main issue upon which she was able to give direct evidence was in relation to the alleged meeting at *Costa Coffee*. She stated clearly and emphatically that she has never been in any *Costa Coffee* in New Malden and did not attend that meeting. I had no hesitation in accepting that on this issue her evidence was reliable.

### *Mr Kim*

66. Mr Kim initially gave evidence via Ms Park's mobile telephone and, when the connection was lost, via Mr Park's mobile phone. Mr Kim affirmed and adopted his witness statement dated 17 May 2018. In his witness statement he stated that during the relevant period he was the Head of Sun Interior. He stated that he had carried out some interior work (making tables and chairs) at *Big Burger* on 2 November 2016, for which he was paid £1,800. He stated that on 25 March 2018, Mr Choi presented him with a document and asked him to sign it so that he could invoice his landlord. Mr Kim signed it. He went on to state that on 16 May 2018, he happened to meet Mr Park who told him that he was being sued by Mr Choi. Mr Park informed Mr Kim that the court documents state that Mr Choi had paid Sun Interior £33,200. Mr Kim told Mr Park that the claim was false as he had never received such a sum of money.
67. During cross examination Mr Kim was clearly uncomfortable about providing an explanation for his actions. He reluctantly admitted that, on his own account, he had willingly signed a document that he knew to be false and unsurprisingly he was anxious to avoid getting into any trouble. The question which led to this admission had to be asked three times. In his closing submission Mr Kingham invited me to conclude that Mr Kim was evasive and that his evidence should be afforded no weight. Although Mr Kim was evasive in my judgment this was due to the difficulty of his situation. In my judgment, Mr Kim's evidence should certainly carry some weight with the Court: it is important evidence, and there is no obvious reason for me to conclude that it is unreliable or should be disregarded. At the very least his evidence indicated that the Sun Interior invoice should be regarded with a degree of scepticism.

### **Factual Findings**

#### *Was there an initial approach and first discussion?*

68. Mr Park acknowledged that he met Mr Choi and his wife on several occasions in 2015 and that, on these occasions there were general discussions regarding the restaurant business, but he denied that he initiated a preliminary discussion about the assignment of the lease.

69. More than four years after the event I was unable to place any reliance on the assertion made by Mr Choi and Mrs Lee in their witness statements that Mr Park ‘*approached*’ them in or around March 2015, in the sense that they were specifically invited to express an interest. However, I am satisfied that there was a first discussion which took place during the early part of 2015. Mr Choi and Mr Park had worked together in the past, knew each other socially and were both businessmen within the restaurant industry. At that time Mr Park’s Head Lease was due to expire in 2033. I see no reason why he would have held back on telling Mr Choi and his wife the length of his lease and how much it was worth. I am satisfied that Mr Park informed Mr Choi and his wife that his Head Lease for the Premises had seventeen years left to run and that he would be willing to assign the lease for £200,000. In my judgment this discussion amounted to early negotiations which subsequently fell through.

*What transpired during the Second Discussion?*

70. The Second Discussion took place around May or June 2016. In my judgment it is significant that the Second Discussion took place shortly after the Second Head Lease was completed. On 24 February 2016 Courtyard Solicitors LLP wrote to Mr Park, in his capacity as director of C&S Union Ltd. It was clear from the content of the letter that Mr Park had instructed the firm of solicitors in connection with the surrender of his existing First Head Lease. The letter stated that it appeared the rent under the First Head Lease had been paid until 24 March 2016 and it was anticipated that the Second Head Lease would be completed before the next rental payment was due, so that no deductions would have to be made from the £100,000 lump sum payable to Mr Park. On his own case, Mr Park advertised the Mino restaurant for sale in March 2016, but as it happened, the Second Head Lease was not completed until May 2016. This meant that Mr Park either paid the rent for another quarter or it was deducted from his £100,000 lump sum. Mr Park was assisting Ms Park in running her restaurant which he described as ‘*unstable*’ and around June 2016 he had some financial trouble. The details of Mr Park’s financial difficulties were not explored during the trial but based on the text messages he sent Mrs Lee in June 2016 I am satisfied that he was under some financial pressure. The pressure was clearly sufficient for him to resort to using Ms Park’s bank account rather than his own. In addition Mr Park made it clear in his witness statement that the proposed increase in rent was ‘*shocking news*’ and represented a ‘*huge sum of rent*’ to the extent that he was not sure that it would be viable for him to continue to run his restaurant from the Premises.
71. The circumstances outlined above provides the background to the Second Discussion at the *Sakura* restaurant in May or June 2016. Mr Park sought to persuade me that he fully disclosed to Mr Choi that his Head Lease had been reduced to five years and that Mr Choi willingly agreed to enter into an illegal subletting agreement. I do not accept Mr Park’s account. In my view, it is inherently implausible that Mr Choi would have been willing to stake his financial future on an illegal sublet. The risks involved would have been obvious to him. The risks would also have been obvious to Mr Park. I am satisfied that Mr Park went beyond simply withholding information about the Second Head Lease and positively asserted that the First Head Lease had at least sixteen years left to run. I entirely accept Mr Choi’s account that from the date of that meeting onwards he was working on the basis that Mr Park had agreed to a short-term subletting followed by an assignment of the lease.

*When was the First or Second Head Lease inspected and what transpired at the further meetings?*

72. As stated above, neither Mr Choi nor his wife stated that they had sight of a copy of the First Head Lease in 2015; that assertion only appears in the Particulars of Claim. Mrs Lee also made no mention of the fact that she had already seen the First Head Lease in her text messages with Mr Park which is consistent with her oral evidence that she only saw a Head Lease on two occasions. Although I do not accept that Mr Choi ever saw the First Head Lease, I do accept that he trusted Mr Park and genuinely believed him when he stated, during the first discussion, that the First Head Lease had seventeen and a half years left to run. Mr Choi was right to trust Mr Park at that point in time because in June 2015 the First Head Lease was not due to expire until 2033.
73. Mrs Choi stated that select pages of the Second Head Lease were sent to her by text message on 27 June 2016, but she was unable to read the pages. She stated that on 16 July 2016, she and her husband were '*for a few moments*' given the opportunity to glance at the Second Head Lease at the Oatlands Park Hotel and when the Landlord showed it to them. I accept Mrs Lee's evidence that these were the only two occasions that she had sight of the Second Head Lease and I conclude that these are the only occasions that Mr Choi saw the Second Head Lease. Mr Park was under pressure to show Mr Choi and his wife the original documents. Given that he had represented that the lease had sixteen years left to run, why he showed them the Second Head Lease will remain a mystery, but I am satisfied that he felt obliged to present them with some documentation.
74. There were at least three further meetings after the second discussion took place (i) the meeting at O'Neill's Public House the following day; (ii) the meeting at the Oatlands Park Hotel; and (iii) the meeting the day before the agreement was signed in the presence of a solicitor. The last meeting was the most important as the purpose was to finalise the agreement. Mr Park, in his witness statement, and Mrs Lee, during her oral evidence, both state that the meeting took place at the Watchman Public House. I am satisfied that is where the meeting took place. Mr Park denied that during the meeting he informed Mr Choi that he had obtained the consent of the Landlord for (a) the underlease the Premises and (b) subsequent assignment of the lease; the leasehold to be assigned had a term of sixteen years remaining; and the level of rent owed to the Landlord under the lease was £9,500 per month. However, I accept Mr Choi's evidence. These were the matters under discussion and by the conclusion of the meeting Mr Choi had been informed by Mr Park that there was at least sixteen years remaining on the lease and the rent would be reviewed every five months. He further explained that the forthcoming rent review would be in four years and seven months which was reflected in the written agreement that was signed the following day. It is unlikely that Mr Park stated that he had the Landlord's consent for the underlease of the Premises and the subsequent assignment of the lease at the first discussion but by 10 August 2016 he confirmed that the consent was in place and that the assignment would take place by 31 May 2017. I accept that Mr Choi, as trusting as he was, wanted to make sure that this part of the agreement was included in the written agreement. It is for this reason that he telephoned Mr Park after the agreement had been signed to add the handwritten addendum. I do not accept the written evidence of Sung Han that Mr Choi and Mrs Lee were aware of the five-year lease as his evidence was not tested by cross-examination.

*Which version of the agreement was signed and witnessed by a solicitor?*

75. Mr Choi's version of the written agreement was consistent with his version of events and crucially his signature and the signature of Mr Park had been witnessed by a solicitor.
76. In order to accept that Mr Park's unsigned written agreement is the correct version I would also have to accept that at some point after the genuine agreement was signed Mr Choi (i) produced a slightly amended version, (i) gained access to the solicitors official stamp; and (iii) forged Mr Park's signature. I do not accept that Mr Park's assertion has any credibility. I am satisfied that the version relied on by Mr Choi is a genuine copy of the agreement and that Mr Park sought to distance himself from it because its very existence undermines his case.

*Was there a secrecy pact?*

77. The 'secrecy' dispute had narrowed considerably by the conclusion of the trial. Although it had been pleaded on Mr Choi's behalf that there had no 'secrecy' pact, during cross examination, he acknowledged that around July 2016, he was asked by Mr Park to keep their arrangement a secret and to act as if he was the manager '*for the time being*'. During re-examination he explained that by then he had handed over £30,000 to Mr Park and had no option but to '*keep going forward*' and so agreed to keep the arrangement a secret but did not understand the reason behind the request. He stated that he was not particularly suspicious but '*believed that certain things*' were going on between Mr Park and the Landlord. He stated that he was not aware that subletting was not permitted under the terms of the Head Lease.
78. Mr Choi agreed to keep his proposed lease agreement with Mr Park a secret. I accept that this occurred around July 2016, before the written agreement was signed. By the time the agreement was signed on 11 August 2016, I have already found, Mr Choi had been informed by Mr Park that the Landlord had given consent for the underlease and for the subsequent assignment of the lease.

### Summary of Factual Findings

79. In summary form my factual findings are as follows:
- i. The first discussion between Mr Park and Mr Choi with regard to an assignment of the lease took place in the early part of June 2015. Mr Park informed Mr Choi that the First Head Lease had seventeen and a half years left to run. Mr Choi offered £60,000 for the assignment of the lease, but Mr Park wanted £200,000 and the negotiations fell through. Mr Choi did not see the First Head Lease.
  - ii. The second discussion took place in May or June 2016. During that discussion Mr Park informed Mr Choi that the lease had more than sixteen years left to run.



Mr Park did not inform Mr Choi that the First Head Lease had been replaced with a Second Head Lease.

- iii. Mr Choi was briefly shown the Second Head Lease by Mr Park on 16 July 2016. He saw the full document when it was provided to him by the Landlord agent around July 2017.
- iv. Following the second discussion there were at least three further meetings before the agreement was signed. The last of these meetings took place on 10 August 2016 at the Watchman Public House in New Malden. The purpose of the meeting was to finalise the agreement. Mrs Lee was present. Ms Park was not present. During this meeting Mr Park falsely stated that he had obtained the Landlord's consent for (a) the sublease of the Premises to Mr Choi, and (b) the subsequent assignment of the First Head Lease to Mr Choi. Mr Park also falsely stated that he still had the benefit of the First Head Lease and that the rent he was required to pay to the Landlord was £9,500 per month.
- v. The agreement signed by Mr Park and Mr Choi and witnessed by a solicitor is the version relied upon by Mr Choi.
- vi. Around July 2017, Mr Choi was asked to keep their subletting arrangement a secret from the Landlord. Mr Choi agreed.

### Misrepresentation

#### Issue 1: Is Mr Park the correct defendant?

80. The answer to this question is clear. The agreement was executed solely between Mr Choi and Mr Park. The agreement states that the landlord is 'Mr Chan Mock Park'. There is no reference to C&S Union Ltd and no reference to Mr Park acting as a director.
81. The agreement is a lease agreement between Mr Choi and Mr Park; therefore Mr Park is the correct defendant.

#### Issue 2: Did Mr Park know that the consent of the Landlord had not been obtained?

82. Based on my factual findings as summarised in paragraph 76, I am satisfied that at no time prior to the signing of the agreement was Mr Choi aware that the consent of the Landlord had not been obtained. He was also unaware that the sublet agreement was unlawful for that very reason.

### The Effect of the False Representations

83. Having concluded that Mr Park made the false representations set out in paragraph 76(iv), I am satisfied that he deliberately omitted to reveal to Mr Choi the full picture. Mr Park at some point took the view that running the *Mina* from the Premises was no longer financially viable but at the same time wanted to exploit the limited commercial

potential of the Second Head Lease. Mr Park's purpose in deliberately misleading Mr Choi was to progress the sublet agreement and to obtain the Premium payment. Mr Park was well aware that the Second Head Lease was considerably less valuable than the First Head Lease and that the Landlord would not consent to a sublet. Mr Park also knew that the sublet agreement was only attractive to Mr Choi because of the opportunity to acquire an assignment of a long lease from which to grow a chain of restaurants. Mr Park made the false representations, knowing that the representations were untrue, with the intention to induce Mr Choi to enter into the agreement.

84. Had Mr Choi known that the lease had less than five years left to run, and that the Landlord's consent had not been obtained he would not have entered into the agreement. Mr Choi trusted Mr Park and relied on the false statements. He would have walked away from the deal and negotiations would have broken down (as they had in early 2015) if Mr Park had made full and proper disclosure. The false representations made by Mr Park were a matter of significance and induced Mr Choi to enter into the agreement on 11 August 2016 and on the terms that he did.
85. As a consequence of the false statements and the inducement Mr Choi suffered loss. Mr Choi's claim for misrepresentation succeeds. The issue of quantum is dealt with below.

### **Unlawful Means Conspiracy**

#### Issue 3: What was Ms Park's role?

86. Mr Choi's claim in unlawful means conspiracy is unpromising, not least because, based on my factual findings, Ms Park was not present at the meeting which took place on 10 August 2016. She was not at any of the other meetings either. The Particulars of Claim assert that Ms Park was aware that Mr Park acted unlawfully by (i) entering into the agreement in breach of clause 18.1 of the Second Head Lease; (ii) purporting to grant an underlease of the Premises in his own name rather than that of C&S Union Ltd and/or (iii) inducing the Claimant to enter the agreement by way of the misrepresentation. The Particulars of Claim also assert that Ms Park, '*coordinated her actions with Mr Park] so as to profit for herself*' and that she has profited, '*inter alia through the application of the £60,000 premium, paid by Mr Choi, to her business ventures.*' As Ms Park was not at the meeting which took place on 10 August 2016, at its highest, the evidence in support of Mr Choi's case that Mr Park and Ms Park '*worked in concert to injure the economic interests of [Mr Choi]*' are the inferences to be drawn from the fact that Mr Park and Ms Park were co-habiting at the time of the agreement and Ms Park opened a bank account for Mr Park to use.
87. The letter from Courtyard Solicitors, dated 24 February 2016, was addressed to Mr Park and Ms Park. The content of the letter referred to the Second Head Lease and the Landlords agreement to pay £100,000 in compensation. During her oral evidence, Ms Park denied knowing anything about the rent increase and the £100,000 compensation paid to Mr Park by the Landlord. She accepted that £32,000 had been paid by Mrs Lee into her bank account but stated that she was '*shocked*' when she found out. She was not asked about the letter from the solicitors and in these circumstances, I do not consider it appropriate to draw an adverse inference based on the content of that letter.

88. Ms Park could not have agreed that Mr Park should make false representations to Mr Choi unless she also knew that the putative representations were false. The conspirators must know the facts on the basis of which the conduct is unlawful. Suspicion is insufficient in this respect; a high degree of blameworthiness is required. The act must be done with the intention that it will cause loss, even if such loss is merely the means to an end rather than the end in itself. There is no evidence at all to show that Ms Park conspired with Mr Park in this way. She was not a party to the agreement, and the money she received was for the sole benefit of Mr Park.
89. The unlawful means conspiracy claim case against Mr Park and Ms Park therefore fails on the facts.

### Loss and Damages

90. A defendant who induces the claimant to enter into a transaction as the result of a false representation is bound to make full reparation for all the damage directly flowing from that transaction. Mr Choi suffered loss as a result of being induced to enter into the agreement on the basis of false statements made by Mr Park. It is alleged that Mr Choi's total loss is £222,072.52 plus interest. The Amended Defence put Mr Choi to strict proof in relation to the payments. The principal documentary evidence supporting the quantum of damages are (i) the bank statements which confirm that between June 2016 and March 2017 payments ranging from £6,000 to £20,000 were paid either to C&S Union Ltd or Ms Park; (ii) the invoice from *Kingston Sun Interior*; and (iii) the invoice from '*Hanil Constructors Ltd.*'

### Premium and Rent Payments

91. Ms Park's bank account was set up for Mr Park's sole use and I am satisfied that he was the intended recipient of payments received from Mrs Lee. The amount paid via C&S Union Ltd's bank account was £49,500 and the amount paid into Ms Park's bank account is £32,000; making a total of £81,500. I am satisfied that these payments were for the premium and rent and are recoverable.
92. Mr Park specifically disputed Payment (a) and Payment (f). It was asserted on Mr Choi's behalf that both of these payments were for the premium. Mrs Lee's evidence was that Payment (a) was a £10,000 cheque issued to Mr Park on 10 June 2016 and Payment (f) was £10,000 paid to Mr Park in a cash in August 2016. Mrs Lee stated during her oral evidence that she did not obtain a receipt for Payment (f). During Mr Park's oral evidence he queried Payment (a) on the basis that the bank statements reveal that on 10 June 2016, a payment was made into the HSBC account in the name of '*Mrs H Lee*'. Ms Park, during cross examination, suggested to Mrs Lee that it was not credible that she would pay such a large sum of money in cash (Payment (f)) yet fail to obtain a receipt.
93. Although Mr Park chose to solely focus on the entry in the bank statements made on 10 June 2016, it was Mrs Lee's evidence that she paid £10,000 into the account on that date, and *then* issued a cheque to Mr Park which was paid on 15 June 2016. Ms Lee

made specific reference to this payment in her witness statement. The credit on 10 June 2016 and the debit on 15 June 2016 both appear as entries in the bank statement. On this issue I accept Mrs Lee's evidence entirely as it is supported by documentary evidence. Furthermore, when Mr Park disputed Payment (a) he appeared to have forgotten that in his witness statement he clearly stated, *'[o]n 10 June 2016, Mr Choi paid the sum of £10,000 to me.'* I am satisfied that Payment (a) is recoverable.

94. Mr Park was adamant during cross examination that he did not receive Payment (f). He stated, *'If [Mrs Lee] gave me cash I need proof.'* In Mr Park's text message to Mrs Lee on 22 December 2016, he indicated that the rent for October, November and December remained outstanding and that this amounted to £28,500 minus the £8,000 that Mrs Lee had paid, making a total of £20,500. Mr Park agreed (albeit reluctantly) during cross examination that if he had been owed more money, he would have mentioned it in that text message. During his closing submissions Mr Kingham invited the Court to conclude that Payment (f) had been paid on the basis of the evidence of Mrs Lee and the absence of any complaint from Mr Park in his text message. I do not accept this submission as it requires a number of inferences to be drawn. In my judgment the evidence in support of the inferences is not reliable for the following interrelated reasons:
- i. In contrast to Payment (a) there is no documentary evidence to support the claim that Mr Park was paid £10,000 in cash in August 2016.
  - ii. Mrs Lee stated in her witness statement, that *'most'* of the payments to the defendants were made by bank transfer or by cheque which indicates that at least one payment was by an alternative method, but no further detail is provided in her statement. The first time that it is made clear that the Payment (f) was a cash payment was during her evidence. Furthermore, Mrs Lee has made mistakes before.
  - iii. According to the agreement the rent was due upon the signing of the contract. The contract was signed on 11 August 2016 and the first rental payment was made the day before on 10 August 2016 in the sum of £9,500. That was the only occasion the correct rental sum was paid. The next three payments in August, according to Mrs Lee, were towards the Premium. One of these payments is said to be Payment (f). By the time Mr Park sent the text message on 22 December 2016 a further rental payment had been made on 12 December 2016 (£8,000). Based on the evidence available this payment ought to have been for September, albeit £1,500 short. Therefore, the rent for October, November and December remained outstanding. However, Mr Park's text message indicates that he was prepared to deduct the *'September'* rent from the October, November, December quarter. It is unclear whether this was an error or a conscious decision.
  - iv. There are no text messages between 27 June 2016 and 22 December 2016. However, during the intervening period the agreement was signed and payments towards the Premium were made. Therefore, it is likely that further discussions took place the contents of which are unknown.
95. For these reasons Payment (f) is not recoverable.

### Refurbishment Work

96. Mr Choi relied on two invoices in support of his claim to recover the costs of the renovation work he carried out at the Premises. The first invoice was in the name of '*Hanil Constructors Ltd*' for the sum of £56,340 made up of (a) wages: £17,750 and (b) materials: £37,590. The second invoice was in the name of '*Kingston Sun Interior*' for the sum of £33,200 made up of (a) wages: £13,950 and (b) materials: £19,250. The witness statement of Mr Kim had been provided during the pre-trial phase. Therefore, Mr Choi was put on notice that the *Kingston Sun Interior* invoice was not accepted by the defendants. In addition, Mr Choi claimed £31,000 for expenses relating to the refurbishment of the Premises. He was unable to produce any receipts. During his closing submissions Mr Kingham invited the Court to accept the refurbishment costs claimed by Mr Choi on the basis of the invoices and his oral evidence. In respect of the £31,000 for which there were no receipts he characterised this as an '*unfortunate evidential gap*'.
97. There is evidence that some refurbishment work was carried out on the Premises by Mr Choi and, in principle, I accept that the cost of this work is recoverable. However, the evidence in support of this claim is tenuous. As mentioned above, the evidence of Mr Kim was sufficient for the *Kingston Sun Interior* invoice to be treated with a degree of scepticism. Mr Kim stated that he made tables and chairs but there is no other evidence as to the nature of the work that was carried out and costs that were incurred. In these circumstances, it is my conclusion that the sums claimed in the *Kingston Sun Interior* are not recoverable, save for £1,800 which Mr Kim accepts was paid to him for the work that he carried out at the Premises.
98. Although Mr Kim's evidence solely relates to the *Kingston Sun Interior* invoice, in my judgment both invoices stand or fall together. There was no dispute between the parties that the invoices had been drafted by Mr Choi and presented to the respective proprietors for signature. The question mark in relation to *Kingston Sun Interior* invoice had a similar impact on the *Hanil Constructor's Ltd* invoice. Furthermore, at the time the refurbishment expenses were incurred Mr Choi may not have anticipated that he would have to produce evidence of this expenditure for the purposes of litigation, but he may reasonably have expected that he should maintain accurate records for tax purposes. No explanation was provided for the absence of financial records such as receipts, bank statements or business accounts. In my judgment insufficient evidence has been adduced to support the claim that the refurbishment costs (save for the £1,800) were incurred.

### Conclusion

99. In summary:
- i. Mr Choi's misrepresentation claim under s2(1) of the Misrepresentation Act succeeds.
  - ii. Mr Choi's unlawful means conspiracy claim against Mr Park and Ms Park fails.
  - iii. Mr Choi suffered loss as a consequence of the misrepresentation.

iv. The recoverable losses are £91,532.52.

100. Any consequential applications including costs are to be dealt with in writing.