Neutral Citation Number: [2024] EWHC 2513 (Comm)

Case No: CC-2022-BHM-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS

KING'S BENCH DIVISION

CIRCUIT COMMERCIAL COURT

Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 9th August 2024

Before:

HIS HONOUR JUDGE TINDAL
Sitting as a Judge of the High Court

- -

Between:

(1) THE PENTAGON FOOD GROUP LIMITED **(2) KHAN ESTATES LIMITED** **(3) ASHFAQ KHAN**	**Claimants**
-v-	
B CADMAN LIMITED	**Defendant**

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MR G CLARKE and **MR CANTERBURY** (instructed by **Dumonts Solicitors)** for the Claimants
MR M DIGGLE (instructed by **Latham & Co Solicitors**) for the Defendant

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APPROVED JUDGMENT

HIS HONOUR JUDGE TINDAL

HHJ TINDAL

Introduction

1. This is a claim for damages for alleged misrepresentation and breach of a settlement agreement. It raises an interesting question about express and implied terms in settlement agreements and liability for representations made during mediation and their admissibility as exceptions to the 'without prejudice rule'.

2. Bernard Cadman, who sadly died in May 2023, was an experienced engineer. Mr Cadman, as I shall call him, set up the Defendant company, B Cadman Limited, which I refer to as 'BCL', in the 1960s. Around 2004, he also set up the pension scheme for BCL and associated companies, a small self-administered scheme or 'SSAS', which was called B Cadman Limited SSAS and was the subject of a Trust Deed from at least 2006, if not earlier. The trustees of that pension scheme, which I shall refer to as 'SASS', were Mr Cadman himself, his wife Doris Cadman who sadly died in May 2024 and whom I shall call 'Mrs Cadman', their daughter Fiona Cadman, as well as an independent trustee, IPM Trustees Limited ('IPM').

3. Mr Ashfaq Khan, the third Claimant, is himself a successful businessman. Mr Khan, as I shall call him, is the Group CEO of the PFG Group, which includes the first and second Claimants, the Pentagon Food Group Limited ('Pentagon') and Khan Estates Limited ('KEL'). The PFG Group is also associated with a limited liability partnership called Araf LLP ('Araf'). There was another associated company called Khan Investment Limited.

4. This case relates to property - Portland House at Portland Street in Hanley in Stoke-on-Trent in Staffordshire - which I shall call 'Portland House'. From the photographs that I have, it is a fairly ordinary-looking industrial unit or warehouse, which was being used for some considerable time by Pentagon. Back in 2011, Araf owned Portland House and was the landlord of Pentagon, then called Caterchoice Limited. In 2016, Araf sold Portland House to three proprietors named in its Land Registry proprietorship register, namely Mr Bernard Cadman, Mrs Doris Cadman and Fiona Cadman ('the Cadmans'), all as trustees of the pension scheme, SSAS (IPM was not a registered owner). It is important to note the company BCL itself has never been the freehold owner of Portland House.

5. This is the third time these parties have litigated over Portland House following a fire there in May 2017. At the start of 2018, in County Court Claim E28YX248, the Cadmans as the freehold owners of Portland House, brought a claim against Pentagon for unpaid rent in the wake of the fire ('the Rent Claim'). That was settled at mediation in 2019 on terms that Pentagon pay the Cadmans on behalf of SSAS £59,000 on a staged basis. That explicitly only covered the Rent Claim and left open other claims about the fire.

6. Sure enough, in 2021, in Technology and Construction Court Claim HT-2021-BHM-000001, Pentagon were sued again on the basis of trespass by fire ('the Fire Claim'). The essential allegation was that Pentagon had either deliberately or negligently started the fire because it had discovered it could not use Portland House in the way originally intended because of a local authority traffic order. That has always been denied by Pentagon and by Mr Khan himself. That is not an issue I am asked to resolve.

7. However, in 2021, the Fire Claim was brought not by Mr Cadman, Mrs Cadman and Ms Cadman as trustees of SSAS, but rather by BCL itself. I will return later to the circumstances in which that happened. That claim too was compromised at a mediation shortly before the trial in January 2022. I will go through the terms of that settlement contract ('the Settlement') later in more detail, but it is relevant to say at this stage that paragraph 3 of the Settlement, on which this case largely turns, said this:

> "Khan Estates Limited will, as soon as reasonably practicable, enter into a contract for the purchase from BCL of the freehold property of Portland House."

8. The parties to the Settlement were on one side BCL itself (not Mr, Mrs or Fiona Cadman as Trustees of SSAS) on one side and on the other side, Pentagon, KEL and Mr Khan. KEL and Mr Khan were not parties to the Fire Claim. They joined the Settlement since its purpose was to compromise the Fire Claim on the footing that KEL would buy Portland House from BCL.

9. That leads to the present claim in 2022, case number CC-2022-BHM-000020. I will call this 'the Enforcement Claim', as it was originally issued in May 2022, claiming specific performance of the Settlement. The original Particulars of Claim said at paragraph 1:

> "This is a claim seeking specific performance of an agreement made between the parties to compromise previous litigation before the High Court. The defendant has failed to perform that agreement and is in breach thereof."

What is now paragraph 17 was largely in the same terms originally, namely that:

> "BCL was obliged by the agreement to sell the building to KEL as soon as reasonably practicable after 20 January 2022."

Likewise, the Claimants pleaded at paragraph 18 of the Particulars of Claim:

> "BCL has not done so. It has failed to take any meaningful step towards the sale of the building to KEL. BCL has instead delayed, prevaricated and sought in correspondence to misdescribe the obligations contained in the agreement and/or to seek to add new obligations thereto and has not done anything meaningful to progress the sale of the building."

Paragraph 19 originally stated:

> "BCL's conduct suggested it may, after making the agreement, have regretted its decision to do so, but whether or not this is so is not material. BCL, acting with legal advice from its solicitor and counsel present at the mediation made a binding contract under which it was to sell the building to KEL on the terms set out in the agreement."

And then paragraph 20:

> "BCL is accordingly in breach of the agreement."

10. Therefore, it was always part of this Enforcement Claim that there was a straightforward breach of the Settlement, in other words, a breach of an express term. That was paragraph 3 of the Settlement, which was characterised as an obligation on BCL to sell the building to KEL as soon as reasonably practicable. I will return later to whether that is the correct interpretation of paragraph 3, but it is certainly the Claimants' pleaded case that it was.

11. The Enforcement Claim was originally brought in May 2022 because the Claimants, in particular Mr Khan and KEL, were contending that BCL were not implementing the Settlement by selling Portland House to KEL. By that stage, Mr Khan and KEL knew that BCL were saying that it would need to get consent from the Trustees of SSAS. What was not necessarily clear at that stage was that Portland House was actually owned by Mr Cadman, Mrs Cadman and Fiona Cadman personally as trustees of SSAS, rather than being owned by BCL. As I said, whilst that was clear in the Rent Claim, it had been contended in the Fire Claim, which had led to the Settlement, that BCL was the owner.

12. In response to the Claimants' summary judgment application in September 2022, BCL responded with a statement of its solicitor, Mr Price, that set out unequivocally for the first time not only that a sale of Portland House required the agreement of the Trustees for SASS, but also that the owner of Portland House was not BCL but rather the members of the Cadman family in their capacities as trustees of SASS.

13. The Claimant's summary judgment application was abandoned and the parties continued for a year or so to try and make the arrangement work to the extent that in August 2023, after Mr Cadman's sad death, a contract was sent through to the Claimants for the completion of the sale of Portland House to KEL. I will come back to the terms of that sale contract later. However, KEL did not take that up and instead the Claimants applied to amend their claim, not so as to delete the pleaded breach of an express term, but to add a claim of misrepresentation. For reasons I gave in a judgment in January 2024, I granted permission for the Claimants to plead misrepresentation, but I refused permission to join either Fiona Cadman or the estate of Bernard Cadman as additional defendants, essentially because any misrepresentations they may have made were on behalf of BCL.

14. What was not the subject of the application for an amendment to the Particulars of Claim at that stage was a claimed implied term in the Settlement. However, that was included in the Particulars of Claim served pursuant to my Order granting permission to amend. At the beginning of the trial yesterday, rather than getting into slightly academic argument about the extent of my original permission, I invited an application for re-amendment. That was contested, but I granted permission to re-amend in the terms of the Particulars of Claim as it had been amended and served, namely to include a claim for breach of an implied term, which was really a different legal label to the same facts. However, I refused a further amendment to plead repudiatory breach of the Settlement.

15. The implied terms pleaded at the new paragraph 12 of the Re-Amended Particulars of Claim were put as three alternatives. Firstly, that BCL warranted that it was the freehold owner of the building. Secondly and alternatively that BCL warranted that it had or at least could obtain the right to sell the freehold interest in the building to KEL or compel its sale. And thirdly, that BCL warranted that it could and would sell or cause to be sold, the freehold interest in the building to KEL pursuant to the terms of the agreement. I will consider those alternatives individually in my conclusions later.

16. The alleged misrepresentations are in two categories. The first category at paragraph 7 and 8 of the Re-Amended Particulars of this Enforcement Claim allege that paragraphs in the Particulars of Claim in the Fire Claim in 2021 contain misrepresentations, namely that BCL owned the freehold of the building when it did not, pointing out Mr Cadman himself had signed those Particulars of Claim as true when they were now admitted to be wrong.

17. The second category of alleged misrepresentations, at paragraph 13 of the Re-Amended Particulars of this Enforcement Claim, are that in the course of the mediation in January 2022, BCL through Mr Cadman and Fiona Cadman made or implied representations to KEL that: firstly, BCL was the owner of the building, secondly, that BCL had the right to sell the building or at least to arrange for its sale and thirdly, that BCL could and would sell the building to KEL pursuant to the proposals of the mediation, which in the event, became the Settlement. Therefore, the second category of misrepresentations are similar to, but not identical with, the pleaded express and implied terms of the Settlement.

18. In BCL's Amended Defence, all of those allegations are denied. It suffices at this stage simply to summarise BCL's essential position. Paragraph 19 of the Claimants' Particulars of the Enforcement Claim quoted above continued:

> "In any event, as appears below, BCL contracted to do a thing it could not do because it did and does not own the building and could not and cannot compel the sale thereof."

However, the Amended Defence responded, also at para.19:

> "The defendant agreed to cause the building to be sold to the second claimant, KEL, an obligation which it discharged as set out above."

In other words, BCL's pleaded case is that the furthest any implication or representation it made could go was that BCL agreed it would cause the property to be sold to KEL, not that it was the legal owner, or that it would sell KEL the property itself.

19. Mr Diggle for BCL and Mr Clarke and Mr Canterbury for the Claimants put the issues in rather different ways, but they seem to me to come down to really five issues. Firstly, are BCL's statements in its Particulars of the Fire Claim and its conduct in the mediation actionable at all ? Secondly, what was the proper interpretation of the express terms of the Settlement and was there a breach of them ? Thirdly, should the pleaded terms be implied into the Settlement contract and if so, was there a breach of them ? Fourthly, was there an actionable misrepresentation by or on behalf of BCL ? Finally, the common issue of causation of loss. When I dealt with the amendment application back in January 2024, the parties agreed that the present hearing would be a liability trial only. I am therefore not dealing with any question of remedy. I am only addressing whether or not BCL is liable in one of those different ways that I have described and whether it caused any loss.

Findings of Fact

20. The factual disputes in this case are relatively narrow. This is really a case about where facts which are agreed (save in a couple of important but fairly narrow respects), take the parties in terms of their legal positions. The key witnesses were Mr Khan and Fiona Cadman, both of whom gave evidence straightforwardly and whose evidence I accept.

21. Although my findings of fact will traverse previous proceedings, no fewer than two previous mediations and a settlement agreement, it is accepted the evidence that I have read and heard is all admissible. I prefer to come back to the reason why it is admissible once I have dealt with the findings of fact. The debate was not so much admissibility of evidence about settlements, but the relevance of that evidence to both the interpretation of the Settlement and the actionability of particular statements or conduct. The findings of fact can be taken in three sections: the background, the 2022 mediation and the aftermath.

The Background

22. As I said, BCL was incorporated by Mr Cadman, an engineer, back in 1964. It was an engineering company, but I understand from his daughter, Fiona Cadman, that BCL grew, or rather sprouted, other related companies. As I also mentioned, back in 2004, a pension scheme trust was set up as B Cadman Limited SSAS. I do not have a copy of the original Deed and one of the points made by Mr Price in his witness statement to resist the summary judgment application was that it was difficult to find. But certainly by 2006 there was a Trust Deed in existence. Taking matters slightly out of order for a moment, in 2012, a further Trust Deed was completed and its terms appointed four trustees of the SSAS, namely Bernard Cadman himself, his wife Doris Cadman, his daughter,Fiona Cadman and also an independent trustee, namely IPM.

23. As Mr Clarke pointed out for the Claimants, at paragraph 5.5(11) that Trust Deed stated:

> "The trustees have power to sell, lend, lease, licence and otherwise deal with any assets of the fund."

However, clause 8.3 provided that:

> "The agreement of any independent trustee shall be required to exercise any such power."

In other words, even though Bernard Cadman, Doris Cadman and Fiona Cadman were the registered proprietors of Portland House and trustees, to sell it, the Cadmans with their 'trustee hats on', as it were, would have to get the agreement of the independent trustee, IPM. That is the plain wording of the Trust Deed, which has not been disputed.

24. In 2012, the SASS Trust's assets did not yet include Portland House. At that stage, it was owned by Araf LLP. The previous year, 2011, Araf had rented out Portland House to Pentagon, then called Caterchoice Ltd. It suffices to note the lease was in broadly standard terms. (Then) Caterchoice was not associated with Mr Khan's businesses (he incorporated KEL in 2013), but within a couple of years, it was bought by the PFG Group and in March 2016 was re-named to Pentagon and I will refer to it as such.

25. As I said, in 2016, as I have explained, Araf sold Portland House to Bernard Cadman, Doris Cadman and Fiona Cadman as trustees of SSAS. They were registered as the proprietors on 9 September 2016, although as I have explained, the 2012 Trust Deed meant they could not sell it without consent of the independent trustee IPM.

26. Fiona Cadman in this trial had the difficult, if not impossible, job of giving evidence about her mother and father, who have both sadly died in the last couple of years. Fiona Cadman's witness statement described Mr Cadman at paragraphs 15 and 16:

> "I should stress that my father was very much his own man. An independent-minded businessman in his eighties. B Cadman was incorporated in 1964 and later years, it set up SSAS and purchased Portland House as an investment."

I note there that even though the natural reading of Ms Cadman's statement there was that BCL purchased Portland House, she very honesty and candidly admitted in evidence that BCL had never owned Portland House. Since 2016 it had been owned by herself, her mother and father as trustees of SSAS. Ms Cadman's statement continued:

> "My father was from a generation where he was very quiet and private and a man of few words. He liked to keep his own counsel and make his own decisions. He relied on me for assistance with matters such as setting up video calls, using WhatsApp and helping with matters involving technology generally. Whilst my mother was also a director of [BCL] and a pension fund trustee, this was very much something that my father ran as 'his company.' The level of work that I would assist my father with was some of the day-to-day office admin. I only actually became a director of [BCL] on 1st June, following my father passing away on 1st May 2023."

Sadly her mother Mrs Cadman died in May of this year, a year after her husband.

27. It is telling Ms Fiona Cadman was candid and honest about her father's straightforward approach to business and specifically the structures of his business. She accepted he treated himself, his company BCL (of which he was the director and a shareholder along with Mrs Cadman) and indeed the pension scheme through SSAS, as really all one and the same. In short, Mr Cadman saw himself as practically indistinguishable from his company and its pension scheme. Ms Cadman accepted that her father would have probably been rather impatient with the idea there was any significant distinction. He would not be the first or last successful small businessman to see himself in those terms. An obvious and famous example might be thought to be Mr Saloman back in the 19th century. However, his claim against his own company which he controlled, *Salomon v A Salomon & Co Ltd* [1897] AC 22, famously established that a company was a different legal entity than the individual who was its director and controlling shareholder. So too is there a legal difference between an individual in his personal capacity and an individual wearing his or her trustee 'hat', especially if he has co-trustees even if those co-trustees are his wife and daughter and particularly if there is furthermore an independent trustee as well. In my judgment, this whole case really comes about through Mr Cadman's impatience with and cavalier attitude towards those important legal distinctions.

28. For example, the rent invoices Mr Cadman produced and sent out to Pentagon just before the fire in May 2017 are headed, 'B Cadman SSAS Limited'. There is no such thing as B Cadman SSAS Limited. There is B Cadman Limited and there is B Cadman Limited SSAS, but no company which is called B Cadman SSAS Limited. From Fiona Cadman's description of her father, he would probably have considered that a pedantic distinction. However, this apparently inconsequential little detail matters for two reasons. Firstly, it reveals that Mr Cadman at best misunderstood and at worst was cavalier with the legal distinctions between the different legal entities comprising his business. Secondly, it shows how that misunderstanding may have spread to others dealing with him.

29. Since Mr Cadman did not really differentiate between himself, his company and the pension scheme, it is hardly surprising that Mr Khan, who had only become involved in Pentagon a couple of years earlier, did not do so either. I accept Mr Khan's evidence that did not change either due to the fire, or as a result of the Rent Claim in the names of Mr Cadman, Mrs Cadman and Ms Cadman as trustees of SASS. Pentagon was Mr Khan's company, but he was not the person on the ground running it day-to-day. In any event, the Rent Claim went to mediation in 2019 and it settled straightforwardly for £54,000.

30. It was two years later, in February 2021, that BCL rather than SASS brought the Fire Claim against Pentagon. The following was specifically pleaded at paragraphs 1, 3 and 7 of BCL's Particulars of Claim in the Fire Claim against Pentagon:

> "The claimant, namely B Cadman Limited, company 00805276 is the owner of the freehold of the commercial property, Portland House…..The claimant purchased Portland House in June 2016 from Araf…..When the claimant purchased Portland House from Araf in 2016, it stepped into Araf's shoes as the landlord under the lease."

As Ms Cadman fairly accepted, all of those paragraphs were wrong, because BCL had never purchased the property and certainly was not its owner - it never had been.

31. I find on the balance of probabilities this happened because Mr Cadman gave incorrect instructions to direct access Counsel (not Mr Diggle and whom I need not name) as to who owned Portland House. As Ms Cadman explained, whereas the Rent Claim back in 2017-2019 was conducted with the benefit of solicitors, in 2021 when the Fire Claim was issued, Mr Cadman himself instructed Counsel. I entirely accept that he may have struggled to find solicitors who were ready, willing and able to act for him, especially at the height of the COVID Pandemic. Nevertheless, he gave the factual instructions to Counsel on which that incorrect pleading was based. It was Mr Cadman who signed the statement of truth at the end of those Particulars of Claim and it was therefore Mr Cadman who was responsible as the director and key shareholder of BCL.

32. In any event, that reinforces Mr Khan's evidence that he did not understand any significant difference between BCL the company on one hand and SSAS the pension scheme on the other. That is why the Defence to the Fire Claim admitted the truth of BCL owning Portland House. Mr Khan could not be expected to realise BCL's own pleading was incorrect on ownership of Portland House if Mr Cadman did not even distinguish between himself, his company and the pension scheme as to who owned it. Moreover, as Mr Diggle fairly said, really the Fire Claim had nothing to do with the ownership of Portland House, but whether Pentagon had caused the fire, whether deliberately or not.

33. Nevertheless, as Mr Clarke fairly said, since the cause of action was trespass, BCL as the claimant had to have an interest in Portland House, which it did not. So, the Fire Claim went forward on a fundamentally flawed basis. It could have been very easily corrected by the substitution of claimants - replacing BCL with Mr Cadman, Mrs Cadman and Ms Cadman as trustees, just as they had been in the Rent Claim. As Ms Cadman said in evidence, I accept there were conversations or emails to that effect between her father and herself, but it never happened in the litigation or in the mediation either. That, in my judgment, is important in explaining what happened at that mediation.

34. Ms Cadman very fairly accepted that she had always known that BCL was not the freehold owner of Portland House and if she knew, I find on the balance of probabilities that her father Mr Cadman certainly knew. However, I also find the solicitors they instructed for the mediation were not told. This explains why Mr Price, who had conduct of that mediation and still acts for BCL – and whom I do not criticise he was not told the true position by Mr Cadman - said this in his statement as late as November 2022:

> "In the underlying claim [i.e. the Fire Claim] BCL claimed that Pentagon had set fire to commercial property occupied under a lease. The claim form, particulars, defence and reply, in those statements of case, the parties pleaded that BCL was the owner of the fire-damaged property when in fact, the property was registered in the name of the trustees. The result is that *unknown to the parties in the litigation*, BCL did not own Portland House and therefore, could not transfer it or contract to do so, so as to bind the owner." (my italics)

I have italicised that Mr Price said the fact that BCL did not own Portland House 'was unknown to the parties in the litigation' for three reasons. Firstly, it shows the Claimants - Pentagon, KEL and Mr Khan – would not have known that. Secondly, it shows that Mr Price, BCL's solicitor in the mediation did not know that. However, unbeknownst to Mr Price, Mr Cadman and Ms Cadman did in fact know that full well, as they were the owners of Portland House along with Mrs Cadman, as Trustees of SASS (along with IPM). That in a nutshell is the Claimants' essential factual case and it is plainly right.

35. In fairness to Fiona Cadman, she was not a party to the Fire Claim and not even a director of BCL at the time, so while she also knew about it, she was under no obligation to say as she was not legally involved, she was just helping her father, as any adult child would. Bluntly, the responsibility for this situation lies with Mr Cadman and Mr Cadman alone. I say that conscious that his daughter is sitting listening to me saying it and I am sorry that I have to do so. However, I am driven to that conclusion by the evidence in the case. Whether that means he was fraudulent or something else, I come to later. But as I will explain, unless necessary to do so, I prefer not to use the word 'fraudulent' in this case. Nevertheless, Mr Cadman was cavalier about the distinction between BCL and SASS.

The Mediation

36. I now turn to the mediation. At the start of trial, Mr Diggle was concerned to ensure the parties did not go into inadmissible evidence as to without prejudice matters and he was careful (and indeed skilful) in his cross-examination of Mr Khan accordingly, as was Mr Clarke in his cross-examination of Ms Cadman. Both accepted the terms of the Settlement themselves were admissible as were some details of what was said at the day-long mediation on 20th January 2022. I shall explain why that was correct in a moment. I also found both Mr Khan and Ms Cadman gave evidence straightforwardly about this.

37. It is first important to contextualise the mediation itself by talking about the pre-mediation agreement dated 14 January 2022 between Pentagon and BCL. (Of course, KEL and Mr Khan were not parties to the mediation, although Mr Khan was present at it as the decision-maker for Pentagon). That pre-mediation agreement was signed on behalf of those parties by their lawyers and by the mediator. Clause 8.1 stated that:

> "Every person involved in the mediation will keep confidential all information arising out of or in connection with the mediation, included but not limited to communications relating to the setup and scheduling of the mediation, the discussions had leading up to and at the mediation and the terms of any settlement, unless otherwise agreed by the parties in writing, but not including the fact that mediation is to take place or has taken place or where disclosure is required by law, to prevent physical harm to self or others or to implement or to enforce terms of settlement or to notify their insurers, insurance brokers and/or accountants."

Clauses 8.2(3) and (4) but they similarly impose confidentiality on information passing between the parties to the scope of the mediation - that they will not record the mediation and that the circumstances of the remote mediation, which is what in fact happened, unsurprisingly given COVID in January 2022. I will, however, quote paragraph 10:

> "No terms of settlement reached at the mediation will be legally binding until set out in writing and agreed to either in writing, including by email, by wet or electronic signature by or on behalf of each of the parties."

I emphasise that, as *Brown v Rice* [2007] EWHC 625 Ch, to which I referred the parties and will return, turned on a similar clause, where the parties thought they had reached a deal at mediation. I do not suggest the parties were familiar with that case, only that it is important context to the drafting of the written Settlement that all the parties understood that until it was drafted and signed, there was no binding settlement, especially given that at the end of a day-long mediation, one can hardly expect the same precision in drafting settlement agreements as in detailed commercial contracts. Indeed settlement agreements at mediations are often initially drafted in manuscript and signed there and then.

38. The far from perfect conditions for the mediation are illustrated by Ms Cadman's evidence. It was January 2022 and we were still in the throes of the COVID epidemic, with the 'Omicron' variant emerging just before Christmas 2021 and the country only just coming out of lockdown in circumstances where a video mediation was a necessity. Therefore, Ms Cadman was unable to do what she would have wanted to do, which is to be with her father, as unfortunately she had COVID herself as did the rest of her family. Therefore, she joined the video mediation, but because she was not there to help him, her father Mr Cadman, by that stage in his 80s, struggled with the technology. He therefore participated in a less than ideal way but as best a way as Fiona Cadman could facilitate, as she called his telephone and put her mobile by her laptop so he could hear and be heard. Fiona Cadman was not even clear whether her mother was in the room with him.

39. Nevertheless, doing the best they could in those difficult circumstances, the parties began to mediate and of course, against the context of the fact that there had been a successful mediation of the Rent Claim just over two years before. I accept Mr Khan's recollection:

> "Having been present at the day-long mediation, no issue was raised at all by BCL as to why the building could not be sold at the agreed price and terms to KEL. It was at the very early stage in the mediation that I put forward a proposal to purchase the building at a price to be agreed in settlement….

> Thereafter, I recall there was back and forth for the majority of the afternoon as to the sale price. Ultimately, Mr Cadman and his daughter, Fiona Cadman each signed the agreement. It was very clear to me that they were empowered and able to sign off on deals such as this that day and there was no indication at all to the contrary. As they did so, I had no reason to believe that BCL was not in a position to sell the building. It was being expressly represented to us that BCL was able to sell the property to us. I was induced to settle the BCL claim on those terms. The whole idea of the settlement was to move fast, so that I could apply the building to a commercial purchase. I was keen to proceed with the purchase as quickly as possible….If I knew that BCL was not able to sell the building, then I would not have entered into that agreement."

40. Of course, one always approaches the statement of a Claimant in a misrepresentation claim, who uses words like 'it was expressly represented to me' or 'I was induced to settle' and so on with a degree of caution. As Mr Diggle rightly said, those are lawyers' words intended to present a lawyer's argument. Indeed in cross-examination, Mr Diggle spent some considerable time with Mr Khan, pointing out to him that in a number of letters following on from that, even after it became apparent that BCL did not own the property - even as late as April 2023 - Mr Khan was still making proposals to adjust the deal so that it would go through. Mr Khan very candidly and honestly accepted that it did not really matter to him whether the purchase came from BCL or from another entity, as long as his company KEL could take on Portland House.

41. Nevertheless, there is still an important difference between the identity of the seller not mattering to Mr Khan particularly and the power to sell of the party he was dealing with. Mr Khan was emphatic in evidence that when he said in his statement that 'if he knew that BCL was not able to sell the building he would not have entered into that agreement', what he meant was that if he knew that BCL was not able to sell the building without third-party consent, then he would not have entered into that agreement without such consent being confirmed in advance. I accept Mr Khan's evidence on that point. Even if later on he was prepared to try and rescue a bad situation by trying to keep the deal on the rails even after he had discovered that BCL did not own Portland House, that does not mean that he was relaxed about whether BCL had power to make the sale happen at all.

42. I accept that Mr Khan would have been extremely concerned if he had realised that BCL could not make the sale happen without third party agreement, not just of Mrs and Ms Cadman but even worse, an independent trustee, which there is no evidence even knew about the mediation, let alone agreed to the deal. After all, the deal only came about that day, as a result of Mr Khan's suggestion. I can reach those conclusions even in the absence of detail about precisely what was said in the mediation. After all, as Mr Khan himself said, his proposal for KEL to buy Portland House at an early stage in the mediation was relatively quickly accepted. From that point the issue was the sale price. Therefore, I can certainly conclude that the principle of the deal that KEL would buy Portland House was one stage of the negotiation with the rest of the negotiation being the price and mechanism of the sale. Nevertheless, after an exhausting day negotiating remotely, a deal was finally agreed along the lines Mr Khan had suggested that morning, after an afternoon spent hammering out the agreed price and the mechanism to pay it.

43. I will quote the written Settlement in full, as it is short but all parts of it are important:

> "Agreement dated 20 January 2022 between B Cadman Limited, BCL, (1) The Pentagon Food Group, Pentagon, (2) Khan Estates Limited, KEL and (3) Ashfaq Khan, Mr Khan.
>
> (1) This agreement is made between the parties named above in full in final settlement of Claim HT-BHM-000001 in the High Court of Justice, Birmingham District Registry, Technology and Construction Court ('the claim') The agreement is made on a commercial basis without admission of liability by any party.
>
> (2) By way of consideration for this agreement, Pentagon Food has procured the agreement of KEL and Mr Khan hereto and BCL agrees to the disposition of the claim as herein provided.
>
> (3) Khan Estates Limited will, as soon as reasonably practicable, enter into a contract ('the contract'), for the purchase from BCL of the freehold property, Portland House, Portland Street, Stoke-on-Trent, ST1 5MG ('the property').
>
> (4) The price to be paid for the property by KEL shall be £900,000, payable to BCL by way of deferred consideration as follows: (i) £100,000 on completion of the contract or by 1 May 2022, whichever shall be earlier; (ii) £200,000 on 1 February 2023; (iii) £300,000 on 1 February 2024; (iv) £300,000 on 1 January 2025.
>
> (5) The payment obligations of KEL shall be secured by first charge on the property in favour of BCL.
>
> (6) Such obligation shall be further guaranteed by a personal guarantee thereof to be provided to BCL by Mr Khan on completion of the contract or by 1 May 2022, whichever shall be the earlier.
>
> (7) The solicitors for BCL and Pentagon shall be, as soon as possible after execution of this agreement inform the Court the parties to the claim have agreed terms of settlement and procured that the trial listed 26 January 2022 is vacated.
>
> Signed on behalf of BCL by Bernard Cadman and Fiona Cadman and signed on behalf of Pentagon, KEL and Mr Khan by Mr Ashfaq Khan."

44. Three important points are immediately clear about the terms of the Settlement:

a. Firstly, it is clear from paragraphs 1, 2 and 7 this was an agreement to settle the claim by BCL against Pentagon to which KEL and Mr Khan were not parties and had no liability. Yet both took on liabilities to pay – indeed £100,000 on completion of the contract or 1 May 2022. Whilst the Settlement benefited Pentagon and KEL, it was unquestionably to Mr Khan's own personal detriment.

b. Secondly, paragraphs 4, 5 and 6 provided that payment would be made to BCL, that BCL would have a first charge and that BCL would have the benefit of the guarantee that Mr Khan would give. SSAS or the trustees were simply not mentioned at all, nor was there any reference to any mechanism for the property to pass to BCL before it was passed on to KEL. Therefore, to all intents and purposes, a reasonable person watching the negotiations would have had no idea that BCL did not own the property in question. It is therefore hardly surprising Mr Khan did not realise that.

c. Thirdly, paragraph 3 is phrased literally as an obligation on KEL rather than an obligation on BCL. It did not say that 'BCL will sell as soon as reasonably practicable'. It said: 'Khan Estates Limited will enter into a contract to purchase as soon as reasonably practicable'. However, it did say that was 'to purchase from BCL', not from the trustees or SASS. Moreover, 'as soon as reasonably practicable' in paragraph 3 has to be read alongside paragraph 4.

The Aftermath

45. As Mr Diggle fairly pointed out, it was in fact Mr Khan's conveyancing solicitors who within perhaps even the next day after the mediation, 21 January 2022, did an Office Copy search and discovered that BCL was not the owner of the property. Instead, it was Mr Cadman, Mrs Cadman and Ms Cadman as trustees of the SASS pension scheme. There was no reference in the Office Copies to IPM, the independent trustee. Therefore, that document would not have disclosed to either of Mr Khan's solicitors, still less to Mr Khan himself, that IPM could under the Trust Deed effectively block the sale. Indeed, had Mr Khan been told about that Office Copy entry - and there is no evidence that he was by either set of his then-solicitors and I find he was not - he might have been relaxed on the footing that Bernard and Fiona Cadman had themselves signed the Settlement, albeit on behalf of BCL. Mrs Cadman had not, but she was the wife of Mr Cadman.

46. However, sadly, there was a problem because Mrs Cadman's health deteriorated sharply in the months after the mediation. Of course, there is no suggestion this was causally related to it – just a sad coincidence. She became quite poorly to the extent that within a few weeks, Mr Price acting for BCL felt professionally that it was important he should get a capacity assessment in relation to Mrs Cadman, because he recognised by that stage that the purchase and sale could not go through without her consent as a trustee or potentially, a Court Order. That capacity assessment was obtained in July 2022, of course after KEL and Mr Khan had come under an obligation on 1st May to pay £100,000 under the Settlement. Mrs Cadman's capacity assessment in July 2022 concluded she did not lack capacity and there was no reason why she could not agree to the sale.

47. I have heard no evidence from Fiona Cadman or anyone else that the independent trustee, IPM, had a specific objection to the sale. I certainly have Mr Price's evidence that when Mr Cadman somewhat testily suggested to him that if he wanted to know more details about the SASS pension scheme (which Mr Price had only just discovered because Mr Cadman had not told him) then he should speak to IPM about it, which Mr Price duly did. However, there is no evidence that IPM had any objection to the sale to KEL. That begs the question of why the sale did not proceed if IPM did not object, Mrs Cadman had capacity and Ms and Mr Cadman had agreed to the sale and signed the Settlement. I am driven to conclude, as Mr Khan suspected, that Mr Cadman simply changed his mind.

48. As Mr Khan explained in his statement and I accept because it is demonstrated by the emails to which he was taken by Mr Diggle, Mr Khan was prepared to be flexible. As late as April 2023, well after SASS' ownership of Portland House had been made clear to him, he proposed an adjustment to the timescale in the Settlement to enable the purchase and sale to KEL of Portland House still to happen. However, just because Mr Khan was prepared to make the deal work, does not mean that he would have been relaxed about the problem in the first place. He was simply in a difficult position: he did not want to sue and was trying to make the Settlement and the purchase happen. However, as time went on, it became apparent to Mr Khan there was increasing damage to Portland House. People had broken in and of course, it was Pentagon's case they had not set the fire in the first place, others had. In May 2022, just before the Enforcement Claim was issued, the payment obligation of £100,000 fell due on KEL and the guarantee on Mr Khan. Therefore, KEL paid to its solicitors in Escrow the first instalment of £100,000, although Mr Khan accepted that the other instalments under the contract had not been paid on the same footing. This is because there was a concern that Portland House was deteriorating and there is correspondence to that effect in the bundle later in 2022 into early 2023.

49. Understandably, eventually Mr Khan finally lost patience. Whilst as late as April 2023 he was still prepared to enable the deal to go through, in August 2023 BCL's solicitors sent through a contract from the SASS trustees not BCL, which did not incorporate staged payments as in the Settlement, even on an adjusted timetable. I will have to determine on another occasion whether Mr Khan's refusal to sign that agreement in August 2023 was a failure to mitigate loss. (But I will come back to causation of loss at the end of this judgment). However, I will observe now that sale contract which did not reflect the Settlement was only provided more than a year after it should have been, by which time I accept Mr Khan's evidence that there was ongoing damage and the economic landscape had fundamentally changed. Moreover, by that stage, the Claimants also issued the Enforcement Claim. Similarly, the summary judgment application had been issued, then adjourned, then finally abandoned in the light of Mr Price's November 2022 statement. Against that factual background, I turn to my conclusions on the issues.

Conclusions

Are statements in litigation and/or mediation admissible and/or actionable ?

50. There are many examples of litigation about litigation. The most obvious perhaps are claims for solicitors' or barristers' negligence. Another example is enforcement of settlement agreements, as in *Pedriks v Grimaux* [2021] EWHC 3448 (QB) I come to in a moment and *Brown v Rice*. A yet further example are cases about what is traditionally called 'witness immunity', although now as 'judicial proceedings immunity', which was encapsulated by Lord Hoffman in *Taylor v Serious Fraud Office* [1999] 2 AC 177 at 208:

> "[I]mmunity from suit…is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say. It is generated by the circumstances in which the statement was made and it is not concerned with its use for any purpose other than as a cause of action. In this respect, however, the immunity is absolute and cannot be removed by the court or affected by subsequent publication of the statement."

51. The principles of judicial proceedings immunity were reviewed and set out by Lewison LJ in *Singh v Reading BC* [2013] EWCA Civ 909 at [66]:

> "(1) The core immunity relates to the giving of evidence and its rationale is to ensure that persons who may be witnesses in other cases in the future will not be deterred from giving evidence by fear of being sued for what they say in court.
>
> (2) The core immunity also comprises statements of case and other documents placed before the court.
>
> (3) That immunity is extended only to that which is necessary in order to prevent the core immunity from being outflanked.
>
> (4) Whether something is necessary is to be decided by reference to what is practically necessary.
>
> (5) Where the gist of the cause of action is not the allegedly false statement itself, but is based upon things that would not form part of the evidence in a judicial enquiry, there is no necessity to extend the immunity.
>
> (6) In such cases, the principle that a wrong should not be without a remedy prevails."

52. I raised 'judicial proceedings immunity' and referred to *Taylor* and *Singh*, because the immunity seemed to me to be fatal to part of the Claimants' case, which relies on the pleading in the Fire Claim Particulars of Claim as itself a freestanding misrepresentation as to the ownership of Portland House. I fully accept that it was a misrepresentation and indeed, Ms Cadman effectively accepted that it was in her evidence. However, it is not in itself an actionable misrepresentation because it falls within a statement of case for judicial proceedings and is being relied on to found a cause of action, as Mr Diggle said.

53. However, as Lewison LJ said in *Singh*, judicial proceedings immunity should not go further than is necessary and does not mean that the Fire Claim Particulars of Claim is inadmissible in evidence or as contextual material, either in the construction of a later settlement agreement of the same proceedings or for that matter, in a misrepresentation claim. It is only its invocation and use as a cause of action in itself, as opposed to part of the evidence proving that cause of action, which falls within the core immunity.

54. That leads me onto a different form of immunity, or strictly privilege: the 'without prejudice rule'. I was referred to several cases on it, but it suffices for the moment to go to two or three of them, starting with the leading modern case on the rule in the House of Lords: *Rush & Tompkins v GLC* [1989] AC 1280 where Lord Griffiths explained at 1299:

> "The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences, rather than litigate them to a finish."

Lord Griffiths approved what Oliver LJ (as he was) said in *Cutts v Head* [1984] Ch 290:

> "That the rule rests, at least in part, upon public policy is clear... and the convenient starting point of the enquiry is the nature of the underlying policy. It is that parties should be encouraged, so far as possible, to settle their disputes without resorting to litigation and should not be discouraged by the knowledge that anything that is said in the course of those notifications and includes, of course, as much the failure to reply to an offer as an actual reply may be used to their prejudice in the course of the proceedings. They should be encouraged, fully and frankly, to put their cards on the table. The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the questions of liability. The rule applies to exclude all negotiations genuinely aimed at settlement, whether oral or in writing from being given in evidence."

55. However, in *Rush* itself, Lord Griffiths emphasised the rule does not simply bind the actual parties to the litigation at the time. The cumulative effect of *Rush* and the later Lords' decision of *Ofulue v Bossert* [2009] 2 WLR 749 (HL) was summarised by Lord Clarke soon after in *Oceanbulk Shipping v TMT* [2010] 3 WLR 1424 (SC) at [22]:

> "[T]he without prejudice rule is not limited to two party situations or to cases where the negotiations do not produce a settlement agreement…[I]n general the rule makes inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement and admissions made to reach a settlement with a different party within the same litigation are also inadmissible, whether or not settlement is reached with that party."

In the present case, this means BCL can rely on the 'without prejudice rule' not only against Pentagon but also against KEL and for that matter, against Mr Khan personally.

56. However, there are exceptions, summarised by Robert Walker LJ (as he then was) in *Unilever v Procter & Gamble* [2000] 1 WLR 2436 at pgs. 2444-5 (citations omitted):

> "[T]here are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote. The following are among the most important instances.
>
> (1) [W]hen the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible.
>
> (2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud, or undue influence….

> (3) Even if there is no concluded compromise, a clear statement…made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel.
>
> (4) Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other 'unambiguous impropriety' …[But t]hat…should be applied only in the clearest cases of abuse of a privileged occasion.
>
> (5) Evidence of negotiations may be given…to explain delay or apparent acquiescence.
>
> (6)…[W]hether the claimant had acted reasonably to mitigate his loss in ….conduct and conclusion of negotiations for compromise of proceedings…
>
> (7) The exception… for an offer expressly made 'without prejudice except as to costs'…
>
> (8) In matrimonial cases there has developed what is now a distinct privilege extending to communications received in confidence with a view to matrimonial conciliation…."

57. In *Oceanbulk*, Lord Clarke approved those exceptions to the without prejudice rule in *Unilever*, but emphasised Walker LJ had said they were not exhaustive. Lord Clarke instanced an action for rectification of a contract as another exception and indeed went on to find a further exception, which was summarised by Lord Phillips in *Oceanbulk* at [48]:

> "When construing a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on the meaning that should be given to the words of the contract. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted 'without prejudice'. This principle applies both in the case of a contract that results from the without prejudice negotiations and in the case of any other subsequent contract concluded between the same parties."

Indeed, this case raises the scope of that exception or a potential other for implied terms.

58. Before turning to that, I should address the relevance of mediation. *Phipson on Evidence, 20th Edition (2024)* at paras 24-51-24-54 notes that some ADR commentators have suggested a different type of privilege to 'without prejudice' and going further, called 'mediation privilege'. Mr Isaacs QC in *Brown v Rice* at [19]-[20] set out the argument:

> "Counsel for Mrs Patel argued for the existence of a so-called mediation privilege, distinct from the without prejudice rule, under which (at least) a mediator could not be required to appear as a witness or produce documents and under which the parties could not waive the mediator's entitlement not to give evidence in respect of the contents of a mediation….

> He sought to build on [the matrimonial exception discussed in *Unilever*]….Counsel for ADR Group also referred to a budding 'mediation privilege' in this and other jurisdictions. In that context, he drew attention to Jacob L.J.'s observation in *Reed v Reed* [2004] 1 WLR 3026 (CA)] at [30], that the line between a third-party assisted ADR and party-to-party negotiations might be 'fuzzy'. However, I do not myself find support in that particular observation for the existence of a distinct mediation privilege….Counsel for both ADR Group and Mrs Patel accepted, however, that this case could be decided under the existing without prejudice rule. In particular, this was because it was common ground between the parties that the court could not properly require [the mediator] to give evidence and, consistently with cl.7.4 of the agreement to mediate, neither party was intending to issue a witness summons against him. I agree that this case can be decided under the existing without prejudice rule. It may be in the future that the existence of a distinct mediation privilege will require to be considered by either the legislature or the courts but that is not something which arises for decision now."

59. Of course, much has happened in the field of ADR since *Brown v Rice* in 2007. At that time, the leading case was *Halsey v Milton Keynes NHS Trust* [2004] 1 WLR 3002, where Dyson LJ, later Master of the Rolls, had suggested that the Court could not require as opposed to strongly encourage, parties to submit to mediation if they were unwilling. However, recently in *Churchill v Merthyr Tydfil BC* [2024] 1 WLR 3827 (CA), the current Master of the Rolls (with whom Birss LJ and Lady Chief Justice Carr agreed) explained Dyson LJ's comments in *Halsey* were *obiter* and the Court did have the power to compel ADR, but it was circumscribed. Sir Geoffrey Vos MR summarised at [65]:

> "The court should only stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made does not impair the very essence of the claimant's right to proceed to a judicial hearing and is proportionate to achieving the legitimate aim of settling the dispute fairly, quickly and at reasonable cost."

Of course, that last point chimes with the Overriding Objective in CPR 1.1, which will soon be amended to include 'promoting or using alternative dispute resolution'.

60. This begs the question whether the undoubted enhanced importance of mediation and ADR generally justifies a more enhanced form of 'mediation privilege' beyond traditional 'without prejudice privilege' e.g. with narrower exceptions. The learned editors of *Phipson* are not convinced by that and I respectfully agree with them. The authorities do not - at least yet - support the view that 'mediation privilege' is distinct from 'without prejudice privilege'. Nevertheless, the contractual and formal context of mediation means that it is a particularly clear – certainly not now 'fuzzy' - example of 'without prejudice privilege', which can be enhanced by the parties' mediation contract and conduct by the imposition of superadded duties of *confidentiality.* These can even be raised by the mediator if they are called upon to give evidence, even if the parties both waive 'without prejudice privilege': *Farm Assist v DEFRA* [2009] EWHC 1102 (TCC).

61. Against that background, I turn to the relevant *Oceanbulk* and *Unilever* exceptions to 'without prejudice privilege' in this case, which were not suggested by either Counsel to have been excluded or even constricted by duties of confidentiality. These are fundamental to the Claimants' misrepresentation claim, since I have already concluded they cannot rely on BCL's Fire Claim Particulars of Claim themselves to found that cause of action. Therefore, they must rely on misrepresentation affecting the 2021 mediation. However, it is common ground that the contents of mediation are admissible and I will now finally explain why in relation to the three relevant exceptions to 'without prejudice'.

62. I can deal with *Unilever* exception 4 'unambiguous impropriety' very briefly. As Lord Walker (as he became) said in *Unilever*, '…that…should be applied only in the clearest cases of abuse of a privileged occasion'. That same point was strongly emphasised more recently by Males LJ in *Motorola v Hytera* [2021] EWCA Civ 11 at [57]:

> "The courts have consistently emphasised the importance of allowing parties to speak freely in the course of settlement negotiations, have jealously guarded any incursion into or erosion of the without prejudice rule, and have carefully scrutinised evidence which is asserted to justify an exception to the rule. Although the 'unambiguous impropriety exception' has been recognised, cases in which it has been applied have been truly exceptional, and there has been no scope for dispute about what was said, either because the statement was recorded or because it was in writing."

In the present case, whilst Mr Clarke faintly suggested that misrepresentation by BCL through Mr Cadman of its ownership of Portland House throughout the Fire Claim and into the mediation was 'unambiguous impropriety', at least if fraudulent and so amounting to deceit, that cannot be right. 'Unambiguous impropriety', as explained by Males LJ in *Motorola*, concerns exceptional misconduct in settlement negotiations such as blackmail or perjury (as *Phipson* also emphasises), not with exempting whole causes of action from 'the without prejudice rule' such as the tort of deceit.

63. In any event, there is a relevant 'bespoke exception' for misrepresentation which induces a settlement agreement as alleged here, namely *Unilever* Exception 2, where Lord Walker explained that 'evidence of negotiations is also admissible to show an agreement apparently concluded between the parties during the negotiation should be set aside on grounds of misrepresentation, fraud or undue influence'. This exception was developed more recently in *Berkeley Square Holdings v Lancer Property* [2021] 1 WLR 4877 (CA) at [47]-[55] by Richards LJ (as he then was). In particular, he said at [47]:

> "Exception (2) is directed to the related issue as to whether an apparent agreement has been made with the necessary consent of the parties to it. The particular matters referred to of misrepresentation, fraud or undue influence all go to whether the consent of the party may be vitiated by misrepresentation, fraud or undue influence and this is not an exhaustive list. Duress would also certainly qualify. There was discussion as to whether Simon J was right in *Jefferies Group Inc v Kvaerner International Ltd [2007] EWHC 87 (Comm)* to hold that exception (2) did not extend to a negligent misrepresentation…

> I am far from sure that Simon J was correct, given that subject to s.2 Misrepresentation Act 1967, rescission is as much a remedy for non-fraudulent misrepresentation as deceit and given also that Robert Walker LJ [in *Unilever*] distinguished between misrepresentation and fraud. However…this is not an issue that requires decision in the present case."

64. For reasons I will explain, this 'negligent or fraudulent only' issue is not one requiring resolution in this case either, but for my part, I respectfully agree with Richards LJ's provisional view. Whilst I was unable to find *Jeffries*, it is hard to see any relevant difference between negligent and fraudulent misrepresentation in the context of rescission of a settlement agreement (leaving aside any other contract). Rescission is available for both, indeed even for innocent misrepresentation, even if it has become a term of the contract (s.1 of the 1967 Act). Differentiation between types of misrepresentation introduces precisely the sort of artificial distinctions which Richards LJ deprecated in *Berkeley Square*, e.g. turning on whether otherwise without prejudice evidence was being deployed to show agreements either should or should not be set aside. Moreover, not only does s.2(1) of the 1967 Act enable recovery of damages on a similar basis for fraudulent and negligent misrepresentation (*Royscot Trust v Rogerson* [1991] 2 QB 297 (CA)), since damages are available in lieu of rescission under s.2(2) of the 1967 Act, in my judgment it cannot make a difference if the remedy claimed is such damages rather than rescission. So, *Unilever* Exception 2 applies, which is why the parties did not contest admissibility.

65. Moreover, as I said, the Supreme Court in *Oceanbulk* added an exception to the without prejudice rule to those in *Unilever* for contractual interpretation. I consider in a moment whether that applies to the implication of terms, but it certainly applies to the Claimants' original and maintained claim of breach of an express term, to which I turn first.

Has BCL breached an express term of the Settlement ?

66. As I have explained, this claim for breach of an express term is part of the Claimants' pleaded case but not at the forefront of it. But it is the most straightforward argument and as stated in *Marks & Spencer v BNP Paribas* [2016] AC 742 (SC), it is more logical to interpret the express terms of a contract first before determining whether terms should be implied into it (or indeed deciding whether it was induced by misrepresentation).

67. The ordinary principles of contractual interpretation apply to settlement agreements and were conveniently summarised by Williams J in *Pedriks v Grimaux* at [113]-[115]:

> "113. The parties are agreed that the applicable principles relating to the construction of contracts were set out by Lord Hodge JSC in *Wood v Capita Insurance Services Ltd* [2017] AC 1173….At paras 10 – 11 [he] said:
>
> > "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement…..[T]his is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as

> a whole and depending on nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning….
>
> …Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause…; and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms."

114. At para 13 Lord Hodge continued:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement… Some agreements may be successfully interpreted principally by textual analysis, for example, because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality,

> brevity or the absence of skilled professional assistance…"

115. In *FCA v Arch Insurance (UK) Ltd & Ors* [2020] EWHC 2448 (Comm) at [62], Flaux LJ and Butcher J summarised the exercise….at [64]:

> "As Lord Neuberger said in *Arnold v Brittan* at [19]–[20], commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an un-wise party, or to penalise an astute party … [A]t para 20… he said: 'The purpose of interpretation is to identify what the parties have agreed, not what the Court thinks that they should have agreed"…."

In *Pedriks v Grimaux* itself at [134]-[138] Williams J construed settlement clauses in a mediation settlement agreement. She rejected the arguments that clauses which specifically provided for one party to provide the other with financial information for a specific period of time and for an associated company to pay 'the maximum dividend available for distribution' could be interpreted as requiring financial information for a longer period of time or any specific level of dividend: those would re-write the contract.

68. However, in the present case, whilst there is no doubt that the Settlement contract was facilitated with skilled professional assistance on both sides, it was, as I explained earlier, concise not detailed, as is typical of such agreements drafted at the end of a long day's mediation, particularly in circumstances where they have to be in writing in order for the mediation to lead to an effective settlement. In those circumstances, the evidential context of the agreement is perhaps more important than it would be in a complex commercial contract negotiated over a period of weeks in granular detail. Contextual interpretation of the kind discussed in *Wood* may well be appropriate for settlement agreements signed at a mediation where things are drafted quickly and shortly to pin down an oral agreement.

69. Moreover, as confirmed in *Oceanbulk*, that evidential context can include matters which would otherwise be without prejudice, including statements made in the course of the mediation. Therefore, when interpreting the Settlement, I satisfied I can take into account the circumstances in which it was produced, even though that was in mediation. I can also take into account that (unlike *Pedriks*) it settled then-current proceedings, litigated by both sides on the footing BCL was the freehold owner of Portland House when it was not.

70. I set out the Settlement contract in full earlier on and made three points about it. Firstly paragraphs 1, 2 and 7 show it was an agreement to settle the Fire Claim between Pentagon and BCL to which KEL and Mr Khan were not parties and under which they had no liability, yet each took on a liability to pay BCL in relation to Portland House. Secondly, paragraphs 4-6 provided staged payment would be made to BCL, which would have a first charge and the benefit of Mr Khan's guarantee. There was no reference to the Trustees or pension scheme of SASS having any interest whatsoever. Thirdly, paragraph 3 imposed the following obligation on KEL (albeit on staged payments in paragraph 4):

> "Khan Estates Limited will, as soon as reasonably practicable, enter into a contract for the purchase from BCL of the freehold property, Portland House."

71. Mr Diggle submitted, as BCL averred in its Amended Defence, that paragraph 3 imposed an obligation on KEL not BCL and the furthest the obligation on BCL went was to cause Portland House to be sold to KEL, not necessarily that it owned it or would sell it itself. BCL was the 'middle-man' or 'conduit' for the sale from the Cadman Family and SASS to KEL. That explained why the clause imposed an obligation only on KEL, not on BCL.

72. Mr Clarke submits that the true construction of that paragraph in the light of the wording of the rest of the Settlement contract and the surrounding circumstances of the litigation and the mediation applying *Wood* and *Oceanbulk* etc is that it was not simply that BCL was obligated to buy Portland House, but BCL was obligated to sell it to KEL, consistent with the rest of the agreement including the staged payments. As Mr Clarke said in submissions, perhaps it would have been clearer if paragraph 3 had explicitly said 'KEL will enter into a contract to buy and BCL to sell the property as soon as reasonably practicable'. But he submits that was implicit and the true meaning of the words used.

73. I remind myself, as emphasised in *Britton, Wood, FCA* and *Pedriks*, that as Lord Neuberger said in *Britton*, the Court's task in interpretation is not to rewrite a contract to assist an unwise party, or to determine what the parties should have agreed, only to identify what they did actually agree. Nevertheless, I agree that clause 3 did impose an obligation on BCL to contract to sell Portland House to KEL, for three reasons:

    a. Firstly, even just looking at paragraph 3 in isolation, that is precisely what it does because it requires KEL not simply to make an offer which BCL could refuse, but '*to enter into a contract* for the purchase *from BCL* of the freehold property, Portland House'. So, KEL was obligated to enter into a contract to buy Portland House from BCL, i.e. a contract *with* BCL. That is not a unilateral contract on KEL, but a contract to contract bilaterally with BCL, imposing an obligation on BCL as well. To oblige KEL to contract with BCL but not BCL to contract with KEL would here be like 'one hand clapping': it would make no sense.

    b. Secondly, paragraph 3 should not be interpreted in isolation, but in the light of the rest of the Settlement contract. The reason for the slightly curious drafting of paragraph 3 (other than its circumstances as a mediation settlement after a long day) is, as paragraph 2 provides, KEL's obligation to contract to buy was the consideration 'moving from' Pentagon for BCL to enter the Settlement contract. If the Settlement had been more straightforwardly that BCL would drop the claim against Pentagon in return for Pentagon buying Portland House off it, then clause 3 would obviously have been drafted rather differently. Those drafting the contract were simply expressing - at the end of a long day's negotiation – that the Settlement was quadri-lateral: (i) BCL would drop the claim against Pentagon in return for (ii) Pentagon procuring those promises to BCL (iii) from KEL to enter into a contract to buy Portland House on the staged payments; (iv) personally guaranteed by Mr Khan. Clause 3 captures part of stage (iii) – the obligation on KEL to contract. That does not mean there was no obligation on BCL to enter the same contract with KEL. In other words, there was a mutuality of obligation as between BCL and KEL on sale and purchase of Portland House, even if not under this contract the same mutuality of obligation between BCL and Pentagon.

    c. Thirdly, that interpretation is also consistent with the wider context of the fact the Settlement was resolving the underlying Fire Claim in which the parties had proceeded on the footing that BCL owned Portland House. The Particulars of Claim for the Fire Claim may not be actionable as such, but they are obviously

> relevant context given they were (incorrect) common ground in the Fire Claim itself. Therefore, paragraph 3 should be interpreted as obliging BCL to contract with KEL to sell it Portland House. When one reads the Settlement contract in the light of the fact that KEL and Mr Khan were stepping into the agreement to settle, the reasonable observer, having the information available to both the parties, including the litigation history, would in my judgment interpret paragraph 3 as not simply an obligation on KEL to enter into a contract to purchase from BCL as soon as reasonably practicable, but as carrying a corresponding obligation on BCL to enter into a contract with KEL as soon as reasonably practicable.

74. I am satisfied that is the proper interpretation of the Settlement contract. I am also satisfied that obligation has been breached by BCL. It did not enter into a contract with KEL when KEL proposed to do so in Spring 2022, let alone as soon as reasonably practicable after the mediation in January 2022. BCL did not even propose to enter into a contract until August 2023 and even then, what was proposed was substantially different than had been agreed in the Settlement over a year earlier. Firstly, it was not BCL who was proposing to sell, it was the Trustees. Secondly, it was for the same purchase price but without any reference to staging the payments as had been agreed even though under the original staging, the full amount payable was not due until 2025. In those circumstances, the offer in August 2023 did not avoid breach by BCL of the Settlement. However, it is relevant to the issue of loss to which I return later.

Has BCL breached an implied term of the Settlement ?

75. Having found that BCL is in breach of an express term in the Settlement, it is no longer necessary for the Claimant to prove breach of an implied term or misrepresentation. However, in case I am wrong on the express term and as they have been fully-argued, I will deal with them, albeit perhaps more briefly than otherwise may have been expected.

76. As Williams J noted in *Perdiks* at [116], the leading case on the implication of contractual terms is *Marks & Spencer v BNP Paribas* [2016] AC 742 (SC) where Lord Neuberger set out the principles in detail at [14]-[21], as helpfully summarised in the headnote:

> "A term will be implied into a detailed commercial contract only if necessary to give the contract business efficacy or if it is so obvious that it went without saying. The implication of a term is not critically dependent upon proof of an actual intention of the parties when negotiating the contract, but was concerned with what notional reasonable people in the position of the parties at the time they had been contracting would have agreed. It is a necessary but not sufficient condition for implying a term that it would appear fair or the court consider the parties would have agreed if it had been suggested to them."

77. However, I note that 'business efficacy', the established phrase, was slightly reformulated by Lord Neuberger at [21] of *BNP Paribas*, adopting an expression used by Lord Sumption in argument that without the term, 'the contract would lack commercial or practical coherence'. I also note that the expression 'so obvious that it goes without saying', is best and most famously encapsulated by McKinnon LJ's expression in the case of *Shirlaw v Southern Foundries* [1939] 2 KB 206 that:

> "If, while the parties were making their bargain, an officious bystander were to suggest some express provision…in their agreement, they would testily suppress him with a common 'Oh, of course!'"

78. That was put in slightly more modern language by Lord Hughes in the Privy Council in *Nazir Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, quoted in *Pedriks v Grimaux* at paragraph 117, which helpfully summarises the law in these type of implied terms in the wake of *BNP Paribas.* Lord Hughes summarised the position at [7]:

> "[T]he process of implying a term into the contract must not become the rewriting of the contract in the way in which the court believes to be reasonable or which the court prefers to the agreement which the parties have negotiated. A term is only to be implied if it is necessary to make that contract work and this may be if (i) it is so obvious it goes without saying and the parties, although they did not apply their minds to the point would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course' and/or (ii) it is necessary to give the contract business efficacy…."

(I interpose to observe that 'business efficacy' is in the sense that without it, the contract would lack commercial or practical coherence. Lord Hughes continued in *Ali* at [7]):

> "Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

79. However, before turning to the pleaded implied terms in the present case, I return to the scope of the *Oceanbulk* exception to the without prejudice rule, I repeat and italicise:

> "When *construing* a contract between two parties, evidence of facts within their common knowledge is admissible where those facts have a bearing on *the meaning that should be given to the words of the contract*. This is so even where the knowledge of those facts is conveyed by one party to the other in the course of negotiations that are conducted 'without prejudice'. This principle applies both in the case of a contract that results from the without prejudice negotiations and in the case of any other subsequent contract concluded between the same parties.

80. Interpretation (or construction) and implication are two different processes, which should be carried out in that sequence, as Lord Neuberger said in *BNP Paribas* at [27]-[28]. As he added, by definition, implied terms are not there to be 'construed' alongside express terms. So, the *Oceanbulk* exception to the without prejudice rule does not on the face of it apply to implication of terms. Yet, as Lord Neuberger added in *BNP Paribas* at [27]:

> "Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation."

81. Whilst interpretation and implication are different and sequential analytical processes, as they both draw on the same evidential context: 'the surrounding circumstances known to both parties at the time of the contract and commercial common sense', it is hard to see why without prejudice material falling within that description should be admissible for interpretation but not for implication. That would erect similar 'artificial distinctions' Richards LJ deprecated in *Berkeley Square*. As he said there at [33]:

> "I do not accept that any extension [to an exception] to the without prejudice rule] must be an incremental development by reference to existing exceptions. New factual circumstances may arise, or conditions or attitudes may change, and the common law must retain the ability to meet them….
> I cannot see any principled basis for saying that an extension to exception (2), because it has not apparently been applied to date in an English case, must be analogous to an existing but different category of exception."

82. By analogy, whilst I accept that the *Oceanbulk* exception to the without prejudice rule literally only applies to interpretation not implication, actually it would only be a very modest extension indeed to extend it to implication – an incremental and analogous development well within the scope of Richards LJ's terms in *Berkeley Square*. Another way of putting it is that while implication is not included in the *Oceanbulk* exception to the without prejudice rule by interpretation of that exception, it is effectively included by implication itself. Moreover, as it is only a modest extension to an existing exception, not a new one, it would also respect what Lord Neuberger had earlier said in *Ofulue* at [89]:

> "Robert Walker LJ's invaluable judgment in *Unilever*… makes a point which should always be borne in mind by any judge considering a contention that a statement made in without prejudice negotiations should be exempted from the rule. After considering a number of authorities, Robert Walker LJ said, at pp 2448—2449, that the cases which he had been considering: 'make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions

> against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties . . . to speak freely about all issues in the litigation . . . Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers . . . sitting at their shoulders as minders'. This approach is entirely consistent with the approach [in] *Rush & Tompkins* [1989] AC 1280, and with that of the courts in the 19th century, mentioned by…..Lord Walker of Gestingthorpe, in para 57 of his opinion."

Indeed, in *Ofulue* at [57], Lord Walker himself had said this:

> "As a matter of principle, I would not restrict the without prejudice rule unless justice clearly demands it."

83. In my judgment, justice *does* clearly demand that implication of terms should be able to draw on the same material as interpretation of terms in the *Oceanbulk* exception, which would avoid not create artificial distinctions and promote not frustrate settlement. Indeed, since implication of terms must not involve re-writing the contract, but only implication that is necessary to make the contract work (as Lord Neuberger said in *BNP Paribas* and Lord Hughes repeated in *Ali*), access to without prejudice material is just as, if not more, likely to enable the Court to implement what the parties really agreed by their settlement. That reassurance is more likely to *promote* settlement and for parties to negotiate freely than anxiety that they must incredibly precise in their settlement agreement as the Court will take a pedantically literal approach to interpretation or implication of its terms.

84. However, that opinion is *obiter* as I have already upheld the Claimants' claim for breach of express terms. It is also *obiter* because it is unnecessary for me to rely on any such modest extension to the *Oceanbulk* exception to the without prejudice rule. Even without it, I can imply terms into the Settlement which are necessary to make it work and no more (in the sense that the term is so obvious it goes without saying and without it, the Settlement would lack business efficacy and indeed commercial or practical coherence).

85. On the assumption that I was wrong to find that paragraph 3 of the Settlement on its true interpretation imposed not just an obligation on KEL to contract to buy Portland House, but an obligation on BCL to contract to sell it to KEL, the three pleaded implied terms in this case at paragraph 12 of the Amended Particulars of Claim are as follows. Firstly, that BCL warranted it was the freehold owner of Portland House. Secondly, that BCL warranted that it had or at least could obtain the right to sell the freehold interest in Portland House to KEL or to compel its sale. Thirdly, that BCL warranted that it could and would sell or cause to be sold the freehold interest in Portland House to KEL pursuant to the terms of the agreement. I will take those in turn, albeit relatively briefly.

86. The first proposed implied term - that BCL was the owner of the building - in my judgment, does not meet the strict standard of necessity confirmed in *BNP Paribas* and *Ali*, with or without access to any without prejudice material. It would not be necessary to make the contract work for BCL to own Portland House itself, so long as it could obtain

the right to sell the freehold interest in the building or compel its sale; or alternatively that it could and would sell or cause to be sold to KEL the freehold interest in the building – i.e. the second or third pleaded implied terms. Only those terms, in my judgment, are necessary in the sense discussed in *BNP Paribas* and *Ali*. But it also follows that, those second and third terms were always implied into the Settlement for the following reasons.

87. I start with the third proposed implied term - that BCL warranted it could and would sell or cause to be sold the freehold interest in the building to KEL. Even if I am wrong that paragraph 3 of the Settlement on its proper *interpretation* imposed that obligation on BCL, an implication to that effect is necessary for the same reasons as given earlier. Without it, the Settlement is an entirely one-sided contract where KEL promised to buy something and pay money and Mr Khan promised to give a guarantee and yet, BCL is under no obligation whatsoever to sell Portland House to KEL. That makes absolutely no commercial sense and indeed, it makes no litigation sense as a proper means of settling the Fire Claim which (wrongly) pleaded BCL owned Portland House. Without having to rely on any without prejudice material at all, on the traditional business efficacy basis, without the implied term that BCL could and would sell to KEL, the contract would lack business efficacy and lack practical and commercial coherence, which is the same thing.

88. In my judgment, the result is the same – again even without reliance on without prejudice material – had the officious bystander asked the parties to the mediation whether BCL could and would sell Portland House to KEL - the parties would have both said: 'Of course, that is so obvious it goes without saying'. Mr Khan on behalf of Pentagon, KEL and himself certainly would have said 'of course'. Likewise, Mr Cadman, from what his daughter says about him, would also have said 'Of course', because he saw no meaningful distinction between his company BCL and the pension scheme SASS. That is similar to what Mr Diggle described in the Amended Defence at paragraph 19: 'the defendant agreed to cause the building to be sold to KEL'. So, on that footing, this term would be implied into the Settlement as necessary in the sense explained in *BNP Paribas*.

89. Moreover, the second pleaded implied term - that BCL warranted that it had or at least could obtain the right to sell the freehold interest in the building or to compel its sale – adds little and is for similar reasons a plain and obvious implied term in this case and again it is unnecessary to rely on without prejudice material to reach that conclusion. It would make absolutely no sense whatsoever for KEL to promise to buy Portland House unless it was part of the same agreement that BCL warranted that it could obtain the right to sell or compel that sale. Otherwise, the contract would be a complete waste of time, or worse would impose a one-sided bargain for the reasons I have explained.

90. In those circumstances and for similar reasons as for the express terms, both implied terms were breached. Either way, BCL did not have the right to sell the freehold interest in the building to KEL, nor did BCL have the right to compel its sale, because it had to get the consent of the trustees, not only including Mrs Cadman, who was not a party to the agreement or even a signatory to it; but also, the independent trustee, which may have objected. In those circumstances, BCL did not have the right to sell or to compel sale. Ultimately, BCL could not make this happen alone without the consent of others. There was a difference between Mr Cadman's *expectation* that people will agree with him on one hand and his legal *power* through his company, BCL to achieve what it was impliedly promising to achieve. Moreover, the proof of the pudding was in the eating. Portland House was not sold 'as soon as reasonably practicable' and certainly not by May 2022,

which is what led to the litigation. Nor was it proposed to be transferred in the terms of the Settlement, even by the proposal in August 2023. I am driven to the conclusion that Mr Cadman had, as Mr Khan suspects, 'seller's remorse' and changed his mind, whether because he fell out with or took against Mr Khan for suing him in May 2022. Certainly, the Settlement was not implemented in the way that it should have been and there was a breach of an implied term, in my judgment, even if I am wrong that there was also breach of an express term. In the circumstances, I need only deal briefly with misrepresentation.

Was there an actionable misrepresentation by BCL to the Claimants ?

91. As I explained earlier on, in this case, there are two categories of misrepresentation. The first arises out of the Particulars of Claim in the Fire Claim where BCL stated it owned Portland House. As I explained, those are not actionable due to judicial proceedings immunity, but they are context not only for the interpretation of the contract and the implication of an implied term (and obviously not without prejudice), as well as context for the inference or for the implication of a representation in the conduct of the mediation. The second category in this case pleaded at paragraph 13 of the Particulars of Claim of the Enforcement Claim is that in the course of the mediation, BCL or Mr Cadman on behalf of BCL made or implied misrepresentations (so falling squarely within *Unilever* Exception (2)) that (i) BCL was the owner of Portland House; (ii) it had the right to sell the building or at least arrange for its sale and; (iii) it could and would sell it to KEL.

92. Starting with (iii), whilst I found BCL was obliged to sell Portland House to KEL by express and/or implied term, as Mr Diggle said, it is not really a representation as to fact, but as too future intention (and was then accurate: *Chitty on Contracts* (2024) p.10-017).

93. Nevertheless, for similar reasons as already discussed, (ii) - the representation that BCL had the right to sell the building or at least to arrange for its sale - was in my judgment an implied representation (as opposed to an implied term) on the test summarised in the headnote to *Property Alliance Group v Royal Bank of Scotland* [2018] 1 WLR 3529 (CA)

> "It was not to water down the requirement that there had to be clear words or conduct of the representor from which a representation could be implied, but a helpful test in determining whether there had been an implied representation, to consider whether a reasonable representee would naturally assume that the true facts did not exist and that if it did, he would necessarily have been informed of it."

94. I accept Mr Diggle's point that the terms of the Settlement contract were not themselves a representation, but the terms of the contract evidence the conduct of the negotiation which led to that contract and are part of the evidential matrix of fact upon which one can make inferences of conduct and so implied representations. So too is the background to the litigation, including the pleadings, even if they are not actionable in themselves. So too is the evidence of Mr Khan and for that matter, Ms Cadman about the conduct of the mediation. I remind myself that it was Mr Khan's idea to propose the purchase and as he said, most of the afternoon was spent negotiating the price. In all those circumstances and in taking into account all of the evidence I have heard, I can on the balance of probabilities infer that it was, as Mr Clarke put it, the unspoken premise of those

negotiations that BCL could sell the building to KEL and indeed, that it had the right to sell the building or at least arrange for its sale. However, as events proved, it did not.

95. In that context, I consider that Mr Khan's own evidence that he did not know that there was any significant difference between BCL and SSAS - is particularly powerful evidence of a reasonable representee in the circumstances. He certainly did not know that BCL did not have the right to sell. He would have expected to have been and indeed necessarily would have been informed of it. As Mr Clarke put it, that was the unspoken premise of the settlement. In short, I find on the balance of probabilities that Mr Khan would never have made a promise to give a personal guarantee to make this deal happen if he had realised that he was contracting with a contractual party which had no right to enable it to happen. In those circumstances, there was plainly an implied representation.

96. I go further and also accept that for similar reasons, BCL made an implied representation that it owned Portland House. The contract itself provided that KEL had to 'as soon as reasonably practicable, enter into a contract for the purchase *from BCL* of Portland House'. Even if I am wrong and that did not impose an express or implied obligation on BCL to sell it to KEL, a reasonable representee (whether Mr Khan or not) would naturally assume that BCL owned Portland House and if it did not, that he would be informed, which is another way in this case of saying there was an implied representation.

97. It is therefore unnecessary for me to find an implied representation to rely on any without prejudice material, nor even on the Particulars of Claim in the Fire Claim as context although not independently actionable. That possibility is why I referred the parties to the case of *Cramaso v Ogilvie-Grant* [2014] 2 WLR 317 (SC), which confirmed that a continuing representation could be actionable by than a different party than to whom it was addressed. In any event, that confirms my view. Here, in the Particulars of Claim in the Fire Claim, BCL misrepresented that it owned Portland House *to Pentagon,* which continued through to the mediation and on which *Mr Khan on behalf of KEL and personally* relied. As Mr Clarke said, that it was part of the unspoken premise of the negotiation that BCL was the owner of the building. That inaccuracy had never been corrected and as I said, was reflected even in the terms of the Settlement itself.

98. Therefore, I find that BCL misrepresented both that (iii) it owned Portland House when it did not; and (ii) it had the right to sell the building or at least to arrange for its sale when it did not, because that depended on the consent of Ms Cadman, Mrs Cadman and IPM. Mr Diggle accepted that were I to reach that conclusion, those misrepresentations continued into the Settlement agreement itself. That concession was inevitable.

99. However, Mr Diggle nevertheless argued that those misrepresentations did not induce Mr Khan to enter the Settlement contract as could be seen from his attempts to maintain the deal even after he discovered that BCL did not own Portland house. However, as I said, the patience of a party trying to rescue a contract despite discovering there was a misrepresentation is not the same as saying that party was not induced into contracting by that misrepresentation. In my judgement, those implied misrepresentations were both material and induced him to enter the contract. If Mr Khan had not been told that BCL owned Portland House or that had not been implied, nor that BCL had the right to sell it or arrange for its sale without the consent of a third party like Mrs Cadman or IPM, he would not have entered the contract *as it stood*. In my judgment, I can conclude that on the balance of probabilities from Mr Khan's evidence and from all the circumstances of

the case, including common sense. Why on earth would someone agree to enter into a guarantee of a transaction where he had no guarantee in return that something would be sold to his company ? In any event, I would conclude on balance of probabilities that if Mr Khan had known the truth, he would not have acted the same anyway. He may still have entered a Settlement contract, but would have insisted that the other Trustees like Mrs Cadman and IPM be added as parties to it or to get their consent before it proceeded.

100. In any event, I do not need to conclude that had Mr Khan known the truth about who owned Portland House, he would not still have proceeded to contract at all. That is not the test for inducement. In *Raiffeisen Zentralbank v RBS* [2010] EWHC 1392 (Comm) Christopher Clarke J, as he then was, said at [186] and [187]:

> "If it is clear that unless the representation had been made to him, the claimant would not have entered into the contract, it is irrelevant to ask what would have happened if he had been told the truth. It is not necessary for the representee to establish he would have acted differently had he known the truth."

That not only applies to negligent misrepresentation as alleged in *Raiffeisen*, it also applies to deceit / fraudulent misrepresentation, as the Supreme Court held in *Zurich Insurance v Hayward* [2016] 3 WLR 637.

101. For those reasons, I am satisfied of the four criteria for misrepresentation set out by Jackson LJ in *Ludsin Overseas v Eco3 Capital* [2013] EWCA Civ 413. Firstly, BCL – through Mr Cadman - made false implied representations to the Claimants, namely that it was the owner of the building; *and* it had the right to sell it or at least to arrange its sale and could and would arrange the sale. Secondly, in making those implied representations, Mr Cadman must be taken, I find, to have intended that the Claimants should act in reliance on it, as that is what he thought would happen. Thirdly, for the reasons I have just said, the Claimants did act on reliance on it. That was the unspoken premise of the agreement, underpinning that negotiation and inducing the Mr Khan and the Claimants to act in reliance upon it in this way. I come to the fourth question of causation of loss in a minute, as it is not only relevant to misrepresentation, but to express and implied terms.

102. Dealing with what Mr Cadman thought would happen takes me directly to the question of whether he – and so BCL - knew the misrepresentations were false, or alternately was reckless as to whether it was true or false. That would be 'fraudulent misrepresentation' However, if he made the misrepresentation in circumstances where he did not have reasonable grounds to believe that it was true under s.2 of the 1967 Act, that would be 'negligent misrepresentation', albeit the remedies are the same: *Rogerson*.

103. I can deal with negligent misrepresentation first. In my judgment, those were at the very least negligent implied misrepresentations. Mr Cadman allowed the negotiations to be conducted on the footing that he had, through BCL, the right to make the sale happen. I accept that he genuinely believed that he had the right to make it happen, because he assumed that whatever he said would 'go' within his business, just as it ordinarily would. But he had no reasonable grounds for that belief, because not only would his wife have to agree as a trustee, which perhaps would not have been a problem had she not sadly been taken ill, the independent trustee would have had to agree as well under the Trust Deed

and there was no evidence that they had even been consulted about it. Therefore, this was clearly a negligent misrepresentation falling within s.2 of the Act.

104. However, Mr Clarke further submits Mr Cadman knew that his misrepresentations were false or alternatively was reckless as to whether they were true or false, as he knew full well that BCL did not actually own Portland House. In my judgement, I find Mr Cadman was cavalier or to put it another way, reckless in relation to that issue. He assumed that if he had agreed a deal, there would be no difficulty. He was not just wrong, he was recklessly wrong in reaching that genuine conclusion.

105. That establishes the tort of fraudulent misrepresentation, even if I would prefer to avoid the word 'fraudulent' being used to describe Mr Cadman. He was cavalier in this particular respect, if not in his other business dealings, for which for all I know, he might have been perfectly sensible. But here, he was cavalier in making implied representations and allowing the negotiations to be conducted on the footing that they were. If he had simply said to Mr Khan himself or through his lawyers, 'Well, of course, we will have to get the trustees on board' it is likely, as I have said, that the deal would still have been done and gone through. But as I say, Mr Khan and the Claimants do not, as said in *Raiffeisen* and *Zurich*, have to prove they would have acted differently if they had known the truth. The Claimants simply have to prove and I find have proved on balance of probabilities that but for the implied misrepresentations I have described, Mr Khan and his companies would not have entered the Settlement contract on the terms that they did.

106. Moreover, having found Mr Cadman was reckless in the misrepresentations, I am conscious in *Zurich* it was held that where a misrepresentation was material, as this one plainly was, that it is not part of even the tort of deceit that a claimant has to prove that he genuinely believed the misrepresentation. In fact, in this case, I am satisfied that Mr Khan did genuinely believe the misrepresentation in the sense that he believed BCL itself owned Portland House and did not understand the difference between BCL and SASS, as I have found Mr Cadman was cavalier about the difference between the company and the pension scheme. It therefore follows, in my judgment, that misrepresentation also succeeds. Therefore, even if I am wrong about BCL being liable for breach of an express term and/or an implied term, I would find BCL are liable for misrepresentation. However, all those liabilities are subject to one final issue which I am dealing with now – loss.

Have the Claimants proved causation of some loss ?

107. Mr Diggle spent some time on loss. I entirely understand why. His argument was that there could not be proof of loss. But his argument was within a narrow compass and it had to be within a narrow compass because this is a split trial. This is not the occasion, as Mr Diggle rightly said, for considerations of mitigation of loss, or the extent of loss. Instead, this is purely and simply the determination of whether the Claimants can prove some loss sufficient to complete the cause of action in breach of contract and misrepresentation. And I am satisfied that there was such loss for the following reasons.

108. Mr Diggle, in his skeleton argument, made really three points on this subject. The first is that the draft contract in August 2023 avoided the loss. For the reasons I have already given, it did not, as it was a contract in different terms than that contemplated by the Settlement agreement and in any event, as Mr Clarke said, could only cap the loss

after 18 months, as opposed to extinguish it. Whether, in fact, it did cap it through the mechanism of either causation or mitigation of loss is a matter for the remedies hearing, not a matter for me now, although I will turn to that hearing in a moment before I finish.

109. Mr Diggle's second point was that the Claimants have not provided any evidence to support the pleaded contention that they were at all times since the agreement ready, willing and able to perform the purchase of Portland House. But that is incorrect, since as Mr Diggle himself pointed out to Mr Khan in cross-examination on the inducement point which I have addressed, Mr Khan and his solicitors was working quite hard and his solicitors were working quite hard throughout 2022 and into 2023 to keep the Settlement deal on the rails, even after they found out that BCL did not own Portland House. The Claimants were therefore more than ready, willing and able to implement the agreement. They were ready, willing and able for a time to adjust the agreement to make it happen.

110. Finally, Mr Diggle said that given the Claimants' plans for Portland House, to which I will finally turn in a moment, it is unlikely that a failure to enter into the contract as soon as reasonably practicable has caused the claimant to suffer any loss. Well, I am satisfied on the balance of probabilities for the reasons that Mr Khan has given that loss was suffered. I accept that it was commercially important to him to conclude the agreement quickly, certainly within a few months, let alone 18 months later in August 2023. By then, there had been deterioration in the property and deterioration in the economic landscape. Therefore, as Mr Clarke puts it, shortly but correctly, KEL has lost an opportunity to own and use or develop and sell the property, I would add in 2022 as opposed to mid-2023. The value of that lost opportunity is a matter for the remedies trial.

111. Finally, speaking of the remedies trial, it is important to manage Mr Khan's expectations, although of course I make no further findings or conclusions yet. Mr Khan, in his statement, puts his loss on different bases. The first is there would have been a residential development of Portland House with annual rental income of £250,000. His second basis is that there would have been a self-storage facility, which would have generated an annual rental income of almost £500,000. His third alternative at the least that there would have been a warehouse, generating an annual income of about £150,000. Either way, he estimates losses to date are in the region of 500,000 to £800,000. All of that is hotly disputed by BCL, who suggests that even if the 2023 proposal did not avoid some loss to the Claimants (as I have found), refusal of it was a failure to mitigate loss.

112. I make no definitive conclusions in relation to those losses, which are a matter for a remedies hearing. But I say this and say it clearly and directly. There are real difficulties with some of those proposed losses, whether through the mechanism of a breach of contract or the question of misrepresentation, even on a deceit/reckless basis. So far as a breach of contract is concerned, it is trite that loss must not be too remote on the principles of *Hadley v Baxendale*. I would imagine that Mr Diggle has already – at least in his head - drafted his skeleton about the limbs of *Hadley v Baxendale* about some of those losses. Mr Khan will have an uphill struggle to establish that they were within the contemplation of the parties to the Settlement when there is no evidence before me and never has been it was ever discussed as his plan with BCL when making the Settlement.

113. Insofar as the question of misrepresentation is concerned, of course, the remoteness in the classic tortious sense is not required with fraudulent (reckless) misrepresentation. There only has to be direct causation of the loss. However, the cases, in particular the

leading case *Smith New Court v Citybank* [1996] 3 WLR 1051 (HL) show that direct causation is not boundless. And again, Mr Khan may have a difficulty in establishing the full extent of the losses which he claims, even on the question of his most limited scenario; and he still has the argument to meet in relation to mitigation of loss.

114. In conclusion, I appreciate that the last thing in the world that these parties may want to do is mediate yet again. However, perhaps 'third time lucky'. It is quite possible that in the context of me having made the determinations that I have and having said the things that I just have, it may well be possible for the parties to finally put this litigation behind them. I would actively encourage that process. I am not, following *Churchill,* going to direct it, but I am going to encourage it, but I will do no more than that.