Neutral Citation Number: [2022] EWHC 2088 (QB)

Case No: QA-2021-000236

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE CENTRAL
LONDON CIVIL JUSTICE CENTRE
ORDER OF HHJ LETHEM DATED 7 OCTOBER 2021

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/08/2022

Before :

MR JUSTICE FREEDMAN

- -

Between :

(1) PISTACHIOS IN THE PARK LIMITED
(2) AYSIN DJEMIL

Appellants/Defendants

- and –

(1) SHARN PANESAR LIMITED
(2) SHARN PANESAR

Respondents/Claimants

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- -

Mr David Sawtell (instructed by **Oracle Solicitors**) for the **Appellants/Defendants**
Ms Ebony Alleyne (instructed by **Owen White Solicitors**) for the **Respondents/Claimants**

Hearing date: 23 May 2022

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Approved Judgment

This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on Wednesday 3 August 2022

MR JUSTICE FREEDMAN:

I Introduction

1. This is an appeal from the Order of HHJ Lethem ("the Judge") of 7 October 2021, who found in favour of the Respondents in a claim of deceit and awarded damages inclusive of interest in the sum of £217,825.94. The Appellants do not seek to appeal the Judge's findings on liability, but on various points in respect of causation of loss only and damages.

2. Pistachios in the Park Limited, the First Appellant, operates community-based cafés in local parks. It is operated by the Second Appellant, Aysin Djemil. Together with Adrian Wickham, the Second Appellant decided to franchise the concept.

3. Sharn Panesar, the Second Respondent, incorporated a company Sharn Panesar Limited, the First Appellant, in order to take on a franchise of Frimley Lodge Park Café. The Claimants entered into a Franchise Agreement ('the Franchise Agreement') on 23 November 2011.

4. The Respondents brought their claim in deceit in respect of the Franchise Agreement, contending that they were induced into entering into that agreement by a business plan ("the Business Plan"), which it was accepted contained old financial projections for the likely profitability of a franchise café.

5. As well as defending on liability, the Appellants also argued that even if liability was found, the Respondents were not entitled to the full extent of the damages claimed. One reason for this was that by letter dated 20 November 2014, the Appellants terminated the Franchise Agreement for alleged repudiatory breach, which they contended was a valid termination. The appeal is in respect of three grounds on quantum only.

II The Judge's findings

6. It is not necessary to set out in any detail the basis of the finding in liability. In summary form only, the Judge made factual findings which led him to conclude that the Appellants were liable for deceit and the Claimants were entitled to rescission. Those findings are set out in the Judge's judgment. The references to numbers in square brackets are to the judgment. The findings are not challenged on appeal. The findings included the following:

    (1) The Appellants accepted that the figures in the Business Plan were not accurate and known not to be accurate.

    (2) At a meeting on 26 September 2011, Mr Panesar was shown financial information in real time on an electronic portal called PX Portal over a period of about 15 minutes (at [50]). It was presented in a cursory way that Mr Panesar could not comprehend and digest (at [63]).

(3) Early the next morning, at 6.58am on 27 September 2011, Mr Wickham sent to Mr Panesar an email. Attached to it was a copy of the Business Plan. It was accepted that the Business Plan contained the old financial projection for the likely profitability of a franchise café. It did not include the revised figures that had been produced in the summer of 2011, and which were incorporated in the revised prospectus (at [21]).

(4) The only meaningful information Mr Panesar was given about the franchise was in this Business Plan (at [63]).

(5) Mr Panesar gave evidence that he had read the Business Plan on a couple of occasions and relied on the figures. He accepted that he had not looked at the small print (at [82]).

(6) The Judge found that Mr Panesar was excited by the prospect of working for himself and was not a sophisticated business man (at [83]). His enthusiasm clouded his analytical ability: he wanted the franchise to work, and he wanted to be a part of it (at [85]).

(7) The Judge found that Mr Panesar *"looked at the café and fell in with the overall picture. He had the rosy and enthusiastic picture on 26 September 2011."* (at [84]).

(8) The Judge was satisfied that Mr Panesar had considered the figures in the Business Plan; it would have been remarkable had he not looked at them (at [89]).

(9) The figures were a significant factor in his deciding to enter the Franchise Agreement (at [90]). As a consequence, the tort of deceit was made out. The Trial Judge found that the reliance on figures was an important factor in Mr Panesar coming to the decision that he did (at [101]).

III Ground 1: error in finding of causation

7. This appeal is limited to four grounds, Ground 4 being parasitic on Grounds 1-3. By way of Ground 1, the Appellants assert that the Judge erred as a matter of law and/or was wrong in holding that Mr Panesar would not have entered into the Franchise Agreement if the Business Plan provided to him had contained accurate figures. In order to consider this, it is necessary to consider the following, namely:

(a) the Appellants' case on causation;

(b) the principles of law on causation;

(c) applying the above principles to the instant case.

(a) The Appellants' case on causation

8. The Appellants' case is that in claims of deceit a claimant needs to prove causation over and above inducement and reliance, and that the same principles of causation of loss apply to claims of deceit as to other tortious claims. The Appellants rely on *Cartwright's Misrepresentation, Mistake and Non-Disclosure (5th Ed.)* at paragraph 5-38 which provides:

> *"The normal principles apply in deceit, and so it must be shown that there is a sufficient continuing causal link between the misrepresentation and the loss which the representee claims to have suffered as a result of his reliance on it. This will be a question of fact; judges ask such questions as whether the representation was a substantial factor in producing the result, or whether in common sense terms there is a sufficient causal connection.*
>
> *The courts have drawn a distinction between the test for causation in relation to the claimant's reliance on the misrepresentation, and the test for causation in relation to the loss he suffers in consequence of that reliance. Even if it [sic] the evidence shows that the claimant would still have entered into the contract if the misrepresentation had not been made, it is possible to hold that he did in fact rely upon it as long as it was present to his mind and acting as one of the factors he took into account in making his decision to enter the contract. However, the fact that the claimant might have acted differently had he not been induced by the misrepresentation is relevant to question of whether his loss was caused by the misrepresentation."*

9. That paragraph of *Cartwright* cites *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555; [2003] 1 P & CR 12 at [89], where Jonathan Parker LJ held there was:

> *"the need, in the context of a claim for damages for misrepresentation, to distinguish between two separate questions: (1) whether the claimant was induced by the misrepresentation to act to his detriment; and (2) if so, what loss he suffered in consequence. As Downs v Chappell shows, the fact that the claimant might have acted differently had he not been induced by the misrepresentation is not relevant to question (1), but it is relevant to question (2)…"*

10. The Appellants also rely on Evans-Lombe J's decision in *Barings plc (in liq) v Coopers & Lybrand (a firm) (No 2)* [2002] EWHC 461 (Ch); [2002] 2 BCLC 410 for the proposition that the same principles of other claims in tort apply. At [135]-[136],

Evans-Lombe J, relying on the earlier decision of *Galoo ltd v Bright Grahame Murray* [1994] 1 WLR 1360, considered that the basic appeal to common sense when determining causation and the distinction between causation and loss applied equally in claims in deceit and in negligence.

11. Applying those authorities, the Appellants submit that a claimant in a claim of deceit must prove that but for the deceit, he would not have entered into the transaction and suffered the loss and damage claimed. They say that in this case Mr Panesar did not prove that he would not have entered into the Franchise Agreement without the deceit, and that he would have entered into the Franchise Agreement in any event had he known the true position. They point to several positive indicators about the business which the Judge identified in his judgment, including:

    (1) Mr Panesar's sister had entered into a franchise herself (at [43]);

    (2) Mr Panesar had looked at the Frimley Lodge Park café which seemed to be doing well (at [43]);

    (3) Mr Panesar was shown financial information in real time from the PX Portal (at [50]);

    (4) Mr Panesar was excited at the prospect of working for himself, having been trading as a chef (at [83]); and

    (5) he had a rosy and enthusiastic view of the café when he went to see it which had been painted by Mr Djemil (at [84]).

12. The Appellants rely on the fact that Mr Panesar himself said that he 'possibly' would still have gone ahead with the Franchise Agreement had he known the real figures (at [86] of the judgment). At paras. 85-86, the Judge said the following:

> *"85. Perhaps because of his background and his enthusiasm, he did not focus on the small print and failed to make the changes to the rent, the franchise fee, and the reference to Food Delicious. I have no doubt that his enthusiasm clouded his analytical ability; that he wanted this to work and he wanted to be part of it.*
>
> *86. In this respect, it is a mark of his honesty, as I have indicated, that he was shown the figures shown in the new prospectus and said that he would possibly still have gone ahead, even if he had known the new figures, and I have asked myself what I need to make of this, if those figures are accurate. This of course is relevant to two respects: firstly, in terms of reliance and secondly in terms of conversation."*

13. At para. 90, the Judge said the following:

> *"Stepping back and bearing in mind his desire for this to work, I am not satisfied that the figures contained in the business plan were the principal reason for him entering into the contract, but that of course is not the test; it must have been a factor; as I have indicated from the passage in Cartwright, where of course the learned author says it is sufficient if it is a cause. In that respect I am satisfied that the test in this respect is low, and I remind myself of the presumption; I am therefore satisfied that this was a significant factor. It fitted in with the broad pattern; had he seen accurate figures then that might have caused him to reflect, representing as it would something of a jarring note."*

14. At para. 100, the Judge said the following:

> *"I have already observed that the issue of causation was not simply relevant to the issue of deceit, but also reoccurs in relation to the losses in this respect. Of course, the second claimant told me that he would possibly have entered into the contract in any event, and if that is right then a break in the causation may occur. On the balance of probabilities, I am not satisfied that the claimant would have entered into the contract if he had known the true situation."*

15. On the basis of all of the above, the Appellants say that the Judge ought to have found that Mr Panesar did not prove that but for the deceit he would not have entered into the Franchise Agreement.

(b) The principles of law of causation

16. The case law in summary shows that:

(1) Causation can be established by showing that there is a sufficient causal connection in common sense terms and/or that the condition in question was a substantial factor in producing the result. The 'but for' test is sometimes applicable but not always so.

(2) It is not required that the factor was the sole inducement for the claimant to be able to rely on it: it is enough that it played a real and substantial part, albeit not a decisive part, in inducing the claimant to have entered into the transaction.

(3) It is not necessary in an action for deceit for the judge to consider what the parties would have agreed had the deceit not occurred.

(4) In a case of deceit, the court does not speculate as to how the claimant would have acted if they knew of the true situation.

(5) However, if the evidence demonstrates that the claimant would have entered into the transaction if it had known the true position, it will be difficult for the claimant to establish an inducement by the fraudulent misrepresentation.

17. As regards the proposition in paragraph 15(1), the leading authority is *Smith New Court Securities Ltd v Scrimgeour Vickers* [1997] AC 254. Lord Steyn stated at 284G to 285B as follows:

> *"The development of a single satisfactory theory of causation has taxed great academic minds... But, as yet, it seems to me that no satisfactory theory capable of solving the infinite variety of practical problems has been found. Our case law yields few secure footholds. But it is settled that at any rate in the law of obligations causation is to be categorised as an issue of fact. What has further been established is that the "but for" test, although it often yields the right answer, does not always do so. That has led judges to apply the pragmatic test whether the condition in question was a substantial factor in producing the result. On other occasions judges assert that the guiding criterion is whether in common sense terms there is a sufficient causal connection: see Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport [1942] A.C. 691, 706, per Lord Wright. There is no material difference between these two approaches."*

18. As regards the proposition in paragraph 15(3) above, Lord Steyn in the same judgment stated at 283G:

> *"In other words, it is not necessary in an action for deceit for the judge, after he had ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred."*

19. Returning to the proposition set out at paragraph 15(2) above, in *Dadourian Group International Inc v Simms* [2006] EWHC 2973 (Ch), Warren J at [544] stated:

> *"It is also the case that the representation does not have to be the sole inducement for the representee to be able to rely on it to establish causation, as one can see from the decision of Morritt [sic] LJ at para 55 of his judgment in Barton. In this context, help can be found in the analysis of Stephenson LJ in JEB Fasteners Ltd v Marks Bloom & Co [1983] 1 All ER 583 at p 589: it is enough if the representation plays a real and*

> *substantial part, albeit not a decisive part, in inducing the representee to act; causation is then established."*

20. The above and Warren J's other directions in law were summarised by the Court of Appeal in the same case of *Dadourian* [2009] EWCA Civ 169; [2009] 1 Lloyd's Rep 601 at [99]. The Court of Appeal found no error in these directions at [101]. Para. 99 read as follows:

> *"As to that, the judge directed himself in law, at J(1) 543 - 546, as follows: (1) it is a question of fact whether a representee has been induced to enter into a transaction by a material misrepresentation intended by the representor to be relied upon by the representee; (2) if the misrepresentation is of such a nature that it would be likely to play a part in the decision of a reasonable person to enter into a transaction it will be presumed that it did so unless the representor satisfies the court to the contrary (see Morritt LJ in Barton v County NatWest Limited [1999] Lloyd's Rep Banking 408 at 421, paragraph 58); (3) the misrepresentation does not have to be the sole inducement for the representee to be able to rely on it: it is enough if the misrepresentation plays a real and substantial part, albeit not a decisive part, in inducing the representee to act; (4) the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play a real and substantial part in the representee's decision to enter into the transaction; the representor does not have to go so far as to show that the misrepresentation played no part at all; and (5) the issue is to be decided by the court on a balance of probabilities on the whole of the evidence before it."*

21. As regards the proposition in paragraph 15(4) above, a starting point is the judgment of Hobhouse LJ in *Downs v Chappell* [1997] 1 WLR 426, where at 433D-F he held as follows:

> *"The plaintiffs have proved what they need to prove by way of the commission of the tort of deceit and causation. They have proved that they were induced to enter into the contract with Mr. Chappell by his fraudulent representations. The judge was wrong to ask how they would have acted if they had been told the truth. They were never told the truth. They were told lies in order to induce them to enter into the contract. The lies were material and successful; they induced the plaintiffs to act to their detriment and contract with Mr. Chappell. The judge should have concluded that the plaintiffs had proved their case on causation and that the only remaining question was what loss the plaintiffs had suffered as a result of entering into the contract with Mr. Chappell to buy his business and shop."*

22. The above has been qualified to preclude an argument by a fraudster that the fraud had not induced the victim because he would have done the same thing had the fraud not occurred. However, it may not preclude an argument against inducement if a claimant's evidence is that it would have acted as it did even if it had known the true position, leading to the proposition in paragraph 11(5) above. Having cited *Downs v Chappell,* Flaux J (as he then was) said the following in *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm); [2009] 2 All ER (Comm) 589 at [105]:

> *"105. ...Thus, as Mr Kitchener puts it, the context in which Hobhouse LJ said this was to protect the victim of fraud from the argument by the fraudster that the fraud had not induced the victim, because he would have done the same thing even without the fraud. Hobhouse LJ was in effect saying the fraudster cannot be heard to say, even if I had told you the truth, you would still have acted as you did. What he was not saying was that, if the claimant demonstrates by cogent evidence (as in the present case) that it would not have acted as it did if it had known the true position, that evidence cannot be relied upon by the claimant as demonstrating inducement by the fraudulent misrepresentation(s)."*

That passage was not questioned on appeal ([2010] EWCA Civ 48; [2011] QB 477).

(c) Applying the above principles to the instant case

23. It was accepted by the Appellants that the deceit had taken place, and no facts were challenged in relation to that. At [78] the Judge correctly identified that the deceit need not be the main cause of the loss, citing *Cartwright* at paragraph 5.23, which states:

> *"…A causal link is therefore required between the representor's statement and the representee's decision to act in such a way as to cause the loss he claims. But the representation need not be shown to be the only cause, or the main cause of the representee's decision: it is sufficient if it is a cause."*

24. As noted above, the Judge applied that at [90], finding that a causal link had been established. The representation was not the principal reason, but the Judge was satisfied that it was a significant factor. He also referred in that paragraph to the application of the presumption. Either it was shown that the Respondents would not have entered into the contract, or the presumption was not displaced to show that the Respondents would not have entered into the contract if the true situation was known to the Respondents.

25. Going back to whether there was a significant cause, following Lord Steyn's dictum in *Smith New Court* (above) there are two ways of approaching causation. The Judge found that the deceit was a significant factor in the Respondents deciding to enter into the Franchise Agreement. He then applied the law above set out such that all elements of the claim were made out.

26. Once the Judge found the above, the question was whether there was material from which the Judge could conclude that Mr Panesar would have entered into the Franchise Agreement had he known the true situation. His conclusion was in the language above cited at the end of [100] when he said, "*On the balance of probabilities, I am not satisfied that the claimant would have entered into the contract if he had known the true situation".*

27. That was a conclusion he was entitled to reach; there was no cogent evidence that Mr Panesar would have proceeded had he known the true situation. Mr Panesar's evidence that he 'possibly' would have entered into the Franchise Agreement in any event was speculative at best. The Judge had evidently weighed up the other factors that might have led him to enter into the Franchise Agreement, but ultimately concluded (at [90]) that the financial information was significant. In those circumstances, it had not been proven on the balance of probabilities from the evidence of Mr Panesar (or from other evidence) that if the figures had been shown accurately that Mr Panesar would have proceeded in any event. The Judge was entitled to conclude as such. He applied the above law correctly.

28. The Appellants cannot attack that finding for the following reasons. First, the Judge made the finding that the deceit in the form of the Business Plan was a significant factor relevant to inducement and reliance. Since the Appellants do not challenge that finding or the factual findings which led to that conclusion. The Appellants in the same breath cannot accept that finding for the purposes of liability but challenge it for the purposes of causation of loss. This is not a case in which the elements of reliance, inducement and causation give rise to separate issues; the losses claimed inevitably flow from the Claimants' decision to enter into the Franchise Agreement. Once established that the misleading financial information was a significant factor in the Claimants having entered into the Franchise Agreement, it followed that it was a significant factor in having caused the losses flowing therefrom.

29. Second, the Appellants in Ground 1 are seeking expressly or impliedly to impugn the findings of fact of the Judge. The Judge was entitled to conclude as he did. There is nothing about the findings of fact of the Judge which indicates that he was wrong. It is not for this court to carry out a fresh assessment of the evidence to see whether a different decision might have been reached. The Judge was better-equipped to make those findings, having heard the evidence at trial and weighed it accordingly (as he did for example at [43]-[44]). It is for the Appellants to show that the Judge's decision was wrong and a conclusion which on the evidence he was not entitled to reach: *Langsam v Beachcroft LLP & Ors* [2012] EWCA Civ 1230, *per* Arden LJ at [72]. The Appellants have failed to satisfy that test.

30. Third, the Judge stated and applied the law correctly. This is set out above in the statement of what the law was, in the references to the law in the judgment as cited above and in the application of the law as set out above in the section headed "causation in the instant case."

31. For these reasons, the first ground of appeal fails. The Judge was entitled to reach the decision which he did, and the attempt to impeach his findings does not indicate that he was wrong in finding as he did.

IV Ground 2: error in reference to inaccurate figures

32. Ground 2 is that the Judge is alleged to have erred in basing his decision on an unpleaded allegation. The allegation is that not only were the Business Plan figures not updated, but the original figures themselves may not have been accurate.

33. The starting point of the Judge's findings was at [38] where he said the following:

> *"Both Mr Djemil and Mr Wickham told me that they realised that the figures that had been used by Business Options had been based on the Manor House Gardens operation, which was an older and established operation and, as I have indicated, was the core café started by Mr Djemil. Therefore, on their own evidence, the defendants accepted that they altered the figures in the prospectus and that they had already revised those figures by the time that the second claimant's sister opened her operation on 10 September 2011. I have to say in passing, and it is a matter I will return to later, that Ms Alleyne has cast considerable doubt on the updated figures contained in the second prospectus, and suggests that even they are not accurate. I observe at this stage that Mr Sawtell is right to point out that this is not part of Ms Alleyne's pleaded case, but of course her pleaded case is that those figures were never made available to the claimants, and to that extent perhaps that is a sterile consideration."*

34. At [42], the Judge found that Mr Panesar did not receive the prospectus with its updated figures. It therefore follows that the Judge's conclusion was based not on the prospectus, but on the Business Plan shown to Mr Panesar on 27 September 2011.

35. Towards the end of the judgment, the Judge said the following:

> *"101. I have spent some time already in this judgment considering his motivation, and important in that respect is what I have described as the consistency of the picture: the information that came on 26 September; the business plan on 27 September; the information from his sister, and his viewing of the café. ...I have already in this judgment found that the reliance on the figures was an important factor in the claimant coming to the decision that he did.*
>
> *102. In any event, on balance I am not satisfied that the updated figures that were shown to Mr Panesar were in*

> *fact accurate. I accept, of course, that they are projections and that therefore accuracy has to be seen through that prism. However, as Ms Alleyne pointed out during the course of cross-examination, the defendants had added a 15% figure to turnover for the first year, for three of the franchises, without any real justification, in my judgment; that there had been significant cuts in expenditure, again without proper explanation from Mr Wickham. Indeed, in that respect he sought to justify them, but came down to pure estimation.*
>
> *103. In my judgment, taking into account the fact that this was a projection, this represented an unduly rosy view of the franchise operation, and I am not satisfied that the amended figures were accurate at all."*

36. It is alleged by the Appellants that the Judge erred in basing his decision on the allegation that the updated figures in their 2011 financial projection were inaccurate: this had not been pleaded by the Respondents. They emphasise the importance of pleadings in identifying the issues and the case which the parties have to meet when adducing their evidence: see *UK Learning Academy Ltd v Secretary of State for Education* [2020] EWCA Civ 370 at [47] and *Dhillon v Barclays Bank plc* [2020] EWCA Civ 619; [2021] 1 All ER 421 at [19]. This is especially important in fraud cases where there are clear requirements as to what is required to be pleaded: see *Kasem v University College London Hospitals NHS Foundation Trust* [2021] EWHC 136 (QB) at [33] - [43] per Saini J. They submit that the findings in respect of the prospectus are unclear and ultimately unfair because it was based on aspects of the evidence which had not been foreshadowed in the pleadings.

37. I am satisfied that the remarks of the Judge about the prospectus are not the basis on which the findings were made in the case. The reasons for this are as follows:

    (1) it is clear from the judgment as a whole that the judgment was by reference to the Business Plan shown to Mr Panesar on 27 September 2011: see especially [38];

    (2) the case could not have been decided by reference to the prospectus because of the finding that Mr Panesar had not been shown the prospectus: see especially [42];

    (3) the opening words to [102-103] "in any event" shows that the independent basis of the decision was by reference to the Business Plan mentioned again in [101];

    (4) the language in [102-103] was to express reservations about the accuracy of the figures in the prospectus and the absence of an explanation for the addition of 15% to the turnover of actual cafes and the reductions in the expenditure/costs. This then led the Judge to say that he was not satisfied that these figures were accurate.

38. It therefore follows that the case was not decided by reference to the figures in the prospectus. If, contrary to the above, the Judge made a finding of deceit by reference to the prospectus, I am satisfied that the case was in any event decided on the basis of the Business Plan independently of any finding in respect of the prospectus. The finding in respect of the Business Plan cannot be challenged and is unaffected by anything said about the prospectus. It follows that Ground 2 is rejected.

V Ground 3: error in rejecting valid termination argument

39. Ground 3 is that the Judge was wrong to consider that the Franchise Agreement had not been validly terminated. The relevant section of the judgment is [104-108], where the Judge held:

> *"104 I rely upon the schedule that was emailed to me this morning by those who instruct Ms Alleyne, and have been seen by Mr Sawtell; very helpfully, that document includes cross-references to the relevant pages in the bundle.*
>
> *105. There has been very little challenge in cross-examination to the figures that appear in this bundle. It was the case that Mr Sawtell cross-examined on whether or not credit had been given for the remuneration that had actually been received. It seems that that is the case from the third column in the schedule, relating to loss of earnings, and I accept the second claimant's evidence which was largely unchallenged.*
>
> *106. I paused to consider whether it is appropriate to make an award up to 2016 which, as Ms Alleyne points out to me, is to the end of the franchise. This engages the fact that the franchise was terminated in November 2014, and it is suggested therefore that the quantification should end at that point. I have to say that this was an issue that was not explored in any great detail during the course of evidence.*
>
> *107. It was suggested that there were emails from Surrey Heath Council concerning the pitch and putt money, and that money may have been kept. That was put to Mr Panesar who gave explanations about arguments over VAT, and falling behind with the payments only because he was keeping that money until the VAT was sorted out; once it was sorted out, it was paid immediately.*
>
> *108. I have not been asked to decide whether the termination of the contract was valid or not; there is insufficient evidence before me to suggest that it was a valid termination, and again I refer to the credibility issues to which I have already alluded. In the circumstances,*

> *therefore, I am satisfied that the 2016 figure is the correct figure, and I therefore award as per the schedule."*

40. Especially para. 108 should be seen in the context of an earlier part of the judgment and in particular the second part of para. 17. Para. 17 as a whole reads as follows:

> *"Turning to remedy, the schedule of issues raises the point as to whether the claimants affirmed the franchise agreement so as to bar rescission; when they discovered the falsity of the situation, whether they therefore have a right to rescind; what loss they have sustained, and whether the claimant breached the agreement by failing to devote his entire time, hand over pitch and putt money, accept repudiatory breach, and whether they are barred from bringing losses post-24 November 2014."* (The syntax is not as clear as it might be, but it appears to be a reference to whether the breaches, identified as repudiatory, were accepted, and whether the Respondents were barred from bringing losses after the termination of the Franchise Agreement.)

41. The Appellants' case can be summarised as follows:

(1) its pleaded case was that the Franchise Agreement had been validly terminated in November 2014 for repudiatory breach;

(2) there was no positive case pleaded in response: indeed there was no Reply pleaded;

(3) there was no case put to the Appellants' witnesses by way of cross-examination;

(4) there was no Respondents' notice;

(5) the Judge was therefore wrong to conclude that to consider that the Franchise Agreement had not been validly terminated.

42. In this characterisation is a difference which goes to the heart of Ground 3. The Judge did not make a positive finding that the Franchise Agreement had not been validly terminated. His finding was that there was insufficient evidence to suggest that it was a valid termination. That was because it was for the Appellants to prove a valid termination and not for the Respondents to show that the termination was not valid.

43. This arose out of the formulation of the matters which have given rise to Ground 3. There was no pleaded cause of action of a repudiatory breach giving rise to a claim for damages. Indeed, there was no counterclaim. The matter was pleaded by way of

defence. The submission of the Appellants in their closing speaking note at trial was as follows:

> "**Repudiatory breach**
>
> *41. There is no pleaded case that Ds were not entitled to terminate the franchise agreement in November 2014. Taking into account Clause 20 of the franchise agreement together with the evidence of Cs' conduct, the court is entitled to consider that, neutrally, there is no material showing that Ds were not entitled to terminate."*

44. The Appellants submitted that whereas damages had been sought by the Respondents up to 2016, there ought to be a cut-off point as at November 2014 when the Franchise Agreement had been terminated.

45. Here lies the problem for the Appellants. It does not suffice for the Appellants to rest their case on the absence of a positive case on the part of the Respondents that they did not repudiate the Franchise Agreement. By the absence of a Reply, there was an implied joinder of issue. In the context of defending the claim for damages for deceit, the onus was on the Appellants to prove on the balance of probabilities that (1) the Franchise Agreement was validly terminated in November 2014, and (2) that termination was a break in the chain of causation such that damages ought to be calculated only up to November 2014. Yet the submission of the Appellants as cited above from the closing speaking note of the Appellants was that this point ought to be decided in their favour absent any material showing that the Appellants were not entitled to terminate.

46. In my judgment, that was to express the onus of proof in the wrong way. Although the matter was being considered only in the context of a defence, the onus of proof in respect of the allegation of a break of causation was on the Appellants to show the two numbered points in paragraph 45 above. It was in this context that the Judge said that *"there is insufficient evidence before me to suggest that it was a valid termination"*. The Appellants had failed to provide sufficient evidence to suggest that it was a valid termination and therefore could not succeed in the case that there was a novus actus interveniens. It followed that the attempt to stop the damages as at November 2014 failed.

47. The Appellants' closing speaking note that there was no material to show that the Appellants were not entitled to terminate did not suffice. The incidence of the onus was that it was for the Appellants to provide material to show that it was entitled to terminate. The Judge's finding was that this had not been done. The Judge was correct in para. 108 of this judgment in finding that there was insufficient evidence to suggest that it was a valid termination. It did not matter that at the start of para. 108 the Judge apparently said that he had not been asked to determine whether the termination was valid given that he went on to determine that the validity of the termination had not been proven. Although it matters not, it is possible that the opening words were a shorthand for the fact that the Appellants had not pleaded a cause of action/counterclaim about a wrongful termination.

48. In my judgment, the Judge was entitled to come to the conclusion which he did, namely that there was insufficient evidence to suggest a valid termination. This conclusion is evident from an analysis of the evidence, namely:

    (1) Mr Panesar was cross-examined and found to be an honest witness.

    (2) Historic allegations of matters from 2011, 2012 and 2013 (e.g. arrears), the most recent of which was about 15 months prior to the alleged repudiation in November 2014 could not sensibly be relied upon to found the termination. Mr Panesar had been cross-examined on these matters very briefly, and he had in any event provided evidence about the same in his second witness statement.

    (3) The allegations more proximate in time to termination included theft and misappropriation of funds: this required proof. There was no document from the local authority to the Appellants provided on disclosure. Mr Panesar was not provided at the time with any summary prior to a meeting of 14 November 2014 for him to consider, nor did the letters of 16 November 2014 and 20 November 2014 contain any particularisation of the allegations.

    (4) The letter of 20 November 2014 stated that the Council's internal investigator alleging *"misappropriation of funds and theft of the Council's money by you or your employees."* It was said that the Council was *"able to produce evidence from themselves and their own 'mystery shoppers'"*. Despite this:

        (a) there were no details about the finding of the mystery shopping exercise nor were there documents to prove the same;

        (b) there were no witnesses from Surrey Heath Council to give evidence of the alleged mystery shopper or of the internal investigation;

        (c) the Appellants did not conduct any investigation and did not lead any evidence about the same.

    (5) The Judge was also entitled to factor in to his judgment the credibility issues at [108]. He considered that aspects of the Appellants' case and evidence were simply not credible (at [29], [42], [57] and [75]). By contrast, the Judge considered Mr Panesar to be an honest and credible witness (at [22], [42] and [86]).

49. In the oral argument, Ground 3 was given far more prominence than in the Grounds of Appeal and in the Skeleton Argument in support of the appeal. The Court was taken orally through documents which received little emphasis in the Appellants' skeleton argument in support of the appeal. This apparent change of approach took the Court by surprise. The Court wished to be appraised more fully of the underlying material. This was provided by the Appellants and the Respondents respectively in documents dated 24 May 2022 and 26 May 2022 containing supporting references so that the

Court could better understand the argument. With the Court's permission, supplementary skeletons were lodged on Ground 3 dated 6 June 2022. The Appellants' skeleton was longer (16 pages) than its first skeleton for the appeal (14 pages of which little more than a page was by reference to Ground 3). I also received a document from the Respondents on 6 June 2022, which although less long, was still long relative to the material provided in respect of Ground 3 in its first appeal skeleton.

50. Having considered this material, I am satisfied that the appeal on Ground 3 must be rejected. First, the onus was on the Appellants to prove the validity of the termination. It is apparent from the trial below that the Appellants approached the matter on the basis that it was for the Respondents to prove that they were not in repudiatory breach, and in the words of the final speaking note there was *"no material showing that [the Appellants] were not entitled to terminate."* Thus, applying the onus correctly, the Judge was entitled to examine whether there was sufficient evidence to suggest that it was a valid termination.

51. Second, the Judge was entitled to conclude that there was insufficient evidence to suggest a valid termination. This was not proven by reference to the alleged historic breaches. As regards the Surrey Heath Council material, there was a dearth of evidence to prove this: no documents from Surrey Heath Council, no documents of the mystery shopper, no investigation by the Appellants and no evidence called from the Surrey Heath Council or from the mystery shopper. There were some very limited minutes of meetings dated 6 November 2014 and 14 November 2014, the latter of which mentioned the mystery shopper exercise but provided no information about it. There was nothing provided to Mr Panesar before the meeting of 14 November 2014 with the Surrey Heath Council and the termination letter of 20 November 2014 being written in very general terms. In short, there was a complete contrast between the gravity of the allegation of misappropriation/theft and the absence of particularity in respect of the same.

52. Third, there are no procedural excuses for the above. It was not the case that the termination of the Franchise Agreement had been accepted as valid or that the Judge found that the termination was invalid. In pre-action correspondence, the Appellants threatened that they would make a counterclaim by reference to the termination, but they did not do so. The Respondents did not accept that the termination had been valid. When proceedings materialised, although the termination was mentioned in the Defence, there was no counterclaim. Absent a counterclaim, there was no reply. There was therefore an implied joinder of issue in the absence of a reply.

53. Against this background, it was for the Appellants to show that the termination was valid, and the Judge was entitled to find that the Appellants had failed to discharge this onus. As is apparent from the limited references to the evidence of Mr Djemil and Mr Wickham in the Appellants' document of 24 May 2022, there was almost no evidence from them to support a case about a valid termination. There was no obligation on the part of the Respondents to cross-examine witnesses who did not provide evidence to the effect that the termination was valid: otherwise, this would be an obligation of the Respondents to assist the Appellants in proving a part of their case. Mr Panesar had made the second statement and was cross-examined briefly on the same. There was no admission on the part of the Respondents at trial that the termination was valid from which they were seeking to resile on appeal. There was

no need for a Respondents' notice because the Respondents sought to uphold the finding that there was insufficient evidence to suggest that there was a valid termination.

54. In the circumstances, the Appellants' suggestion that the Respondents have been running a case which they did not run below is rejected. If there is a procedural point, it is the degree of change of emphasis on the part of the Appellants in respect of Ground 3 from the way presented at trial and in writing to the way in which it has been presented before the Court. In the event, the Court has tested the point by seeing the post-hearing notes about documentary references and supplementary skeleton arguments. Having considered these documents, I am satisfied that the Judge did not err in the conclusion which he reached. His reasoning in respect of the point which is now Ground 3 is short, but the Appellants have confirmed in writing that this is not a case of a failure of a judge to set out reasons as per *English v Emery Reimbold and Strick Ltd* [2002] 1 WLR 2409. There has been no challenge to the decision on liability. Grounds 1 and 2 have been rejected as above. As regards Ground 3, the Judge made the essential point, reflecting the much more compressed way in which the point which has given rise to Ground 3 was expressed before him (in distinction to the way in which it has been presented on appeal). Even with the considerable expansion on the point in the appeal, and particularly at the hearing of the appeal, the conclusion remains the same. The Judge was not wrong, and Ground 3 is rejected together with the other grounds of appeal.

55. In the event that there had been sufficient evidence led by the Appellants to indicate that the termination was valid, I should have had serious reservations as to whether the chain of causation was broken between the deceit and the damage. The only challenge was not about the calculation of damages up to 2016, but on the basis of novus actus. The Appellants would have to show that the alleged breaches of contract obliterated the causative potency of the losses caused by the deceit. It would not be enough to prove contributory negligence: that is not available for deceit. Nor would it be enough to prove that the alleged breaches of contract caused damage: there was no claim for damages. It is not obvious that any lawful termination of the Franchise Agreement in respect of a party who has been the victim of deceit in entering into the same would bring to an end the ongoing damages caused by the original deceit. It might depend on the precise nature of the basis for termination, but that was barely explored at trial.

VI Conclusion

56. For all these reasons, I conclude that each of the three Grounds of Appeal are rejected. It is accepted that with the rejection of the first three Grounds, Ground 4, which is parasitic on the other grounds, must also fail. It follows that the appeal is dismissed.