Neutral Citation Number: [2016] EWHC 2483 (Ch)

Case No: HC-2014-002059

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 12/10/2016

Before :

MR JUSTICE MANN

- -

Between :

Mortgage Agency Services Number One Limited (trading as Britannia Commercial Lending)	**Claimant**
- and -	
Cripps Harries LLP	**Defendant**

- -
- -

Ben Hubble QC and Hugh Evans (instructed by **Burges Salmon LLP**) for the **Claimant**
Jonathan Seitler QC and Jonathan Chew (instructed by **Triton Global Ltd**) for the **Defendant**

Hearing dates: 27th-30th June, 1st July, 5th-7th July, 11th July, and 15th July 2016

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Judgment Approved

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Mr Justice Mann :

Part I - General matters

Introduction

1. This is an action in which a lender (the claimant, "Masnol") claims damages for fraud, conspiracy and (originally) inducing breach of contract against a borrower's solicitors, the defendants ("CHH"). It is said that two employees of the defendant firm deliberately misled the claimant in a manner which led to its lending to a Mr Spencer McGuinness, a property owner and developer. There has been a serious

shortfall in recovery in respect of the loan and the lender seeks to recover its losses accordingly.

2. In outline the facts are as follows. In what follows I shall describe the claimant as Masnol even though at the time it traded under the name Britannia Commercial Lending.

3. By 2007 Mr McGuinness had acquired 31 flats (basically the upper part of the building) in what has been described as phase 1 of a development at Mizzen Mast House in Docklands. The acquisition had been financed by means of a loan from West Bromwich Building Society ("West Bromwich") secured on those flats. He was seeking to acquire the rest of the flats (phase 2) and had exchanged contracts. There were disputes about the quality of the building work which Mr McGuinness used, rightly or wrongly, as a reason for delaying completion. Towards the end of that process, in 2007 Masnol (a lending arm of the Britannia Building Society) was invited to lend to Mr McGuinness to refinance the West Bromwich funding of Phase 1. He explained that he wished to do that in order to achieve the release of a £500,000 or £600,000 deposit which was held as security for payments. Masnol was approached through Savills as brokers.

4. By this time Mr McGuinness was said to have been in arrears on his West Bromwich loan and LPA receivers had been appointed. That appointment and those arrears were not disclosed to Masnol. Nor was the dispute about the quality of building works. Masnol agreed to lend £11.4m for the refinancing. The defendants (CHH) were instructed to act for Mr McGuinness; Heatons were instructed to act for Masnol. Miss Helen Francis (now Mrs Helen Hunnisett) was the principal CHH solicitor involved at first; then from 27th April 2007 Mrs Glavin (an experienced legal executive) took over from then until completion. Completion took place on 10th May, when Masnol lent its money and the West Bromwich charge was discharged, leaving (unknown to Masnol) over £350,000 owing as an unsecured debt. It was not very long before Mr McGuinness fell into arrears on the Masnol loan and in due course receivers were appointed. A sale generated a shortfall. Part of the shortfall has been recovered from surveyors said to have been negligent, leaving a very substantial unrecovered balance which Masnol now seeks to recover from CHH. It does so on the footing that several misrepresentations were made by CHH in course of the conveyancing, some by Miss Francis and some by Mrs Glavin, which were made knowing of their falsity, and that had they not been made Masnol would have withdrawn. The same misrepresentations lie at the heart of an alternative conspiracy claim. Until final submissions there was a further claim for procuring a breach of contract, arising out of warranties given by Mr McGuinness in the loan documentation. However, that claim was not pursued by Masnol on the footing (it was said) that it added nothing – if it succeeded on the misrepresentations and conspiracy it did not need the procurement claim, and if it failed on those it was unlikely (on the facts) to succeed on the latter claim.

5. The misrepresentations (which will be amplified below) can be summarised and distilled for present purposes as follows:

(1) Describing outstanding works as snagging when they were more than that; and misdescribing when a meeting about them took place. This is said to have concealed the significant fact that there were serious defects or items of disrepair.
(2) Giving a false answer in preliminary inquiries as to the existence of notices or correspondence which wrongly failed to disclose the existence of the West Bromwich receivership.
(3) Falsely stating that the redemption figure for the West Bromwich loan was £11.1m when the redemption figure was in fact a figure which included the substantial unsecured borrowings; and making a false statement about the application of the balance of funds after the discharge of the West Bromwich charge.
(4) Falsely suggesting that a schedule or rentals of the Phase 1 properties was correct and falsely stating that CHH had no knowledge of letting arrangements.

6. This is not a case in which there is any material dispute as to the words or conduct said to convey the representation. There is a dispute in some cases as to what the words used should be taken to mean, and in some cases a dispute as to falsity. In all cases there is a dispute as to knowledge of falsity or recklessness as to truth on the part of the makers of the alleged representations.

7. Nor was there any dispute as to the requirements for liability in fraud. It was agreed that what is required is a misrepresentation of fact by the defendant, made knowing it is false or reckless as to its truth, that the defendant should intend the claimant to rely on it and that the claimant does rely on it and suffers loss (*EC03 Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413). There was, however, a dispute as to how inducement should be approached.

8. Damages were in dispute until part way through the hearing before me, when they were agreed subject to liability. The defendants agreed the damages at the figure of £5,254,123.99.

9. Because of the number of alleged misrepresentations, and because they are spread over a significant period, it will be necessary to set out a very large amount of the detail of the dealings between the various parties.

10. Mr Ben Hubble QC led for the claimant; Mr Jonathan Seitler QC led for the defendant.

Witnesses

11. I received evidence from the following witnesses and make the following general findings about them and their evidence. The events in this case took place over 9 years ago, and not surprisingly by and large they all had a little direct recollection of

actual facts. Their evidence relied heavily on reconstruction, and on being reminded by the documented events.

Miss Tracey Birch

12. Miss Tracey Birch was a business development manager for Masnol, a post she occupied for many years. It was her job to get the business in and she was the person who was first approached by Mr McGuinness (via Savills) for the refinancing lending. She developed Mr McGuinness's proposal and prepared the internal proposal for lending authorisation for Masnol's credit committee, a proposal which was ultimately approved. In the course of that she is said to have acted on some of the misrepresentations.

13. She was a clear witness and was prepared, with hindsight, to acknowledge shortcomings in the process. For various reasons the lending in this case was not good lending and she was defensive in some of her responses. Her demeanour in the witness box was very defensive indeed. Insofar as it is necessary to consider inducement and reliance, the extent to which she was prepared to pursue the lending despite a number of contra-indications means that one has to examine more critically than one would expect her protestations that had she known what she says was concealed she would not have put the lending forward or would not have pursued it. She demonstrated a surprising willingness to downplay those contra-indications.

Miss Gisella Alberici

14. Miss Alberici was the solicitor at Heatons who had conduct of the lender's side of the transaction in legal terms. She dealt with the client and with the other side. As a witness she was clear and reliable, and did not seek to avoid answers in cross-examination which did not help her client's case. It was as a result of some her frank answers that some allegations of misrepresentation were abandoned in final submissions.

Mr Stephen Goldstraw

15. Mr Goldstraw at the relevant time was titled the managing director of Masnol's commercial lending division, though he was not actually a director. His main role in relation to the events of this case was that he was the most senior person on the credit committee which had to consider Mr McGuinness's loan application. He was able to

give authoritative evidence as to the impact of certain factors on the deliberations and decisions of the credit committee. He was open about things that had apparently gone wrong, and not defensive. He presented as a reliable witness.

Mrs Helen Shaw

16. Mrs Shaw was at the time of the events of this case a Portfolio manager in the Residential Investment Team of Masnol. Her job involved supervising relationship managers which meant that she was the line manager of Ms Derrett, who completed most of the pre-completion administration of the subject loan. Ms Derrett is no longer employed by Masnol and has apparently declined to give evidence, and Mrs Shaw gave evidence in order to provide such assistance as she could by way of describing relevant actions and the apparent reason for taking them. She had little recollection of her own of relevant events, and indeed probably never had much personal knowledge of them anyway. She could do little more than comment on documents, most of which were not seen by her at the time. She gave her evidence in a straightforward way.

Miss Helen Francis (now Mrs Helen Hunnisett)

17. Miss Francis is one of the two key players in this litigation on the CHH side. She is one of the two people said to have made fraudulent representations and to have conspired with her client to make them. She was very newly qualified at the time. The attack on her credibility came in large part by a challenge to her acts not only in relation to the misrepresentations alleged but also by reference to other acts which are said to fall into the same category, that is to say allegedly illegitimate acts which she did in order to buy her client time or otherwise assist him in the process of finalising the loan. I will consider all that in a separate section of this judgment devoted to the point and to what the evidence says about her credibility. So far as her demeanour in the witness box is concerned she presented herself moderately and carefully. She gave considered answers which demonstrated an awareness of the need for precision, but not in a way which demonstrated pre-consideration of difficult questions which she saw coming. As a witness she was convincing in her answers and explanations, despite sustained pressure from Mr Hubble as cross-examiner. At the time of giving evidence she was not in the most robust health, having (I was told) low blood pressure, and on two occasions we had to break off to allow her to recover. However, despite that she seemed determined to carry on and not use that as an excuse for not doing so. She presented as a thorough and conscientious witness. She was accused by Mr Hubble of being evasive. I do not agree. She did not always answer the question, but not in a manner which I considered to be evasive. Bearing in mind what I say below in relation to specific attacks on her credibility, it is sufficient at this point to say that I found her to be a conscientious solicitor who, at the time of this

transaction, was inexperienced and hard-pressed at work. She came over as honest, and that is what I ultimately find her to have been.

Mrs Helen Glavin

18. Mrs Helen Glavin was a legal executive with long conveyancing experience, working in CHH's residential investment department ("RID"), which was the department that handled the relevant transaction for Mr McGuinness. She had a short involvement during the conveyancing procedures in relation to phase 2 of the purchases at Mizzen Mast House by Mr McGuinness and then acted in the closing phases of the Masnol re-mortgage transaction. She is the other person said to have committed wrongs sued on in this action. She is now in her late 60s, having retired very shortly after her involvement in those events. She had little actual recollection of the events in question in this case and, like everyone else, had to rely on documents to reconstruct events. She was not always a certain witness, and sometimes did not directly address the questions that were put to her. She was obviously intensely uncomfortable in the witness box and hated having to re-live the events of this case. There was a reluctance to accept as likely events matters which seemed to be clearly recorded in uncontentious documents. However, these aspects of her evidence were not, in my view, badges of a guilty conscience. They were badges of excessive caution in the face of a fraud allegation (and process) that she plainly found very uncomfortable. She was clear and convincing in her denials of dishonesty and wrongful behaviour, and as a witness she was very credible. It is, of course, necessary to test that assessment of apparent credibility against the established facts at the time, but as a live witness there was nothing which indicated that she was anything other than credible and honest.

Mr Michael Vos

19. Mr Vos was the partner in charge of the RID at the time of the events in question. He had little involvement in any of the relevant events, and no recollection which was useful. His cross-examination ground to a halt when it transpired that there was little in his evidence that Mr Seitler needed to (or indeed could) rely on and when, as a result, Mr Hubble ceased his cross-examination of him. I need say no more about him than that.

Mr Peter Garry

20. Mr Garry was, at the time, a partner in CHH in the commercial dispute resolution team. His principal function in the present case was to deal with a challenge which Mr McGuinness sought to make to the appointment of the receivers by West Bromwich, and with negotiating the redemption terms. He also had a limited involvement in considering an application by Mr McGuinness to restrain the vendor from rescinding the contract to purchase phase 2. His evidence was, again, mostly

reconstruction. There was no material challenge to his credibility, and I find him to have been a clear and reliable witness.

Other witnesses

21. The claimant served other witness statements which went to damages. The witnesses were not called (and the defendant did not wish to cross-examine two of them anyway) and since damages were agreed, subject to liability, I do not need to deal with them.

The facts and the structure of this judgment

22. This case is a little unusual in that there are a number of alleged misrepresentations, made by two people and spread across a period of weeks. It will assist the narrative if I set out the general factual background in a little more detail than hitherto, identifying the general course of the lending transaction and other aspects of the transactions relevant to the case, the events of representation and briefly indicating their alleged falsity, and then return to each of the representations to consider them in more detail, because that will enable their significance, and the key facts surrounding them, to be more clearly understood than one continuous narrative encompassing all relevant events. I shall also devote some sections to the detailed attack on the credibility of Miss Francis and Mrs Glavin, because there was a concerted attack on each of them based on a number of detailed aspects of the documents and their evidence. In fairness to them, and in the light of the approach of the Court of Appeal decision in *Harb v HRH Prince Abdul Aziz* [2016] EWCA Civ 556, it will be necessary to consider a large amount of detail in this judgment.

23. All this gives rise to a more fragmented approach to the facts than the more familiar approach of setting out a chronological story and then revisiting it to consider liability, but it is necessary in order to prevent oneself getting held up by, and lost in, detail on the way to several final destinations.

24. In all the following sections dealing with the facts, any recitation of fact should be taken as a finding by me unless the contrary appears.

Part II - Factual matters in more detail

The representations and conspiracies in their general context

25. Mr McGuinness had been an Olympic gymnast, but by 2006 he had become a property developer with a substantial portfolio (and apparently a gym owner), much of it in his own name (apparently), though some properties were vested in companies.

In that year he exchanged contracts to buy all the flats in a new development at Mizzen Mast House. He completed on 31 of them (Phase 1 - basically the upper half of the building) with finance from West Bromwich on 17th August 2006. CHH acted for him through Ms Leslie Hill-Smith (a solicitor) who worked in CHH's RID. However, she was about to leave at that time, and her place in the RID was to be temporarily taken by Miss Francis and Ms Katherine Leslie. In an email of 17th August Ms Hill-Smith told Mr McGuinness that Miss Francis would be taking over his transaction, with assistance from Mrs Glavin and Mr Vos. At that time Miss Francis was a trainee and just short of qualifying. Once she had qualified she was intended to go to the general development team, but because of short-handedness she had to help in the RID. She was destined to stay there until 27th April 2007. Miss Francis never met Mr McGuinness. Her dealings with him were by email and telephone.

26. Completion of phase 2 was due to take place on 6th October and Mr McGuinness needed finance for it. In about September 2006 his broker, Ms Maria Magnussen of Savills, approached Masnol for funding to acquire phase 2 and an indicative offer of finance was made, but it did not progress further. In the end Mr McGuinness obtained his finance from elsewhere. Mr McGuinness had made other approaches for finance to Masnol but they had been declined, mainly because they were on new-build properties which, as a category, fell outside the categories on which Masnol was prepared to lend.

27. On 2nd October Laura Starbuck, an associate of Mr McGuinness, sent Mrs Glavin a snagging report on Mizzen Mast House and some correspondence. It is not clear why it was sent to her. She says that she immediately sent it on to someone else - Miss Francis or someone in the property dispute resolution team. She says she did not read the material. I accept that evidence.

28. On 3rd October Mr McGuinness sent an email to Miss Francis telling her about the problems he had had with the phase 1 units at Mizzen Mast House. He made them sound extensive and some of them serious (for example, lifts not working). His email stated that he would not complete on phase 2 until the problems were resolved. Miss Francis told him she would write to Mr Jonathan Rose, the vendor's solicitor, that night, and she did so, enclosing what she described as "snagging reports" and indicating that her client would not complete on 6th October in the light of those matters. In these circumstances what Mr McGuinness was saying about the condition of the premises came to her attention and she had dealings about them with the vendor's solicitors. The details of her knowledge and its significance will be dealt with in the context of considering the representation which is said to turn on it.

29. On 5th October Miss Francis suggested to Mr McGuinness that he might like her to involve the firm's property dispute resolution department in the matter of the defects, and on 5th October Mr McGuinness asked her to inform the bond company which had

given a bond in lieu of a deposit that they would not be completing on 6th October. She did that on the same day, expressing Mr McGuinness's concern that the phase 2 flats would be in a similar condition to the phase 1 flats.

30. On 5th October a meeting took place on site to review the situation in relation to "snagging" (as Mr Rose described it in an email to Miss Francis). This is a meeting which figures in one of the representations said to have been made by her. She did not attend it; its existence was reported to her by Mr Rose and confirmed by Mr McGuinness who also described it as being about "snagging" when he asked her, on 6th October, to request a completion extension until the end of October. She did that in an email of 6th October, saying:

> "However, due to the condition of some of the first phase of flats he has been unable to tenant some of the properties for the first month and thus is having to find alternative funds to finance the purchase of the second phase of flats. I am therefore writing to request that you seek an extension on the completion from your client until the end of October to enable my client to get his financing fully in place."

31. In cross-examination Mr Hubble criticised this email on the footing that it did not reflect an earlier email that Mr McGuinness had written to her in which he gave her instructions. To a degree Mr Hubble is correct in pointing up a discrepancy, but his questions ignored the fact that the email begins "I have now spoken to my client …" raising the possibility that the explanation was that there had been a further oral conversation. I do not consider that this email shows Miss Francis to be making this up (which was the essence of the criticism in cross-examination).

32. On 12th October 2006 the vendors served a notice to complete in relation to phase 2.

33. When this was reported to Mr McGuinness a telephone call took place in which he told Miss Francis that he had a lender in place but had not yet got valuations. He needed more time, but did not have it because of snagging, including an instance of sewage leaking out of one flat. On the same day (12th October) Miss Francis was able to report to Mr Rose that Mr McGuinness had had an indicative offer from Allied Irish Bank. He told Miss Francis that if necessary he would start litigation on the snagging or repair issue, providing her with correspondence about it.

34. On 18th October Mr Rose emailed Miss Francis to say there were a number of inaccuracies in details that she had provided and asking whether Mr McGuinness had got a formal mortgage offer yet. She asked Mr McGuinness who said he had not, he

was waiting for a valuation (and he blamed defects in the premises for the delay) and that completion was realistically 3 weeks away. Miss Francis responded on 19th October to the effect that he did not have a legally strong enough case to be able to resist completion, and again offered to get an opinion of a litigator, though their best hope lay in the goodwill of the vendor. She said that she believes she must have got advice from someone else in the firm to write this email.

35. On 26th October Mr Rose pursued the question of funding for phase 2. He wrote:

> "2. In order to consider further your client's request for additional time, we need to know precisely where your client is up to in terms of the funding arrangements. Has a formal facility letter been issued and if so, please supply a copy. If not, then there should be indicative heads of terms, which again supply and give an indication of when you expect to receive formal credit committee approval to enable the matter to proceed."

36. Miss Francis pursued the matter with her client by email of the same date which forwarded Mr Rose's email:

> "Please see email below. Please can you let me have details of where you are up to with the valuations for the remaining flats? If you have facility letters please let me have copies so I can forward them to Jonathan Rose, or alternatively provide the developer with them direct."

Mr McGuinness responded promptly:

> "We have funding offers from 2 lenders:
>
> (a) Britannia (see attached)
>
> (b) Allied Irish. They will not do an offer until they receive vals in draft."

37. On the same date Miss Francis responded to Mr Rose:

> "We are holding a facility letter from Britannia Commercial Lending covering half the properties. The remaining properties will be covered by Allied Irish. Their offer is still being

> finalised because of the delay in obtaining valuations but I understand that all the valuers requests have now been dealt with and they are reporting to the bank. As soon as this is in place, a formal facility letter will be issued covering the remaining flats."

38. Miss Francis was accused by Mr Hubble of mendacity in relation to this letter. He said that she expressed herself in the way she did in order to buy her client some time, knowing that what she said was not true. The true factual position was that Mr McGuinness did not have a facility letter from Masnol as that expression is normally understood (that is to say a formal document setting out all the formal terms of a loan). The most that Mr McGuinness had was an indicative offer dated 8th September 2006, which Mr McGuinness had sent her the same day. It was not a facility letter, and made it clear that it was only the basis on which the lender would be prepared to progress a credit application.

39. The underlying factual position was indeed as Mr Hubble said it was. There was only an indicative offer letter from Britannia. It did, however, outline a lot of the terms which would appear in a formal facility letter (though not with the same degree of formality of expression). Miss Francis explained that she made a mistake. She could not actually recall sending the letter, but would not have said something that she did not believe to be true. She says she must have thought that the Britannia letter was a facility letter, despite the fact (emphasised by Mr Hubble) that Mr Rose's prior email had drawn a distinction between a facility letter and "indicative heads of terms". She offered her inexperience and pressure of incoming emails as the reason for the mistake. I accept that evidence. The rest of her email tends to suggest she was conflating offers and facility letters - she says that Allied Irish's "offer" was being finalised and that when valuations had been obtained a "facility letter" would be "issued". I also note that in a later email to Mr McGuinness concerning a possible Allied Irish loan she referred to a "facility confirmation letter", which is likely to be a reference to an offer letter, and which demonstrates that she did not keep the two concepts clear in her mind, if indeed she was aware of the distinction.

40. If she had deliberately mis-stated the position it must either have been because she decided to do it off her bat, unprompted by the client, or because she was prompted by the client. The former I regard as unlikely in the circumstances. I do not think her thought processes would have been sufficient for her to work out the true position and what needed to be said in order to buy time, and I do not think her perception of her duties to her client would have driven her well past exaggeration to lying. The latter is even more unlikely. If it were to have happened there must have been an oral conversation between when Mr McGuinness sent his email (timed at 2.26am) and when Miss Francis sent hers (9.56am) in which Mr McGuinness asked her what to do and why to do it. That is fundamentally implausible. If he drove the matter he must have sent her the information in a form which provided accurate information, and then relied on being able to catch Miss Francis on the phone before she responded to Mr

Rose. If he did not drive it then there must still have been a telephone call of uncertain purpose (unless she was ringing for instructions) in which the difference between the offer and a facility letter was discussed and Mr McGuinness gave his instructions. That is even less likely in the circumstances.

41. I have carefully considered this matter. Having listened to Miss Francis's explanations, and having seen her in the witness box, I find it much more likely that she made the mistake that she says she made than that she was being deliberately dishonest.

42. The vendor did not rescind on the expiry of the notice to complete, and Miss Francis asked for an extension. For his part Mr Rose asked for details of the funding, and was told that funding would be provided by Masnol (as to half the properties) and Allied Irish Bank (whom Mr McGuinness actually preferred as the lender for all the properties). Mr Rose responded by saying that firmer details would need to be provided if an extension was to be given and eventually on 31st October he extended the time for completion to 10th November. At his end Mr McGuinness was (apparently) still trying to get his funder in place and on 1st November he told Miss Francis that he would be using Allied Irish and not Britannia. He continued to complain about the state of the premises in an email to Knight Frank, which was copied to Miss Francis. He made it clear in an email to the vendor's agents (copied to Miss Francis) that he considered that describing the outstanding items as "snagging" was to trivialise them. On 8th November the vendors extended the time for completion to 17th November.

43. Meanwhile on 3rd November 2006 West Bromwich appointed LPA receivers under their loan secured on phase 1. It is not apparent that Miss Francis was told this by her client at the time, but she came to know of it in due course. Mrs Glavin was told of it by Mr McGuinness at a point of time she could not remember. Mr McGuinness apparently in due course disputed the validity of the appointment on the basis that the non-payments were the fault of the lender in failing to organise direct debits properly, and he also wrote to the lender saying that he understood payments would be taken from a deposit held by the lender. There is no record of either lawyer being told by Mr McGuinness that the existence of the receivers was a matter which should not be disclosed to a lender (or to Masnol). That seems to me to be significant. Such an instruction, by itself, would be important, but if it was confined to an instruction which did not involve misleading it would not be improper, and would be likely to be recorded somewhere. An instruction not to disclose it and to conceal it at all times from Masnol, by improper acts if necessary, would be less likely to be recorded, but is a less likely event in itself.

44. Miss Francis was then away for 2 weeks and she prepared holiday notes for those who would deal with her matters while she was away, including a note for Mizzen Mast

House. In her absence Mrs Glavin and Kat Leslie were to deal with conveyancing matters that arose. They passed the defects matter on to the construction team, and Jane Ryland (a partner) and Laura Phoenix (an assistant solicitor) dealt there. A number of things which occurred in this period are said to demonstrate knowledge of, or afford knowledge to, Mrs Glavin of building disputes going beyond snagging matters. I will deal with them when I come to deal with what are said to be fraudulent misrepresentations made by Mrs Glavin. For present purposes it is enough to note that the ongoing defects problem was one which Mr McGuinness was using, rightly or wrongly, to delay completion on phase 2.

45. During this limited period and within CHH the matter was being dealt with principally by Ms Ryland and Ms Phoenix. One of Mr McGuinness's concerns was that the vendors would call on a bond given by way of deposit on the contract, and there was limited discussion about getting an injunction to restrain the call. In the end no such injunction was applied for. There was discussion between them and the vendor as to extending the bond (for which Mr McGuinness would have to pay) and about a further upfront payment (which Mr McGuinness was not prepared to pay).

46. On 16th November Miss Phoenix sent Ms Ryland a list of the "snagging issues" which had been sent to her and which had already been copied to Mrs Glavin. It was not in fact an itemised list of issues, but (in the main) a list of whether snagging had or had not been done in relation to each of the phase 1 flats. A more detailed list of "snagging" for each of the flats passed from Mr McGuinness to Ms Ryland (copied to Mrs Glavin) and from Ms Ryland to Ms Phoenix on the same day, as were emails detailing tenants' complaints. These documents describe works in terms which are said to demonstrate that the disputes went beyond mere snagging. These emails are important to the claimant's case because they are said to have given Mrs Glavin the knowledge which makes one of her later representations knowingly false. Mrs Glavin's evidence was that she did not open any of this material, considering it was for someone else in the disputes resolution team to deal with. I accept that, although she was copied in on various emails from time to time during and after this period, by and large she would not have considered them with any interest, or particularly registered their contents. She was a conveyancer, and this was a building dispute. She was also busy on a wide range of matters. She would not have devoted attention to the detail of matters which were not immediately relevant to her.

47. As the new extended completion date drew near there was more discussion about further extensions and an extension of the bond (which required an agreed extension if it was to operate beyond the completion date). Mrs Glavin was not involved in that - a note of someone in the construction team dated 24th November chronicles the events of the day, including a telephone call with Mrs Glavin and comments that "Helen [Glavin] knows nothing". During the course of the day Mr McGuinness himself negotiated an extension of the bond and Mr Rose was told that. A claim on the bond that day was therefore avoided. Mrs Glavin was not involved in all this. During this period her whole involvement on the file was slight if indeed there was

any. It does appear that on 30th November 2006 she received a demand on Mr McGuinness under the bond mechanism which suggests that a claim had actually been made on the bond, but that seemed to go away. She passed it on to the construction team and expressed the view that it seemed premature.

48. New completion dates were proposed and arranged, through the construction team. Mr McGuinness continued to wish to use the outstanding building works as a reason for not completing, though the vendor said that it was an entirely separate issue and Mr McGuinness received advice (on 1st December) that the defects on phase 1 were not a legal reason for failing to complete. On 24th November Mr Rose agreed not to serve a rescission notice or claim under the bond for the present, noting that the bonds had been extended to 28th December. He required a copy of a promised valuation and a statement of Mr McGuinness's intentions. Mrs Glavin was copied in on this email.

49. On 1st December 2006 an email from Mr Graham Stephen, of the bond provider, to Mr McGuinness told him that he had "picked up on a rumour" that a receiver had been appointed over Mr McGuinness's assets and asked him to advise by return whether or not that was correct. It appears from an attendance note of Miss Ryland that she and Mrs Glavin had a discussion with in which the latter is recorded as saying that Mr McGuinness said there was an "administrator but not in the insolvency sense", he was not aware of anything else and that she advised him to sort out any rumours in case anyone he did owe money to "applies for bankruptcy". Mrs Glavin seemed reluctant to accept that she gave that advice, because it was not her place to give that sort of advice, but could not remember this conversation. I think it likely that she had it. It demonstrates that she knew there was a receivership, but she did not contest that knowledge anyway. Mr McGuinness then confirmed to Mr Stephen that a receiver had been appointed over the Mizzen Mast House assets, but not all his assets, because of a "small dispute" with West Bromwich. Mrs Glavin was copied in on the email traffic.

50. The defects issue continued to be debated, with CHH pointing up what they said was the significance of the defects and on occasions stating that tenants were withholding rent. There were continuing debates about renewing the bond and payment of the fees relating to that. Mrs Glavin was copied in on a number of emails about that, despite the fact that her original involvement had been temporary while Miss Francis was away. It is entirely plausible that she would not read all such emails, and I accept her evidence to that effect.

51. By the beginning of 2007 Mr McGuinness had obviously decided to try to refinance the West Bromwich loan. On 8th January 2007 his broker, Maria Magnussen of Savills, emailed Ms Derrett and Miss Birch at Masnol in the following terms:

> "The above client has a new proposal that he would like Britannia to consider.
>
> He purchased the attached properties in July using finance from West Brom Commercial, however, they are hold [sic] a rental retention of £500,000 which he wishes to try to release – Unfortunately, their rental calculation of 135% is prohibiting this, so he is looking to re-mortgage the whole portfolio to a new lender.
>
> You must however be aware that West Brom did have difficulties in collecting initial payments however, this has now been rectified and if you are interested in funding this, I would suggest you seek confirmation of this directly from the West Bromwich.
>
> These 30 flats are in a block of 70, but in a development of approximately 300 flats, and the majority are fully let.
>
> I can, of course, provide full details, but would like an indication as to whether you are interested, what loan to value you would consider (we are really looking for min of 80%) and costings at this stage."

52. This email was the beginning of the chain of events which ended up with Masnol lending its money. The important observation to make at this stage is that the email actually invites Masnol to confirm the reasons for non-collection of the initial payments by West Bromwich with West Bromwich. Had such an enquiry been made it would have revealed the receivership. This suggestion is seriously inconsistent with part of the case of the claimant so far as it turns on non-disclosure of the receivership. It is part of the claimant's case that Mr McGuinness in effect conspired with Miss Francis and Mrs Glavin to make sure that they did not mention the receivership in correspondence, and positively concealed it, because he did not want Masnol to know about it. That case is much harder to run and maintain if his own broker was inviting contact with West Bromwich from the outset, though it is not necessarily completely inconsistent with it because, at least in theory, Mr McGuinness might have changed his mind after this letter and adopted a different approach.

53. The email attached a list of the phase 1 properties with the heading "Mizzen Mast Quay Valuation - 28.06.06". The list identified each flat, its square footage, its value,

the value of attached parking and a total valuation, which had apparently been prepared by Edward Symmons. The total was £14,545,000, and the aggregate "New rents" listed in the last column was £195,870. Those must be monthly figures, and Miss Birch has written on it an annual total of £903,240.

54. On 9th January Miss Birch emailed Ms Magnussen indicating she would propose to her credit committee a loan of £11,240,000 or 77.5% of value, whichever was the lower, for a 25 year term, with a "margin" of 1.20%. She was working on the rental payments covering interest in the amount of 115%. She wanted to know if that was of interest to Mr McGuinness. It apparently was, because on the same date Masnol prepared an indicative (subject to contract) offer in those terms. One of the terms of the offer was that there should be an independent external valuation of the properties by a panel valuer evidencing a minimum market value of £14,505,000.

55. Meanwhile the tussle between Mr Rose, who was trying to get phase 2 completed, and Mr McGuinness's side, who were trying to put finance together and avoid rescission and a call on the bond, was still going on. Miss Francis re-engaged with the matter on 15th January when she was asked to look over the paperwork for completion, but a lot of the dealings still took place between Mr Rose and Laura Phoenix of the property disputes department. It ended with completion of 14 of the flats on 17th April 2007, with some of the rest completing later, and some never completing. The detail of the completions was not apparent at the trial, but that does not matter. The lending bank became Bank of Scotland, not Allied Irish who had been on the scene for some time, but the former bank was only to lend on 30 of the 38 properties in phase 2. The funds for the remainder were to be raised elsewhere on "retail mortgages". The defects continued to be debated during this period. A meeting about the issues took place on 31st January.

56. On 14th February 2007 Miss Birch offered slightly better terms to Mr McGuinness and said the next step would be to get credit committee approval of the revised terms. She proposed getting a desktop valuation from Edward Symmons and asked if Mr McGuinness had any objection to that (they had already valued the property for the previous transaction). She also asked Colliers to give her desktop advice on 16th February - the bank's policy required two valuations at that stage for loans over £10m. Colliers came back with a valuation at around £14m and an estimated rental valuation of around £550,000 to £575,000 per annum. This latter figure was much lower than the estimated rental income of £903,240 as Edward Symmons had said it was in 2006 (in a prior valuation which Miss Birch had seen). In due course she decided to put the Colliers valuation on one side and preferred a reiterated Symmons figure produced to her. It is relied on by the defendant as part of material said to demonstrate that Masnol would have completed the re-mortgage anyway. The matter went before the credit committee on the basis of the higher figure.

57. On 21st February Miss Francis informed Mr Rose that she was about to receive an approved version of a facility letter from Bank of Scotland in respect of phase 2. Mr Rose asked for a copy of it (a by now familiar request) to evidence funding. Miss Francis sought instructions from Mr McGuinness on forwarding a copy of the letter and he gave her clear emailed instructions on the same day that:

> "You can forward the top page of the offer but I do not want them to see the breakdown and it should not really matter anyway."

58. That is what she did. On 22nd February 2007 she wrote to Mr Rose:

> "I attach the scanned front page of the offer letter in relation to these units in accordance with my clients instructions."

That demonstrates that if Mr McGuinness wished something to be kept confidential (which he was entitled to do, subject to his acts being misleading) he was capable of giving clear instructions to that effect which Miss Francis carried out without concealing them and without hiding them behind mendacity. It is right that this was a withholding of information which would have been obvious to the other side, unlike the information that she is accused of fraudulently concealing, but it is still not without significance that there is a clear record of the instructions given.

59. Laura Phoenix, with Jane Ryland, continued to deal with the outstanding defects issues and was working towards completion of the phase 2 purchase. On 1st March she wrote to Mr McGuinness, copied to Miss Francis, saying:

> "By copy of this email I am asking Helen to restate that completion is 'without prejudice to any claim that you and/or Etra has to damages in respect of defects, any breach of contract or at all' before progressing to completion."

Etra Limited was the name of one of Mr McGuinness's companies in whose name Mr McGuinness was considering taking some of the phase 2 flats.

60. The bank continued to put Mr McGuinness's finance application through its system. On 6th March Miss Birch emailed Ms Magnussen revising the offer downwards to £10.9m because of a reduction in rental values found by Edward Symmons. Miss Birch was persuaded to reinstate the offer to its former levels when Mr McGuinness

convinced her (in email traffic) that passing rentals were more significant than the rental value put on the properties in the desktop valuation. On 14th March Masnol issued a second set of indicative terms offering a facility of £11.4m.

61. Mr Rose continued to press for completion of phase 2 and Miss Francis continued to deal with that on the conveyancing side. On 14th March 2007 he sent a completion statement, which included a lot of interest for late completion, and which Miss Francis forwarded to Mr McGuinness with an email which read merely "deep breaths". This reflected her anticipation that Mr McGuinness would not find that addition at all welcome (which he did not). The significance of those words is that when she printed out the email exchange (including her client's response to the proposal that interest be paid) for her file she deleted the words "deep breaths" from the print. This is said to demonstrate her propensity for dishonesty. I make findings about this in the separate section of this judgment dealing with credibility. When she responded to Mr Rose on 15th March she said, following instructions, that it was surprising that interest was being charged when the seller could not have completed in the previous October as the flats were not fit for letting then.

62. By now Mr McGuinness was contemplating completing phase 2 in instalments, with 16 going first. That is what ultimately happened. As pointed out above, the purchase of 16 was completed on 17th April 2007; some other completions took place later on a date which is unclear, and some, in the event, never completed.

63. Meanwhile the credit application for the re-mortgage was going through Masnol's processes. On 19th March it received the approval of the credit committee, subject to certain conditions. Heatons were instructed to act for Masnol in the re-mortgage and Miss Alberici wrote to Miss Francis on 21st March saying that she had instructions. The latter reported this to Mr McGuinness and said that she assumed that he was no longer pursuing that offer (it is not clear why she would have believed this, but the point was not pursued). Mr McGuinness responded the same day saying that the offer was in respect of West Bromwich with whom he had an issue because the property was, and had soon after completion been in, receivership. He wanted to get the appointment of the receiver invalidated and asked that the matter be passed to a "senior partner who can advise the lenders Solicitors that they are representing me. I will give you a call to briefly go over the details." I observe at this stage that that wish is inconsistent with Mr McGuinness having expressed any idea at that stage that Heatons and Masnol should not be told about the receivership. He then had a full conversation with Miss Francis about the receivership matter which is recorded in an attendance note, which is likely to be the conversation proposed in Mr McGuinness's email. Nowhere in that attendance note is there any suggestion that the receivership was to be kept from the new lender. Notwithstanding that, this correspondence, and some correspondence with the receivers' solicitor, is said to be the genesis of a conspiracy between Miss Francis and Mr McGuinness, and later Mrs Glavin, to conceal the receivership from Masnol.

64. Accompanying Heaton's letter of 21st March was a document headed "Lender's Solicitors Initial Requirements", to which the letter anticipated written (the word is emphasised) replies together with supporting documentation. This document gave rise to the first alleged misrepresentation. The introductory words to the document were:

> "To enable us to prepare the Report on Title at an early stage, please supply the information requested in this memorandum as quickly as possible."

65. Question 3.6 was:

> "Please confirm that the Borrower has not received and is not aware of any adverse surveyor's, environmental, valuer's or other professional's report on the Property."

Miss Francis responded on CHH notepaper on 26th March by saying:

> "3.6 Confirmed. Following completion there was a meeting on site to determine outstanding snagging issues in relation to the properties that were to be dealt with by the seller."

66. That representation is said to be false not because there were reports which were not disclosed; it is said to be false, to the knowledge of Miss Francis, because it gave the impression that the only issues were snagging when they were more serious, and because it gave the clear impression that the meeting on site was shortly after completion and gave the impression that the issues had been resolved timeously. A third alleged falsity was not pursued in the light of Miss Alberici's evidence who gave some evidence which went to reliance – even though that evidence would not have gone to falsity or Miss Francis's knowledge of it.

67. As with all the representations, I will deal with their actionability later in this judgment. At present I am merely seeking to put them in context to make the later detailed consideration more understandable. This is the only operative fraudulent representation alleged against Miss Francis by the time of final submissions.

68. Mr Garry was given the instructions within CHH to deal with the receivership point. Mr McGuinness said he considered that the receivers ought not to have been appointed because the defaults in respect of which they were appointed were actually down to the fault of West Bromwich who failed to set up direct debits properly,

though the real focus of Mr Garry's activity became to resist the payment of receivership charges (which were considerable). Mr Murray, of Needham & James, acting for the receivers and West Bromwich, became his opponent in this debate.

69. On 26th March West Bromwich provided a "Redemption Statement" for Mr McGuinness, valid to 31st March 2007. It was in a sum over £11.75m, and included early redemption interest but no express provision for receivership costs. It later turned out that the figures included over £50,000 of receivership-related costs.

70. The Easter weekend was the weekend of 6th to 9th April. Miss Birch had dealings with Mr McGuinness after Easter in which he provided a schedule of his assets which is relied on by CHH as containing inconsistencies which should have been apparent to Miss Birch. Miss Francis continued to deal with the conveyancing aspects of the re-mortgage in the course of which she is said to have told more lies, though not ones which were operative for the purposes of the fraud claim. On 13th April Miss Alberici asked Miss Francis for replies to the standard form of Commercial Property Standard Enquiries (CPSE). Miss Francis sent them to Mr McGuinness for his response on 17th April. He did not respond for a few days and was chased by Miss Francis shortly before she left the department on Tuesday 24th April. Miss Alberici had chased Miss Francis, and she was also seeking copies of the tenancy agreements (assured shorthold tenancies – "ASTs") under which the phase 1 properties were sublet to tenants. On 25th April Miss Alberici chased 8 missing ASTs.

71. 26th April was the last day on which Miss Francis had conduct of the re-mortgage. On 27th April that conduct passed to Mrs Glavin when Miss Francis, as had always been intended, moved to her new department. The file was left on Mrs Glavin's desk and she had to run with it. She thought it was just a matter of finishing a job most of which had been done by another. There was some sort of discussion between the two of them on 30th April.

72. The completed CPSEs were sent by Mrs Glavin to Miss Alberici on 27th April. These contain two of the alleged misrepresentations. The relevant questions and answers (answers in italics, as in the original) are:

> "27. Notices.
>
> 27.1. Except where details have already been given elsewhere in replies to these enquiries, please supply copies of all notices and any subsequent correspondence that affect the Property or any neighbouring property and have been given or received by

> you or (to your knowledge) by any previous owner, tenant or occupier of the Property.
>
> 27.2 Are you expecting to give or to receive any notice affecting the Property or any neighbouring property?
>
> *None served or received*
>
> 28. Disputes
>
> Except where details have already been given elsewhere in replies to these enquiries, please give details of any disputes, claims, actions, demands or complaints that are currently outstanding, likely or have arisen in the past and that:
>
> (a) relate to the Property or to any rights enjoyed with the Property or to which the Property is subject; or
>
> (b) affect the property but relate to property near the Property or any rights enjoyed by such neighbouring property or to which such neighbouring property is subject.
>
> *NO."*

73. The document bears CHH's name where one would expect to find a signature at the end.

74. It is said that these two answers were false, and false to the knowledge of Mrs Glavin, because:

> (a) The receivership was initiated by a notice, Mrs Glavin knew that, and such a notice was a notice within question 27.1. No other notice is relied on as falling within that question. CHH say that the receivership notices were not notices falling within this question so there was no falsity; and if there was Mrs Glavin

did not know the answer was false.

(b) Answer (b) is said to be false because there were two relevant disputes - the building dispute which arose as between Mr McGuinness and the vendors of the property, and disputes about rent collection and tenancy management which had arisen in the context of the challenges to the actions of the receivers in that respect. CHH accepts that the building dispute ought to have been disclosed, but not the other disputes. So far as any disputes ought to have been disclosed CHH says that Mrs Glavin did not know this answer to be untrue or inaccurate.

75. It was only after this that Miss Francis sent some handover notes which referred to the re-mortgage transaction. I deal with these below.

76. Masnol signed a facility letter for the loan on 1st May and sent it to Heatons. Thereafter, and over the next 10 days, there was pressure from West Bromwich (via Mr Murray) and Masnol to complete. Mr Garry had instructions to challenge the figures put forward by the receivers (West Bromwich). As well as disputes as to whether the receivership fees and early redemption payments should be charged, there was lack of clarity as to what rents the receivers had been receiving. This meant that Mr McGuinness was disputing what sum he should be paying under the mortgage. By 9th May Heatons were pressing hard for completion. There was much correspondence on the "redemption figure" which was required, and about "redemption statements", expressions which are important in considering the later misrepresentations alleged against Mrs Glavin. Negotiations were going on between Mr Garry and Mr Murray (for the receivers/West Bromwich) as to what sum should be paid in the light of the disputes that had arisen. The detail of what was going on is important, but for the moment the significant events took place on 10th May. At 11.41 Mrs Glavin emailed Miss Alberici:

> "We need £1,100,000 to redeem the mortgage as at today."

77. It is common ground that she meant £11,100,000, not £1,100,000, but nothing turns on that mistake. Miss Alberici was not misled by it. The statement is said to have been false, and that Mrs Glavin is said to have known it was false, because the deal with Mr McGuinness was different. West Bromwich and Mr McGuinness had agreed that £11.1m would be repaid as a result of the refinancing with Masnol, that £365,000 would be left as an unsecured loan, to be repaid in 10 days, and (at the time of the letter) there were still negotiations about the balance and about rent collection disputes. At the end of 10th May there was a deal under which a balancing sum of £88,576.47 was to be paid on or before 9th November 2007. That last figure was not agreed when Mrs Glavin sent her email but that does not matter. The falsity of Mrs Glavin's statement is said to lie in the fact that £11.1m was not the sum required to redeem. Redemption was part of a package, and Mr McGuinness was having to pay a lot more than that to redeem, and Mrs Glavin knew that. That is said to make the statement fraudulent. CHH's case, in a nutshell, is that the statement was accurate, and/or Mrs Glavin believed it to be accurate, because £11.1m was the sum that was

required to redeem the charge - the charge would be redeemed on payment of that sum even though moneys were left outstanding as unsecured sums by arrangement between the parties.

78. The next representation said to be fraudulent occurred about 15 minutes after the redemption statement one. At 12.02 on 10th May Miss Alberici emailed Mrs Glavin to say:

> " … all I now need is an email confirming to what use the surplus funds will be put following redemption …"

Mrs Glavin replied at 12.06 saying:

> "… the balance of the funds will be utilised for the discharge of fees in relation to the re-mortgage and any surplus for future property investment …"

79. The loan was to be £11.4m. After the redemption amount as identified by Mrs Glavin all but about £6,000 went in fees, so there was a very small surplus. The representation by Mrs Glavin is said to amount to a representation that the net amount being lent by Masnol was in excess of what was required to meet the total outstanding indebtedness on the West Bromwich loan - the fact that there was stated to be a surplus necessarily conveyed that the whole loan had been paid off, contrary to the facts (a large part was left unsecured). Masnol alleges that this statement was made without direct instructions (which it seems it was) and was reckless at the least.

80. The last alleged representations were made on the same day (10th May). Masnol and Heatons were concerned to have evidence about the ASTs affecting the property On the previous day (9th May) Miss Alberici emailed Mrs Glavin stating what she needed. The fourth thing was:

> "4. I will send to you a schedule of ASTs. Please confirm [in] a letter on your headed paper (please sign, scan and send letter) that Spencer Robert McGuinness has carefully checked the rental schedule and has confirmed to you in writing that the schedule is correct, all the ASTs are in place at the rent stated and that there are no arrears. Sorry to seem painful on this point but normally AST information would come via solicitors and is therefore information that is treated as "warranted" correct for the reps and warranties in the facility agreement (and an event of default if not correct). Please supply the letter as soon as I send the schedule (in the next few mins)."

81. She in fact did not send the schedule until the next day when she wrote stating:

> "I attach the tenancy schedule for annexation to the confirmatory letter. Please ask Spencer to e-mail or fax confirmation to you, confirming that the above tenancy schedule is correct and copy that to me for my file. As mentioned I also need a confirmatory back-to-back letter on your firm's headed paper."

82. Mrs Glavin returned the schedule by fax at 11.11 with a covering letter on the firm's headed notepaper headed: "Flats at Mizzen Mast House, Mast Quay, London as set out on the attached schedule ("the Property")", and which said:

> "We have received instructions from our client Spencer McGuinness that he has perused the schedule of Tenancy Agreements attached and he can confirm that the information contained therein is correct.
>
> It must be stressed that we have no knowledge of the said agreements or the arrangements that our client has with regard to the letting of the Property and can only confirm on the basis of our client's instructions and as such we accept no liability in respect thereof."

83. This letter is said to be knowingly false in a number of respects:

> (a) It is said that the first sentence was an implicit representation that CHH did not have reason to believe that Mr McGuinness's confirmation was false, when Mrs Glavin did have reason because she had been receiving information indicating that the rental levels were not what he said they were. The schedule was extensively false.
> (b) The second sentence (paragraph) was said to be knowingly false in that Mrs Glavin did have knowledge of "arrangements" about lettings in the form of the existence of receivers who were collecting rent and with whom Mr McGuinness was in dispute.

84. Those, then, are the representations in their general context. I shall in due course go back and deal with them all in more detail, following each of them through as a strand where possible. In addition to those representations Mr Hubble advanced a case in conspiracy. He relied on a bipartite conspiracy between Miss Francis and Mr

McGuinness in the early stages and then a bipartite or tripartite conspiracy once Mrs Glavin took over the conveyancing. So far as Miss Francis is concerned, it is said that there was a common understanding between her and Mr McGuinness that she should not reveal the construction disputes or the existence of the receivership, because to do so would imperil the loan. Mr Hubble accepted that this might not add much to his fraud claim, because the only unlawful means which were ultimately deployed was the representation in her answer 3.6 (other alleged unlawful means having been abandoned in his final speech), and if he won on the deceit he would not need the conspiracy allegation. But he still maintained the claim against her. So far as the involvement of Mrs Glavin is concerned, he submitted that it is likely that Miss Francis had a conversation with Mrs Glavin at about the time of the takeover at which the former told the latter that the receivership and the dispute with the receiver about rents should not be mentioned, and that it was likely that Mrs Glavin agreed with Mr McGuinness that she would not tell Masnol about the rent collection dispute.

85. It was Masnol's case that each and all of the representations was intended to be relied on by Masnol in deciding to go ahead with the loan, and that that was causative of the ultimate loss. CHH submitted that even if the misrepresentations had not taken place, and if Masnol had discovered that which it is said was concealed from it, the transaction would still have been pursued because the information would have gone through Miss Birch and she would not have thought it sufficiently significant to suggest halting the loan, or even to pass the information on to her relevant superiors or the credit committee.

Part III – the claim based on the acts of Miss Francis

Miss Francis's motivation

86. I deal with this issue in a separate section because it is in my view a significant point which forms an important (though not determinative) piece of the background to each of the lies which she is alleged to have told.

87. The allegations against Miss Francis fall into the category of the most serious. Not only are they fraud allegations; they are fraud allegations made against a solicitor. That means that the allegations have to be tested against the levels of proof and probability referred to in the well-known speech of Lord Nicholls in *In re H (Minors)* [1996] AC 563 at 586-7:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on

> the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

88. Of particular relevance to a case of fraud such as the present is the question of motive. By and large dishonest people are dishonest for a reason. They tend not be dishonest wilfully or just for fun. Establishing a motive for deceit, or conspiracy, is not a legal requirement, but if a motive cannot be detected or plausibly suggested then wrongful intention (to tell a deliberate lie in order to deceive) is less likely. The less likely the motive, the less likely the intention to deceive, or to conspire unlawfully. In many, if not most, fraud cases this would not be a particularly live point. The defendant is often a person who would be a direct beneficiary of the fraud, and a plausible motive is, to that extent, relatively easily propounded. The present case is, however, different.

89. Miss Francis could not conceivably be said to have any direct benefit in the loan which Mr McGuinness was trying to get. She had no interest in his business. The motive suggested by Mr Hubble was of a different kind. He suggested that Miss Francis was trying to help her client to succeed in his transaction and to ensure his business continued to come to the firm.

90. That, as a motive, would be plausible in some cases. One can imagine cases of small firms with a very important client, to whom a particular partner or solicitor is close in commercial or personal terms, which makes it all the more plausible that the solicitor will assist his client's transactions by being less than straight from time to time. However, in this case I do not find it particularly plausible. One has to look both at the position of Miss Francis and at the position of Mr McGuinness.

91. Miss Francis was, when she embarked on her work for Mr McGuinness, at the end of her traineeship. She was due to take up work in the development team, but she was drafted in for an unplanned short stay in the RID in order to fill in for a departing colleague. She was due to move on at the end of April 2007. The clients she would encounter in the RID were not clients with whom she had built up any relationship; nor were they clients with whom she would expect to have a future commercial relationship. They were basically clients bought in by others whose transactions were being processed by the RID. In terms of her own future billings, she had no particular reason to keep them sweet.

92. Looking at Mr McGuinness, he was a significant client of the firm, but the firm had lots of other, and many bigger, clients, and was not particularly beholden to him. It was not suggested that anyone gave Miss Francis an instruction to keep him sweet and further his objectives, much less to do things falling short of a proper standard in order to do so. She would have had to have taken the view that she should "assist" him by mendacity all on her own, which is very unlikely. He happened to be a client (and not the only one) into whose affairs she was parachuted when she unexpectedly had to fill in the RID vacancy. She was always going to move on to another department. She never met him in person, and all her dealings were remote (over email and telephone). Her relationship with him was such that she did not even have small talk or banter with him; that was typical of RID relationships. She expressed the view that she would not put her career and reputation on the line for him in those circumstances. I find that evidence to be highly plausible, and of itself compelling.

93. Certain particular matters were relied on as demonstrating that Miss Francis had a relationship with Mr McGuinness which made him special and the relationship one which she would be very anxious to preserve.

94. Mr Hubble pointed to the number of matters which she was conducting for him, which made him one of her bigger clients. She acknowledged that that was the case. But the fact remains that he was not going to be her client in a few months when she left the department. She observed in the witness box that he was charming but disorganised, and Mr Hubble said that that contributed to making him a "special" client for her. I fail to understand the logic of that submission.

95. On 23rd March 2007 one of Miss Francis's colleagues (Emily Wright) sent her an email into which she had apparently pasted something from the firm's electronic newsletter. It read:

> "The RID team has been instructed to act on the re-mortgage of 31 flats for existing client Spencer McGuinness to a value of

> £11,000,000. This has led to a referral to Peter Garry and Troy Wano on a litigation matter relating to the existing mortgage.
>
> Is this your friend spencer?!"

Miss Frances responded:

> "yes and balls to the team. I have the bloody instruction! gotta love him though (he is the ex-national floor gymnast!)".

96. It was put to her that this was her saying that she had got the instruction, was pleased to have it and that it showed that she could obtain and develop clients. She denied that. She said that she was being sarcastic. She was pointing out that it was her, not the team, who had to carry out the instruction, impliedly suggesting that it was not necessarily a desirable instruction to have for those who had to fulfil it. I found her evidence on the point to be completely convincing. This is not a situation in which one construes the emails as one would a technical conveyance, but the terms of the Wright email are important. It says "The RID team has been instructed". It does not say that the RID team have somehow won the instruction. Miss Francis's riposte was therefore not to the effect that she had won the instruction, but that she had got it to deal with. The words "gotta love him though" suggests a contrast with what as gone before - she likes the man but does not like the instruction. Hence the use of the word "bloody". This is not Miss Francis claiming a triumph. This is Miss Francis not enjoying what she has to do. This email exchange carries none of the factual implications that Mr Hubble suggested.

97. The next evidential matter which Mr Hubble relied on as a demonstration of motivation, as well as a demonstration of her propensity positively to mislead in order to pursue it, is a risk assessment form. In accordance with her firm's practice Miss Francis filled out a risk assessment form for the re-mortgage instruction matter on 23rd March 2007. It contains various boxes which have to be ticked, one of which was whether the value of the transaction was over £10m. This transaction was, but she did not tick the box. She did click the box which said "Risk category normal". One of the other boxes is entitled: "Other areas of concern exist (eg payment of fees, client's credit history, profitability, legal complexity)". It is unticked. Below those boxes is the following text:

> "Fee earner should consider the Assessment Table above. If no sections are ticked then matter is Normal Risk and fee earner must complete Normal Risk box below. If Risk level is re-designated this Form and the File Information Sheet must be amended.

> Any ticked responses indicate that a Higher Risk Category may be appropriate. The fee earner must then discuss the matter with the Head of Team or Business Group who will designate the Risk Category. If it is Higher Risk the Head of Team or Business Group will complete the Higher Risk File box below and decide on appropriate risk management action. If a matter is designated Higher Risk this form must be copied to the Risk Manager."

98. Below that, under the heading "Risk Analysis – for Normal Risk Files" is another box labelled "Risk category Normal". Miss Francis has ticked that box and not filled in the Notes section below. A further section, below her signature, entitled "Risk Analysis – for Higher Risk Files" is not filled in.

99. Mr Hubble placed a lot of significance in what Miss Francis did in relation to this form. His case was this transaction was not in the Normal Risk category because it was worth more than £10m, because of the existence of the receivership dispute (of which she had been told the previous day) and because of the dispute about the building works which again was known to Miss Francis. It is said that despite that knowledge, and despite the knowledge that she should have marked the form up to reflect this, she deliberately did not do so because she wanted to keep the file for herself.

100. Miss Francis could not remember signing this form. The thrust of her evidence is that it was her general practice to go to her supervising partner to discuss the risk form before it was signed, and not after it. That had been her general practice as a trainee and she still followed it when she qualified. She would therefore have gone to Mr Vos to discuss it. She accepted it was filled in wrongly, at least in respect of the £10m box, and she could now see that there were matters which made the transaction higher risk, but she did not appreciate them at the time, and did not think that she would have drawn a link between what she knew about the building defects issues and the receivership on the one hand and the risk assessment in the form on the other (though she could not remember). She denied that she had been motivated by a desire to keep the file.

101. I do not think that this incident is any indication of Miss Francis's dishonesty or of a desire to keep the file. Mr Hubble needs to establish that her filling in the form wrongly was a deliberate decision by her, conscious of what she was doing. He put the motive in one form - to make sure she kept the file. That case is to my eyes deeply implausible. This was happening about a month before Miss Francis was about to move into her previously designated department. There was no evidence or suggestion that she was going to be able to take Mr McGuinness with her, and we know that she did not do so. She just left him behind - the file dumped on Mrs Glavin's desk, as will appear. There was no suggestion that she had anything like billing targets which would make her want to keep him. There was no suggestion that

even if she had said this was a higher risk file she would have lost, or thought she would have lost, all contact with the work. She might, I suppose, have thought that she could complete the matter before she left, but that was not investigated. The suggested dishonesty was potentially very serious for her. Someone might have found out about it - it would have been very easy to spot the obvious mistake about transaction value - and it might, for all she knew, have led to serious trouble for her. It is unlikely that she would have run that risk.

102. That is Mr Hubble's theory of motivation in relation to this risk assessment form, without Miss Francis's actual evidence on the point. It is very unlikely. Having seen her give evidence, it is even clearer that the suggested motivation of this potentially very serious act lacks all plausibility. I so find.

103. So far as the incident goes, I think the most likely explanation is the one suggested by Miss Francis. She discussed the matter with Mr Vos, and as a result was able to tick the normal risk box. That would explain the ticking of the "Normal risk" box and the wrong ticking of the value box - the former becomes authorised, the latter becomes just careless, done because it no longer mattered once Mr Vos had agreed it was a normal risk. It may well be that the receivership and defects matters should have been given more attention in this context, as Miss Francis herself conceded with the benefit of 9 years hindsight, but that is carelessness. The idea that she appreciated that those accounts ought to have been fed into the risk assessment process and deliberately left them out verges on the absurd in the context of the evidence.

104. I therefore find that the motivation suggested by the claimant for Miss Francis's dishonesty has at most a theoretical plausibility about it, but it lacks reality in the real factual situation which existed when Miss Francis was working in the RID. That presents a significant contra-indication to the correctness of Mr Hubble's case. However, it does not determine it. The point has to be weighed with the other factual evidence, because if one found a number of prejudicial pieces of evidence in which she apparently did make wrong statements in circumstances which might be interpreted as fraudulent then those have to be considered with the suggested motive as part of the overall factual picture.

Miss Francis's credibility - points on which she was challenged

105. In this section I deal with the detail of particular points on which Miss Francis was challenged as demonstrating her propensity to lie or mislead (there is no avoiding the words) when she thought it was necessary to do so. They are points, other than the main representation which she is said to have made, which are said to support the

claim that the alleged misrepresentation was made dishonestly. This section is long; that is because there are many points and they figure heavily in the case against Miss Francis on the question of dishonest intention.

106. As a general point Mr Hubble observed that a number of her explanations of what she was taxed with were reconstruction and not recollection. He said that as such those explanations did not have the weight that recollection would have. He is right to a large degree about her lack of actual recollection, but to hold this against Miss Francis would be wrong and unfair. The timing of the presentation of this action must be borne in mind. The events in this case happened in 2007. The loan went bad fairly soon after it was granted in May of that year. In August 2008 solicitors to the claimants notified the defendant firm that it considered that "a number" of the answers to the CPSE questions were inaccurate or untrue and that the firm knew or ought to have known that. Particular reference was made to the failure to disclose the receivership but that is all that was said at that time.

107. Nothing else relevant passed for 3 years. The surveyors were sued in 2009, and that claim was settled in 2011. In June of that year Masnol's solicitors again wrote intimating a claim, alleging a duty of care and intimating a possible claim in fraud in relation to the sum required to redeem the loan facility and the utilisation by Mr McGuinness of the advance. There was then some correspondence which Mr Hubble described as desultory (I was not taken to it), with draft particulars of claim provided in April 2013, until the present claim was actually issued in 2014. In the latter part of that period there was a standstill arrangement for a few months, which explains why limitation has not been a defence to a claim which was apparently started more than 6 years after the events in question (other than in relation to the addition of certain of the claims by late amendment).

108. That is very slow progress for a fraud claim where something has been known about the fraud from an early stage. The claimant is, of course, entitled to wait until the end of the limitation period before issuing (which it did), and to wait until the end of the 4 month period for serving the claim form when issued (which, again, it did) but in those circumstances it is the party responsible for the delay between the events and the trial (almost 10 years). It is hardly surprising that witnesses should have virtually no recollection of the detail of what will have seemed like insignificant events at the time. Miss Francis claims to have been involved in this case for 5 years, in part of her witness statement which explains how it has disrupted her life. Although she was not examined further on the point, I assume that she had not had cause to resurrect the events of this case in her mind for the preceding 4 or 5 years, which makes recollection even at the time when she first turned her mind to it very difficult. To use that lack of recollection as a means of criticising her (and the defendants' other witnesses), when the delay was attributable to the claimant not pursuing its case, is capable of amounting to unfairness and I shall bear that in mind when considering the weight of Miss Francis's explanations (and those of others in the same position).

109. With that in mind I therefore turn to the large number of pieces of evidence which are said to demonstrate dishonest behaviour on the part of Miss Francis, or which are said to demonstrate her willingness to act in an other than straightforward manner so far as Mr McGuinness's affairs are concerned. I have to deal with them individually, but I am aware of the need to consider each of them in the context of the others, and to consider them all in the round. Mr Hubble denominated most of them as numbered lies, and I shall do the same (and otherwise use his nomenclature, save in one instance) in the interests of clarity.

"Deep breaths"

110. This was not a lie but was said to be a deletion by Miss Francis of words in a printed email chain; it is referred to in outline above. It was not, of itself, of any direct significance to the fraud of which she was accused, but was said to demonstrate a propensity to mislead, and her manner of dealing with it in evidence is said to reflect adversely on her credibility.

111. On 14th March 2007 Mr Rose sent to Miss Francis a Completion Statement for phase 2. It included £176,000 interest for late completion, which Mr McGuinness was seeking to avoid paying. She forwarded the email to Mr McGuinness with the words "deep breaths…" as the only text in the email. She then printed it out and put the print on the file. She replied to Mr Rose that she was "a bit surprised (and aghast!)" at the addition of the interest but would forward it to Mr McGuinness.

112. Mr McGuinness responded to Miss Francis the same day saying that if the interest was not deducted he would claim damages for breach of contract in relation to phase 1. The chain of emails comprising his reply, Miss Francis's "deep breaths…" email and Mr Rose's original email were then printed out the next day (15th March) and placed on Miss Francis's file. However, in this print the words "deep breaths …" were omitted from Miss Francis's email to Mr McGuinness, so the text of the print of that email was blank. Mr Hubble suggested that Miss Francis removed these words, and that this doctoring of emails (something which she is said to have done again later in relation to another email) shows the levels to which she was capable of stooping.

113. Miss Francis had no recollection of performing this act of deletion. She did not even accept that she did it, or must have done it. She could therefore not volunteer an actual explanation. She suggested that she might have deleted them because she was concerned that Mr Rose might see them and that they looked unprofessional, though she could not suggest how Mr Rose might have seen this piece of paper. Mr Hubble suggested that she deleted them because they would look unprofessional if someone

else in CHH looked at them; Miss Francis doubted that that could have been the explanation.

114. In his final submissions Mr Seitler suggested that Mr McGuinness deleted the words before he sent his email back to Miss Francis. While that is theoretically and technically possible, Mr Seitler did not suggest any reason why Mr McGuinness might have done that. He merely suggested that he was more likely to have done it than Miss Francis, who had already put on file a print of her email without the words deleted.

115. I have first to find who deleted the words. It must have been either Mr McGuinness or Miss Francis. On balance (slightly) it was probably the latter. It is known from later events that she did such things, and it is not apparent why Mr McGuinness would remove them. It might in theory be that he blind-copied a third party with the email exchange and did not want that person to see Miss Francis's remarks, but that is no more than speculation. The explanation is much less clear, though. Mr Hubble's suggestion is not particularly plausible bearing in mind that Miss Francis had already put on file her original email with the "deep breath" words still there. What I think can be said is that whatever the explanation is it is not sinister and, if it was done by Miss Francis, it does not demonstrate her to be a particularly clever plotter (which she would have to be to make good some of Mr Hubble's suggestions about her later conduct). Why would she delete words from a print of an email when she had already generated a print of the earlier email with those words in it? Mr Hubble's submissions sought to make her out to be evasive in respect of this issue. I disagree. At most I consider her evidence made her out to be puzzled and at worst the deletion was misguided. I do not consider that this incident demonstrates Miss Francis to be a person capable of the dishonesty sought to be attributed to her.

The first lie – "no instructions"

116. On 26th September 2006 Mr Rose, the seller's solicitor asked what the current position was in relation to mortgage finance and that completion would be able to take place on 6th October. Miss Francis replied on 26th September:

> "I have sent the engrossment leases to our client for signature. However, I have not as yet had final instructions with regard to mortgage finance. As soon as I hear further from my client I will of course let you know."

117. Mr Hubble used this email as the basis of the first (chronologically speaking) of a number of occasions on which Miss Francis is said to have deliberately lied or embellished in correspondence in order to gain a benefit (usually time) for her client. This was said in final submissions to be a lie because she had had, to her knowledge,

no "instructions" on the point. In cross-examination it was suggested that the use of the word "final" suggested that things were more advanced than they were, and was used to gain time for her client.

118. I reject this criticism for the following reasons.

119. On 1st September Miss Francis had emailed her client, confirming that she was now to assist with completion and asked him:

> "Is there any word on who the lenders will be as yet?"

120. Mr McGuinness's reply came on 3rd September:

> "I am still unsure as to who the lender will be but I will know more this week."

121. So she had received some instructions - her client had instructed her he was unsure about the identity of the lender, impliedly suggesting that there were candidates (unspecified), and that she could expect greater clarity later in the week.

122. Mr Rose pursued the question of the funder on 6th September, asking:

> "What is the position with regards to your Client's funding, have solicitors been instructed on behalf of the Funder, and have there been any further queries raised in respect of which replies are required from this firm."

123. Miss Francis responded on 7th September:

> "I am still awaiting confirmation of mortgage offers from our client in relation to the remaining units, but please send engrossment leases as soon as is convenient."

124. That is a straightforward statement of the position, and no complaint was made about that formulation.

125. Mr Rose chased the position again on 26th September, in a letter to which Miss Francis's challenged email was a response:

> "As completion is in fact only a week and a half away, can you please confirm the current position with regard to mortgage finance, and that the necessary arrangements will be made to ensure that completions take place in accordance with the terms of the contract."

126. Miss Francis then replied to that in the terms which Mr Hubble describes as an "unjustifiable embellishment" (by which he meant a lie, according to the rest of the relevant part of his skeleton argument).

127. It seems to me that, in that context, Miss Francis's statement is not even an embellishment, let alone a lie. It was a re-statement, in different terms, of what she had said on 7th September. She was anticipating clear instructions on the point, and it is not apparent to me why she should not have thought that those were going to be final. Mr Hubble's suggestion that she was deliberately trying to give the impression that things were farther advanced than they were attributed too much significance to the expression "final instructions", and even if that were one of the possible effects of the use of those words I consider that to attribute to Miss Francis the intention to exaggerate in that respect, with the concomitant assessment that that would get her client more time than some other formulation, and to suggest that she deliberately lied in that respect and to that end, is to attribute to her more guile than I consider she possessed. She was merely using the form of words that came to hand to describe the situation as she saw it and the use of the words was bona fide. Even if Mr Hubble is right in saying that she had not had anything previously amounting to "instructions" I do not think that Miss Francis intended to mislead or to cheat by using the words she used. She did not know of any falsity involved in their use.

The second lie - changing funder

128. This is said to have been a repeated lie. On 6th October 2006 Miss Francis emailed Mr Rose and said:

> "…Due to the conditions of some of the first phase of flats [Mr McGuinness] has been unable to tenant some of the properties for the first month and thus is having to find alternative funds to finance the purchase of the second phase of the flats."

The reference to alternative funds (and therefore an alternative funder) is said to have been a lie because the inability to tenant the properties did not generate the need to change funder.

129. On 11th October Miss Francis again wrote to Mr Rose:

> "It has been a direct result of these problems [viz the building defects and the failure of the vendor to respond to them] that he has been unable to procure funding to complete on the second phase of 38 flats as he has been unable to tenant them all and has been forced to seek alternative funding."

130. This is said to be the same lie. Both lies are said to have been told in order to buy her client more time - it was a way of justifying the delay and persuading the vendor that he was doing what he could to compete, whereas the truth was that he was not seeking some sort of alternative funding for that reason, or at all.

131. Pressed by me, Mr Hubble put two alternative cases as to the genesis of the lie - until I required him to do so he had not put a case on the genesis. His first alternative (and presumably his primary case) was that Miss Francis told the lie because she had had a prior discussion with Mr McGuinness and she agreed to use the concept of alternative funding as a means for getting more time out of Mr Rose. It must logically follow from the fact that he says Miss Francis lied that she reached that agreement knowing that what she was to say was not true. His alternative case was that she did it of her own volition. Miss Francis could remember no conversation with Mr McGuinness and could not recall being told to use the wording she used; she did not believe she was told that.

132. Mr Seitler submitted that on the facts there was an alternative funder and no lie; that Miss Francis had no motive for telling such a lie and cannot have thought it would do any good; and that uncertainty about her answers, relied on by Mr Hubble as showing implausible answers, was a sign of caution in dealing with this matter after almost 10 years.

133. Once again I acquit Miss Francis of the lie, for the following reasons.

134. This is yet another aspect of the case which is bedevilled by the complete and understandable absence of detailed recollection on the part of Miss Francis. The position has to be pieced together so far as possible from the documents. On 1st

September Miss Francis was asking Mr McGuinness who the lender was, and he was unable to tell her on 3rd September (see above). On 8th September 2006 Mr McGuinness received an offer of funding from Britannia but it is not apparent that that offer letter was provided to CHH at that time (email traffic shows it was provided later). On 26 September Miss Francis sent the letter which I have found not to constitute the First Lie. There then followed some correspondence about snagging and on 3rd October Miss Francis wrote to Mr Rose, on the instructions of Mr McGuinness, saying that in the light of the condition of the units already purchased her client was not prepared to complete on 6th October. Mr Rose responded the next day to the effect that he had advised his clients that Mr McGuinness was not entitled to delay completion because of snagging works. The next day Miss Francis passed this response on to Mr McGuinness, told him that the state of the phase 1 properties would not justify not completing phase 2, asked him if he wanted the matter passed to the Property Dispute Resolution department for a more detailed view as to whether he could resist completion, and asked him how he would like to progress the matter.

135. On 6th October Mr Rose wrote again about snagging after a site meeting that had apparently taken place the day before. He said that he had been told by his client's agents that Mr McGuinness was financing the purchase through Allied Irish. It is not apparent that Miss Francis had been told that by anyone before then. She immediately forwarded the email to Mr McGuinness and asked him whether he was intending to complete and if so whether he could give her details of the lender and the lender's solicitors.

136. Mr McGuinness responded about 3 hours later asking Miss Francis to request an extension until the end of October. He referred to the defects and said:

> "I require more time to get comparables on the top half in order to support the lower half but clearly if the building was uninhabitable for the best part of 1 month we require more time to complete the lower half. I have Allied Irish in place as the lender and it is not dependent upon any other transactions and I am currently finalising valuations with the valuer. It is our intention to complete and we are still moving forward however the delay is attributable to building issues and I would hope that the extension can be agreed so we can all move forward towards completion. I would hope that there be understanding and agreement so that we do not need to go down a litigation route to delay completion."

137. Just over one hour after that email, at 14:36 on 6th October, Miss Francis sent the first of the two emails said to constitute the Second Lie. The opening words of the email are not set out above. They are:

> "Thank you for your email, I have now spoken to my client who has asked me to re-iterate that he is still moving towards completion on these units."

The rest of the relevant email is set out above.

138. Mr Seitler invites me to find that in the conversation which Miss Francis referred to in those opening words Mr McGuinness must have told Miss Francis about Britannia's (Masnol's) offer and that that is the alternative lender. If that is right then he submits that there was an alternative lender. That means there was no lie. He relies on the fact that further emails are said to demonstrate a continuing confusion between Britannia (Masnol) and AIB as lender.

139. The first problem with that is that Miss Francis says in her witness statement (at paragraph 31) that it was on 25th October that she first knew of Masnol as a potential lender. That is probably a matter of inference rather than recollection, and could be wrong, because most of her evidence involves putting together facts by reference to the documents, not from recollection. However, that was her evidence. She herself did not suggest in oral evidence that she had been told about Britannia on 6th October. Furthermore, Mr Seitler's suggestion does not explain how she came to describe Britannia as an alternative lender whose proposal needed time to work through. So that limited rationale does not quite work.

140. Miss Francis said that she would not have said in the email that she had spoken to her client unless she had. I accept that evidence. I think it likely, in the light of that, that what followed in the letter flowed at least in part from that conversation. That is both because the letter impliedly suggests that what is said flows from instructions given, and because the letter is not a regurgitation of the preceding email from her client.

141. So something happened in that conversation which resulted in, or contributed to, the letter. On Mr Hubble's primary case Mr McGuinness told Miss Francis to lie and she agreed to do so. I do not think that that is probable. First, I think it unlikely Miss Francis would be sufficiently motivated to undertake the lie - see above. Second, it is a strange and clumsy lie. It refers to an inability to let phase 1 properties and "thus" (ie therefore) Mr McGuinness is having to find alternative funds. That is illogical and does not make sense. Third, if Mr McGuinness and Miss Francis were hatching a plot the alleged result is an unlikely chick. Presumably on this footing Mr McGuinness and Miss Francis were trying to hatch something which would be more convincing in persuading Mr Rose to give Mr McGuinness time than a threat of litigation arising out of delay, contemplated in the preceding email. Why would it be thought that a fictitious alternative lender would achieve that? They must also have calculated that

Mr Rose would be more likely to give time if he thought there was an alternative lender than if he was told that more time was needed to satisfy the existing lender (AIB, whom Mr Rose knew about), as anticipated by Mr McGuinness's preceding email. That is an unlikely calculation, in my view.

142. I therefore think that the conspiracy theory is highly improbable. I consider that the idea that Miss Francis lied off her own bat is even more improbable. On this footing she must have worked out, in an hour, that if she sent an email threatening litigation, or an email asking for time because Mr McGuinness was working with Allied Irish, then Mr Rose would be less likely to allow Mr McGuinness until the end of October to complete than the words she used. That is pretty improbable even without taking into account Miss Francis's demeanour and character as they appear in the witness box. Taking the latter factors into account it becomes fanciful. I simply do not accept that she would think like that. That is not in her character, she had no reason to do it, and furthermore if she were that devious she would have written a better worded email than the one she wrote.

143. I therefore consider those explanations to be well on the wrong side of the improbable/probable divide for the purposes of Mr Hubble. I think that the real explanation lies in inelegancy of expression in a relatively inexperienced solicitor who was overwhelmed with work and who lacked supervision and support (which she admitted she did). It is impossible to recreate her thought processes, but it seems to me to be most likely that she misunderstood some of what Mr McGuinness told her on the phone, when she combined it with his previous email, and failed to express herself clearly when she referred to finding "alternative funds". She may have meant that he was having to renegotiate his existing funding arrangements with his existing funder - it may be significant that she uses the word "funds" not "funder". Her oral evidence on the overall point was not clear. It seemed that she did not always follow the logic of the attack on her. I think that that was the genuine confusion of an innocent person who had mis-spoken over 9 years ago rather than the calculated misleading approach of a person covering up her misdeeds. I find that she did not lie either in the witness box or in the email.

144. Events then moved on to the second email. Mr Rose was unmoved by the 6th October email and on 11th October he indicated his client would serve a notice to complete. Miss Francis immediately said she would pass the matter on to Mr McGuinness and did so, asking for instructions. She has not recorded the receipt of instructions, but within an hour of asking for them she sent the email of 11th October. I think it highly unlikely that she sent this email without instructions, though this time the email does not recite a conversation with Mr McGuinness. This email has its own lack of clarity. It says that Mr McGuinness has been unable to complete on the second phase "as he has been unable to tenant them all and has been forced to seek alternative funding". This is different to the first email, but has its own logical problems. He could not start tenanting the second phase before completion. If it is a lie it is an unnecessarily clumsy one. Contriving the lie requires a sophistication of

approach which is belied by the expression of it. Again, I think she was confused, not mendacious. Again, it may be significant that she refers to "funding" and not "funder". But once more, I consider the sinister explanations are simply not probable. Miss Francis's confusion, misunderstanding and mis-expression are much more likely.

The third lie - statements about a facility

145. I have adopted this description rather than Mr Hubble's because Mr Hubble's does not quite encapsulate the fact that he in fact relies on 4 lies in one email. That email is an email of 27th October from Miss Francis to Mr Rose, timed at 9.56am. In that email she said:

> "We are holding a facility letter from Britannia Commercial Lending covering half the properties. The remaining properties will be covered by Allied Irish. Their offer is still being finalised because of the delay in obtaining valuations but I understand that all the valuers requests have now been dealt with and they are reporting to the bank. As soon as this is in place, a formal facility letter will be issued covering the remaining flats."

146. This is said to contain 4 lies:

> (i) Miss Francis did not hold a facility letter from Britannia (Masnol). All she held was an indicative offer letter.
> (ii) Miss Francis "had no idea whether the Masnol offer covered half the properties" (to quote Mr Hubble's written submissions).
> (iii) Miss Francis twisted the facts when she made her reference to valuers' requests when compared to what Mr McGuinness had told her.
> (iv) There was no basis for her assertion that a formal facility letter would be issued covering the remainder of the flats when the other matters were in place.

147. To this Mr Hubble adds a further act of misleading by Miss Francis in a subsequent conversation when she is said to have deliberately misled Mr Rose about the existence of a Masnol facility letter. There is no direct evidence of the statement which forms this lie; Mr Hubble invites an inference from a letter from Mr Rose.

148. The statement in the email about the facility letter is wrong. The most Mr McGuinness had was an indicative offer from Masnol dated 8th September, albeit it was detailed in its terms. It made it plain on its face that it was not a contractual

document and made it clear that it was only the basis on which the lender would be prepared to progress a credit application. Mr Hubble is therefore entitled to start from that position of falsity.

149. Mr Hubble's challenges on this point have to be put in their context. On 26th October Mr Rose wrote to Miss Francis:

> "2. In order to consider further your client's request for additional time, we need to know precisely where your client is up to in terms of the funding arrangements. Has a formal facility letter been issued and if so, please supply a copy. If not, then there should be indicative heads of terms, which again supply and give an indication of when you expect to receive formal credit committee approval to enable the matter to proceed.
>
> 3. Please also clarify the position with regard to valuation and whether these flats have yet been valued by the lender's valuer.
>
> As you will understand, it is only by the provision of detailed documentation that my clients will be able to take an informed decision of the extent (if at all) to which they are willing to allow further time. As I have said, I am due to speak with my client after lunch today, and the sooner that you can come back to me with the detailed information requested, the better for all concerned."

150. Miss Francis forwarded that email to her client twenty minutes later, and copied it to his brother Dean. She said:

> "I think you may be out of the country at the moment so I have copied in Dean in case he is able to assist. Please see email below. Please can you let me have details of where you are up to with the valuations for the remaining flats? If you have facility letters please let me have copies so I can forward them to Jonathan Rose, or alternatively provide the developer with them direct.
>
> Please also up date me on the progress with the valuations. In order to prevent Jonathan Rose from preparing to draw down on the exchange deposit bonds we will need to satisfy the

> developer that drawdown of funds is imminent. Please let me have any information to go back to him with.
>
> I am out of the office from twelve noon tomorrow but in all day today if you need me."

151. Mr McGuinness responded at 2:26 am the next day:

> "Hi Helen,
>
> we have funding offers from 2 lenders:
>
> a) Britannia (see attached)
>
> b) Allied Irish. They will not do an offer until they receive vals in draft.
>
> The valuer has requested additional comps so I have provided them and am awaiting an answer. We will proceed but as I said previously, I think we are 3 weeks out. Allied Irish are who will want to proceed with as they are our main funder and the terms are better."

152. At 9:32am Miss Francis wrote to Mr McGuinness:

> "Spencer/Dean,
>
> Can I clarify how many of the properties the Britannia loan covers?"

153. She did not get a written response before she sent the email complained of at 9:56am the same day (27th October). The written response from Mr McGuinness came at 13:40:

> "Its all of them."

154. The first point arising out of all this is Miss Francis's use of the expression "facility letter". It was not accurate. She accepts this. All Mr McGuinness had was a letter of offer, which she had been sent shortly before. In her oral evidence she said that she understood the distinction now but might not have understood it at the time. This was despite the fact that, as pointed out to her, Mr Rose's previous letter had drawn a distinction between facility letters and offers. As with most of her evidence, Miss Francis had no recollection that could help with establishing why she used the words she used. She asserted that she would not have said something that she knew to be wrong, and reconstructed that she must have thought that the Britannia offer letter was a facility letter. She was busy and may have looked too hastily. She noted that she had written the word "Offer" on the letter (actually she had written "Offer now revised") but that does not help her because that might be thought to be different from a facility letter.

155. This point is a troubling point because one would have thought that Miss Francis might well have known the difference between a facility letter and an indicative offer. The terms of her own emails demonstrate that she knew there was a distinction between an "offer" and a facility letter. However, it remains possible that she thought the indicative offer was more final than it was. It did contain a lot of terms which, at a glance, looked like formal contractual terms.

156. As always in relation to Miss Francis, this is said to be another lie motivated by a desire to keep Mr Rose's client at bay and give Mr McGuinness more time, which is itself said to be motivated by Miss Francis's desire to further her client's interests even at the expense of the truth. That motive remains a problem for Mr Hubble for the reasons appearing above, but everything has to be looked at together. Before considering the probabilities in relation to this particular allegation of mendacity the "lie" needs to be put into the context of the rest of the letter.

157. The statement about the facility letter is only half of the relevant sentence. The second half is the statement about the number of properties covered by the Britannia loan. This statement is also wrong. There are a number of curiosities about it. First it is not clear why Miss Francis said anything about numbers or 2 lenders at all. She cannot have got that idea from Mr Rose's preceding email because it assumed one lender. Second, unless there is some fraudulent motive, it is odd that Miss Francis would say anything about it at that point, bearing in mind that she had asked Mr McGuinness and Dean McGuinness how many were covered just 24 minutes before and did not get an answer from Mr McGuinness until 4 hours later (which was inconsistent with 2 lenders lending on half the flats each, because Mr McGuinness said the Britannia offer covered all of them). Third it is not clear where she got the idea that it was a half unless, as she surmised, she thought the loans were spread equally between Britannia and Allied Irish. She thinks she must have got it from somewhere, but could not suggest where. Mr Seitler suggested that she may well

have spoken to Dean McGuinness and been told by him. I do not think that that is particularly likely. There was very little time between her email to him and her email to Mr Rose (some of which time will have been spent drafting it), and it is not at all apparent why Dean McGuinness would have thought the borrowing was split half and half.

158. There is one further oddity which was not relied on by Mr Hubble. It was not readily apparent from the Britannia offer letter whether it covered all the properties or not, but it was reasonably clear from Mr McGuinness's email of 27th October that the Allied Irish borrowing was to cover all the properties. The letter says that Mr McGuinness preferred to go with Allied Irish, meaning for the whole of the loan. That makes it even odder that Miss Francis should say what she said about Britannia.

159. Mr Hubble did not actually suggest that the statement about half the borrowing was made with fraudulent intent. He went no further than suggesting that it was made without any idea that it was true - I suppose that it is an allegation of recklessness. But his theory was that this letter was written to keep Mr Rose at bay. The choice seems to me to be between the first sentence (in particular) being honest but careless or being dishonest. Looking at the whole of the first sentence, and putting it in context, and in the context of Miss Francis and her ability and work pressure at the time, I have reached the clear conclusion that confusion and a bit of carelessness, and ignorance of terminology (facility letters and offers) is the right explanation. Mr Hubble's theory, as I have said, is that the letter was written to spin things out for Mr McGuinness. If that were right then this would be a very odd letter to write. One has to assume some sort of ability and propensity to scheme on the part of Miss Francis. Assuming that, why would she say anything about Britannia at all? Why not tell Mr Rose that Allied Irish was going to be the lender (which she had already been told by Mr McGuinness) and point out where they had got to (which she in fact did in relation to what she said was half the properties)? It might be said that she mentioned Britannia because she had what she thought was a facility letter from them and Mr Rose had been asking about facility letters. But the theory of the fraud is that she did not have a facility letter from Britannia, and knew that. Furthermore, she would know that Mr Rose had actually asked to see the facility letter, so any fraud could be readily penetrated in one further email when Mr Rose asked to see it (which he might have done, for all Miss Francis knew, and which he in fact did the next day). So in this putative fraud Miss Francis realises that she needs to present the matter as being farther on than it is; accurately summarises its state in relation to some properties; makes up a split between lenders which she knows is wrong; and then attributes half the lending to a lender whom she dishonestly says has provided a facility letter knowing that it has not, but knowing that the vendor is going to want to see one and she cannot provide it. All this is to buy Mr McGuinness a bit more time.

160. That sort of constructed fraud is highly implausible. It is much more likely that Miss Francis was confused, and I think that that confusion is demonstrated by her reference to half the properties being covered by each loan. It is more likely that she inferred

this from the presence of two lenders, mis-reading her client's letter. It is theoretically possible that she picked up the idea from someone else, though her own confusion is more likely. This email is not the cleverly constructed lie of a fraudster who must be capable of some level of calculation; it is the email of a confused junior solicitor. Insofar as she cannot explain it all, and there remains a bit of a mystery about it, that is because of the lapse of time since the events in question.

161. That deals with the first and second of the allegedly false and mendacious elements. I turn to the third falsity, which turns on the words:

> "The offer is still being finalised because of the delay in obtaining valuations but I understand that all the valuers requests have now been dealt with and they are reporting to the bank."

162. This is said to be a "twisting" (Mr Hubble's word) of what Mr McGuinness had said in his earlier email:

> "The valuers requested additional comps so I have provided them and am awaiting an answer."

163. I consider this to be a very unfair allegation. One has to read the words from Mr McGuinness's email with the preceding words:

> "b) Allied Irish. They will not do an offer until they receive vals in draft."

So the bank was waiting on the valuers. The valuers had been waiting on additional comparables, which Mr McGuinness had provided. Having done so, the valuers had what they needed and presumably they would report to the bank (in draft or final form). When that was done Mr McGuinness expected his offer (see opening words of the email). Miss Francis's words are another way of describing that process. Allied Irish had not made an offer as they had not obtained valuations ("because of the delay in obtaining valuations)"; the valuers' requests have been dealt with (Mr McGuinness had provided additional comparables as requested) and the valuers would therefore report to the bank (Mr McGuinness was awaiting an answer from the bank, after their report). There is nothing "twisting" in Miss Francis's wording at all.

164. The fourth alleged falsity in Miss Francis's email is said to be her assertion that "a formal facility letter will be issued covering the remaining flats". Mr Hubble submitted that there was no basis for that assertion. His skeleton argument described it as a "lie", meaning that Miss Francis knew it was false or was reckless as to its falsity.

165. It is true that anyone dealing with Mr Rose would have known that he was keen to see a facility letter as evidence of funding, so in bald terms it might be thought that a promise of a facility letter would be something that would help to keep him and his client onside for longer. To that extent the statement about the likelihood of a facility letter could be calculated to achieve the result which Mr Hubble's submissions seek to link to the intention of Miss Francis. However, I can see no reason why Miss Francis would not have held the bona fide belief that a facility letter, either in her terms (if that is what she thought an indicative offer was) or in strict terms would be forthcoming once the valuers had performed. That was the sentiment expressed by her client, or at least it would be a plausible reading of his email so to view it. To read this sentence as another calculated act of a calculating fraudulent solicitor, bearing in mind who was writing it and the sort of person that she appears to be, is to vest any inaccuracy or over-statement with far too much significance.

166. It follows, therefore, that Mr Hubble's attack on credibility based on this letter fails.

167. Last under this head is an allegedly dishonest statement made by Miss Francis which it is said should be inferred from an email of Mr Rose sent at 14:22 on 27th October. In that email, which refers to a recent conversation between him and Miss Francis, he said:

> "3. I was somewhat surprised to learn that the offer letter that you hold from Britannia is for a sum in excess of £12m and was granted on 9th September. Whilst I understand that your client prefers to hold out for what he perceives will be better terms from Allied Irish, the fact remains that no formal offer letter is apparently in place, nor is there any indication of when it will be.
>
> 4. What we now need is to see a copy of the Britannia facility letter, and to hear from your client by way of concrete proposals as to what is intended by him to remedy the continuing breaches…"

168. In his written final submissions Mr Hubble invited the "obvious inference… that Miss Francis knew full well by the end of her conversation with Mr Rose that she did not hold a facility letter, (and had misled him again to buy time for Mr McGuinness, which she denied)."

169. It is not apparent from Mr Hubble's final submissions, or from his cross-examination of Miss Francis, how she is said to have misled Mr Rose in this conversation. His cross-examination tended more to rely on this conversation as demonstrating that she knew full well what the difference was between an indicative offer and a facility letter. There was no direct evidence as to what was said in this conversation. Miss Francis could not remember it. I am not prepared to infer any positive act of misleading in those circumstances. Accordingly, Mr Hubble's point fails.

The fourth lie - the facility letter covers all the units

170. By February 2007 the lender for phase 2 had been changed to the Bank of Scotland but that bank was not going to fund quite all of the properties (8 were being funded by retail lenders). Miss Francis knew this. On 7th February Mr Rose pressed for a sight of the facility letter for financing phase 2, and did so again on 9th February. On 12th February Miss Francis was sent an approved (but not issued) version of the facility letter by the bank. She obviously realised that it did not fund 8 of the properties and emailed Mr McGuinness immediately to ask if that was correct. She asked if he was happy to have the letter forwarded to Mr Rose. Mr McGuinness replied within 5 minutes confirming that 8 flats would be funded through retail mortgages and saying:

> "If you could confirm that you have been confirmed by the banks solicitors that they are in receipt of the offer that should suffice. I do not want them to have a copy as it is not relevant to them for the purposes of completion."

171. The next day Miss Francis replied to Mr Rose:

> "I have received an approved version of a facility letter for Etra Limited and am informed by the Bank of Scotland's solicitors that the formal offer is being issued today. I will up date you once I hear further."

172. Etra Limited was one of Mr McGuinness's properties in whose name he was contemplating taking the phase 2 properties. Miss Francis was accused by Mr Hubble of misrepresenting the position in this email in that she gave the impression that the

facility letter covered all the properties, and not all bar 8. This was said to have been a knowing representation in order to gain time for her client, who was still being pressed to complete.

173. On 19th February Mr Rose asked yet again for the facility letter to be forwarded as soon as possible. He said that his client did not agree "at that stage" to a formal assignment of the contract to Etra Ltd, but in anticipation that it might happen he had replacement pages available for each lease to cater for that event. He pressed again on 20th February and on the same day (within about an hour) Miss Francis responded:

> "Thank you for your email. I am now in receipt of a copy of the offer letter. The offer relates to units 109 – 602 which are being taken in the name of Etra Limited. I understand that we will not be assigning the leases to Etra until completion but I would be grateful if you could forward me the engrossment pages by email so I can forward these on to Etra for signing to save a last-minute scramble.
>
> I understand that 101– 108 are to remain in Spencer's name and be dealt with under a separate facility."

This was described by Mr Hubble as "coming clean".

174. The claimant's case is that Miss Francis deliberately allowed Mr Rose to acquire the impression that the facility letter covered all the properties in her first email, and she understood that he had gained that impression because of what he said in his email of 19th February. In her cross-examination she denied intending to give that impression, though she could see how it might have happened. She said that she was not sure she would have realised his assumption.

175. I think it is right that Miss Francis's email probably gave the impression, and therefore represented, that the facility letter covered all the properties. In his written final submissions Mr Hubble acknowledged that that misrepresentation might be considered inadvertent and so honest. However, he said that in the light of the previous lies, such an explanation is very unlikely. On this reasoning his case on the representation fails. My finding in respect of the previous lies is that there were none. Miss Francis had behaved honestly. There is no reason to suppose that she was behaving any differently in the present instance.

176. Indeed, there are positive reasons for supposing that she wished to behave conscientiously. She did not have instructions to forward the facility letter and so did not do so. There was nothing wrong in that. However, she did not comply with her client's instructions when she formulated her email of 13th February. Mr McGuinness had told her to say that the bank's solicitors had confirmed that they (i.e. the bank's solicitors) were in receipt of the offer. If she had wanted to be evasive, and did not mind telling untruths, she could have said that. However, she did not say that. She told the truth. She said that she had received an approved version of a facility letter. That is a badge of honesty.

177. I therefore find that Miss Francis was not dishonest in her email of 13th of February. She did not intend to mislead, or thereafter to leave Mr Rose under a false impression. The allegation to the contrary runs up against the additional difficulty that it is not particularly plausible that the misrepresentation alleged against her would be seen by her as having any useful effect. Mr Hubble submitted that it gained her client a week. It is not apparent to me that anything would have happened a week earlier than it did, or that somehow the transaction would have been imperilled, if she had informed Mr Rose of the 8 retail mortgages one week earlier than she did. Nor do I think it at all likely that those sort of considerations would have played any part in her thinking.

178. The claim to the fourth lie therefore fails.

The fifth lie - the fraudulent misrepresentation about construction effects in answer 3.6

179. This is the only operative fraudulent misrepresentation by Miss Francis which is still relied on by the claimant to sustain its claim in fraud (though it still has its conspiracy claim). All the other allegations based on what she said are credibility issues only. It therefore assumes a particular importance. However, since it is not the last in the chain of lies alleged by the claimant, and since it is particularly important to judge this one in the context of findings about Miss Francis's credibility arising out of the rest of her conduct, I shall postpone a consideration of it until I have considered the other specific attacks on Miss Francis's veracity and credibility.

The sixth lie - waiting to speak to Heatons/finalised offer

180. At 15:58 on 2nd April Mr Murray (the solicitor for the receivers and West Bromwich) emailed Mr Francis about phase 2 saying:

> "Thanks Helen. Has a definite loan offer now been produced and accepted by your client. All we have recently received is

> indicative terms. Also have they confirmed the 4th April as yet feasible?"

At 17:01, Miss Francis replied:

> "I am still chasing to speak to the fee earner [at Heatons] dealing. I confirm we have received a finalised offer for the re-mortgage. I have sent a title bundle relating to the units to the lender's solicitors and await their comments.
>
> I realise the world and its dog will be trying to draw down before the Easter break but I will use my best efforts to reach this deadline and will be asking them to do the same!"

181. This is said by the claimant to contain two lies. First, Miss Francis is said to have already spoken to the fee earner and found out that Heatons were not doing any work until they received an undertaking as to their fees from Mr McGuinness, so she was not, at the time of writing to Mr Murray, chasing to speak to the fee earner; and second, Miss Francis did not have a finalised offer. Again, the motive is said to be to keep the other side (this time Mr Murray) at bay, with an indication that the re-mortgage was imminent.

182. So far as the first lie is concerned, Miss Francis had no recollection of writing the email but suggested she might still have been waiting to speak to Heatons even though she had spoken to them very recently. She was clear that she would not have said something that was untrue.

183. The full context of this email is as follows. West Bromwich had been threatening proceedings, though Miss Francis was not dealing with that aspect of the matter. Miss Francis was obviously trying to progress the re-mortgage. On 2nd April at 12:43 she wrote to Mr Duncan:

> "Further to this matter, I confirm we are now in receipt of the deeds held by your client in relation to the above properties to enable us to proceed with the re-mortgage.
>
> I have requested funds for this Thursday 4 April and am waiting to hear from the new lenders solicitors whether this will be feasible. The fee earner dealing has been unavailable this

> morning but I will endeavour to contact her this afternoon to ascertain what outstanding matters (if any) remain."

184. The reference to 4th April was a mistake - Thursday was the 5th. It was the last working day before Easter. Mr Murray responded to that in his email of 15:58 (above). Before Miss Francis sent her allegedly offending email she wrote to her client at 16:43:

> "I have just spoken to Heatons who have effectively downed tools' until they receive an undertaking from us that we are holding funds to cover their fees of £20,000 plus VAT (£23,500) on account. They will have at least 4 or so hours work to do in going through the title papers I have sent them plus time to consider the tenancy agreements once you send these but they will not start this until they receive the undertaking/the money.
>
> Are you able to free up £23,500?"

185. Mr McGuinness responded at 17:00:

> "I will speak to Dean. I am trying to bring everything in at once before Thursday as there is a lot going on so in short, yes I can free it up but I will need to make sure everything is in place. Any word on the registrations for Disco Doc? I have about 500k in total in SDLT retention all over the place and it would be good for try to free up some of that? When do Heaton's expect registration back? Could you confirm that they have sent off the second lot for registration please? Are you able to use the funds that you have on account in order to give the undertaking?"

186. Miss Francis then wrote her email to Mr Murray one minute later.

187. Mr Seitler suggested that the email traffic suggested that Miss Francis was indeed waiting to have another conversation with Heatons as a result of Mr McGuinness's email to her. I doubt if that is correct. It is actually open to question whether she had received Mr McGuinness's email before she sent hers. Hers was timed as an outgoing email at 17:01. It will have taken a minute or two to compose and check. It is not easy to see how she can have received Mr McGuinness's timed at one minute earlier,

read it, assimilated it to the necessary extent and then have written and despatched hers, all in one minute. Furthermore, the point about SDLT and Discovery Dock (another of Mr McGuinness's developments) is a different matter to that which concerned Mr Murray. If she was waiting to speak to Heatons about that then she would not need to mention that to Mr Murray.

188. I do think that on this occasion Ms Francis probably said something that was not true. But I do not think that this demonstrates a propensity to be dishonest in her client's interest. The context in which the remark was made was one in which Miss Francis was trying to find out whether completion on 5th April was going to be feasible. Her email of 12:43 said she was trying to find that out; Mr Murray then asked her whether the solicitors (Heatons) had confirmed whether it was; and Heatons do not seem to have answered that question - they merely said they were not working on the matter until they had an undertaking in respect of their costs. It was therefore still an open question. There were not a lot of hours work to be done by Heatons (as Miss Francis understood it - see her email to her client) so it might still have been possible if Mr McGuinness had been able to back an undertaking quickly enough. So Miss Francis was going to have to go back with the question when she was in a position to give the undertaking.

189. In that context her answer was wrong, but in my view the error was born of carelessness rather than dishonesty. By her own admission in the witness box she did not want to tell Mr Murray that Heatons had downed tools, and she did not have to. I find that she hoped to be able to persuade them to take them up again shortly, and did not want to give an answer that would close that off. In writing her email she chose an erroneous form of words. She could equally well have said that she did not know, and would have to have a further discussion with Heatons. That would have served her purpose and not been dishonest. All she has done is to say that she has tried to have the conversation and has hitherto failed instead of saying that she was going to have one. That was wrong, and might even have been cavalier, but I do not think that it betokens a generally dishonest approach.

190. This view is, of course, a reconstruction. Miss Francis did not offer this explanation. But having (understandably) no actual recollection reconstruction is all one has left. Mr Hubble reconstructs a fraud. I prefer an alternative reconstruction.

191. The second alleged lie is the statement about the loan offer. The actual state of play was that on 22nd March 2007 Miss Francis had received from Heatons a letter stating that they were acting for Masnol who were making available a facility of £11,400,000 to Mr McGuinness. It enclosed some preliminary inquiries, required an undertaking as to fees and asked for copies of the ASTs affecting phase 1. It referred to its being a condition of the loan that there be a blocked rent account. On 22nd March she referred to this letter in an email to her client and said:

> "I assume you are no longer pursuing this offer but please confirm."

Mr McGuinness confirmed that:

> "This offer is in respect to the re-mortgage away from West Bromwich …"

192. She had herself not received a form of loan offer (though Mr McGuinness had), and her evidence was that, reconstructing, she would have thought that the letter from Heatons was an indication that an offer was finalised. She reconstructed that that is what she would have had in mind when she wrote the letter.

193. Miss Francis's statement in the letter is wrong (as she herself acknowledged in the witness box). The relevant question in these proceedings is whether it is dishonest. Miss Francis has already demonstrated a confusion as to what are indicative offers and what are facility letters. Even given that confusion, it is odd that the solicitors' letter was thought by her to be sufficient evidence of a firm offer to justify the statement in the letter. It plainly was not. However, having considered her evidence in the round I find that when she made this statement she did not make it knowing it to be untrue, or being reckless as to its truth or falsity. She was confused (she may even have been confusing it with other offers, which she had seen, in relation to phase 2, though she did not suggest that in her evidence). She was careless; but I do not consider that she was dishonest, and I do not consider that this statement, even taken with the preceding inaccurate statement about waiting to contact Heatons, demonstrates a propensity to be dishonest in the interests of her client.

Seventh lie - no knowledge of tenancy arrangements

194. On 25th April Miss Alberici emailed Mr Francis telling her (amongst other things) what she needed in order to issue the title report. She said:

> "In order to issue the title report I need:
>
> 1. ASTs (I understand that these will be received here tomorrow morning);

> 2. Replies to CPSE1 and SLPIF. I will also (when I receive the ASTs) be sending you a schedule and asking you to confirm on headed paper that all the ASTs are in place and there are no rent arrears;…"

195. Miss Francis replied within three-quarters of an hour on the same day:

> "1. Please let me know if you do not receive ASTs tomorrow and I will chase.
>
> 2. I will chase up replies to enquiries, although please note we do not deal with the ASTs at all or the rental collection so I have no knowledge of the tenancy arrangements."

196. The ASTs are the assured shorthold tenancies affecting the properties in phase 1. The statements about them in response 2 are said to be false and a lie because at a meeting on 23rd March Mr McGuinness had told her that the receivers were collecting rent, and on 17th April Miss Francis wrote this to Mr McGuinness:

> "I have just spoken with Duncan Murray of Needham and James who has asked me to make you aware that if we do not supply details of the tenants by Friday then they will be instructing administrators to go round the individual flats to obtain details and will seek to recover the cost from you."

197. Mr McGuinness responded that he had given them the details. This correspondence is said to demonstrate that Miss Francis knew that the receivers were collecting rent and that they were threatening to attend flats to obtain details, and that in turn is said to make her response 2 false.

198. I reject this submission. The statement is not false, in its context and when properly read. Point 2 responds to Miss Alberici's warning that CHH were going to be asked to confirm that the ASTs were all in place and that there were no rent arrears. Miss Francis's response is to the effect that her firm was not going to be able to give that information and confirmation because they did not deal with the ASTs at all (which was true), that they did not deal with the rent collection (which was true) and that they had no knowledge of the tenancy arrangements which, in the context, was also true. The "arrangements" of which she spoke were the "arrangements" which Miss Alberici had asked about - whether the ASTs were in place and whether there were rental arrears. It did not comprise each and every bit of information which Miss

Francis (or others in her firm) might have had about the ASTs. It was the "arrangements" of which they would have known had they dealt with the ASTs as such or the rental collection. The bits and pieces of knowledge which Miss Francis is said to have had did not amount to "arrangements" for these purposes.

199. In the circumstances Miss Francis's response was perfectly proper and not false. It answered the point made. If that is wrong, and Miss Francis's knowledge of the two bits of information relied on by the claimants would be capable of amounting to "arrangements", I am quite satisfied on the evidence that she did not have them in mind when she wrote her email so as to make the email knowingly false.

200. This alleged lie is therefore no such thing. In fact I consider that the suggestion to the contrary comes perilously close to the sort of fraud allegation that could not be properly made by responsible lawyers.

Eighth/ninth lies - 24th April email to Mr Murray

201. On 24th April Miss Alberici emailed Miss Francis asking to have enquiries returned as soon as possible. She went on:

> "I will let you have the net advance figure before you go. In the meantime can you let me have the redemption figure (I need to pass this to my client) *and confirmation as to the use of the equity release (which I also need to pass to my client).*"

The italicised words were not italicised in the original. They are my marking of words which were removed when Miss Francis forwarded this email to Mr Murray on the same day.

202. Miss Francis was apparently a little puzzled by this question because she emailed back:

> "Can you confirm what you mean by confirmation of the equity release?"

Miss Alberici responded:

> "Thanks Helen – by equity release just really to what use Spencer will put the surplus monies from the advance after the current loans are redeemed."

203. 90 minutes later Miss Francis wrote to Mr Murray:

> "Further to this matter I attach an email from the new lenders solicitors FYI. My client is completing the CPSEs today and will send asap that I have not been able to let you have any completion figures just yet as Heatons need to complete their report.
>
> Please assure your clients that we are very close to completing on this and my instructions remain to proceed as quickly as possible to avoid any unnecessary expense on both our client's behalf.
>
> I will need to request a further redemption figure from your client as Heatons need an indicative figure of the loan amount without all of the additional costs of receivers etc.
>
> I have copied this email to my colleague Helen Glavin who will have conduct of the file from Friday 27 April but I will be coming back to you before then to up date you."

204. Below that there is reproduced, in the normal way, the first email in the above chain that Miss Alberici sent to her but without the words that I have italicised.

205. Mr Hubble relied heavily on this as being a good example of the dishonest lengths to which Miss Francis would go in order to aid her client's cause. It is said against her that the reference to equity release, if passed on to Mr Murray, would alert him and his clients to the possibility of an equity release and lead to their demanding that they got more out of the transaction. She is said to have appreciated that and that she therefore removed the reference to it from her email chain.

206. Miss Francis did not recall making this alteration, though she did not dispute that she did. Once again, she had to reconstruct why she thought she would have done it. She

said she deleted it because in her mind she thought the point was irrelevant. Her understanding was that there was not going to be any equity release (and she was, in essence, right about that) and that was why the words were irrelevant. She also said that her thought processes would not have worked in such a way as would have induced her to remove the words for the reasons suggested by Mr Hubble.

207. Miss Francis managed to identify another occasion when she had done the same thing in circumstances which are said to be innocuous. In points numbered 3 and 4 of her email of 25th April (see above, in which Miss Alberici wrote about the ASTs) Miss Alberici asked for a building regulations certificate (point 3) and sign off of a fire assessment (point 4). Miss Francis passed on the request (in her own words, not by forwarding the email) to Mr Rose, on 26th April, and at 11.59 he responded in an email which contained the sentence:

> "I refer to our recent email correspondence and look forward to hearing from you regarding the outstanding completion."

He then went on to answer the questions asked of him, in terms which do not matter. Miss Francis then forwarded Mr Rose's email, minus the sentence I have quoted, to Miss Alberici. She again explained that she must have omitted the words because they were irrelevant. Irrelevance was her only suggestion. Mr Hubble suggested a more sinister motive, namely that she wanted to avoid pointed questions as to why there were outstanding completions in relation to phase 2.

208. This behaviour on the part of Miss Francis requires very careful consideration. On her own admission it is unprofessional, but it is actually worse than that. If a solicitor forwards an email there is, in my view, an implied representation that the whole thing is copied. That is what the recipient is likely to think if there is no indication to the contrary. So Miss Francis was guilty of a misleading act when she sent the two emails referred to above.

209. This is relied on by Mr Hubble as a badge of dishonesty. It potentially has that quality. However, Miss Francis's explanation is inconsistent with dishonesty and has to be considered.

210. Her explanation is somewhat strange. To take the trouble to delete part of an email which is irrelevant, purely on the grounds that it is irrelevant, is an odd thing to do. If it were irrelevant one would have thought it could have been safely left in in the knowledge that it would be disregarded by the recipient. If it were irrelevant and confidential then that would be different, but that was not Miss Francis's explanation

(or reconstruction). If it were irrelevant and misleading, then again that would be different, but that was not quite her explanation either, though one of her answers linked the question of irrelevance to her client telling her that there would be no surplus.

211. So the question becomes whether her odd explanation should be accepted, or whether Mr Hubble's suggestion of dishonesty is correct. Mr Hubble does, of course, have the burden of proof.

212. Having considered the matter carefully I consider that Mr Hubble has not made out this allegation of dishonesty. I have come to that conclusion for the following reasons.

213. First, there is the incident which Miss Francis herself identified (the omission of the reference to outstanding completion in the 26th April email). I do not consider that Mr Hubble's suggestion of a dishonest motive on that occasion is particularly plausible. The missing words do not in terms refer to phase 2, and the thought processes that would be attributable to Miss Francis would have to be rather convoluted and would, in my view, be very unlikely. She would have to think the words could be linked by Miss Alberici with phase 2, even though the phase is not identified (though the property is, in the heading), then she would have to think there was a risk that Miss Alberici would think that there was a delayed completion of that phase (the email refers to "outstanding", not "delayed" completion), and then think that Miss Alberici would or might wish to take an interest in that fact and that that might imperil Mr McGuinness's loan. In her evidence to me she told me that she would not have made that leap, and having considered her evidence, her experience and her character I accept that evidence. Without that leap the omission of the words has an insufficient sinister character for Mr Hubble's purposes. My conclusion on that has a clear knock-on effect when considering the more important incident which Mr Hubble relied on (the omission of the words about equity release).

214. Next, the development of the emails, coupled with Miss Francis's knowledge of the transaction, makes it less likely that her thought processes were as Mr Hubble would have them. She was apparently not alive even to the concept of an equity release. The email chain reveals that she did not understand Miss Alberici's question when she first asked it. It was then explained to her. Mr Hubble's thesis would have Miss Francis realising what the concept was, understand that there would be no surplus (her evidence that her client had told her that was not challenged), appreciate that despite that fact there was a risk Mr Murray would be alerted undesirably to something that didn't exist, and decide to avoid that risk by removing the words from the email. Again, having heard Miss Francis give evidence I simply do not accept that she would have had that elaborate a thought process. She said that she regarded that sort of argument as too sophisticated for her, and I accept that evidence.

215. Next, if Miss Francis were really that concerned to keep any suggestion of surplus away from Mr Murray (notwithstanding the fact that there would not be one) she could, as she herself observed, have gone about things in a different way. She did not actually have to forward the email at all. If she needed to transmit part of its content she could have cut and pasted, or summarised.

216. All in all, therefore, I prefer Miss Francis's explanation to the more sinister one proposed by Mr Hubble. They both start from the premise that Miss Francis did not want to say anything about the surplus to Mr Murray, and they both have an element of deliberate concealment, but the true explanation is not one which characterises Miss Francis as perennially dishonest. She was undoubtedly misguided, but that is not enough for Mr Hubble's case.

217. The other alleged lie in the email with which the doctored email was forwarded is said to come from the words:

> "… Heatons need an indicative figure of the loan amount without all of the additional costs of receivers etc."

218. Heatons had not in fact asked for an indicative figure without those costs, and Miss Francis agreed that this sentence was not correct. She said it mistakenly conflated two things - the fact that Heatons wanted a redemption figure and the belief on the McGuinness side of the transaction that the redemption statement should not include receivership costs because they were disputed and Mr McGuinness did not intend to pay them if he could avoid it. Mr Hubble said it was a deliberate act to try to increase the prospects of Mr Murray providing a redemption statement of that kind.

219. Again, the inquiry has to be as to Miss Francis's intentions when she wrote and sent that sentence. If she merely made a mistake then the email is not a badge of dishonesty. If she did not then it is. Once again I accept her evidence that it was a mistake. She did not express herself accurately. In addition to considering her evidence on the point, and the manner in which it was given, there is the logic of the situation. If she were trying to lead Mr Murray into providing the sort of redemption statement that Mr McGuinness is said to have wanted then she would hardly have forwarded Miss Alberici's email which asked for something different from that which she asked Mr Murray for. The email was sent because it had useful information ("FYI"), and is inconsistent with the criticised paragraph. If she were scheming in the manner which Mr Hubble's case suggests she would not have forwarded the email at all.

Other credibility matters

220. Other matters were put to Miss Francis to test her credibility, or which go to it. With one exception I do not propose to set them out here. The principal attacks are set out above. Nothing in those other matters was sufficient, either by itself or with other matters, to demonstrate that Miss Francis was, as a matter of course, prepared to lie to assist her client, or that she actually did so.

221. The one exception to my course arises out of matters relating to an allegation of conspiracy against Miss Francis in relation to concealment of the existence of the receivership from Masnol. It is alleged against her that she realised that if Masnol discovered the receivership it would have led to the transaction collapsing, and that she decided that it should not be revealed. In doing so she conspired with Mr McGuinness and Mrs Glavin to that end. In order to make that allegation good Mr Hubble relied on a number of matters with which I have to deal. I propose to do that in a later section of this judgment after I have considered the one surviving fraudulent misrepresentation claim against Miss Francis. At this stage in this judgment I record that I find that there was no such conspiracy or concealment on the part of Miss Francis, and the events relied on yet again do not demonstrate that she was prepared to lie and cheat in the interests of her client. That finding, like my other dismissals of the allegations of dishonesty against Miss Francis, is an important factor when it comes to considering the fifth (and only remaining actionable) lie alleged against her.

Miss Francis's alleged fifth lie - the actionable misrepresentation in her answer to question 3.6

222. I return, therefore, to the alleged lie on which the claim is based so far as the acts of Miss Francis are concerned. This lie is said to be contained in her answer to question 3.6 in the inquiries sent to her by Miss Alberici.

223. The terms of this answer have already been set out above, but I will repeat them with a little more context.

224. The document in question was sent to Miss Francis for completion on 21st March 2007. The relevant question was:

> "3.6. Please confirm that the Borrower has not received and is not aware of any adverse surveyor's environmental, buyer's or other professional report on the Property."

225. On 23rd March, and in order to be able to complete it, Miss Francis emailed Mr McGuinness in the following terms:

> "Further to Peter's email, I am going through the lender enquiries for the re-mortgage and would be grateful if you could let me have instructions on the following so I can respond:
>
> ...5. I will need to disclose the snagging site meeting and report the solicitors acting [sic] are you aware of any other professional reports by surveyors, environmental, valuer's or other professionals that are adverse in relation to the property?"

226. Within 17 minutes Mr McGuinness had responded by sending to her a copy of her email to him with his answers following on the questions asked. Under her question 5 was the following:

> "NO. THE VALUER WAS AWARE OF THE SNAGGING ISSUES AND IS RE-INSPECTING THE PREMISES."

227. Miss Francis then wrote and sent her answer back to Miss Alberici:

> "3.6 Confirmed. Following completion there was a meeting on site to determine outstanding snagging issues in relation to the properties that were to be dealt with by the seller."

228. This response is said to have been false in the following respects:

> a) It gave the clear impression that the only issues were snagging, when they were more serious defects, to such an extent that Mr McGuinness had been unable to rent out some of the properties. Miss Francis is said to have known that.
>
> b) It is said to have given the clear impression that the meeting on site was

shortly after completion, when it was not. The meeting to which she intended to refer was on 31st January, some months after completion of phase 1.

229. A further allegation of falsity, namely that the email gave the impression that the issues had been resolved timeously when they had not, was not pursued separately as a misrepresentation in the light of evidence from Miss Alberici as to how she read it.

The representations alleged

230. Logically the first question is whether the representations alleged were actually made.

231. As to the first (only snagging and nothing more serious), I consider that, objectively viewed, the statement about snagging was a statement about the quality of the works that were under discussion at the meeting. The statement was to the effect that there was a meeting (not a report) and that it was about the sort of thing that would be viewed as snagging. The dividing line between work that can be regarded as "snagging" and more serious work is not one that can be sharply drawn. In any given case there may be room for debate as to which side of the line a particular item lies on, but what the statement conveys is that the meeting was about work that might reasonably be viewed as snagging. Wherever the dividing line might be, the meeting would not be taken to be about work that was too serious to be regarded as snagging.

232. Mr Seitler sought to dispute this. He relied on an answer given by Miss Alberici in which she confirmed that one could not tell from Miss Francis's answer whether "it means purely cosmetic or more substantial post-completion works", and said that that demonstrated that the statement did not give a false impression. I do not consider he is right. "Cosmetic" does not equate to "snagging" for these purposes, so she was not asked about the right distinction. In any event, her evidence would go more to reliance than what the statement should be taken to mean.

233. As to the second, I do not consider that there was an implied representation (or impression) that the meeting was "shortly" after completion. It says "after" completion, and while it would not be taken to be referring to a meeting (say) 2 years after completion, "shortly" is not in my view implicit. Different contracts have different snagging periods, and "after completion" might refer to something within a snagging period of months.

The falsity of the representations

234. I will deal with the second of the representations first, because it is more straightforward. The facts were that there was a meeting about snagging on site, probably on 5th October 2006. In connection with that there were preceding reports on various flats, on a flat by flat basis, dealing with various defects in relation to both phases 1 and 2. There was another meeting on 31st January 2007 to discuss defects. That gave rise to two forms of report. The first was copied to Miss Francis , among other people, on 12th February. All the flats in those reports were phase 2 flats. The second was amended versions of reports prepared in October, and those amended reports were again all phase 2 flats. However, some phase 1 issues are apparently dealt with in a covering letter. It does not appear that those reports were sent to Miss Francis.

235. The only meeting and reports that dealt with snagging (and other matters) relating substantially to phase 1 were therefore those of October 2006. That is not that long after completion, and they fall within the representation of a "meeting" as having been after completion, in my view. The representation was, to that extent, true.

236. Mr Hubble's case, however, is that the statement refers to the January meeting and its February report. He says that January is too late to be a meeting "following completion". Looking at the facts objectively there is no reason to treat the statement as referring to that meeting. It refers to a single meeting (and, by implication, the associated report) which deals with phase 1 (the phase with which the re-mortgage, and therefore the question, must be concerned). The January report dealt principally with phase 2. That meeting is therefore apparently irrelevant.

237. The only reason for supposing that the statement might be meant to refer to the January meeting is Miss Francis's reconstruction (not recollection) that that was the case. She assumes in her witness statement that her preceding email to Mr McGuinness referred to the January report, and she then reconstructs that her answer to Heatons' question referred to the same thing (with a mistaken cross-reference in her paragraph numbering).

238. In her cross-examination she was asked which site meeting she referred to, and she said:

> "16. A. I believe it would have been the one that the report was
>
> 17 made pursuant to, because I'm focusing on the fact that

> 18 I have to disclose there is a report and that was,
>
> 19 I think, 31 January but the reason I say site meeting at
>
> 20 all is because I'm thinking I am telling them about
>
> 21 a surveyor's or valuer's report, because that's what I'm
>
> 22 thinking of when I'm answering the question." (Day 7 p55)

239. Earlier (p52) she said that the only report she was aware of "was the snagging report that we discussed this morning, so I've put the answer there." However, she is wrong about that being the only report she was aware of. She was, or had been, aware of the October reports, and she had been cross-examined about those as well in the morning. The correspondence demonstrates that she had actually sent those reports to Mr Rose, and she said she would have skimmed through those reports to check what they were and what they related to. Since those reports, unlike the report following the January meeting, dealt substantially with phase 1, one would have thought it more likely that that is the meeting (report) that she had in mind. That meeting is, on any footing, fairly described as being one "following completion" in my view. I do not in the circumstances give much weight to her reconstruction about the report that she meant. I think the evidence points elsewhere.

240. So if it matters, I would be more inclined to find that Miss Francis was referring to the earlier reports. If so, on this timing point there was no falsity on that basis either.

241. However, I regard this point as being rather immaterial. The thrust of the allegation against Miss Francis is that she deliberately understated the quality of the defects, and the timing of the meeting or reports that she intended to refer to is very much subsidiary to that. So it is necessary to consider the truth of what she said about "snagging".

242. This representation requires more detailed consideration. The allegation against Miss Francis is that the expression "snagging" was inaccurate, and deliberately so in order to disguise the real significance of the works. It is said that the works went beyond what could be regarded as snagging. That requires a consideration of the work in question as it appears from the documentation. There is no surveyor's report in this case. The allegation requires a trawl through many emails and attachments, looking at snippets of information which are said by Mr Hubble to show that there were more serious defects than anything that could be described as "snagging".

243. Many of the items relied on plainly fall within the description of "snagging". There are two or three candidates for items which do not, and Mr Hubble also relied on Mr McGuinness's characterisation of them as things which were more serious than snagging. Nobody volunteered a definition of "snagging" to me, so I am left to form my own impression of the relative seriousness of the matters relied on. I consider that in the context of the answer given the expression is used to give the impression of residual defects in the building, not fundamental, of the kind which (regrettably) happen in building projects and which one might expect after completion and which one would expect a builder to be given time to fix, and to be fixable in that time. Technically, snagging works are probably works which would not prevent practical completion, which means the same thing.

244. The non-snagging defects were summarised by Mr Hubble as being two defective lifts, heating and air-conditioning not working properly, plumbing defects (foul drainage and leaks from bathroom fittings and shower trays), and doors and windows not correctly fitted. They, or some of them, are said to have led to difficulties in letting some of the flats. Mr Hubble conceded that since he was challenging the honesty of Mr McGuinness one had to be careful about statements about defects coming from him, but said that even so there was enough evidence to justify his criticism of Miss Francis's use of the term. In considering the impact of the alleged defects and what Mr McGuinness says about them one also has to bear in mind that is suited Mr McGuinness to play them up because he was using them, and similar defects in phase 2, as a weapon in negotiation to get out of paying interest for late completion of phase 2. In making my findings about this I do not propose to set out the dozens of emails in which the problems are referred to (and sometimes denied). I shall merely set out my conclusions.

245. So far as the lifts were concerned, it was said on 3rd October in a letter from Miss Francis to Mr Rose that the lift in the building had not functioned correctly since completion. That does not say that it did not work at all. It appears that the lift issues were ironed out, though not completely, over time and towards the end of 2006 they did not feature nearly as much in the complaints as sewage, damp and door/window issues. By February the lift issues were no longer featuring in what was said to be a catalogue of continuing serious complaints. The lift issues may have been serious at the time of the October reports, and probably not properly characterised as "snagging". However, they seem to have been sorted out by the time of the next meeting at the end of January, because they did not figure (or figure nearly so largely) at that time.

246. The heating and air conditioning problems appear to be more widespread and longer lived. One would expect such things to be generally working on completion, and while the odd problem might be viewed as having the quality of "snagging" more widespread and persistent problems would not. I have acquired the impression that those problems fall into the latter category. Some of the plumbing problems, if accurately portrayed, are not sufficiently serious to emerge from the "snagging"

category (eg leaking shower trays) but there are frequent references to sewage backing up into other lavatories, and sewage smells, which are sufficiently serious to be not fairly characterised as snagging. The problems with ill-fitting doors and windows is hard to judge. The numbers involved are not clear. On the whole I consider this problem to have been snagging rather than something more serious.

247. In my view, therefore, some of the defects, and their persistence, mean that the whole package cannot be characterised as mere snagging (which expression I use to distinguish them from something more serious). There is some, but only limited, support for this view from what was said in correspondence about it. Various letters from CHH (where property dispute lawyers were involved) draw a distinction between snagging and more serious work, and Miss Francis herself did so in an internal email of 23rd March 2007 when she said:

> "Since completion there have been all sorts of problems with snagging and defective work which have prevented [Mr McGuinness] from renting them all out …"

248. She explained this as being a sort of "brain dump" in which she was quickly summarising the situation without necessarily intending to draw the distinctions which have to be drawn for the purposes of characterising her later statement as a misrepresentation or not, and she was drawing on a theme which had been adopted by her building dispute colleagues.

249. Mr Seitler drew attention to various things which he said demonstrated that things were not as bad as Mr McGuinness was presenting them:

(i) A letter from Laura Phoenix of the property disputes department which listed items which were inadequate and which were all snagging items, the most serious of which was a heating problem which was being fixed. I agree that all the items, as listed there, tend to look like snagging items, but this is a late letter. It does not cover what has been wrong in the past, and those past matters did contain more serious matters.

(ii) An email from Mr McGuinness to Miss Francis of 14th March 2007 which read:

> "Please advise that if the interest is not deducted we will claim for compensation and damages for the breach of contract in respect of the outstanding build issues and snagging that exceeded the 6 month period to remedy. Note that there are still some items outstanding and notably, no heating or ongoing generic faults to the heating system. If the interest is not

> deducted I will instruct your litigation department to make the claim however would prefer to draw a line under it and avoid having to go to the trouble."

The reference to interest is a reference to the interest for late completion that the vendor was seeking to charge on phase 2. Mr Seitler suggested that this email supported a conclusion that Mr McGuinness was using the issues as a bargaining tool and that the true position was that the items were no more than snagging. I agree that he was seeking to use the issue as a bargaining tool, and that historically Mr McGuinness probably could not resist over-emphasising the scope of some problems when it suited him to do so. However, I do not think that this email demonstrates that all the issues were always over-blown and were never more than snagging. This merely reflects Mr McGuinness's position in the overall bargaining situation at a time when he was seeking to keep the phase 2 transaction alive whilst not paying for late completion.

(iii) On about 23rd March 2007 Mr McGuinness had a conversation with Miss Francis about the receivership and, to a lesser extent, about phase 2. Mr Seitler relied on the fact that Mr McGuinness did not complain that the snagging issues had an effect on rent, or were sufficiently bad to prevent completion of phase 2. This, Mr Seitler said, demonstrated that by this time (which is just 3 days before the representation complained of) the previous issues had subsided because they were not referred to. I disagree with his inference. Mr McGuinness had been using defects as a means of delaying completion of phase 2. To a degree it was a tactic, but not necessarily totally so. The fact that defects are not mentioned by Mr McGuinness in this context, and that he was apparently going to complete phase 2, does not, in this context, mean that all the problems had gone away and not been as bad as portrayed. It means that he was not focusing on them at that time.

250. In summary, therefore, I do not consider that Mr Seitler's three points mean that the issues with the building had not been as bad as previously suggested or that they had gone away, though it is true that many of them had been addressed. I do not think that this evidence assists in determining whether what Miss Francis said was wrong.

251. I therefore find that the meeting in October 2006 related to phase 1 things other than snagging. The position is less clear in relation to the January meeting. The reports of the January meeting concentrate on problems with the phase 2 flats, not the phase 1 flats. There is no suggestion that all the old phase 1 problems still existed. In particular, lift problems are not referred to and they had not been mentioned (or mentioned much) in the preceding weeks. I am not prepared to infer (especially in a fraud case) that the lift problems persisted at the time despite the fact that there are references to problems again before the end of the year. There is, however, a general

reference to heating problems which, when coupled with later references, suggest that this was still a problem (and a continuing problem) in January. The position about sewage is not so clear, but references later in the year suggest that that too was persisting. I therefore conclude, so far as relevant, that there were extant matters going beyond snagging on January 31st 2007.

252. It therefore follows that to the extent that Miss Francis's statement suggests that there were problems confined to snagging problems at the meeting she identifies, whether the meeting was the October one or the January one, it gave a false impression and was wrong.

Fifth lie - knowledge of falsity

253. The next question, therefore, is whether she made her statement knowing it to be wrong or being reckless as to its truth. Since I do not consider that there was any falsity as to the date, and in any event since that is subsidiary to the gravamen of the complaint which is that she knew the works were more than just snagging and deliberately sought to give the contrary impression, I shall concentrate on that more significant allegation.

254. Miss Francis denied any intention deliberately to downplay the significance of the works. Her witness statement says that it would never have crossed her mind that there was any reason to downplay the issues or to give any false impression about them, and she did not have a particular view as to whether the defects were properly described as snagging or as defective work (the latter being more significant than the former). If it had been her intention to down-play or obscure the fact that there had been any issues she could merely have replied "Confirmed" to the question and gone no further. She went as far as to say that if she were in the same situation today her response would not have been any different.

255. In her cross-examination she explained that at the time she would not have had in the forefront of her mind the contrast between snagging and more serious defects (Day 7 p54) and that the transaction was her first encounter with snagging and she would not have known what was "ordinary stuff" (the expression put to her by Mr Hubble) for these purposes. When it was pointed out that the question asked about reports and she had replied about a meeting, she said:

> "6 A. But the fact that there had been that snagging point is
>
> 7 what has prompted me to put that answer in this

> 8 question, because it's asking about adverse
>
> 9 environmental, surveyors or other professional reports.
>
> 10 At no point had I seen any other reports about the
>
> 11 condition of the property, had it been suggested to me
>
> 12 there was one. That was the only formal report I'd seen
>
> 13 and had in my mind, so that was the answer that I gave,
>
> 14 without intending to be misleading." (Day 7 p53)

256. What I find she is saying there is that she intended to describe the report in question and did it by reference to its being a snagging report. The essence of her evidence (in this and other answers) was that in using her expression she was summarising a state of affairs and not deliberately using a word to downplay the true state of affairs.

257. In order to challenge her case and to make his own Mr Hubble took Miss Francis through the development of the complaints that Mr McGuinness was making about the state of the premises in order to seek to demonstrate that she knew what the defects were and knew that they were more than snagging. This took most of a morning. Following on from her taking over the file in October 2006 there are a number of emails and other documents to which Miss Francis was privy which, on their face, were said to support the notion that the defects complained of included substantial works and were not confined to snagging. The most significant matters were as follows:

(a) On 3rd October Miss Francis wrote to Mr Rose sending "snagging reports" for the phase 1 properties. She added:

> "We understand that there have been problems with the heating, ventilation and drainage in some flats, that some of the keys to the doors and windows or are missing altogether and that many of the appliances, including sinks and toilets are ill-fitting and dirty. We are also advised by our client that the lift in the building has not functioned correctly since completion."

She went on to say that in the light of the condition of those flats her client was not prepared to complete on phase 2 on 6th October. In evidence she said she would have skimmed through the snagging reports. I accept that evidence. They were long and detailed, and she would not have read all of them in detail. At the same time, as she accepted, she read enough (or possibly had been educated sufficiently by her client) to pick out certain particular issues.

(b) On 5th October Miss Francis wrote to Mr McGuinness to offer the services of colleagues to deal with the building issues if he wished:

> "The issue of whether the problem is detailed in the snagging reports go beyond mere snagging issues is somewhat subjective although if you feel that the problems go beyond mere snagging and wish to pursue the matter further, I can ask one of my litigation colleagues to review the contract and give an opinion. Certainly if the properties have been uninhabitable you may have more of a case."

Her evidence (based as always on reconstruction) was that she is likely to have spoken to one of her colleagues before making those remarks. I accept that evidence. I do not think Miss Francis was at all equipped to deal with the subtleties of what was mere snagging and what might be viewed as more serious than that.

(c) On 6th October she wrote again to Mr Rose pointing out that due to the condition of some of the flats in phase 1 Mr McGuinness had been unable to let some of the properties for the first month. According to the email, this must have been based on a conversation that she had had with Mr McGuinness.

(d) On 12th October Mr McGuinness emailed her with correspondence about the defects in relation to phase 1. His email to her starts by referring to snagging in relation to phase 2, and goes on to refer to its being unacceptable to require tenants to live with such issues and expect to call them mere snagging. Miss Francis was minded to accept that the latter reference was a reference to phase 1. Looking at the email, I am not satisfied that it was, but undoubtedly the significant matters referred to in the attached email were phase 1 matters.

(e) On 19th October Miss Francis again emailed Mr McGuinness and expressed the view that problems with phase 1 did not give a legal basis for refusing to complete on phase 2. She again offered to get an opinion from one of her colleagues in the Property Dispute Resolution department.

(f) On 2nd November Mr McGuinness emailed the developer's agents making complaints and saying:

> "My point has been that these are not snagging issues, they are build issues."

He went on to say that he could not rent 4 apartments because they were uninhabitable and said:

> "This email is just meant to highlight the scale of the problems and how they should not be trivialised to snagging with 6 months to remedy."

The email was copied to Miss Francis. She said she would probably have skimmed this email; she was more concerned with things which affected what she was concerned with, which was completion of phase 2. I accept that evidence, and I accept other evidence that she gave to the effect that many of the incoming emails to which she was copied, and which made reference to defects, would have been no more than skimmed by her if they were read at all.

(g) Miss Francis was on holiday for two weeks from 13th November. In her absence Mrs Glavin, who was looking after the file, passed the construction disputes on to the property disputes resolution team. Correspondence then took place between that team and Mr Rose. One of those pieces of correspondence was an email from Mr James Lee (an Associate in that department) to Mr Rose. It was copied to Miss Francis (and to Mrs Glavin). It contained detailed complaints and 11 attachments relating to one particular flat. Miss Francis could not remember receiving this email, but was confident that she would have opened it and skim-read it to see if there were any action points in it. She considered she would have noticed the heading "Outstanding construction issues with Phase 1". There were in fact no action points for her in that email. I do not consider that she would have paid it much attention.

(i) She had no particular recollection of knowing that a meeting about defects was coming up on 31st January 2007, but she thought there was a positive outcome to that meeting. She did not think it related to both phases – she probably did not give it any particular thought. The detail of the matter was being dealt with by Laura Phoenix in the property disputes resolution department.

(j) She had a recollection that Mr McGuinness was seeking to reserve his position as to the non-completion of building works pre-completion of phase 2. On 1st March Laura Phoenix copied her in on an email to Mr McGuinness saying that Miss Francis was to be asked to ensure that completion was without prejudice to claims that Mr McGuinness had in respect of defects and breach of contract. On 14th March she received express instructions from Mr McGuinness by email:

> "Please advise that if the interest is not deducted we will claim for compensation and damages for the breach of contract in respect of the outstanding build issues and snagging that exceeded the 6 month period to remedy. Note that there are still some items outstanding and notably, no heating or ongoing generic faults to the heating system. If the interest is not deducted I will instruct your litigation department to make the claim however would prefer to draw a line under it and avoid

> having to go to the trouble."

Miss Francis accepted that that email seemed to be referring to phase 1. She took from this that Mr McGuinness was prepared to drop his claim, and the thrust of her evidence seemed to be that this raised a question-mark as to whether he would really bring a claim when necessary to do so. Her evidence on that small point was not easy to follow.

(k) On 15th March Mr McGuinness wrote to the company who provided the deposit bond for phase 2 commenting on the works and what he regarded as an unjustified interest charge for late completion. Miss Francis was copied in on that email, and accepted that on a close study of that email it now appeared to be referring to both phases 1 and 2, but doubted if she would have read it that closely at the time. As I have already indicated in relation to many of the emails into which she was merely copied, I accept her evidence on that. However, as she accepted, she already knew at the time that there were still build issues in relation to be phase 1 units.

(l) On 23rd March Miss Francis wrote to 2 partners about the possibility of obtaining an injunction in respect of the receivers whom West Bromwich had appointed some months before. She wondered whether the particular partners in question were the right people to deal with the injunction. She explained:

> "When Leslie Hill-Smith acted on the purchase of these properties at Mizzen Mast in London they were secured by a mortgage of around £11,000,000 with West Brom. Since completion there have been all sorts of problems with snagging and defective work which have prevented Spencer renting them all out. Laura Phoenix and Jane Ryland have been dealing with a claim in respect of this."

Miss Francis accepted that this email reflected the fact that there were outstanding build issues in respect of phase 1. She described herself as considering both phases together and giving the partners the information that she had, which was that he wanted to pursue a claim in respect of both phases. She explained to me that she thought the phase 1 claim was "a bit of a bluff" and that he may well not have pursued it. She said that her recollection in the witness box was that phase 1 had essentially been resolved and he had been happy not to make a claim until the question of interest for late completion of phase 2 came up. Some of this explanation was given to me after a short mid-morning break when she came back in and asked to clarify a previous answer. Mr Hubble submitted that her clarification was a dishonest attempt to try to repair some damage that she thought she had done before the break. I reject that submission. I consider that Miss Francis was doing her best under difficult conditions, at a distant point in time, to make sense of the situation which had existed some nine years before.

(m) On 28th March Laura Phoenix wrote to Mr Rose on behalf of Mr McGuinness, and copied Miss Francis. In that letter she formally notified Mr Rose that the firm was instructed to commence formal proceedings against the vendors in relation to its failures (1) to carry out "snagging works" and (2) to remedy defects in accordance with the sale agreements for the phase 1 flats. Three clauses in the agreements are identified and there is a reference to the site meeting on 31 January 2007. Miss Francis was not sure that she would have read this at the time, especially since the material was in an attachment not addressed to her. She explained that she would have been focused on the conveyancing aspects. She was challenged by Mr Hubble that she was deliberately denying having read the email because it was inconsistent with the version of events that she put forward as to how she came to answer the preliminary enquiry. Having seen Miss Francis give evidence, and considered the totality of her evidence and how she worked (and her experience) at the time, I reject that suggestion. I consider that she was doing her honest best and that she did not read, much less absorb, this written material. In any event, I do not think that her denial should be seen as being inconsistent with the overall nature of her evidence on the state of her knowledge and belief at the time. She admitted that she knew that the defects in the phase 1 apartments had not been remedied.

258. That is, or reflects, the background to the exchange which then took place between her and Mr McGuinness when she received the enquiries, and her response to Heatons. I find the following:

(i) She knew there had been building defect problems with phase 1.

(ii) She knew at least some of them were called snagging, and from time to time became aware of the nature of the disputes, some of which were, as a matter of law, more than mere snagging (as I am using that term), but I find that she never focused on that particular distinction because she never had to. Furthermore, she did not have the experience which would have enabled her to consider the distinction in relation to any particular works.

(iii) She knew at the time that Mr McGuinness was saying that some of the works had not been completed, but did not focus on which works or their extent. Again, she did not have to. The matter was being dealt with by someone else.

(iv) She had some doubts as to the extent to which the disputes could lead to a genuine claim, but again never focused on that particular point because she did not have to.

(v) She knew there had been a meeting on 31st January, but did not focus on the precise issues that arose.

259. Mr Hubble put firmly to Miss Francis that the truthful answer to question 3.6 should have been to identify the history of problems with snagging and defective work. I reject that proposition. The question asked about reports, not about work. As Mr Hubble himself accepted, Miss Francis's answer would have been truthful if it had stopped with the word "Confirmed".

260. He then went on to suggest that the use of the word "snagging" was deliberate and by using it Miss Francis was trying to give a misleadingly reassuring impression about the works in question. She thought she had to say something, and said something misleading because it was reassuring.

261. Miss Francis denied that. She said she did not have the distinction between snagging and more serious defects in the forefront of her mind. This was her first experience of the "snagging process" (as she put it) and would not have known if it was the more "ordinary stuff" (as the cross-examiner put it) and did not know that her answer would be more reassuring. She was doing her best to answer the question, did not know the extent to which it was inaccurate and had no intention to mislead.

262. Thus the critical point is whether Miss Francis when she used the expression "snagging meeting", was deliberately trying to mislead Masnol, knowing that the issues were more serious than might be understood by the expression "snagging", and deliberately tried to conceal that by the expression that she used.

263. I accept that she had the means of knowledge. The emails and letters I have referred to, and indeed others, demonstrated that the problems with phase 1 had, at least as described by Mr McGuinness, been more serious than snagging. From time to time Miss Francis is likely to have known, in general but probably vague terms, what some of those issues were. That, however, is not enough. Masnol's fraud case requires that those points be present in Miss Francis's mind at the time she answered the inquiry, that she appreciated the seriousness of those points, appreciated that she could downplay them by using the word snagging, and deliberately chose to do so.

264. I do not accept that that was her state of mind. I consider that she made a good faith attempt to answer the question and did not have any intention at all to mislead. She did not know or appreciate the extent to which her statement was false. There are a number of factors which in my view make the contrary conclusion not just improbable but highly unlikely. They are the following:

(a) Having had due regard to Miss Francis's experience, character and the quality of her evidence, I do not consider that she possesses the

devious quality which Mr Hubble's case requires.

(b) Once again, I do not consider it likely that she would have had any motive for such a deliberately dishonest act.

(c) On the case against her as presented, she must have done her dishonest act unbidden. It was not put to her that she had a discussion with Mr McGuinness about it. She emailed Mr McGuinness about the point at 16:50 on 23rd March. The terms of her email did not suggest any prior conversation. Mr McGuinness responded very quickly at 17:07. His response did not suggest that there should be any downplaying of anything either; nor does it suggest a conversation between the two. So either there was a conversation between the two before Miss Francis sent out the answers on the 26th March (Monday), in which they plotted, or Miss Francis realised what was required and did it off her own bat. The latter hypothesis seems to me to be very unlikely. She was carrying out a conveyancing process. She had not been involved much in the defects, though she had been required to send the odd formal email about them. I do not consider that she would have had the mindset, inclination or motive to work out that a somewhat sophisticated reply was necessary to conceal the true facts and then contrive her wording. The former hypothesis (a conversation with Mr McGuinness) would at least provide a trigger to do something, but she would then have to give effect to that by her wording. I do not consider it at all likely that she would have that mindset, or willingness to conspire, and in any event (as I have said) the theory was not put to Miss Francis.

(d) I accept Miss Francis's evidence that the distinction between snagging and other works was not in the forefront of her mind at the time. She had the information available to her, but as a conveyancer carrying out a conveyancing function I do not think it likely that she would have been thinking in those terms.

(e) Miss Francis went farther than she had to. The question asked about professional reports. The snagging reports did not qualify (as Mr Hubble conceded). She could just have stopped at "Confirmed". If she were being as calculating as the fraud requires it is likely that should would have realised that. She in fact went farther than that and reported on something that she did not need to. I accept, of course, that many dishonest people are not always competently dishonest, and that they do miss tricks. However, I do not think that that is what happened in this case. Miss Francis's first reaction was that the snagging reports would have to be disclosed (see her email to Mr McGuinness). In my view that was a badge of honesty. Her first instinct was the honest one of disclosure rather than playing down and suppression.

(f) When she came to answer the question she used a shorthand - "snagging". That would be a natural shorthand for someone in her

> position. While from time to time both snagging and other defects had been referred to in such a way as to suggest a distinction between them, it would be natural to refer to a "snagging report" to refer to the report. In fact she did not use that expression in the answer - she referred to a snagging meeting only. That was another honest mistake (it was not put that it was somehow sinister that she did not use the word "report"), and in my view is much more consistent with the inexperience which I consider to underpin the whole incident. Inexperience is a far more likely explanation than dishonesty.

265. I therefore acquit Miss Francis of the only surviving causative fraudulent act alleged against her. She did not know of any falsity inherent in her form of words, was not reckless about it and certainly was not dishonest.

Conspiracy alleged against Miss Francis in relation to the receivership

266. Various other allegations of conspiracy against Miss Francis not being pursued, one survived and still falls to be considered. It is an allegation that she conspired with Mr McGuinness, and then also with Mrs Glavin, to conceal the receivership from Masnol. Technically this probably adds nothing to the claim itself, because what is alleged is an unlawful means conspiracy, and the unlawful means alleged are lies by Mrs Glavin. If Mrs Glavin told lies then there is a claim in deceit anyway, and the conspiracy is an unnecessary allegation. However, the allegations are important allegations as against both Miss Francis and Mrs Glavin, and they both go to credit and are an important part of the landscape of the claim that Masnol seeks to make in relation to the receivership. It is therefore necessary to consider them. This section of this judgment concentrates on the claims so far as they are made against Miss Francis, though there is an obvious knock-on effect in relation to conspiracy against Mrs Glavin.

267. The claimant's case is that Mr McGuinness and Miss Francis (and later Mrs Glavin) conspired to conceal the receivership from Masnol, and implemented that conspiracy in dealings with Heatons in which Miss Francis was careful not to do anything that would reveal it and couched her communications in a manner which was dishonest. Mr Hubble accepted that an instruction not to reveal the receivership per se was not wrongful, but in a transaction such as the re-mortgage the recipient of the instruction would soon find herself in a position where she had to do something improper if revealing it was to be avoided. It was put to Miss Francis that she agreed with Mr McGuinness that the receivership was going to have to be hidden so that the re-mortgage could go through. On one occasion it was put that there must have been a conversation with Mrs Glavin in which she said it had been agreed with Mr McGuinness that the receivership, a dispute about rent arrears and the construction disputes were not going to be disclosed to Masnol. That is an even farther reaching conspiracy. The case advanced is therefore a high one. The essence of the case

against Miss Francis was that she knew that disclosure of the receivership could well be fatal to the re-mortgage, that she therefore knew that it would have to be kept from Masnol, that she agreed with Mr McGuinness that that should be done (even at the expense of honest correspondence), and that she knew that if the receivership was not resolved it could result in Mr McGuinness's bankruptcy and his business empire crashing down (as it was put) She therefore decided to, and did, couch her correspondence in manners which concealed it and then did what she could to ensure that Mrs Glavin continued in the same vein.

268. The principal relevant evidential elements said to support this conspiracy allegation are as follows.

269. On 22nd March 2007 Miss Francis, having received her first contact from Heatons, asked Mr McGuinness in an email whether he was pursuing the offer (possibly misunderstanding what it was about). He put her right on the same day:

> "The offer is in respect to the re-mortgage away from West Bromwich however I have an issue with them as the property is and has been in receivership since very soon after completion. They have a rental deposit on account of nearly £400,000 and I would like to apply for a court injunction straight away to have the appointment of the receiver invalidated and to make a claim against the Society for costs and damages. If you could please pass the matter on to a senior partner who can advise the lenders Solicitors that they are representing me. I will give you a call briefly to go over the details."

270. This was the first that Miss Francis knew of the receivership. It should be noted that Mr McGuinness did not, in this email, give any indication that the receivership was to be kept from the new lenders. So any conspiratorial conversation must have come afterwards. The email does, of course, promise a telephone call. There is a short attendance note, apparently of a conversation with Mr McGuinness, on 23rd March but it is merely 4 lines and contains no hint of a request to keep information about the receivership from the lender. One would have thought that if the initiative came from Mr McGuinness then he would have wished to get the message over as early as possible lest Miss Francis should let information slip in early correspondence with the new lenders. This conversation would have been a candidate. It would be an important instruction and one would have thought that it would have been noted. If it came just as an instruction not to disclose the receivership then there is no reason why Miss Francis should not have noted it. Of course, if she received an instruction (and accepted it) knowing that she would inevitably have to mislead, then if she was being appropriately conspiratorial she might not wish to make an attendance note of the conversation. However, I regard such a possibility as being highly improbable. I think that the reason that there is no mention of the point in the attendance note of

23rd March is because it was not mentioned in that conversation. If it was not mentioned that early, then that diminishes very significantly the probabilities of there ever being any such conversation because, as I have said, is to Mr McGuinness would have wanted to get the point over as soon as possible.

271. Early on 23rd March Miss Francis sent an email to 2 other members of her firm (Mr Scott and Mr Paffard) who were going to be dealing with the possible receivership injunction. She told them that she did not have any details other than a forwarded email and was just checking that they would deal with it. Later the same morning she made the same enquiry of another member of the firm, Ms Wakeford. In none of those emails did she mention any need for secrecy (though since any other person acting in the injunction would be unlikely to have contact with Heatons that is less significant).

272. There is then another attendance note, undated but placed in the bundle in a position which suggests that the conversation was on 23rd March. This is a detailed note of a conversation in which Mr McGuinness gives his views about the receivership. It is mainly about the receivership but it does refer to the re-mortgage:

> "Properties now in receivership a month after completion. They are holding a retention which you understood would be released on completion but they have
>
> This has caused problems – receivers collecting some rent but not enough to pay as their costs are [large?] Up-to-date but not getting any rent coming out.
>
> Now being unreasonable you want to re-mortgage they are still being unreasonable, asking for more info.…
>
> We should carry on with re-mortgage as well."

273. Again, there is no reference to the need to keep the existence of the receivership from the new lender. This would have been a natural point at which Mr McGuinness would have mentioned that need, if he perceived it, and once again there is no plausible reason why Miss Francis would not record that, bearing in mind the full nature of this attendance note. I regard it as unlikely that it would not have been recorded if it had been the subject of the conversation. There remains the same possibility that Miss Francis realised that instruction ought not to recorded because it

was wrongful in some way, but again I think that is fundamentally unlikely. I consider that the strong probability is that the point was not the subject of a conversation at this stage.

274. That scenario makes it all the less likely that the point was ever the subject of a discussion, or at least one initiated by Mr McGuinness. If he did not mention the receivership as damaging the prospect of his loan at the outset then it is not at all clear why, or in what circumstances, it would have occurred to him later that there should be no mention of it. In fact, with one exception to which I will come, Mr Hubble never did put, or explain, at what stage a conspiratorial conversation between Mr McGuinness and Miss Francis took place, and having reviewed the events I find it very difficult to see when, logically, it might have done if it was not in the initial stages.

275. That analysis depends on Mr McGuinness having initiated the conspiracy by pointing out to Miss Francis that it would be unhelpful to the new loan to reveal the receivership. I have taken that assumption first because it is more natural that he would be the initiator rather than Miss Francis. I should, however, consider the possibility of Miss Francis realising these things for herself, both because it is a possibility that has to be considered and because Mr Hubble, in his written submissions, seemed to submit that Miss Francis knew of the dangers to Mr McGuinness's loan "and decided to hide the receivership". This suggests a sort of unilateral decision.

276. What Mr Hubble relied on, and put to Miss Francis, was that she would have realised various things from documents she saw. First, she would have seen from correspondence involving the receivers that Mr McGuinness and the receivers were at loggerheads. Second, she gave some advice to Mr McGuinness about the new mortgage, including advice as to events of default. Third, Heatons had indicated that they would require confirmation that there would be no rent arrears, which was a confirmation that Mr McGuinness would not be able to give. Fourth, Heatons indicated that they would need to be told if there was a management agreement, which could not be dealt with without disclosing the receivership. Mr Hubble submitted that Miss Francis must have known of these things and decided to hide the receivership.

277. Miss Francis admitted having much of this information available to her, but denied that she had put two and two together and appreciated that the receivership would have to be concealed. I accept that evidence. Miss Francis was a conveyancer who was conducting a conveyancing process for a somewhat vague client. She knew little of receiverships generally. She did not have the experience, cunning or even motive to analyse the situation in the manner suggested, and I accept that she did not. I do not consider that it would have occurred to her, off her own bat, to conceal the receivership. I have reached that conclusion taking into account the matters to which

I now turn and which, it can be said, are capable of providing some evidence of an intention to suppress.

278. It seems that on 26th March Miss Francis asked West Bromwich for a redemption statement. At 16:48 on that day West Bromwich emailed her one. It showed early redemption interest of £190,000 odd and a total balance due, before adding extra interest and deducting repayments and recoveries, of £12,231,086.65. Miss Francis emailed back to ask for confirmation as to whether it included penalty fees, receivers' fees and solicitors' costs, and passed the original on to Mr McGuinness, observing that it made no reference to receivers' fees "or any other penalties" but also observing that the letter reserved the right to alter the statement if there were omissions. There then followed a period during which Mr Garry of CHH was instructed to challenge the receivership (and therefore the receivership fees), and during which he and Miss Francis corresponded with Needham and James about the matter and about redemption.

279. By the end of April Miss Alberici for Masnol was asking for redemption figures (see her email of 24th April referred to above). On 24th April Miss Francis forwarded that email to her client (having previously sent him some enquiries to consider and answer):

> "FYI - I know they are a chore but can you let me have replies to the enquiries as soon as possible? I also need to disclose the redemption figure to Heatons which for which [sic] I can only go on the £12,231,086.65 as this is the only official figure I have received (this includes receivers fees and if Heatons request a breakdown of this we will have to disclose)."

280. The £12m sum referred to is the same as in the redemption statement she had received a month earlier. Her reference must therefore be a reference to that redemption statement.

281. Mr Hubble relied on this as demonstrating that Miss Francis did not want to disclose receivers' fees because that would reveal the receivership, and as therefore demonstrating that she was aware that she should not reveal that matter and, further, that she conspired with Mr McGuinness to that effect. He placed heavy emphasis on the word "disclose".

282. A similar point was made in relation to an attendance note of Miss Francis of the same day, when she apparently spoke to Mr McGuinness. Her attendance note reads:

"Interest payment due today – whether it's worth paying.

Need redemption figure less money on account .

Cannot reveal figures with"

283. Miss Francis was inclined to accept that the apparently missing words at the end were a reference to receivers' costs. Mr Hubble said that this again demonstrated that she clearly understood that the receivers' costs were not to be revealed and that this was attributable to an understanding and arrangement that the receivership was not to be referred to "come what may". This time the most significant word for Mr Hubble's case was "reveal".

284. These two documents are really the high point of Mr Hubble's conspiracy case. They would certainly be consistent with what he says happened. Miss Francis's explanation for both was that her understanding and intention was that the figures to be disclosed as redemption figures should not include receivership costs because the receivership was being seriously disputed and in those circumstances it would be inappropriate to include the receivership costs. They were not accepted by Mr McGuinness as being an appropriate part of any redemption figure – it was part of his case that they should not be paid. She had not received instructions not to refer to the receivership, but she did consider that it would have been wrong to include receivership costs when they were disputed. She firmly denied that she appreciated that disclosure of the receivership would throw the re-mortgage into doubt because it would reflect adversely on her client. She accepted how it was that the words might be taken against her, but denied that the point had occurred to her.

285. I have given careful thought to these two documents because they are capable of being significant in this context. However, bearing in mind the evidence of Miss Francis as a whole, and what I regard as the improbability of the alleged conspiracy, I do not believe that they reveal that she was knowingly party to some sort of concealment. The fact was that the receivership was being challenged. It seemed that the lawyers did not think that the challenge was particularly good, but it was being challenged. Miss Francis had no instructions to put forward any redemption figure which included receivership costs because Mr McGuinness was not (at least at that time) intending to, or reconciled to, paying them. Quite the reverse. Accordingly, to put forward the only figure for redemption which Miss Francis had got, which (as she had discovered) had the receivership costs built-in, would be to put forward a redemption figure which, on her instructions, would have been inappropriate. That, in my view, is what she was seeking to convey. I think that she expressed herself badly, but that is what she meant.

286. One can test Mr Hubble's case by assessing how it hangs together with other known facts. There were extensive dealings between Miss Francis, Mr McGuinness, various individuals acting for the receivers and West Bromwich, the members of CHH who were dealing with the receivership dispute and solicitors acting for Masnol during the months between Miss Francis first knowing about the receivership and these two documents. I have read the various communications and attendance notes in that period (most of which were not presented to me at the trial). In none of the documents on the McGuinness/CHH side is there any hint of a plan of concealment as between Miss Francis and Mr McGuinness. She had at least one conversation with Mr Garry which is recorded in a short attendance note, and it does not appear that she told him about any need for concealment. If she had entered into her conspiracy by then then she would be deceiving not only Masnol but partners in her own firm. That is theoretically possible, but not, in my view, particularly plausible.

287. Then there is the question of timing. I have already adverted to this point. It does not seem plausible that the conspiracy was actually entered into when Miss Francis was first told about the receivership even though, if it was initiated by Mr McGuinness, he ought logically to have done that at the outset. At no stage either in his cross-examination or in his final submissions did Mr Hubble suggest when it was that the conspiracy was hatched. One can infer that, on his case, it must have been before 24th April, because on his case the two documents I have been considering must post-date it. But it is not possible to identify a sensible point of time at which Miss Francis received, or proposed, that silence and misleading should take place. There is no attendance note. If the answer to that is that Miss Francis was a sufficiently sensible conspirator to realise that she should not generate one, then one asks why she would generate the email and attendance note of 24th April.

288. There is one further oddity. The conspiracy would only work if the conspirators reckon that if they kept quiet about the receivership then Masnol would not discover it in some other way. In my view they had no reason to suppose that. For all they knew Masnol could have discovered the existence of the receivership by asking appropriate questions of West Bromwich. In actual fact it appeared that it was the policy of Masnol not to approach an existing lender on a re-mortgage transaction lest the existing lender improve terms and deprive Masnol of the deal, but there is no reason why Mr McGuinness and Miss Francis would have known that. For all they knew Masnol would at least ask for a reference from the existing lenders (which could be done without revealing the fact the existing loan was being re-financed), and such a reference would be likely to throw up the receivership. The valuers as instructed by Masnol might have stumbled across it in the course of their valuation exercise, again so far as Mr McGuinness and Miss Francis knew. Accordingly, the conspirators would have to hope that those two rather more obvious sources of information would not reveal the receivership if they were to achieve their aims. I do not regard that thinking as being at all plausible.

289. In addition to all that, there is, again, the perennial question of motive. I do not need to develop that point further. Yet further, as will appear, as it became apparent that Miss Francis would not be able to see the re-mortgage through, Miss Francis was going to have to draw her successor into the conspiracy. It is in fact Mr Hubble's case that that happened. Drawing in a third person who, like Miss Francis, had no particular reason to engage in misleading behaviour (as will appear) decreases yet further the probabilities of there being a conspiracy in the first place.

290. In all the circumstances, therefore, I do not consider that those two documents are sufficient to demonstrate the conspiracy that Mr Hubble seeks to rely on. I accept Miss Francis's evidence that she never received a conspiratorial instruction from Mr McGuinness, and that she never developed a plan herself.

Part IV – the claim based on the acts of Mrs Glavin

The handover to Mrs Glavin and Mrs Glavin's participation thereafter

291. By emails of 19th and 24th April sent to the receivers' representatives and Heatons respectively Miss Francis informed them that she would be moving within the firm on 26th April and that her colleague Mrs Glavin would take over the matter and would be "fully briefed". Mr Hubble submitted that that meant it was likely that there was a conversation between Miss Francis and Mrs Glavin before the latter took over. Mrs Glavin said there was no discussion - she arrived on morning to find the file on her desk on the morning of the 27th April (a Friday), without (at the time) any handover notes, much to her displeasure (because she was already too busy to cope with her existing workload). She actually took the file to her lead partner Mr Vos and asked to be relieved of it, and he refused, saying she should just finish off the transaction. She subsequently got handover notes on Monday 30th April. She basically finished off the re-mortgage transaction. It is in the course of doing so that she is alleged to have told a number of important lies, and to have conspired with Mr McGuinness and Miss Francis to do so.

292. Mrs Glavin also took over completion of phase 2. That is by now of much less relevance in this case and it will not be necessary to refer to very much of this activity.

293. It was suggested to Mrs Glavin that before the handover there was an unrecorded conversation between Miss Francis and Mrs Glavin to the effect that the receivership should not be revealed to Heatons, and neither should the then existing dispute about rent collection that was ongoing in relation to the receivership. She denied that there was such a conversation. I have already found that Miss Francis did not have an intention to conceal the receivership, and that she and Mr McGuinness did not conspire to that end. It follows from that that the conversation that was put did not occur, but having heard Mrs Glavin give evidence I am quite satisfied with her own

evidence that there was no such conversation. There is no evidence of it whatsoever. It is true (see above) that Miss Francis wrote 2 emails in which she reassured counterparts that Mrs Glavin would be fully briefed, but that is a statement of intention as to the future. The conversation is a fact which Mr Hubble is propelled to having to allege in order to make his case work, but that is not a basis for finding it to have existed. Its existence would require propensities which I do not consider Miss Francis to have had. And insofar as Mr Hubble's case involves Miss Francis suggesting that Mrs Glavin should take improper steps to conceal the receivership it would involve Mrs Glavin agreeing to wrongful acts when she had no reason to do so. I deal with alleged motive in the next section but for the present merely observe that Mr Hubble's suggested motive for Mrs Glavin's lies (pressure of work) cannot realistically have operated to induce her to accept an improper suggestion from Miss Francis. It also seems to me to be fundamentally unlikely that the relatively inexperienced Miss Francis, who had been in the department for about 6 months, should go off and start making improper suggestions to Mrs Glavin, who was in practice her senior.

294. I am, of course, for these purposes dealing with Mr Hubble's suggestion of an improper concealment. He did not advance a case that there was a proper instruction not to reveal the receivership, which was somehow taken too far. Both Miss Francis and Mrs Glavin denied that any such proper instruction was given anyway.

295. So all Mrs Glavin had at the time were Miss Francis's handover notes. They were brief in the extreme, merely describing the fact of a re-mortgage with Britannia, the need for landlord's consent and the following reference to the receivership:

> "When the mortgage is redeemed we need to ensure that the bank agrees that it will pay the receivers and for the withdrawal from office of the receivers."

296. Those words are in bold. These handover notes were only made available to Mrs Glavin on Monday 30th. It was not suggested that the presence of these words demonstrated that there must have been a prior reference to the receivership passing between the two women.

Mrs Glavin's motive

297. Once again it is important to consider the alleged motive for the serious wrongs that Mrs Glavin is said to have committed. The absence of a convincing motive tells against the likelihood of her conduct being dishonest.

298. The motive alleged against her was that she was under pressure at work. Her evidence was that she generally worked from 8.30 or 9.00am until 8 or 9 in the evening. The RID was a pressurised environment and very tiring. On her retirement 6 months later she said was exhausted physically and mentally. The claimant's case is that this over-pressured working environment led her to take short cuts to get work off her desk, and in the present case to take dishonest ones. It is also said that she resented the position that she was in, which was an additional motive for dishonesty.

299. Pressure of work can undoubtedly lead to shortcuts, but is rather less likely to lead to deliberately dishonest shortcuts. Mrs Glavin was at the end of her working career. Her evidence was that she had never been accused, much less been found to be guilty of, dishonest behaviour at any time in the past, and that evidence was not challenged. If, therefore, she was dishonest in the case of Mr McGuinness then it was the one and only time that pressure of work drove her to that. That makes pressure of work a much less cogent motive. Resentment is a curious motive for dishonesty in these circumstances. One can imagine circumstances in which a resentful employee might want to hurt her employer, but it is not clear why resentment at her working conditions should lead her to commit acts of dishonesty for the benefit of the client.

300. She cannot have been driven by any bonus considerations because she would not have been entitled to one in her final year. Mr McGuinness had been her client prior to her taking up the reins in April 2007, but he was not a close or special client, so she had no particular incentive to keep him particularly sweet. Since there is no suggestion that dishonest services were offered to all her clients (in fact the opposite - she had never been accused of dishonesty) there is no reason why Mr McGuinness should have been singled out for this particular brand of favourable treatment. She was not given the re-mortgage transaction because she was the person who was regularly assigned to his work. The re-mortgage transaction was dumped on her without any consultation. And she was due to retire in 6 months and leave all conveyancing behind. So there is no motive discernible on any of those bases. And in any event these sort of matters were not alleged against her as her motive.

301. So pressure of work and resentment is all that the claimant is left with. As I have said, they are prima facie unlikely motives in these circumstances. There is therefore no particularly plausible motive for the dishonesty which is alleged against her. As with Miss Francis, that is not a conclusive factor against there being dishonesty, but it is something that weighs heavily in considering whether, on each occasion, her conduct was dishonest.

302. There is one additional factor which makes pressure of work an unlikely motivation for dishonesty. At one point in her cross-examination, when being asked about rental statements, she made a remark about wanting to get the matter off her desk. That was

seized on by Mr Hubble as demonstrating her mentality and supporting the allegation of dishonesty. I am sure she wanted to complete work as quickly as possible, but it is unfair to apply that remark in the manner in which Mr Hubble sought to apply it. It has to be viewed in its context. But if one posits a legal executive who wishes to get rid of work, then one has to bear in mind the case of the claimant that an honest answer or statement would have brought the re-mortgage transaction to an end. What her allegedly dishonest answers are said to have done is to keep the transaction going. If Mrs Glavin was really motivated by a desire to get to the end of the work she could have done it more effectively by telling what the claimant said was the truth, thereby effectively terminating the transaction and clearing her desk.

Mr McGuinness's lie and Mrs Glavin's credibility

303. Mr Hubble's attack on Mrs Glavin's credibility starts with an email that Mr McGuinness sent her early in their relationship. Since he makes much of it as a particular badge of dishonesty on the part of Mrs Glavin I should deal with it specifically.

304. One of the last acts that Miss Francis carried out on McGuinness matters before handing the file over was to send Mr McGuinness a draft of a letter which it was proposed that Mr Wano (who assisted Mr Garry) should send to Needham & James in relation to the receivership. It appears that Mr McGuinness rang Mrs Glavin early on 27th April to tell her that he approved the contents of that letter with one amendment. Mrs Glavin referred to this conversation in an email to Mr Wano timed at 09:55 which reads:

> "I have just spoken to Spencer who has confirmed his agreement to your letter that Helen copied him in on yesterday. He would however ask you to add in it the request for a full statement of all rent which has been collected by the Receiver since appointment, and the total of this sum must be reflected in the redemption statement."

305. It would seem that this was Mrs Glavin's first involvement with Mr McGuinness since she acquired conduct of the matter that same day. The addition which Mr McGuinness asked to be made reflected his concern that the receivers had not accounted properly for rent that they had received. He had been pressing for information about this.

306. At 10:52 Mr McGuinness sent an email to Mrs Glavin under the subject heading "Confirmation of Rentals, Mizzen House":

> "Dear Helen,
>
> I can confirm that there are no rent arrears on the property and that the property is fully let with all AST's provided in place.
>
> Should you require any additional information please let me know."

307. It is the claimant's case that this is a lie on the part of Mr McGuinness because he cannot have known that there were no rent arrears because he had not been collecting all the rent and he did not know what rent the receivers had been collecting. His ignorance of the rents being collected was the reasoning behind his request for an amendment to the letter being sent to the receivers' solicitors. That much would seem to be correct. However, the claimant goes on to tie Mrs Glavin in with this lie because it is said that, as a result of the conversation that they had had earlier, she must have known that it could not be the case that there were no rent arrears. Furthermore, it is said against her that she actually asked for the email to be sent – she seemed to admit this in cross-examination. She is therefore said to have asked for a dishonest confirmation that rents were up-to-date and the only reason for that was that so she could inform Masnol, if necessary, that Mr McGuinness had said that that was the case. She is also criticised for not having reported to someone else in her firm that Mr McGuinness had apparently lied. All this is said to show that she was dishonest.

308. When the email is looked at in the context of all the evidence I do not consider that Mrs Glavin's involvement with it shows that she was dishonest.

309. First, and despite her apparent acknowledgment that she asked for the email, I think that she is likely to be confused about that and did not make the request. This was her first day (indeed probably her first hour) with the file. The conversation that she had with Mr McGuinness before her email to Mr Wano was the first that she had. She will not have had time to consider the file and work out that such a "confirmation" was required. If she got into work at her normal time then she will have been at her desk between 8:30 and 9:00. By 09:55 she had typed and sent the email to Mr Wano that I have set out above. Before then she had had the conversation with Mr McGuinness to which the email refers. If she made some sort of request one would have thought she would have made it in that conversation; but by the time she had her conversation she would not have had time even to begin to familiarise herself with the file, much less identify a specific need for that information. Furthermore, the more likely course of events is that Mr McGuinness rang her rather than the other way round, so the purpose of the call is unlikely to have been to ask him to provide the

email. The more likely genesis of the email is that it was Mr McGuinness responding, a little late, to a previous email that he had received from Miss Francis on 25th April by which she forwarded conditions precedent from Miss Alberici one of which was:

> "I will also, when I seek the ASTs, be sending you a schedule and asking you to confirm on headed paper that all the ASTs are in place and there are no rent arrears."

For some reason Mr McGuinness decided to provide that confirmation that morning.

310. In her cross-examination Mrs Glavin said that she did not take any action on Mr McGuinness's email because she doubted that it was absolutely correct and wasn't going to act on it. Mr Hubble relied on this as further evidence of her dishonesty – presumably he would invite me to disbelieve this evidence and say that Mrs Glavin was lying to cover up her participation in a dishonest email. I do not accept that suggestion because what Mrs Glavin said is consistent with later emails which she did not turn to, and was not taken to, when being cross-examined. Having received Mr McGuinness's email she responded at 11:15:

> "I understand from Heatons that they want copies of the outstanding tenancy agreements.
>
> I have spoken to Needham & James and they have totally refused to answer any of Troy's [Mr Wano's] points raised in his letter including the statement of rent. They have said that the rents received are shown within the redemption figure and following redemption we can obtain a copy of the statement. They will not entertain this at this stage.
>
> Please respond to the above urgently."

311. Mr McGuinness responded twenty minutes later, copied to Mr Wano:

> "It is a requirement of the lenders that to redeem the loan we have an accurate position on the rental accounts. There is absolutely no reason to withhold this information and it is yet another example of their poor conduct. The receiver has a duty to act openly and honestly to both myself and his appointer and

> not to withhold any financial information. Refusal to do so only adds to the already long list of their inability to keep accurate records of information they have been given. The completion statement does not break down rent received it only breaks down information received. Please could you go back to them and advise them that it is not a request but a requirement and we require the information for redemption, let alone should be provided with it regardless of necessity or not?
>
> Troy,
>
> Could you please write to them in follow up to your letter that it goes on record that they REFUSE to answer any points or give information that they have a duty, under legal requirements that they provide accurate statements.
>
> I will call you to discuss if that is okay?"

312. What these emails show is that Mr McGuinness made his erroneous statement, and that within 25 minutes Mrs Glavin sent an email which was plainly inconsistent with it; and within another 20 minutes Mr McGuinness sent another email plainly inconsistent with his first. This supports Mrs Glavin's evidence that she did not believe Mr McGuinness's first email and did not act on it; and bearing in mind his second email it is not surprising that she did not take it further. One has to bear in mind the context of this. This all happened within little more than 2 hours of Mrs Glavin taking over conduct of a file she knew little or nothing about before that morning. To suggest that this demonstrates dishonesty on her part is to view it in a very distorted fashion. What would have made it dishonest would be if she had asked for Mr McGuinness's "confirmation" knowing that he could not honestly give it, but the timing is against that and even Mr Hubble's desk-clearing motive theory could not realistically explain why she would do that.

313. What might be said against Mrs Glavin is that she was insufficiently curious as to how Mr McGuinness could write his email. But she was new to the file and generally overworked, and it would be quite understandable if she did not pursue the point further. I do not accept that her failure to refer the matter to anyone more senior is a badge of anything significant to this case at all. Bearing in mind she was new to the file it is entirely understandable if she got on with her work and sorted out matters as they arose. It is not clear to me in any event what she was supposed to report. Furthermore, Mr Vos's response to her request to be relieved of the file would not have encouraged her to report this short email at the time.

314. In the circumstances, and bearing in mind, as I do, the entirety of her evidence on the point in the witness box, I do not consider that this incident demonstrates dishonesty on the part of Mrs Glavin, or a propensity on her part to be dishonest.

Mrs Glavin's first alleged operative lie - CPSE question 27.1

315. It will be remembered that Miss Alberici had asked Miss Francis to complete and return the standard CPSE inquiry form. Miss Francis had sent the form to Mr McGuinness for his contribution and he returned it. It fell to Mrs Glavin to complete the form and return it, which she did on 27th April at 13:58 - again, very early in her conduct of the file. The first alleged actionable misrepresentation is said to appear there in the answer to question 27.1, which I have set out above but which I repeat here with its answer:

> "27. Notices.
>
> 27.1. Except where details have already been given elsewhere in replies to these enquiries, please supply copies of all notices and any subsequent correspondence that affect the Property or any neighbouring property and have been given or received by you or (to your knowledge) by any previous owner, tenant or occupier of the Property.
>
> 27.2 Are you expecting to give or to receive any notice affecting the Property or any neighbouring property?
>
> *None served or received"*

316. This is said to have been false because the notice appointing receivers was a notice falling within this clause. It was put squarely to Mrs Glavin that she knew she ought to have referred to the receivership in the context of this question and deliberately did not do so because of the pressure she was under in order to complete the loan on the Monday, which was then being firmly proposed. She is therefore said to have knowingly made a false statement. In his written final submissions Mr Hubble did not quite put the matter in quite that way. He submitted:

> "80. Any thought would have indicated that a Receivership would start with a notice. Merely not knowing whether it did

> or did not cannot be a defence without enquiry, for that would be reckless."

317. It is not clear to me whether Mr Hubble had moved from knowing falsity (clearly put to Mrs Glavin) to recklessness, but I will consider both cases.

318. Mrs Glavin said that she was not aware of any notice and was not aware that the receivership had been commenced by a notice; it would not have occurred to her at the time. She also believed that the receivership was "personal" to Mr McGuinness and did not affect the property, and that any lender would have found out about it anyway through its own researches and due diligence. Her evidence in her witness statement was that she would have worked from Mr McGuinness's answers to the questions (which were on the file) and turned them into more legal language than he had used. She was not familiar with the CPSE enquiries, which were relatively new; she was more familiar with older forms of enquiries.

319. The first logical question is whether the answer is false by reason of the notices which appointed the receivers. In my view it is not, for the following reasons.

320. The purpose of the enquiries is to enable a purchaser to consider matters which might affect its use of the property after purchase. That is apparent from their overall nature and content. So far as question 27 is concerned it is also apparent from the notes to the enquiries. The note to question 27 reads (so far as relevant):

> "27. Notices.
>
> The Buyer needs details of every notice affecting the property so that it:
>
> Knows what may affect the Property;
>
> Can take steps in the contract to ensure that the Seller deals with all notices as appropriate;
>
> Is prepared to take appropriate action following completion of the Transaction; and

> May negotiate an indemnity.
>
> Examples of notices which may affect the Properties include planning notices, compulsory purchase notices, public utilities' notices, repair notices, landlords' notices of intention to sell the freehold, tenants' notices of intention to buy the freehold or to enfranchise, notices about a change of landlord, or tenant, mortgages and rent review.
>
> Notices about disputes should be included in the reply to enquiry 28."

321. Thus the thrust is apparent. It is looking to notices which give rise to rights or obligations which may affect the property after completion. That is borne out by the verb used in the question - the expression is "notices … that affect the Property", not "notices …. that relate to the Property".

322. In my view a notice appointing a receiver under a mortgage is not such a notice. It does not change the rights or obligations affecting the property for these purposes. The mortgage has already done that. It is implementing a right under the mortgage, but that is different. It might be a right relating to the property, but it does not "affect" it in the way that the word contemplates, as the note contemplates, or as the examples given in the note contemplate. It might relate to something that the purchaser is interested in (if the purchaser is a mortgagee) because it might go to the creditworthiness of the buyer, but that does not mean it affects the property. It is the mortgage itself that affects the property.

323. I accept that the note refers to "notices about … mortgages", but it does not follow that all notices which might be given under a mortgage will "affect" the property. The examples given are only of notices which "may" affect the property. It does not follow that all notices about mortages do affect the property. I find that the notice appointing the receivers does not, for these purposes. For the sake of completeness I should say that evidence given by Miss Alberici as to what she would expect to have had disclosed to her under this question is of no relevance to this point.

324. Accordingly in saying that there were no notices, and in not mentioning the notice appointing the receivers, the answer to enquiry 27 contains no misrepresentation. That is an end of the deceit case in relation to that particular allegation. However,

since there was a clear attack on Mrs Glavin's subjective dishonesty I will deal with that point as well.

325. Mrs Glavin denied dishonesty. She was aware of the receivership but did not know about the procedures for putting a receiver in place. She basically gave that particular aspect of the matter no thought. She was therefore not aware of the notices appointing the receivers. She also gave evidence of her view that the receivership was a matter which was personal to Mr McGuinness and did not affect the property and that her experience was that matters affecting a borrower would be researched by the lender. It would not have occurred to her that the lender would not already have known about the receivership. The mortgage would in any event be discharged on completion. In all those circumstances she denied the dishonesty alleged.

326. I accept her evidence on this point without hesitation. It has strong support in plausibility. Mr Hubble is right to point out that her evidence was in essence reconstruction not recollection, but she was firm in her actual evidence of not seeking to mislead. This answer was provided on her first morning with the file. She had Mr McGuinness's attempts at answers, but he had not attempted an answer for enquiry 27. It is entirely plausible, and I accept, that she would not have thought about a notice appointing the receivers in the context of enquiry 27, especially if she did not know how such things worked (again, highly plausible for a legal executive who spent her time doing conveyancing). Her failure to understand that any appointment notice was one which needed to be disclosed coincides with what I have held to be true construction of the question asked, but even if I am wrong about that then my view is nonetheless at least an understandable and rational one (if I may be allowed to say so), so it would be plausible and natural for her not to associate such a notice with the enquiry. So her entire thought process, as she reconstructs it, is reasonable, plausible and inconsistent with dishonest intent. It is true that it is a reconstruction, but then so is the case of Mr Hubble. His case starts with her knowing about the receivership, and then proceeds through what she must have known as a result. I accept her reconstruction over his.

327. I also bear in mind the context and alleged motive. As I have observed more than once, this was an act done right at the beginning of her conduct of the file. So the claimant's case requires that almost the first act she did on the file was deliberately fraudulent. She had had one conversation with Mr McGuinness, but that is all. It was not suggested to her that in that conversation Mr McGuinness told her to suppress the receivership and that that was why she did not refer to the notice. The motive put to her was that she was under pressure and was trying to get the matter completed by a then hoped for Monday morning completion (30th April) . I reject that suggestion, both on the basis of having heard Mrs Glavin give evidence and on the grounds of relative implausibility. I do not consider it remotely likely that pressure of work of itself would lead Mrs Glavin to tell this deliberate lie, and I consider it highly unlikely that someone in her position would decide to assist a client to complete a transaction speedily by deliberately concealing, by a lie, something that she knows ought to be

disclosed. There is nothing in it for her personally, nothing in it for the firm, and a clearer desk is not something that she would be likely to achieve by this particular alleged mendacious behaviour.

328. The same applies to any suggestion that Mrs Glavin was lying to keep the client happy. It is highly unlikely that someone in her position, with her limited connection with Mr McGuinness, would do such a thing. I find as a fact that there was no prior conversation with Mr McGuinness in which the latter asked or instructed her not to refer to the receivership, and I have already rejected the claimant's case that there was a prior conspiratorial conversation with Miss Francis.

329. This allegation of fraud therefore fails.

Mrs Glavin's second alleged operative lie - CPSE question 28

330. Question 28 on the CPSEs related to disputes:

> "28. Disputes
>
> Except where details have already been given elsewhere in replies to these enquiries, please give details of any disputes, claims, actions, demands or complaints that are currently outstanding, likely or have arisen in the past and that:
>
> (a) relate to the Property or to any rights enjoyed with the Property or to which the Property is subject; or
>
> (b) affect the Property but relate to property near the Property or any rights enjoyed by such neighbouring property or to which such neighbouring property is subject."

To this question Mrs Glavin has appended the word "NO". That was also the answer given by Mr McGuinness in his proposed response.

331. This answer is said by the claimant to be wrong, and fraudulently so, in two respects. First it conceals the fact that there were ongoing disputes with the receivers, and

second it is said to conceal the defects disputes affecting phase 1. The defendant accepts that the defects dispute ought to have been disclosed in answer to this question (the second respect) but denies that Mrs Glavin was dishonest in not referring to them. The defendant does not accept that the disputes with the receivers fell to be disclosed, and also, so far as may be necessary, denies that Mrs Glavin was dishonest in not referring to them. I shall deal with the receivership-related points first.

Question 28 - receivership matters

332. The point about receivership disputes raises a similar question to that which I have considered in relation to enquiry 27, namely whether the dispute falls within the proper construction of enquiry 28. Mr Hubble's written final submissions identified one particular dispute for these purposes as being one reflected in an email sent by Mr Murray on 25th April 2007 to Miss Francis. In that email he says:

> "Your client must understand we cannot wait any longer. If the refinance does not happen then we want your clients to agree to make available at his office for collection at 12 noon on Friday 27th April 2007 all the keys to the flats and the tenancy contracts or proceedings [will] be issued without fail. A letter will also be sent out to all the tenants on Friday. He really does need to make this happen now."

333. This was one of two disputes about the receivership that it was put to Mrs Glavin as being deliberately concealed by Mrs Glavin in her answer to enquiry 28. The other was the dispute about rent collection. Mr Hubble did not, in this context, rely on the dispute about the appointment of the receivers. That is not referred to in the relevant part of his final written submissions either.

334. The first question is therefore whether those two disputes fall within the description of the disputes which enquiry 28 asks about. In my view the first of them does not quite fall within the overall definition. The only "dispute" part of the first of the matters complained about is the threatened proceedings. The requirement of redemption is not a dispute; neither is the demand for delivery up of keys. But the threat of proceedings (whatever they may be) betokens a potential dispute. If the proceedings would have been the receivers enforcing their rights under the charge then they would in my view have related to the property. However, that dispute was not then current; nor could it have been said on 27th April to have been "likely". So strictly that probably did not have to be disclosed.

335. However, the dispute about rent collection is one relating to the property. The question was what rents the receivers had collected. The rents related to the property and a dispute as to whether, and the extent to which, they had been collected in my view "relates" to the property. It was also a very live dispute.

336. In coming to that conclusion I have not ignored the guidance notes to the CPSE which again tend to indicate that what the enquiry is intended to do is to flush out matters which might affect the purchaser after completion. I will not lengthen this judgment by setting them out. Despite the tenor of those notes, the disputes about rent collection fall within the actual question, and if it matters it is the sort of thing that might affect a purchaser because that sort of dispute might lead to difficulties over rent collection from tenants even after the receivers have departed the scene following completion.

337. So in this instance there was a dispute which had not been disclosed. It is therefore necessary to consider the state of Mrs Glavin's knowledge about it and whether she deliberately failed to disclose it. I shall also take the opportunity of considering those points in relation to the first "dispute" in case I am wrong in my conclusion as to whether the dispute fell within the enquiry.

338. Miss Glavin's evidence was that she knew about the receivership but she denied deliberate concealment of any dispute about it. She has (yet again unsurprisingly) no independent recollection of her thought processes at the time, but said her belief would have been, and still is, that a dispute about the receivership would have been personal to Mr McGuinness and would not have affected the property after completion. The essence of her evidence is that it would not have occurred to her that the dispute about rent collection fell within the enquiry.

339. Mr Hubble's case is that Mrs Glavin knew about the disputes with the receivers and had them "in the forefront of her mind" on the morning of 27th April. He seems to base this on her email at 09:55 to Mr Wano, coupled with the suggestion (accepted by Mrs Glavin as a possibility, but she did not know) that she must have gone back and looked at the email of 25th April from Mr Murray to Miss Francis which imposed the noon deadline. He might also have added the email exchange between Miss Francis and Mr McGuinness later that morning (see above), but that was not put to her in her cross-examination. What was put to her was a Time Report prepared by Mr Wano in relation to 27th April which records a meeting with Mrs Glavin for 10 minutes:

> "Internal Client Meetings – discuss helen glavin.

> hg has been speaking with sm - attempting to redeem Monday; hopeful that receivers will accept that
>
> persuaded hg to try and redeem – pursue claims post redemption; she will again be talking to him today and expects he will agree to this"

No timing is given for this event, but judging by prior events on the timesheet which can be related to the known timing of emails it must have taken place at some point after 11:56 because Mr Wano records that he considered an email which must have been Mr McGuinness's email of that time. A fee narrative shows that after considering that email Mr Wano spent ten minutes considering whether receivers were required to provide a breakdown of receipts and then a further fifty minutes considering whether there was an obligation to provide a full redemption statement. That means that at least an hour must have elapsed after the timing of Mr McGuinness's email before he spoke to Mrs Glavin, assuming (as I do) that the fee narrative is constructed chronologically. Given that we know that Mrs Glavin sent out the answers to enquiries at 13:58, that does not really leave much time to fit in the meeting between her and Mr Wano before she sent them. I am not prepared to find that it occurred within that narrow timeframe. The significance of that is that one of the matters relied on as keeping the receivership "in the forefront" of Mrs Glavin's mind was not operative at the time the enquiries were likely to have been answered.

340. Mr Hubble's line of attack on Mrs Glavin's knowledge and intention moves from saying that the receivership was in the forefront of her mind to saying that, that being the case, she must have taken a decision to suppress that fact from the answers to the enquiries, knowing that a truthful answer to the enquiry required a reference to the receivership disputes. That chain of reasoning wholly fails.

341. I do not consider it likely that Mrs Glavin did have the receivership disputes in the forefront of her mind. She had just taken over the file. She had to deal urgently with Mr McGuinness's early morning phone call and communicating its contents to Mr Wano, but she also had to get on with the enquiries themselves. She may also have had other matters that she was doing. I do not doubt that she was under work pressure, suddenly having to deal with this unexpected and unwelcome file. I accept her evidence that, rightly or wrongly, she did not consider that the receivership had an effect which would persist after completion. She was focused on pursuing the conveyancing. A person who, as I find Mrs Glavin did, considered that a receivership was "personal" and not persisting would be even less likely to have it, and the receivership disputes, in mind at all (save when she had to deal with emails about it or have a conversation about it with Mr Wano). Furthermore, although I have found that technically one aspect of the receivership dispute problem falls within the enquiry, a bona fide view that it does not is not at all implausible; nor is the idea that a person would not necessarily get as far as thinking about that. That applies even more strongly to the dispute element that I have found does not fall within the enquiry.

342. In the circumstances I find that Mrs Glavin simply did not have the state of mind which would make her response dishonest. She did not have the receivership in mind when she answered and transmitted the answer to enquiry 28, and that state of mind was honest and genuine. Insofar as there was a misrepresentation it was not made knowing it to be untrue or being reckless as to its truth or falsity. Mrs Glavin was doing her conscientious best under difficult conditions.

343. Yet again, as with so many of the other allegations of dishonesty, I also take into account the absence of a plausible motive. I do not need to repeat again what I have said above about this.

Question 28 - defects matters

344. The complaint here is a failure to refer to the dispute about building defects in relation to phase 1. Because the defendant accepts that this is an omission which makes the answer to question 28 inaccurate, I am spared the task of considering whether this is a misrepresentation. What I have to consider is whether it is dishonest or innocent.

345. Mrs Glavin's evidence was that she misunderstood the question. She had known about the snagging issues but by the time she was completing the enquiries they were, as far as she knew, historic matters. She was not experienced in this form of enquiries and did not understand that they required disclosure of disputes even if they had been resolved and were for that reason historic. Had she understood that such disputes ought to have been disclosed she would taken steps to make sure they were disclosed. As it was she accepted the answer which Mr McGuinness had proposed for this question, which was "No". Nor was she prompted to realise she had made a mistake when, on the following Monday, she received hand-over notes which referred to problems in letting the phase 1 properties and to the fact that other members of the firm had been dealing with the construction dispute.

346. Mr Hubble's case on this is that Mrs Glavin knew of the construction dispute, and knew that it involved more than mere snagging. She knew of it because in October 2006 she had assumed temporary conduct of the phase 2 completion file for 2 weeks while Miss Francis was on holiday. During that period, and afterwards, she took part in certain discussions which demonstrated her knowledge of the presence of defects and that they were being used by Mr McGuinness to delay completion of phase 2, and afterwards she was copied in on emails which referred to the continuing dispute. As a result she must have known about the dispute, and must have had it in mind, when she completed question 28, and her evidence that she thought it did not cover past disputes was incredible. It was highly unlikely that the construction dispute did not

come to mind. So when she answered "No" to the question she was saying something that she knew to be false.

347. I do not accept Mr Hubble's reasoning and I find that Mrs Glavin genuinely did not believe that she had to disclose historic defects disputes and overlooked her previous contact with the defects dispute. That involvement was not great but it was more than being a mere postbox. It appears that to a degree Mrs Glavin was instrumental in effecting the engagement of the property disputes resolution department in the issue. She had a few conversations with Mr McGuinness which were probably more than just passing conversations. She will have acquired a very limited understanding that there was a dispute and that Mr McGuinness was saying it was serious. Having said that, I find that pressure of the conveyancing work that she had to conduct meant that she did not pay much attention to that side of the matter, and would tend not to read emails into which she was copied (as opposed to those where she was designated as the primary recipient), especially after Miss Francis returned from her holiday. This means that the defects never figured particularly strongly in her consciousness. In her haste to complete the unfamiliar enquiries on an unfamiliar file, under pressure to do what could be done to achieve completion the next working day, I think it likely that she looked at and accepted the client's proposed answer (which in my view many solicitors would do) and did not embark on any sort of thought process which would have brought the defects disputes into mind, especially as I accept she genuinely misread the question. It is much more likely that the answer was the product of pressure and lack of care than that pressure led to a deliberately dishonest act.

348. I acknowledge that when being questioned about her involvement in the autumn of 2006 Mrs Glavin was sometimes less than focused and sometimes overly cautious. She was on occasions reluctant to accept what seemed to be fairly plain on the contemporaneous documents. However, I think that this reflected her dismay and discomfort at the serious allegations that were being made against her and not an evasiveness born of dishonesty.

349. The absence of a plausible motive applies to this act as much as to the others alleged against her.

350. I therefore find that the fraudulent misrepresentation claim based on CPSE enquiry No 28 fails.

351. For the sake of completeness I add that Mr Seitler did not take the point in relation to this representation that the statement was not a statement by Mrs Glavin or her firm, but was merely a statement by the client. The same applies to the claim under question 27 and the claim in relation to the preliminary enquiry answered by Miss Francis.

The representation about redemption

352. These are representations about the redemption amount, arising out of the fact that West Bromwich agreed to discharge the mortgage on phase 1 for less than the full amount of the debt secured (or said to be secured) over it, leaving a balance unsecured. The actual representation relied on was made in an email at 11.41 on 10th May when, in answer to a question from Miss Alberici:

> "All I now need is the figure for the redemption - can you get this to me ASAP?"

Mrs Glavin responded:

> "We need £1,100,000 to redeem the mortgage as at today."

(meaning, as is common ground, £11,100,000). Mrs Glavin is said to have deliberately and knowingly misrepresented the amount required to redeem by referring only to the amount necessary to discharge the mortgage when in fact Mr McGuinness agreed to pay additional amounts as an unsecured debt and she ought to have referred to those as well because they were part of an agreement required to achieve redemption. As a result the receivership costs (left unsecured) were not disclosed, and so neither was the receivership. This is said to have been a deliberate and dishonest act on the part of Mrs Glavin.

353. Mrs Glavin is said to have repeated this mis-statement 12 minutes later, and to have been guilty of associated dishonesty. At 11.43 Miss Alberici asked for clarification of the sum and for a redemption statement:

> "Can you clarify - is that **one** million one hundred thousand or **eleven** million one hundred thousand. Is there a redemption statement that Jackie [Derrett] and i can see?"

To which Mrs Glavin responded, at 11:53:

> "Sorry, I missed out a one it should have read £11,100,000".

354. The failure to answer the question about the redemption statement is said to have been a deliberate omission. There was a redemption statement, but it showed receivership costs and a shortfall on completion which Mrs Glavin wished to conceal.

355. Mrs Glavin's case and evidence is that she gave an honest answer. While she was aware that a deal was arranged under which an unsecured balance was left owing by Mr McGuinness, she provided the figure which was required to redeem the charge - £11.1m was the amount which West Bromwich required to release the charge and provide a good unencumbered title to Masnol for its charge. She did not intend to make a statement about how much was owing under the loan relationship, or secured by the charge. She intended to, and did, make a statement about how much West Bromwich required to be paid by way of a redemption figure for its charge.

356. Once again there is a dispute as to whether the relevant representation was made. Mr Hubble's case is that the statement by Mrs Glavin, on its true construction in its context, was one which was, and was taken as, referring to the whole of the moneys due under the loan relationship (including receivership costs), and not just the sum necessary to redeem the charge. It was therefore false. The defendant's case is that the statement in the 11:41 email was one which referred only to what was required to redeem the charge. The sum required for that purpose was the £11.1m referred to, so there was no misrepresentation.

357. Stripped of the context of this case, it does not seem to me that the words "[a sum to] redeem the mortgage" are particularly ambiguous. The normal meaning of those words would coincide with Mrs Glavin's professed understanding. One redeems mortgages; one repays or discharges loans. Even if a mortgage is being discharged on receipt of less than the total debt, I would still consider the natural meaning to be that just stated. However, Mr Hubble's submission is that there is a context in this case which makes the expression unambiguously one which refers to the discharge of the whole loan. He says that the context makes it clear that Mrs Glavin intended to make a statement about the payment of the whole loan.

358. The context of a statement may introduce an ambiguity which would not otherwise be there. It was common ground that where a statement is ambiguous the representor should have intended the statement to be understood in the (false) sense in which it was understood by the representor, or that the representor should have used the ambiguity for the purpose of deceiving the representee, if a claim in deceit is to succeed (*The Kriti Palm* [2007] 1 All ER (Comm) 667).

359. Mr Hubble's submissions went beyond this sort of ambiguity analysis, and went so far as to say that in its context the statement was unambiguous. I shall consider that point, but even if he fails on it he can still succeed if he establishes ambiguity and that

Mrs Glavin intended the sense that was false. In fact, since Mrs Glavin says she intended what I have described as the prima facie sense, he will fail on either way in which he puts his case if he fails to establish that Mrs Glavin intended his sense of the expression.

360. In order to make good his case Mr Hubble relied on the detailed run-up to the critical email, so it is necessary to consider that detail.

361. In the run-up to the refinancing there were three areas of dispute relating to the amount of moneys said to be owed by Mr McGuinness to West Bromwich. First, there were early redemption fees. Second, there were the fees, costs and expenses associated with the appointment of the receivers. Third there was a dispute as to the amount of rent collected by the receivers for which they were obliged to account. Mr McGuinness did not wish to pay the first, considered (at least for negotiating purposes) that he should not pay the second, and considered that the receivers had not properly accounted for all of the third (the rental payments in respect of the phase 1 properties). It is unnecessary to set out how that dispute unfolded; it is sufficient to identify the areas of dispute. They amounted, in aggregate, to hundreds of thousands of pounds.

362. The appropriate figure which Mr McGuinness should pay, (and therefore, as a matter of logic, what would have to come from the refinancing) was being debated between Mr Murray for the receivers/West Bromwich and Mr Garry for Mr McGuinness. On occasions Mrs Glavin was drawn into the dispute, but it was Mr Garry who was conducting Mr McGuinness's side of the matter.

363. By 9th May there was great pressure being imposed by Masnol to finalise the refinancing. There had still been no agreement which, if any, of the disputed parts, Mr McGuinness would or would not be liable for. At 10:19 Mr Andrew Palmer (who was assisting Miss Alberici at Heatons) emailed Mrs Glavin to say:

> "It is now imperative that this matter completes today otherwise it will not happen at all."
>
> Please can you let me have the redemption figure as a matter of urgency?"

364. Mrs Glavin was not in a position to deal with that because she was not dealing with the dispute, so she forwarded the email to Mr McGuinness and to Mr Garry. Mr

Garry tried to get hold of Mr McGuinness but could not do so and sent a text to him to warn him about the risks to the transaction.

365. At 11:25 Miss Alberici emailed Mrs Glavin attaching an undertaking and adding:

> "Can you also:
>
> … 2 – let me or Andrew have the redemption statement as soon as you have the figure (I believe that Spencer has this but is disputing an early repayment charge that has been applied)."

366. Mr Hubble submitted that this email made it clear that Heatons wanted to know the figure to pay off the loan. That is partially true, but it does not have the force which Mr Hubble suggests. At the time it is likely to have been assumed by both sides that the loan as a whole would be dealt with. Miss Alberici will have assumed that, and Mrs Glavin will not have thought any different. Accordingly, the contrast between paying off the whole loan and redeeming the mortgage whilst leaving some of the debt unsecured will not have been in their respective minds (and especially not in Miss Alberici's) and is not inherent in the reference to the redemption statement.

367. The possibility of redeeming the charge and leaving other monies to be debated emerged shortly thereafter. At 11:48 Mrs Glavin emailed Mr Garry, apparently having heard from Mr McGuinness that an offer should be made. It is not apparent that Mrs Glavin knew what that offer was. It was made by Mr Garry to Mr Murray at 11:50 on the telephone and recorded in an attendance note:

> "Suggesting redeem at £11m and both sides reserve rights to claim more or pay less."

The attendance note went on:

> "You [Mr Murray] pointed out figure is £600k+ less than redemption statement.
>
> I said if your clients want more than they can say so, but I have no instructions.

> You asked me what redemption figure we would state to Britannia. I said I would think £11m. You asked how much SmcG would borrow. I said I would think the same."

368. It was not apparent that this attendance note was ever seen by Mrs Glavin. It has never been suggested that Mr Garry was in any way party to any deception about the redemption figure or that he has in any way behaved wrongfully in this matter. Indeed, this attendance note was not cross-examined upon.

369. This offer was confirmed in a letter faxed at 12:08, in which Mr Garry said that CHH did not know what figure Mr McGuinness would borrow.

370. At 12:02 Miss Alberici emailed Mrs Glavin:

> "Dear Helen – can you urgently email to me the redemption figure (global for all 31 redemptions) and your bank details (Britannia will send the monies directly to you when I receive a completion undertaking). My client needs the redemption figure before they can release any monies."

371. Again Mr Hubble said that this was obviously a reference to what he described as "redemption of the loan as well as a charge". Again, that may well be what Miss Alberici had in mind, because she knew nothing about treating parts of the debts differently. It did not mean "redemption of the whole loan as opposed to just redemption of the charge" because that was a distinction which had not yet arisen in the correspondence.

372. Mrs Glavin was cross-examined on this. It was put to her that the reference to "redemption figure" would have been understood as being a reference to the redemption of the loan as well as the charge. She responded:

> "Redemption figure is the amount that the lender will release the security over the property."

In my view she is correct about that. There is, of course, no difference between her understanding and what is said to have been Miss Alberici's understanding if there was no reason for treating parts of the loan separately. The cross-examination went on:

> "Q. It's followed on from the request for a redemption
>
> 7 statement and so it would have been clear to you,
>
> 8 wouldn't it, that when Ms Alberici is using the term
>
> 9 "redemption" she is envisaging that the loan is going to
>
> 10 be discharged as a result of payment of that redemption
>
> 11 figure?
>
> 12 A. I don't know what she is envisaging. My understanding
>
> 13 is that the -- my duty is to ensure that Britannia have
>
> 14 good title to the property. My concern is the
>
> 15 redemption of the -- the amount required to redeem in
>
> 16 respect of the registered charge. I do not know whether
>
> 17 there is a difference between the redemption
>
> 18 statement/redemption figure/redemption mortgage. It is
>
> 19 my understanding that "redemption figure" means the
>
> 20 amount that is required to discharge the loan -- sorry,
>
> 21 to discharge the mortgage."

373. Mr Hubble sought to make much of the correction at the end of this answer. He said that this showed the mask slipping – that Mrs Glavin understood that a redemption figure would be the sum to discharge the whole loan and not merely the mortgage and this slip revealed her true state of mind. Having listened carefully to her evidence, and having reviewed the totality of her evidence, I am satisfied that that is not correct. I am quite satisfied that when she referred to a redemption figure, or was referring to the process of redeeming, she was referring to the process of bringing the mortgage to an end by the payment of money. In fact, prior to this transaction, there was no transaction which she could recall in which the money being paid was less than the money owing on the loan secured by the mortgage, but that does not detract from the force of what she said she understood by redemption. She made a slip, but not one which revealed her true thinking.

374. In response to Miss Alberici's request for a redemption figure, Mrs Glavin replied (at 12:21):

> "I am doing my best to obtain the same. I will fax it to you immediately I receive it."

375. In his opening Mr Hubble described that statement is being untrue because the amount required for redemption of the loan was known; he said that a decision was taken to conceal it and not provide it. That overstates the matter on any footing. The amount that West Bromwich was claiming was known, but it was at the time a disputed amount. Because the figure was disputed there was no redemption figure that Mrs Glavin could give to Miss Alberici at the time. She could, in theory (and subject to getting her client's instructions, which she did not have) have provided the figure claimed by West Bromwich, but, as Miss Alberici herself agreed in cross-examination, providing a disputed figure was not much good to anybody. In her own cross-examination Mrs Glavin said that she was waiting for Mr Garry to give her a figure that was acceptable for redemption. In his written final submissions Mr Hubble submitted that that could not be correct in the context of the emails that had gone before. I reject that submission too – that is exactly what Mrs Glavin was waiting for. Until the dispute about the amounts owing was resolved Mrs Glavin was simply not in a position to provide a redemption figure whether in the sense that Mrs Alberici says she was expecting or in the more technical sense which Mrs Glavin attributed to the term.

376. At 14:37 Mrs Glavin emailed Mr Garry to say:

> "Any news on the redemption figure. Money is being TT'd into our account for me to hold pending Heaton's confirmation in writing for me to forward it to West Brom. Obviously the redemption statement is the key issue."

377. Mr Hubble's opening indicated that the last sentence of that email would need to be investigated in order to see whether it reflected the fact that there was a real problem in disclosing redemption statements because doing so would reveal that which (on the claimant's case) Mrs Glavin would not want to reveal (the existence of the receivership and the fact that not all the borrowing was being discharged) or whether this is just Mrs Glavin doing something routine in expecting and requiring a redemption statement. That investigation never happened in cross-examination. One of the difficulties for the claimant in saying that it reflected something sinister is that that analysis would presumably mean that Mr Garry was somehow in on it; otherwise there would be no point in her saying it. As I have already pointed out, there was no suggestion that he was somehow involved in a conspiracy to suppress, or appreciated some sort of need not to disclose the receivership and/or the debt surplus. In those circumstances the only sensible explanation is the innocent one – Mrs Glavin was saying that she needed a redemption figure so that she could tell Masnol what figure

was being paid to remove the mortgage and give Masnol a clear title. If she intended this remark innocently, then it supports the case that she was innocent throughout.

378. It is also theoretically possible that Mrs Glavin intended her last sentence to be an innocent presentation of what she wanted, as far as Mr Garry was concerned, whilst harbouring the intention to provide a deliberately misleading figure to Masnol. That would mean that Mrs Glavin was intending to mislead not only Masnol but also a partner in her own firm. Whilst it was not put to her that she intended to mislead partners, Mr Hubble did not shrink from making such an allegation (in a different context) in his final submissions. In my view this extension of the case on Mrs Glavin's deviousness makes it all the less likely that she harboured such deviousness in the first place. It is one thing to tell lies to the other side in the conveyancing in order to get a troublesome matter of her desk as quickly as possible; it is another to extend the lying process to her own partners. That suggests a degree of calculation which is born not of haste but of something rather deeper and more sinister. I did not form the view that Mrs Glavin was at all likely to have indulged in such conduct.

379. The email to Mr Garry seems to have prompted a meeting or telephone call between her and Mr Garry of which the latter took a note. It reads:

> "£11,106,000
>
> Got to send back £23k odd disbs & costs.
>
> Can retain tomorrow if Spencer pays overnight interest. He has to pay interest.
>
> Need redemption figure as at today's date."

380. It appears that by this time Mrs Glavin knew how much was coming in from Masnol and how much was going to have to be taken out of that for the lender's charges. The last sentence probably records what she said to Mr Garry. It is, I suppose, consistent both with her explanation of events (which is that she needed a figure which she could tell Masnol was the figure necessary to redeem the mortgage, because that is what she thought she would have to tell them) and with the allegations against her (which is that she would need to know the number to give Masnol in order to disguise the fact that the entire debt was not being paid and in order to conceal the receivership). However, if it was the latter then, again, she was effectively misleading Mr Garry in a very calculating way which goes beyond Mr Hubble's suggested motivation for her allegedly dishonest conduct. The former explanation is, in my view, more likely.

381. At 14:47 Miss Alberici emailed Mrs Glavin:

> "Helen – see below. The amount of £11,106,000 is coming over to you. Please confirm as soon as you are able to redeem and complete.
>
> Can you let me have, for now, a copy of the old redemption statement as requested by my client? Are you expecting the revised one in today?"

The "below" was an email to her from her own client (Ms Derrett) saying:

> "Funds have been released. Could you ask the borrower's lawyers to advise as soon as possible once completion has taken place so that we can hopefully fix the deal today (pending receipt of AST confirmation/redemption statement).
>
> Spencer has advised that his lawyers have an historic redemption statement – could you please ask for a copy of this?"

382. The reference to an old redemption statement is probably a reference to one of 2nd May which showed a large sum owing in respect of debt, receivership costs and early redemption costs. The claimant's case in cross-examination was that this request was yet another demonstration of the fact that the claimant was using the expression "redemption statement" to mean a statement of the amount of money required to pay off the loan, and that that would have been apparent to Mrs Glavin. Again, I accept that that may well have been what the claimant was anticipating, because the sort of dichotomy which has become important in this case was not in play. However, I do not accept that that, as a specific point, would have been in the mind of Mrs Glavin. I accept that, in terms of redemption, she will have been thinking about the amount necessary to redeem the charge, which she did not then know. She certainly did not understand that it would be anything like the amount set out in the old redemption statement that she had received about a week before.

383. At 15:11 Mr Garry emailed Mr Murray reporting:

> "We have received monies from Britannia sufficient to enable us to forward £11 million to you or your clients to redeem once

> terms have been agreed. Please note that this email is not an undertaking to forward funds and you must deal with our Helen Glavin in relation to that.
>
> We are now informed that we may keep this money overnight if necessary, but that if there is no redemption tomorrow we must return it tomorrow...."

384. There seems little doubt that Mr Garry was using "redemption" in the sense which Mrs Glavin says she gave to it. That, of course, does not determine what she meant by it, but it does demonstrate, at the very least, the term is not so inflexible as to mean only (even in context) what Mr Hubble says it meant.

385. At 16:13 Mr Murray sent an "updated alternative redemption statement" to Mr Garry, copied to Mrs Glavin. He asked for a conference call at about 5pm. The redemption statement showed a sum required on the mortgage account as being £11,877.023.29, including receivership costs and an early redemption charge. Mrs Glavin was asked why she did not forward this redemption statement or the earlier one to Miss Alberici. Her explanation was that neither redemption statement contained a redemption figure which her client had agreed. I accept that evidence. I do not think that she is the sort of person who would have sent either redemption statement with an email saying, effectively "here is a redemption statement but it does not mean anything because the figures are not agreed". She is more likely to have taken the view that there was no point in sending one that was not agreed. The suggestion of the claimant, of course, is that she did not send them because they would have revealed that which she was trying to keep quiet about. Once again I reject that suggestion. I do not consider that it is at all likely that she had become so steeped by now in a course of silence (and conspiracy) that she would be making that calculation. She had no motive for taking the dishonest line attributed to her and I do not consider her to be the sort of person who would take that course.

386. At 16:46 Miss Alberici emailed Mrs Glavin again stating her needs, which included a "redemption statement". Mr Hubble submitted that it was obvious that Miss Alberici wanted to identify the amount to redeem the loan. I disagree. It will not have been obvious to Mrs Glavin, particularly in the hurly-burly of this completion, that that is what they were after. Had it been so important to Masnol to know that one would have thought they would have asked the specific question, or at least not been satisfied with the short email which ended this phase of the operation and on which this aspect of the fraudulent misrepresentation claim is based. But even if that is wrong I do not consider that anything that took place in the correspondence will have been sufficient to indicate to Mrs Glavin that words associated with "redemption" might have a different meaning from that which she ascribed to the concept. Mrs

Glavin said that it would not have occurred to her that Masnol were after a statement of the loan, and I accept that evidence.

387. From 5pm onwards on 9th May various phone calls took place during which the final form of the deal between Mr McGuinness and West Bromwich took shape. Mr Garry and, it seems, Mrs Glavin, had telephone calls with Mr Murray and Mr McGuinness. During the course of a conversation with Mr Murray Mr Garry reiterated the offer to pay £11m with all rights reserved as to any future sums. According to Mr Garry's attendance note, Mr Murray suggested that his clients might be prepared to accept "a much increased figure now, balance admitted and payable over time. They might (you don't know) agree no early redemption interest." That was put to Mr McGuinness who instructed Mr Garry to make an offer to pay £11.1m now and admit that he owed a further £365,000 less rents received payable ten days after the amount of rents collected was agreed or determined. That was then put to Mr Murray. Mrs Glavin knew of this negotiation, but it was conducted by Mr Garry and not her. It follows that Mrs Glavin knew that redemption of the mortgage was part of an agreement dealing with an unsecured balance, as she accepted. This does not, however, impact much (or at all) on her understanding of what "redemption" meant. It still meant the process of discharging the mortgage. She was not a particularly sophisticated lawyer, and the idea that redemption should by now be viewed as a process or concept involving payment of money, the discharge of the legal estate plus an agreement as to the payment of other moneys is not something that would, or did, occur to her.

388. At 18:48 Mr Murray came back to Mr Garry saying (according to the latter's attendance note) that his clients would accept

> "£11.1m tomorrow (to redeem), further £365k in 10 days.
>
> Balance just short of £200k interest-free period 6 months to pay that."

Reference is made to sorting out the rent dispute. At 19:36 Mr McGuinness agreed those terms with some limited modifications. According to an attendance note, he acknowledged that he could pay the £365,000 in 10 days. His proposed counter-terms were put to Mr Murray at 20:41 in an email copied to Mrs Glavin. The first term is described as follows:

> "1. He [viz Mr McGuinness] pays £11.1 million tomorrow to redeem and end the receivership tomorrow. No interest runs on that sum. We are currently holding that sum on client account."

389. The words "to redeem" are not without interest; they show the sense in which Mr Garry, at least, treated those words – in his eyes, redemption did not include paying

off the whole loan because the remaining terms of the letter deal with the payment of the balance of the sums which should be agreed as due.

390. The next day (10th May) opened with a flurry of emails which I do not need to deal with in this context. At "10.35ish" (according to Mr Garry's attendance note) he had a conversation with Mr Murray followed by one with Mrs Glavin. The one with Mr Murray dealt with the rental dispute and interest. The one with Mrs Glavin is recorded as follows:

> "Afterwards speaking H Glavin.
>
> You are happy that once Britannia release the money they cannot recall it, i.e. no comeback on us."

391. Mrs Glavin had no recollection of this telephone conversation and could not help as to what the concerns of Mr Garry ("comeback") were. It was put to him that his concerns were about rental income, and that was the suggestion made in final submissions. Mr Garry's view (again, without being able to summon up a direct recollection) was that he was just being cautious, as any solicitor would be, about the release of monies. It is impossible at this remove in time to decide what Mr Garry's underlying concern was. Mr Hubble's suggestion is of significance because his case is that disputes about rental arrears were an issue, and even if Mrs Glavin had forgotten it this conversation would have bought it back to her mind. In giving a reassuring answer to Mr Garry Mrs Glavin was said to have misled Mr Garry. This was not put to her, and I reject the suggestion. I can see why the logic of Mr Hubble's case drives him to making such averments, but the fact that he has to go to such extremes demonstrates, in my view, the weakness of his case on Mrs Glavin's motivation and intentions and not its strength.

392. At 10:59 Mrs Glavin wrote to Mr Murray proposing an undertaking to be given by Mr Murray's firm:

> "Immediately upon receipt of the sum of £1,100,000 [sic - it is common ground that that this was again a mistake for £11,100,000] as agent for West Bromwich Building Society, redemption of the registered charges will be confirmed and forms DS1 will be issued as soon as practicable thereafter and forwarded to you."

393. These terms, emanating from Mrs Glavin herself, support the genuineness of her protestations as to what she thought "redemption" meant.

394. The undertaking was proffered later on in a letter from Needham & James under cover of a separate letter which read:

> "I refer to our earlier discussions today and in the interests of time I am sending you with [sic] the letter requested for evidence to Britannia Building Society of the agreement on redemption. However, this is to be retained by you until the agreement reached is recorded in writing and my consent will be required before it can be released to Britannia."

395. The claimant relies on this letter as supporting its case that the redemption of the charge on payment of £11.1m was part of a wider agreement, which had still to be finalised, involving an agreement to pay unsecured sums. This is said to have meant that £11.1m was never the redemption figure even for the charge; the redemption figure ought to have reflected the outstanding unsecured sums which (although not quite finalised by then) were obviously going to be the subject of an agreement. In evidence Mrs Glavin said that that was not how she read the matter at the time, though she can now see that that combined arrangement was the overall agreement. She expressed the view that it did not occur to her that for redemption to occur there had to be payment not merely of the £11.1m, but also agreement as to the balance. She was content that she had an arrangement for the release of the security and confirmation of the release of the DS1 forms, which is what she was concerned with, would be achieved.

396. One or two of Mrs Glavin's answers on this point are a little hard to accept. She was an experienced and conscientious conveyancer and I believe that she is likely to have noticed that the undertaking could not be released until confirmation had been given by Mr Murray, and that that was dependent on an overall agreement being reached. But I do not consider that that somehow transformed her understanding of what redemption was, namely the process of procuring the discharge of a charge by the payment of money. It may be that analytically redemption was dependent on the wider agreement, and therefore on Mr McGuinness entering into a promise to pay other money, but it does not follow that that would change the meaning of redemption, or sums required for redemption, in Mrs Glavin's mind, and I find that it did not.

397. Against that background I make the following determinations.

398. First, I find that the statement made by Mrs Glavin in the critical email is actually unambiguous, but not in the sense of Mr Hubble. I find that her expression about redemption should be taken to mean the sum required to discharge the mortgage itself.

That is what it means objectively, and the facts known to both parties (not just the facts known to one) would not have required a different meaning to be given to it. There was therefore no misrepresentation on this footing.

399. Second, even if it was ambiguous in the circumstances, Mrs Glavin did not intend the sense in which the claimant is said to have received it. She honestly, and without any intention to mislead, and not knowing of an alternative meaning, intended to convey the sense of the sum required to be paid to discharge the charge – the £11.1m sum. This means that on either limb of his case Mr Hubble has failed to establish what he needs to establish in terms of Mrs Glavin's belief about what redemption was when she gave Miss Alberici the redemption sum in the critical email. Whatever might have been the meaning given to it by someone else, Mrs Glavin believed that the sum she referred to (adjusted to take account of the obvious and accepted error in the expressed amount) was correctly described as the redemption sum. That belief was honest, and indeed in my view it was reasonable (which supports the crucial finding of honesty). If it matters (which strictly it does not) it coincided with the way the term had been used by Mr Garry, and her use of the term can be seen to be consistent. It also coincides with how she used the expression in other correspondence – for example, in a letter providing undertakings to Heatons on 9th May she undertook to "forward all sums required to redeem the Existing Security". Her response in the allegedly fraudulent email was not cagey, deliberate or calculated (in the sense relied on by the claimant), and she did not intend it to be understood in the sense that Miss Alberici says she understood it.

400. The motive point is a particularly significant one in this context. I have already indicated that the motive for fraud attributed to Mrs Glavin is said to be her anxiety to get a troublesome matter off her desk. Such a motive does not really begin to explain the much more deeply calculated conduct of which Mrs Glavin must have been guilty if the claimant's case is correct on this point. The wrong answer to the CPSE inquiry could, more plausibly, be treated as a hasty answer done quickly, and without too much thought, and brought about because of a desire for speed. That cannot be the case with the redemption statement. As a pure statement, out of context, that might be possible. But the way the case was presented against her does not allow that theory. If the claimant's case is right she must have been carefully avoiding providing redemption statements along the way, and had also been misleading at least one of her partners. Those are not quick decisions. They must be part of some calculated plan. Mr Hubble did not shrink from alleging an initial conspiracy to suppress the receivership. Presumably the redemption point is part of the implementation of that conspiracy. But one asks rhetorically why Mrs Glavin should do that, ending with such a big lie. There is no particularly good answer to that perennial question, and the absence of such an answer is a telling point against the conspiracy and the fraud.

401. I therefore dismiss this allegation of deceit.

402. There is one subsidiary matter which was raised and which I should deal with. In an email on 10th May at 12:02 Miss Alberici said she wanted "an email confirming to what use the surplus funds will be put following redemption". Mrs Glavin replied (4 minutes later):

> "Further to your telephone call, I confirm that the balance of the funds will be utilised for the discharge of fees in relation to the re-mortgage and any surplus for future property investment."

403. It is said that this deliberately and dishonestly gave the impression that there was a surplus and that therefore the whole McGuinness loan would be paid off out of the moneys provided by Masnol. It was, of course, not the case that the whole loan was paid off. Mrs Glavin's response to that accusation is that the response was, in the context, accurate, and/or believed to be so. She knew that £11,106,000 was coming in from Masnol, and that £11.1m was required to deal with the West Bromwich charge. That left £6000. That is the surplus she was talking about. She knew enough about Mr McGuinness's business to know that his money went back into property investment and therefore she answered the question in the terms that she did. In response to my questions on the point, she confirmed that she did not ask Mr McGuinness what was going to happen to that money; she merely assumed that it would be applied in his business. She did not know it to be false, if indeed it was (which was not established).

404. The allegation of the claimant is that the statement was false because it covered up the fact that there was in fact no surplus if one is looking at the West Bromwich loan as a whole. That allegation of dishonesty assumes that Mrs Glavin was aware of that fact (which she was), that that is the sense in which Miss Alberici was asking her question, and that Mrs Glavin intended to mislead her by making a statement about such things. I do not consider that Mrs Glavin had that state of mind. Mrs Glavin was making an honest statement about what she considered to be the surplus over the amount required to redeem (of which she had just informed Miss Alberici). She was simply not thinking about the whole loan relationship; she was thinking about redemption in her own terms. The answer she gave was honest. Mr Hubble submitted that statement was reckless at least to the extent of being made without proper enquiry of Mr McGuinness, and I accept that it was made without making due enquiry. It was not, however, reckless in the sense of Mrs Glavin not caring whether the statement was true or not. She did care and answered it to the best of her ability. Ironically, I think that on this occasion she was giving a quick answer in order to bring the matter to an end, but her motives in that respect were pure. She gave what she thought was the right answer, albeit in haste.

Representations about the ASTs - the factual background

405. This part of the case turns on the letter Mrs Glavin wrote on 10th May providing her client's confirmation of the schedule ASTs attached to that letter. It is said that the first sentence contains an implicit representation that CHH did not have any reason to believe that Mr McGuinness's confirmation was false when she in fact did have such a reason and the AST particulars were in fact false.

406. I can deal briefly with the alleged falsities in the AST particulars. The schedule of the ASTs provided with the 10th May letter (which, as will appear, had been drawn up by Mr Palmer, Miss Alberici's assistant) was a 1½ page list of tenancies by apartment number, duration/commencement date and monthly rent. The monthly rents all exceed £2,000 (and most of them also have odd numbers of pence). The alleged inaccuracy of the schedule appears in an annex to Mr Hubble's skeleton argument. In all cases the rent is said to be over-stated. In many cases the "true" AST is not available, and the true rent is said to emerge from what the receivers say they recovered (which is much less) and/or from future lettings. Underlying the falsity as to rent is an allegation that Mr McGuinness had produced false documents to Heatons (from which Mr Palmer compiled the schedule). In many cases the duration is also said to be false. At the trial the defendant did not join issue with the claimant's case that the schedule was false to the extent set out in Mr Hubble's annex and Mr Seitler confirmed that he had no basis to dispute it (and he sensibly did not try to pick away at any small potentially challengeable aspects). In those circumstances I shall approach this part of the case on the footing that Mr McGuinness did confirm a materially false schedule - the falsity being as to the rents payable and, in at least some cases, as to the then current duration of the tenancies. The rents were probably overstated by 100% or more. The real questions in relation to this first sentence are whether the implied representation in fact falls to be implied, and Mrs Glavin's knowledge of any falsity and her honesty or dishonesty in relation to it.

407. The second sentence is said to be false because Mrs Glavin did have knowledge of "arrangements" which Mr McGuinness had as to letting because she knew there were receivers, knew they were collecting the rent, knew there was a dispute about the rent collected and knew that it was contended there were rent arrears. All those are said to be "arrangements". The defendant disputes that any representation was made about knowledge of "arrangements", denies that the matters relied on were "arrangements" within the meaning of what was said anyway, and denies any dishonesty on the part of Mrs Glavin in relation to the matter.

408. Whether or not representations were made depends in part on the context. That context also has a bearing on the state of mind of Mrs Glavin. I shall therefore start with that consent.

409. The starting point for Mr Hubble on this particular trail is Mr McGuinness's dishonest confirmation to Mrs Glavin that there were no rent arrears, on 27th April 2007. I have

dealt with this above. Those circumstances are said to demonstrate her dishonesty; I have rejected that accusation. In the present context it is said that this incident showed that Mrs Glavin contemplated the possibility that she might have to use Mr McGuinness's false confirmation. I reject this submission; indeed, I regard it as nonsense. As I have pointed out, at the time of the relevant email exchange Mrs Glavin had had conduct of the file for less than 3 hours. According to the claimant's case she was already "contemplating" using information said to be false, but hoping not to have to do so. That would require a degree of foresight that is absurd in the circumstances. She would not yet be very familiar with the file (she had not even got a handover note at that point), this is one of the first things that she sees and has to deal with when she gets into the office and yet she is already contemplating fraudulent behaviour whilst hoping that there will be a way round it. Such a foundation for the following fraud claim verges on the absurd.

410. By 2nd May she had had more dealings with the file. On that date, at 16:31, she emailed Mr Murray to say:

> "I have just managed to speak to Heatons to ascertain the present position. They have reported to their client and it is possible that we may be able to receive funds for Friday. It is necessary for them to calculate the rental income in order to confirm the amount that will be available to us and unfortunately I have to confirm to Heatons that there are no rent arrears. In the absence of any rental statements I am not able to do this. Perhaps you could comment."

411. This email is the starting point for a submission by the claimant that Mrs Glavin was herself going to have to undertake some sort of calculation to verify the rental position and that she knew that. Mr Hubble's submission was that this email showed that either she or her client were going to have to provide the necessary confirmation. While she said in cross-examination that she was waiting for litigation to confirm matters about rents, I was invited not to accept that evidence and to give weight to evidence from Mr Garry to the effect that this sort of matter was a matter of detail for the RID and he was dealing with a broad brush negotiation which did not involve such detail.

412. I agree that this email tends to indicate that Mrs Glavin was going to have an involvement in communicating material about rent arrears, but I accept her evidence that the detail about this would come through Mr Garry's negotiation rather than hers. However, that is not the most significant point about this. The much more significant point is whether this email shows that she knew she was going to have to make some sort of calculation comparison. I do not think that it shows any such thing. It shows that she acknowledged she was faced with a problem. She thought rental statements were required in order to deal with the problem and she asked for Mr Murray's

"comments". It does not go further than that. It may be the case that, as a matter of logic, if a rental statement were forthcoming from the receivers, then it would have to be reviewed by someone, and quite possibly compared with something else in order to consider its effect and, conceivably, accuracy. However, that, at the time of the email, would be something for the future, and it does not follow that Mrs Glavin would ever have to carry out any such exercise herself. It was put to her in terms that it was she who was going to have to carry out the comparison, and she expressed the view that she would have nothing to compare any rental statement with. She said that what she was doing was passing on requests from Heatons. In my view what she meant by that was that she was, in effect, taking the matter one stage at a time. She may not have given much thought as to who would do what with a rental statement when received, but I find that she certainly did not think that she was going to have to carry out a comparison herself. She was carrying out the technical aspects of conveyancing. Others were dealing with the more complicated areas of negotiation, the activities of the receivers and the like.

413. At about the same time Mr Garry himself wrote to Mr Murray and reiterated the need for a rental statement so that "our client… confirm to his new lender that there are no rent arrears (or if so what arrears there are)". So it is apparent that it was not Mrs Glavin who was asking for the document.

414. In an email of 2nd May at 19:28 Mr Murray told Mrs Glavin that if she could confirm that the "schedule of payments received" was the only outstanding issue for completion then he would forward one to her. The next day at 10:21 she confirmed to him that she had spoken to Heatons that morning and that as far as they could tell her they had everything they needed except for "the rental income from the properties". On the same day at 15:20 Mr Murray responded:

> "The figure collected by the receivers to date is £29,713.10".

415. No breakdown was provided. It was suggested to Mrs Glavin that it would have struck her that this was an extremely low figure. She said that she did not think that she would have considered the point. Mr Hubble submitted that that was implausible. I do not think that it is at all implausible, in the circumstances. Mrs Glavin's job did not require her to embark on a detective-like exercise of ascertaining the veracity or significance of figures she was provided with. Her job was more mechanical than that. Nor do I think that she is the sort of person who would have embarked on the enquiry in all the circumstances. In the circumstances I accept her answer.

416. On 4th May Mr Garry wrote to Needham & James, asking, amongst other things, for a rental breakdown, and at 11:23 he reported to Mr McGuinness (copied to Mrs Glavin and Miss Francis):

> "Following our telephone discussion today, I am attaching a copy of the letter to Needham & James which has been faxed.
>
> I understand from Helen Glavin that Needham & James have not forwarded an itemised rent collection breakdown (as required in order to enable you to report to Britannia on rent arrears), but only a total. I have accordingly added further reference to that in the letter."

417. This, coupled with an answer given by Mrs Glavin in cross-examination, seems to have been relied on by Mr Hubble as demonstrating that Mrs Glavin understood that she was to report to Masnol on rent arrears. Mr Hubble said that Mrs Glavin accepted that initially but then resiled from it. As Mr Seitler correctly pointed out in his final submissions, this misrepresents Mrs Glavin's evidence. The question put to her was not to the effect that she (as opposed to Mr McGuinness) was going to report to Masnol. What she was asked was:

> ". Q ... That in fact means, doesn't it, in order to provide, to enable you, Helen Glavin, *on behalf of Mr McGuinness* to report to Britannia on rent arrears?
>
> A. Yes.
>
> Q. It's the shorthand for that?
>
> A. Yes, because I was dealing with Heaton's."

418. The emphasis is mine. They show that the question was apparently one focused on what Mrs Glavin would say *on behalf of Mr McGuinness*, rather than say herself. This is an important point because the whole of Mr Hubble's case on this misrepresentation turns on what he says Mrs Glavin should have done herself, and what she herself was saying, as opposed to her being a means of transmitting what Mr McGuinness said was the case. Accordingly, reliance on this short exchange in the way in which Mr Hubble relies on it is unfair. When Mrs Glavin went on to make clear that as far as she was concerned she was not giving a confirmation on behalf of CHH she was maintaining a consistent (and entirely plausible and sensible) position.

419. On 4th May at 12:21 Mr Murray emailed a slightly different figure for rents collected along with a schedule describing "Account Cards for period 03 November 2006 to 03 May 2007". The total figure given in his email was now £29,698.31. The schedule contained several columns – a date column, a "Rent Received" column containing names, some sort of reference number column, a credit column and a balance. Against each name was an amount, usually £1,100 but in some cases a little more than that. They totalled the figure given in the email.

420. This schedule is very important for the claimant's case because that case involves an allegation that Mrs Glavin carried out a comparison between the schedule and a schedule of tenancies received subsequently from which it is said she must have realised that there were rent arrears and also that the rental figures in the AST schedules ultimately produced were wrong. It is therefore important to understand her attitude to the schedule. As always in this case which is so devoid of primary recollection, Mr Hubble's case depends on what "must have been the case" and Mrs Glavin's evidence depends largely (though not entirely) on reconstruction.

421. Mr Hubble suggested in his final submissions, and put to Mrs Glavin, that she must have appreciated that the rent schedule was for six months and had only a small number of payments on it. This is, I think, part of the foundation for his submission that she herself realised that there were arrears. Mrs Glavin did not accept what it was said she must have realised. She said she would have looked at it and realised that there was no useful information that she could get from it. It was disregarded because it was not what was required, and she "put it back with [Mr Garry] for him to get accurate figures." It would have been sent to Mr McGuinness and she believed he came back and said that there were payments missing from this schedule, so that immediately put it into doubt. (One can see that she forwarded it at 14:01 to Mr McGuinness and Mr Garry.)

422. I accept Mrs Glavin's evidence that she would not have paid a lot of attention to the schedule. I certainly do not accept the suggestion that she looked at the schedule and must have realised that it was somehow significant in terms of rental arrears. It says what it says. It shows a relatively small number of payments, but the significance of that would have had to have been worked out, and Mrs Glavin would not have been expected to work it out for herself. To repeat, she was doing the conveyancing. She was not carrying out some sort of forensic exercise, even if limited. Furthermore, on the same day at 16:51 Mr McGuinness emailed Mr Garry, copied to Mrs Glavin, in the following terms:

> "We have been informed by various tenants that they have paid amounts not included within the statement sent, including properties charged by West Brom but not relating to Mizzen House. I have asked for this to be reconciled and will come back to you with an account of these payments."

423. This email supports the idea that it was Mr Garry who was dealing with these matters, or at least it supports Mrs Glavin's view that that was the case, even though Mr Garry might have thought that such detail was in fact being dealt with by Mrs Glavin (his reconstruction). Mr Garry emailed back (copied to Mrs Glavin) to say he would deal with the point on receipt of information from Mr McGuinness, and at 16:58 Mr McGuinness said (copied to Mrs Glavin) he would forward under separate cover further evidence (received from the receivers' office) referring to 5 payments received by tenants only one of which appeared in the statement. All this shows that the question of payments received was, as far as Mrs Glavin was concerned, a detail which she knew she did not need to deal with, or at least which she did not need to analyse. It is entirely plausible that she would take that view; and I regard as deeply implausible that she would actually have realised somehow that this information was pointing to rent arrears, had that in mind thereafter and decided to suppress it in the crucial letter making the alleged misrepresentations. I find that she did not take in the contents of the schedule.

424. Some details were provided in an email timed at 17:08 which identified 5 unaccounted for payments from three flats at Mizzen House. Four were £1,100; one was £950. It was suggested to Mrs Glavin, but not really accepted by her, that she must have realised that the flat rentals were at about £1,100 per month. Her evidence was that she would not have taken in this email. Once again, bearing in mind her functions in this transaction and her character, I accept her evidence. The fact of the payments being about £1,100 per month would not have been of great significance to her as conveyancer, and, I repeat, she was not carrying out some sort of forensic exercise. The receivers in due course denied receipt of any further rents.

425. On 9th May at 16:46 Miss Alberici emailed Mrs Glavin (copied to Mr McGuinness) with what she needed. Her requirements included:

> "… 4 – I will send to you a schedule of ASTs. Please confirm [in] a letter on your headed paper (please sign scan and send letter) that Spencer Robert McGuinness has carefully checked the rental schedule and has confirmed to you in writing that the schedule is correct, all the ASTs are in place at the rent stated and that there are no careers. Sorry to seem painful on this point but normally AST information would come via solicitors and is therefore information that is treated as "warranted" correct for the reps and warranties in the facility agreement (and an event of default if not correct). Please supply the letter as soon as I send the schedule (in the next few mins).

> 5 – I need to see the first page of each AST dated (as mentioned they are all undated). I guess Spencer has the originals?
>
> Please note the need to deal with all these items by around 10.30 tomorrow."

426. The schedule in question was in the course of being prepared by Mr Palmer (Miss Alberici's assistant) from what he understood to be copies of the agreements themselves. The schedule came through at 07:19 the next day (10th May) under cover of an email (copied to Mr McGuinness) from Miss Alberici which said:

> "Hi Helen – I attach the tenancy schedule for annexation to the confirmatory letter. Please ask Spencer to e-mail or fax confirmation to you, confirming that the above tenancy schedule is correct and copy that to me for my file. As mentioned I also need a confirmatory back-to-back letter on your firm's headed paper.
>
> Can you let me know as soon as you can after 9am where you are with the outstanding matters?"

427. Mrs Glavin forwarded this email to Mr McGuinness, despite the fact that he had been copied in on the original, via an email timed at 09:37, which means that she must have sent it almost as soon as she got in to work. Her email said:

> "Can you look at this schedule and confirm to me as a matter of extreme urgency that it is correct. I then have to confirm on my letter headed paper [sic] of this.
>
> Can you also let me know your response regarding the dating of the AST's raised in Andrew Palmer's email?"

428. This forwarding email was copied to Miss Alberici, who would thereby be aware of what it was that Mrs Glavin was asking Mr McGuinness to do. There is no record of Mr McGuinness actually providing a confirmation but Mrs Glavin said in cross-examination that he must have provided an appropriate confirmation because otherwise she would not have sent the letter that she subsequently sent. She made a reference to the fact that there had been technical difficulties in recovering some of

her emails. Whatever the position in relation to that, it was not suggested to Mrs Glavin that she never received any confirmation from Mr McGuinness at all, and I find that she did receive the confirmation that she sought. I am satisfied that she would never have sent her subsequent letter without it.

429. On the basis of that confirmation she sent the letter on which this misrepresentation claim is based. I shall set out its terms once more:

> "Flats at Mizzen Mast House, Mast Quay, London as set out on the attached schedule ("the Property")
>
> We have received instructions from our client Spencer McGuinness that he has perused the schedule of Tenancy Agreements attached and he can confirm that the information contained therein is correct.
>
> It must be stressed that we have no knowledge of the said agreements or the arrangements that our client has with regard to the letting of the Property and can only confirm on the basis of our client's instructions and as such we accept no liability in respect thereof."

430. It was put to Mrs Glavin, and was part of the claimant's case in its final submissions, that the earlier of the two emails on that date (07:19) "plainly" required a confirmatory back to back letter dealing with the absence of rental arrears, and that Mrs Glavin would have realised that fact. She said she could not remember what she thought about that email because it was so far back in time and I was invited by Mr Hubble to reject that evidence. I in fact accept that evidence. I consider it extremely plausible, if not inevitable, that Mrs Glavin could not remember her thinking when she received that email. She must have arrived at work, read the email and quickly sent it out to her client so that completion could take place. I think it very unlikely that she paused for any real thought about its contents. I agree that interpreting the email with the leisure to do so, and knowing that some point arose in relation to it, would lead one to understand that the "confirmatory back-to-back letter" was a reference back in terms to the letter referred to in the email of the preceding day, but to realise that it referred to rent arrears would require turning back to that early email which I think is unlikely that Mrs Glavin did.

431. I shall return in due course to consider Mrs Glavin's state of mind in relation to the represented matters, but first I have to decide what representations were actually made.

432. So far as the first misrepresentation is concerned (an implied representation that CHH did not have any reason to believe that Mr McGuinness's confirmation was false), this representation was not pleaded and was not relied on as such in the claimant's opening written skeleton argument. However, in opening Mr Hubble sought to rely on an implied representation that the solicitors knew of no reason why the AST schedule was false. That formulation was repeated and it re-emerged in a slightly different form in his written final submissions - that CHH did not have reason to believe that Mr McGuinness's confirmation was false. Mr Seitler did not take the point that it was not pleaded, so I shall not take it either, though it is undesirable in a fraud case to be relying on an unpleaded representation. He accepted that Masnol was entitled to expect CHH to respond honestly, but went on "But such an honest response is personal to Mrs Glavin and not the wider firm. Mrs Glavin was not warranting the belief of every person in CHH." That point was not developed, and I do not fully understand it. If it is a sort of vicarious liability point, I reject it. If the representation was made it will have been made on behalf of the firm.

433. However, I do not consider that that particular representation was made. It seems to have been carefully formulated - "knows of no reason" why the AST schedule was false or "did not have reason to believe" that the schedule was not correct. It presupposes that the solicitor has considered the matter, formed a judgment, is entirely happy that what is said is correct, and there are no contra-indications. That would not be part of a solicitor's functions, would be inconsistent with a solicitor's obligations to his or her client, and would be contrary to everyday practice and experience. A solicitor putting forward something that his client says is true is entitled, if not obliged, to put that matter forward even if he suspects (or even suspects strongly) that it is not true. He may have some reason to believe that the instructions are untrue (that is an everyday occurrence, unfortunately), but passing on the instructed fact says nothing about that. All he is doing is passing on what his client says. Nor would the other side normally be taken to treat the statement as any representation by the solicitor about the underlying fact. If the fact is disbelieved it is the client who is disbelieved, not the solicitor. When he passes on what his client says a solicitor would not be entitled to make a statement about whether he has any ground for believing its untruth, and would probably be in breach of his duty to his client if he did.

434. One can test the matter in this way. How would a solicitor who knows of some indication that his client may not be telling the truth protect himself or herself from an action if it turns out to be false? Does the solicitor have to put forward the stated fact, and then add: "We should say that there is a possible indication in material which we have seen or considered which means that what we have just transmitted from our client might not be true"? The answer to that is obvious - of course the solicitor does

not have to say any such thing. That is because the solicitor does not make a "no reason to believe" representation in the first place.

435. Those points deal with the alleged representation as a matter of generality, in terms of what a solicitor will be taken as saying, or not saying, when he or she passes on a client's instructions. In the present case the first sentence of the letter is doing no more than that. It is transmitting something that the client has said is true. There is no representation by CHH as to whether the firm (or Mrs Glavin) has any reason to believe anything at all about the truth of what the client says.

436. Furthermore, the second sentence makes it express that no representation is being made. If there were any doubt about it, the disclaimer of knowledge and liability is directly inimical to the idea that first sentence is making a statement as to whether there is <u>any</u> ground for not believing in the accuracy of the schedule. It makes it clear that the solicitors are not saying anything on the topic at all.

437. In short, this case falls within the fourth category of cases referred to by Jackson LJ in *Webster v Liddington* [2014] EWCA Civ 560:

> "46. Let me now stand back from the authorities. When a person (X) passes information produced by another (Y) someone with whom X is hoping to contract (Z), a range of possibilities exist. In particular:
>
> i) X may warrant to Z that the information is correct. X may thereby assume contractual liability to Z for the accuracy of the information. That liability may exist under the main contract or a collateral contract.
>
> ii) X may adopt the information as his own, thereby taking on such responsibility as he would have if he were the maker of the statement.
>
> iii) X may represent that he believes, on reasonable grounds, the information supplied by Y to be correct. That involves a lesser degree of responsibility than scenario (ii).
>
> iv) X may simply pass on the information to Z as material coming from Y, about which X has no knowledge or belief. X then has no responsibility for the accuracy of the information beyond the ordinary duties of honesty and good faith."

438. That means that the misrepresentation case against Mrs Glavin on this first sentence fails at this first stage - the representation was simply not made.

439. Mr Seitler did not go so far as to say that a solicitor has *carte blanche* to pass material on, no matter how dishonest the situation. As I have pointed out, he accepted that Masnol was entitled to expect CHH to behave honestly. For example, if Mrs Glavin had not received the stated confirmation that she said she had received, and knowingly said otherwise, then there would be actionable dishonesty. But in that case that would be because there was a misrepresentation as to what the client's instructions were. The position where a solicitor actually knows, for a fact, that what the client is saying is untrue, and there was no bona fide doubt about it, would be likely to lead to a conspiracy claim, but not a misrepresentation claim. But that is not how Mr Hubble formulated this part of his claim.

440. Having said that, Mr Hubble did mount a concerted attack on Mrs Glavin's knowledge of falsity and her honesty in that respect. In fairness to Mrs Glavin I shall not leave that hanging but will deal with it in a later section of this judgment.

441. The second alleged representation (that CHH had no knowledge of the letting arrangements) is of a more familiar type. It is, on its face, a statement about knowledge. However, on the facts of this case, I rather doubt that it was made as a representation for the purposes of the law of deceit. What is said about knowledge has to be read in the context of the purpose for which it is said. It is a statement made not as part of material which is to be relied on as such, but as a justification for the second part of the sentence which is a disclaimer of liability. However, that point was not taken by Mr Seitler, or debated before me, and I shall not base my decision on it.

442. The more significant point is whether what Mrs Glavin is said to have known amounts to knowledge of "the said agreements or the arrangements that our client has with regards to the letting of the Property". The context of this statement is that it is a form of letter (provided, be it noted, at the request of the other side to the transaction) in which the client's personal confirmation is being passed on. That confirmation is about the accuracy of an AST schedule which (as drafted by the other side) sets out the terms (lengths) and rents of tenancy agreements relating to identified flats. Those are the sort of limited details that the lender wanted. When Mrs Glavin said that her firm had no knowledge of "the said agreements or the arrangements" she was saying that they had no knowledge of matters which would be relevant to that schedule. She was making clear that her firm had no knowledge which would enable the firm in any way to vouch for the accuracy of the schedules. That was entirely correct. The firm was not managing the properties; it was not collecting rent; it had not acted in the grant of the ASTs. It therefore had no knowledge of the letting arrangements for the purposes of the confirmation provided by Mr McGuinness.

443. The knowledge that was alleged against the firm in this respect, and which is said to make the representation untrue, was knowledge about the problems of the receivership and rent collection. Mr Hubble's final submissions relied on the existence of the receivership, that the receivers were collecting the rent, that Mr McGuinness was in dispute with the receivers about the amount of the rent and that he was contending that there were rent arrears. These were all said to be "arrangements" within the statement in the letter. In my view they are not. The appointment of, and dispute about, receivers were not an "arrangement" to which Mr McGuinness was a party; nor was the failure (if any) to account for rent collected, or the existence of rent arrears. They were nothing to do with the sort of details the lender had chosen to have vouched via the schedule which it created. They might well be matters in which the lenders would be interested, but that is not the same point. I do not consider that knowledge of them fell within the second sentence of the letter.

444. Mr Hubble's pleaded case developed the point a little further. His pleading (paragraph 27A) adds the fact the receivers' schedule showed rents about half the rents in the AST schedule, and that "as a result the Schedule of Tenancy Agreements was or was highly likely to be false"; and/or that the tenancies (by which I assume is meant the tenancy agreements) provided by Mr McGuinness as being consistent with the AST schedule were themselves false. If it were the case that Mrs Glavin actually knew the rents were false, or that the tenancy agreements proffered by Mr McGuinness were false, then I suppose that would just fit into expression which is under discussion. There would be knowledge of "the said agreements" in that CHH would know that they were not agreements at all, or there would be knowledge that the "arrangements" that Mr McGuinness had over the letting of the property were arrangements other than those proffered by Mr McGuinness. That, therefore, would be a legally sustainable case in terms of the representation said to have been made. However, knowledge of falsity in that sense was not really pursued to that extent at the trial.

445. That means that this part of the deceit case fails at an early hurdle. The one representation was not made, and the other was either not made or was not false. However, even if those conclusions are wrong the case still fails on the facts because I do not consider that Mr Hubble has established that Mrs Glavin knew of any falsity that might exist, a point to which I now turn.

Mrs Glavin's knowledge and honesty in relation to the AST representation

446. It was alleged against Mrs Glavin that she knew two things about the falsity of what Mr McGuinness was putting forward which made her conduct dishonest. First, it is said she knew the schedule was false in describing the rent that it did, and second she knew there were actually rent arrears. I reject both allegations.

447. So far as the first is concerned, it depends on a comparison between the receivers' schedule (and the later email about the 4 missing rental payments) and the AST schedule. That is the way the point is pleaded. The fact that the receivers' schedule showed rents below the scheduled rents is said to mean that the AST schedule was, or was highly likely to be, false. The logic fails. It does not mean any such thing. One simply cannot draw those conclusions from the fact. The most that could be said is that, in the relevant circumstances, someone might be put on inquiry, but that is nowhere near what is pleaded.

448. Nonetheless Mr Hubble ran his factual case that Mrs Glavin actually carried out a comparison between the two schedules, and that as a result she knew that the AST schedule was wrong. His case on this starts from Mr McGuinness's bald statement in the 27th April email, and goes on to submit that "the overwhelming likelihood" is that she compared the receivers' schedule against the Heaton's AST schedule of leases and realised that there must have been something wrong. I have no hesitation in rejecting that case. If there is an "overwhelming likelihood" it is that Mrs Glavin did no such thing. She had no cause to pay any detailed attention to the receivers' schedule, and I accept that she did not. By the same token she will have had no reason to remember it, or the corrective document which Mr McGuinness's brother subsequently provided. So far as the AST schedule it is concerned, I have already described it - it was very short 1½ page list of tenancies by apartment number, duration/commencement date and monthly rent. It is true that the monthly rents all exceed £2,000 (and most of them are also have odd numbers of pence), which an examination, if one had carried it out, might have led one to wonder how the round sums apparently collected by the receivers could be made to correspond with the monthly rents. However, it is not at all likely that Mrs Glavin, or any other legal executive in her position, would have paused to reflect on that point even if they had noticed it, and I find that she did not. I am sure that she saw the email when she got to work on 10th May and sent it straight out to her client to see if the client would give the confirmation apparently requested. There was no reason why she would dwell on it. It was the client who was providing the confirmation. Her job was to receive, and then transmit, that confirmation. I do not consider it all likely (or indeed particularly plausible) that Mrs Glavin would have done more than that. Without pausing to do it, and then pausing further (in her busy day) to reflect on what the figures might show, it would not occur to her that there might be a question-mark about rent. Nor, in my view, does the initial 27th April email make it any more likely that she would have paused to consider a matter which was essentially one for her client. She was not particularly engaged in the rent collection debate with the receivers; she had no particular interest in what rents the receivers had collected; she had no particular interest in the rents chargeable under the tenancies. Unless and until she acquired an interest in one (and probably two or more) of those matters I do not think it likely that she would carry out the sort of comparison exercise upon which Mr Hubble's case depends. Without it Mr Hubble's case on knowledge of the discrepancies, and therefore dishonesty, fails.

449. So far as Mr Hubble's case depends on Mrs Glavin's knowledge of rent arrears, I find that she had no knowledge of that, for essentially the same reasons. She did not carry out the sort of forensic exercise which would be required to raise the question in the

first place, and had no means of knowing that there were in fact arrears. It was no part of her job to consider that sort of thing, and she did not do so.

450. Mr Hubble also submitted that Mrs Glavin ducked the question of rent arrears in her own confirmatory letter because she knew it could not be answered. My conclusions on her knowledge about rent arrears deals with this, but again, having considered Mrs Glavin's evidence, the manner in which she gave it and the type of person she obviously is I do not think that that allegation can be maintained. Once again it requires a degree of sophisticated and careful calculation which I do not consider to be part of Mrs Glavin's make-up, and once again I do not understand what plausible motive there can have been for her deliberately omitting a confirmation about rent arrears. Apart from anything else, I do not think that anyone who thought about it would have thought they would get away with it. Miss Alberici had asked for a confirmation of no rent arrears, and one would have thought that if one deliberately omitted that confirmation she would come back and seek it. As it happened she did not, but no half-sensible plotter can really have thought that that would be likely to happen. It would be a huge gamble, and Mrs Glavin was no more a gambler than she was a plotter.

451. Mr Hubble's case actually elevated the rent arrears point to a higher one than that. His pleaded case actually pleads:

> "and further she deliberately and dishonestly did not confirm whether there were any rent arrears as she did not know whether or not there were."

452. In one respect this does not go as far as the case he put at the trial, which is that she knew there were arrears. But whichever version one takes, the plea is unsustainable. I do not understand how such an omission could be dishonest. It was apparent what had been asked for, and it was equally apparent that it had not been provided. Its omission is not relied on as an implied representation about the absence of rent arrears; that would be absurd. So even if Mrs Glavin had thought there were rent arrears, I do not see how omitting to refer to them can in any way be dishonest. If anything it is actually honest. This point goes nowhere.

453. I think that there is likely to be a relatively simple explanation of what happened about the failure to refer to rent arrears in the critical letter, and it does not involve any dishonesty on the part of Mrs Glavin at all. The 9th May email from Miss Alberici asked for confirmation of the accuracy of the AST schedule and the absence of rent arrears. However, the early 10th May email asked that Mr McGuinness should provide something less -

> "Please ask Spencer to email or fax confirmation to you, confirming that the above tenancy schedule is correct and copy that to me for my file."

454. I think one of two things happened. The first possibility is that Mr McGuinness, in haste, worked from, and by reference to, that email (which, it should be noted, mis-states Miss Alberici's requirements) and provided a confirmation in those terms. Mrs Glavin passed that on in the first sentence of her letter. If she did anything when she got Mr McGuinness's confirmation she is more likely to be have referred back to the most recent email from the other side and seen that Mr McGuinness's confirmation corresponded apparently with that email. The second is that Mr McGuinness realised that he could not accurately confirm an absence of rent arrears and confirmed only that which the 07:19 email ostensibly required in the hope that he would get away with it, and Mrs Glavin either checked the confirmation against the most recent email or accepted it having that confirmation in mind. Whichever of those is closer to the truth, each of them is far more likely than the highly improbable scenario that Mrs Glavin worked out that there were rent arrears and, either with or without conspiring with her client, put forward something which she hoped would disguise it.

455. I therefore find that Mrs Glavin had no knowledge of rent arrears, or of the falsity of the AST schedule. It would be mealy-mouthed to say merely that the claimant has not established its case. I find positively that Mrs Glavin behaved entirely honestly in relation to those matters. So far as her knowledge of receivership-related matters is concerned, she did, of course, know of the receivership, and of the disputes attending it in general terms, but that knowledge does not render the representation in the second sentence false. Even if that conclusion is wrong I do not consider that Mrs Glavin appreciated that it was false, and that she was therefore not dishonest in that respect either.

456. It follows, therefore, that this last allegation of deceit against Mrs Glavin fails.

Conspiracy and Mrs Glavin

457. As is by now plain, there was a conspiracy claim against Mrs Glavin as well as the deceit claim. As will by now be equally plain, that claim fails on the facts. She never had any arrangement with any other person (Miss Francis and/or Mr McGuinness) to suppress any particular piece of information, let alone to lie about it. In the light of the narrative, and my findings, above, such a claim fails.

Part V – other matters and conclusions

Reliance, inducement and causation

458. Had I found any wrong to have been committed, at this point I would have had to have gone on to consider causation, including questions of reliance and inducement. The submissions of the parties would make this a very significant exercise. There are

very large factual points, and very significant legal ones (at least according to the defendant).

459. The factual points arise because the defendant's case is (in outline) that even if the claimants had known about the facts underlying the alleged misrepresentations (the receivership, the rent difficulties and the building works) the loan would still have gone ahead. That is said to be because Ms Birch and Ms Derrett were the people who prepared material for the credit committee, and they would not have passed the information on to the credit committee which was the body that considered the loan for approval. By the time of final submissions it was not suggested by Mr Seitler that the committee would have granted the loan even if it had been aware of the matters which I have just identified. The point was limited to those who were the "filter".

460. These points potentially raise complex legal issues. The legal issues are raised because of submissions made by Mr Seitler about the presumption of inducement (or its absence), and whether one of the relevant tests for inducement was what the claimant would have done if the falsehood had not been told (Mr Seitler's case) or what would it have done if the claimant knew the representation to be false (Mr Hubble's case). I was invited by both sides (though Mr Seitler started it) to consider a wide range of authorities and (in the case of Mr Seitler) to reject clear Court of Appeal guidance on one aspect of the point. The factual issues arise because Mr Seitler deployed a wealth of material which was said to demonstrate that Ms Birch in particular ignored a large number of "red flags" in what was said to be her anxiety to get the transaction to credit committee. The factual material requires a lot of exposition. The only concession made by Mr Seitler which would cut down that inquiry is his concession that if Masnol had known that the rental income on Phase 1 was much less than Mr McGuinness had said it was then the lending would not have gone ahead. To the extent that CHH passed on false figures with an intention of misleading then he did not have a case on inducement.

461. The points taken by Mr Seitler as demonstrating a less than rigorous attitude to the lending which in turn are relied on as pointers to what he says is the correct finding which is that the truth would have made no difference to Miss Birch (and Ms Derrett) include the following:

i) Miss Birch downplayed a desktop valuation from Colliers which gave a much lower estimated rental value than Edward Symmons. The alternative view was not passed on to her credit committee. She even went so far as to suggest that the two valuers shared the same figures, which they did not.

ii) She ignored a thinly coded warning about the reputation and reliability of Mr McGuinness which was given to her by Colliers, who had expressed surprise at the rental levels reported (rental levels being a key consideration for Masnol). Somewhat remarkably to my eyes, she described the conduct of the Colliers valuer as "unprofessional", when it is pretty plain that he was doing his job and gave a proper warning, and his warnings turned out to be fully justified in the end.

iii) A credit search was done against Mr McGuinness which revealed a judgment and loan defaults, but no apparent significance was attached to these. It is said that Miss Birch accepted a lame excuse from Mr McGuinness about the

judgment. A failure by Mr McGuinness to provided requested bank statements was not followed up adequately.

iv) No sensible reference was taken. The existing lenders were not asked for a reference. The only reference taken up was a reference for Etra Limited, from a bank with whom that company had banked for only a few months and with whom it had merely a current account.

v) It was not easy to see what Mr McGuinness was getting out of the re-mortgage transaction, as far as the information available to Masnol was concerned.

vi) It is said that Miss Birch failed to pay sufficient attention to an asset schedule provided by Mr McGuinness which would have revealed inaccuracies in information provided by Mr McGuinness

462. I have considered whether it is necessary to go on to consider all this (and other) material in case I am wrong on my conclusions on dishonesty and have concluded that I should not. A hypothetical finding of fraud on 5 or 6 different bases is not a particularly satisfactory foundation for a somewhat complex discussion about the law of inducement in deceit claims. The point cannot be dealt with quickly or shortly, or indeed satisfactorily, on this basis. So far as the facts are concerned, the need to consider the point across a large factual picture, and on the basis of several different factual hypotheses (depending on the subject matter of the misrepresentation which is in issue) would make the inquiry an elaborate one. I do not consider that it is necessary or proportionate for me to conduct it. I have also considered whether I could usefully express conclusions on the point more shortly than would have been necessary had I needed to decide the points, but I do not consider that that would fair or appropriate either.

463. That means it is also unnecessary for me to deal with yet another point which arose in this case, namely the significance of two "missing" witnesses. Ms Derrett was not called to give evidence and no witness statement was served from her. No particularly good reason was given in proper evidential form for her not being called, despite her evidence being relevant to the inducement case because she was part of the route by which material got to the credit committee – she had conduct of the day to day aspects of the transaction after mid-March 2007. She ceased to be employed by Co-operative group about a year before the trial. Mrs Shaw said that she was not called because she no longer worked at Masnol, but that is obviously not a good reason for not calling her. It was said during the case that she did not want to give evidence. Ms Derrett still had friends in the group. As Mr Seitler pointed out, it would be surprising if she had not been proofed, or at least interviewed, at some stage in the long build up to the trial. I shall confine myself to saying that I find it surprising that she was not called, if necessary under witness summons with a gist statement, and the failure to call her is one of several features which give Mr Seitler's factual case on inducement rather more force than one might have thought would be the case. It is unnecessary for me to go further.

464. The other "missing witness" is Mr Hornung, the main valuer at Edward Symmons. A witness summary was provided in relation to him, but he was not called so he could not be cross-examined. I think that the failure to call him was of less significance than Ms Derrett.

465. Beyond that I shall not go in relation to inducement and causation.

Breach of undertaking, breach of trust and breach of fiduciary duty

466. The claimant puts its claim under these heads as well as deceit, conspiracy and inducing breach of contract. It was not easy to follow, but in any event Mr Hubble accepted that it was only a last ditch claim in the event that he won on the representations but lost in reliance. Since he has lost on representation this claim does not arise.

Delivery of this judgment

467. For the sake of completeness I deal briefly with a point which arose at the beginning of the trial, though my decision on the representations means that it no longer has significance.

468. Some of the misrepresentations were added by amendment under an order of HH Judge Barker QC dated 28th January 2016 (the construction defects allegations in inquiry 3.6 and CPSE 26, and the letter of 10th May). Introduction outside the limitation period was run in opposition to their introduction and that point failed. However, the judge gave permission to appeal. The appeal was listed for January 2017, which was obviously well after the trial.

469. At a hearing on 3rd March 2016 the defendant applied for an adjournment of the trial pending the hearing of that appeal. One of its concerns was a risk that there would be an adverse finding at the trial on some of those issues and they might be found to be issues which the Court of Appeal might rule should not have been pleaded. In the course of submissions counsel for the claimant suggested that difficulties which might arise out of a judgment delivered at the trial on issues which the Court of Appeal later ruled should not have been the subject of the claim could be avoided by the trial judge preparing a judgment in draft which would not be handed down if it appeared that the appeal might make a difference to it. This was a course which Asplin J considered might have some benefits (see her judgment at paragraph 25).

470. Although this proposed course of delivering only a draft judgment was dismissed as bizarre by the defendant at that hearing, Mr Seitler espoused it in his submissions before me. They went to a situation in which I made findings against his client only on the newly introduced allegations. His concern was unfair damage to the reputation of the defendants in the event that the Court of Appeal subsequently determined that the allegations ought not to have been introduced – they would have been found guilty of fraud, but only on allegations which should not have been allowed in by amendment. He submitted that if I were minded to deliver a judgment of that nature I should hold it back (but preferably supplying it in draft to the parties) until after the appeal, at which point it could be delivered or modified depending on the outcome of the appeal.

471. As it happens I have not had to take that course. I have dismissed all the allegations. However, I can say that had it mattered I would have been unlikely to have adopted the course propounded by Mr Seitler. It seems to me to be a somewhat odd state of affairs to have a judgment available and delivered in draft, but then not finalised until after an appeal whose result might not be known for 6 months or more after the trial,

and many months after the judgment was prepared. I would have been likely to have said that the defendants should take their medicine, even though it subsequently appeared they need not have been prescribed it. But this point does not arise in the event of my actual findings.

Conclusion

472. It follows, therefore, that the claim in this case is dismissed. Miss Francis and Mrs Glavin stand entirely exonerated of the serious matters alleged against them.

473. By way of post-script I add one last observation. I am aware that I have dismissed a large number of allegations. Not all of them could be dismissed immediately, and Miss Francis and Mrs Glavin have had questions that they had to answer about certain things they did and said. One might wonder how a claim can be brought and sustained over so many points (some merely evidential, some going to the actual claim itself) and yet fail on all of them so comprehensively and it be found that there is nothing in the claim or allegations at all. The answer to that is twofold.

474. The first is that the prospects of establishing a fraud are not directly proportional to the number of adverse allegations made. The second lies in what I think seems to have happened in the genesis of this case. The claimant was anxious to maximise its recovery in what was a fairly disastrous loan. It did not recover in full from its valuers; having heard the evidence in this case, and without making findings on the inducement/causation part of this case, I will merely say that I am not surprised that contributory negligence was run by the surveyors, as I am told it was. When attention turned to CHH the claimant donned its fraud detection goggles, turned the sensitivity up to High and attributed a dishonest motive to every interesting feature in the landscape (in very delayed proceedings). That led to a large number of accusations of dishonesty being made. Some allegations came close to being allegations which should not have been made or sustained (though I acknowledge that the claimant did exercise sufficient judgment to abandon some allegations after the close of evidence). Whilst motive is not a necessary ingredient in the claim, as I have frequently said, it is obviously important and I doubt if sufficient attention was paid to the realities of that part of the case, especially once the defendant's evidence was complete. The result is that Miss Francis and Mrs Glavin have had years of anxiety, culminating in a trial, which they should not have had. They should now be freed from that anxiety.