

OPUS 2

INTERNATIONAL

(1)Dr Helle Poulsen (2)Mr Barry Weller v (1)Specsavers Optical Grp. Ltd (2)Bognor Regis Visionplus Ltd (3)Bognor Regis Specsavers Ltd v (1)Shakila Parham (2)John Parham v (1) Specsavers Optical Grp. Ltd (2)Uckfield Specsavers Ltd

Day 1

November 28, 2013

Opus 2 International - Official Court Reporters

Phone: +44 (0)20 3008 5900
Email: transcripts@opus2international.com
Website: <http://www.opus2international.com>

1 Thursday, 28 November 2013
2 (2.00 pm)
3 SUBMISSIONS ON PLEADINGS
4 Submissions by MR STUART
5 MR JUSTICE HILDYARD: Yes, good afternoon.
6 MR STUART: Good afternoon, my Lord, I appear on behalf of
7 the claimants in these two matters, together with
8 Mr Winn-Smith. My learned friends Mr Potts and
9 Mr Rivett appear for the defendants, Specsavers.
10 My Lord, this is the trial, as you know.
11 MR JUSTICE HILDYARD: Yes.
12 MR STUART: We hope you have all the bundles, we think you
13 do. We each put in skeleton arguments in accordance
14 with the PTR. Mr Potts then produced a very short
15 preliminary issue point earlier this week. My Lord,
16 I wasn't planning to put in, and I hadn't prepared
17 a formal skeleton reply to that two-page document.
18 I was planning just to answer such an application. But
19 my clerks received a call to ask: did I have anything in
20 writing, which I didn't at that point. So I tidied up
21 my own notes that I was about to use, and I have now
22 handed those in.
23 MR JUSTICE HILDYARD: Yes.
24 MR STUART: Mr Potts has a copy as well, of course.
25 MR JUSTICE HILDYARD: I should admit that I haven't, in the

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1 time available, done them justice. I shall over the
2 evening, but you may find me a little slow on the uptake
3 on them. I think Mr Potts' shorter skeleton came in on
4 the 25th, is that right, which is now some time ago, so
5 I had rather hoped that there would be a written
6 response. But I don't want to unsettle you early on.
7 MR STUART: Not at all, my Lord, that's fine. I must say
8 Mr Potts' short point in his skeleton is that you should
9 somehow determine the issue of the construction of the
10 contract clause, clause 19.6 in the contract --
11 MR JUSTICE HILDYARD: Yes.
12 MR STUART: -- at the outset of the trial.
13 MR JUSTICE HILDYARD: I don't know whether that is his
14 point, and I will clarify it with him, although he may
15 also entice me to that. But I understood it was almost
16 in two parts, but he can clarify. As I understood it,
17 the first part is really: are you departing from the
18 list of issues which was directed and agreed? Because
19 his skeleton argument proceeds on a rather different
20 footing than yours. That's one point.
21 The second point, which is connected but may be
22 separately dealt with, is: what, on its true
23 interpretation, does the relevant clause 19.6, whatever
24 it is, mean?
25 MR STUART: Yes.

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1 MR JUSTICE HILDYARD: The latter point he may, as I say, try
2 and entice me to deal with, but I daresay he would
3 recognise that the fact that we are now at trial and
4 that the background facts in any event have to be
5 established may make that second point more difficult.
6 But we will hear him, he may very well have other
7 arguments. I thought I should say that right at the
8 beginning, because I have been a bit confused as to the
9 ambit of his preliminary issue, as he would like to have
10 it.
11 MR STUART: My Lord, that's my position as well. When
12 I received his two and a half page note, I read it as
13 saying that: yes, asserting that our skeleton goes
14 beyond what's in the pleading and the list of issues,
15 but -- I am reading paragraph 2 of his note:
16 "It is respectfully suggested that the court should
17 determine the issues of construction, implied terms, at
18 the outset. This will ensure that cross-examination and
19 submissions are appropriately focused."
20 What he then goes on to argue, briefly, is
21 effectively he is suggesting that our pleaded case is
22 that we have to show that Specsavers deliberately
23 created, concocted allegations, whereas we argue that
24 the application of clause 19.6 involves a number of
25 alternative ways of putting it, one of which is that the

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1 grounds to conclude fraud and dishonesty need to be real
2 and genuine, and we say that it's an objective test
3 there. Alternatively we say they have to be reasonably
4 concluded, and we say again that's an objective test,
5 and we say that the defendants say in their pleading
6 that it's a subjective test, ie as long as in their own
7 minds they genuinely believed we were guilty of fraud
8 and dishonesty. Even if that was completely wrong, it
9 seems they are going to seek to assert that the clause
10 is triggered and they can have our shares for nothing.
11 MR JUSTICE HILDYARD: You may have to unbundle that at the
12 end of the day.
13 MR STUART: Yes.
14 MR JUSTICE HILDYARD: But at the moment the fault line
15 between you appears to be that the list of issues, the
16 impression which may be given by the list of issues is
17 that you agreed to the central issue being: did they
18 have grounds, query reasonable grounds, in good faith,
19 query, for their perception and belief that your clients
20 have been dishonest?
21 MR STUART: Yes.
22 MR JUSTICE HILDYARD: That would not necessarily involve
23 proving that they were dishonest, simply that to the
24 requisite standard, be it objective, reasonable, good
25 faith or anything else, they believed you to be

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1 dishonest. That seems to be the fault line between you.
 2 MR STUART: Exactly, my Lord, and the basis, as I understand
 3 his very short submission, for him suggesting that you
 4 should determine that at the outset is that there will
 5 be, as he puts it, focusing of the cross-examination and
 6 the evidence that you are going to hear, by which
 7 I understand him to mean that if you agree with him that
 8 it is a purely subjective test in his mind, as long as
 9 he reasonably believes, et cetera, and the underlying
 10 factual question as to whether my clients were dishonest
 11 or not as a fact will not need to be dealt with.
 12 MR JUSTICE HILDYARD: Yes.
 13 MR STUART: My Lord, that's why my answer to that can be
 14 taken shortly or at length, but if you have my little
 15 note, I can take you to the crucial points.
 16 MR JUSTICE HILDYARD: Well, you say, on a brief reading of
 17 your note, that the question is in any event going to
 18 have to be addressed, for two main reasons: one
 19 effectively procedural, the other effectively
 20 substantive.
 21 The procedural reason is you say: if I crystallise
 22 this point now, there could be the problem that either
 23 the matter would have to go to the Court of Appeal now,
 24 or the trial may take place if the Court of Appeal were
 25 to disagree with me on a false footing.

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1 MR STUART: Yes.
 2 MR JUSTICE HILDYARD: That's the procedural point.
 3 MR STUART: Procedural.
 4 MR JUSTICE HILDYARD: The second point you raise is that,
 5 quite apart from being a difficult issue, their
 6 counterclaim raises an issue as to whether or not your
 7 clients were dishonest in any event, and as there is no
 8 suggestion the counterclaim be split off, I have to go
 9 through the task anyway.
 10 I don't know whether that's right or wrong, but
 11 that's as I understand your points.
 12 MR STUART: Yes. The counterclaim point can perhaps be
 13 supplemented slightly in that I also say that, even
 14 within the claim and the defence to the claim, this
 15 issue about whether my clients were actually dishonest
 16 is a pleaded issue.
 17 MR JUSTICE HILDYARD: Right, show me that.
 18 MR STUART: Let me show you that. So, my Lord, we are going
 19 to do it in the Bognor, the white bundles.
 20 MR JUSTICE HILDYARD: Okay.
 21 MR STUART: I think we are all agreed that everything more
 22 or less mirrors each other in the two bundles.
 23 MR JUSTICE HILDYARD: Okay.
 24 MR STUART: If I can take you to white bundle A.
 25 MR JUSTICE HILDYARD: Are we just going to go with the ...

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1 I see, you explained this to me but I didn't quite get
 2 the hang of it. The white bundles are --
 3 MR STUART: For what we call the Bognor claim that is
 4 Poulsen and Weller irrespective -- Bognor Regis --
 5 MR JUSTICE HILDYARD: That's when we're on now, it's A.
 6 MR STUART: That's what we are sort of terming the lead
 7 claim here. We have agreed we are going to deal with
 8 that first.
 9 MR JUSTICE HILDYARD: No, that's fine, I understand that,
 10 I have the hang of that.
 11 MR STUART: Your Lordship is going to hear all the evidence
 12 on that.
 13 MR JUSTICE HILDYARD: Yes.
 14 MR STUART: We are thinking we might have a short break,
 15 a hiatus in the trial.
 16 MR JUSTICE HILDYARD: Always welcome.
 17 MR STUART: Exactly, for perhaps some reading on the
 18 Uckfield claim then to take place, rather than you to
 19 start trying to read everything now.
 20 MR JUSTICE HILDYARD: Right.
 21 MR STUART: We are agreed on that.
 22 So if I can take you, then, to the pleadings in the
 23 Bognor claim, so we are in A, white A, the material
 24 pleadings start at tab 3, it's an amended particulars of
 25 claim.

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1 MR JUSTICE HILDYARD: Yes.
 2 MR STUART: Your Lordship has that. Could I just as
 3 a premise, my Lord, so I don't start telling you things
 4 that you obviously --
 5 MR JUSTICE HILDYARD: No, I tell you what, I apologise for
 6 this, I have read your skeleton arguments.
 7 MR STUART: Yes.
 8 MR JUSTICE HILDYARD: And anything else I have blinked at
 9 but wouldn't pretend to have really read. Over the
 10 course of this evening -- I am afraid I had another
 11 matter, but I will try and --
 12 MR STUART: My Lord, that's fine, as long as I know, then
 13 I can tailor this submission to what you need to know.
 14 MR JUSTICE HILDYARD: I am not very familiar with the
 15 pleadings.
 16 MR STUART: No. Then let me just take you through them
 17 briefly, my Lord, and I will highlight the bits I want
 18 to on this point that we are discussing.
 19 So you will see that if you go to -- the pagination
 20 we are using is in the top right-hand corner, my Lord --
 21 page 27 of the bundle.
 22 MR JUSTICE HILDYARD: I think I have the hang of the first
 23 bit, because that's sort of setting the scene, isn't it,
 24 setting the constitution of --
 25 MR STUART: That's the background, absolutely, setting the

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1 scene.
2 The shareholders' agreement and specifically,
3 my Lord, page 29 is the crucial clause 19, this is
4 what's happened in this case. Specsavers -- within that
5 clause 199 purchase notice provision, there are two
6 alternatives. The first set of alternatives is for
7 Specsavers to serve a purchase notice but they pay fair
8 value for the shares.

9 The second alternative is for Specsavers to serve
10 a purchase notice and they get the shares for par value,
11 which is the difference between perhaps £625,000, in
12 this case, £625,000 is what my clients purchased their
13 shares for, and they of course will say that they went
14 up considerably in value as a result of the excellent
15 work they did, et cetera. So we could be looking at
16 a million, a million and a half pounds worth of shares,
17 it's their livelihood, their business. The fair value,
18 who knows what the fair value might be, but it's
19 hundreds of thousands of pounds on anybody's basis,
20 versus the par value, £50.

21 MR JUSTICE HILDYARD: £50.

22 MR STUART: Yes.

23 So 19.1 and 2 is for fair value, and that's all
24 about material breach, if there has been a material
25 breach, and various other usual -- your Lordship will

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1 have seen such provisions in shareholders' agreements.
2 19.5 explains fair value, so fair value for
3 everything above 19.5, purchase notice on that basis.

4 Then we come to 19.6.

5 MR JUSTICE HILDYARD: And I have read that.

6 MR STUART: You have read that, so you see, my Lord, the
7 ambit of the potential interpretations that each of the
8 parties put forward in their skeleton arguments, and in
9 their pleadings as I'll come to, because it does say "If
10 Specsavers has grounds to conclude", to conclude that
11 the recipient -- where there has been performance(?)
12 et cetera -- has been fraudulent; has been fraudulent or
13 dishonest.

14 MR JUSTICE HILDYARD: Yes. Until now, as I understand it,
15 and the target for you is: although there is a dispute
16 as a matter of interpretation and an important one, as
17 to the sort of grounds or the nature of the grounds
18 which they have to show that they had, or you have to
19 show they didn't --

20 MR STUART: Yes.

21 MR JUSTICE HILDYARD: -- it's always been focused on the
22 grounds to conclude.

23 MR STUART: Yes.

24 MR JUSTICE HILDYARD: Is it still focused on there?

25 MR STUART: We say that in interpreting the grounds to

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1 conclude, one interpretation -- one of the alternatives,
2 and I'll come to it in a moment -- is that those grounds
3 are the grounds to conclude are based upon things
4 actually having happened, not --

5 MR JUSTICE HILDYARD: Why is that? I mean, I could say
6 "I believe we are making progress".

7 MR STUART: Absolutely.

8 MR JUSTICE HILDYARD: And be entirely honest and careful
9 about that, and then it's demonstrated we are not making
10 progress. Was my belief falsified?

11 MR STUART: If the contract says "Mr Stuart is to lose the
12 case if the court considers we are not making progress",
13 I have no power over you to decide whether you feel we
14 are making progress or not. If it's your subjective
15 view that we are or we are not, so be it.

16 MR JUSTICE HILDYARD: Yes.

17 MR STUART: If it is purely a matter of subjective intent
18 within the minds of Specsavers, given that this clause
19 gives Specsavers the benefit of taking the entire
20 company for nothing, which is what this does --

21 MR JUSTICE HILDYARD: It still goes to the quality of the
22 grounds that they have to have, not the proof of the
23 pudding.

24 MR STUART: We assert that on a proper interpretation of
25 that clause, one of the potential proper interpretations

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1 of that clause is that those grounds -- "grounds for
2 concluding" means actual grounds, ie that it actually
3 happened. We say that that is consistent with the
4 commercial sense of the whole arrangement, because
5 otherwise --

6 MR JUSTICE HILDYARD: So if you show that you were not
7 fraudulent --

8 MR STUART: Exactly.

9 MR JUSTICE HILDYARD: -- or if you show that they can't
10 show that you were, I don't know where the burden of
11 proof is, I will have to have a look at that --

12 MR STUART: I think the burden of proof is on them but yes,
13 I will take you to the case law.

14 MR JUSTICE HILDYARD: You win.

15 MR STUART: Correct. That's on one --

16 MR JUSTICE HILDYARD: However reasonable or honest their
17 grounds.

18 MR STUART: Yes. They might -- let me take an example,
19 my Lord. Let me take an example. Let us say for one
20 moment that an employee at the shop, a dismissed
21 employee had a grudge against the shop owners, my
22 clients.

23 MR JUSTICE HILDYARD: Right.

24 MR STUART: And that employee made false allegations of
25 fraud to Specsavers about them, so they have done

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1 nothing wrong, my clients have nothing wrong, they have
 2 done nothing which to a reasonable person viewing this
 3 in a commercial way should trigger the ability for
 4 Specsavers to be able to say "Right, we will have your
 5 shares for nothing, thank you". But Specsavers receive
 6 that completely false allegation by a discontented
 7 ex-employee, and they say "Well, there is a person,
 8 a witness, who has made an allegation that you are
 9 fraudulent. That is a ground to conclude that you are
 10 fraudulent. It is a ground. We subjectively believe
 11 that person, there is nothing you can do about it, we
 12 will have your shares for nothing".
 13 We say that is the effect of the interpretation that
 14 my learned friend puts upon this clause, and we say that
 15 cannot be right, and that therefore one of the ways in
 16 which the court should interpret this clause is to say
 17 that having grounds to conclude means that it actually
 18 happened. It's an argument, it's a way of putting it,
 19 it's an interpretation point, in this unusual type of
 20 clause.
 21 MR JUSTICE HILDYARD: Where does it mention grounds, then?
 22 Why doesn't it say if --
 23 MR STUART: Yes, if they were --
 24 MR JUSTICE HILDYARD: "If it is established they were
 25 fraudulent ..."

13

1 MR STUART: My Lord, of course, but all the recent
 2 authorities on interpretation of the contract, of course
 3 the draftsman and the draftsmen here are Specsavers,
 4 let's remember that as well, this is a standard form
 5 agreement put out by Specsavers that covers all of
 6 the -- at the time --
 7 MR JUSTICE HILDYARD: Well, that might furnish
 8 a contra proferentem, but not vanish the words.
 9 MR STUART: It doesn't vanish the words, I can't vanish the
 10 words.
 11 MR JUSTICE HILDYARD: No.
 12 MR STUART: I have to seek to get you to interpret those
 13 words in the way that I say makes the commercial sense.
 14 MR JUSTICE HILDYARD: I understand your point, that you now,
 15 and my reason for using the word "now" is whether
 16 previously you wish to focus on the proof of the
 17 pudding.
 18 MR STUART: Yes, I wish to say that --
 19 MR JUSTICE HILDYARD: My question is whether you did that in
 20 agreeing the list of issues before, or whether the
 21 quality of the grounds which have to be held has always
 22 been the focus of the case. That's what it comes down
 23 to.
 24 MR STUART: My Lord, the quality of the grounds could
 25 include whether the grounds are based on actuality or

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1 not. That's one way of arguing the quality of the
 2 grounds.
 3 Let me take you --
 4 MR JUSTICE HILDYARD: Right.
 5 MR STUART: Let me take you through it, my Lord.
 6 MR JUSTICE HILDYARD: Yes.
 7 MR STUART: Let me take you -- I'll come back to
 8 paragraphs 9 and 10 in a moment, but just to make
 9 your Lordship's point that this has not been suggested
 10 before, that you are tying whether actually there was
 11 fraud and dishonesty with whether clause 19.6 is
 12 triggered.
 13 Can I take you to paragraph 34 of the amended
 14 particulars of claim on page 40?
 15 MR JUSTICE HILDYARD: Yes.
 16 MR STUART: It reads as follows:
 17 "Further and alternatively and in any event, the
 18 first defendant did not have grounds to conclude that
 19 the claimants were being fraudulent or dishonest as
 20 required by clause 19.6 of the shareholders' agreement
 21 and as now alleged by the first defendant. The
 22 claimants had not been fraudulent or dishonest and there
 23 was no genuine or real basis upon which the first
 24 defendant could draw such conclusion."
 25 My Lord, that I say, is as clear as one can put it.

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1 It's a paragraph at the heart of the particulars of
 2 claim, and it's responded to -- I can briefly flick
 3 forward.
 4 MR JUSTICE HILDYARD: Yes, where is that responded to?
 5 MR POTTS: Paragraph 73, my Lord, of the reply.
 6 MR STUART: Thank you. Paragraph 73, which becomes 74.1,
 7 blah, blah, et cetera, the numbering goes slightly wrong
 8 there:
 9 "Save that it is admitted that clause 19.6 of the
 10 shareholders' agreement required the first defendant to
 11 have genuine grounds to conclude that the defence had
 12 been fraudulent or dishonest, paragraph 34 is denied."
 13 So I say that this way of putting it has been fairly
 14 and properly asserted, it's been fairly responded to --
 15 MR POTTS: Could your Lordship just look at the rest of that
 16 paragraph?
 17 MR JUSTICE HILDYARD: I am looking at it. The first
 18 defendant had grounds to conclude that. They don't --
 19 I think they might even say -- I will hear Mr Potts on
 20 it, and I don't want to spend too long in deciding what
 21 we are going to do --
 22 MR STUART: Yes.
 23 MR JUSTICE HILDYARD: -- but I think he may say that he has
 24 never taken on the burden of showing fraud or
 25 dishonesty, you may have but he thinks you are barking

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1 up the wrong tree.
2 MR STUART: My Lord, I am not seeking to prevent Mr Potts
3 running any arguments he wants to in his closing
4 submissions at the end of this case, and let me make it
5 clear --
6 MR JUSTICE HILDYARD: No, no, I am sorry, I didn't make
7 myself clear. I do not think he regards it as incumbent
8 on him to demonstrate that you were fraudulent or
9 dishonest.
10 MR STUART: Yes.
11 MR JUSTICE HILDYARD: You may be wanting to take on that
12 burden, but he is not wanting to take that burden.
13 MR STUART: Yes, well, that's --
14 MR JUSTICE HILDYARD: The only burden he wishes to take on
15 as his defence is to demonstrate to my satisfaction that
16 they did have those grounds. You then say: well, those
17 grounds may have been based on tittle-tattle, which is
18 the example you gave me. That wouldn't qualify. That
19 supports the introduction of some quality to the
20 grounds, ie reasonable grounds or some such. But that's
21 a different argument.
22 MR STUART: Yes.
23 MR JUSTICE HILDYARD: Isn't that what we are -- I mean, you
24 know the case better than I do but that's as it
25 appears --

1 MR STUART: That might be the battleground. But if he is
2 going to say that there is no burden on him to show that
3 we were actually guilty of fraud and dishonesty, then
4 how does that square with other parts of his defence and
5 counterclaim? It certainly doesn't square with
6 paragraph 34 of my particulars of claim, I say. I have
7 set it out there expressly and he has denied it. He
8 doesn't, for example, anywhere in these pleadings or in
9 his skeleton argument say openly "we now accept that we
10 cannot prove" --
11 MR JUSTICE HILDYARD: No, of course he doesn't but he does
12 not say that you were fraudulent or dishonest, does he?
13 MR STUART: Yes, he does.
14 MR JUSTICE HILDYARD: Where does he say that?
15 MR STUART: He says it here, I'll take you to it now. For
16 example, I am just using examples, but he says it at --
17 I am in the defence and counterclaim, my Lord, so tab 4
18 in bundle A.
19 MR JUSTICE HILDYARD: Yes.
20 MR STUART: Paragraph 48.1.2. I am dealing with each of the
21 main -- can I make it clear, my Lord, the main issues of
22 dishonesty here are the assertions by the defendant, by
23 Specsavers, that, number one, payments to Mr Vos were
24 knowingly overpaid; secondly, payments to Mr Ferguson
25 were knowingly overpaid.

1 MR JUSTICE HILDYARD: Yes.
2 MR STUART: Thirdly, that Mr Vos was effectively paid in
3 respect of time which he simply didn't work, and
4 knowingly so, by the claimants; and, fourthly, that the
5 claimants concocted documents/deliberately interfered,
6 et cetera. Those are the allegations of dishonesty
7 which are asserted.
8 So, my Lord, page 63 at the top, we are on the issue
9 of Mr Vos and his payments, 48.1.2 at the bottom of
10 page 62:
11 "In the period between 2009 and 2011, Mr Vos was
12 paid a total of 37,000 purportedly in respect of
13 overtime which he had worked."
14 I am over the page at 63:
15 "Specifically in the period 2010 to 2011, Mr Vos was
16 paid a total of 74,000 which comprised 35,000 salary,
17 17,000 and 21,000 overtime. Such a level of
18 remuneration was obviously inflated given that Mr Vos
19 was only a part-time practice manager."
20 So it's an actual assertion of inflation, and I'll
21 come in a moment, my Lord, to the counterclaim where
22 this is followed through, into an actual claim for
23 hundreds of thousand pounds.
24 MR JUSTICE HILDYARD: There is no plea of dishonesty there,
25 is there? It's a plea of various facts which the

1 investigation revealed and which they considered
2 constituted grounds sufficient for the purposes of the
3 clause.
4 MR STUART: In this section, we are not dealing with just
5 their investigation, but with what they actually assert
6 to be the position.
7 MR JUSTICE HILDYARD: Yes.
8 MR POTTS: My Lord, I am sorry, that paragraph is in
9 response to paragraph 20. Perhaps just your Lordship
10 should see just the context.
11 MR JUSTICE HILDYARD: Yes.
12 MR STUART: To assert such a level of remuneration was
13 obviously inflated is an assertion that inflation means
14 deliberate, not -- anyway. 48.2:
15 "The level of remuneration which Mr Vos received
16 from the second defendant was unreasonable, unjustified
17 and did not represent proper payment for the work
18 actually carried out."
19 MR JUSTICE HILDYARD: Where are you reading now, I am sorry?
20 MR STUART: 48.2, my Lord, second sentence:
21 "In particular, it is averred that ..."
22 MR JUSTICE HILDYARD: Yes, sorry. Unreasonable and
23 unjustified".
24 MR STUART: "... the level of remuneration which Mr Vos
25 received from the second defendant was unreasonable and

1 unjustified and did not represent proper payment for the
 2 work actually carried out."
 3 An assertion.
 4 MR POTTS: Could your Lordship just read the subparagraphs
 5 again there?
 6 (Pause)
 7 MR STUART: 50.4, my Lord, on page 66:
 8 "The payment of monies to Mr Ferguson and Mr Vos,
 9 not representing proper payment for actual services
 10 rendered."
 11 That's the assertion. Paragraph 62.1, page 72 of
 12 your Lordship's bundle:
 13 "In respect of the payments to Mr Ferguson, that the
 14 claimants knowingly made or allowed to be made, false
 15 payments from the business to Mr Ferguson ..."
 16 There is no quibbling here.
 17 MR POTTS: No, my Lord, your Lordship needs to read the
 18 start of 62.
 19 MR STUART: My Lord, the reason I am taking you to these at
 20 the moment is I haven't yet taken you to the paragraphs
 21 in the counterclaim which then take up these specific
 22 allegations, but I just want to take you to the way in
 23 which it's put, because your Lordship seemed to be
 24 suggesting that there is no suggestion -- no assertion
 25 of dishonesty here, and --

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1 MR JUSTICE HILDYARD: I haven't seen one yet.
 2 MR STUART: Well, there is an assertion, I'll come to the
 3 actual assertion based on the claim, but the point I'm
 4 making, my Lord, is that 61.1 is "knowingly made or
 5 allowed to be made false". To suggest knowing --
 6 MR JUSTICE HILDYARD: But this is reciting what was stated
 7 in the investigation report.
 8 MR STUART: Yes, yes, but I'll ask your Lordship, as I say,
 9 just to bear with me and just see the way it's put
 10 "knowingly made false payments to Ferguson".
 11 MR JUSTICE HILDYARD: Yes.
 12 MR STUART: 62.2: "Knowingly made false overtime payments to
 13 Vos".
 14 MR JUSTICE HILDYARD: Yes.
 15 MR STUART: 62.3: "Claimants knowingly allowed Vos to fail
 16 to complete hours".
 17 MR JUSTICE HILDYARD: Yes.
 18 MR STUART: Then 62.4, 1, 2 and 3: "Claimants attempted to
 19 interfere with evidence".
 20 62.5: "Claimants had submitted false and/or forged
 21 documents".
 22 So then, my Lord, we come to those allegations, in
 23 paragraphs 73 and 74, which was the one my learned
 24 friend took you to, the nature of the underlying
 25 allegations -- and I accept there are allegations at

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1 that point being made -- are the same:
 2 "Knowingly made false overtime payments ...
 3 knowingly made false payments to Ferguson ... knowingly
 4 allowed Vos to fail to complete hours ... knowingly
 5 attempted to interfere with evidence ... and false and
 6 forged documents."
 7 So, my Lord, we then come to page 85 of your bundle,
 8 which is now the counterclaim of the defendant,
 9 paragraph 84, and this is not hedged around in any sense
 10 with -- and it wouldn't make any sense to be, because
 11 this is a counterclaim now, this is nothing to do with
 12 the mere triggering of the clause 19.6:
 13 "The assertion is between April 2006 and 2011 the
 14 first and/or second claimant knowingly ..."
 15 "So that is kept in as a knowingly, they go on of
 16 course to try and add an alternative in case they can't
 17 prove that, or negligently, but we still have:
 18 "... knowingly procured or allowed the second
 19 defendant to pay to Mr Ferguson the sum of £76,000."
 20 Paragraph 85 --
 21 MR JUSTICE HILDYARD: But in 84, subject to the dividing
 22 line between want of good faith and dishonesty, they
 23 seem to use every word in the book except "fraud and
 24 dishonesty".
 25 MR STUART: What is dishonesty for these purposes? I think,

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1 my Lord, my learned friend is stating the case, and
 2 I don't think it's an issue, dishonesty for these
 3 purposes in the civil context, fraud or dishonesty must
 4 involve an element of knowing, deliberateness.
 5 MR JUSTICE HILDYARD: Well, yes, but the converse is true,
 6 knowingly doesn't inevitably involve dishonesty.
 7 MR STUART: Knowingly paying somebody 76,000 for work which
 8 he had not in fact completed, that's the assertion. Of
 9 course knowingly, yes, the defence to the counterclaim
 10 would say: it is admitted that the claimants knowingly
 11 paid £76,000 to Mr Ferguson and did knowingly pay that.
 12 That's not the assertion. The assertion is knowingly
 13 paying it to him for work which he had not completed.
 14 That's a deliberate act of dishonesty.
 15 MR JUSTICE HILDYARD: I mean, the thing is usually you get
 16 this in the converse situation, where someone has
 17 pleaded something, for example in the context of
 18 a knowing receipt type claim, and the court is troubled
 19 that the word "dishonesty" or "fraud" has not been used
 20 as to whether the ingredients of liability -- accessory
 21 liability have been met. So the argument is usually
 22 that the pleader says, "Well, I didn't say it but
 23 I meant it". Yours is the converse: you say they meant
 24 it but didn't say it.
 25 You are never obliged to plead fraud. Lots of

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1 people try and avoid pleading fraud unless it's
 2 an ingredient of the claim, because of the, you know,
 3 Re H and the difficult burdens of proof.
 4 MR STUART: Correct. But, my Lord, they are asserting that
 5 we knowingly made false -- the word "false", there is
 6 no -- I am at paragraph 87, my Lord.
 7 MR JUSTICE HILDYARD: Right, you are quite right, I haven't
 8 read that. Let's take a look at it.
 9 MR STUART: 84, 85 and 86 are the three parts, so 84 is
 10 paying the 76,000 to Mr Ferguson for work which he had
 11 not in fact completed. So the court is going to have to
 12 deal with the issue on the facts and the evidence about
 13 whether Mr Ferguson completed the work, whether that was
 14 a payment for that work, et cetera. Those factual
 15 underlying issues.
 16 MR JUSTICE HILDYARD: Yes.
 17 MR STUART: Whilst I'm at 84, my Lord:
 18 "In so acting [so that is in paying this money to
 19 Mr Ferguson for work that he had not in fact done] we
 20 acted in breach of our duties (ii) in that we failed to
 21 act in good faith."
 22 So it's not suggested that we did this accidentally
 23 or without thinking that it was in some way wrong; we
 24 did it, and by doing it we failed to act in good faith.
 25 85 is then the same points made, but in relation to

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1 knowingly procuring the second defendant to pay to
 2 Mr Vos for overtime which he had not in fact completed.
 3 Again, we have 85.2, "failed to act in good faith".
 4 86 is then the "knowingly allowed Mr Vos to fail to
 5 complete his hours".
 6 Then 87, in relation to all of the above:
 7 "Further and alternatively, by reason of the fact
 8 that the first claimant was at all material times
 9 married to Mr Vos, in knowingly procuring or allowing
 10 the second defendant to make false overtime payments to
 11 Mr Vos."
 12 I say that couldn't be a clearer assertion of
 13 dishonesty if it tried, to knowingly make a false
 14 payment to somebody. Those are the elements of
 15 a dishonest act, and allowing Mr Vos to fail, et cetera.
 16 Then they claim that money.
 17 So, my Lord, I do say that the underlying issues,
 18 factual issues, that your Lordship will have to grapple
 19 with at this trial are bound to include whether those
 20 payments were genuine payments for work done and/or
 21 whether they were knowingly false payments.
 22 My Lord, whilst I'm on that, I will come back to the
 23 paragraphs in the particulars of claim, but can I just
 24 ask you to look at the defendant's witness statements
 25 and how they put it in their witness statements.

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1 Because if in some way they have stepped back from that
 2 allegation, the import of it in their witness
 3 statements, then I could begin to accept that perhaps we
 4 might not have to deal with all of that. But that is
 5 not the position. I am in my little note now, my Lord,
 6 on page 4, just to assist you in the page references.
 7 We are now in bundle C, white C. Your Lordship has it.
 8 I have only picked out some examples, my Lord,
 9 where, as it were, the nature of the assertions made is
 10 summarised. I don't want to have to take your Lordship
 11 through every detailed piece of what is asserted against
 12 them, but page 31 in this bundle, paragraph 131 of
 13 Mr Dyson's statement.
 14 MR JUSTICE HILDYARD: Yes.
 15 MR STUART: "In summary, I understood from the investigation
 16 report which I was provided with in mid-September 2011
 17 and from my discussions with Mr McAlindon that he had
 18 concluded as a result of his investigations that the
 19 claimants had indeed caused Bognor Visionplus to make
 20 false payments to Mr Vos by way of an inflated salary,
 21 bonuses and overtime payments when in fact there
 22 appeared to be in evidence to justify such payments.
 23 Mr McAlindon was also persuaded that false payments of
 24 up to almost £100,000 had in fact been made to
 25 Mr Ferguson over a five-year period, when there was no

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1 evidence of substantial work being done so as to justify
 2 such payments. Mr McAlindon was not convinced that the
 3 claimant's justifications for the payments were true.
 4 Further, Mr McAlindon also had serious grounds to
 5 suspect that the claimants had tampered with the
 6 evidence and the documents were forged."
 7 132:
 8 "I did not consider that such conduct was the
 9 behaviour of individuals who are honest."
 10 That's an allegation of dishonesty.
 11 MR JUSTICE HILDYARD: Is it?
 12 MR STUART: "The sums being taken from the store were
 13 substantial and one of the worst cases that I had ever
 14 seen of monies being siphoned out of a store."
 15 That's not beating about the bush.
 16 Paragraph 133, my Lord, third line down:
 17 "There was absolutely no doubt in my mind that the
 18 claimants had acted fraudulently and dishonestly, having
 19 regard to the conclusions reached by the loss prevention
 20 department in the report, accordingly I believe that SOG
 21 has sufficient grounds", et cetera.
 22 So that's the way he puts it.
 23 Then at 135:
 24 "The claimants appear to have effectively stolen
 25 money from Bognor in the following respects ..."

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1 MR JUSTICE HILDYARD: Doesn't the last bit you have read to
 2 me rather sort of provide quite a neat little way of
 3 looking at the matter? He, Mr Potts, says that provided
 4 he shows that this witness had absolutely no doubt in
 5 his mind that the claimants had acted fraudulently and
 6 dishonestly, it doesn't matter whether they did or not.
 7 MR STUART: He doesn't say that, the witness doesn't say
 8 that.
 9 MR JUSTICE HILDYARD: He doesn't have to, because all he is
 10 saying is what he did think rather than what he didn't
 11 think.
 12 MR STUART: Yes, but he doesn't just say what he thought.
 13 Paragraph 137:
 14 "The amounts which the claimants stole ..."
 15 That's not hedged around or provisoed in any way.
 16 "The amounts which the claimants stole ... was
 17 significant enough for SOG to report the matter to the
 18 police."
 19 Now, they did that some time later, so as to the
 20 genuineness of whether they really believed that,
 21 whether SOG really did that, reporting it to the police
 22 and subsequently to the Revenue, whether they did that
 23 just to back up their own argument is another matter,
 24 because they didn't report it to the police at the time,
 25 they reported it to the police later, and they reported

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1 it to the Revenue two years later.
 2 "But the amounts which the claimants stole cannot be
 3 clearer."
 4 My Lord, if I take you to Mr McAlindon, who is the
 5 man who is said to have investigated this and reached
 6 these conclusions, paragraph 87 for example, which is
 7 the summary of his conclusion about Mr Ferguson:
 8 "This reaffirms my view from the time that the
 9 payments procured by the claimants" --
 10 MR JUSTICE HILDYARD: Sorry, B and C?
 11 MR STUART: Sorry, paragraph 87, my Lord.
 12 MR JUSTICE HILDYARD: C/3?
 13 MR STUART: C, tab 3, Mr McAlindon, page 73.
 14 MR JUSTICE HILDYARD: Page 73, thank you so much. Sorry.
 15 MR STUART: Mr McAlindon says:
 16 "This reaffirms my view", so he is actually saying
 17 it as present evidence, not even -- it's reaffirming
 18 what he previously knew, but he is saying that is what
 19 he is saying now.
 20 "... the payments procured by the claimants to
 21 Mr Ferguson, some £90,000, could not reasonably have
 22 been for genuine maintenance work for the store."
 23 Paragraph 94, in relation to the work done by
 24 Mr McAlindon, the assertion is:
 25 "This did not appear to be true. I concluded that

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1 this explanation was false."
 2 Then his conclusion, he sets out on page 83,
 3 paragraph 139, my Lord:
 4 "It was clear from the evidence uncovered in that
 5 investigation that those payments were false payments
 6 knowingly approved and/or allowed by the claimants.
 7 Furthermore, I consider that the claimants had
 8 fabricated evidence to support their position and had
 9 knowingly attempted to mislead."
 10 The allegations about false payments are further
 11 confirmed by Ms Mancini in tab 7 page 126, paragraph 60.
 12 Of course she is relying on Mr McAlindon, because she is
 13 not taking a step back from asserting that the payments
 14 were false. She says:
 15 "I understand from Mr McAlindon that a significant
 16 proportion of the payments made to Mr Vos and
 17 Mr Ferguson were false, in that they did not relate to
 18 work done for Bognor."
 19 That's her assertion. Then she explains that they
 20 are actually seeking to recover those monies, further on
 21 down.
 22 Then Mr Raines, tab 9, page 150, paragraph 59 at the
 23 bottom, third line:
 24 "I was very shocked at the scale of deceit on the
 25 part of the claimants and the lengths that they had gone

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1 to to cover their tracks."
 2 So the assertion is one of deceit.
 3 MR POTTS: Could your Lordship just read paragraph 57, just
 4 for the context, and 58?
 5 MR JUSTICE HILDYARD: Yes. (Pause)
 6 MR STUART: So, my Lord, can I just go back to the pleading
 7 point, then? I leapt forward to 34 to show you where we
 8 quite plainly made the assertion or the denial that the
 9 clause 19.6 was not triggered because the claimants had
 10 not been fraudulent or dishonest.
 11 Paragraph 10 was the amendment made to the pleading
 12 which set up the various alternative interpretations,
 13 constructions which the claimants seek to argue. Does
 14 your Lordship have page 31, paragraph 10? It's in
 15 bundle A.
 16 MR JUSTICE HILDYARD: Yes.
 17 MR STUART: Paragraph 10 of the amended particulars of
 18 claim, page 31.
 19 MR JUSTICE HILDYARD: Okay, I have that.
 20 MR STUART: So we put it in various alternative ways:
 21 "For reasons of business efficacy and sensible
 22 construction, there is an implied term implicit in
 23 clause 19.6, or alternatively the said clause on its
 24 proper construction requires", so we say it's either
 25 an implied term or interpretation/construction point

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1 which chimes with the recent corporate authorities:
 2 "... the grounds to conclude for the dishonesty to
 3 be real and genuine grounds."
 4 Real and genuine. My Lord, if that be right, the
 5 question is: a real ground, we say is one based on
 6 actual objective facts, not merely upon allegations:
 7 "Alternatively, the defendant is to act reasonably
 8 and with bona fides when assessing whether there are
 9 really such grounds existing."
 10 So we say that there is an element of reasonableness
 11 and bona fides to be brought in:
 12 "Alternatively, any grounds must be reasonable
 13 grounds, and these must objectively ..."
 14 So we actually expressly raise the issue of
 15 objective test rather than subjective, and this is
 16 responded to by the defendants in their defence,
 17 page 52, my Lord. So there can be no --
 18 MR JUSTICE HILDYARD: I hadn't understood there was
 19 a dispute about this aspect. I have always
 20 understood -- always, since I got the papers -- that
 21 there is an issue between you as to the quality of the
 22 grounds. I have no doubt about that.
 23 MR STUART: Yes.
 24 MR JUSTICE HILDYARD: That seems to have been the accepted
 25 dispute.

1 MR STUART: Nobody is seeking to suggest that there aren't
 2 here pleaded various different alternative ways, and
 3 then that is responded to at paragraph 15.2 of the
 4 defence by the defendant asserting that, on its proper
 5 construction:
 6 "Clause 19.6 entitles the first defendant to serve
 7 a purchase notice if it subjectively had grounds".
 8 That's what they say it is. That's the submission
 9 they say, so that's their interpretation.
 10 MR JUSTICE HILDYARD: Yes, and that's an accepted area of
 11 dispute between you.
 12 MR STUART: Absolutely. Absolutely, which will have to be
 13 covered in your Lordship's judgment in due course.
 14 MR JUSTICE HILDYARD: Yes.
 15 MR STUART: Going back to our various alternative ways of
 16 putting it, at paragraph 10:
 17 "Alternatively, any such grounds must be reasonable
 18 grounds, must objectively lead the first defendant
 19 reasonably to conclude acting with bona fides that there
 20 has been fraudulent or dishonest conduct."
 21 Then in the bit that's not added by the amendment we
 22 have the good faith argument brought in as well, at the
 23 bottom there, ie the first defendant would act towards
 24 one another in good faith insofar as the operation of
 25 the company was concerned.

1 MR JUSTICE HILDYARD: That is good faith, but that's in the
 2 operation -- acting towards one another insofar as the
 3 operation of the business and the company was concerned.
 4 Acting in good faith and acting dishonestly are not sort
 5 of polarities, are they?
 6 MR STUART: No. One can act in good faith --
 7 MR JUSTICE HILDYARD: One can act otherwise than in good
 8 faith without being dishonest or fraudulent.
 9 MR STUART: Absolutely. But there is an issue about -- we
 10 have already said above in one of our alternatives, that
 11 the first defendant is required to act reasonably and
 12 with bona fides, so that's the same as bona fides, if
 13 you acted in faith. So we say that that element of good
 14 faith and reasonableness of approach is brought into the
 15 interpretation of this clause and how it attaches.
 16 MR JUSTICE HILDYARD: Yes.
 17 MR STUART: My Lord, that's a very long way around of saying
 18 that, at the end of this trial, and not at the outset,
 19 in my submission, your Lordship should deal with all
 20 issues, all counterarguments on the interpretation of
 21 this clause, and you should do so having had the benefit
 22 of hearing all the witnesses, having understood how your
 23 interpretation fits into the scheme of this dispute, and
 24 certainly my submission is that it would be wholly
 25 artificial for you to interpret clause 19.6 now in some

1 sort of vacuum before you hear all the evidence. We
 2 would be wasting time, frankly, if we are going to have
 3 detailed submissions on these interpretation points now
 4 on both sides, as it were, closing submissions, if you
 5 like, on all the interpretation points now and for you
 6 then to make a determination on that now; that would be
 7 an inappropriate way forward.
 8 I do take my procedural point, my Lord, I know it's
 9 never -- I am not being impertinent in any way to say
 10 that an interpretation of a contract like this might end
 11 up in the Court of Appeal, and it would be very
 12 unfortunate if your Lordship and this trial proceeded on
 13 one basis simply because your Lordship took a view.
 14 Either way, I mean. Either way. And in any event you
 15 are going to have to determine it all anyway, because
 16 it's all asserted, it's all there and it's part of the
 17 case.
 18 Those are my main points, my Lord, in opposition to
 19 my learned friend's suggested way forward. If I don't
 20 persuade you with those, I suspect I will not persuade
 21 you with some of the more minor ones that I set out
 22 here.
 23 MR JUSTICE HILDYARD: That's very, very helpful, and it's
 24 given me a whistlestop tour through the pleadings,
 25 I daresay we may have to revisit them. But leaving

1 aside your point that there is a sort of general caveat
 2 at the front of the list of issues --
 3 MR STUART: Yes, if you look at it, my Lord, you will see.
 4 MR JUSTICE HILDYARD: Yes, I see that.
 5 MR STUART: It does say:
 6 "The list identifies in broad terms the main issues
 7 in the case, but is not intended to deal with every
 8 detailed issue or to be exhaustive."
 9 So I cannot be precluded from running
 10 an interpretation argument that is based upon something
 11 said in paragraph 34 of my particulars of claim which is
 12 denied in the defence and replied to in the reply. It's
 13 one way in which I seek to argue the case.
 14 MR JUSTICE HILDYARD: I don't think they would preclude you
 15 running an interpretation argument. You seek to say
 16 that it's a matter -- as a matter of interpretation, the
 17 relevant clause 19.6, though framed in the context of
 18 grounds --
 19 MR STUART: Yes, yes.
 20 MR JUSTICE HILDYARD: -- actually as a matter of
 21 interpretation requires proof before its exercise of
 22 fraud or dishonesty.
 23 MR STUART: Yes.
 24 MR JUSTICE HILDYARD: Proof, not grounds; proof. You say
 25 that's a matter of interpretation.

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1 MR STUART: I say that grounds for these purposes means
 2 proof, yes. "Grounds to conclude" is the phrase.
 3 MR JUSTICE HILDYARD: Yes, and you say by some process of
 4 interpretation, which you will have to help me with,
 5 that denotes that it's not enough genuinely to have
 6 grounds if your grounds are subsequently demonstrated to
 7 be wrong, and you say that happens as a matter of
 8 interpretation.
 9 MR STUART: I say that that is an interpretation of
 10 clause 19.6.
 11 MR JUSTICE HILDYARD: Where do you say that in the list of
 12 issues? That's, I think, what I am struggling with
 13 a little bit.
 14 MR STUART: Well, by the use of the words "whether the
 15 grounds to conclude fraud must be: 1.1, real".
 16 Another way of saying that something is real is that
 17 it actually happened. That's an interpretation of the
 18 way to put it.
 19 MR JUSTICE HILDYARD: "Real" is the word that carries you
 20 there, is it?
 21 MR STUART: Yes.
 22 MR JUSTICE HILDYARD: "Real and genuine".
 23 MR STUART: Real and genuine, objectively. Objectively.
 24 MR JUSTICE HILDYARD: "Real grounds" means that the -- not
 25 only do you have grounds but --

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1 MR STUART: They are real grounds, they are not just made up
 2 grounds. They are not wrong grounds or false grounds,
 3 they are real grounds.
 4 MR JUSTICE HILDYARD: Right, they are not made up grounds,
 5 I follow.
 6 MR STUART: Or wrong.
 7 MR JUSTICE HILDYARD: You can have grounds for believing
 8 something without your belief being true --
 9 MR STUART: That's not the clause. The clause doesn't say
 10 "grounds to believe". It does not say that, my Lord,
 11 this is the whole flaw in my learned friend's case. If
 12 it said -- can I take you to 19.6?
 13 MR JUSTICE HILDYARD: Well, grounds to conclude.
 14 MR STUART: "Grounds to conclude", what does that mean, what
 15 do the parties objectively are held to intend that to
 16 mean in the circumstances of this sort of clause? I say
 17 "grounds to conclude" is not just subjective grounds
 18 upon which they might believe, which is the way my
 19 learned friend puts it.
 20 MR JUSTICE HILDYARD: You are veering into the question
 21 which is accepted to be one which does arise of
 22 interpretation.
 23 MR STUART: Leave out --
 24 MR JUSTICE HILDYARD: What I think you are saying is it's
 25 all a matter of interpretation, you say that what this

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1 clause really means is that it had to be demonstrated
 2 before its exercise that they were in fact fraudulent.
 3 MR STUART: Yes.
 4 MR JUSTICE HILDYARD: That's what you say it comes to, and
 5 you say that you get there through the door marked
 6 "real".
 7 MR STUART: I get there through the door marked "real" or
 8 through the proviso which says I can put my case how
 9 I want to as long as it's in the pleadings somewhere,
 10 and paragraph 34 is a blatant --
 11 MR JUSTICE HILDYARD: You can't put your case as you want
 12 to, if I may say so, if it involves a departure from the
 13 case that you previously agreed.
 14 MR STUART: Of course, but there is no limit on the case to
 15 that extent. I haven't agreed to drop a point. Just as
 16 my learned friend hasn't agreed to drop his
 17 counterclaim, or the assertion of knowingly making false
 18 payments in that counterclaim.
 19 MR JUSTICE HILDYARD: Did you exchange skeletons or were
 20 they sequential?
 21 MR STUART: No, we exchanged skeletons. We have had the
 22 witness statements for months, and the witness
 23 statements made it quite clear the way in which it's
 24 proceeding on both --
 25 MR JUSTICE HILDYARD: So you must have been rocked to your

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1 foundations which the, really I think at least thrice
 2 repeated point that it was not for them and it wasn't
 3 part of their case to show actual fraud and dishonesty.
 4 They say that three or four times.
 5 MR STUART: I wasn't rocked to my foundations, my Lord. Of
 6 course given the evidence in this case as we now know it
 7 to be, they know, I suspect, that they are not going to
 8 be able to show there had been a fraud in his evidence.
 9 MR JUSTICE HILDYARD: Well, I don't want to get into
 10 forensic points like that.
 11 MR STUART: I don't want to either. Well, my Lord, you are
 12 making a forensic point to me.
 13 MR JUSTICE HILDYARD: No, I am not, I am rather querying why
 14 in a sense -- well, I am slightly carping, I suppose,
 15 that you didn't -- and this must have been something
 16 which you had to tackle full on.
 17 MR STUART: And I do. In my submission, my skeleton
 18 argument tackles it full on, I have perfectly fairly set
 19 it out. I am not saying --
 20 MR JUSTICE HILDYARD: Well, it is a misunderstanding between
 21 you as to the scope of the trial, and --
 22 MR STUART: I don't accept that, at all, my Lord I do not
 23 accept that my learned friend approached this trial on
 24 the basis that there wasn't going to be an issue of fact
 25 as to whether or not my clients were dishonest, because

1 his counterclaim plainly proceeds on that basis, his
 2 witness statements say repeatedly that my clients were
 3 dishonest, and he is going to cross-examine my clients,
 4 according to the timetable that he agreed, for days on
 5 end.
 6 Now, if it's got nothing to do with whether or not
 7 they were dishonest or not and the whole thing --
 8 MR JUSTICE HILDYARD: One has had long trials without
 9 dishonesty, you know.
 10 MR STUART: I know, my Lord, but if the only issue in this
 11 case were whether the defendant's people had grounds to
 12 believe, which is not the wording of the clause, but if
 13 that were it, then presumably there will be no
 14 cross-examination of my clients, and it would all be for
 15 me to cross-examine them about whether they did or
 16 didn't have grounds to believe and whether they
 17 genuinely believed it or reasonably believed it or all
 18 the other alternative ways it's put in paragraph 10.
 19 But paragraph 34 of the particulars of claim is
 20 absolutely clear and is responded to, as I say, and says
 21 that we were not fraudulent or dishonest, and our
 22 witness statements say the same.
 23 MR JUSTICE HILDYARD: Okay.
 24 MR STUART: My Lord, the way I put it for present purposes
 25 is this: you are not yet deciding on this

1 interpretation, my interpretation argument.
 2 MR JUSTICE HILDYARD: No.
 3 MR STUART: But if at the end of the day after you had heard
 4 everything and seen all the case law and understood how
 5 all of this played out, you were to conclude that I was
 6 right, if you did conclude that, and that in this
 7 particular type of clause, those words, whatever they
 8 say, the draftsman may not have envisaged the
 9 hypothetical that we are talking about here, that is
 10 wrong but genuinely held, and you found in my favour,
 11 then there will plainly be an issue of fact as to
 12 whether my clients were or were not dishonest, because
 13 if they were not dishonest, and there is a requirement
 14 that they were -- and I know that's a premise, it's
 15 a hypothetical premise -- but if that turns out to be
 16 the position at the end of the trial, then you will make
 17 your finding as to whether or not they were dishonest or
 18 not.
 19 If you don't do that, if we proceed on this whole
 20 trial and it is somewhat artificial, frankly, given the
 21 nature of this case, on the basis that: we are not going
 22 to decide whether or not your clients were dishonest,
 23 nobody has the burden of proof here, it's not an issue,
 24 that would be a complete waste of time because we would
 25 not have addressed one of the central factual elements

1 of the case.
 2 MR JUSTICE HILDYARD: No, because if Mr Potts says "I don't
 3 have to show dishonesty" and doesn't cross-examine with
 4 a view, and you were right, you just get up and say,
 5 "Poor old Mr Potts didn't grab at the one point that
 6 mattered".
 7 MR STUART: As I say in my little note here, I can't prevent
 8 him from doing whatever he wants to do.
 9 MR JUSTICE HILDYARD: So why are you bothered? Do you see
 10 what I mean? If he is saying he doesn't want to --
 11 I don't know whether or not he will stick to this --
 12 MR STUART: Exactly.
 13 MR JUSTICE HILDYARD: He is saying it was not part of the
 14 trial to demonstrate dishonesty or fraud. You can put
 15 in the back pocket that if he fails to establish it, you
 16 are a proof of the pudding man. You say: no proof of
 17 pudding, no right to serve the transfer notice at par.
 18 MR STUART: That's one of my alternative interpretations.
 19 MR JUSTICE HILDYARD: Right.
 20 MR STUART: If he wished to make that concession openly, and
 21 I would like it in writing because I don't want there to
 22 be any misunderstanding at the end of this trial, if his
 23 case is: we are not going to assert, to the extent that
 24 we are going to try to prove by the evidence, by
 25 cross-examination, by calling our own evidence, that

1 your clients were dishonest, that is not an issue in
 2 this trial, whatever result you or the Court of Appeal
 3 may decide on the issue of interpretation, then I would
 4 like him to say that now and we will, subject to what
 5 your Lordship decides, have to proceed of course. If he
 6 makes a concession, he makes a concession, I can't
 7 prevent that. But I suspect he is not making
 8 a concession, and for the reasons I have given it's not
 9 the appropriate course here for you to limit this trial,
 10 to take out the very issue of dishonesty so that, in
 11 some sort of vacuum, we determine whether the evidence
 12 of dishonesty was sufficient for a reasonable -- I do
 13 quibble with the word "belief", my Lord, because it
 14 doesn't say "belief", you understand that.

15 MR JUSTICE HILDYARD: "Conclude".

16 MR STUART: So a reasonable conclusion of fraud and
 17 dishonesty. That's a summary of my points, my Lord. Is
 18 there anything else I can assist you with at this stage?

19 MR JUSTICE HILDYARD: No, I do not think so. Although it's
 20 not usual, I think I ought to hear from Mr Potts to see
 21 what he says about this and how far he takes this.

22 MR STUART: Yes.

23 Submissions by MR POTTS

24 MR POTTS: My Lord, the idea of making a concession is
 25 a curious one. Could I just refer your Lordship to my

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1 note, the short note, as to why this is an important
 2 issue? Paragraph 4 of my note deals with a well known
 3 citation from the case of Lombard about what is
 4 necessary for a fair trial. He says: oh, well, it's
 5 just a point of interpretation and I can do whatever
 6 I like, we will run with everything, we will sort it all
 7 out at the end in closing submissions.

8 My Lord:

9 "It is a matter of fundamental fairness, it is
 10 essential to the conduct of a fair trial that each side
 11 should know in advance the case the other side is making
 12 and that is what case it has to meet and prepare for.
 13 It is the function of the pleadings to provide that
 14 information."

15 I would add to that, my Lord, that that's also why
 16 we have the list of issues which was ordered by the
 17 court at the PTR on my suggestion, and the idea that
 18 somehow this is all sort of in there is just not the
 19 case.

20 The idea, my Lord, that we should just have
 21 a general amble through everything and then, at the end
 22 of the -- after hearing all the evidence, your Lordship
 23 should then be addressed on issues of construction and
 24 what is and is not within the pleaded case, we say is
 25 fundamentally not the way a trial should be conducted.

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1 We are entitled to know the case that we have to meet,
 2 and the case we have to meet, my Lord, on construction
 3 is that set out in paragraph 10 of the points of claim,
 4 which deals with the implied and construction points
 5 which are raised.

6 Now, my learned friend now says that the first one,
 7 the real and genuine grounds, he says that now means you
 8 have actually -- it has to be objectively the case.
 9 That's not what he says even in his own note. Does
 10 your Lordship have the note that he handed up?

11 On page 2, he himself accepts that the first of the
 12 highlighted sections, which is the one which he now
 13 relies on, could be said to be a subject -- I think he
 14 means subjective -- ground.

15 "The remainder necessarily are understood to assert
 16 an objective test."

17 I don't accept on the second or the other stuff,
 18 objectively, obviously the quality of the evidence is
 19 a matter in issue between us and I accept that.
 20 Your Lordship may have seen from our skeleton that we
 21 say the question of sort of rationality, Wednesbury
 22 unreasonableness, that's the reasonableness.

23 But the question on grounds, real and genuine
 24 grounds, the idea that somehow we have misunderstood
 25 this --

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1 MR JUSTICE HILDYARD: You use real is a counterpoint to
 2 fanciful"?

3 MR POTTS: Yes, absolutely. My friend has himself said
 4 I think the idea is sort of them being made up.

5 MR JUSTICE HILDYARD: So it's not fanciful or bogus grounds.

6 MR POTTS: That's right, it's not bogus grounds, made up.

7 My Lord, that ties in, if your Lordship has the list of
 8 issues you can see the counterpoint for this. Because
 9 what you have in issue 2, which is in fact really the
 10 sort of entitlement to exercise the option, you will see
 11 that they say there are two alternatives, 2.1 and 2.2
 12 are their case, which is they say that we concocted
 13 false allegations and that we acted in bad faith
 14 fraudulent and dishonestly, motivated by a desire,
 15 et cetera, to seize their shares. So they are saying,
 16 "We didn't have a genuine belief", that's their case as
 17 pleaded.

18 The alternative, and that's our case, and that's the
 19 basis on which the pleadings proceed and on which the
 20 trial has been prepared, is whether we say: no, we did
 21 have grounds to conclude, and that goes back to 1, the
 22 grounds to conclude is that we had genuine grounds, that
 23 we believed them.

24 So, my Lord, we say that this is not just some sort
 25 of -- to say that somehow we are not taken by surprise

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1 in some way and we always knew this I am afraid is not
 2 the case at all.
 3 Your Lordship was shown, just by way of
 4 illustration, I will not go back through it, various
 5 paragraphs from my clients' evidence. They all make out
 6 my point, they are all based on what they believed at
 7 the time, and the basis at the time on which they formed
 8 a conclusion. There is nothing in there, none of those
 9 paragraphs, I will not go back through them,
 10 your Lordship saw them when I put the context --
 11 MR JUSTICE HILDYARD: There was one, possibly, elliptical
 12 one about stealing.
 13 MR POTTS: Yes, but it comes I think below the reference to
 14 the report.
 15 MR JUSTICE HILDYARD: Yes.
 16 MR POTTS: So it's not an assertion there. So, my Lord, we
 17 say that this is not just a -- well, we just sort of can
 18 see how the case develops and see how it goes. They
 19 were required to put forward their pleaded case, they
 20 did so in paragraph 10. Paragraph 10 of the pleading
 21 makes clear what they say. My friend himself accepted
 22 in his own note that the first point was dealing with
 23 the subjective one. He seems to now be seeking to
 24 resile from that. He could have been in no doubt on the
 25 pleaded case as to what our position was, and if there

1 were any doubt on the pleaded case, and I say there is
 2 absolutely none, the list of issues puts it beyond
 3 peradventure. The idea to say the list of issues isn't
 4 determined, no, sure, but it is meant to identify the
 5 main issues. This is not just some subsidiary point,
 6 it's absolutely fundamental to the whole case.
 7 We say, my Lord, that it is right that, it's for him
 8 to plead his case, and we say firstly that that is not
 9 what his pleaded case is at all. Secondly, we say that
 10 if he were to seek to run a different case, the
 11 appropriate course would be for him to apply to amend,
 12 and the court would then be faced with the appropriate
 13 exercise of determining whether permission to amend
 14 should be granted.
 15 We say that there are two reasons why you would not
 16 grant permission. Firstly, there is no application, and
 17 they have been on notice of this point. We say it's
 18 just too late. The case has been prepared -- my learned
 19 friend says: oh, we were going to cross-examine anyway,
 20 we would have done it, my Lord, it would not affect the
 21 way we present the case. My Lord, I don't accept that
 22 for a moment. For example, we have put in hearsay
 23 notices from all the employees who put in statements as
 24 to what -- they gave information to the investigation,
 25 because of course we take the view, well, the issue is:

1 what information did we have before us at the time?
 2 Those statements speak for themselves. There is not
 3 an issue as to whether those matters were truthful or
 4 whether those witnesses were giving truthful testimony
 5 or not. If the issue was today whether they had been
 6 dishonest, I might have taken, we might have taken
 7 a very different course on that evidence. We may have
 8 called additional witnesses, just by way of example.
 9 My learned friend then seeks to say, well, it's in
 10 the counterclaim. But as my friend accepts, he accepted
 11 in response to a question from your Lordship, that other
 12 than in good faith does not equal dishonesty. There is
 13 no plea of dishonesty in the counterclaim. My friend
 14 accepts that the allegation that these were for work
 15 which was not actually done is not an allegation of
 16 dishonesty.
 17 That is our case, we don't have to plead dishonesty.
 18 I am very conscious, my Lord, in terms of a pleading as
 19 to the obligations on counsel in making and pleading
 20 forth particulars of dishonesty. If I was going to make
 21 an allegation of dishonesty, I would make it squarely
 22 and plead it squarely.
 23 MR JUSTICE HILDYARD: I know you have another point in that
 24 regard as to the particularisation of their
 25 counterclaim.

1 MR POTTS: My Lord, yes, well, it is, there it is. But
 2 theirs is not properly particularised, and this point is
 3 not for now.
 4 My Lord, we say that -- as I say, this is a question
 5 that is fundamental to the case -- they have chosen to
 6 assert, that is their pleaded case, it's the list of
 7 issues they have agreed, and it's not open for them to
 8 depart by way of ambush at the last moment in relation
 9 to a matter that is not pleaded.
 10 Secondly, as I say, we say it's too late, but
 11 importantly the court will not grant permission to amend
 12 where the case is hopeless.
 13 Now, on a point of construction, it's the test of
 14 summary judgment. The court is able to make
 15 an assessment of summary judgment. Your Lordship said:
 16 yes, what about factual matrix? On these points there
 17 is no factual matrix evidence which --
 18 MR JUSTICE HILDYARD: When you say "these points" what do
 19 you mean?
 20 MR POTTS: On the interpretation of these paragraphs.
 21 MR JUSTICE HILDYARD: Some of them are more difficult than
 22 others. You mean on the real point?
 23 MR POTTS: My Lord, on this point, on what they say what
 24 they are asserting, there is no matrix point, my Lord,
 25 and your Lordship will be determining those issues by

1 reference to -- your Lordship will see it's a question
 2 of syntax, and of looking at the agreement as a whole.
 3 Your Lordship will need to read those, and I propose at
 4 some point to take your Lordship through the
 5 shareholders' agreement in order to see that. But there
 6 aren't major matrix issues in relation to this question.
 7 It's a question of looking at it in its context, but
 8 it's really the context of the agreement.
 9 So, my Lord, we say that this is an important point,
 10 this isn't just some questions -- the idea that the
 11 trial should just sort of amble on and we should leave
 12 everything to the end and then they can run whatever
 13 case they like and the idea that I should be forced to
 14 make some concession to a case which they haven't
 15 pleaded is, with all due respect to my friend, really
 16 the wrong way and indeed of fundamental unfairness to my
 17 clients.
 18 There was no doubt as to the way they were putting
 19 their case, and there was no doubt in the way they were
 20 agreeing the list of issues, and indeed there was no
 21 doubt in the way we prepared our evidence, as
 22 your Lordship has seen.
 23 So, my Lord, we say that your Lordship should look
 24 at the interpretation point upfront, your Lordship
 25 should hear submissions, even if your Lordship doesn't

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1 make a determination on it. In opening the case
 2 your Lordship should hear and see the interpretation
 3 points in terms of implied terms and construction,
 4 because that will affect the way in which the case
 5 develops thereafter, and we say that your Lordship
 6 should -- it is not necessary to hear evidence in order
 7 to take a view on the construction points. My friend
 8 I think hasn't suggested otherwise.
 9 My Lord, are there any other points in relation to
 10 that your Lordship would like to hear from me on?
 11 MR JUSTICE HILDYARD: Well, I shall probably have to think
 12 about this and what you said, but your main point is
 13 that the entire focus agreed in this case was to be on
 14 your clients' state of mind, if you like, when they
 15 concluded that there were grounds for thinking,
 16 concluding that there were reasonable grounds or that
 17 there were grounds, whatever may be the quality of the
 18 grounds.
 19 MR POTTS: Yes.
 20 MR JUSTICE HILDYARD: You say that that has always been the
 21 basis on which you have both proceeded and that is the
 22 basis on which it's come before the court?
 23 MR POTTS: Yes.
 24 MR JUSTICE HILDYARD: Mr Stuart appears to be saying that
 25 actually, and the doorway into this is his construction

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1 of the word "real", the focus of the trial should be or
 2 should extend to the claimants' state of mind as being
 3 the proof of the pudding.
 4 MR POTTS: I am not sure he says it's the claimants' state
 5 of mind at all, my Lord; I think he says it's
 6 objectively as to whether they had been fraudulent or
 7 dishonest.
 8 MR JUSTICE HILDYARD: Well, you can't really be fraudulent
 9 or dishonest without a naughty state of mind, can you?
 10 MR POTTS: No, my Lord, there's an issue between that -- in
 11 a civil case, the question, my Lord, we dealt with this
 12 in our skeleton. This isn't a gauche case showing that
 13 subjectively they knew what they were doing was naughty.
 14 The question is objectively do they fall below the
 15 standards to be expected of --
 16 MR JUSTICE HILDYARD: Reasonable men. It's a sort of
 17 Cavender Group(?) type test.
 18 MR POTTS: My Lord, yes. So that's addressed in our
 19 skeleton. We say it makes sense in the context of this,
 20 because the aim is to protect our brand. So the
 21 question as to whether they actually knew what they were
 22 doing was naughty, if you like, is not the issue. It's
 23 dealt with at paragraph 101 of our skeleton, my Lord,
 24 it's Brunei, we say, as to dishonesty. So in fact it's
 25 an objective standard.

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1 Whether that's the case, the point is they say the
 2 issue is you look at it today, not then and you look at
 3 it today and say: based on all the evidence, trying the
 4 matter out in court now, were they objectively
 5 fraudulent or dishonest? That's what I think he says.
 6 We say no. In terms of the case, the issue is: at the
 7 time did we have -- frankly we say that's what the
 8 clause says, and my friend took your Lordship to -- he
 9 didn't actually show you the agreement, but it is
 10 interesting that 19.2 sets out a whole number of matters
 11 which are objective, whether there was a material breach
 12 which was not remedied, whether they were insolvent,
 13 whether they resigned and so on. Those are all
 14 objective matters.

15 The parties in this case, in 19.6, have chosen to
 16 not say -- they could have just ignored the first word
 17 and said: grounds arise if they have been fraudulent or
 18 dishonest, then we would be entitled to ... they haven't
 19 said that, that's not what it says. The clause says "If
 20 we had grounds to conclude that they have been
 21 fraudulent or dishonest". My friend's construction
 22 seeks to ignore the obvious and -- this is not
 23 a question of ambiguity. There is no ambiguity in what
 24 that clause says. We say that as a matter of
 25 construction that is the sense which it can bear. One

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1 can do that by reference to syntax, look at the
 2 agreements as a whole and you will see that there are
 3 other clauses in terms of the way this joint venture is
 4 to operate, and Specsavers' particular concerns as to
 5 the matters and protections which are built into the
 6 agreement and how it's meant to operate in terms of the
 7 A directors and B directors.

8 But that's a point of construction. We say that
 9 that is a short point. It's fundamental as to whether
 10 the focus of the trial is looking at it today or looking
 11 at it then. It's a very different exercise and it would
 12 have led to a different exercise in terms of trial
 13 preparation.

14 In terms of cross-examination, my friend says I have
 15 days and days. I don't know about days and days, we
 16 have a tight timetable for cross-examination, limiting
 17 that. My concern is that unless those issues are
 18 addressed, this trial will certainly not fit within its
 19 window, it will amble.

20 MR JUSTICE HILDYARD: Is it meant to be concluded this term?

21 MR POTTS: My Lord, yes, it is. It is 15 days, absolutely.

22 MR JUSTICE HILDYARD: Do we have 15 days? You know I have
 23 two days out on another matter?

24 MR POTTS: My Lord, even with your two days we are due to
 25 conclude this term. It is a different exercise to

1 cross-examine as to -- it may mean putting matters to
 2 the witnesses to see what was available at the time so
 3 that it's possible to see the nature of those grounds,
 4 but it's a very different exercise from actually seeking
 5 to show fraud and dishonesty now, it's a very different
 6 exercise by way of cross-examination. It's not the same
 7 task at all.

8 And as I said, my Lord, it's not just the exercise
 9 of cross-examination, it's in the way that witnesses
 10 have been called on our side, and the nature of
 11 evidence. Your Lordship has seen all that evidence. It
 12 is not dealing with the position today.

13 So, my Lord, we say that it's a matter of
 14 fundamental fairness that the parties identify their
 15 cases on the pleadings. That is what they did.
 16 Paragraph 10 of their pleading made that absolutely
 17 clear, what their points of construction and
 18 interpretation and implied terms were. If there were
 19 any doubt, which there isn't, it was confirmed by the
 20 list of issues agreed some time ago, and this is
 21 an attempt to move the goalposts.

22 MR JUSTICE HILDYARD: But at least as regards the first
 23 claimant, you will be seeking, will you not, to
 24 establish a knowing state of mind in the making of false
 25 payments?

1 MR POTTS: In terms of, they knew that money was going out
 2 for work which was not -- sorry, no. What I am showing
 3 is at the time Specsavers had grounds to conclude at the
 4 time that they, in terms of the construction point,
 5 knowingly were making --

6 MR JUSTICE HILDYARD: I am looking at your counterclaim
 7 paragraph 87.

8 MR POTTS: On the counterclaim we would be saying -- and
 9 this is a trial on liability, I should say just for now,
 10 this is a trial on liability, not quantum -- that, yes,
 11 these were gratuitous payments.

12 MR JUSTICE HILDYARD: You are going more than that.

13 MR POTTS: We do go further, yes.

14 MR JUSTICE HILDYARD: So on your counterclaim, and the test
 15 I have in mind is paragraph 87, you will be enquiring as
 16 to the state of mind of the first claimant in making
 17 overtime payments as well as into whether those overtime
 18 payments were really overtime payments or just bunce.

19 MR POTTS: Yes, I don't have to prove the motivation, just
 20 that they didn't represent consideration.

21 MR JUSTICE HILDYARD: You say knowingly and/or negligently
 22 procuring and/or allowing?

23 MR POTTS: Yes.

24 MR JUSTICE HILDYARD: Knowingly is a counterpoint to
 25 negligently, and betokens a knowing that they are false

1 rather than being a little bit uncertain as to whether
 2 they are or not, and careless in the process.

3 MR POTTS: That's true.

4 MR JUSTICE HILDYARD: So your counterclaim does involve
 5 an analysis, let's avoid characterisation in terms of
 6 dishonesty, of the state of mind of the first claimant.

7 MR POTTS: Yes, to some extent, yes, that's true, that's
 8 fair.

9 MR JUSTICE HILDYARD: So at least in that regard the trial
 10 is not hermetically sealed to the question of the
 11 objective quality of what was done or your subjective
 12 assessment of what you understood to have been done.

13 MR POTTS: That's a fair point, my Lord. Certainly
 14 obviously the main focus of the trial is the issue on
 15 the claim. But the counterclaim is there as well, and
 16 it's a matter before the court.

17 MR JUSTICE HILDYARD: Yes. So it would be quite difficult
 18 for me to really chop this about quite as you say,
 19 although it may be a fair point that I have not been
 20 given notice and certainly not an adequate steer of the
 21 interpretation of the contract now put forward on behalf
 22 of the claimants that it does involve, in order for 19.6
 23 to be triggered, proof of actual dishonesty.

24 MR POTTS: Yes, and the issue on the dishonesty is obviously
 25 much wider. The issues, in terms of the exercise of the

1 option, are such matters as --
 2 MR JUSTICE HILDYARD: That has not been raised. I am sorry
 3 to cut across you.
 4 MR POTTS: Yes.
 5 MR JUSTICE HILDYARD: I am also unclear whether or not the
 6 claimants maintain that it is sufficient for you to
 7 establish (a) whether they accept a sufficient use to
 8 establish an objective departure from the standards of
 9 reasonable men, or whether, under their view now of the
 10 word "real" you have to show a knowing of dishonest
 11 departure from the stance of reasonable men.
 12 MR POTTS: Yes, that's also not flagged up. It's not just
 13 your Lordship, it's us in terms of our preparation of
 14 the whole case. Obviously it's a matter for
 15 your Lordship, you are entitled to obviously have some
 16 understanding on the parties' positions, but it is also
 17 incumbent on them to let us have some idea.
 18 MR JUSTICE HILDYARD: I am only using me, because it's
 19 inevitable, without being too cynical, that you will
 20 rigidly view the case in the way you have viewed it in
 21 the past. I am just an interloper for the moment.
 22 That's the reason why I used me as the test.
 23 MR POTTS: My Lord, yes.
 24 MR JUSTICE HILDYARD: It seems to me there is force in the
 25 point that a problem of being too definitive at the

1 moment is the Court of Appeal procedure problem.
 2 I fully accept that, especially on the question of the
 3 contractual interpretation, there is every prospect that
 4 the matter should be appealed. It's one of those
 5 things, that's the way of things. But I don't want
 6 an appeal process which loses a 15 day slot or which
 7 compromises the 15 day slot by making it a trial which
 8 was possibly conducted on a false basis, that would be
 9 absolutely terrible. What do you say about that?
 10 MR POTTS: My Lord, I understand the point is a substantive
 11 point. What I would say is that at the very least
 12 your Lordship should -- firstly there is the procedural
 13 fairness point which is not dealt with by that, there is
 14 a procedural point but there is a substantive point of
 15 fairness and we say that that doesn't deal with the
 16 substantive unfairness of them being able to run a case
 17 which has not been --
 18 MR JUSTICE HILDYARD: No, but how far do you press that?
 19 I mean, it's your right, as it's their right, to press
 20 for a ruling. Do you press for that ruling, even if the
 21 consequence could be, if you win but the Court of Appeal
 22 is against me, that we have to have a retrial? I am
 23 just urging you to consider how far you wish to press
 24 this.
 25 MR POTTS: My Lord, could I have a moment?

1 MR JUSTICE HILDYARD: I will give you plenty of time to do
 2 this, because --
 3 MR POTTS: The transcript writers need a break as well.
 4 Reply submissions by MR STUART
 5 MR JUSTICE HILDYARD: I am pretty persuaded so far that the
 6 adumbration of the way that the claimants put their case
 7 is insufficient, I do not personally know its ambit or
 8 its real -- what really you say. I don't mean it
 9 rudely. But Mr Potts is surely right that the purpose
 10 of pleadings and a list of issues is to confine and
 11 define your case.
 12 MR STUART: And skeleton arguments.
 13 MR JUSTICE HILDYARD: Sorry?
 14 MR STUART: And skeleton arguments.
 15 MR JUSTICE HILDYARD: And skeleton arguments.
 16 MR STUART: Served those in advance.
 17 MR JUSTICE HILDYARD: If your skeleton argument departs from
 18 the pleading, it's really my duty, and I think
 19 Rolled Steel rather shows this, to spot that and ask
 20 whether anyone is ever going to take the point. Unless
 21 they say never, and even if they do say never, I have to
 22 say: right, your case goes beyond your pleading, you
 23 must either review your pleading or abandon your case.
 24 MR STUART: My Lord, absolutely, if paragraph 34 is not
 25 a pleading that goes to this one alternative basis in my

1 skeleton argument, if that is not pleaded in
 2 paragraph 13 --
 3 MR JUSTICE HILDYARD: Your pleading -- I am sorry to appear
 4 to argue, but I just want to get this right and remember
 5 I am a newcomer -- in relevant part on interpretation is
 6 paragraph 10, isn't it?
 7 MR STUART: And 34, further or alternatively, and in any
 8 event.
 9 MR JUSTICE HILDYARD: No, but that's a factual matter. Your
 10 pleading as to what the blooming thing means is in
 11 paragraph 10.
 12 MR STUART: Our pleading as to what the thing means is in
 13 paragraph 10 and --
 14 MR JUSTICE HILDYARD: Anywhere else?
 15 MR STUART: And our case as to what the thing means and the
 16 effect of what it means is in paragraph 34.
 17 MR JUSTICE HILDYARD: That's just a more general way of
 18 putting it. The question is: did they have grounds to
 19 conclude that your clients had been fraudulent or
 20 dishonest?
 21 MR STUART: Yes.
 22 MR JUSTICE HILDYARD: In paragraph 10, you go to the nature
 23 or quality of the grounds necessary for that purpose.
 24 MR STUART: Yes.
 25 MR JUSTICE HILDYARD: You do not go beyond that anywhere in

1 your pleading, it's only clause 10, paragraph 10, which
2 defines it.
3 MR STUART: Yes.
4 MR JUSTICE HILDYARD: That is your definitive, because
5 pleadings are required to be definitive, and confining
6 statement as to what you are going to say about the
7 meaning of paragraph 10.
8 MR STUART: Yes. The grounds to conclude fraud or
9 dishonesty must be real.
10 MR JUSTICE HILDYARD: Must be real and genuine grounds.
11 MR STUART: Yes, real and genuine, so that's two hurdles in
12 one that they have to get over.
13 MR JUSTICE HILDYARD: Yes. You say that, within that,
14 though I say I hadn't spotted that, "real and genuine"
15 means that the grounds have, in the end, to be proven in
16 terms of not any belief on the part of the defendants,
17 but --
18 MR STUART: Yes, "real" means, as you put it to my learned
19 friend, his "real" is not -- how did you put it?
20 MR JUSTICE HILDYARD: Do you accept that, that real means
21 not fanciful?
22 MR STUART: No, I don't, that's what I am saying. You put
23 it to him that "real" means not fanciful. In his way of
24 thinking "real" means not fanciful or bogus. In my way
25 of thinking, "real" means not wrong.

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1 MR JUSTICE HILDYARD: I think you are, at the very least and
2 by tomorrow you will have to explain this and how you
3 get there, because I think that Mr Potts will say that
4 that is not an available construction.
5 MR STUART: And my skeleton argument seeks to say that it
6 is.
7 MR JUSTICE HILDYARD: Let's see that. Where is that?
8 MR STUART: That's why we are here at all in this little
9 argument that we are having at 3.40 on Day 1. It's
10 because he says that my skeleton argument puts my case.
11 MR JUSTICE HILDYARD: There is a difference between the way
12 you generally put your case and how you tie it into the
13 word "real". How do you say as a matter of
14 interpretation you get to where you want to get?
15 MR STUART: My Lord, we start under the heading
16 "Interpretation of Clause 19.6" on page 7 of my skeleton
17 argument. My Lord, I am just checking you have tab 1 in
18 our little -- so you are in the Bognor skeleton
19 argument?
20 MR JUSTICE HILDYARD: Yes, I am at page 8 on paragraph 11.
21 MR STUART: Yes. Exactly. So we say these are eithers,
22 these are all alternatives, which I must say is why I do
23 think or I would contend that my learned friend's
24 suggestion that the whole trial would be focused one way
25 if you decide this one way and the whole trial would be

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1 focused another if you don't is simply not right. This
2 is just one alternative argument, and it's somewhat
3 artificial to say, as he does, that he is going to
4 assert that the first claimant knowingly made a false
5 payment to her husband, but he is not going to assert
6 for the sake of proving it that by knowingly making
7 a false payment to her husband she was acting
8 dishonestly or fraudulently. If asked for particulars
9 of the dishonesty or fraudulent activity, he would say,
10 and I took you to it and this is why I took
11 your Lordship to it throughout the defence, the
12 particulars of the dishonesty and fraud are the
13 knowingly made a payment to her husband.
14 So it really is entirely circular, what he is
15 saying. There will not be any substantial difference in
16 focus of this trial, whatever your Lordship determines
17 as to this. But, returning to your Lordship's question,
18 which is: where is it set out in my skeleton argument?
19 Paragraph 11(a):
20 "The clause properly interpreted or on its proper
21 construction implies that such grounds to conclude fraud
22 or dishonesty are real and genuine grounds ie
23 effectively that there actually was fraud or dishonesty
24 and not merely a subjective and thus potentially
25 erroneous conclusion to deem one that there was fraud

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1 and dishonesty."
2 My Lord, can I say -- I think I mentioned this
3 somewhere in a note -- one of the reasons why this is so
4 clearly put, I would suggest, at this point, is this at
5 the PTR, the PTR judge raised the issue with counsel in
6 front of the court: what would, in the hypothetical
7 situation, if Specsavers had an actual belief but that
8 belief was wrong?
9 MR JUSTICE HILDYARD: What was the answer?
10 MR STUART: And the answer from Mr Potts was: ah, well, that
11 will be an interesting matter of interpretation that one
12 would have to deal with. And I agreed. That is
13 a matter that would have to be dealt with. That's why
14 I have four square raised it in my skeleton.
15 MR POTTS: What I actually said, my Lord, was: absolutely,
16 we are entitled to exercise it, the issue as at the
17 time.
18 MR STUART: No, you did not say that.
19 MR JUSTICE HILDYARD: Well, don't argue amongst yourselves.
20 The fact is, isn't it, that paragraph 11(a) of your
21 skeleton argument says something which is not said in
22 clause 10, paragraph 10, of your pleading.
23 MR STUART: Yes, because it adds the word -- where in
24 clause 10 it says "real", the word "real", so we are
25 saying that the grounds must be real.

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1 MR JUSTICE HILDYARD: No, it's not good enough just to
 2 repeat things. You have to say, do you not, in order to
 3 square your pleading with your present case --
 4 MR STUART: Yes.
 5 MR JUSTICE HILDYARD: -- that the requirement of real and
 6 genuine grounds --
 7 MR STUART: Yes. Involves --
 8 MR JUSTICE HILDYARD: -- denotes --
 9 MR STUART: Denotes.
 10 MR JUSTICE HILDYARD: -- dishonesty and fraud on the part
 11 of your clients must be established as a fact before
 12 clause 9.6 is triggered.
 13 MR STUART: Yes, that that is what it means.
 14 MR JUSTICE HILDYARD: That is not what you say in 10, is it,
 15 on any fair reading of it?
 16 MR STUART: Well, the fair reading is that I say that the
 17 construction requires the grounds to conclude fraud and
 18 dishonesty to be real. To be real. My learned friend
 19 says "I understand 'real' to mean not fanciful". No.
 20 People in the general world don't understand the word
 21 "real" to mean not fanciful. That's simply not
 22 an interpretation -- that's not the only interpretation
 23 of the word "real". To many people sitting in this
 24 court the word "real" means actual, means not wrong, not
 25 false, not wrong. It's not simply that they have a --

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1 MR JUSTICE HILDYARD: So when the police have real grounds
 2 for suspicion, they are not allowed to proceed on them
 3 unless they are established? When would the circle ever
 4 be broken?
 5 MR STUART: I keep reminding you that this is not a clause
 6 which says grounds for suspicion.
 7 MR JUSTICE HILDYARD: Well, real grounds for concluding
 8 that.
 9 MR STUART: Grounds to conclude. If it said "grounds to
 10 suspect", if it said that, obviously the concept of
 11 suspecting something involves the possibility that
 12 something --
 13 MR JUSTICE HILDYARD: So "real" takes colour from its
 14 context, does it?
 15 MR STUART: Yes.
 16 MR JUSTICE HILDYARD: You say all this, you must explain all
 17 this, and you must show, I think you must apply to amend
 18 your pleading to include this, and you must demonstrate
 19 on that pleading, given the time, that that is
 20 a permissible amendment to make and that it is
 21 a sensible point to argue. If, on either ground you
 22 fail, you must be confined to what paragraph 10 says.
 23 Is that not right?
 24 MR STUART: Yes, it's to paragraph 10 that your Lordship
 25 wants amended.

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1 MR JUSTICE HILDYARD: Well, I don't want to amend it.
 2 MR STUART: No, you want me to amend it if I wish to pursue
 3 an argument --
 4 MR JUSTICE HILDYARD: I think you must consider very, very
 5 carefully in the light of all that's been said by
 6 Mr Potts and for what it's worth by me, that
 7 paragraph 10 of your plea, and paragraph 11, appear to
 8 be different in the quality that they, meaning that they
 9 give to the word "real".
 10 MR STUART: My Lord, can I simply ask rhetorically, perhaps,
 11 what meaning to the word "real" is specified in
 12 paragraph 10 of my pleading? I don't put "real (ie not
 13 fanciful)". I don't put real (not bogus)". I don't
 14 make any limit on my contended for interpretation of
 15 clause 19.6. It will be for your Lordship to determine
 16 what clause 19.6 actually means. Of course it does.
 17 I just simply want your Lordship to consider as one of
 18 the alternatives as to what it means, clause 10, the
 19 word "real" and that being further clarified in my
 20 11(a).
 21 MR POTTS: My Lord, I am just wondering, in terms of my
 22 friend's note, because I am afraid I'm really struggling
 23 to understand, on page 2 of the note he handed up to
 24 your Lordship, the paragraph at the bottom of the page
 25 breaks down what he says the pleadings mean, and unless

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1 I have misunderstood he said:
 2 "The real and genuine grounds [which is what we are
 3 talking about now], the first of those is" --
 4 MR JUSTICE HILDYARD: That's why I asked him whether he
 5 meant not fanciful or bogus, because on what you have
 6 elaborated in your speaking note, you appear to
 7 attribute a subjective quality to "real" rather than
 8 a proof of the pudding quality to it.
 9 MR STUART: Do you mean in this note here, my Lord?
 10 MR JUSTICE HILDYARD: Yes.
 11 MR STUART: It could be said to be -- I am trying to
 12 interpret what my learned friend's argument is here,
 13 I am sorry if it's not clear enough. I think my
 14 skeleton argument is quite clear as to what I mean, and
 15 I would be surprised -- in fact my learned friend is
 16 well aware of what I am trying to argue from
 17 paragraph 11(a) of my skeleton argument, because he is
 18 able to stand up here now and say that that is what he
 19 is arguing. So we can all see this is somewhat
 20 artificial --
 21 MR JUSTICE HILDYARD: It's not really artificial. At the
 22 moment I am wanting to do two things -- three things
 23 actually. I am wanting to make sure that there is
 24 conformity between your pleading and what you say, what
 25 you say being what you have said in your skeleton

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1 argument and in your oral submissions, which are capable
 2 of being construed as being inconsistent.
 3 MR STUART: Yes. I understand, my Lord.
 4 MR JUSTICE HILDYARD: So I want the pleading to be conformed
 5 in terms of what you say it should be worded as. I do
 6 not think that that's a difficult matter, and therefore
 7 it can be done in early course.
 8 MR STUART: Yes.
 9 MR JUSTICE HILDYARD: Secondly, once you have properly
 10 stated in a way which will bind and confine the case,
 11 I want to test whether that is consistent with the case
 12 as previously put and with the list of issues as agreed.
 13 MR STUART: Yes.
 14 MR JUSTICE HILDYARD: Third, I want to test, even if only
 15 provisionally, whether that is an available meaning in
 16 point of interpretation.
 17 MR STUART: Understood, my Lord.
 18 MR JUSTICE HILDYARD: If my answer to any of those was in
 19 the negative --
 20 MR STUART: Yes.
 21 MR JUSTICE HILDYARD: -- the case must be confined to the
 22 quality of the grounds on which the conclusion was made.
 23 MR STUART: Yes.
 24 MR JUSTICE HILDYARD: And your arguments that the quality
 25 must include that they were reasonable and in good

1 faith.
 2 MR STUART: Yes, all of my --
 3 MR JUSTICE HILDYARD: Do you see what I mean?
 4 MR STUART: Yes. My learned friend isn't suggesting that
 5 I can't run 11 -- those parts of 11(a), which --
 6 MR JUSTICE HILDYARD: No, he is not. He says you are wrong,
 7 but he accepts you can argue it.
 8 MR STUART: Exactly, exactly, my Lord, so we are still going
 9 to have all the interpretation arguments about 11(a) and
 10 (b) and --
 11 MR JUSTICE HILDYARD: Then the next thing which we are
 12 discussing is, bearing in mind this aspect of the
 13 matter, will we get on quicker and more effectively if,
 14 contrary to the usual practice, you each give me a sort
 15 of your view of the law so that I know what is and what
 16 isn't relevant when we get to the facts.
 17 MR STUART: Yes.
 18 MR JUSTICE HILDYARD: Ordinarily there is enough definition
 19 that one would prefer to have the facts.
 20 MR STUART: Exactly.
 21 MR JUSTICE HILDYARD: But this is a case where, possibly, in
 22 light of the disagreement which has emerged, it would be
 23 better if I knew what the law was.
 24 MR STUART: Absolutely, my Lord, that's fine.
 25 MR JUSTICE HILDYARD: It's not impossible, after seeing the

1 law, I would say: well, whatever may be the facts
 2 established, I can't see you getting there. Do you see
 3 what I mean?
 4 MR STUART: On 11(a) "real", yes. But I mean, as to all the
 5 rest of the interpretations to be the potential
 6 interpretations available, including, as I said, my
 7 learned friend is putting forward a positive case that
 8 you are to interpret 19.6 as meaning that they have
 9 a subjectively -- he has put that, that's his pleading
 10 and his skeleton argument case, that 19.6 has an element
 11 of "subjectively" interpretation, and I say that's
 12 plainly wrong on the law. So yes, I am very happy to
 13 take your Lordship through the law and interpretation of
 14 clauses such as this.
 15 Timetable, my Lord --
 16 MR JUSTICE HILDYARD: Yes. Can I just mention that, very
 17 understandably -- and I apologise to them -- the
 18 transcript writers have asked for a short break. I am
 19 so sorry that I was neglectful of that. So I will rise
 20 for five minutes, until 5 to 4. So I would like you to
 21 think how best you can help me for the remaining sort of
 22 half hour or thereabouts, which we would have of the
 23 day, to make my reading this evening and our progress
 24 tomorrow as efficient as possible.
 25 MR STUART: Indeed, my Lord, yes.

1 (3.50 pm)
 2 (A short break)
 3 (3.55 pm)
 4 MR JUSTICE HILDYARD: Yes.
 5 MR STUART: My Lord, I fully understand and take on board
 6 what your Lordship has directed that I need to do.
 7 Given that it's 2 minutes to 4, and given that
 8 obviously, my Lord, I get the impression that
 9 your Lordship is keen that I should think carefully
 10 about whether to do number one, and thus move on to two
 11 and three, before actually just doing it, so I would ask
 12 whether I could have until 10 o'clock tomorrow morning
 13 to do that. That is to amend the pleading, if I so
 14 wish, blah blah blah, or to notify Mr Potts that I don't
 15 wish to amend the pleading and take (a), those words,
 16 any further.
 17 MR JUSTICE HILDYARD: So draw stumps now, you mean?
 18 MR STUART: Your Lordship said that obviously it would
 19 perhaps assist if I could, given that your Lordship
 20 hasn't yet had an opportunity to read anything much
 21 beyond the skeleton arguments and given that it's now
 22 already 4 o'clock, so any reading that your Lordship can
 23 do is going to be of a nature, it might be best perhaps
 24 if I, in the first instance, suggested where
 25 your Lordship might focus your reading, and then perhaps

1 Mr Potts could, if there is something which he thinks
 2 you really need to read before we do some proper
 3 submissions in the morning, he could ... I would suggest
 4 that's probably the best use of time, my Lord, because
 5 making submissions to you in circumstances where you
 6 haven't read any of the witness statements is actually
 7 possibly going to be a longer exercise than if you could
 8 read the witness statements and then I could ...
 9 MR JUSTICE HILDYARD: Well, I notice that on the menu, you
 10 were going to deal with housekeeping matters and you
 11 were going to deal with your opening speech on the law
 12 and common themes.
 13 MR STUART: Yes.
 14 MR JUSTICE HILDYARD: None of that requires me to have
 15 a detailed grasp beyond what you have treated me to,
 16 does it?
 17 MR STUART: My Lord --
 18 MR JUSTICE HILDYARD: I don't want to haunt you on this; if
 19 you need more time, you need more time.
 20 MR STUART: I have to say that there are two ways that
 21 I could open the case to you, and I am ready to, if
 22 necessary. One, on the basis that you had read what we
 23 had each put in our --
 24 MR JUSTICE HILDYARD: I thought I was going to have this
 25 afternoon a speech on the law and common themes.

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1 MR STUART: Right.
 2 MR JUSTICE HILDYARD: Is there anything you want to tell me
 3 about that?
 4 MR STUART: My Lord, I can certainly do that. I must say
 5 I had intended to speak to you on the law and common
 6 themes in circumstances where you had pre-read the
 7 witness statements. If you have not read the witness
 8 statements, then you don't have the general background
 9 knowledge of what --
 10 MR JUSTICE HILDYARD: Well, I've read them, I just wouldn't
 11 pass Mastermind on them. I've read them, I've just done
 12 it fairly quickly. I will want, before they go into the
 13 box, to have considered them with greater care, but
 14 I know roughly what happened, I know the sort of areas
 15 of dispute.
 16 MR STUART: Yes. My Lord, I am certainly happy if you want
 17 to use the next 20 minutes for me to start on the issue
 18 of, the legal issue of interpretation.
 19 MR JUSTICE HILDYARD: Well, you might as well, mightn't you,
 20 because we are going to have to do it anyway?
 21 MR STUART: Yes.
 22 SUBMISSIONS ON LAW
 23 Submissions by MR STUART
 24 MR STUART: So, my Lord, this is in my skeleton argument,
 25 just after the bit where your Lordship drew your point

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1 from, so page 9. My Lord, we have put together two
 2 lever-arch files, which hopefully you have, of
 3 authorities. I see them to the right on the bottom row
 4 of your carousel.
 5 MR JUSTICE HILDYARD: I may have seen some of these before,
 6 I daresay.
 7 MR STUART: Exactly, my Lord, absolutely.
 8 MR JUSTICE HILDYARD: Yes. Well, I haven't seen all of
 9 them, but I have seen a good many of them.
 10 MR STUART: My Lord, can I take you just to one which
 11 I suspect you may not have seen. I don't know, you may
 12 have seen it. It wasn't initially in the bundle. It's
 13 in bundle 2. It's a recent case, and sometimes if one
 14 goes to a recent case, one can get an overview.
 15 MR JUSTICE HILDYARD: Yes.
 16 MR STUART: And a statement of the ... there are really two
 17 cases which I would ask you to look at. The first is
 18 Dear v Jackson 2013, this is divider 25, my Lord.
 19 MR JUSTICE HILDYARD: Yes.
 20 MR STUART: The second that I will take you to is right at
 21 the back behind 31, a case called Yam Seng, again 2013.
 22 I don't know whether these are two of the cases that
 23 your Lordship mentioned as being well aware of.
 24 MR JUSTICE HILDYARD: No.
 25 MR STUART: In that case, let me take you to these, then.

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1 So 25, first of all, this is Dear v Jackson in the Court
 2 of Appeal 2013. Does your Lordship have that one?
 3 MR JUSTICE HILDYARD: Yes.
 4 MR STUART: Your Lordship will see that in the Introduction
 5 by Lord Justice McCombe -- does your Lordship have
 6 that? -- that this is a case about effectively
 7 a shareholders' agreement, but I don't need to take
 8 your Lordship through all the background facts to it,
 9 because what is really good about it is at paragraph 15
 10 under the heading "The Law on Construction and
 11 Implication of Terms" where the Court of Appeal commend,
 12 as they put it -- do you have paragraph 15, my Lord?
 13 MR JUSTICE HILDYARD: Yes, I do.
 14 MR STUART: "In paragraph 39 of his judgment, the Judge said
 15 that he had been 'treated' by counsel to detailed
 16 citation of the 'ever increasing binding (and Privy
 17 Council) authorities on this subject ..."
 18 Including all of those listed there.
 19 "Suffice it to say, we were not so 'treated' at the
 20 hearing of the appeal. In opening, Mr Miles QC for
 21 Messrs Dear and Griffith said that he was not going to
 22 go through the authorities again. The appeal was argued
 23 accordingly against the background of the Judge's
 24 summary of the effect of the cases as set out in
 25 paragraph 40 of his judgment."

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1 Just to get it clear, my Lord, if you flick to
 2 paragraph 18 of this judgment, Lord Justice McCombe
 3 says:
 4 "In my judgment ... the judge's seven propositions
 5 are a sufficient and helpful summary of the necessary
 6 approach to these problems ..."
 7 So they commend this as a sort of --
 8 MR POTTS: My Lord, could you have a look at paragraph 16
 9 for completeness?
 10 MR STUART: Yes, sorry, I am not wishing to flick, I am
 11 wishing to go back now to 15, and then I'll take you to
 12 16 and 17. 15, this, my Lord, if you like, is the
 13 search point summary:
 14 "(i) Construction (or as I would prefer to call it
 15 interpretation) is, in relation to any point at issue,
 16 the ascertainment of the meaning which the document
 17 would convey to a reasonable person having all the
 18 background knowledge which would reasonably have been
 19 available to the parties in the situation in which they
 20 were at the time of the contract.
 21 "(ii) For that purpose, even though the point in
 22 issue may be a narrow one, the interpretation of the
 23 relevant provision depends upon an understanding of its
 24 context within the agreement as a whole.
 25 "(iii) The court's function is to ascertain the

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1 meaning of the agreement rather than to seek to improve
 2 upon it, or put right any inadequacies of meaning.
 3 Nonetheless the court recognises that draftsmen may make
 4 mistakes, may use occasionally inappropriate language
 5 and may fail expressly to address eventualities which
 6 may later occur."
 7 I say that, my Lord, is important.
 8 "Implied terms.
 9 "(iv) the implication of terms is no less a part of
 10 the process of ascertaining the meaning of an agreement
 11 than interpretation of express terms. Implication
 12 addresses events for which the express language of the
 13 agreement makes no provision.
 14 "(v) In such a case the usual starting point is that
 15 the absence of an express term means that nothing has
 16 been agreed to happen in relation to that event. But
 17 implied terms may be necessary to spell out what the
 18 agreement means, where the only meaning consistent with
 19 the other provisions of the document, read against the
 20 relevant background, is that something is to happen.
 21 "(vi) Although necessity continues (save perhaps in
 22 relation to terms implied by law) to be a condition for
 23 the implication of terms, necessity to give business
 24 efficacy is not the only relevant type of necessity. The
 25 express terms of an agreement may work perfectly well in

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1 the sense that both parties can perform their express
 2 obligations, but the consequences would contradict what
 3 a reasonable person would understand the contract to
 4 mean. In such a case an implied term is necessary to
 5 spell out what the contract actually means."
 6 "Commercial common sense."
 7 This is important, my Lord, in our case, we say:
 8 "(vii) The dictates of common sense may enable the
 9 court to choose between the alternative interpretations
 10 (with or without implied terms), not merely where one
 11 would 'flout' it, [so the old test of having to flout
 12 business common sense is not right] but where one makes
 13 more common sense than the other. But this does not
 14 elevate commercial common sense into an overriding
 15 criterion, still less does it subject the parties to the
 16 individual judge's own notions of what might have been
 17 the most sensible ..."
 18 Then at paragraphs 16 and 17 there is an issue as to
 19 whether the last of those is right.
 20 MR JUSTICE HILDYARD: Second to last, yes.
 21 MR STUART: Sorry, the second to last of those.
 22 MR JUSTICE HILDYARD: Mr Miles had accepted for present
 23 argument, so as to have to avoid having to go through
 24 all these cases again, that the judge had got it right
 25 in 1 to 7 subject to a gloss in 6 which wasn't going to

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1 arise in this case.
 2 MR STUART: Yes.
 3 MR JUSTICE HILDYARD: The gloss that he had, which may arise
 4 in this case, I don't know, is that you can't -- well,
 5 two things. One is necessity is still a litmus test,
 6 because if it's totally unnecessary, one wonders why it
 7 should be part of the process of construction to include
 8 it. It's a test. It's not definitive. It's
 9 indicative, but not definitive.
 10 MR STUART: Yes.
 11 MR JUSTICE HILDYARD: That seems pretty readily
 12 understandable, I should have thought.
 13 MR STUART: Absolutely, my Lord.
 14 MR JUSTICE HILDYARD: Mr Miles was cautioning against
 15 abandoning that test, so comprehensively that you just
 16 inserted into a contract what you happened to think was
 17 useful from time to time, and that is a salutary
 18 thought, isn't it? Because the court doesn't mend
 19 people's bargains, all it does is interpret them.
 20 MR STUART: Yes.
 21 MR JUSTICE HILDYARD: You may think that they are mad not to
 22 have included such and such a bit, but that doesn't
 23 warrant rewriting the contract.
 24 MR STUART: Exactly. Of course that is now the process that
 25 the court is to -- the way in which the court is to

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1 approach the interpretation or implication process that
 2 we are trying to achieve. But it's important to
 3 recognise that the draftsman may not have worded it
 4 quite right, and one has to look at the commercial
 5 context.
 6 MR JUSTICE HILDYARD: But you start with the words, don't
 7 you?
 8 MR STUART: You absolutely start with the words.
 9 MR JUSTICE HILDYARD: When you are assessing whether the
 10 draftsman has it quite right, you don't mean whether the
 11 draftsman has done what you think would have been best.
 12 MR STUART: No, the draftsman -- the meaning, the
 13 interpretation of the words is to be that which is
 14 objectively the proper meaning and understanding of the
 15 words, not simply what one party or the other thinks or
 16 thought the words meant.
 17 So, my Lord, can I then just take you to the
 18 Yam Seng decision, which is a first instance decision of
 19 Mr Justice Leggatt. This is behind tab 31, I hope.
 20 MR JUSTICE HILDYARD: Yes. I spotted that, thank you.
 21 MR STUART: I am in the headnote.
 22 MR JUSTICE HILDYARD: This is the good faith issue?
 23 MR STUART: Yes, this is about implying in or interpreting
 24 as including the issue of good faith when one is
 25 exercising a clause such as this.

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1 This is actually a case about a distributor
 2 agreement, not a shareholders' agreement of the nature
 3 of the present case. My Lord, we say the nature of the
 4 present case, as you know from our skeleton, is that
 5 this is a shareholders' agreement but this is in
 6 relation to a shop, basically, it's a Specsavers shop,
 7 it is akin to a franchise, if you like. It's the
 8 Specsavers brand, it's a Specsavers shop, but actually
 9 we are the owners of the shop and we run the shop.
 10 We say that that relationship, that relational
 11 contract, as I'll take your Lordship to in a moment in
 12 this judgment, is the sort of contract where English law
 13 will now readily imply a requirement of good faith,
 14 reasonableness, bona fides, et cetera, in relation to
 15 it.
 16 If I can take your Lordship just to the holding for
 17 a moment, and then I'll take you to the parts in the
 18 judgment, so page 1322, which is in the All England
 19 report, just below F, does your Lordship have that?
 20 "While under English law, a duty of good faith was
 21 implied by law as an incident of certain categories of
 22 contract. It was not appropriate to recognise
 23 a requirement of good faith as a duty implied by law
 24 even as a default rule into all commercial contracts.
 25 Nevertheless, there was no difficulty in applying such

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1 a duty in any ordinary commercial contract based on the
 2 presumed intention of the parties on the basis of the
 3 implication of terms in fact. In particular, the
 4 requirement that parties would behave honestly was also
 5 necessary to give business efficacy to commercial
 6 transactions. Although its requirements were sensitive
 7 to context, the test of good faith was objective in the
 8 sense that it depended not on either party's perception
 9 of whether a particular conduct was improper, but on
 10 whether, in the particular context, the conduct would
 11 have been regarded as commercially unacceptable by
 12 reasonable and honest people."

13 My Lord, those legal conclusions really start on
 14 page 1348. Does your Lordship have that? Just below C,
 15 under the heading "An implied duty of good faith?"
 16 Your Lordship has that?

17 MR JUSTICE HILDYARD: Yes.

18 MR STUART: 120:

19 "The subject of whether English law does or should
 20 recognise a general duty to perform contracts in good
 21 faith is one on which a large body of academic
 22 literature exists. However, I am not aware of any
 23 decision of an English court, and none was cited to me,
 24 in which the question has been considered in any depth."

25 The judge then sets out what he describes as the

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1 academic commentators. My Lord, I think the conclusion
 2 he reaches is at 131, paragraph 131, on page 1350 at F.
 3 Does your Lordship have that?

4 "Under English law a duty of good faith is implied
 5 by law as an incident of certain categories of contract,
 6 for example contracts of employment and contracts
 7 between partners or others whose relationship is
 8 characterised as a fiduciary one. I doubt that English
 9 law has reached the stage, however, where it is ready to
 10 recognise a requirement of good faith as a duty implied
 11 by law, even as a default rule, into all commercial
 12 contracts. Nevertheless, there seems to me to be no
 13 difficulty, following the established methodology of
 14 English law for the implication of terms in fact, in
 15 implying such a duty in any ordinary commercial contract
 16 based on the presumed intention of the parties.

17 "Traditionally, the two principal criteria used to
 18 identify terms implied in fact are that the term is so
 19 obvious that it goes without saying and that the term is
 20 necessary to give business efficacy to the contract.
 21 More recently, in Attorney General for Belize ... the
 22 process of implication has been analysed as an exercise
 23 in the construction of the contract as a whole. In
 24 giving the judgment of the Privy Council in that case,
 25 Lord Hoffmann characterised the traditional criteria,

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1 not as a series of independent tests, but rather as
2 different ways of approaching what is ultimately always
3 a question of construction: what would the contract,
4 read as a whole against the relevant background,
5 reasonably be understood to mean?"
6 Then skipping on to 134, over the page:
7 "Importantly for present purposes, the relevant
8 background against which contracts are made includes not
9 only matters of fact known to the parties but also
10 shared values and norms of behaviour. Some of these are
11 norms that command general social acceptance; others may
12 be specific to a particular trade or commercial
13 activity; others may be more specific still, arising
14 from features of the particular contractual
15 relationship. Many such norms are naturally taken for
16 granted by the parties when making any contract without
17 being spelt out in the document recording their
18 agreement.
19 "A paradigm example of a general norm which
20 underlies almost all contractual relationships is an
21 expectation of honesty. That expectation is essential to
22 commerce, which depends critically on trust. Yet it is
23 seldom, if ever, made the subject of an express
24 contractual obligation."
25 Skipping to 136:

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1 "The fact that commerce takes place against
2 a background expectation of honesty has been recognised
3 by the House of Lords ..."
4 About halfway down between F and G, my Lord:
5 "The House of Lords affirmed the decision of the
6 courts below that, even though the clause read literally
7 would cover liability for deceit, it was not reasonably
8 to be understood as having that meaning. As Lord Bingham
9 put it at [15]:
10 "'Parties entering into a commercial contract ...
11 will assume the honesty and good faith of the other;
12 absent such an assumption they would not deal.'
13 "To similar effect Lord Hoffmann observed at [68]
14 that parties 'contract with one another in the
15 expectation of honest dealing', and that:
16 "'... in the absence of words which expressly refer
17 to dishonesty, it goes without saying that underlying
18 the contractual arrangements of the parties there will
19 be a common assumption that the persons involved will
20 behave honestly.'
21 "As a matter of construction, it is hard to envisage
22 any contract which would not reasonably be understood as
23 requiring honesty in its performance. The same
24 conclusion is reached if the traditional tests for the
25 implication of a term are used."

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1 Then 138, my Lord, is important:
2 "In addition to honesty, there are other standards
3 of commercial dealing which are so generally accepted
4 that the contracting parties would reasonably be
5 understood to take them as read without explicitly
6 stating them in their contractual document. A key aspect
7 of good faith, as I see it, is the observance of such
8 standards. Put the other way round, not all bad faith
9 conduct would necessarily be described as dishonest.
10 Other epithets which might be used to describe such
11 conduct include 'improper', 'commercially unacceptable'
12 or 'unconscionable'.
13 "Another aspect of good faith which overlaps with
14 the first is what may be described as fidelity to the
15 parties' bargain. The central idea here is that
16 contracts can never be complete in the sense of
17 expressly providing for every event that may happen. To
18 apply a contract to circumstances not specifically
19 provided for, the language must accordingly be given a
20 reasonable construction which promotes the values and
21 purposes expressed or implicit in the contract."
22 My Lord, I will come back, but just so I can explain
23 what we say is the relevance of this: in our contract,
24 we buy the shop, the shareholding which gives us the
25 right to all the profits, the distributing of profits in

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1 the shop, and we work in the shop and it is our
2 livelihood. We buy that, and Specsavers, although it's
3 not actually technically a franchise operation, it is in
4 effect a franchise operation. It's not technically
5 a partnership, but it is a joint venture type of
6 relationship, and it is the sort of relationship that
7 Specsavers itself describe us as partners.
8 In that sort of contract, where our ownership of
9 those shares is our livelihood, and we have paid such
10 a huge sum of money for it, this clause 19.6 is a clause
11 whereby we could lose our entire livelihood and our
12 entire asset. We could lose it for nothing, for a par
13 value of the shares, £50.
14 When you are interpreting the meaning of that
15 clause, therefore, and deciding to what extent to imply
16 or interpret in any of the interpretations that we put
17 in our skeleton argument at 11(b), (c) or (d), so that
18 grounds to conclude fraud or dishonesty are to be real
19 and genuine, that the defendant must act reasonably and
20 with good faith or with bona fides when assessing such
21 grounds, that the grounds must be reasonable grounds
22 objectively leading to the conclusion that we were
23 guilty of fraud and dishonesty.
24 So if I can call it, these are slightly lesser
25 levels of proof than the one that your Lordship has said

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1 is really not yet fully pleaded out and perhaps
 2 difficult.
 3 In interpreting the clause, you need to have the
 4 context of what it is we are in, how much we have paid
 5 for it, and what we would lose, and it's a right that is
 6 being given to Specsavers here, at 19.6, they may take
 7 our shares for nothing. In that sort of clause it is,
 8 we say, proper to interpret or imply all of the terms of
 9 good faith, reasonableness, honest dealing, et cetera,
 10 that we have set out in paragraph 10 of the amended
 11 particulars of claim.

12 My Lord, I'll just finish the few more passages on
 13 this one, I am on 1532 at paragraph 141, my Lord:

14 "What good faith requires is sensitive to context.
 15 That includes the core value of honesty. In any
 16 situation it is dishonest to deceive another person by
 17 making a statement of fact intending that other person
 18 to rely on it while knowing the statement to be untrue.
 19 Frequently, however, the requirements of honesty go
 20 further."

21 And then he gives an example of giving information.
 22 Then at G, 142:

23 "In some contractual contexts the relevant
 24 background expectations may extend further to an
 25 expectation that the parties will share information."

1 He is dealing with his information provision
 2 example.

3 "English law has traditionally drawn a sharp
 4 distinction between certain relationships -- such as
 5 partnership, trusteeship and other fiduciary
 6 relationships -- on the one hand, in which the parties
 7 owe onerous obligations of disclosure to each other, and
 8 other contractual relationships in which no duty of
 9 disclosure is supposed to operate. Arguably at least,
 10 that dichotomy is too simplistic. While it seems
 11 unlikely that any duty to disclose information in
 12 performance of the contract would be implied where the
 13 contract involves a simple exchange, many contracts do
 14 not fit this model and involve a longer term
 15 relationship between the parties which they make
 16 a substantial commitment."

17 My Lord, I say that's our case, it's a long-term
 18 relationship to which we make a substantial commitment.

19 "Such 'relational' contracts, as they are sometimes
 20 called, may require a high degree of communication,
 21 cooperation and predictable performance based on mutual
 22 trust and confidence and involve expectations of loyalty
 23 which are not legislated for in the express terms of the
 24 contract but are implicit in the parties' understanding
 25 and necessary to give business efficacy to the

1 arrangements. Examples of such relational contracts
 2 might include some joint venture agreements, franchise
 3 agreements and long term distributorship agreements."

4 My Lord, we say that you should conclude that our
 5 agreement falls into that relational category.

6 144, and I will finish on this little chunk:

7 "Although its requirements are sensitive to context,
 8 the test of good faith is objective [this is very
 9 important, my Lord, because my learned friend says no,
 10 it's subjective, and I say no, it is objective] in the
 11 sense that it depends not on either party's perception
 12 of whether particular conduct is improper but on whether
 13 in the particular context the conduct would be regarded
 14 as commercially unacceptable by reasonable and honest
 15 people. The standard is thus similar to that described
 16 by Lord Nicholls in a different context in his seminal
 17 speech in Royal Brunei ... this follows from the fact
 18 that the content of the duty of good faith is
 19 established by a process of construction which in
 20 English law is based on an objective principle. The
 21 court is concerned not with the subjective intentions of
 22 the parties but with their presumed intention, which is
 23 ascertained by attributing to them the purposes and
 24 values which reasonable people in their situation would
 25 have had.

1 "Understood in the way I have described, there is in
 2 my view nothing novel or foreign to English law in
 3 recognising an implied duty of good faith in the
 4 performance of contracts. It is consonant with the theme
 5 identified by Lord Steyn as running through our law of
 6 contract that reasonable expectations must be
 7 protected."

8 He cites:

9 "Already reflected in several lines of authority ...
 10 show that a power [this is just above H, my Lord, and is
 11 most pertinent to our case] conferred by a contract on
 12 one party to make decisions which affect them both must
 13 be exercised honestly and in good faith for the purpose
 14 for which it was conferred, and must not be exercised
 15 arbitrarily, capriciously or unreasonably (in the sense
 16 of irrationally)."

17 My Lord, I say that in summary is what we have here.
 18 We have a clause which confers on Specsavers a decision
 19 which affects us both, but affects us much more than
 20 them, we lose everything if they trigger this clause,
 21 and that must be exercised honestly and in good faith
 22 for the purpose for which it was conferred and must not
 23 be exercised arbitrarily, capriciously or unreasonably.

24 Therefore, my Lord, when one is looking at the
 25 pleadings in this case, which I did take you to earlier,

1 and the way in which we plead it and they defend it, we
 2 say that our interpretation and our implied terms as set
 3 out in paragraph 10 of our amended particulars of claim
 4 are consonant with established principles of English
 5 law.
 6 My Lord, I see it's 4.27 pm, and that's all I had to
 7 say on that authority.
 8 MR JUSTICE HILDYARD: That's very helpful, and it's
 9 an interesting point at H. I mean, most contractual
 10 provisions when exercised do affect the contractual
 11 parties, and therefore it may need a little bit of
 12 refinement, I suspect, with all respect.
 13 MR STUART: My Lord, of course.
 14 MR JUSTICE HILDYARD: I mean, I can quite understand where
 15 there is a power given to X on behalf of them both,
 16 that's a very different matter than when it is cause and
 17 effect, that the exercise of a contractual power affects
 18 the other contracting party. So I think I raise it
 19 because I suppose it may be necessary, and you may have
 20 included the Abu Dhabi and Socimer International Bank
 21 cases to see quite what the derivation of that broad
 22 principle may be.
 23 MR STUART: Yes. My Lord, we do have that, and we also, if
 24 I flick very quickly back in my skeleton to
 25 paragraph 16 --

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1 MR JUSTICE HILDYARD: Yes, it's in 21 and 8.
 2 MR STUART: Yes.
 3 MR JUSTICE HILDYARD: Thank you.
 4 MR STUART: We have a section from Lewison as well at the
 5 back of tab 2, and you will see I have cited Fitzroy
 6 House Epworth Street v Financial Times in 2006 in my
 7 paragraph 17. I agree with your Lordship, of course one
 8 has to look in a rather more refined way --
 9 MR JUSTICE HILDYARD: I have to look fairly carefully,
 10 because English law has usually set its face against any
 11 implied term or other interpretation of fair dealing,
 12 except in very specialised situations, although the
 13 expectation of honest behaviour is rather different.
 14 MR STUART: Yes.
 15 MR JUSTICE HILDYARD: Do you see what I mean?
 16 MR STUART: I do, my Lord. What I'm seeking to -- and I'll
 17 take you to first thing in the morning, as I say, in 16
 18 and 17 of my skeleton argument in this particular type
 19 of clause, which is effectively a termination clause or
 20 a triggering clause whereby one party can effectively
 21 take the other party -- terminate the contract or take
 22 the other party's part of the contract, then looking at
 23 the cases in Lewison and those sorts of clauses are just
 24 the sort of clauses where --
 25 MR JUSTICE HILDYARD: Well, clauses which tend to be

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1 expropriatory in effect are restrictively construed.
 2 MR STUART: Absolutely.
 3 MR JUSTICE HILDYARD: But that's rather different, isn't it?
 4 MR STUART: No. I say no, I say this clause is
 5 expropriating my shares.
 6 MR JUSTICE HILDYARD: I am sorry, yes.
 7 MR STUART: It's expropriating my whole livelihood and
 8 £1 million worth of assets.
 9 MR JUSTICE HILDYARD: But a restrictive interpretation is
 10 rather different than --
 11 MR STUART: It's a different point, but it all feeds into
 12 the same general approach towards such clauses.
 13 MR JUSTICE HILDYARD: Be careful, in other words.
 14 MR STUART: Be careful, the defendants would have to very
 15 clearly make out a case for their interpretation which
 16 effectively says "We subjectively believe that they were
 17 guilty of fraud or dishonesty".
 18 MR JUSTICE HILDYARD: I don't know, and I will hear from
 19 Mr Potts, but I rather suspect that he would not cavil
 20 with the thought that the clause would have to be
 21 honestly implemented, ie not for collateral or dishonest
 22 purpose. I'll hear from him about that.
 23 MR POTTS: My Lord, can I just raise one point, so my friend
 24 realises there is an issue here. My friend in Yam Seng
 25 took you to the reference to "unreasonably", and this is

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1 not relevant because it goes the implied terms as they
 2 are now set out. The word "reasonably" is sort of
 3 scattered through them, and he says he accepts, at H,
 4 that "reasonably" and the sense in which it's used is in
 5 the sense of irrationality.
 6 MR JUSTICE HILDYARD: I understand that you say it's not
 7 wholly beyond the realms of -- not without the margins
 8 of rationality.
 9 MR POTTS: Yes. The point is he seems to be accepting that
 10 that's the test as to what reasonableness means. Again
 11 in terms of clarity, I am not sure if -- I don't know if
 12 that is what he is saying or not.
 13 MR JUSTICE HILDYARD: Perhaps, Mr Stuart, you might cogitate
 14 on that if you want to clarify.
 15 MR STUART: My Lord, yes, it's more than clarified in the
 16 paragraphs in my skeleton argument.
 17 MR JUSTICE HILDYARD: I will re-read those.
 18 MR STUART: I would make it clear, my Lord, I am addressing
 19 the case as pleaded against me in 15.2 and 15.3 of the
 20 defence on page 52. The pleading by my learned friend
 21 is that:
 22 "Clause 19.6 of the shareholders' agreement
 23 therefore entitles the first defendant to serve the
 24 purchase notice if it subjectively had grounds to
 25 conclude that [had grounds to conclude that]

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1 a shareholder had been fraudulent or dishonest. The
2 implication of a term into clause 19.6 is not necessary
3 explored to give business efficacy. Further, it was not
4 a term of the shareholders' agreement express or implied
5 that the parties would act towards one another with good
6 faith."
7 That's his case. So I am having to address that.
8 If he wants to concede that actually there is to be
9 interpreted a duty to act towards one another with good
10 faith, in this sort of clause, in this sort of
11 agreement, then we can shortcircuit this. But at the
12 moment there is no concession made and therefore I am
13 addressing his case, which is: no duty of good faith,
14 subjective test, what's in his client's mind --
15 MR JUSTICE HILDYARD: I think we may be back to the --
16 MR STUART: We are.
17 MR JUSTICE HILDYARD: -- dishonest/good faith difference.
18 MR STUART: Yes, absolutely.
19 MR JUSTICE HILDYARD: Well, that's extremely helpful.
20 I notice, and was rudely not making provision for the
21 fact, that we have a transcript. It would help me to
22 have as soon as possible -- it's a great luxury but
23 nevertheless it's very helpful also -- the four page
24 format. I say that now, just so everyone knows what
25 would be most helpful.

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1 MR STUART: Of course, my Lord.
2 MR JUSTICE HILDYARD: Yes. My experience in the past has
3 been that one starts with longer days with huge optimism
4 but in fact then one gets worn down by them, but if you
5 both agree on earlier starts or later ends, then I will
6 certainly be amenable to that, if thereby we can finish
7 things off, or at least finish things to the point of
8 closing submissions, which is a lesser burden,
9 nevertheless a target which we really must try and
10 achieve.
11 MR STUART: Yes, my Lord.
12 MR JUSTICE HILDYARD: Thank you so much.
13 (4.35 pm)
14 (The court adjourned until 10.00 am
15 on Friday, 29 November 2013)

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1 MR STUART: Understood.
2 MR JUSTICE HILDYARD: Tomorrow I am rising early at quarter
3 to 4, as I hope you have been alerted to, and in order
4 not to lose you any time, I therefore propose to start
5 at 10 o'clock, if that is convenient to all.
6 Given your homework and my comments and
7 deliberation, you may have each of you to think whether,
8 if we deal with the law first, how long it would take
9 and how it would affect the convenience of witnesses.
10 It's an obvious point and you will have it more in your
11 mind than I do. If they each have to be set back,
12 I don't know, they may be very busy people, they may
13 have commitments of all sorts.
14 MR STUART: My Lord, certainly the first few witnesses are
15 the claimant's witnesses, ie the claimants themselves
16 and Mr Vos. They will all be here throughout anyway.
17 MR JUSTICE HILDYARD: All right. I just raise it so no-one
18 is too shocked by any slight alteration.
19 MR POTTS: If your Lordship is starting at 10, which is very
20 helpful, because I am concerned about getting this
21 finished before the end of term, I just have some slight
22 concerns about being provided with a draft amended
23 pleading at 9.55 am.
24 MR STUART: I will email by 9 o'clock.
25 MR JUSTICE HILDYARD: That's excellent. To me as well?

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