

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 2

November 29, 2013

Opus 2 International - Official Court Reporters

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1 Friday, 29 November 2013
 2 (10.00 am)
 3 SUBMISSIONS ON CASE AND LIST OF ISSUES
 4 Submissions by MR STUART
 5 MR JUSTICE HILDYARD: Good morning.
 6 MR STUART: Good morning, my Lord.
 7 My Lord, overnight I considered the way in which the
 8 matter proceeded yesterday and your Lordship's
 9 invitation to me to amend my case and/or a list of
 10 issues if I was going to run an argument a certain way.
 11 I concluded that I hadn't carefully enough or properly
 12 enough clarified to your Lordship the way I want to put
 13 the case, and so I've now done that in a written note.
 14 I don't know whether your Lordship received that
 15 note?
 16 MR JUSTICE HILDYARD: Yes, I did, and thank you very much
 17 for it.
 18 MR STUART: If I can just briefly speak to it, my Lord, so
 19 that we can be absolutely clear.
 20 MR JUSTICE HILDYARD: Can I tell you where I've got to on
 21 it, then you can elaborate as and when you need.
 22 MR STUART: Yes.
 23 MR JUSTICE HILDYARD: My understanding is you do not wish to
 24 amend, point one. You accept that the case as you plead
 25 it is focused on the quality of the grounds, and you say

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1 that they must have reasonable grounds and they must be
 2 honest in their assessment of the grounds, and they must
 3 be such that they do actually conclude rather than
 4 suspect that those grounds are present.
 5 MR STUART: Can I take the last point. Not that they do
 6 actually conclude, as my note makes clear. My learned
 7 friend says it -- it, Specsavers -- subjectively
 8 concludes. I don't accept that the words "grounds to
 9 conclude" necessarily imports that it's merely
 10 subjective conclusion of Specsavers.
 11 I hope that is made clear in my note and, if not,
 12 I will go to that.
 13 MR JUSTICE HILDYARD: Yes, but they've got to conclude,
 14 haven't they? I mean, who else would conclude?
 15 MR STUART: Objectively, I say that the words used, "grounds
 16 to conclude", not "grounds that Specsavers might
 17 conclude", as my learned friend puts it in his pleading
 18 and skeleton argument, and I don't want your Lordship to
 19 think that I'm in any way accepting that interpretation
 20 or construction of the words of clause 19.6.
 21 They -- Specsavers -- have to have, I acknowledge
 22 that the words are they have to have grounds to
 23 conclude, but I don't accept that on a proper
 24 interpretation of the words "grounds to conclude", in
 25 the restrictive way in which it should be interpreted,

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1 et cetera, et cetera, I'm trying to establish with
 2 your Lordship, that it is merely for your Lordship to
 3 look to see whether Specsavers itself subjectively
 4 concluded.
 5 "Grounds to conclude" can have an objective sense,
 6 and I say that's the proper sense in which it's to be
 7 interpreted. That is an important point of difference
 8 between myself and my learned friends.
 9 MR JUSTICE HILDYARD: Yes.
 10 MR STUART: The interpretation of the words actually used in
 11 clause 19.6.
 12 MR JUSTICE HILDYARD: Right. Okay. That's a useful
 13 clarification. Thank you.
 14 Beyond that, you do not press this matter in terms
 15 of amendment. You will live with the list of issues
 16 which you say are consistent with the pleading and your
 17 now intentions. So far as your skeleton argument
 18 suggests it other, that is no longer your intention?
 19 MR STUART: Yes, and I've tried, if you like, to amend my
 20 skeleton argument rather than amend the list of issues
 21 or the pleading, to amend my skeleton argument in the
 22 sense that I acknowledge that one reading of the way
 23 I put it originally in the skeleton argument might lead
 24 one to the authority process that my learned friend
 25 arrived at and your Lordship was arriving at.

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1 I think that what I didn't make perhaps clear enough
 2 is that in my skeleton argument, even as originally
 3 drafted, what was seen as the bad words were in
 4 brackets. And if you look at the whole of the brackets,
 5 you can see what I was -- I should have been able better
 6 to show you what I was trying to get at, which was the
 7 difference between my learned friend's case here, that
 8 it's subjective, and my case, that it's not subjective
 9 in that way.
 10 Therefore, I seek to effectively amend my skeleton
 11 argument as I've set out in my note, in paragraph 4 of
 12 my note, so that the skeleton argument should perhaps
 13 read:
 14 "(a) The clause properly interpreted or on its
 15 proper construction requires that such grounds to
 16 conclude fraud and dishonesty are real and genuine
 17 grounds to conclude, ie effectively grounds that
 18 actually show objectively that there actually was fraud
 19 or dishonesty and not merely grounds to reach
 20 a subjective, and thus possible erroneous conclusion by
 21 D1 that there was fraud and dishonesty."
 22 That is my argument. That is the way I wish to put
 23 it, and I say that is entirely within the ambit of the
 24 pleading and the list of issues.
 25 MR JUSTICE HILDYARD: It follows, therefore, that you are

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1 not saying that it is a necessary fact to be shown that
 2 your clients were in fact fraudulent or dishonest.
 3 MR STUART: Exactly. My Lord, I acknowledge that and it's
 4 your Lordship's point yesterday about, well, perhaps
 5 we're talking here about a burden of proof point and
 6 what one side or the other has to prove, and
 7 I absolutely acknowledge and accept your Lordship is
 8 right.
 9 MR JUSTICE HILDYARD: It goes beyond burden of proof,
 10 doesn't it? You're not going to argue that as a matter
 11 of interpretation or instruction clause 19.6 is
 12 triggered only if the defendant demonstrates actual
 13 fraud on the part of your clients?
 14 MR STUART: Correct.
 15 MR JUSTICE HILDYARD: I take your point that if they were to
 16 prove that, it would be an easy step to show compliance
 17 with 19.6, a point which you make at the end of your
 18 helpful note. But that must be a matter for them, must
 19 it not? It's not for you to tutor them how to succeed,
 20 is it?
 21 MR STUART: No.
 22 MR JUSTICE HILDYARD: If they choose not to do that, you're
 23 not going to say they failed, they just will have to
 24 show grounds by reference to the subjective or objective
 25 standard according to which way I interpret the clause.

1 MR STUART: Yes, that's absolutely right, my Lord. If my
 2 learned friend chooses to run the case at trial on the
 3 basis that he's not going to seek to prove the fraud and
 4 dishonesty, he's only going to seek to prove --
 5 MR JUSTICE HILDYARD: The grounds.
 6 MR STUART: -- that they had grounds at the material time --
 7 MR JUSTICE HILDYARD: That's a matter for him.
 8 MR STUART: That's a matter for him. I do, however, go on
 9 to say that, just as your Lordship has acknowledged, if
 10 he did prove that, then it might be easy to show grounds
 11 to conclude. It must also, therefore, be at least
 12 arguably open to me to persuade your Lordship on the
 13 evidence, and I'm therefore taking on a burden on to
 14 myself here, that we were not guilty of fraud and
 15 dishonesty. And if I choose to do that and succeed,
 16 that too must be a matter that is relevant to the issue
 17 that my learned friend has to prove, namely that there
 18 were grounds to conclude.
 19 So that's the way I put it, and I too could choose
 20 not to engage in that battle ground and not to argue
 21 about whether I was in fact guilty of fraud or
 22 dishonesty. For example, in many employment cases,
 23 unfair dismissal claims, where the tribunals have made
 24 it clear that one has to look at the dismissing
 25 employer's mind, one doesn't have to definitely prove

1 one way or the other whether the employee was guilty of
 2 fraud to be dismissed. But that doesn't mean that if in
 3 the trial the employee wishes to show and does show to
 4 the satisfaction of the court that he was not guilty,
 5 that that cannot be a relevant factual matter in
 6 determining the actual issue.
 7 So that's the way I put it, my Lord. And I do
 8 therefore say that not only because of the counterclaim
 9 points, but also because that's the way we wish to put
 10 our case -- and we do plead that in paragraph 34 of the
 11 particulars of claim, and I don't think even
 12 your Lordship suggests that we can't assert something
 13 that we've pleaded. Your Lordship is quite right to
 14 say, well, paragraph 34 is not the interpretation of the
 15 contract point, it's: depending on the interpretation of
 16 the contract are they able to show, et cetera. I accept
 17 that --
 18 MR JUSTICE HILDYARD: I'll hear Mr Potts, obviously, but
 19 I accept that your case is: my clients were not
 20 fraudulent or dishonest, and you, the defendants, had no
 21 grounds for saying that they were.
 22 MR STUART: Yes.
 23 MR JUSTICE HILDYARD: Sufficient to trigger clause 19.6.
 24 MR STUART: Yes. Just to be clear, I might have been
 25 running this case on the basis either, yes, my clients

1 were guilty of fraud or dishonesty but you didn't have
 2 grounds to conclude, or --
 3 MR JUSTICE HILDYARD: That would be quite a dangerous case.
 4 MR STUART: That would be a very dangerous case to run, and
 5 unusual. Or I might be running the case on the basis
 6 that it does not matter whether my clients were guilty
 7 or not. It makes no difference to the court's
 8 determination of the real issue, which is whether
 9 they --
 10 MR JUSTICE HILDYARD: Well, let's focus on the case as you
 11 do put it.
 12 MR STUART: Exactly, my Lord. This is what I'm trying to
 13 get across here.
 14 We have chosen to take up the cudgels on that issue,
 15 we have chosen to plead it and we have chosen to put it
 16 in our witness statements and to lead evidence about it.
 17 If Mr Potts wishes to deal with that in whatever way he
 18 wishes, that's a matter for him. But I can't be
 19 precluded from putting forward evidence to your Lordship
 20 about the way I put the case -- unless it's wholly
 21 improper, which it isn't -- therefore, my submission is
 22 that your Lordship is going to hear evidence about all
 23 of these facts and the underlying issue about whether we
 24 were or weren't guilty of dishonesty and fraud. And in
 25 those circumstances, it really would be better to get on

1 with hearing that evidence rather than your Lordship
 2 reaching some preliminary view, which view is aimed at
 3 then somehow chopping the extent of the factual
 4 investigation here down, as Mr Potts seeks to do.
 5 MR JUSTICE HILDYARD: It will, won't it? I'll hear from
 6 Mr Potts, but you have put forward your case in your
 7 witness statements, and your case, as you put it, is
 8 consistent with them, and therefore demonstrative of
 9 them, being honest and not dishonest.
 10 MR STUART: Yes.
 11 MR JUSTICE HILDYARD: No more will be heard from you about
 12 that. That's what they say.
 13 MR STUART: Yes.
 14 MR JUSTICE HILDYARD: It will be a matter for Mr Potts to
 15 determine the extent to which he wants to show otherwise
 16 by cross-examination.
 17 MR STUART: Absolutely.
 18 MR JUSTICE HILDYARD: And I'm not going to say anything more
 19 about that. That is a matter for him. He hasn't closed
 20 it out, but he can expect a fair judicial tetchiness if
 21 he labours that point given the preliminary issue he
 22 sought to interest me in.
 23 MR STUART: Absolutely, my Lord.
 24 MR JUSTICE HILDYARD: So we're sort of there, aren't we?
 25 Mr Potts, do you wish to say anything?

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1 Submissions by MR POTTS
 2 MR POTTS: My Lord, just three points. The first point is,
 3 just in terms of the case, the suggestion that we and
 4 your Lordship were under some misapprehension as to what
 5 was being said, I don't accept that for one moment.
 6 This is a point which is raised -- it was very clear --
 7 not just in one paragraph, in three paragraphs in the
 8 skeleton argument: paragraphs 14, 17 and 20(a).
 9 My friend's submissions to your Lordship yesterday
 10 were not ambiguous in any way at all. He was saying
 11 that the issue for your Lordship --
 12 MR JUSTICE HILDYARD: He's thought better of it.
 13 MR POTTS: He's thought better of it.
 14 MR JUSTICE HILDYARD: There may be, I suppose, issues of
 15 costs. I don't know. But it can only be that.
 16 MR POTTS: That's not for now, my Lord.
 17 The second point though is as to the case he is now
 18 asserting, and I accept it's helpful some indication as
 19 to paragraph 1 where he says he's accepting that we do
 20 not have to show objectively that there was fraud or
 21 dishonesty. But my concern is he refers to paragraph 4,
 22 but paragraph 4 of his note is inconsistent with what he
 23 seems to be saying elsewhere. At the end of that, he
 24 says:
 25 "Properly interpreted, there must be real and

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1 genuine grounds to conclude, ie effective grounds, that
 2 actually show objectively that there was fraud and
 3 dishonesty and not merely grounds to reach a subjective
 4 and therefore potentially erroneous conclusion that
 5 there was fraud."

6 Now, that's back to where he was yesterday, unless
 7 I'm misunderstanding this. It's also inconsistent with
 8 what he's saying within his note itself, because he says
 9 in paragraph 4 that, effectively, if we got it wrong, we
 10 reached a wrong -- if we reached a subjective view but
 11 erroneous, that's not enough. That's not consistent
 12 with what he says in paragraph 10. He has this example
 13 of the Chinese, or the Frenchman or the Chinese man, or
 14 whatever it is. But he accepts then, in paragraph 10,
 15 that in fact we reached a view if Y is in fact
 16 Chinese and not French, the court is likely to need
 17 convincing evidence and explanation for the contention
 18 for grounds. But he accepts that you could reach an
 19 erroneous view. It is the subjective view that matters,
 20 but that might be tested.

21 That is inconsistent with paragraph 4. I'm sorry to
 22 labour this point.

23 MR JUSTICE HILDYARD: No, you're right to do so, but my
 24 understanding of our discussion this morning is that he
 25 wishes to run what might be the sort of median case,

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1 which is that, on his construction of clause 19.6, it is
 2 triggered only if you had grounds such as objectively to
 3 demonstrate that his clients were fraudulent or
 4 dishonest.

5 That's what I understand him to be saying.

6 MR STUART: Yes, my Lord.

7 MR POTTS: There's a question of what one means by
 8 objectively. Just to take two examples. The element of
 9 let's say you get it wrong but you have at the time what
 10 appears to you to be convincing and compelling evidence,
 11 but if the court looks at it now, today, the court
 12 reaches a different view objectively. This is the point
 13 about objectively and subjectively and it is an
 14 important point, my Lord.

15 For example, two examples, what about if there was
 16 evidence which is available to the court today but
 17 wasn't available at the time? Is that a matter which
 18 the court can properly have regard to in determining if
 19 the condition is accepted?

20 Secondly, another example, which is the one he picks
 21 up. He seems to say in paragraph 4 to say, well,
 22 erroneous; if you get it wrong, looking at it
 23 objectively today, that won't suffice. But that is not
 24 consistent with paragraph 1 or paragraph 10, because
 25 he's saying that we don't have to prove that the fraud

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1 was actual, ie objectively, we don't have to prove. He
2 accepts that we don't have to prove objectively that
3 there was fraud or dishonesty. And in paragraph 10 he
4 also accepts that we don't have to prove objectively
5 there was fraud or dishonesty. But then in paragraph 4,
6 he seems to be saying that we do.

7 Paragraph 4 is going right back to the point where
8 we started this argument yesterday, I'm afraid, my Lord.
9 It is important. My friend needs to do two things,
10 my Lord, today I think, with respect. He needs to
11 firstly clarify actually what he is saying. I'm not
12 being deliberately obtuse about this. I genuinely do
13 not understand how that is consistent with paragraph 1
14 and paragraph 10.

15 Secondly, he needs to make good, as your Lordship
16 said, in terms of opening the case on the law, which is
17 what we're meant to be doing and which your Lordship
18 directed should be done anyway, he needs to make good
19 those submissions as to whether in fact, if he wants to
20 show that in fact they were not fraudulent or dishonest,
21 that that is in fact on the authorities the relevant
22 issue for your Lordship.

23 Both of those points he needs to make good today.
24 But the first one is this clarity point on paragraph 4.
25 So I'm afraid it is absolutely essential, because I do

13

1 not -- we cannot let this just generally sort of amble
2 on and then we'll see at the end. There is not the
3 clarity here, and paragraph 4 is inconsistent with
4 paragraphs 1 and 10.

5 Reply submissions by MR STUART

6 MR STUART: My Lord, I don't accept that whatsoever. My
7 paragraphs are perfectly clear. My learned friend is
8 being deliberately obtuse or he is just not
9 understanding it. That's fine. It's a matter for him.
10 Your Lordship understands fully understands the point
11 I've made. You've recited it back to me this morning
12 absolutely accurately.

13 I am saying that it is not a necessary element of my
14 learned friend's case that he must show today to the
15 court that we were guilty of fraud and dishonesty.
16 I accept that. The actual battle ground between the
17 parties is about whether Specsavers had grounds to
18 conclude that at the time.

19 MR JUSTICE HILDYARD: The thing is, he has a point that the
20 variety with which you express this, even in your latest
21 note, gives rise to concern that we have not batted
22 the issue down with sufficient precision to be safe.
23 That's the real worry. We don't want to have wasted the
24 afternoon and a little bit of this morning, and in four
25 or five days' time be unclear what actually the test

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1 under 19.6 is asserted, rightly or wrongly, by you
2 to be.

3 I don't think it's fair and I don't think it's
4 helpful to describe opposite counsel as deliberately
5 obtuse.

6 MR STUART: That's his own word.

7 MR JUSTICE HILDYARD: I think that we are trying to reach
8 a definition.

9 MR STUART: We are trying to reach a definition, but the
10 parties are putting forward two different definitions.

11 MR JUSTICE HILDYARD: Yes. He accepts that.

12 MR STUART: My learned friend's definition, as I've set it
13 out in paragraph 2 of my note, appears in his defence.

14 He pleaded it, and he says:

15 "19.6 required the first defendant to have some
16 genuine ground on which it might conclude --

17 MR JUSTICE HILDYARD: That's his case.

18 MR STUART: That's his case.

19 MR JUSTICE HILDYARD: But what's yours? We're trying to
20 tighten up your case.

21 MR STUART: That's right.

22 MR JUSTICE HILDYARD: He might be completely wrongheaded,
23 for all I know. His interpretation may be barmy,
24 I don't know. But I'm not focusing on that at the
25 moment, I'm focusing on what you say.

15

1 MR STUART: What I say is as set out in paragraph 3 and 4 of
2 my note, I wish to contend that the grounds must be real
3 and genuine, and I say that interpreted properly -- this
4 is paragraph 4 of my note -- that the clause, properly
5 interpreted, requires that such grounds are real and
6 genuine grounds to conclude something.

7 MR JUSTICE HILDYARD: I can read what you say. It's the
8 "ie" words in parenthesis which I would like you to
9 consider deleting because they go backwards, don't they?

10 MR STUART: No, my Lord, they don't go backwards. They
11 clarify. What I mean by --

12 MR JUSTICE HILDYARD: They may clarify, but they take you
13 back to where you were.

14 MR STUART: No, because if you look at what I've said, I've
15 said that effectively grounds that actually show
16 objectively that there actually was fraud --

17 MR JUSTICE HILDYARD: Well, that's whisper thin, isn't it,
18 between actually demonstrating that they were?

19 MR STUART: But I'm not saying that that is the test. I'm
20 not saying that the test is were we actually guilty of
21 fraud.

22 MR JUSTICE HILDYARD: Well, I know you're not orally saying
23 that, but you're writing-ly saying that.

24 MR STUART: No. I'm saying --

25 MR JUSTICE HILDYARD: Shall we delete them, then?

16

1 MR STUART: No, we shouldn't delete them, my Lord, because
 2 it's the way I wish to put the case.
 3 I'm saying that there is a difference between
 4 clause 19.6 meaning that the defendants today at this
 5 trial have to, as a necessary element of their case,
 6 prove that we were guilty of fraud and dishonesty, and
 7 I am accepting that that is not the position. So my
 8 learned friend has a clear concession by me that it is
 9 not a necessary element of him succeeding that he proves
 10 to your Lordship that we were guilty of fraud and
 11 dishonesty.
 12 MR JUSTICE HILDYARD: Can I put a formula to you and see if
 13 you each agree this, on your case being your case and on
 14 Mr Potts' retort as being a possible case?
 15 You are saying that to trigger 19.6 and rely on it,
 16 the defendants must have reached the conclusion that
 17 they did on grounds such as to be objectively capable of
 18 supporting the conclusion that your clients were
 19 fraudulent or dishonest. That is what you say the
 20 clause means.
 21 He has a lighter touch to the clause, if I can put
 22 it that way.
 23 MR STUART: The only words I would quibble with that are
 24 "capable of supporting", because if one sets the bar at
 25 that level --

1 MR JUSTICE HILDYARD: But if you say "which do support",
 2 then I think you have to be a very subtle philosopher to
 3 distinguish between that and actual demonstration of
 4 fraud which you disavow.
 5 I think there may be some subtlety which I'm
 6 overlooking, in which case you must tell me. But at
 7 first blush, second and third blush, it looks to me to
 8 be a line so faint that it's probably beyond me.
 9 MR STUART: My Lord, my quibble was with the height at which
 10 you set the bar: capable of support.
 11 MR JUSTICE HILDYARD: Objectively capable of support.
 12 MR STUART: Yes, objectively capable of support for
 13 something is not the same as objectively showing
 14 something.
 15 MR JUSTICE HILDYARD: Absolutely, and that's what I sought
 16 to demonstrate, because I think the distinguishing point
 17 between proving actual fraud or dishonesty and proving
 18 that the facts objectively support that conclusion seems
 19 to me to be so difficult that I wouldn't trust myself,
 20 without very considerable guidance from you, to be able
 21 to distinguish it.
 22 MR STUART: My Lord, if I can give you an example of the
 23 distinction and a real example, as in this case.
 24 MR JUSTICE HILDYARD: Yes.
 25 MR STUART: If the fact, the ground to conclude, the

1 circumstance, the fact that was relied upon was an
 2 admission by somebody, "I was guilty of fraud", so C1
 3 admitted -- this is a hypothetical -- if C1 admitted to
 4 D1 --
 5 MR JUSTICE HILDYARD: That would be a fact capable of
 6 supporting the conclusion that they were fraudulent or
 7 dishonest.
 8 MR STUART: But it would not only be capable of supporting,
 9 any fact is capable of supporting something.
 10 MR JUSTICE HILDYARD: Is it? Not in (inaudible) but...
 11 MR STUART: No, no, but any relevant fact.
 12 MR JUSTICE HILDYARD: Take your example yesterday. Tittle
 13 tattle --
 14 MR STUART: Is capable of supporting.
 15 MR JUSTICE HILDYARD: -- is capable of supporting it, but is
 16 not objectively capable of it in that no sane court
 17 would proceed on the footing merely of tittle tattle.
 18 MR STUART: Yes.
 19 MR JUSTICE HILDYARD: So it doesn't encapsulate your case.
 20 Mr Potts' case is of much more benign construction,
 21 if you like, much more from his point of view. He says
 22 that thinking is enough. I don't know. But, you know,
 23 we'll hear from him as to the confines of his case. You
 24 haven't pressed for that, but at the moment I'm just
 25 focusing on yours.

1 MR STUART: Yes. My Lord, if by your phrase "objectively
 2 capable of supporting" you mean the way you put it in
 3 your last sentence, that is, well, a court --
 4 MR JUSTICE HILDYARD: Test it this way: The evidence turns
 5 out that the basis on which they proceeded was
 6 a hysteric in the Specsavers shop saying, "Everyone is
 7 fraudulent, all of them are"; right?
 8 MR STUART: Yes.
 9 MR JUSTICE HILDYARD: Now, you could say that's capable of
 10 supporting because, who knows, the hysteric may have hit
 11 on something with a grain of truth in it, but it's not
 12 objectively capable of it in the sense that I could
 13 reasonably proceed on the footing of it.
 14 MR STUART: Yes. My Lord, as long as your use of the word
 15 "capable" is linked with the way you put "objectively
 16 capable", then that is in accordance with the way I'm
 17 trying to argue this case. As I said --
 18 MR JUSTICE HILDYARD: Mr Potts may say that I've not got the
 19 test right, but, you know ...
 20 MR STUART: Absolutely, and I'm not seeking to say he can't
 21 argue his case. You've asked me to clarify what I'm
 22 saying as to mine. And I understand his complaint is
 23 that he says he doesn't know whether or not, on my
 24 version, he has to prove or show that my clients were or
 25 were not actually fraudulent and dishonest on the

1 evidence before the court today. I am conceding that he
 2 does not have to show that. He may choose to, I may
 3 choose to, but he doesn't have to. I say that my
 4 formulation, with your Lordship's clarification, is
 5 such --
 6 MR JUSTICE HILDYARD: You're going to add to it in fact.
 7 You're going to say objectively and reasonably and
 8 you're going to add all sorts of qualities.
 9 MR STUART: Yes, I know, but for the moment we're just
 10 dealing with the one that he says is not a proper way to
 11 proceed because it's not pleaded and it's not in the
 12 list.
 13 Well, I say that the way I've put it now is proper
 14 and is in the list and is plainly one of the battle
 15 grounds between us. He says it's purely subjective.
 16 I say no, there's an objective element to looking at
 17 the -- as to whether these grounds to conclude something
 18 exist or not.
 19 MR JUSTICE HILDYARD: Yes.
 20 MR STUART: I don't know whether that answers my learned
 21 friend's point sufficiently for your Lordship's purposes
 22 and therefore we can -- I'm very happy to move on to
 23 carry on with the...
 24 By the way, my Lord, you saw that in the way I put
 25 it, this is paragraph 6 of my note, 6 and 7, but I don't

1 simply pluck this concept of actuality and reality from
 2 nowhere. I do say that -- and this was a comment that
 3 my learned friend made yesterday and your Lordship
 4 seemed to take it up, and that's why I'm keen at least
 5 to address it so that your Lordship knows my point here,
 6 that it is not sufficient, in my submission, simply to
 7 say that it needs to be not fanciful, that the grounds
 8 must be not fanciful. That is far too low a test. Even
 9 within summary judgment, meaning of the word "real",
 10 "real prospects of success", means, as I've set it out
 11 for your Lordship --
 12 MR JUSTICE HILDYARD: Of course in that context it did mean
 13 not fanciful.
 14 MR STUART: No. Perhaps I should take your Lordship to the
 15 White Book. It means not false, not fanciful --
 16 MR JUSTICE HILDYARD: What it's getting at is that the
 17 grounds must be not a load of hooley. That's what it's
 18 getting at.
 19 MR STUART: It is, and that's in that specific test. That's
 20 what the courts have determined in the CPR. But we are
 21 dealing here with a commercial contract between the
 22 parties, not a legal test on the question of what is
 23 summary judgment, and therefore I say that what we're
 24 dealing with here is as set out in my paragraph 6. The
 25 grounds must be grounds that actually exist.

1 MR JUSTICE HILDYARD: Well, I think we may be going
 2 backwards --
 3 MR STUART: No, no, the grounds, my Lord. The grounds must
 4 actually exist. Not that the thing that you're
 5 concluding must actually exist, must be proven to
 6 actually exist, but the grounds must be --
 7 MR JUSTICE HILDYARD: Yes, but that's just saying that they
 8 must genuinely be taking those grounds into account,
 9 rather than some other grounds.
 10 MR STUART: No, whether one takes into account a ground is
 11 not the same thing as whether a ground exists.
 12 Absolutely not, my Lord. This is the difference. Each
 13 time my Lord seeks to put my case, you put it in the way
 14 framed within my learned friend's subjective ambit of
 15 this whole thing. According to my learned friend, it's
 16 all about what's in their mind. I don't accept --
 17 MR JUSTICE HILDYARD: I think you may be being excessively
 18 defensive in that regard.
 19 MR STUART: I am. I'm sure I am.
 20 MR JUSTICE HILDYARD: I quite understand you'll treat me to
 21 a number of definitions of "real". I don't mean that
 22 rudely, but I think I have got the hang of "real".
 23 MR STUART: And "ground".
 24 MR JUSTICE HILDYARD: And "ground", but I don't cut you off
 25 on that. At some point you will elaborate on this.

1 All I'm bothered about now is defining the trial,
 2 defining what the ambit of the dispute between you is.
 3 I know there are all sorts of disputes and I know you
 4 will have different perspectives on them, but the
 5 question is whether we have, in the formulation or some
 6 variation of it that I put to you, captured your highest
 7 case.
 8 MR STUART: Yes. So long as the objective nature of the --
 9 MR JUSTICE HILDYARD: You are going to say, such as
 10 objectively capable and you are going to
 11 say: objectively and reasonably capable of supporting
 12 the conclusion that they were fraudulent or dishonest.
 13 Is that right?
 14 MR STUART: Yes.
 15 MR JUSTICE HILDYARD: Are you able to live with that,
 16 Mr Potts, or not?
 17 MR POTTS: My Lord, just for clarity, paragraph 4, the bit
 18 in parenthesis which I picked up. The reason I'm
 19 concerned about it is it is exactly the wording, word
 20 for word, bracket for bracket, which appears in 11(a) of
 21 the skeleton argument which your Lordship took issue
 22 with yesterday. That's why they were going to have to
 23 go off and amend. So this isn't just some pleading
 24 point. It's absolutely clear that there is a critical
 25 distinction between subjective and objective.

1 If the test is, as I think your Lordship put, the
2 point is -- could I show your Lordship paragraph 94,
3 because it may be that there isn't actually that much
4 between them? 94 of my skeleton, as to what we say the
5 issue is.

6 MR JUSTICE HILDYARD: Say again? I'm sorry.

7 MR POTTS: Paragraph 94 of my skeleton. This captures what
8 we say, and I think it's consistent with what
9 your Lordship just said. Your Lordship said that if the
10 point is that no sane court could proceed on that
11 footing, then that doesn't suffice. I think that's what
12 your Lordship said.

13 Now, if your Lordship looks at 94, we say:

14 "It doesn't require the existence of an objective
15 fact that we have been fraudulent or dishonest."

16 That's what is in those parentheses, which I have
17 objected to. It does not say "if the claimants have
18 been fraudulent". At the other extreme, it doesn't say
19 whether we just believe that it's been fraudulent.
20 Rather, it's grounds to conclude. We do say it is
21 a question of looking at our subjective mind, ie it must
22 have concluded -- it had the state of mind -- and it
23 must have had a basis on which it could and did so
24 conclude.

25 We say -- and this is the other element of the

25

1 objective and reasonable which, I'm afraid, does require
2 definition by my friend, and I hope he's going to do
3 that today -- is what that means. Firstly, point 4,
4 we'll see the clause no doubt, but it's the breadth of
5 conduct is wide. But in terms of genuine grounds, what
6 we say is that it's a question of unreasonable -- it
7 wasn't unreasonable. And we say what reasonable -- and
8 reasonableness is, again, an important phrase, my Lord.
9 My friend bandies it around, but it's important to have
10 clarity as to what it means because it has two different
11 potential meanings.

12 MR JUSTICE HILDYARD: But, Mr Potts, that's a matter for
13 him. He will try and persuade me that, amongst the
14 inferred, if you like, qualities, the grounds must be
15 reasonable.

16 MR POTTS: Yes.

17 MR JUSTICE HILDYARD: You will say: what on earth do you
18 mean by that? Do you mean reasonable in the Clapham bus
19 sense, or do you mean not wholly unreasonable in the
20 Wednesbury sense, and that will be a debate between you.
21 But is it going to be --

22 MR POTTS: My Lord, my concern is I'm afraid it does matter,
23 because it goes back to the objective/subjective point.
24 Because if he's saying that that means -- and the cases
25 refer to this and talk about that one has an objective

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1 sense, which is the judge looking at it now takes a view
2 objectively that it's reasonable, and the other sense is
3 the subjective sense of the decision-maker at the time
4 and it's not outside the bounds, and so on.

5 My concern is that actually you do get back into
6 exactly this point about objective/subjective. If he's
7 saying the grounds is: I actually have to show, you've
8 got to look at it now and say -- as your Lordship says,
9 and we accept that -- if no sane decision-maker could
10 form that conclusion, that's fine, because that's
11 looking at subjectivity, but subject to the fact that
12 there is a basis for it.

13 MR JUSTICE HILDYARD: That wasn't explaining the quality
14 I gave to the words "capable of". My "capable of"
15 is: upon a basis from which it could and did so
16 conclude. That's "capable of".

17 MR POTTS: Yes.

18 MR JUSTICE HILDYARD: Then a further question is: must there
19 be some other qualification which is reasonableness?
20 That, as it seems to me, is a longer debate, which will
21 have to go into the question of what terms you can
22 either imply or read into by some sort of inferential
23 process, if they're different, which they may be, intra
24 contract. But we can't -- that may be more of Rome than
25 we can build in a day.

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1 MR POTTS: I'm not sure, my Lord. Because, with respect,
2 the way they run this point in their pleading is they
3 run these points both alternatively as a matter of
4 construction or of implied terms, so they are run
5 together.

6 MR JUSTICE HILDYARD: They say they're the same and
7 Lord Hoffmann slightly agrees with that.

8 MR POTTS: They say it's the same thing, but my concern is
9 that we have these -- my friend, I hope, today will
10 address those points in terms of the justification for
11 these, because we're having an opening on the law and
12 the principles -- is that he says it's objectively and
13 reasonable, and we do need to have clarity as to what
14 that means.

15 I'm content if my friend is accepting, as I said,
16 that we don't have to prove fraud; secondly, that it
17 is -- this is, I'm afraid, where I do have a difference,
18 because he says, no, he doesn't accept that it's the
19 subjective state of mind of my client that is the
20 starting point of the exercise. And that's the critical
21 point: it either is or it isn't. If he says it isn't,
22 then we're back to the objectively heresy. If he's
23 accepting that the starting point is the position as to
24 the state of mind of my clients at the time and whether
25 they held the belief and that they had a basis on which

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1 they could do so, and that basis is that no sane court
2 or no sane decision-maker could proceed on that basis,
3 then I'm content and we can argue the nuances.

4 But if he's saying, no, actually the question is,
5 objectively, whether those grounds -- ie objectively
6 whether there was fraud or dishonesty, then we're back
7 to the heresy.

8 MR STUART: The heresy there, my Lord, is in my learned
9 friend's argument of eliding whether the grounds are
10 objectively or whether the grounds show something
11 objectively.

12 To be clear, yes, my case is that the test is
13 objective, not subjective. Yes, that is my case. And
14 I understand his case to be that it is subjective and
15 that is what is pleaded in the pleadings. That is
16 a dispute between us.

17 As to reasonableness, yes, he wishes to say
18 reasonableness means Wednesbury unreasonableness; I wish
19 to say Clapham omnibus reasonableness. That is
20 a dispute between us, yes. That needs clarifying, yes.

21 That is our case.

22 MR JUSTICE HILDYARD: He's worried that your reasonableness
23 takes us back to you requiring him to show that there
24 was in fact fraud or dishonesty.

25 MR STUART: And I absolutely concede that he does not as

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1 a matter of proof have to show that to your Lordship
2 today. So he has his answer.

3 MR JUSTICE HILDYARD: What do you say your version of
4 reasonableness imports?

5 MR STUART: It imports that the man on the Clapham omnibus,
6 the objective bystander, would conclude fraud and
7 dishonesty, because it's grounds to conclude, grounds to
8 conclude. Not grounds to believe, not grounds to
9 allege, not grounds to suspect. Grounds to conclude.

10 MR JUSTICE HILDYARD: So if the objective bystander would
11 say, "Well, I can quite understand that they reach that
12 conclusion", that would suffice?

13 MR STUART: If the objective bystander would say that the
14 grounds to conclude fraud and dishonesty were
15 reasonably -- reasonably enable them to conclude or
16 enable me, the objective bystander, to conclude.

17 Let me use my example of the admission, my Lord, as
18 a testing ground for what I'm saying. If C1 admitted
19 fraud and dishonesty, then an objective bystander, the
20 man on the Clapham omnibus, would say that there were
21 grounds to conclude fraud and dishonesty. And the
22 grounds to conclude fraud and dishonesty would not be
23 that there actually was fraud and dishonesty, because
24 the admission might have been completely mad and wrong.
25 She might not have been fraudulent and dishonest at all,

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1 but she might have made the admission.

2 So we are not going back to proving the actual fact
3 of whether there was fraud and dishonesty or not, we are
4 simply proving the ground, whether there was a ground to
5 conclude fraud and dishonesty and, for example, an
6 admission by the person concerned that I was fraudulent
7 and dishonest would reasonably be taken by anybody to be
8 a ground to conclude that she had been fraudulent and
9 dishonest.

10 So there, one can see the difference between what my
11 learned friend would have to show. He doesn't have to
12 prove that C1 was fraudulent and dishonest, but he does
13 have to show that there was a ground to conclude that
14 she was fraudulent and dishonest and he might show that,
15 for example, by saying there's an admission of such.

16 MR JUSTICE HILDYARD: I think you're possibly being a bit
17 imprecise. There are three possibilities at least,
18 aren't there, when you're dealing with reasonableness?
19 One is the test of whether they thought it reasonable.
20 That's a purely subjective test and they may have been
21 very harsh people. Who knows?

22 MR STUART: Whether they thought it reasonable or whether
23 they thought there was fraud and dishonesty?

24 MR JUSTICE HILDYARD: Yes.

25 MR STUART: No, which, my Lord? I'm sorry to reflect it

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1 back on you, but that is an imprecision.

2 MR JUSTICE HILDYARD: I don't think so. What we're looking
3 at is the test of reasonableness.

4 MR STUART: Yes.

5 MR JUSTICE HILDYARD: The first possibility is that the only
6 person who has to think it reasonable is them. That's
7 one test, yes?

8 MR STUART: To think what is reasonable, my Lord?

9 MR JUSTICE HILDYARD: That you were fraudulent and
10 dishonest.

11 MR STUART: That I was fraudulent --

12 MR JUSTICE HILDYARD: Bear with me. There are three
13 possibilities, as I see it; there may be more. One is
14 the test is, did they think, whatever anyone else might
15 have thought, that it was reasonable to conclude that
16 you were dishonest, okay? One test.

17 MR STUART: Yes.

18 MR JUSTICE HILDYARD: The polarity which you were putting
19 is: would everyone in the whole world faced with those
20 grounds think it dishonest? That's what you were
21 saying: anybody. That's the polarity, that's the
22 broadest opposite view, yes?

23 MR STUART: Yes.

24 MR JUSTICE HILDYARD: In between that is: would a reasonable
25 person think they were dishonest and reasonable [sic]?

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1 I thought you were being slightly imprecise in your
2 language because you darted off into the third, the
3 polarity, by raising the point that anybody would have
4 thought them dishonest. I don't take that to be your
5 case?
6 MR STUART: Correct, my Lord. You're absolutely right to
7 correct me there. It's the middle ground. It's
8 a reasonable person reasonably thought.
9 MR JUSTICE HILDYARD: Then there is a 2(b), which Mr Potts
10 may have put forward, which is that the objective
11 bystander, the man in the middle, would have thought it
12 not unreasonable so to have concluded.
13 MR STUART: Exactly.
14 MR JUSTICE HILDYARD: And that's what he says in the context
15 "reasonable" means, and there's a bit of a fight between
16 you.
17 MR STUART: There is. He goes for that Wednesbury
18 unreasonable version and I go for the reasonable
19 version. So, yes, your Lordship has it and I'm
20 absolutely happy to concede that that is the battle
21 ground.
22 MR JUSTICE HILDYARD: So you concede, even on your
23 implication of inference of "reasonable", that it's not
24 for him to show that anybody would have thought that,
25 it's for him to show, on your view of the case, that an

1 objective bystander would have thought it reasonable to
2 think that?
3 MR STUART: Yes, reasonably would have thought it
4 reasonable. That a reasonable objective bystander --
5 MR JUSTICE HILDYARD: The objective bystander is, by
6 definition, a reasonable man.
7 MR STUART: He is, my Lord, correct. Absolutely.
8 MR POTTS: That's helpful. I think there's still just
9 a little nuance there. In terms of the third point --
10 would a reasonable person have thought that it was
11 dishonest -- slightly imports the question which
12 I highlighted about the erroneous or hindsight point.
13 We say the issue is not to be assessed today.
14 MR JUSTICE HILDYARD: No, the man -- the objective bystander
15 is looking at the facts available to you then.
16 MR STUART: Yes.
17 MR JUSTICE HILDYARD: We can't adopt the standard of now
18 unless we're going to get into a proof of actual
19 dishonesty.
20 MR POTTS: Yes.
21 MR STUART: I agree, my Lord, it's not as of now. So, for
22 example, in my example of the admission, if now there
23 was evidence that that admission was caused by C1 having
24 a mental breakdown, that would not be relevant.
25 MR JUSTICE HILDYARD: Well, if the objective person would

1 now say, "Blimey, I got it wrong, didn't I", that's
2 irrelevant, it's what he thought at that time.
3 MR STUART: What the objective bystander thought at that
4 time.
5 MR JUSTICE HILDYARD: According to whether it's the 2(a)
6 or 2(b).
7 MR STUART: Yes. Just a slightly nuance on my learned
8 friend's way of putting it. It is what was available to
9 them at the time, because if somebody, for example,
10 deliberately doesn't turn their mind to something which
11 is available to them --
12 MR JUSTICE HILDYARD: We're now getting into the depths of
13 the case.
14 MR STUART: We are.
15 MR JUSTICE HILDYARD: All we're trying to do is find out
16 what the outer limits of the case are.
17 MR STUART: Yes, and I agree.
18 MR JUSTICE HILDYARD: I don't know, I feel that no doubt in
19 a couple of days' time, we'll look back and think that
20 either we were sort of talking about angels on the head
21 of a pin or we will think that perhaps we didn't count
22 them sufficiently. I don't know.
23 But I think we're sort of getting towards
24 a confinement of the case which, in fairness to
25 Mr Potts, is necessary in order for him to gauge the

1 extent to which he actually bats on, by reference, for
2 example, to subsequent events as to your client's state
3 of mind, which he doesn't want to do.
4 I'm not stopping him from doing that, but I will
5 look dyspeptic if he does in light of the submissions
6 he's made.
7 MR STUART: Absolutely, my Lord. I totally agree. I
8 absolutely agree with you. It's up to him what he does,
9 but given the way he's put the case now, it would be
10 somewhat surprising if he took a certain course.
11 MR JUSTICE HILDYARD: Are you content with that, Mr Potts?
12 MR POTTS: My Lord, I am. Therefore, I think it would be
13 helpful -- I am still concerned about the way this has
14 developed and the way this trial may continue to develop
15 unless we have some sense as to the scope. And for that
16 reason, your Lordship's suggestion yesterday, which is
17 this is a case where actually the submissions on
18 construction and the law, as indeed the timetable
19 provides for, should be dealt with, we should continue
20 as we started yesterday.
21 MR JUSTICE HILDYARD: I am a little agnostic about that for
22 this reason.
23 It could well help if the trial were divided into
24 what in effect is a preliminary issue of construction,
25 and then the witnesses once that has been adjudicated.

1 But there are at least two problems with that. One is
 2 the simple problem of timing, and my not being quick
 3 enough to make up my mind, deliver a judgment. And,
 4 secondly, if I do deliver that, then if it went to
 5 appeal, they could say "wrong again" to me.
 6 MR POTTS: I'm not suggesting your Lordship should make
 7 a deliberation on it, but in terms of what the agreed
 8 timetable provided for and your Lordship indicated
 9 yesterday, which is we feel it would be helpful for
 10 your Lordship to hear the law on the construction and
 11 the interpretation arguments first and then the
 12 evidence, which is really entirely separate, will then
 13 follow. But your Lordship -- it will focus --
 14 your Lordship will then have in mind what your Lordship
 15 is having to do when listening to the evidence. So we
 16 think that is appropriate, my Lord.
 17 I'm not asking your Lordship to make --
 18 MR JUSTICE HILDYARD: Do you mean a first tilt at the law so
 19 that I can see with greater accuracy where the
 20 differences between the parties are?
 21 MR POTTS: Absolutely, my Lord.
 22 MR JUSTICE HILDYARD: Are you content with that?
 23 MR STUART: Absolutely. As I understand, that's what I'm in
 24 the middle of doing. I've started showing your Lordship
 25 two cases to try and get the --

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1 MR JUSTICE HILDYARD: All right. Don't feel I'm going to
 2 reach a concluded view. Do not feel that you won't have
 3 another go at it, no doubt in closing submissions, but
 4 do tell me what features you say must be read into the
 5 clause and on what ground.
 6 MR STUART: Yes, and I'm in the middle at the moment of
 7 showing you the legal authorities that get us into that
 8 process.
 9 MR JUSTICE HILDYARD: Very good. I didn't want to embarrass
 10 you if you had not prepared in this way.
 11 SUBMISSIONS ON LAW (continued)
 12 Submissions by MR STUART (continued)
 13 MR STUART: So, my Lord, I took you yesterday to the two
 14 cases in bundle 2 of your authorities, namely number 25,
 15 Dear & Griffith v Jackson, the 2013 Court of Appeal
 16 decision, and number 31, the Yam Seng, 2013 decision of
 17 Mr Justice Leggatt.
 18 MR JUSTICE HILDYARD: Yes.
 19 MR STUART: To an extent, I did that just to try to show you
 20 that at 2013 that is the position so that when we
 21 perhaps just take a step back to get a clear overview of
 22 the law on this element, one can see how things have
 23 slightly moved, 2013, compared to what is in Chitty and
 24 Lewison and the Privy Council, et cetera, cases that
 25 they recite. But it is important just to take you to

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1 those briefly.
 2 MR JUSTICE HILDYARD: Where do you want me to go?
 3 MR STUART: If you are in my skeleton argument, my main
 4 skeleton argument, at paragraph 14 I refer you to
 5 Chitty, which is in your bundle 2, tab 29. We've copied
 6 the relevant extract, chapter from Chitty, 29.
 7 MR JUSTICE HILDYARD: What date is this?
 8 MR STUART: We start at page 985.
 9 MR JUSTICE HILDYARD: What's the edition of Chitty and when
 10 was it revised? I can't remember. It's quite recent.
 11 MR STUART: That's a good question. My Chitty has just gone
 12 temporarily missing --
 13 MR JUSTICE HILDYARD: Don't worry.
 14 MR POTTS: It's 2012, my Lord, 31st edition.
 15 MR JUSTICE HILDYARD: You say this is an example of old
 16 habits dying hard, but it isn't.
 17 MR STUART: No, not at all, my Lord. I have taken yesterday
 18 you in detail to the 2013 cases and I hope I've at least
 19 shown you those extracts from those cases which I say
 20 moves matters forward somewhat.
 21 MR JUSTICE HILDYARD: Yes.
 22 MR STUART: So, 13-02, "Implication of terms", about halfway
 23 down that paragraph, the sentence starting:
 24 "The principles that traditionally govern the
 25 implication of terms differ from those which apply to

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1 the construction of express terms. Nevertheless in the
 2 modern law there is a close affinity between the two
 3 processes, in that in both cases the court is seeking to
 4 establish what the contract would reasonably have been
 5 understood to mean having regard to the commercial
 6 purpose of the contract as a whole and the relevant
 7 available background of the transaction [citing the
 8 Belize case 2009]."
 9 My Lord, you have that in the same bundle of
 10 authorities at number 22, and the relevant passage is,
 11 I say, at page -- well, it really starts at page 1993 at
 12 the top, A.
 13 MR JUSTICE HILDYARD: It's 16 and onwards.
 14 MR STUART: That's right, 16 and onwards. My Lord,
 15 I specifically ask your Lordship to look at 21 through
 16 to 27. So 21:
 17 "It follows that in every case in which it is said
 18 that some provision ought to be implied, the question
 19 for the court is whether such a provision would spell
 20 out in express terms what the instrument read against
 21 the relevant background would reasonably be understood
 22 to mean. The question can be reformulated in various
 23 ways ... implied term must go without saying ...
 24 necessary to give business efficacy," and so on.
 25 "But these are not, in the board's opinion, to be

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1 treated as different or additional tests. There is only
2 one question: is that what the instrument, read as
3 a whole against the relevant background, would
4 reasonably be understood to mean?"

5 Then at paragraph 22:

6 "The formulation serves to underline two important
7 points. The first, conveyed by the use of the word
8 'business' is that in considering what the instrument
9 would have meant to a reasonable person who had
10 knowledge of the relevant background, one assumes the
11 notional reader will take into account the practical
12 consequences of deciding that it means one thing or the
13 other."

14 I say, my Lord, that's important here because you
15 should look at what the practical consequences will be
16 of the way my learned friend puts it, which is that
17 subjectively, if they had reason to believe, they get
18 our shares for nothing, whereas compared with what we
19 say is the practical consequence of it, we say therefore
20 it should be our objective approach.

21 23:

22 "The danger lies in detaching the phrase 'necessary
23 to give business efficacy from the basic process of
24 construction of the instrument. It is frequently the
25 case that a contract may work perfectly well in the

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1 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."

5 25:

6 "Likewise, the requirement that the implied term
7 must go without saying is no more than another way of
8 saying that although the instrument does not expressly
9 say so, that is what a reasonable person would
10 understand it to mean. Any attempt to make more of this
11 requirement runs the risk of diverting attention from
12 the objectivity which informs the whole process of
13 construction into speculation about what the actual
14 parties to the contract or authors or supposed authors
15 of the instrument would have thought about the proposed
16 implication."

17 And that is then further expanded. So 27 is the
18 summary:

19 "The board considers that this list is best regarded
20 as not as a series of independent tests which must each
21 be surmounted, but rather as a collection of different
22 ways in which judges have tried to express the central
23 idea that the proposed implied term must spell out what
24 the contract actually means, or in which they have
25 explained why they did not think that it did so. The

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1 board has already discussed the significance of
2 'necessary to give business efficacy'. It goes without
3 saying. As to the other formulations, the fact that the
4 proposed implied term would be inequitable or
5 unreasonable, or contradict what the parties have
6 expressly said or is incapable of clear expression are
7 all good reasons for saying that a reasonable man would
8 not have understood that to be what the instrument
9 meant."

10 So, my Lord, that is now the guidance, the summary
11 guidance.

12 Returning, then, to Chitty.

13 MR JUSTICE HILDYARD: The Moorcock is interesting at 24,
14 isn't it, which he approves?

15 "What the law desires to effect by the implication
16 is to give such business efficacy to the transaction as
17 must have been intended at all events by both parties
18 who are businessmen."

19 MR STUART: Yes.

20 MR JUSTICE HILDYARD: But one has to be aware of the
21 possibility that it might have been preferable for them
22 to say this, and one must acknowledge the fact that they
23 ex hypothesi did not say that and, as between advised
24 parties, they are to be assumed in many circumstances to
25 have chosen not to say that. Those are the dangers that

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1 one must be aware of, aren't they, in having in mind the
2 relevant circumstances?

3 MR STUART: Yes, but one mustn't raise the word "must" into
4 some sort of necessity. This is the difference perhaps
5 between interpreting a clause which is there and
6 implying a term. The words of a clause may be capable
7 of two meanings, and it is not necessary to show that
8 that clause must have had one of those two meanings.

9 MR JUSTICE HILDYARD: No, but if the court were to conclude
10 that the parties could advisedly have omitted words
11 sought to be implied, although the court might think
12 that they were, in the events that have happened, wrong,
13 if they could have advisedly thought that, then it's not
14 for the court to subvert their advice, is it?

15 MR STUART: It's not for the court to change the actual
16 agreement, no. But the point I'm trying to make is one
17 mustn't fall back into the old concept of having to show
18 necessity for one's meaning. If there are two possible
19 meanings, then the more sensibly commercial of those two
20 can be the one selected by the court.

21 MR JUSTICE HILDYARD: If the court decides that although
22 that would have been more commercial in the events that
23 it can see, that is not good enough. It is not for the
24 court to select the interpretation which best suits the
25 events that have happened; it is for the court to decide

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1 what those parties, against the circumstances in which
 2 they made their decision and the advice that they are
 3 assumed to have received, in the context in which they
 4 operated, that is to say as businessmen, whether they
 5 could advisedly have decided not to qualify, for example
 6 in this case by using words such as "reasonable"?

7 MR STUART: All the way up to the end of your sentence, but
 8 whether they could reasonably be understood to have
 9 meant to do that.

10 MR JUSTICE HILDYARD: Yes.

11 MR STUART: It's the objective approach.

12 MR JUSTICE HILDYARD: If the court, as I put it, concludes
 13 that they could, even if misguidedly and unfortunately,
 14 have advisedly decided to shape the clause as they've
 15 put it without the term sought to be implied, that
 16 concludes the enquiry?

17 MR STUART: Yes. Do I understand your Lordship's use of the
 18 word "could", you mean "did" advisedly --

19 MR JUSTICE HILDYARD: "Could", because it's not a subjective
 20 test, it's an objective test.

21 MR STUART: Yes, okay. Then, objectively you would have to
 22 identify that they are reasonably meant. That the
 23 reasonable meaning, objectively analysed, is that they
 24 did do that.

25 MR JUSTICE HILDYARD: They could advisedly have decided not

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1 to include that term. The fact is they didn't.

2 MR STUART: Exactly. The fact is they didn't.

3 MR JUSTICE HILDYARD: And that is a relevant fact, isn't it?

4 MR STUART: It is. It is a relevant fact.

5 MR JUSTICE HILDYARD: A highly relevant fact, because you
 6 must start with the words.

7 MR STUART: You must start with the words. You must start
 8 with the words, yes.

9 My Lord, perhaps one picks it up in Rainy Sky, which
 10 is tab 24 in the bundle. At page 2908 and 2909 in
 11 Rainy Sky, paragraph 21 of Lord Clarke's summary, 2908,
 12 my Lord -- does your Lordship have it -- paragraph 21.

13 "The language used by the parties will often have
 14 more than one potential meaning. I would accept the
 15 submission made on behalf of the appellants that the
 16 exercise of construction is essentially one unitary
 17 exercise in which the court must consider the language
 18 used and ascertain what a reasonable person, that is
 19 a person who has all the background knowledge which
 20 would reasonably have been available to the parties in
 21 the situation in which they were at the time of the
 22 contract, would have understood the parties to have
 23 meant. In doing so, the court must have regard to all
 24 the relevant surrounding circumstances. If there are
 25 two possible constructions, the court is entitled to

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1 prefer the construction which is consistent with
 2 business common sense and to reject the other."

3 MR JUSTICE HILDYARD: I think it's that last sentence which
 4 has raised eyebrows.

5 MR STUART: It has.

6 MR JUSTICE HILDYARD: Has there been subsequent to
 7 Rainy Sky?

8 MR STUART: My Lord, there's --

9 MR JUSTICE HILDYARD: Don't worry.

10 MR STUART: I'll take you to the summary of its effect in
 11 Chitty and Lewison. Also, while we're in Rainy Sky,
 12 just to go to 2909, and this is dealing with that point
 13 about business, the business sense point. They were
 14 looking at the Antaios speech of Lord Diplock. 24:
 15 "Having regard to the improbable results for which
 16 the landlord has contended, only the most unambiguous of
 17 such clauses could properly be found to bear the
 18 landlord's construction and that in the case of only one
 19 of the leases did the clause," et cetera.

20 Then the quote:

21 "For my part, I would accept that the more obvious
 22 readings of both favours the landlord's construction.
 23 I am persuaded, however, that they are capable of being,
 24 and therefore for the reasons already given, should be
 25 construed differently."

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1 This is the important part of the dicta:

2 "That case is therefore an example of the adoption
 3 and application of the principle endorsed by the judge
 4 and by Sir Simon Tuckey, where Neill LJ said it was
 5 necessary when construing a commercial document to
 6 strive to attribute to it a meaning which accords with
 7 business common sense."

8 "Strive to attribute to it", that is a guiding
 9 principle for your Lordship's task here.

10 So, my Lord, if I can just take you back to Chitty,
 11 the Belize case is summarised at paragraph 1305 on
 12 page 987.

13 So the summary of it is at the bottom of 987 and
 14 over into 988:

15 "As a result, the principles that traditionally
 16 govern the implication or non-implication of terms and
 17 which are set out in the paragraphs which follow should
 18 now no longer be regarded as tests to be applied to
 19 determine whether or not a term should be implied, but
 20 rather as guidelines to assist the court to answer the
 21 single question: is that what the instrument, read as
 22 a whole against the relevant background, would
 23 reasonably be understood to mean."

24 Then 1306 on the issue of efficacy, the Moorcock,
 25 the little section at the end of 1306:

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1 "In this situation, although there is an apparently
 2 complete bargain the courts are willing to add a term on
 3 the ground that without it, the contract will not work
 4 or because an implication is necessary to give effect to
 5 the reasonable expectations of the parties."
 6 My Lord, I say that's important here. The
 7 reasonable expectations of parties to a joint venture
 8 shareholder agreement such as this are and would be that
 9 somebody who bought these shares for £625,000 would not
 10 lose these shares simply on the subjective belief of the
 11 counterparty that something existed. It would have to
 12 be a more -- well, all of the things which we seek to
 13 put in, ie that it's reasonable, objectively reasonable,
 14 on proper grounds, et cetera, et cetera.
 15 The final part of this section on Chitty that I've
 16 asked you to go to is page 991. Again, just at the end,
 17 the last sentence. Again it's citing the Belize,
 18 paragraph 25 of the Belize decision:
 19 "Even a carefully drafted contract may not have
 20 catered for an unanticipated contingency and the term
 21 can then be implied if obviously required."
 22 MR POTTS: Could your Lordship just read the whole paragraph
 23 perhaps, the bit above.
 24 MR STUART: My Lord, since we're here, rather than skip
 25 about -- I've almost finished this section -- could

1 I just take you to 13-10, "Where a term is not to be
 2 implied"? This is page 992, 13-10:
 3 "A term ought not to be implied unless it is in all
 4 the circumstances equitable and reasonable. But this
 5 does not mean that a term will be implied merely because
 6 in all the circumstances it would be reasonable to
 7 do so."
 8 That's an obvious, perhaps, clarification.
 9 My Lord, I'm just skipping to my skeleton argument.
 10 I'm at paragraph 15 of my skeleton argument and I've
 11 already taken you through all those sections, so we can
 12 skip -- all those sections of Dear & Griffiths v
 13 Jackson, I took those yesterday. Does your Lordship
 14 recall that?
 15 MR JUSTICE HILDYARD: Yes.
 16 MR STUART: So we can skip past that onto 16 of my skeleton
 17 argument where I move to Lewison, and the question here
 18 is: what sort of clause is this?
 19 As I've said there, it is in effect a termination
 20 clause. Whether one calls it a termination clause or
 21 a forfeiture clause, it has the effect of my clients
 22 losing their shares for nil. It is in distinction with
 23 19.2 of the agreement where my clients get fair value
 24 for their shares, et cetera, et cetera, but it is that
 25 sort of clause whereby my clients are going to lose

1 property rights.
 2 MR JUSTICE HILDYARD: I'm not sure I follow the reference,
 3 though, to Lewison, and that's where there's simply
 4 a provision which grants termination on a party
 5 committing a breach of contract, and you have to ask,
 6 well, does that cover every breach, however minor, or
 7 not?
 8 19.6 tells you, subject to your dispute between you
 9 as to what 19.6 means, but it is a code, isn't it? It's
 10 not an every breach point at all, is it?
 11 MR STUART: No, I'm not saying it is actually an every
 12 breach point. The clause that you're construing here is
 13 not actually a termination clause with an every breach
 14 provision, but I'm saying that the principles as to why
 15 the courts have arrived at the principle when
 16 interpreting termination clauses of that nature, the
 17 same principle should apply to this clause and this sort
 18 of clause. That's my point.
 19 MR JUSTICE HILDYARD: I see. So it's the analogy.
 20 MR STUART: It's the analogy. I cannot find for
 21 your Lordship, and it appears from the 30 authorities
 22 provided neither of us can provide you with an authority
 23 which is actually a clause in these terms or of this
 24 sort, an actual clause which says X may purchase Y's
 25 asset for effectively nil if X has grounds to conclude Y

1 was fraudulent.
 2 But by analogy with the reasoning of the courts, and
 3 that's why I ask your Lordship to look at this because
 4 it is important to see why in this sort of case the
 5 courts have adopted this restrictive approach, this
 6 approach which limits the right to exercise
 7 a termination clause like this sort of clause.
 8 In tab 30 in your bundle just after the chunk of
 9 Chitty, there is a chunk of Lewison. Does your Lordship
 10 have that?
 11 MR JUSTICE HILDYARD: Yes.
 12 MR STUART: 5th edition. I suspect it's, again, 2012.
 13 Again, my learned friend will be able to help us on the
 14 date.
 15 Page 801, does your Lordship have that? Paragraph
 16 17.14, as I've said in my skeleton argument, under the
 17 heading "Termination clauses".
 18 MR JUSTICE HILDYARD: Yes, thank you.
 19 MR STUART: "A contract may provide that a right of
 20 termination can be exercised in the event of
 21 a non-repudiatory breach, but a clause in a contract
 22 that purports to enable one party to terminate it if the
 23 other party commits any breach of contract is likely to
 24 be interpreted as being limited to repudiatory
 25 breaches."

1 You see, my Lord, what I'm saying is this, by
 2 analogy.
 3 MR JUSTICE HILDYARD: Yes.
 4 MR STUART: The actual words used by the party says X may
 5 terminate in the event of any breach by Y. And a court
 6 might say, well, they have carefully drafted this and
 7 they haven't limited the terms "any breach", and
 8 therefore the very fact that they haven't limited it to
 9 any material breach or any substantial breach, or
 10 whatever, or any repudiatory breach must mean, or should
 11 be taken as meaning objectively, that they didn't intend
 12 that and that a reasonable man would therefore say that
 13 the parties didn't intend it to mean that.
 14 But the courts have not simply stuck with that.
 15 They have said that in relation to this sort of clause
 16 where one party loses his property rights, it's likely
 17 to be interpreted as being limited to repudiatory
 18 breaches.
 19 The fourth paragraph beyond that, my Lord, two
 20 paragraphs from the bottom of 801:
 21 "Many contracts contain provisions entitling one
 22 party to terminate it if the other commits any breach of
 23 contract. The courts have evolved a principle of
 24 interpretation that limits the right to terminate to
 25 cases in which the breach in question is repudiatory."

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1 Citing the Antaios.
 2 "Where a charter party containing a clause entitling
 3 the owners to withdraw the vessel on any breach of this
 4 charter party, the House of Lords held that the right of
 5 termination was limited to repudiatory breaches."
 6 My Lord, I'm not going to take you to it, but that
 7 section from Lord Diplock is in your tab. Just for your
 8 note, it is in your tab 4, bundle 1 --
 9 MR JUSTICE HILDYARD: The Antaios?
 10 MR STUART: The Antaios. The trouble with the Antaios is
 11 that 90 per cent of the judgment is about what is the
 12 test to go to the House of Lords on. But the relevant
 13 part that it's authority for your Lordship will find at
 14 pages 200 to 201 of the judgment in The Antaios which
 15 is, as I say, in tab 4 in your bundle.
 16 Then in Rice (trading as The Garden Guardian) v
 17 Great Yarmouth Borough Council:
 18 "The contract for the provision of leisure
 19 management and grounds maintenance services contained
 20 a clause entitling the council to terminate it if the
 21 contractor committed a breach of contract. The Court of
 22 Appeal held that the right of termination was limited to
 23 repudiatory breaches. Lady Justice Hale said the notion
 24 that this term would entitle the council to terminate
 25 a contract such as this at any time for any breach of

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1 any term flies in the face of commercial common sense."
 2 My Lord, it is important that I do take you to that
 3 one. That is in your tab 17 in bundle 1.
 4 MR JUSTICE HILDYARD: I think you can probably take it that
 5 I would accept that the more serious the effect on one
 6 party, the less likely it is that the court will accept
 7 that the other party can work that effect on a whim.
 8 MR STUART: Yes.
 9 MR JUSTICE HILDYARD: That I appreciate.
 10 MR STUART: My Lord, again, I am not wishing to quibble too
 11 much, but "on a whim" I say is too low a way of putting
 12 it.
 13 Obviously my learned friend will seek to argue that
 14 as long as he can show that he didn't do it on a whim,
 15 that is what the contract intends, is intended to cover.
 16 But I say it's not as low as that by any means. To make
 17 good that submission, I should support it with reference
 18 to these cases. Lady Justice Hale -- this is
 19 paragraphs 17 to 24, I think, my Lord, in this judgment.
 20 Tab 17, Rice (t/a The Garden Guardian) v the Great
 21 Yarmouth Borough Council, Lady Justice Hale. Does
 22 your Lordship have it?
 23 MR JUSTICE HILDYARD: Yes.
 24 MR STUART: Just go back to 15 so your Lordship sees the
 25 context here. This was the clause in that instance,

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1 it's not the same as our clause, of course it's not,
 2 it's a termination provision. 15:
 3 "The most significant provision is clause 23, headed
 4 'Termination': 'if the contractor commits a breach of
 5 any of its obligations under the contract, the council
 6 may terminate the contractor's employment having
 7 immediate effect'.
 8 Paragraph 17 of Lady Justice Hale:
 9 "The council argued first that clause 23 should be
 10 applied literally so as to give them the right to
 11 terminate the contract for the breach of any of the
 12 obligations contained in it other than the trivial. The
 13 judge was referred to a number of well-known
 14 authorities. On the one hand, it is open to the parties
 15 to agree that as regards a particular obligation any
 16 breach shall entitle the party not in default to treat
 17 the contract as repudiated. See Bunge v Tradax. On the
 18 other hand, if detailed semantic and syntactical
 19 analysis of words in a contract is going to lead to
 20 a conclusion that flouts business common sense, it must
 21 yield to business common sense. See The Antaios. The
 22 judge pointed out that none of these authorities dealt
 23 with commercial circumstances having many parallels to
 24 those of a local authority and a contractor
 25 contractually required for a period of years to provide

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1 a wide variety of services."
 2 Then at the bottom:
 3 "In the context of a contract intended to last for
 4 four years involving substantial investment or at least
 5 substantial undertaking of financial obligations by one
 6 party and involving a myriad of obligations of differing
 7 importance and varying frequency, I have no hesitation
 8 in holding that the common sense interpretation should
 9 be imposed upon the strict words of the contract."
 10 My Lord, I say that is important, to see how
 11 Lady Justice Hale approaches the whole process here and
 12 issues about the length of the relationship under this
 13 contract.
 14 So this is a shareholder agreement, a joint venture
 15 shareholder agreement whereby my clients are going to be
 16 the owners of that store and run that store indefinitely
 17 actually; it's not even a fixed four-year term, it's
 18 indefinite. They could have been there for 50 years.
 19 And involving substantial undertaking of financial
 20 obligations. Well, it couldn't have been more
 21 substantial on my clients' part. They used up
 22 everything they had to buy it because it became their
 23 livelihood.
 24 "By one involving a myriad obligations of differing
 25 importance", well, that is the position here.

1 "... No hesitation in holding that the common sense
 2 interpretation should be imposed on the strict words."
 3 So the strict words are Specsavers have grounds to
 4 conclude fraud and dishonesty. Those are the strict
 5 words. But the common sense interpretation, in the
 6 circumstances where my clients are to lose everything,
 7 as your Lordship puts it the draconian effect of this
 8 clause and the fact that it's such a windfall to
 9 Specsavers to obtain shares for nil which -- they then
 10 sold those shares for, let's say, £400,000/£500,000 and
 11 kept the £400,000/£500,000, which is what happened here.
 12 I'm talking about the Bognor case for the moment.
 13 "... and that a repudiatory breach or an
 14 accumulation of breaches that as a whole can properly be
 15 described as ... are a precondition of termination."
 16 So it doesn't say that. It doesn't say "repudiatory
 17 breach". The parties could reasonably have been
 18 believed to have left it out deliberately, but
 19 nevertheless because of the nature of the clause and the
 20 nature of the relationship, there is a pre-condition.
 21 At 22, my Lord, is really where Lady Justice Hale
 22 summarises the point about the draconian consequences:
 23 "The problem with the council's argument in this
 24 case is that clause 23 does not characterise any
 25 particular term as a condition or indicate which terms

1 are to be considered so important that any breach will
 2 justify termination. It appears to visit the same
 3 draconian consequences upon any breach, however small,
 4 of any obligation, however small."
 5 One might say the same thing here, in our case. On
 6 my learned friend's view, if my clients were dishonest
 7 in any way, however small, it might be said, on his
 8 version, the clause applies, however small the
 9 dishonesty.
 10 MR JUSTICE HILDYARD: I hadn't understood your case to
 11 distinguish between different types of dishonesty.
 12 I don't think you've said that. I mean, I didn't
 13 understand you to sort of -- I mean, if he's
 14 dishonest -- there isn't a sort of "it's only little
 15 one" point, is there?
 16 MR STUART: I think there must be, my Lord.
 17 MR JUSTICE HILDYARD: Really? I hadn't understood you to
 18 submit that.
 19 MR STUART: I think in my skeleton argument I say
 20 "material". I say the dishonesty has to be material.
 21 MR JUSTICE HILDYARD: Immaterial dishonesty?
 22 MR STUART: Immaterial dishonesty surely could not be --
 23 MR JUSTICE HILDYARD: I don't know. I'll think about that.
 24 I'm going to rise in a second to give the shorthand
 25 writers a break. You have a legitimate concern not to

1 be dispossessed of a valuable asset by a carelessly
 2 invoked clause, let us say.
 3 MR STUART: Yes, or an unreasonably invoked --
 4 MR JUSTICE HILDYARD: Unreasonably invoked clause. But they
 5 for their part have an interest, particular in the
 6 context of dishonesty, bearing in mind that if someone
 7 is dishonest in a small thing, that may be indicative of
 8 some concern.
 9 MR STUART: Of course, but if that were --
 10 MR JUSTICE HILDYARD: They may say, well, actually you can't
 11 really distinguish, because where's the line? Supposing
 12 you lift 50p and put an IOU in the cash till, that's not
 13 very material in terms of the effect on the profit, but
 14 it doesn't say much for the person doing it. Do you see
 15 what I mean? It's a very difficult line to draw.
 16 MR STUART: I think probably, my Lord, the answer to the
 17 question is that it comes within the concept of whether
 18 it is reasonable to --
 19 MR JUSTICE HILDYARD: I'm not sure many people on the
 20 omnibus would think any dishonesty was reasonable.
 21 I think they would just think it was dishonest.
 22 MR STUART: No, no, I hadn't finished my sentence. Whether
 23 it is reasonable to take a certain matter of alleged
 24 dishonesty. Let's say, for example, Specsavers
 25 discovered that Dr Poulsen was having an affair with

1 somebody --
 2 MR JUSTICE HILDYARD: We can't get beyond the grip of
 3 dishonesty, agreed, but having an affair isn't
 4 necessarily dishonest, although --
 5 MR STUART: It may have -- and they considered that was, or
 6 it was dishonest towards Mr Vos, there was dishonesty
 7 shown to Mr Vos, that can't be something which could
 8 reasonably be part of the invocation of clause 19.6.
 9 MR JUSTICE HILDYARD: I think the problem with analogies is
 10 that they often set up a false test.
 11 MR STUART: Yes.
 12 MR JUSTICE HILDYARD: I'm going to rise. I imagine that the
 13 shorthand writers would appreciate a break. We'll come
 14 back just before quarter to if that suits everybody.
 15 (11.36 am)
 16 (A short break)
 17 (11.47 am)
 18 MR STUART: My Lord, I'm just at the end of paragraph 16 of
 19 my skeleton, the Lewison citation and the Antaios and
 20 the Rice. I've taken you to those two. I think
 21 your Lordship suggested that perhaps I'd never suggested
 22 anywhere in my submissions that the issue of
 23 materiality -- I think if your Lordship reads the final
 24 sentence of paragraph 16 of my skeleton argument, I hope
 25 it couldn't be clearer than that.

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1 MR JUSTICE HILDYARD: Let's have a look.
 2 MR STUART: I acknowledge, of course, it's by analogy
 3 with --
 4 MR JUSTICE HILDYARD: I see.
 5 MR STUART: It's by analogy. That was a case about just
 6 a simple termination on any grounds. We're in,
 7 effectively, a termination for fraud and dishonesty and
 8 so, by analogy, I say the fraud and dishonesty relied
 9 upon by D1 must be material to the relationship because
 10 this is a relational contract, and I say this is the
 11 basis upon which a reasonable person would reasonably be
 12 able to invoke clause 19.6.
 13 My Lord, I don't want to move on unless I've made it
 14 clear what I'm trying to say.
 15 MR JUSTICE HILDYARD: You say that there is some form of
 16 something properly called fraud or dishonesty which
 17 would not be material to the relationship between the
 18 parties?
 19 MR STUART: My Lord, I think I would have to concede fraud
 20 will always be material to a relationship, a commercial
 21 relationship, fraud. If a person commits fraud in a way
 22 which is wholly outwith the Specsavers shop, they've
 23 still committed fraud, and therefore I can quite
 24 acknowledge and accept that that would be material even
 25 if it was fraud in relation to something other.

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1 What I'm saying is that when one is looking at what
 2 is dishonesty, and as I understand it Mr Potts is going
 3 to say that fraud is not what is alleged here, it's only
 4 dishonesty, alleged, I'm saying that the dishonesty
 5 relied upon to invoke a contractual right to take
 6 someone's shares for nothing should be or needs to be
 7 dishonesty that is material to the relationship between
 8 the parties.
 9 MR JUSTICE HILDYARD: I'm sorry to press you on this, but do
 10 you mean that it must be fraud or dishonesty in the
 11 conduct of the business in which they are involved?
 12 MR STUART: No, I just said fraud -- I acknowledge fraud
 13 outside the business would still be material to the
 14 relationship. If I don't want to be in a relationship,
 15 a joint venture partner with a fraudster, that is
 16 a reasonable commercial concept that a reasonable person
 17 would understand the parties to have intended by this --
 18 MR JUSTICE HILDYARD: So it's not confined to the conduct of
 19 the business which they've engaged upon under the terms
 20 of their agreement?
 21 MR STUART: Not for fraud. But dishonesty, in my
 22 submission, dishonesty could be of a kind which is of
 23 absolutely no materiality to the relationship of being
 24 a joint venture partner with somebody. It might be such
 25 a small matter of dishonesty, it might be a matter of

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1 personal dishonesty. I'll come back later to the
 2 question of what is dishonesty for these purposes, and
 3 I am going to agree with my learned friend on the
 4 objective, and I'll take you to his law and I'll agree
 5 with it.
 6 But it cannot be an act of dishonesty, however small
 7 and however immaterial, that a reasonable person could
 8 then use to invoke clause 19 -- that would not be
 9 a reasonable, or bona fides, or honest invocation of
 10 clause 19.6, I say, to take --
 11 MR JUSTICE HILDYARD: You say if they were done on the
 12 underground for not having a ticket, to take an example,
 13 it might be categorised by London Underground as
 14 dishonest, you would say that wasn't something that bore
 15 on their relationship?
 16 MR STUART: Just like when a judge gets on the train to
 17 Watford and doesn't have a ticket, it doesn't bear on
 18 her judgeship, and didn't.
 19 MR JUSTICE HILDYARD: I don't know. It's a cautionary
 20 court.
 21 MR STUART: I'm talking about the judge who was, at the
 22 time, married to the prime minister of this country and
 23 she --
 24 MR JUSTICE HILDYARD: Oh, she got on the train to Watford?
 25 MR STUART: Yes. Unfortunately, she was found not to have

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1 had a ticket and was pulled up and incurred a penalty
 2 notice for not having one, et cetera, et cetera. That
 3 did not, so far as the courts were concerned, and the
 4 Ministry of Justice, whichever entity it was at the
 5 time, didn't impinge upon her ability to sit as a judge.
 6 MR JUSTICE HILDYARD: To sit as a judge.
 7 MR STUART: Yes, that's what I'm saying. These are all
 8 somewhat -- I agree with your Lordship, these are all
 9 somewhat hypothetical given the actual nature of this
 10 case.
 11 MR JUSTICE HILDYARD: No. I think I understand your point
 12 that it must be such as impacts on their relationship in
 13 some way.
 14 MR STUART: Impacts on the relationship.
 15 That's my argument, that's my interpretation, that's
 16 what I say the court should interpret this as, and I say
 17 that that is in line with the way in which the courts
 18 now interpret termination clauses or forfeiture clauses,
 19 et cetera.
 20 My Lord, on to the question of objectivity now.
 21 Paragraph 17 of my skeleton argument.
 22 MR JUSTICE HILDYARD: Yes.
 23 MR STUART: This really is taken up still from this passage
 24 in Lewison. We're on page 802 in Lewison in tab 30.
 25 MR JUSTICE HILDYARD: Yes.

1 MR STUART: So just after Rice v Great Yarmouth. Halfway
 2 down:
 3 "In other cases the contract provides that the right
 4 to terminate only arises if there has been a substantial
 5 or material breach."
 6 Now, of course, my Lord, that's not the case in
 7 relation to 19.6 here, though it is in relation to 19.2.
 8 And I'll come back to that as a point to assist
 9 your Lordship when trying to work out what 19.6 means.
 10 But in cases where the right to terminate arises for
 11 substantial material breach, whether the breach is
 12 substantial or material must be judged objectively.
 13 That is citing Fitzroy House Epworth Street v
 14 Financial Times, which is number 20 in your Lordship's
 15 bundle. Again, this is a by analogy argument I'm making
 16 here, my Lord, of course.
 17 MR JUSTICE HILDYARD: Where is that case?
 18 MR STUART: Number 20 in bundle 1 of the authorities, 2006,
 19 Court of Appeal. A break clause in a lease. Does
 20 your Lordship see that?
 21 MR JUSTICE HILDYARD: Yes.
 22 MR STUART: The holding on page 2207, just above E,
 23 dismissing the appeal:
 24 "Material had been inserted in the break clause in
 25 order to mitigate the requirement for absolute

1 compliance with all covenants at the relevant time. But
 2 it was not to be taken to have been the intention of the
 3 parties to modify the rule to the extent that it was
 4 reasonably fair to both landlord and tenant that there
 5 was no justification for attributing to the parties an
 6 intention that material was intended to permit only
 7 breaches which were trivial, that the materiality of any
 8 breach was to be assessed objectively by the ability of
 9 the landlord to relet or sell the property without
 10 delay."
 11 My Lord, that comes from page 2218, paragraph 24,
 12 page 2218 at B, paragraph 24 of Sir Andrew Morritt's
 13 judgment. Does your Lordship have that?
 14 "I did not understand counsel for the tenant to
 15 submit that the test was subjective, though he did
 16 suggest that the conduct of the parties may have some
 17 evidential value in determining the issue. It cannot,
 18 I think, be seriously disputed that the issue of
 19 material compliance, whatever it involves, must be
 20 determined on an objective basis. This was the view of
 21 the Court of Appeal in Fortman v Modem Holdings, when
 22 considering a similar provision in a loan note. It
 23 follows from my rejection of the principle enunciated by
 24 Judge Rich and my conclusion that the test of the
 25 material compliance must be of an objective one that

1 I would accept the contentions of counsel for the
 2 landlord to which I have referred to above."
 3 My Lord, as I say, I'm just seeking to take this as
 4 an example and by analogy with that approach to such
 5 clauses, as I've said in paragraph 17 of my skeleton.
 6 Here, we have a clause which says there are grounds
 7 to conclude that Cs have been fraudulent or dishonest.
 8 I say that that -- and I'm using Sir Andrew Morritt's
 9 words -- whatever it involves, must be determined on an
 10 objective test. That's the point I'm seeking to make.
 11 The court should approach it objectively.
 12 MR JUSTICE HILDYARD: Approach what objectively?
 13 MR STUART: Should approach objectively whether Specsavers
 14 had grounds to conclude fraud and dishonesty.
 15 We're back to where we started this morning,
 16 reasonably -- ie your Lordship's gloss on the way I put
 17 it. So we're seeking to show whether Specsavers can use
 18 the trigger of having grounds to conclude fraud and
 19 dishonesty. That's clause 19.6. I'm saying that when
 20 assessing whether Specsavers has grounds to conclude
 21 fraud and dishonesty, you should judge whether
 22 Specsavers has grounds to conclude fraud and dishonesty
 23 objectively just as, in a case where the issue is
 24 whether there has been material compliance, one has to
 25 determine that on an objective basis also.

1 My Lord, paragraph 18 of my skeleton. We're on to
2 the --
3 MR POTTS: Sorry, my Lord. My friend was on 17 of his
4 skeleton. Again, I'm just -- 17 is the same, if I can
5 refer to it as the heresy. He is not maintaining what
6 he says in 17; is that right?
7 MR STUART: Yes, I am maintaining what is said in 17, it is
8 not a heresy. My learned friend is confusing whether
9 there was fraud and dishonesty, whether your Lordship
10 has to actually find that there was fraud and
11 dishonesty. And I'm not suggesting that my learned
12 friend has to do that, I'm not suggesting your Lordship
13 has to find that, and that is not what is being judged.
14 In Sir Andrew Morritt's terms, that is not what is
15 being determined. What is being determined in our case
16 is whether Specsavers had grounds to conclude fraud and
17 dishonesty. And I say that the determination of that
18 issue, that is whether Specsavers had grounds to
19 conclude, should be determined objectively. Did they
20 objectively have grounds to conclude? Did they
21 objectively have grounds to conclude?
22 MR POTTS: My problem is the final sentence.
23 MR JUSTICE HILDYARD: I've been puzzling and --
24 MR STUART: Oh, the final sentence, I'm sorry. The final
25 sentence, yes.

1 MR JUSTICE HILDYARD: This is a sort of commentary of yours,
2 is it? It's not a test.
3 MR STUART: It's not a test.
4 MR JUSTICE HILDYARD: My understanding is, that last
5 sentence possibly ought to go.
6 MR STUART: You can delete the last sentence. I'm sorry --
7 MR JUSTICE HILDYARD: What you're really saying is you think
8 they will not succeed unless they can show dishonesty,
9 and Mr Potts says he thinks he can.
10 MR STUART: Exactly. Mr Potts says, "I can show that
11 Specsavers had grounds to conclude dishonesty even
12 without showing that there was actual dishonesty".
13 MR JUSTICE HILDYARD: But you wouldn't mind if I put at
14 least a square bracket around that as being commentary
15 rather than test?
16 MR STUART: You can put a line through it since it's
17 obviously confusing.
18 MR JUSTICE HILDYARD: I've done that.
19 MR STUART: It's my fault that it's there. Please put
20 a line through the last sentence.
21 MR JUSTICE HILDYARD: Okay.
22 MR STUART: So moving on to 18, reference there to Chitty
23 1327. My Lord, if I can just take you back, then, in
24 tab 29 to Chitty. Does your Lordship have that?
25 MR JUSTICE HILDYARD: Yes.

1 MR STUART: It's paragraph 13-027:
2 "A discretion conferred by contract in seemingly
3 absolute terms may be restricted by the implication of
4 a term that the discretion should not be exercised
5 dishonestly, for an improper purpose, capriciously,
6 arbitrarily or in any way that no reasonable person
7 acting reasonably would act."
8 That's obviously the Wednesbury unreasonable
9 element.
10 That is citing the Abu Dhabi case which
11 your Lordship has at tab 8 in your first bundle. The
12 reference is at page 404 in tab 8. Could I take
13 your Lordship to that? It is just a short half a page.
14 MR JUSTICE HILDYARD: It's not a surprising proposition.
15 MR STUART: No, exactly. So Lord Justice Leggatt here, at
16 404 on the left-hand side, he first cites
17 Tillmans v Knutsford:
18 "Discretion had to be exercised fairly as between
19 the parties. No mala fides is suggested, but it is
20 said, and I think with truth, that discretion must not
21 be exercised in an arbitrary and unreasonable manner,
22 and in this case there was really no exercise of
23 discretion at all as the matter was not considered or no
24 full or sufficient enquiry was made."
25 Then The Vainqueur Jose:

1 "To the exercise of such discretion, the common law
2 principles must apply and these undoubtedly include
3 fairness, reasonableness, bona fides and absence of
4 misdirection in law. Mr Hallgarten argued for the
5 owners that the exercise of the discretion is purely
6 subjective involving only that it should be exercised
7 bona fide, but that if and insofar as it is objective,
8 it must not be exercised arbitrarily or capriciously.
9 "He also relied on Associated Provincial Picture
10 Houses v Wednesbury for his proposition that the court
11 should not interfere with the exercise of discretion by
12 owners under clause 40 unless they have come to
13 a conclusion so unreasonable that no reasonable owners
14 could ever have come to it.
15 "For the purposes of judicial review, the court is
16 concerned to judge whether a decision-making body has
17 exceeded its powers, in this context whether
18 a particular decision is so perverse that no reasonable
19 body, properly directing itself as to the applicable
20 law, could have reached such a decision."
21 This is the important point, my Lord:
22 "But the exercise of judicial control of
23 administrative action [ie Wednesbury unreasonableness]
24 is an analogy that must be applied with caution to the
25 assessment of whether a contractual discretion has been

1 properly exercised. The essential question always is
 2 whether the relevant power has been abused, where A and
 3 B contract with each other to confer a discretion on A
 4 that does not render B subject to A's uninhibited whim.
 5 In my judgment the authorities show that not only must
 6 the discretion be exercised honestly and in good faith,
 7 but having regard to the provisions of the contract by
 8 which it is conferred it must not be exercised
 9 arbitrarily, capriciously or unreasonably. That entails
 10 a proper consideration of the matter after making any
 11 necessary enquiries. To these principles little is
 12 added by the concept of fairness."

13 My Lord, I say that encapsulates many of the
 14 interpretation/implied term points that we contend for
 15 in our pleading.

16 I'm flicking back to my paragraph 11 in my skeleton.
 17 We know that (a) has now been slightly amended. (b), we
 18 now know what that is, it's attaching to the grounds.
 19 (c):

20 "D1 is required, whether on the proper
 21 interpretation or implied term, to act reasonably and
 22 bona fides when assessing whether there are really such
 23 grounds existing."

24 Then (d):
 25 "D1 must ... the grounds must be reasonable grounds

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1 which objectively lead D1 to conclude, acting with bona
 2 fides, that Cs have been fraudulent or dishonesty."
 3 (e):
 4 "D1 must act with good faith."
 5 I say that the Product Star case as cited in Chitty
 6 is good authority for those propositions. To the extent
 7 that in the defence and in the -- does your Lordship
 8 recall the defence, the material parts of the defence?
 9 This is in white bundle A, tab 4, paragraph 15 and
 10 subparagraphs 15.1, 2 and 3. We having asserted the
 11 implication of the terms, as you know, from paragraph 10
 12 in the particulars of claim:

13 "The first defendant is required to act reasonably
 14 and bona fides when assessing whether there are really
 15 such grounds existing. Any such grounds they rely upon
 16 must be reasonable grounds, and these must objectively
 17 lead the first defendant reasonably to conclude, acting
 18 with bona fides, that there has been fraud."

19 That's the way we put it, and I say that is entirely
 20 supported by the Product Star. The answer to that comes
 21 at paragraph 15:

22 "It is admitted that clause 19.6 required the first
 23 defendant to have some genuine ground on which it might
 24 conclude that a shareholder had been fraudulent. Save
 25 as aforesaid, paragraph 10 is denied. The shareholder

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1 agreement reflects the joint venture structure..."
 2 Et cetera.

3 And so:
 4 "Clause 19.6 of the shareholder agreement therefore
 5 entitles the first defendant to serve a purchase notice
 6 if it subjectively had grounds to conclude that
 7 a shareholder had been fraudulent or dishonest. The
 8 implication of a term into 19.6..."

9 He must there be dealing with the terms I'm seeking
 10 to have implied in paragraph 10 of my particulars of
 11 claim.

12 "The implication of a term is not necessary in order
 13 to give business efficacy."

14 I say that's somewhat old hat and not an answer to
 15 the point.

16 15.3:
 17 "Further, it was not a term of the shareholders
 18 agreement, express or implied, that the parties would
 19 act towards one another with good faith."

20 He goes as far as that. 15.3.

21 "It is expressly denied that the company operated as
 22 a quasi partnership..."

23 Et cetera, et cetera.

24 There is the battle ground, my Lord, I say. And
 25 I say that the case law, the whole body of the case law

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1 clearly shows that the interpretations, implied terms
 2 that we put forward are properly to be interpreted into
 3 this sort of clause in this sort of contractual
 4 relationship.

5 My Lord, I think I'm on to the last bit of the
 6 authorities in relation to this. Paragraph 19 of my
 7 skeleton argument. Just finally on this reasonableness
 8 and good faith point.

9 MR JUSTICE HILDYARD: The point that you have to eventually
 10 deal with, I suppose, is whether 19.6 is in the nature
 11 of conferring a discretion on the defendant with respect
 12 to your clients. Because I think that Abu Dhabi is
 13 dealing with the point in that context, but it is fairly
 14 trite that outside the context of discretion people can
 15 be pretty bloody in the way that they exercise
 16 contractual powers. Do you see what I mean?

17 MR STUART: I do, my Lord, but if anything, I would
 18 submit -- can we just go back to -- and it's a point
 19 I wanted to make anyway. If we just go back to the
 20 material parts of the contract which are perhaps best
 21 summarised whilst we're there in the particulars of
 22 claim. You have them neatly summarised. And they're
 23 admitted in the defence. This is in tab A, white A,
 24 tab 3, clause 19 --

25 MR JUSTICE HILDYARD: Just before you do that. In the

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1 Product Star v Abu Dhabi case, it was expressly
 2 described as a discretion in the master or owner to
 3 abandon, as it were, loading or discharge if they
 4 thought in their discretion it was dangerous or
 5 impossible. So they're expressly given a discretion,
 6 and that is one context. But do you say that the 19.6
 7 is an analogous clause? It doesn't mention the word
 8 "discretion", does it?
 9 MR STUART: It says the word "may". What more can it do?
 10 They didn't have to serve a purchase notice if they
 11 didn't want to. They chose to do this. They didn't
 12 actually choose to do it immediately or in reaction to
 13 finding this out. They only served their purchase
 14 notices after we'd issued some proceedings.
 15 MR JUSTICE HILDYARD: I'm not sure that really addresses the
 16 point.
 17 MR STUART: I'm just saying that by way of aside.
 18 MR JUSTICE HILDYARD: I mean, the point, just so you should
 19 have a fair chance in the end, is that there may be
 20 a difference, looking purely in terms of contract, not
 21 looking at judicial or administrative power, purely in
 22 terms of contract, between a power which vests a
 23 discretion, or a contractual provision, more accurately,
 24 which vests a discretion, expressly so, and which
 25 qualifies a right to do something by saying it is

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1 discretionary.
 2 MR STUART: Yes.
 3 MR JUSTICE HILDYARD: And a contractual right which is not
 4 so caveated. Do you see what I mean? I haven't put it
 5 very well, but do you see what I mean?
 6 MR STUART: I believe your Lordship hasn't put it very well
 7 because there isn't a difference between a contractual
 8 right and a contractual right.
 9 As your Lordship says, a discretion to exercise
 10 a contractual right is the same as having the
 11 contractual right. There is no additional issue of
 12 discretion. If you look at --
 13 MR JUSTICE HILDYARD: I'm not sure. Take a right of
 14 forfeiture, a devastating right, one might think, very
 15 draconian in its potential effect, moderated only by
 16 statute in controlled circumstances.
 17 MR STUART: Yes.
 18 MR JUSTICE HILDYARD: Now, it would be hard, I suspect, to
 19 find much authority controlling the right of forfeiture
 20 by reference to much more than whim. I mean, it is
 21 commonplace that mortgagees exercise a right of
 22 forfeiture in extremely aggressive situations. It's
 23 a pity, one might think, as a human being. But as
 24 a lawyer, one just has to look to the statute to control
 25 it. That is because it's just a right. It's not

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1 a discretion, it's a right.
 2 You needn't answer this now, but I'm just saying
 3 that one can't adopt Abu Dhabi, or the Product Star,
 4 without looking to see whether it is an analogous
 5 contractual provision. I'll take it for the moment you
 6 say it is, but I think I'll need assistance in due
 7 course as to why you say it is.
 8 MR STUART: My Lord, a termination clause is a right to
 9 terminate.
 10 MR JUSTICE HILDYARD: Yes.
 11 MR STUART: A forfeiture clause, as your Lordship says, is
 12 a right effectively to terminate.
 13 MR JUSTICE HILDYARD: Yes.
 14 MR STUART: But a termination clause of the kind that
 15 Lady Justice Hale was dealing with, for example, in the
 16 contract whereby a local authority --
 17 MR JUSTICE HILDYARD: They're different cases. I know you
 18 want to put them in as analogy, but they're saying, oh,
 19 my goodness, they can't have intended the right to
 20 terminate to arise in respect of a breach, however tiny.
 21 MR STUART: Yes, and I say, by analogy with our case, here
 22 they can't have intended the right to take my shares for
 23 nothing to arise in circumstances where the defendant
 24 chooses to do so unreasonably.
 25 MR JUSTICE HILDYARD: Well, that's the whole question in the

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1 case.
 2 MR STUART: Yes, that's the question in the case, and I say
 3 that it's by analogy with all of the lines of authority
 4 on all of the other ways in which people lose their
 5 proprietary rights and things, termination clauses,
 6 discretion -- exercise of discretion clauses in
 7 contractual arrangements that give one party the
 8 opportunity to do something to the other party's assets,
 9 or their obligations under the contract, et cetera. All
 10 of the cases have built up a principle that, in those
 11 sorts of clauses, the party should not be allowed --
 12 should not be deemed to have been allowed -- it should
 13 not be intended or thought to be intended that the
 14 parties meant that the party was allowed to do it,
 15 either dishonestly or for an improper purpose,
 16 capriciously, arbitrarily, or in a way that no
 17 reasonable person acting reasonably would act.
 18 That is in accordance with the same sorts of
 19 principles that apply in the cases I've taken you to.
 20 MR JUSTICE HILDYARD: Well, I should correct something
 21 I said. It's obviously not the whole question of
 22 whether they acted unreasonably, but the whole question
 23 is what does the clause mean. And one mustn't reach
 24 a priori assumptions.
 25 My point to you, which I don't expect you to address

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1 completely now, is that on the cases you've told me,
2 they seem to me at the moment to address, in the case of
3 the Baroness Hale cases, they address the situation
4 where the parties have not defined what sort of breach
5 gives rise to termination.

6 That is not the case here. The parties have here
7 expressed the right of termination and expropriation, as
8 you would put it, as applicable if the conditions of
9 19.6 are satisfied. And there's an argument as to those
10 conditions, a perfectly valid argument, between you, but
11 they're not Baroness Hale-type cases.

12 Then you've also taken me to Abu Dhabi, which are
13 discretion cases, that is to say where a contract vests
14 in some person, in that case the master or owner,
15 a discretion not to do something where that person
16 thinks it too dangerous to do so.

17 Those are discretion cases. You may be right that
18 the general sense of them can be transported, but they
19 are not in line with your case. And the question is: on
20 what ground, really, by what process of analysis can you
21 apply those cases of a qualified discretionary right to
22 the situation of an absolute right, though that absolute
23 right is subject to express controls? Do you see what
24 I'm getting at?

25 MR STUART: I see your Lordship's point.

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1 MR JUSTICE HILDYARD: So I don't need you -- and you may
2 wish to reflect on it -- to answer that now, but one
3 can't sort of borrow phrases, can one, from different
4 sorts of cases? Otherwise, you know -- the authorities
5 aren't a bag of tricks, are they?

6 MR STUART: No, no. They aren't a bag of tricks. But if
7 the reasoning behind Lady Justice Hale's -- for example,
8 the reasoning in paragraph 18 of Lady Justice Hale:

9 "In the context of a contract intended to last for
10 four years involving substantial investment or at least
11 substantial undertaking of financial obligations by one
12 party, and involving a myriad of obligations, I have no
13 hesitation in holding that the common sense
14 interpretation should be..."

15 Et cetera, et cetera.

16 MR JUSTICE HILDYARD: Yes, but that's of that clause.

17 MR STUART: Yes.

18 MR JUSTICE HILDYARD: One can't say that any long-term
19 contract which involves difficult things and has caused
20 expense is subject to those rules. You've got to look
21 at the clause.

22 MR STUART: Yes, and the clause was: if the contractor
23 commits a breach of any of its obligations under the
24 contract. Our clause is: if Specsavers has grounds to
25 conclude fraud and dishonesty.

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1 MR JUSTICE HILDYARD: Right.

2 MR STUART: Then something happens. What happens? The
3 draconian effect, as Lady Justice Hale puts it, of in
4 that case the contractor losing his livelihood, and in
5 our case the draconian effect of my clients losing
6 their... I say that, by analogy, the same matters are
7 relevant to the interpretation and that where it appears
8 to visit the same draconian consequences, as
9 Lady Justice Hale puts it, then the same principle as to
10 that clause applies.

11 We're only seeking to do to our clause, 19.6, what
12 Lady Justice Hale did to her clause, which was a totally
13 different clause, but it was a clause "if a contractor
14 commits a breach of any of its obligations under the
15 contract". And although it says that, it was held that
16 the pre-condition of that breach being repudiatory was
17 interpreted into --

18 MR JUSTICE HILDYARD: Well, as I say, you may want to think
19 more -- just to help you, perhaps. Supposing in the
20 Hale line of cases the actual provision in the contract
21 had been: this contract may be terminated by A in
22 respect of any breach (however small).

23 Now, you couldn't apply the Hale reasoning in that
24 context, could you?

25 MR STUART: Correct.

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1 MR JUSTICE HILDYARD: So it all depends on the clause.

2 MR STUART: On the words of the clause, I agree. I am not
3 seeking to shy away from that.

4 But I say look at the words of our clause. It is as
5 wide and undefined because it doesn't say anything in
6 brackets after the words that we're trying to analyse
7 here. It just says "has grounds to conclude fraud and
8 dishonesty". It just says that. So one must interpret
9 that, I say, in what I say is the restrictive way in
10 which the courts interpret all contracts of this kind,
11 of this nature -- not of this precise same, but ones
12 where the party is about to lose some substantial asset,
13 a draconian clause like that, one should interpret that
14 clause along the lines of all of the interpretations in
15 these cases.

16 MR JUSTICE HILDYARD: At some point you will help me,

17 I think it's accepted that this sort of clause is not to
18 be exercised whimsically or capriciously.

19 MR STUART: Yes.

20 MR JUSTICE HILDYARD: The court will very rarely support
21 whimsical or capricious enterprises.

22 MR STUART: That's right.

23 MR JUSTICE HILDYARD: But the court is surprisingly
24 resilient to fairly brutal exercises. And it's the
25 difference which you have to get over, I suppose. Do

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1 you see what I'm --
 2 MR STUART: I do.
 3 MR JUSTICE HILDYARD: Anyway, you return to that as and when
 4 you feel like it.
 5 MR STUART: My Lord, I understand.
 6 In paragraph 20 in my skeleton argument, I set out
 7 the facts and matters, some of which, during the course
 8 of these submission, I've already perhaps highlighted.
 9 But this is a risk. So we're in my skeleton argument,
 10 paragraph 20. The agreement is a commercial agreement.
 11 MR JUSTICE HILDYARD: Yes.
 12 MR STUART: And we've paid a very substantial sum.
 13 MR JUSTICE HILDYARD: Yes.
 14 MR STUART: The clause gives Ds an entitlement, which is an
 15 enormous penalty to us. The trigger for the entitlement
 16 or penalty is that Cs have committed fraud or acted
 17 dishonestly. I know that's a gloss, because actually
 18 the trigger is that D1 has grounds to conclude that C --
 19 MR JUSTICE HILDYARD: Yes, we must read that subject to our
 20 discussion this morning.
 21 MR STUART: Exactly. What I'm saying is that, in
 22 interpreting what that means, one needs to take a step
 23 back and ask what a reasonable man would say the parties
 24 are understood to have meant -- sorry, intended it to
 25 have meant. And that does, therefore, import the

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1 issues, all of the issues which we put forward in our
 2 interpretation, ie not just not whimsical, but going
 3 beyond that.
 4 The other material breach -- so there is a material
 5 breach provision in the contract, 19.2:
 6 "Specsavers may serve a purchase notice on any other
 7 shareholder in any of the following circumstances.
 8 "The recipient committing a material breach of his
 9 obligations."
 10 For that, they have to pay fair value. Well, if
 11 they have to pay fair value even where we have committed
 12 a material breach, a clause which gives them the ability
 13 to take our shares for nothing should be seen as being
 14 intended by the parties to be more restricted than the
 15 material breach clause. There's no reciprocal
 16 entitlement in our agreement for us to purchase their
 17 shares if they've committed fraud or dishonesty. It's
 18 a one-way penalty here.
 19 The relationship between us is one of joint venture.
 20 Your Lordship will remember that, even in their own
 21 pleading, paragraph 15 I took you to, of the defence,
 22 they say it was a joint venture.
 23 It's not a partnership in the sense of a Partnership
 24 Act partnership. I agree that, of course it's not. But
 25 it is a quasi partnership because it's a joint venture,

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1 it's in the nature of a joint venture arrangement. It
 2 is akin to a franchise business, but it's not
 3 a franchise business, it's just akin to it.
 4 But in essence, the nature of the relationship is
 5 joint venture/quasi partnership.
 6 MR JUSTICE HILDYARD: Can I ask you this. Do you suggest
 7 that the contractual arrangements between the parties
 8 are, as it were, overlaid by some other utmost good
 9 faith-type engagements?
 10 MR STUART: I say that the contractual nature and
 11 relationship of the parties here is of the nature of
 12 those kinds of contractual relationships, those
 13 relational contracts as was referred to in the case that
 14 I took you to yesterday. It's of that nature that an
 15 implication of a requirement of acting in good faith is
 16 imposed.
 17 MR JUSTICE HILDYARD: That arises under contract and not any
 18 other construct?
 19 MR STUART: It arises as a consequence of the nature of the
 20 contract. The contract is a relational contract.
 21 MR JUSTICE HILDYARD: People bandy around "partnership" and
 22 "quasi partnership" and "joint ventures" and everything
 23 else, but slightly --
 24 MR STUART: It's a convenient way the courts have --
 25 MR JUSTICE HILDYARD: It's a convenient but slightly

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1 misleading way. The question is, do you say that the
 2 nature of the relationship, whatever its badge, is such
 3 as to give rise to obligations between the parties above
 4 and beyond their contractual ones?
 5 MR STUART: No. But I say their contractual ones include
 6 implied or are to be interpreted with the contractual
 7 ones that are --
 8 MR JUSTICE HILDYARD: That, I understand. You say that you
 9 must look at the sort of contract that it is, but you're
 10 not saying that there's anything above and beyond what
 11 can be expressed or implicit in the contract?
 12 MR STUART: Because your Lordship has included the word "or
 13 implicit", no, I absolutely agree with you. You're
 14 absolutely right --
 15 MR JUSTICE HILDYARD: Right. So it's only contract that
 16 we're operating in?
 17 MR STUART: It's interpretation and implicit in that
 18 contract, I say, yes.
 19 We are dealing here with contract. They have agreed
 20 to enter into a relationship with each other, which is
 21 governed by a contract.
 22 MR JUSTICE HILDYARD: But are you saying that the
 23 contractual rights and obligations which the contract
 24 imposes are to be subject to some equitable obligation
 25 over and above the contractual one?

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1 MR STUART: No, I don't put it as an over and above
 2 equitable obligation. No, I say it's part of the
 3 incidence of the relational contract here. This is not
 4 a contract where X sells to Y a glass. There's no
 5 relational contract there. There's just a contract for
 6 the sale of some goods from X to Y.
 7 In that sort of contract, because it's not
 8 a relational contract, there's not necessarily to be
 9 implied a term of acting in good faith.
 10 MR JUSTICE HILDYARD: I only ask it probably because of the
 11 spectacles which I am used to.
 12 It is a common place in unfair prejudice petitions
 13 and in company processes that people habitually argue by
 14 reference to the Westbourne Galleries v Ebrahimi case,
 15 as you will know, that the contractual provisions of the
 16 articles are to be read subject to some overarching
 17 equitable obligations arising, as is the premise, in
 18 equity and giving rise, for example, to duty of utmost
 19 good faith and that sort of thing. My understanding is
 20 you've clarified, and I think it's important, that you
 21 do not rely on Westbourne Galleries or equitable-type
 22 overarching obligations.
 23 MR STUART: Not for the purpose of the implied
 24 term/interpretation as to clause --
 25 MR JUSTICE HILDYARD: Or for any purpose?

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1 MR STUART: We're not here dealing with any other purpose,
 2 are we?
 3 MR JUSTICE HILDYARD: So for no purpose relevant to the
 4 decision in the case.
 5 MR STUART: For this trial that we're having at the moment,
 6 we're dealing with a trial of an issue that's been
 7 determined -- that is to be determined on these
 8 pleadings. So, no, I'm not relying upon matters outwith
 9 what I say are the contractual, implicit contractual and
 10 proper interpretation of the contract here, and that the
 11 relationship --
 12 MR JUSTICE HILDYARD: No fiduciary or other similar type
 13 obligations are asserted?
 14 MR STUART: In relation to this clause 19.6 and the exercise
 15 of it, no.
 16 MR POTTS: My Lord, just for clarity. Paragraph 10, could
 17 your Lordship just pick up, of the pleading. I hesitate
 18 to return to that paragraph, but this is the quasi
 19 partnership point as pleaded. 1, tab 3, page 31. It's
 20 the bottom section.
 21 MR JUSTICE HILDYARD: Yes, I've underlined this. This is
 22 what I was bothered about, lest this is a Westbourne
 23 Galleries or sort of quasi fiduciary-type relationship
 24 point. I wanted -- I think you've disavowed that.
 25 MR POTTS: Yes, it's not --

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1 MR STUART: It says -- I'm sorry.
 2 MR POTTS: My Lord, it's not just there. The allegation is
 3 made there. We replied to it denying quasi partnership
 4 and said it's all -- it's everything. Your Lordship
 5 then, if you turn to page 100 in the reply, tab 5, and
 6 you'll see in 10.2, day-to-day issues and so on, it
 7 says:
 8 "It was the intent to secure a mutual advantage ...
 9 agreed to operate the joint venture in the spirit of
 10 a quasi partnership on the terms set out in the
 11 agreement. The expectation was that both parties would
 12 abide by the rules ... including division of
 13 responsibilities in the spirit of mutual trust and
 14 confidence. Neither would seek to use powers purely to
 15 advance its own interest expressed to the other."
 16 That is, I think, a duty of utmost good faith. Then
 17 10.3:
 18 "The company is a quasi partnership run as a joint
 19 venture, formed on a personal basis, mutual confidence,
 20 understanding that they would participate..."
 21 And so on.
 22 So there's no doubt about this, this is an issue
 23 that we've had to deal with. This is their pleaded
 24 case. If my friend is dropping that, that's fine, but
 25 I want it to be clear.

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1 MR STUART: I'm not dropping it. I'm saying that in
 2 relation to the construction of clause 19.6, that's not
 3 the way I put it.
 4 My Lord, I think you'll find that that and all of
 5 that is in relation to an argument, which is one we
 6 haven't really got on to yet, which is that the
 7 defendant has acted in breach of its obligations to us.
 8 And we say that those obligations included to act with
 9 mutual trust and confidence. Well, mutual trust and
 10 confidence can be an implied term of a contract.
 11 MR JUSTICE HILDYARD: But do you say that end runs, 19.6?
 12 If 19.6 is given its contractual effect and supposedly
 13 notwithstanding your interpretation of it, nevertheless
 14 the determination is that 19.6 was permissibly invoked,
 15 right? So you are bought out at this nominal price.
 16 MR STUART: Yes.
 17 MR JUSTICE HILDYARD: Right? The pleading at page 100 seems
 18 to lead to the conclusion that, in some way, that
 19 conclusion is subject to some other considerations, such
 20 as to end run, if I can put it like that, the
 21 contractual provisions. Is that part of your case?
 22 MR STUART: No. The intention of page 100, insofar as it's
 23 dealing with paragraph 15 of the defence, which is
 24 itself dealing with paragraph 10 of the amended
 25 particulars of claim, is that we are dealing here with

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1 what is the proper interpretation of 19.6.
 2 What I am saying is that in interpreting 19.6, which
 3 is a contractual provision, part of the background, part
 4 of the factual background must be the nature of the
 5 relationship between the parties. That's the relevance
 6 of it. I'm not saying that 19.6 -- I'm not saying that
 7 we are relying upon a cause of action that is not the
 8 contractual one in respect of 19.6, and 19 generally.
 9 MR JUSTICE HILDYARD: So would this be fair: in terms of
 10 confining the issues between you, that you rely on this
 11 purely as a background factor relevant to the
 12 interpretation of the contract, and in particular
 13 clause 19.6 of it, but you are not relying on it as
 14 giving rise to any extra-contractual or equitable or
 15 fiduciary obligation?
 16 MR STUART: For the purposes of this trial, yes. As it says
 17 at the bottom, the provision that I'm seeking to say is
 18 that the parties would act towards one another with good
 19 faith. My learned friend denies that and says no, the
 20 parties don't have to act with good faith; he can
 21 exercise his clause 19.6 rights not in good faith.
 22 MR JUSTICE HILDYARD: That I understand, but I understand
 23 you to be only relying on this as part of the factual
 24 matrix for the interpretation of the contract. You are
 25 not relying on this as giving rise to some

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1 extra-contractual fiduciary or Ebrahimi-type obligation?
 2 MR STUART: Yes, I'm not relying upon the imposition of
 3 a fiduciary duty outside the contractual --
 4 MR JUSTICE HILDYARD: Or any other equitable obligation?
 5 MR STUART: Well, to the extent that one could say that
 6 a duty to act towards one another with good faith could
 7 be described either as an implied contractual term or an
 8 equitable consideration, that's just a label that the
 9 court is --
 10 MR JUSTICE HILDYARD: But I think, possibly pedantically,
 11 I like to distinguish between contractual obligations
 12 which may include good faith or fairness, and equitable
 13 considerations which have a different source than
 14 contract. I want to know whether you're relying on any
 15 source than contract to determine the relationship
 16 between the parties?
 17 MR STUART: No. For the purposes of this debate, we are
 18 relying upon the contractual relationship between the
 19 parties --
 20 MR JUSTICE HILDYARD: For the purposes of the trial, we're
 21 not?
 22 MR STUART: Correct. And the nature of the relationship
 23 between the parties is part of the factual matrix in
 24 determining what are the obligations, properly
 25 construed, of the contractual relationship between the

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1 parties. And we say, as set out in paragraph 10, that
 2 it was an implied term of the shareholders agreement
 3 that the parties -- because of the nature of this
 4 shareholders agreement -- that the parties would act
 5 towards one another with good faith.
 6 Therefore if this clause 19.6 was exercised not in
 7 good faith, that would not be a valid exercise of
 8 clause 19.6.
 9 MR JUSTICE HILDYARD: Because it would be without the
 10 contractual power?
 11 MR STUART: Correct, because it would be --
 12 MR JUSTICE HILDYARD: Not because of any overarching
 13 obligation? I'm sorry to press it but because of my
 14 spectacles of habitually having to deal with arguments
 15 that the articles of association, being akin to
 16 a contract, mean and say one thing but nevertheless the
 17 powers apparent from them are to be subject to equitable
 18 constraint, because that has been meat and drink to me
 19 for years, I like to know whether I am to drink or eat
 20 any of that. And I think you're saying no?
 21 MR STUART: My Lord, I'm saying not insofar as you're
 22 labelling it as purely that. I spent 20 days last year
 23 dealing with a --
 24 MR JUSTICE HILDYARD: Chancery judge?
 25 MR STUART: Dealing with one of your colleagues, actually it

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1 was Mr Nicholas Strauss QC, sitting as a Chancery judge,
 2 in relation to an unfair prejudice petition where the
 3 two parties were shareholders but they were brothers and
 4 there was then this whole --
 5 MR JUSTICE HILDYARD: We're not in that territory.
 6 MR STUART: We're not in the territory of two brothers and
 7 looking at something outside the contractual relational
 8 part of this to find some equitable agreement/equitable
 9 obligation outwith -- we're not in that sort of
 10 territory.
 11 MR JUSTICE HILDYARD: Can I suggest this. I do not wish in
 12 any sense to be unfair and I appreciate the difficulties
 13 of a judge confining your case by a process of
 14 questioning. We have the luxury of a transcript.
 15 MR STUART: We do.
 16 MR JUSTICE HILDYARD: If, on review, there are matters which
 17 you feel you didn't intend to agree to, then within
 18 a narrow time limit, because otherwise the case will
 19 proceed on a false footing, you may mention those to me
 20 or your junior can have a look. So I'm not saying,
 21 right, done and dusted --
 22 MR STUART: Understood. Your Lordship is not going to hold
 23 me --
 24 MR JUSTICE HILDYARD: -- but I'm saying that I do want to
 25 have these ground rules established. Do you see?

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1 MR STUART: Yes, I do see. I'm perfectly happy to ensure
 2 that we proceed on the thrust of what we're actually
 3 asserting, not merely leave open to amble through in
 4 15 days' time --
 5 MR JUSTICE HILDYARD: Over the course of the weekend
 6 et cetera, you can look and if you feel that, "Oh, my
 7 gosh, I didn't mean that", then you must tell me but no
 8 later than --
 9 MR STUART: On Monday morning, my Lord, I will absolutely
 10 clarify if --
 11 MR JUSTICE HILDYARD: You may not need to.
 12 MR STUART: Exactly. What I have agreed to may be exactly
 13 what I want to agree to. But if I consider that I think
 14 that what your Lordship is saying is actually not what
 15 I thought I was agreeing to, then I'll correct myself on
 16 Monday morning.
 17 So, my Lord, 21 is really rehashing what I've been
 18 arguing throughout the submissions on the law, namely
 19 that this clause is a form of penalty, it's a form of
 20 termination, however one puts it. It should therefore
 21 be read restrictively in the way that other clauses of
 22 termination, of forfeiture, of penalty are to be read --
 23 have been read restrictively.
 24 I've cited in the little footnote Holt & Kitchener,
 25 my Lord. I think it's probably not a point that is much

1 in issue but that's tab 16 in your bundle, tab 16 in
 2 bundle 1. Lord Justice Lewison, then Kim Lewison QC
 3 sitting as deputy judge. Does your Lordship have that?
 4 MR JUSTICE HILDYARD: Yes, I do.
 5 MR STUART: I think it's at page 820 at G, "How does
 6 clause 6.7 come into operation". It's at I. Does
 7 your Lordship have it, "The second way...", do you see
 8 that?
 9 "The second way in which Mr Kuschke put his case on
 10 this point was by reference to the well-known principle
 11 that a contract will not be interpreted so as to permit
 12 a party to it to take advantage of his own wrong.
 13 Although the principle is not in doubt, I cannot see
 14 that it applies to this case."
 15 So he doesn't --
 16 MR JUSTICE HILDYARD: That may be applicable in this case as
 17 well.
 18 MR STUART: It may be but it will depend upon the facts as
 19 found by your Lordship once you've heard all the
 20 evidence about how and why this party, Specsavers --
 21 MR JUSTICE HILDYARD: Because if they weren't entitled to
 22 operate the clause, that's that, isn't it? I don't need
 23 to get into wrongs or anything else, do I? They're
 24 either within or without the clause?
 25 MR STUART: No but, my Lord, in interpreting the clause --

1 let us for example say that Specsavers wrongly generated
 2 some evidence of dishonesty.
 3 MR JUSTICE HILDYARD: Right.
 4 MR STUART: I won't take a hypothetical, I'll take an
 5 actual. There's a witness coming to court called Trish
 6 Lofting and she says that she did not say what
 7 Specsavers contend she said and they say that it was her
 8 saying something which led to the whole investigation in
 9 that case. Now, if it turns out that Specsavers made
 10 that up and that it was wrong and that they have then
 11 used that in order to get themselves into a position to
 12 purport to exercise clause 19.6, then this principle,
 13 although it didn't apply as Mr Justice Lewison found
 14 there, this principle might apply.
 15 MR JUSTICE HILDYARD: Original sin?
 16 MR STUART: Original sin. And it works into the question of
 17 my learned friend's subjective argument, doesn't it?
 18 Because if I subjectively have grounds to conclude,
 19 believe, whatever way he puts it, that C1 is guilty of
 20 fraud because I have deliberately chosen to ignore an
 21 explanation given by three witnesses and deliberately
 22 chosen to just rely upon one witness, for example, or
 23 what one person said about something, then that would be
 24 wrong and they shouldn't be allowed -- the clause
 25 shouldn't be interpreted so as to permit Specsavers to

1 do that. That's what the principle is. It goes to the
 2 issue of interpretation.
 3 MR JUSTICE HILDYARD: I think that might be a bit broad but
 4 so be it.
 5 MR STUART: That's the contention anyway.
 6 My Lord, paragraph 22 is really, again, rehashing
 7 points that I have made repeatedly now as I've taken
 8 your Lordship through these authorities. It's all on
 9 this issue of subject -- my learned friend's argument
 10 that this is all a subjective test to be applied to the
 11 clause.
 12 I had better delete the last sentence of
 13 paragraph 23 so that it doesn't confuse matters. Does
 14 your Lordship have that? 23 in my skeleton argument, if
 15 it's going to be said, "Well, hang on, that's what we've
 16 already deleted from the previous paragraph". It's not
 17 necessary so we don't need it.
 18 And 24 is really repeating the arguments that I've
 19 made to your Lordship.
 20 MR JUSTICE HILDYARD: Yes.
 21 MR STUART: We say that this clause is not triggered, this
 22 right to take our shares for nothing is not triggered
 23 simply where D1 might conclude or it had grounds that it
 24 might conclude. It doesn't say that and it shouldn't be
 25 read as that, it shouldn't be interpreted as that, as my

1 learned friend seeks to interpret it in his skeleton
2 argument and in his pleading.
3 My Lord, my skeleton then goes on to repudiation but
4 just before I go to repudiation, my learned friend and
5 your Lordship asked me to clarify what is my position on
6 dishonesty insofar as it feeds into clause 19.6. I did
7 promise to do that. I acknowledge, my Lord, that the
8 authority, a good authority that surmises matters fairly
9 in relation to what is dishonesty here is at tab 28 in
10 your bundle, the ODL case. I'm taking this as an
11 example because it's a recent, July 2013, High Court
12 summary of the principles that are set out in various
13 other places. So tab 28, I think it's paragraph 110.
14 Sorry, my Lord, it's bundle 2 of authorities, tab 28.
15 MR JUSTICE HILDYARD: Paragraph 110?
16 MR STUART: Paragraphs 109, 110:
17 "ODL contends that Mr McGrath's breaches of duty
18 were dishonest or fraudulent and having carefully all
19 the evidence and submissions I am satisfied that that
20 contention is correct. The appropriate test for
21 determining whether the breaches of fiduciary duty by
22 Mr McGrath were dishonest or fraudulent is that
23 developed particularly in the context of claims for
24 dishonest assistance in breach of trust, that someone is
25 dishonest [these are the important words, my Lord] if he

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1 fails to act as an honest person in his position would
2 have acted regardless of whether he [one might add the
3 word "subjectively"] honestly believed that he was
4 honest."
5 So I agree that the test of dishonesty here is an
6 objective one that one must look at, that someone is
7 dishonest if he fails to act as an honest person in his
8 position would have acted regardless of whether he
9 personally honestly believed that he was honest.
10 Because some people, some not very honest people, might
11 consider themselves perfectly honest but actually
12 according to the norms of humankind --
13 MR JUSTICE HILDYARD: You can't set up your own moral code
14 as a test.
15 MR STUART: Correct. I accept that and concede that. So if
16 that assists, then --
17 MR POTTS: My Lord, just on paragraph 22 of my friend's
18 skeleton, just for clarity, halfway down:
19 "It was unreasonable that someone would presume that
20 they would only lose their livelihood and shareholding
21 if they themselves were guilty of fraud or dishonesty of
22 a material kind. To commit fraud or dishonesty of
23 a material kind involves knowledge that what one is
24 doing is wrong. If one knowingly risks their livelihood
25 by actually acting fraudulently or dishonestly, then

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1 they can reasonably be held to suffer the penalty."
2 I think my friend is saying that that should go.
3 MR STUART: Not should go, but that I accept that the test
4 of dishonesty is -- someone is dishonest if he fails to
5 act as an honest person in his position would have
6 acted.
7 MR POTTS: They are two mutually inconsistent statements.
8 I would just like him to say which one he is actually
9 putting his case on.
10 MR STUART: They are not mutually inconsistent. To commit
11 fraud --
12 MR JUSTICE HILDYARD: Well, I think they could be thought to
13 be so because, on the one hand, you've got to know that
14 what you're doing is dishonest --
15 MR STUART: Not dishonest. Wrong. That you would know it's
16 wrong. To commit fraud or dishonesty of a material kind
17 involves knowledge that what one is doing is wrong.
18 But I accept that the test of dishonesty, for the
19 purposes of clause 19.6, because this is a clause that
20 is to be subject to English law, the test of dishonesty
21 is the objective test of dishonesty, that is: does
22 a person fail to act as an honest person in his position
23 would have acted? It is not, in my submission,
24 a particularly relevant matter anyway here because these
25 are all hypothetical.

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1 MR JUSTICE HILDYARD: Well, my understanding is that it
2 could be relevant because I think your clients do not
3 consider it wrong to withdraw from a company monies by
4 way of salary to which they might otherwise have been
5 entitled by way of dividend. Their view in that regard
6 may be questioned, and I think you're accepting that if
7 it is wrong and dishonest to do that, by objective
8 standards, then they were dishonest in doing it?
9 MR STUART: If they have acted in a way or if they have
10 failed to act as an honest person in their position
11 would have acted, then they're dishonest as per the
12 objective definition of dishonesty.
13 MR JUSTICE HILDYARD: All right.
14 MR STUART: The only reason I've even raised the issue in 22
15 is as to what is the proper interpretation of
16 clause 19.6, and the fact that, when one is looking at
17 what the parties must have intended at the time that
18 they made that contract, what would a reasonable person
19 have -- what would they have had in their mind. My
20 learned friend is at pains to point out that
21 your Lordship is not going to determine whether they
22 were in fact dishonest.
23 MR JUSTICE HILDYARD: Assuming it goes to what I understand
24 to be your defence, put in your claim, your answer at
25 one level, which is to say -- and I'm sorry to use the

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1 vernacular -- "oh, for goodness sake, they were my
2 monies". That is part of your defence?
3 MR STUART: That is part of my defence, yes, and I don't shy
4 away from saying that an honest person, acting with
5 their own money, even though that money could be paid
6 out to them as dividend, or as salary, or as some other
7 thing, an honest person could have reached the
8 conclusion that they were acting honestly and could have
9 acted in that way.
10 MR JUSTICE HILDYARD: Anyway. Whatever made be say it in
11 paragraph 22, you accept that the test of dishonesty for
12 these purposes is the test recorded in paragraph 110 of
13 the ODL case?
14 MR STUART: Yes.
15 MR JUSTICE HILDYARD: And we should read paragraph 22
16 insofar as it might be thought to say something
17 different as controlled by that test?
18 MR STUART: Absolutely.
19 My Lord, I see the time, but I think I could
20 probably wrap up legal argument by reference to the last
21 bit of legal point that I make at page 17 of my
22 skeleton, paragraphs 25 and 26, under the heading of
23 "Repudiation and its effect". So if your Lordship would
24 just bear with me for a few minutes, just on this point.
25 MR JUSTICE HILDYARD: Yes.

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1 MR STUART: What is repudiation is set out in Chitty,
2 paragraph 24. This is in tab 29 of your Lordship's
3 second bundle. You have Chitty. We've previously
4 looked at chapter 13 on implied terms.
5 MR JUSTICE HILDYARD: Which paragraph of your skeleton?
6 This is 25.
7 MR STUART: I'm at 25. As I say, I'm not sure there's any
8 real issue between the parties as to the legal
9 principles involved in repudiation. They're well
10 settled; they're summarised in 24. The only potential
11 issue seems to be about acceptance of repudiation.
12 There seems to be an issue between us as to that.
13 I say:
14 "D1 appears to contend that it is necessary for us
15 to accept the alleged repudiation, presumably on the
16 basis that breaches contended for are anticipatory
17 breaches or breaches of an executory [not executor]
18 contract. But even if that were so, which is not
19 accepted by Cs, an act of acceptance of repudiation
20 requires no particular form."
21 I cite Chitty 24-013, which your Lordship has, as
22 I say, in tab 29.
23 Page 1706 of Chitty, does your Lordship have that?
24 "Where there is an anticipatory breach, or the
25 breach of an executory contract and the innocent party

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1 wishes to treat himself as discharged, he must accept
2 the repudiation."
3 Citing Heyman v Darwins and then citing
4 Vitol v Norelf, et cetera. You do have copies of those
5 in your bundles.
6 "It is usually done by communicating the decision to
7 terminate to the party in default, although it may be
8 sufficient to leave evidence of an unequivocal overt act
9 which is inconsistent with the subsistence of the
10 contract."
11 In other words, one doesn't actually have to show
12 a letter going back saying, "We hereby accept your
13 repudiatory breach of this contract".
14 As Chitty puts it, it requires no particular form.
15 And that's citing the Stage Trading Corp of India v
16 Golodetz case and Vitol, as I say.
17 My Lord, paragraph 26 of my skeleton. What are the
18 alleged repudiatory breaches by D1? They are fully
19 listed for you in the list of issues, and I don't shy
20 away from that or seek to go beyond it, or behind it, or
21 anything. I say just simply go to the list of issues
22 number 3, subsections 3.1, 3.2, 3.3, 3.4, 3.5, 3.6
23 and 3.7. Those are what we say are the repudiatory
24 breaches, one or a combination of more than one of them.
25 My Lord, as I say, I think I've probably used up

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1 much more than my time. But that, in relation to what
2 we've called the law and on the understanding that
3 your Lordship is going to give me the opportunity to
4 correct things if I've got them slightly wrong
5 somewhere, and that you're not actually planning to give
6 any judgment on any particular preliminary issue of any
7 sort that hasn't yet been -- at a preliminary stage,
8 those would be my submissions on the law for these
9 purposes.
10 Does your Lordship have anything?
11 MR JUSTICE HILDYARD: Thank you very much indeed.
12 Mr Potts, 2.05?
13 MR POTTS: My Lord, yes.
14 MR JUSTICE HILDYARD: Will you conclude by 3.45?
15 MR POTTS: I will, on the opening.
16 Just in terms of opening, my friend in his skeleton
17 doesn't touch on the facts. This is not meant as an
18 insult, but there's no opening on the facts in his
19 skeleton. Is my friend ... that's it, is it? I just
20 wanted to...
21 MR STUART: I'm in your Lordship's hands entirely and
22 I started trying to say this yesterday and we got
23 slightly sidetracked on to the law. That's it on the
24 law from me and, I understand, my opening as to the law.
25 We put in our little chronology for how the case is to

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1 run, that after each side's -- does your Lordship have
 2 that? It's tab 5.
 3 MR JUSTICE HILDYARD: Yes. We should by now be into the
 4 evidence, but for one reason or another we started
 5 late --
 6 MR STUART: We've got a little late. The next item might
 7 have been claimant's specific opening on Bognor, by
 8 which I think what we had in mind was your Lordship
 9 might want a detailed opening on the facts of the Bognor
 10 case, ie for me to take you through in detail the actual
 11 documents that are relevant, et cetera, et cetera,
 12 et cetera. But I'm very much aware that many of
 13 your Lordship's colleagues no longer wish to have that
 14 done to them. They would rather get on and hear the
 15 evidence.
 16 MR JUSTICE HILDYARD: I think Mr Potts is making a point and
 17 raising a query.
 18 MR STUART: Yes.
 19 MR JUSTICE HILDYARD: The point he makes is that, usually,
 20 the judge has some written summary of the salient facts
 21 to get his teeth into.
 22 MR STUART: Yes. My Lord, I say those salient facts are set
 23 out in the pleadings. These pleadings are rather more
 24 extensive than some one we sees somewhere. Once
 25 your Lordship has read our pleading, it sets out all the

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1 facts that we rely upon. If your Lordship has then had
 2 an opportunity to read our main witness statements which
 3 have the main documents relied upon in relation to those
 4 facts highlighted in bold for you, if you wanted to go
 5 to a certain document -- I'm in your Lordship's hands.
 6 I am very happy on Monday morning to open this case.
 7 MR JUSTICE HILDYARD: No, no, I think the point is that
 8 skeleton arguments are meant to save the court some time
 9 and to say to the court, look, it's all there somewhere,
 10 have a good look at it --
 11 MR STUART: Of course, but skeleton arguments are not --
 12 MR JUSTICE HILDYARD: Causes more problems, in a way.
 13 But anyway that's what you want to do.
 14 The question is whether you wish to use any part of
 15 this afternoon and, if so, what part, to emphasise those
 16 points which you think you should to set me on a fair
 17 course to understanding the evidence. I leave that to
 18 you.
 19 MR STUART: On the basis that your Lordship doesn't want to
 20 be taken to the evidence -- I can happily take you to
 21 the evidence as well, but that will be quite a --
 22 MR JUSTICE HILDYARD: No. It's just a question of whether
 23 you have some directional points, some signposts,
 24 some summaries, something which you think would briefly,
 25 without delving into the documents except where you

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1 thought, you know...
 2 If this case is at all standard, there will be
 3 a very finite number of documents which will become
 4 dog-eared and the rest of them will become ignored.
 5 MR STUART: Exactly, my Lord.
 6 MR JUSTICE HILDYARD: If there are some dog-eared ones which
 7 you think I should start appreciating, or if there are
 8 some points by way of overall direction to assist me
 9 with the witnesses which you think I should have, then
 10 now is your time.
 11 MR STUART: Okay. My Lord, the position is I do have -- I
 12 have a document which I was --
 13 MR JUSTICE HILDYARD: How long will that take?
 14 MR STUART: To take you through it briefly?
 15 MR JUSTICE HILDYARD: Yes.
 16 MR STUART: With the assistance of my document and without
 17 going to each and individual dog-eared document, but
 18 just to give you the heads-up, as it were, on the
 19 overall -- that would take about twenty minutes.
 20 MR JUSTICE HILDYARD: Right. If we do that, will you be
 21 able to finish by 3.45, or not?
 22 MR POTTS: I hope so, my Lord. I would like to start the
 23 evidence fresh on Monday.
 24 MR JUSTICE HILDYARD: I am partly saying it because I will
 25 rise, I'm afraid, at 3.45 and we will have to have some

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1 break in the proceedings for the transcript writers.
 2 We will curtail our short adjournment and return at
 3 2.05.
 4 (1.07 pm)
 5 (The short adjournment)
 6 (2.05 pm)
 7 SUBMISSIONS ON FACTS
 8 Submissions by MR STUART
 9 MR STUART: So, my Lord, a 20-minute gallop through the
 10 factual issues and some pointers towards where you might
 11 find the evidence. I'm not going to take you through
 12 all the evidence now, but so at least you have an
 13 aide memoire and a summary idea of what the issues we
 14 say are.
 15 I've handed up to your Lordship two documents.
 16 MR JUSTICE HILDYARD: Yes.
 17 MR STUART: The one is part of the other, as it were.
 18 There's a short document, which says "The list of areas
 19 of factual dispute". Does your Lordship have that?
 20 MR JUSTICE HILDYARD: Yes.
 21 MR STUART: Which literally lists out what I take to be the
 22 central areas of factual dispute that are likely to
 23 arise. This is in relation obviously to Bognor only at
 24 this stage.
 25 Then using those headings, if you like, the larger

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1 document is the one perhaps I'll use for the moment, for
 2 today's purposes, under those headings. The second
 3 document then just picks out and highlights some of the
 4 key areas of evidence that your Lordship is likely to
 5 have in mind when dealing with those factual disputes.
 6 Does your Lordship have that?
 7 MR JUSTICE HILDYARD: Yes.
 8 MR STUART: So, my Lord, as I say, dealing with it very
 9 quickly, the first area that I maintain is the question
 10 of Mr Vos' work. There is plainly a substantial issue
 11 as to what work he actually did, and we say that the
 12 contemporaneous evidence, for example, over on page 2 of
 13 my note, the fifth item down, E2, page 475, notes of
 14 a management meeting showing the heavy involvement of
 15 Mr Vos in the interviewing, recruitment matters. At
 16 E2/493, there are management meeting notes showing that
 17 he was responsible for staff discipline and dealing with
 18 opt-on requirements.
 19 An example, you see E2/522, even Ms Laker, who is
 20 actually making a complaint against the second claimant,
 21 so it cannot be said that we are in some way using our
 22 own friends here, what they say. This is in what she
 23 said about Mr Weller, she wrote:
 24 "I am also very confused as to who is in charge at
 25 Bognor because I always believed there to be three

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1 directors, Dr Poulsen, Mr Godfrey Vos and Barry Weller.
 2 Any queries we had, or days off, required holidays, all
 3 had to go through Godfrey. Recent correspondence has
 4 all come from Godfrey."
 5 We say that the contemporaneous evidence was quite
 6 clear, and this was evidence that was available to
 7 Specsavers and would have been available to them on all
 8 of this sort of thing and there is lots of similar
 9 stuff.
 10 Just over the page, page 3 of my note, my Lord,
 11 fifth item down, just to be clear as to what the
 12 defendants', Specsavers', view as to this issue was at
 13 the time, back in October 2010:
 14 "I have caught up with Mark Raines reference this
 15 issue. We will not be taking action as the store is not
 16 showing signs of financial difficulty and we believe
 17 that both partners are aware."
 18 That is both partners are aware of the large
 19 payments that have been made to Mr Vos for all the work
 20 that he's doing. Absolutely the partners are aware. So
 21 are Specsavers aware. So for them now to suggest that
 22 this is some sort of fraud and dishonesty because of the
 23 amount of and the nature of the work he was doing wasn't
 24 anywhere near what he was being paid for is just simple
 25 nonsense.

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1 1.2, how many hours did he actually work? That's
 2 going to be a very hard matter for anybody to prove,
 3 isn't it? But there is contemporaneous evidence as set
 4 out here as to the amount that he worked. Meetings,
 5 notes of meetings recording that, certainly by
 6 March 2011 -- this is page 4, my Lord, the fourth item
 7 down -- recording that Mr Vos was then working
 8 full-time. He was working full-time. So D1's
 9 contention that somehow we knew he was just a part-timer
 10 and, frankly, it was nonsense that he should be paid
 11 such a large amount of money given what a full-timer was
 12 due to be paid, it's just not right.
 13 E4/864, Mr Rajan, this is a Specsavers man, not us.
 14 Mr Rajan's notes at the same meeting record Mr Weller
 15 having stepped back two years ago. So this contention
 16 that somehow they weren't aware that Mr Vos had taken
 17 over the role of Mr Weller because of Mr Weller's very
 18 unfortunate illness is just not right.
 19 Did he work overtime in addition to his contracted
 20 hours? Yes, he did and it's within his terms and
 21 conditions, for example, that he should do so. There's
 22 plenty of evidence to support that.
 23 Has he been paid overtime by Bognor for work not
 24 done? There's no actual evidence of that. There's no
 25 evidence that he actually was paid for work that he had

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1 not done. They can't prove one way or the other what
 2 work he did; they don't even try to.
 3 If so, did the claimants know or should they have
 4 known this to be the case? Well, the defendants, they
 5 say that both partners are aware, but that's the
 6 document that I just took you to.
 7 So that's one side of the Mr Vos allegation. The
 8 second allegation is about Mr Ferguson. He's not
 9 Mr Vos, he's not married to the first claimant, but it
 10 is suggested that somehow the payments to him were
 11 fraudulent and dishonest. No proper basis for alleging
 12 fraud and dishonesty is provided. No proper evidence
 13 that these -- I don't even know what is being suggested
 14 happened to these payments or why the claimants should
 15 pay sums of money to a man who does work for the store
 16 beyond that which they think they should.
 17 But anyway, that's the allegation.
 18 As to the work that he did, 2.1, that's evidenced in
 19 various documents at the time, including Mr Weller's
 20 evidence in his witness statement or in addition to
 21 Mr Weller's evidence in his witness statement referring
 22 to the schedules.
 23 As to how many hours of work he did, well, again,
 24 the defendants can't actually produce evidence of all
 25 the work that he did or didn't do, dates, times,

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1 et cetera. They seek to draw inferences, but we say
 2 that's not a proper basis for anything.
 3 On what basis was he paid? He was paid on the basis
 4 of the letter to him setting out what he was being paid.
 5 And the payments are made, they're all there, they're
 6 all documented, they're not hidden. These payments
 7 aren't secret or dishonest. They're all paid properly
 8 and they're paid actually through Specsavers. My Lord
 9 must remember that fact: payments in this case are made
 10 by Specsavers, not by the companies.
 11 Has he been overpaid? Well, the sum total of the
 12 defendants' case seems to be, well, over a five-year
 13 period, we've added up all the payments we, the
 14 defendants, have paid to Mr Ferguson, and it comes to
 15 £94,000. And we think that's too much. That's not
 16 a proper basis for asserting fraud and dishonesty
 17 somehow implying that you take five years, you come to
 18 94,000, you divide one by the other and that's 18,000
 19 a year and we think that's too much. That's no basis at
 20 all.
 21 Did we know or should we have known? Yes, of course
 22 we knew; the defendants knew as well.
 23 So the other side of the allegation about Mr Vos is
 24 Mr Weller's work. The defendants seem to be raising as
 25 an issue whether or not Mr Vos actually did take over
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1 Mr Weller's role. We say he did, they say no, he
 2 didn't. The evidence is that he did, and I've already
 3 taken you, my Lord, to E/864 as an illustration of the
 4 fact that even at the time back in March 2011, all of
 5 this was quite openly and proper done.
 6 There's a factual issue about the grievance by
 7 Ms Laker, and that factual issue about Ms Laker feeds
 8 into one of the assertions of repudiatory breach being
 9 that Specsavers didn't deal properly with the
 10 allegations and that's 4.2 "SOG's use of the situation".
 11 My Lord, this is an example on page 7, item 4.2:
 12 "SOG's use of this situation."
 13 This is an example, we say, of contemporaneous clear
 14 evidence of what Specsavers' real motivation here is.
 15 They come before you, my Lord, saying, oh, all we're
 16 here to do is to maintain the good public persona of the
 17 name and to protect it. No, my Lord, that's not right,
 18 is it? Look at page 517, Mr Rowe writing to Mr Moylan
 19 in the following terms:
 20 "Good news, just had a grievance letter alleging
 21 bullying by the Bognor Regis directors."
 22 Four exclamation marks. They want to use any
 23 allegations they can against the Bognor Regis directors.
 24 This then feeds into the next factual question which
 25 is the question of were they running a vendetta against
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1 us or not? There were various sub-issues within that --
 2 banking arrangements, the dual company structure, the
 3 use of optimisation, the Sunday trading. The Sunday
 4 trading issue which, of course, is one that also repeats
 5 itself in the Parhams' case, but I won't go on to that
 6 yet.
 7 I'm on page 9 now of my note. Your Lordship will
 8 see references to various emails from Specsavers, the
 9 fourth one down, and email from Tim Smart:
 10 "Derek has asked that we ramp up the pressure."
 11 That's what they want to do.
 12 Further on, E3, page 729:
 13 "The Board are frustrated that the progress we made
 14 has stagnated. I have personally committed, if you're
 15 struggling to gain traction I would recommend a speedy
 16 escalation to Dave Clark."
 17 Exactly, let's see what tactics Specsavers are now
 18 prepared to use in order to achieve their aims.
 19 Mr Clark, then, 735:
 20 "I have capacity to take on another two stores."
 21 We know what that then turns into. It turns into
 22 the alleged investigation and it has nothing to do with,
 23 as it is said by Specsavers now, oh, we only started
 24 investigating because we heard that Mr Weller wanted to
 25 sell his shares. The path through which we get here is
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1 nothing to do with Mr Weller selling his shares, that
 2 causes us to look into it. It's: we've got to deal with
 3 these people -- and we'll see what they say about these
 4 people in a moment -- and we'll ramp it up, we'll
 5 escalate, we'll take on these two stores.
 6 Then 5.1.5, the other initiatives, including the
 7 mystery shopper. Plainly that caused a certain amount
 8 of acrimony. Ending on page 10, my Lord, the last item
 9 I've got there, the response is:
 10 "I have also just read the extremely rude and
 11 threatening..."
 12 It is quite plain that, for whatever reason,
 13 Specsavers' head office staff didn't like Dr Poulsen.
 14 They didn't like her manner and they didn't like the way
 15 she acted, perhaps because she stood up to them. So the
 16 proof of the vendetta -- and this is key, my Lord --
 17 page 11, I've listed here some of the emails. Take the
 18 second one down, Mr Rowe and Mr Deane:
 19 "I am cancelling one day of my holiday to get to
 20 Bognor. She will not escape. Something to look forward
 21 to. I can guarantee I will upset her."
 22 That's very early on in the chronology, but it all
 23 goes through. E2/299, the next two items down:
 24 "Have these been checked by legal, as we have any
 25 leverage for this to be investigated I would like it to
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1 be."
 2 Two on:
 3 "Helle is on my hit list. This needs to be dealt
 4 with."
 5 Mr Rowe, 355:
 6 "I'm then going to get a BRM sorted and go to war."
 7 BRM is a business review meeting, my Lord.
 8 So this is the way in which they go to war. They
 9 start it by a business review meeting, they turn it into
 10 an issue. Once that issue isn't then resolved to their
 11 satisfaction, they turn it into a reason to investigate,
 12 as they put it, and escalate it to that. Then they
 13 escalate it to a completely false allegation of fraud.
 14 We then in the chronology here, we then have the one
 15 about the good news, just had the grievance. So this
 16 how that is all part of the ongoing strategy.
 17 Over the page, 12, at the top:
 18 "Do we need an escalated action to get Helle to see
 19 that they are part ..."
 20 What's an escalated action, your might ask? And
 21 we'll see what it is in a moment.
 22 689:
 23 "Should we now have a strategy for dealing with
 24 Bognor once and for all?"
 25 Dealing with Bognor once and for all? It's quite

1 2 1

1 plain they've decided they're going to get them out.
 2 Then the Sunday trading matter comes up.
 3 Mr Dyson to Mr Raines on 10 January 2011, document
 4 739. 10 January 2011, that's a crucial point in the
 5 chronology. As he puts it:
 6 "Can you get under the skin of this and develop
 7 a plan to resolve and put her back in her box, or an
 8 exit plan?"
 9 Yes, they want a plan to get her out, or to force
 10 her, bully her into doing what they say.
 11 The answer from Mr Raines to Mr Dyson:
 12 "I am aware of this and it is on my agenda. Agreed
 13 the objective is to exit if poss."
 14 So that's their preferred option: let's get her out.
 15 "Mike Rowe is establishing what is actually
 16 happening here in terms of people's agendas before
 17 deciding the best way to achieve the objective".
 18 Mr Dyson to Mr Ryan:
 19 "We need to stick to the party line and our agreed
 20 process, which no doubt you will already be planning.
 21 We need to write to them explaining the roadmap, and if
 22 she wants to go, then so be it."
 23 Then things become a little more opaque. We don't
 24 see quite what's going on, but one can infer from the
 25 nature of the emails that I've set out thereafter,

1 2 2

1 including the last one:
 2 "Of course I understand."
 3 What does he understand?
 4 So within all of that, my Lord, within all of that
 5 ongoing process we've got the subsections of what
 6 happened in March 2009, the delaying of the bonuses in
 7 2011, the proposed sale of the shares from Mr Weller and
 8 the way in which they, Specsavers, prevented that, which
 9 we say is frustrating a proper execution of this
 10 contract.
 11 I see the time. I'm just rushing through.
 12 My Lord, we then come on to some other issues of
 13 fact. They're perhaps more peripheral, but in our
 14 submission, they go very much so that your Lordship can
 15 see the genuineness of SOG's case here. Item 7, letters
 16 of representation. I'm not sure whether your Lordship
 17 has this firmly in mind. It's not something that cries
 18 out from the pleadings.
 19 Can I just take your Lordship to -- it's the only
 20 document I'm going to take you to, or documents. E2,
 21 sorry, we're in the white bundle, does your Lordship
 22 have it? E2?
 23 MR JUSTICE HILDYARD: Yes.
 24 MR STUART: Page 364. A letter from Specsavers Optical
 25 group. Sorry, 364/1.

1 2 3

1 MR JUSTICE HILDYARD: Yes.
 2 MR STUART: Then we see that these letters are letters to
 3 the auditors. The first one is in 2008.
 4 MR JUSTICE HILDYARD: Hmm-hmm.
 5 MR STUART: The next one, page 364/3-4 is in 2009. The next
 6 one, 364/5-7 is 2010.
 7 MR JUSTICE HILDYARD: Yes.
 8 MR STUART: 364/8-9, now we're getting into the material
 9 time period.
 10 MR JUSTICE HILDYARD: Yes.
 11 MR STUART: Signed by the defendants on behalf of the board
 12 of directors of Specsavers. The third paragraph down on
 13 364/9, does your Lordship have it?
 14 MR JUSTICE HILDYARD: Yes.
 15 MR STUART: "To the best of our knowledge we are not aware
 16 of any fraud or suspected fraud involving management or
 17 employees. Additionally we are not aware of any fraud
 18 or suspected fraud involving any other party that could
 19 materially affect the financial statements. To the best
 20 of our knowledge we are not aware of any allegations of
 21 fraud or suspected fraud affecting the financial
 22 statements that have been communicated by employees,
 23 former employees, analysts, regulators or any other
 24 party."
 25 Et cetera.

1 2 4

1 Your Lordship will see at page 364/10-11 an
2 equivalent certification to the auditors for 2012, dated
3 20 March 2012. Do you have that on page 364/11?
4 MR JUSTICE HILDYARD: Hmm-hmm.
5 MR STUART: And even 364/13. So now we're into March 2013.
6 The first two paragraphs on page 13:

7 "To the best of our knowledge, we are not aware of
8 any fraud or suspected fraud involving management or
9 employees. Additionally, we are not aware of any fraud
10 or suspected fraud involving any other party. To the
11 best of our knowledge we're not aware of any allegations
12 of fraud or suspected fraud."

13 So how genuine, my Lord, in those circumstances, is
14 the reliance placed by Specsavers now in order to get
15 them home on clause 19.6 upon an assertion that in 2009,
16 2010, 2011, all the directors of the company and the
17 main employee were all party to some sort of fraud or
18 dishonesty?

19 The explanation my Lord sees, according to the
20 defendants now, is it was a mistake. Well, we can all
21 mistakes, I suppose, but we will ask your Lordship to
22 draw a different inference to that.

23 My Lord, issue 8, the issue of how the alleged
24 discovery of financial irregularities came about.
25 I think your Lordship has probably picked up already the

1 25

1 nature of the battle ground there. We do not accept
2 that this was discovered by some genuine -- somebody
3 blowing a whistle or something happening, they just
4 suddenly came across it. What happened here is they
5 have sought to create an issue as to payments and
6 they've inevitably drawn a conclusion that there are
7 issues as to payments, and then they've drawn
8 a conclusion that those issues as to payments are
9 grounds to conclude fraud and dishonesty, or dishonesty.
10 We say that the contemporaneous evidence of how it
11 actually happened doesn't fit that explanation, and I've
12 cited for you, just as an aide memoire, some of the key
13 documents in the chronology.

14 My Lord, number 9, there's plainly a factual issue
15 about the creation of these documents that were said to
16 be created by Mr Vos and/or the claimants during the
17 course of the investigation. These are documents
18 essentially about Mr Vos going on the payroll, there
19 being a contract of employment for him which appears --
20 which is plain, actually, the actual physical document
21 that was available by 2011 must have been a document
22 that was printed not on 1 May 2009, which is its
23 purported date, et cetera. Mr Vos has -- the claimants
24 acknowledge, admit, that those documents were generated
25 in the way in which they say they were and that they

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1 don't -- those copies of the documents weren't generated
2 on the dates of the documents. There is an explanation
3 given as to that, and it is going way over the top to
4 suggest that generating a copy of a document and
5 printing it off on paper that exists in 2011 is fraud
6 and dishonesty.

7 It doesn't make any sense anyway, my Lord. Just
8 take a step back. What we're dealing with here is
9 Mr Vos' contract of employment. It was the defendants
10 who required Mr Vos to be employed. They, the
11 defendants, did not want him to carry on being
12 a contractor putting in invoices. They wanted him to be
13 employed.

14 There was then a hiatus whilst he wasn't employed
15 and they had to remind the claimants to employ him,
16 please, and then he was employed and all his employment
17 salary, remuneration, bonuses and overtime was paid by
18 the defendants, not by the claimants. The claimants
19 authorised the defendants to pay it. All the monies are
20 paid through the central banking system of the
21 defendants.

22 So none of this was done surreptitiously. There's
23 no reason to backdate a contract dishonestly or
24 fraudulently because we all know when Mr Vos became an
25 employee, and we know why. And the defendants were

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1 involved in the setting-up of the employment and the
2 carrying on of the employment.

3 So it just simply is not right as a matter of fact
4 to assert that simply because a letter doesn't bear a --
5 was copied out on a date not bearing its name is somehow
6 fraud and dishonesty, and the claimants' explanations
7 for those are set out. The references to them are
8 paginated there.

9 Mr McGowan is a peripheral matter, my Lord. He was
10 the investigator sent to effectively bully Mr Weller.
11 And the issue of the tax implications, my Lord. There's
12 a late witness statement -- I forgot to ask my learned
13 friend whether he has yet got instructions on whether
14 that witness statement is allowed to go in
15 unchallenged --

16 MR POTTS: There are just two points. There's a late
17 witness statement. I don't accept it contains any
18 evidence at all. It contains a lot of submissions and
19 the two statements are actually in identical terms.
20 I have no objection to your Lordship looking at them,
21 but my formal view is I don't think they actually
22 contain evidence, my Lord. But I don't have a violent
23 objection to them going in just to get things moving.

24 MR STUART: That's fine. I think your Lordship will be able
25 to deal with those when Mr Vos and Ms Parham --

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1 MR JUSTICE HILDYARD: So they're to go into the bundle and
2 I'm to attach appropriate weight or not.
3 MR POTTS: Yes, I think so, my Lord.
4 My Lord, there's just one other point on the witness
5 statements -- no, I'll leave it for today. I want to
6 crack on.
7 MR STUART: My Lord, I've again overrun my time. I'm
8 terribly sorry. That's a trot, rather than an amble
9 through. That's a gallop through and that's document
10 which -- obviously my learned friend has it now as well,
11 but it's an aide memoire with some page references which
12 might turn into a core bundle.
13 MR JUSTICE HILDYARD: No, no, that's useful. Thank you.
14 SUBMISSIONS ON LAW (continued)
15 Submissions by MR POTTS
16 MR POTTS: My Lord, can I take your Lordship first to my
17 skeleton argument. I'm going to address briefly some
18 points on the law. I'm then going to show you -- I'm
19 not going to take you through lots of documents at all,
20 but I will give you some headlines of some particular
21 documents perhaps for some reading, if I may. A few, a
22 very few documents, and I'll see if I can deal with this
23 quite quickly.
24 What I'm actually going to do, given this is a case
25 about construction, I'm actually going to show you the

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1 agreement, which might be helpful. Just before I do
2 that, can I show you paragraph 95? I've shown you this
3 briefly, but could your Lordship just read perhaps
4 paragraph 94, the points raised there. That just sets
5 the framework for what I'm going to be dealing with.
6 (Pause)
7 MR JUSTICE HILDYARD: Yes.
8 MR POTTS: My Lord, that in a nutshell is what we say the
9 clause means in terms of construction and those are the
10 points which I'll come back to and touch on in terms of
11 the relevant law.
12 Can I then take your Lordship to the shareholders
13 agreement itself. If your Lordship has volume D, this
14 is the constitutional file. It's at page 94. I think
15 this is a document which may go into the dog-eared
16 category.
17 MR JUSTICE HILDYARD: Yes. 94?
18 MR POTTS: My Lord, yes. I'm just going to take you through
19 this if I may.
20 Firstly, just in relation to parties, you've got
21 Specsavers -- I'm going to refer to it as SOG, which is
22 my main client -- then we have Dr Poulsen, optician, and
23 Mr Weller, retailer, and then the company, which is
24 Specsavers Limited, and then there is also, in this
25 case, Visionplus Limited. I'll come on to that in

1 30

1 a little bit when we discuss the dual company matter.
2 But in terms of this, the shares are held -- in
3 paragraph 3 -- 60 shares to the optician, 40 to the
4 retailer. Paragraph 5 deals with the management fee,
5 which is SOG's management fee. Then the business, we
6 have some definitions. There's the business of the
7 retail opticians under the trademarks, and those are
8 SOG's trademarks, from a retail store and the sale of
9 goods as offered by other Specsavers stores in the
10 British Isles.
11 Then we have over the page the manual, which is:
12 "The specification of the methods, processes,
13 techniques, systems, et cetera, which Specsavers
14 considers appropriate to be in the interest of the
15 company and all Specsavers stores generally in the
16 British Isles."
17 That's relevant when you see the definitions of
18 management, because there have been lots of references,
19 my Lord, to this being "our store" by the claimants
20 and -- in terms of -- let's just have a look at 3.1 in
21 terms of the delegation:
22 "The directors agree to divide responsibility for
23 the management of the day-to-day operation of the
24 business in accordance with the Specsavers manual."
25 So that's actually how it's divided. It's as

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1 specified in the manual.
2 "While the provisions of the manual shall always
3 take precedence, the directors hereby delegate to the A
4 directors primary responsibility to attend at the
5 premises to manage the operation of the business in
6 accordance with the manual, and to the B directors [we
7 are the B directors] all powers of signing all cheques,
8 bank and treasury mandates, transfer of funds and other
9 instructions..."
10 And so on.
11 Then there are listed a whole number of matters in
12 3.2, which are not day-to-day operational issues for the
13 A directors, including, 3.2.9:
14 "An increase in salaries or rates of pay of
15 employees by more than 5 per cent."
16 3.2.11:
17 "Entering into contracts or expenses or obligations
18 outside the ordinary course of business."
19 3.2.13:
20 "The appointment of any professional adviser or
21 consultant in relation to the business."
22 3.2.15:
23 "Change the policies and systems of any group
24 company from those set out in the manual, including
25 relating to purchasing, pricing, merchandising,

1 32

1 training, budgeting, contracts, IT systems, employment,
 2 payroll, audit, banking and administration."
 3 3.3 deals with all matters not part of the
 4 management to be determined at a duly convened meeting
 5 of the board. SOG controls the board.
 6 "Any dispute as to whether a matter constitutes part
 7 of the day-to-day operations shall be determined by
 8 Specsavers whose decision is final and binding."
 9 And then there's an issue at 3.8 about complaints
 10 and that Specsavers -- there's an obligation to notify,
 11 and Specsavers will be entitled to deal with the
 12 complaint against company and personnel.
 13 Clause 4 deals with the dividend policy. The
 14 suggestion that everything -- they're entitled to take
 15 whatever money out they like.
 16 4.1, there is a dividend policy, they shall have
 17 profits --
 18 "If there are profits available for distribution,
 19 shareholders procure that such profits shall be applied
 20 in payment of cash dividends to the maximum level
 21 provided that all loans have been repaid."
 22 3.1.2 is:
 23 "Provision towards the cost of a shop fit."
 24 3.1.3:
 25 "Other transfers to reserves as the board of

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1 directors consider to be reasonably prudent or
 2 necessary," and then there's a dispute resolution.
 3 5 deals with the management fee payable to SOG,
 4 which I took your Lordship to on the definitions,
 5 referable to gross sales.
 6 6 is a clause in relation to presentation, brand
 7 presentation:
 8 "The company permits Specsavers to erect at the cost
 9 of the company a sign showing trademarks ..."
 10 And then there are obligations on the company to
 11 keep the premises fitted out and dressed, point of sale,
 12 et cetera, et cetera. All in relation to presenting the
 13 Specsavers brand.
 14 6.3, again, is there's an obligation to do a fit-out
 15 every five years.
 16 7, a positive obligation to participate fully in
 17 national and regional promotions and, again, sole
 18 discretion of Specsavers. Again, advertising, marketing
 19 strategies and so on. So 7 deals with all of that.
 20 8 deals with the stocks and, again, the obligation
 21 is to use the Specsavers stocks.
 22 Paragraph 9 deals with accounting, and 9.2,
 23 particularly in term for an accounting fees:
 24 "Specsavers will supply the monthly management
 25 accounts based on the information supplied by the group

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1 companies in accordance with this agreement."
 2 And then there's an obligation to use a computer
 3 system in paragraph 10, to use hardware as specified by
 4 Specsavers and to ensure that the system is operated.
 5 Group Treasury is at 11, the point made about making
 6 payments, which is that they're credited to the account
 7 of the group company as nominated by Specsavers and we
 8 sign the cheques.
 9 13 is on training. Again, an obligation that we can
 10 specify training requirements in accordance with the
 11 manual, arrange an annual national seminar and an
 12 obligation under 13.2 that the A director and such other
 13 grades will attend and complete those seminars, and so
 14 on. Reimbursed for costs. Then an in-store training
 15 fee in 13.3.
 16 15, intellectual property:
 17 "The Specsavers trademark remains that of SOG and
 18 the company confirms that all goodwill attaching to the
 19 trademarks belongs to Specsavers."
 20 Then -- oh, yes:
 21 "Each of the parties shall use their best endeavours
 22 to protect and promote the goodwill associated with the
 23 system and the trademarks."
 24 That obligation there.
 25 18 deals with transfers. My Lord, it was said that

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1 this is a long-term commitment. Well, that is true to
 2 some extent, but they're not bound in. It is open to
 3 them to decide to -- to the A directors to decide to
 4 leave. They can decide to sell their shares and,
 5 indeed, that is what happened. Dr Poulsen acquired the
 6 shares from somebody else, and Mr Weller.
 7 The A shares:
 8 "[They] shall not transfer or dispose of ... to any
 9 other person except in accordance with clause 19 unless
 10 such person has first been approved by Specsavers as
 11 being an acceptable transferee ... Specsavers may take
 12 account of (but shall not be limited to) the following
 13 considerations."
 14 Then there's a reference to an individual who is
 15 registered with the GOC as an optician, that they've got
 16 the -- and then for a retailer, that they've got the
 17 relevant retailing skills.
 18 My Lord, this is important just in terms of we'll
 19 come back to this question about dishonesty, that we are
 20 dealing here with professionals. We are talking about
 21 regulated individuals. Opticians are subject to the
 22 regulation of the General Optical Council, and I'll come
 23 back to that in a moment.
 24 Then purchase notice, my Lord, which we need to look
 25 at. 19.1 deals with the recipient of a purchase notice,

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1 and 19.2, which we've talked about, there are two
 2 categories of purchase notice here. 19.2 says we may
 3 serve a purchase notice. Then there's a number of
 4 circumstances which I would respectfully say, these are
 5 all objective. Death, that's pretty objective.
 6 Insolvency, again, is to be determined as objective.
 7 Then 19.2.3:
 8 "The recipient committing a material breach of his
 9 obligations under this agreement and where the breach is
 10 capable of remedy within 30 days, not doing so."
 11 And then 19.2.4:
 12 "Repetition of a breach of the same."
 13 19.2.5, petition for winding up. Ceasing to be
 14 employed and then failing to agree to a modification of
 15 the agreement.
 16 So it is an option to purchase, and I know there's
 17 been reference -- it's been described in expropriation
 18 or whatever, I'll come back to this. This is an option
 19 to purchase. It's a proprietary right conveyed on
 20 Specsavers. I'll come back to that in a moment.
 21 This is to be compared, 19.2.6, is to be compared --
 22 sorry, 19.2 -- sorry, 19.5, I should say, for
 23 completeness deals with the fair value, which is subject
 24 to 19.6. Then 19.6, which is the clause. Now, my
 25 friend said it's just fraud or dishonesty. He didn't

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1 actually read you the whole clause, and if I may I will:
 2 "If Specsavers has grounds to conclude that the
 3 recipient, whether through performance of his
 4 obligations under this agreement, his/her service
 5 contract with any group company, the articles or
 6 otherwise, has been fraudulent or dishonest..."
 7 And then it goes on:
 8 "... whether towards any group company, the
 9 directors, the shareholders or otherwise, then it may
 10 serve a notice."
 11 Then the price will be the par value.
 12 Then there's a power of attorney provision.
 13 My Lord, I'll come back to comment on the width of
 14 that in a moment. But it isn't just, oh, well it's
 15 fraud or dishonesty. It's fraud or dishonesty as
 16 defined therein.
 17 25.2:
 18 "In the event of a conflict with the article, the
 19 provision of this agreement prevails."
 20 25.4:
 21 "None of these provisions is deemed to constitute
 22 a partnership ... no authority to bind the other in any
 23 way."
 24 Then, 25.8, "No variations or cancellation except in
 25 writing".

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1 25.9:
 2 "This agreement supersedes any previous agreement,
 3 or any of them in relation to matters dealt with... and
 4 represents the entire understanding between the parties
 5 in relation thereto."
 6 MR JUSTICE HILDYARD: What was the remit of the independent
 7 neutral, nothing to do with us anyway?
 8 MR POTTS: Nothing to do with us. I think that, for
 9 example, if there's a dispute in relation to the
 10 distribution, I think that can be remitted to the
 11 neutral. Let me see if I can find that. Oh, no, that's
 12 the auditors -- 4.2 is to the auditors. My Lord, we'll
 13 check. I don't think it is anything relevant to us.
 14 My Lord, while we're there, could I show
 15 your Lordship also the service agreement entered into at
 16 the same time which is at D, page 16. It's one of
 17 these. This is for Dr Poulsen. This is the service
 18 contract.
 19 The particular clause, my Lord, I would like to draw
 20 your attention to is just 3.1.6. There's the usual
 21 clauses as to servicing the interests of the company and
 22 so on, "the company" being Bognor. 3.1.6, the
 23 obligation on the directors is:
 24 "... to use your best endeavours to promote the
 25 interests of the company and all Specsavers stores and

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1 the Specsavers brand."
 2 My Lord, what we would say, just in terms of factual
 3 matrix -- a ghastly phrase -- I'm not sure we're allowed
 4 to use it, but from ICS v West Bromwich. Just some
 5 matters to remember. The business is operating under
 6 the brand, and I've shown your Lordship a number of the
 7 provisions which emphasise the importance of the brand
 8 and the obligations that we are leaving it to the
 9 A directors on a day-to-day basis to promote the brand
 10 and to operate the business in accordance with the
 11 manual and so on, and the importance of preserving the
 12 value of the brand.
 13 It's important to remember that this is -- SOG
 14 has -- there are 1,500 companies operating under the
 15 brand within the UK and abroad. That sets the context,
 16 we say, firstly for what the importance of this
 17 agreement is and why -- and the context of this
 18 provision under 19.6, but it also actually goes to the
 19 alleged motivation which I'll come back to for this
 20 alleged conspiracy on the part of my clients.
 21 The second point is clause 3, which we've looked at:
 22 this idea that it's their store. It's not. They have
 23 responsibility to attend the store, to manage the
 24 operation in accordance with the manual. That is the
 25 extent to which it is delegated. It is correct,

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1 however, that they are afforded a significant degree of
2 independence in terms of day-to-day operational control.
3 The point is SOG is trusting them to conduct the
4 operations to the highest standards. They are, in the
5 case of the optician, a regulated individual and they
6 are -- we are not there on a day-to-day basis. So we
7 need, we say, to be in a position to protect the brand
8 from mismanagement or other improper conduct.

9 So, my Lord, that's the overview in terms of the
10 contract itself.

11 Now, my Lord, in terms of what this is, if I can
12 just show your Lordship paragraph 89 and 90 in my
13 skeleton. I've shown your Lordship the clause and we've
14 set it out there. Now, your Lordship was taken to some
15 point about the exercise of contractual discretion and
16 this, we say, is no different -- this is not
17 a discretion, I'll take your Lordship back to Abu Dhabi
18 in a moment. But this is an option to purchase. It's
19 a proprietary right granted to Specsavers to be
20 exercised in certain circumstances, in certain
21 conditions. And it's well established that if you
22 have -- just like a shareholder's voting right, a voting
23 right is a proprietary right and is not subject to
24 a fiduciary obligation.

25 My Lord, can I show your Lordship Albert Phillips,
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1 which is in the bundle of authorities. Volume 1, tab 1.
2 The other point, my Lord, we say that even if this was
3 at less than what might be said to be a market value,
4 the question is what is the commercial burden(?), we
5 say.

6 If your Lordship keeps my skeleton open and then
7 we'll dip in and out. My Lord, if your Lordship has the
8 headnote about halfway down between the hole-punch, one
9 of the articles that was provided:

10 "The company in general meeting might, by resolution
11 passed by a requisite majority, determine that the
12 shares of a member be offered for sale by the company to
13 the other members and may fix the price to be paid
14 provided it shall not be less than 1 shilling per
15 share."

16 Then if not it will be 1 shilling.

17 It was accepted in the case that the shares would
18 have a greater value. But in terms of the holding, if
19 we look at the second hole-punch:

20 "The articles authorise the passing of a resolution
21 for the sale of the shares of any member at a price
22 which might be as low as a shilling, although the value
23 is in fact greater. The plaintiff on whom the onus
24 rests is not established that the power is exercised in
25 an improper way for an improper purpose."

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1 Then Lord Cozens-Hardy, Master of the Rolls:

2 "There is no authority for applying the doctrine
3 that between the members of a partnership firm there
4 must be an acting bona fide to the members of the
5 company voting at a general meeting properly convened.
6 They have no fiduciary relation either to the company or
7 to the other members. Whether or not there was any
8 malicious intention in what the members had done in the
9 present case was immaterial having regard to the
10 decision in *Bradford v Ferrand*."

11 My Lord, can I just turn that up. Your Lordship
12 will see the judgment of the Master of the Rolls starts
13 at 295, and the section I would refer your Lordship to
14 is at 297, because the summary of the facts in the
15 *Bradford Corporation* case are interesting. It's a point
16 which your Lordship made, in fact. Just going back to
17 that.

18 This is on the left-hand side of the page, the
19 second paragraph down:

20 "Then it was said by the plaintiffs there is
21 malicious intention. It must have been done to punish
22 the plaintiff for leaving the federation. It's a case
23 of malice. Personally, I don't care whether it's malice
24 or not since the case of *Bradford Corporation*, where the
25 *Bradford Corporation* did not succeed in preventing a man

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1 from, on his own land, tapping a stream of water, the
2 spring from which *Bradford* was partly supplied with
3 water, because he was doing that which he was entitled
4 to do, however malicious his motive. However much he
5 may have intended to levy blackmail on the corporation,
6 that did not avail them. That is quite immaterial."

7 My Lord, just briefly in terms of the position of
8 a shareholder, if your Lordship has volume 1, tab 7, the
9 *Swindon Football Club* case, as to whether directors, in
10 exercising their votes as shareholders, were subject to
11 some obligation, and the point was there made, my Lord,
12 that -- you can see from the headnote:

13 "They are entitled to vote in their own interests."

14 In relation to the resolution, the point was made
15 that whilst they might be fiduciaries as directors --
16 this is page 269 at the top -- they can vote their own
17 personal shares as a member as they think fit.

18 The point being, my Lord -- and this is where my
19 friend, with respect, goes wrong in terms of this issue,
20 come back to rationality. What we have here, the
21 decision to exercise the option, the decision to
22 exercise the option is not a discretionary one for my
23 clients. They have a right to do so. It's
24 a contractual right, it's a proprietary right that they
25 have under the contract. It is not one subject to some

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1 discretion, some overarching obligation in relation to
 2 the decision whether to exercise. I'll come back to the
 3 point about the conditionality -- the conditions of
 4 them, whether the conditions are satisfied, which is
 5 a slightly, if I might say so, a different point.
 6 But if one looks at the Abu Dhabi case, which was
 7 at 1, tab 8, which my friend took you to, this isn't
 8 a case where, as your Lordship says, there is
 9 contractual discretion given under a contract which
 10 affects them. It is a right which affects them, just as
 11 in the Bradford case, the decision in relation to his
 12 water may affect another party, but that doesn't mean
 13 this is a contractual discretion case to be exercised
 14 subject to some duty.
 15 The point in the Abu Dhabi case, and your Lordship
 16 gave the other example of -- it may be an example of
 17 where a contract provides a power of the mortgagee to
 18 determine an interest rate. That would be another case
 19 where there is a discretion afforded, and that may be
 20 subject to some kind of implied term. But the Abu Dhabi
 21 case, your Lordship will see that the question was, the
 22 obligation under the contract was, under his discretion,
 23 if he considered it dangerous or impossible to reach
 24 a port, then he had a right to order the cargo to be
 25 loaded or discharged. You see that in the headnote.

1 4 5

1 And my friend took you, I think, to page 404, and we
 2 accept that, in relation to a contractual discretion
 3 point, there may be an issue in terms of the process and
 4 the purpose to which that exercise is -- sorry, the
 5 contractual discretion is exercised.
 6 But if one looks at the Abu Dhabi case, that's an
 7 ongoing contract, it's an ongoing obligation. It's
 8 policing the things that can happen under the terms of
 9 that contract. In our case, we have a contractual right
 10 not to exercise a discretion, but we were afforded an
 11 option to purchase if a condition is satisfied.
 12 Now, my Lord, where we say the element of
 13 rationality comes in is in relation to the condition,
 14 not in the decision to exercise. We are not subject to
 15 some overarching duty of good faith towards the other
 16 party to have regard to their interest. This is
 17 a proprietary right that we can determine to exercise,
 18 provided the condition is satisfied.
 19 MR JUSTICE HILDYARD: Why does it matter to you that it's
 20 a proprietary right, if it is a proprietary right?
 21 Surely the distinction is between a personal right --
 22 MR POTTS: Well, personal.
 23 MR JUSTICE HILDYARD: A right which is not in some other
 24 capacity nor exercisable on behalf of somebody else.
 25 It's your right, you can do with it as you want within

1 4 6

1 the confines of the right.
 2 MR POTTS: Yes.
 3 MR JUSTICE HILDYARD: Do I have to worry about whether the
 4 nature of the right under an option is proprietary?
 5 MR POTTS: Maybe not. No, my Lord, no. The point is it's
 6 a personal right, whether you call it personal or
 7 proprietary, it belongs to us --
 8 MR JUSTICE HILDYARD: It's your right.
 9 MR POTTS: It's our right. We're not exercising
 10 a discretion affecting both parties under the contract,
 11 which is what my friend's point is.
 12 MR JUSTICE HILDYARD: Then you have to distinguish, don't
 13 you, between on the one hand the motivation in
 14 exercising a right, which is what the subject was, as
 15 I read it, of Phillips, and the extent or scope of the
 16 right, and they're different.
 17 MR POTTS: Yes.
 18 MR JUSTICE HILDYARD: Here, the question is really as to the
 19 scope of the right and as to whether the personal right
 20 conferred was subject to limitations such as
 21 reasonableness or not. I'm not quite sure what Phillips
 22 has to do with it at the minute.
 23 MR POTTS: My Lord, no, I'm working through it. I'm dealing
 24 first with the point about the motives, because my
 25 friend says -- there was all stuff this morning about

1 4 7

1 some kind of duty of good faith and --
 2 MR JUSTICE HILDYARD: That goes to the scope under their
 3 argument.
 4 MR POTTS: Yes.
 5 MR JUSTICE HILDYARD: Within the limit of the right, you can
 6 be as brutal as you like. You can even be, possibly,
 7 malicious, though modern authority might mitigate that,
 8 I just don't know. But here we are a scope of right
 9 case, aren't we?
 10 MR POTTS: Yes.
 11 MR JUSTICE HILDYARD: Although it is also alleged against
 12 you that, even within the scope of the right, you acted
 13 for some ulterior or malicious purpose, which is
 14 a separate aspect of the case, I would have thought.
 15 MR POTTS: Yes. The ulterior purpose point is it infects
 16 both elements --
 17 MR JUSTICE HILDYARD: It does. That's a sort of purpose
 18 point.
 19 MR POTTS: My Lord, the first point is, in relation to
 20 purpose, we say it's irrelevant. We're entitled, if we
 21 have the right, if it's satisfied, it's satisfied.
 22 MR JUSTICE HILDYARD: Well, motive is irrelevant.
 23 MR POTTS: Motive is irrelevant.
 24 MR JUSTICE HILDYARD: That's Phillips.
 25 MR POTTS: Yes.

1 4 8

1 MR JUSTICE HILDYARD: You can be, within the confines of the
2 right, you can be even, nay, he says rather quaintly,
3 malicious.
4 MR POTTS: Yes.
5 MR JUSTICE HILDYARD: Motive and purpose are slightly
6 different, aren't they, because purpose may go into the
7 issue of scope and then scope is a matter of
8 interpretation?
9 MR POTTS: Yes. I accept that, my Lord. I hesitate to
10 descend into the joys of cases such as Brady v Brady to
11 distinguish between purpose and -- I hope we don't need
12 to go there.
13 MR JUSTICE HILDYARD: No.
14 MR POTTS: My Lord, just to go back to the -- as to the
15 scope of what is afforded to us in the circumstances, it
16 is important, my Lord. My friend has sort of, as
17 a matter of construction, doesn't -- it is worth looking
18 back at 19.2 as opposed to 19.6.
19 19.2, and my friend makes the point, and I'll come
20 back to this in terms of the termination clause in
21 a moment, but he points out and I would say
22 respectfully, it's an important distinction.
23 19.2 provides that:
24 "We may serve a purchase note, for example, if the
25 recipient commits a material breach of his obligations."

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1 Now, that, I would say respectfully, that
2 obviously -- I will take your Lordship to an authority
3 in a moment. That is an objective point. That is
4 a matter which would be subject to challenge. It
5 doesn't say: Specsavers may serve a purchase notice if
6 it has grounds to conclude that the recipient has
7 committed a material breach. It says whether they have
8 or haven't, and I'll come back to that.
9 The difference is, in 19.6 it does not say: if the
10 recipient, whether through performance of his
11 obligations, et cetera, et cetera, has been fraudulent
12 or dishonest. It does not say that.
13 The parties have gone to the trouble of picking an
14 alternative formulation, and one of the problems with my
15 friend's approach is that he seeks to do violence to the
16 contract, the agreement which has been made by ignoring
17 the words at the start of that clause, which are:
18 "If Specsavers has grounds to conclude ..."
19 Then, my Lord, the additional point which is worth
20 noting in terms of the scope of this obligation and the
21 condition, is the scope of dishonesty. It is not
22 defined narrowly, it is defined as widely as you could
23 possibly like. It has the words "or otherwise" inserted
24 in two places. Firstly:
25 "... whether through performance of his obligations

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1 under this agreement, his ... the articles or
2 otherwise."
3 And then:
4 "... that he has been fraudulent or dishonest
5 whether towards any group company, the directors, the
6 shareholders or otherwise."
7 So the width is inserted both in relation to the
8 nature of what has been done and who it has been done to
9 or towards.
10 We would respectfully say, my friend has made some
11 points about materiality, trying to draw some
12 distinction I think between somehow it's different if
13 it's fraudulent or different if it's dishonest, and he
14 says in his submissions this afternoon that is not
15 a distinction which is drawn in this clause as to
16 somehow it is different if it's fraud or it's dishonesty
17 in terms of the width of what is caught. We say it is
18 wide in both contexts. It doesn't have to be fraud in
19 relation to the operation of the store, it is fraud in
20 either of those circumstances. The width is extremely
21 wide.
22 We say that makes perfect commercial sense. This is
23 a case where this is a regulated profession, we are in
24 business with somebody who we're giving a significant
25 degree of independence to. We're not in the store on

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1 day-to-day business. It's important to us that they
2 show the highest standards in relation to the operations
3 at the store and, in circumstances where we take the
4 view, from the view, reach a conclusion that they have
5 not been, this allows us to decouple that relationship
6 in a way which is clean, quick, straightforward, and
7 this is a clause which is designed for the benefit of
8 SOG. It allows us to give the option if we have grounds
9 to conclude it. As I said, it does not say -- my
10 friend's construction argument ignores -- we've had all
11 this stuff about real and genuine and whatever. But
12 just look, you have to start with words, and we say it's
13 clear on the face of the words that the focus is whether
14 we have grounds to conclude. And we say -- back to my
15 skeleton -- that that means we look at our subject --
16 you look at our subjective state of mind, and we accept
17 it's not free-ranging in the sense of it doesn't say,
18 "We have a suspicion", I accept that. We've put that in
19 paragraph 94. But we must have concluded that they were
20 dishonest and had a basis on which it could and did so
21 conclude.
22 I've made the point about the breadth of conduct,
23 which is there.
24 MR JUSTICE HILDYARD: Can I just mention that I've been
25 asked for a break.

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1 MR POTTS: Now would be convenient.
 2 MR JUSTICE HILDYARD: Would that be all right?
 3 MR POTTS: Yes.
 4 MR JUSTICE HILDYARD: Then we will have 40 minutes. It may
 5 be you won't finish, I don't know.
 6 Until 3.15.
 7 (3.07 pm)
 8 (A short break)
 9 (3.15 pm)
 10 MR POTTS: My Lord, if I can return back to what the context
 11 of grounds to conclude as a matter of construction.
 12 I've dealt with the point about motive.
 13 In paragraph 94.3, I've set out, as I said, the two
 14 matters that we actually concluded and we had a basis.
 15 Now, the question -- I've made the point about the
 16 scope of the conduct. Here, I want to touch on this
 17 point my friend has referred to as the reasonableness
 18 and the objective grounds, and so on. We say that
 19 reasonableness does have some relevance in relation to
 20 this condition. We would say perhaps "reasonable" is an
 21 unhelpful phrase. We would say rationality is the
 22 relevant test here.
 23 If I may, my Lord, could I take your Lordship back
 24 to Socimer, which is in volume 1, tab 21, which touches
 25 on two points, really. The first point is that this is

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1 a case in fact which is also, again, involving the
 2 contractual discretion point, because under the terms of
 3 the contract, there was a right given to one of the
 4 parties to sell and to determine the time at which the
 5 assets are sold. You can see that, in the headnote,
 6 point 1:
 7 "Where a contract allocated to only one party has
 8 power to make a decision under the contract which might
 9 have an effect on both parties, then there are the
 10 principles in relation to discretion."
 11 But in terms of the question of objective and
 12 subjective, could I take your Lordship back to
 13 paragraph 66 at page 577. We say this does inform the
 14 question of grounds to conclude. But in particular in
 15 relation to reasonableness.
 16 "It is plain from the authorities that the
 17 decision-maker's discretion will be limited as a matter
 18 of necessary implication."
 19 MR JUSTICE HILDYARD: Where are you now?
 20 MR POTTS: Paragraph 66, my Lord, bottom left-hand corner on
 21 page 577, top right, in Socimer.
 22 MR JUSTICE HILDYARD: I seem to be missing 577. I'm so
 23 sorry. (Handed)
 24 MR POTTS: Your Lordship has the headnote?
 25 MR JUSTICE HILDYARD: Yes, I did. I was just grappling

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1 around for 66 and then saw that I was missing a page.
 2 MR POTTS: "The discretion will be limited to a matter of
 3 limitation by concepts of honesty, good faith,
 4 genuineness and the need for absence of arbitrariness."
 5 Then:
 6 "The concern should not be ... reasonableness and
 7 unreasonableness are also concepts employed in this
 8 context but only in a sense analogous to Wednesbury
 9 unreasonableness, not in the sense in which the
 10 expression is used when speaking of a duty to take
 11 reasonable care or when otherwise employing entirely
 12 objective criteria as, for example, when there might be
 13 an implication of a term of requiring the fixing of
 14 a reasonable price or a reasonable time.
 15 "In the latter class of case, the objective one, the
 16 concept of unreasonableness is intended to be entirely
 17 mutual and thus guided by objective criteria. Gloster J
 18 was therefore right to put to Mr Millet a distinction
 19 that should be made between a duty to take reasonable
 20 care and a duty not to be unreasonable in a Wednesbury
 21 sense. Mr Millet was, in my judgment, wrong to submit
 22 that it made no difference which test you deployed.
 23 ... pursuant to the Wednesbury rationality test, the
 24 decision remains that of the decision-maker, whereas on
 25 entirely objective criteria of reasonableness, the

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1 decision-maker becomes the court itself."
 2 That, we say, is a critical point. The issue is we
 3 are focusing on the decision-maker, Specsavers. We are
 4 not focusing on the -- I think my friend referred to the
 5 man on the Clapham omnibus. We could also say the
 6 judge. We are not asking you to make the decision.
 7 That is not the focus. That would be the focus of the
 8 objective exercise of taking reasonable care, or
 9 otherwise deploying objective criteria.
 10 We are focusing on the decision-maker, SOG, and he
 11 goes on to say:
 12 "The decision-maker ... A similar distinction was
 13 highlighted in Cantor Fitzgerald. I will therefore use
 14 the expression rationality instead of Wednesbury
 15 unreasonableness, and confine reasonableness to the
 16 situation where the arbiter on entirely objective
 17 criteria is the court itself."
 18 My Lord, that was why I picked up my friend on this
 19 point about the reference to reasonable in his implied
 20 terms, because, again, it's a phrase which is imprecise
 21 and can cover either of these two matters.
 22 We say that as a matter of construction, that you
 23 have grounds to conclude means you obviously have to so
 24 conclude, and (b) that you actually have to have a basis
 25 upon which you could and did so conclude.

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1 My Lord, if I could then just take you to another
2 example of this, a very recent one, which is the
3 decision in Eclair. That is volume 2 of the
4 authorities. It's tab 26. My Lord, just to give some
5 explanation, it's a long decision, I'm not going to take
6 your Lordship through the entirety of it, but just in
7 terms of the background facts, your Lordship can see
8 that in paragraph 2. It's a very recent decision of
9 Mr Justice Mann, 30 August of this year.

10 In paragraph 2, you can see that the issue was where
11 the board served notice of a public quoted company,
12 where they served a notice under section 793 of the
13 Companies Act and the articles seeking disclosure of
14 interest in shares.

15 The issue was whether that exercise has been
16 properly done, and the matter which I draw
17 your Lordship's attention to is submissions which were
18 made at paragraph 160 in relation to -- there was an
19 allegation that the decision of the board was subject to
20 an implied obligation to adhere to principles of natural
21 justice. There's a reference to the potentially
22 expropriatory and serious effect of the articles, as
23 your Lordship will be familiar, obviously, with the
24 section. The section allows the suspension of rights on
25 the shares and, indeed, the sale of the shares if the

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1 disclosure is not given.

2 It was said, if your Lordship sees in paragraph 160,
3 that there's a reference to the expropriatory and
4 serious effect of the articles --
5 MR JUSTICE HILDYARD: I'm sorry to interrupt. The problem
6 with reasonableness in the sense of it relying on an
7 objective test is that it may destroy the purpose of the
8 clause which is intended to leave within the hands of
9 the party the test of whether the clause is applicable.

10 MR POTTS: Yes. Exactly. On that point, my Lord, could
11 your Lordship read paragraph 161?

12 MR JUSTICE HILDYARD: Yes.

13 MR POTTS: If you read that to yourself. (Pause)

14 MR JUSTICE HILDYARD: Yes.

15 MR POTTS: My Lord, we would say that that caveat, that
16 concern, is relevant here. This is a clause,
17 a commercial clause which expressly on its face says:
18 the issue is whether Specsavers has grounds to conclude.
19 It does not say -- it does not import an objective sense
20 of a duty to take care, and also it is not a matter --
21 no doubt my friend will use all the great skills that he
22 has as a lawyer to show the matter in a different light.
23 That is not the exercise which is intended by 19.6. If
24 the issue was intended to be an objective test, it would
25 have been drafted as 19.2 was drafted. That's an

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1 objective test, 19.6 is not.

2 Similarly, my Lord -- that's on rationality.

3 My friend made a number of points of this being akin
4 to or referable to a termination clause and, I mean, in
5 a sense it highlights the point. Termination clauses
6 are referable to breaches of contract. 19.2 is
7 reference to a breach of contract. 19.6 is not. It is
8 not a termination clause in that sense at all.

9 My friend in paragraph 16, I think, of his skeleton
10 refers to the objectivity of the exercise of the court
11 to look at to see whether there has been a breach. That
12 may involve looking at the clause and, indeed, of course
13 the question is indeed -- in fact, indeed, it would be
14 open to the parties, if they wanted to, to say any
15 breach of contract. In this case, of course,
16 interestingly, of course, they have -- the parties --
17 this is careful and detailed drafting. They have said
18 a material breach of obligations and one which, if
19 capable of remedy, is not remedy.

20 So there is precision in the drafting there, and
21 respectfully I would say there's equal precision in 19.6
22 with the different formulation.

23 And the citation of Lewison, my Lord, it's just for
24 your Lordship's note really, in volume 2 tab 30.

25 MR JUSTICE HILDYARD: I'm not sure I fully understand you're

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1 "not a termination". It is in a sense a termination
2 clause, but it's not a termination for breach clause.

3 It's a termination in defined circumstances clause.

4 MR POTTS: Yes. My friend's submissions on termination were
5 by reference to material breach --

6 MR JUSTICE HILDYARD: It does terminate their shareholding.

7 MR POTTS: My Lord, yes, indeed. Well, it's an option.

8 MR JUSTICE HILDYARD: And it brings them into the
9 relationship between them in that regard.

10 MR POTTS: Yes, my Lord. I agree with that. It was the
11 submission in relation to material breach and
12 construction which I took issue with because it's just
13 got nothing to do with this at all. It's not referable
14 to breach. The parties have specified different
15 circumstances. So it's really just the point as to this
16 is an option to purchase.

17 My Lord, I should address, I think, briefly the
18 position on good faith which has been raised in a number
19 of different ways by my friend. It goes in relation to
20 the question, I think, of also the implied terms.

21 Now, my Lord, just on implied terms, can I just show
22 your Lordship a helpful summation in Lewison, which is
23 at volume 2 of the authorities?

24 MR JUSTICE HILDYARD: This is before good faith?

25 MR POTTS: My Lord, yes, because this is -- the good faith

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1 obligation, he says, is an implied term.
 2 MR JUSTICE HILDYARD: Yes.
 3 MR POTTS: So just to see the test. It's paragraph 606, the
 4 relevant criteria. 2, tab 30. Just for the helpful
 5 criteria. My Lord, I commend that to your Lordship as
 6 a helpful summation.

7 I'm not going to take your Lordship back to Belize,
 8 but does your Lordship have my skeleton open still?
 9 MR JUSTICE HILDYARD: Yes.
 10 MR POTTS: If your Lordship could just look -- it's got to
 11 be reasonable effort. It's must to be necessary.
 12 Necessary is still there. It must be so obvious, it
 13 must be capable of clear expression, it mustn't
 14 contradict any express terms of the contract.

15 My Lord, I would respectfully say this is a contract
 16 which is clear on its express terms, and the implied
 17 terms that are sought to be imported by my friend are,
 18 we would say, contradictory to the express terms.
 19 I don't believe that those -- the drafting of those
 20 implied terms is capable of clear expression. With all
 21 due respect to my friend, I think they're utterly
 22 incomprehensible. They're not necessary to give
 23 business efficacy to the contract at all.

24 It is important, my Lord, to remember the
 25 admonishment made, which I have referred to in

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1 paragraph 79, that the power of the court to imply a
 2 term into a contract is limited. I've quoted the
 3 reference from Belize. I won't take your Lordship back
 4 to the case, but the quote is:

5 "The court has no power to improve upon the
 6 instrument whether it would be ... or articles. It
 7 cannot introduce terms to make it fairer or more
 8 reasonable. It is concerned only to discover what the
 9 instrument means."

10 This goes, my Lord, to the obligations to impose
 11 some obligation of good faith, of objectivity that
 12 somehow has to come in, all of those which are in my
 13 friend's implied terms.

14 It may be your Lordship -- we should be reminded of
 15 what those implied terms are, as to how he puts them in
 16 his pleading in paragraph 10. He says:

17 "Required to act reasonably and bona fides when
 18 assessing whether there are really such grounds
 19 existing."

20 I would say that, respectfully, is not clear and
 21 concise.

22 MR JUSTICE HILDYARD: Where are you looking at?

23 MR POTTS: This is paragraph 10. That's the first one:

24 "Alternatively, any such grounds must be reasonable
 25 grounds and these must objectively lead the first

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1 defendant reasonably to conclude, acting with bona
 2 fides, that there has been fraudulent or dishonest
 3 conduct before they can legitimately purport to rely on
 4 the ground."

5 I'm afraid I just have absolutely no idea what that
 6 means.

7 "And then to say it is an implied term."

8 Then we got back to this quasi partnership.

9 "... act towards another in good faith."

10 I'll come back to that very briefly. But, again,
 11 I'm not quite sure where that goes.

12 We would say that this doesn't get anywhere near.
 13 It's tortuous. The test is in the tortuous nature of
 14 the drafting, to say that somehow this is necessary to
 15 give business efficacy, so obvious that it goes without
 16 saying in those clauses: capable of clear expression,
 17 not contradictory in express terms.

18 The contract is clear on its face, as a matter of
 19 construction. Grounds to conclude that there has been
 20 fraud or dishonesty in those wide senses.

21 So, my Lord, then when one has a look at this duty
 22 of bona fides and good faith --

23 MR JUSTICE HILDYARD: The learning or implied term
 24 notwithstanding at the highest level, and therefore
 25 binding, is not always easy to fully understand.

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1 I mean, there may be sort of three types of
 2 implications, if you like. There may be importation by
 3 inference where you have a whole load of standard terms
 4 which were intended to be incorporated.

5 MR POTTS: Yes.

6 MR JUSTICE HILDYARD: You may have a genuine implied term
 7 which is necessary to give business efficacy. That may
 8 not be the final determinate, but it's an ingredient in
 9 determining whether it was intended by the parties to be
 10 part of their compact. Then there may be things which
 11 are implicit.

12 MR POTTS: Yes.

13 MR JUSTICE HILDYARD: That is to say, you can read the thing
 14 and you can say, "I'm not implying anything really, it's
 15 just implicit in what is said that this is what they
 16 intended". All of them are aspects of finding out what
 17 the parties reasonably really intended by the words that
 18 they used.

19 MR POTTS: I agree. My Lord, I don't disagree with that.

20 The point is, when one looks at those clauses, these
 21 are, if you like, litmus tests, they're all ways of
 22 saying the same thing.

23 MR JUSTICE HILDYARD: They are to some extent cautionary
 24 notes against the court refashioning the contract.

25 MR POTTS: Cautionary notes. Yes. My Lord, you can see

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1 that particularly in relation to the implied term
 2 obligation of good faith, which is implicit in the
 3 second and third implied terms which he's referring to.
 4 I mean, the first point I would make is, apart from
 5 the drafting, which I'm afraid is pretty
 6 incomprehensible, but what's intended? What does this
 7 mean, this duty of good faith in this context? We say
 8 in a nutshell the courts are very slow to imply a duty
 9 of good faith into a commercial agreement. Secondly,
 10 there is no need to do so where the parties have
 11 comprehensively set out their obligations and no room
 12 for such implied obligations. And the third point is
 13 that the only basis in fact that they rely on for the
 14 imposition of such term is an unparticularised
 15 allegation of quasi partnership, which, as I'll come to,
 16 is utterly hopeless.

17 Now, my Lord, in relation to the duty of good faith,
 18 if your Lordship has paragraph 80 of my skeleton, my
 19 friend suggested that such a term may be implied in
 20 certain established categories, I think he said. Now,
 21 in relation to that, he took -- he quotes in his
 22 skeleton paragraph -- if your Lordship has paragraph 19
 23 of his skeleton and if your Lordship could keep mine
 24 open as well -- he says:

25 "So far as the suggested term of reasonableness and
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1 good faith, the parties here were in the relationship of
 2 joint venture partners or quasi partners."

3 I don't accept that for a moment. A joint venture
 4 is not a term of art. It just means that people are
 5 together in a venture together. Almost, effectively,
 6 any contract can be said to be a joint venture. It
 7 doesn't in itself impose any duties. Quasi partner, on
 8 the other hand, is a slightly different concept. What
 9 he says at the end of 19 is:

10 "The implication of the terms is therefore
 11 inconsistent with modern established principles, see for
 12 example Chitty on Contract and cases citing that in an
 13 analogous relationships."

14 If your Lordship just turns up the bit in Chitty,
 15 volume 2 of the authorities bundle at tab 29, it's
 16 13-028. He refers to the case of Malik v BCCI.

17 MR JUSTICE HILDYARD: Not to ordinary commercial relations.

18 MR POTTS: Which is the bit he doesn't refer to.

19 My Lord, just out of interest, footnote 170 refers
 20 to the case of Jani-King v Pula. Jani-King v Pula was
 21 a franchise agreement, just out of interest. He says
 22 that's so obviously a commercial relationship where
 23 there must be that sort of duty. Well, Chitty doesn't
 24 seem to agree with that.

25 Now, my Lord, my friend took your Lordship to the
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1 recent first instance decision of Yam Seng which, again,
 2 is in volume 2, tab 30 --

3 MR JUSTICE HILDYARD: Which is Mr Justice Leggatt's
 4 decision?

5 MR POTTS: My Lord, yes. It's in volume 2 --

6 MR JUSTICE HILDYARD: It's 31, is it?

7 MR POTTS: Yes, tab 31.

8 Now, what is interesting is actually what he did do.
 9 Obviously there's a discursive discussion, an
 10 interesting discussion about the duty of good faith.
 11 But the actual clause, the term that he was prepared to
 12 imply was not a general duty of good faith at all. If
 13 your Lordship would read 160 to 164 to yourself, which
 14 is on page 1356. (Pause)

15 MR JUSTICE HILDYARD: I mean, this was a duty not to
 16 undercut.

17 MR POTTS: Yes, my Lord. The implied term was not to
 18 approve a retail price lower than the duty free retail
 19 price.

20 MR JUSTICE HILDYARD: Which is quite an extravagant one.

21 MR POTTS: It is. But just for the reasons -- in
 22 circumstances where he was, firstly the agreement was
 23 a skeletal document which didn't specify the obligations
 24 in any detail. 161.

25 Secondly, the agreement specified the duty free
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1 retail price for each product, so they were constrained.
 2 Importantly, it was common ground between the parties
 3 that there was an industry assumption that retail
 4 prices --

5 MR JUSTICE HILDYARD: I find that a rather different --

6 I mean, one would be surprised if where you are in
 7 essentially a competitive venture which will involve
 8 competition with others, the terms contended for seem
 9 a bit homespun and unlikely.

10 MR POTTS: My Lord, yes. The distinction here, just unlike
 11 the Yam Seng case here, is that in our case we have very
 12 detailed provisions. We have an entire agreement
 13 clause. There are no industry assumptions that the
 14 parties in commercial relationships should act towards
 15 each other with utmost good faith. Indeed, I've
 16 mentioned the Pula decision. No suggestion to the
 17 contrary. And, notably, they haven't put forward any
 18 suggestion as to the content of this obligation of good
 19 faith, what it actually means, what it requires of us.
 20 I'm just not certain, just some allegation of bona
 21 fides. That doesn't help.

22 My Lord, the other point just to bear in mind, just
 23 in terms of context, that since this decision, the
 24 Yam Seng case, I have to say it caused a little
 25 consternation, there have been three cases in which the
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1 point has been addressed again, none of which has found
 2 such a duty. The first one is a Court of Appeal
 3 decision, which is the Mid Essex and I'll take you to
 4 that very briefly. The second one is a case for
 5 your Lordship's note, TSG Building Services v South
 6 Anglia, which is 2013, EWHC, 1159, the decision of
 7 Mr Justice Akenhead, where he said:
 8 "Cases in contracts are sensitive to context.
 9 I would not draw any principle from this extremely
 10 illuminating and interesting judgment of general
 11 application to all commercial context."
 12 Then the final case is Hansard v Boots, which I may
 13 show your Lordship in a moment, which interestingly was
 14 a joint venture arrangement.
 15 Firstly, can I just show your Lordship the Court of
 16 Appeal decision, which is binding on your Lordship. The
 17 Court of Appeal decision, which is at volume 2 at
 18 tab 27.
 19 MR JUSTICE HILDYARD: Then I shall have to await the
 20 weekend.
 21 MR POTTS: My Lord, the relevant paragraph, it's
 22 paragraphs 105 and 106, if your Lordship could just read
 23 those.
 24 MR JUSTICE HILDYARD: This is Lord Justice Jackson, is it?
 25 MR POTTS: Yes.

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1 MR JUSTICE HILDYARD: Yes. Yes, this is if they wished to
 2 do so, they must do so expressly.
 3 MR POTTS: Yes.
 4 MR JUSTICE HILDYARD: There may be a difference, which we
 5 may not have to explore but which you may want to think
 6 about, between on the one hand the implication of a term
 7 such as in the Mr Justice Leggatt case, where you are
 8 regulating the way they are on a continuing basis to
 9 conduct each other in respect of the other.
 10 MR POTTS: Yes.
 11 MR JUSTICE HILDYARD: Right. That's one case. The court
 12 may be more ready in that case.
 13 Then you have the, I know you don't like calling it,
 14 termination clause or an option clause which
 15 contemplates the reverse.
 16 MR POTTS: Yes.
 17 MR JUSTICE HILDYARD: It contemplates the bringing to an end
 18 of a relationship. So no future regulation of their
 19 conduct inter se, but simply a test prescribed as to the
 20 conditions under which that relationship can be brought
 21 to an end.
 22 MR POTTS: Yes.
 23 MR JUSTICE HILDYARD: That would be quite a difficult
 24 context under previously established principles in which
 25 to imply good faith. It may be that the law has

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1 changed, and obviously it may be that Mr Stuart will
 2 show me the error of his ways, but that is what one
 3 might think the previous position.
 4 MR POTTS: My Lord, yes. In terms of your Lordship's
 5 reading, we will give your Lordship, if we may, a copy
 6 of the Hansard v Boots case. And it's particularly, for
 7 your Lordship's note, paragraph 86 is the particular
 8 paragraph.
 9 My Lord, in terms of the -- if your Lordship was
 10 going to read anything else in terms of -- if I may,
 11 my Lord, if I can reserve my position for Monday
 12 morning. I won't be very long, but I just have a few
 13 other points that I would like to make, if I may.
 14 MR JUSTICE HILDYARD: Yes.
 15 MR POTTS: But in terms of the documents which your Lordship
 16 should look at, there's the investigation report, which
 17 is at E5/1265; the rebuttal to that report, which is
 18 E6/1390; the resignation letter, which is E6/1400;
 19 particularly at 1401; and, my Lord, there are the
 20 disputed letters which are referred to in our skeleton.
 21 Your Lordship will find them, and the references are
 22 there given.
 23 MR STUART: I think they're also in that little note that
 24 I handed up to your Lordship at page 17. So it's
 25 E2/527, E2/529, E2/530 and E2/553.

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1 MR POTTS: That's most helpful.
 2 My Lord, in terms of the chronological run of this
 3 matter, we have in our skeleton -- your Lordship will
 4 see from our skeleton that section B deals with the
 5 chronological run, and if I could perhaps recommend that
 6 to your Lordship's reading --
 7 MR JUSTICE HILDYARD: In your skeleton?
 8 MR POTTS: Yes, in my skeleton. Section B.
 9 MR JUSTICE HILDYARD: Very good.
 10 How are we doing? Do you wish to start at 10.00 on
 11 Monday or not?
 12 MR POTTS: My Lord, I think if we may, I think so. I think
 13 we are actually sort of on track on the timetable in
 14 terms of -- we were allocated one and a half days on
 15 opening and we've been one and a half days on opening.
 16 MR JUSTICE HILDYARD: I mention it because we'd hoped that
 17 we would finish today this preliminary assessment of the
 18 law and the facts. If you think you need, say, half
 19 an hour, then we would be bang on course if we start at
 20 10.00. Is that --
 21 MR STUART: If your Lordship would start at 10.00, we will
 22 start at 10.00.
 23 MR JUSTICE HILDYARD: I don't want to exhaust everyone, but
 24 I think it does become extremely exhausting on days when
 25 you're cross-examining, but if Mr Potts is content to do

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1 that, then I would be agreeable to that.
2 MR POTTS: My Lord, yes. Shall we see how we go, my Lord?
3 We'll start maybe on Monday and see how exhausted we
4 are.
5 MR JUSTICE HILDYARD: We'll see how we go. My experience of
6 trying to extend days when you're cross-examining is not
7 very satisfactory for anyone really, especially if it's
8 the same witness who does get very, very tired, counsel
9 gets tired and the judge gets ratty.
10 MR STUART: My Lord, to be clear, Monday and Tuesday, full
11 days, Wednesday and Thursday, not sitting, Friday --
12 MR JUSTICE HILDYARD: I'm doing something else on Wednesday
13 and Thursday, yes.
14 MR STUART: Friday, full day.
15 MR JUSTICE HILDYARD: I think so.
16 MR POTTS: Yes, my Lord.
17 MR STUART: Thank you very much. I just need to try and
18 line up my witnesses, you see, and so I just want to
19 work out -- I've got three full days to fill with
20 witnesses of my side next week and I just want to try to
21 put them on notice as to when they might be coming.
22 MR JUSTICE HILDYARD: Have a very good weekend, all.
23 (3.47 pm)
24 (The hearing adjourned until
25 Monday, 2 December 2013 at 10.00 am)

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