

JERSEY / JUDGMENT

Hore and Anor v Valmorbida and Anor - [2022] JRC 202 (30 September 2022)

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judgment

INDEX Title Paragraph No.

Introduction

1-6 The parties 7-21 The SPAs 22-32 Mr Russo 33-34 The Woodbury House incident 35-38 Purchases of other works of art 39-40 Untitled 1991 by Jean-Michel Basquiat 41-42 Message from Hades by Kusama Study for Portrait (Jose Capelo) by Francis Bacon 44-45 In the Brothel by George Condo 46-58 Cubist Priest by George Condo 59-60 The Comedian by George Condo 61-62 Blue Expanding Orgy by George Condo 63-65 Iron Man by George Condo 66-71 The termination of the Co-Ownership Agreement, SPA1 and SPA2 72-78 The Heads of Terms 79-94 The Settlement Agreement 95-101 Mr Valmorbida's dol / fraud 102-129 The Plaintiffs claims consequent upon Mr Valmorbida's dol 130-135 Contract and vitiation of consent 136-169 Waiver, renonciation and election to be bound ("affirmation") 170-184 Applying these principles to the facts 185-196 Other pleaded claims Deceit 198-216 Breaches of fiduciary duty and trust 217-235

Conclusion

236-237 the deputy bailiff:

Introduction

1. The First Plaintiff ("Mr Hore ") is a retired investment banker. The Second Plaintiff ("Little Wing") is an English limited company owned by Mr Hore . 2. The First Defendant ("Mr Valmorbida ") is an art dealer who lives in England but has connections to the United States of America and Australia. The Second Defendant is a Jersey company incorporated in 2015 and was until September 2019 named AVA Holdings Limited ("AVAHL") and is commonly referred to as such in contemporaneous documents referred to in this judgment, but in this judgment will be referred to as "the Company". At the date of the hearing Mr Valmorbida owned all the shares in the Company but during the period that the Court was principally concerned the Company was a joint venture vehicle owned in equal shares by Mr Hore and Mr Valmorbida . 3. Various Jersey based regulated entities have provided registered address,

directors and associated administrative support to the Company during the period that the Court is concerned with. 4. In summary, Mr Hore claims that he and Little Wing are the victims of fraud ("dol"), fraudulent misrepresentation and deceit and in consequence are entitled to \$15,633,334 in damages/restitution and approximately \$20 million in damages for lost opportunity in respect of the manner in which he would have invested the sums in excess of \$20 million that the Plaintiffs invested in the manner described below. 5. The proceedings concluded with a seven day trial which commenced on 10 th May 2021. During the trial, Mr Hore gave evidence for just under two days and Mr Valmorbida gave evidence for just over two days. Most of this time was taken up by cross-examination as the witness statements of both men stood as their evidence in chief. 6. We now consider the parties, the evidence, the relevant legal principles and our conclusions having applied the law to the facts that we have found. The parties 7. Mr Hore is 60 years old and enjoyed a successful career at Goldman Sachs and then Tudor Investments. He retired in 2009. 8. He is the sole director and shareholder of Little Wings. The Jurats found that he gave his evidence in a clear and calm manner. He had a clear grip of what he wanted to say. He dealt well with confusing and difficult questions when he was cross-examined. Overall, the Jurats found that he was an honest and candid witness. Where his evidence varied from the pleadings settled on his behalf, he admitted, and we accepted, that he had not focused on some aspects of the pleaded case. He did, on occasion, become slightly flustered when he could not recall the order of events. He was happy to accept when he made mistakes and overall the Jurats regarded him as a credible witness who stood up well to scrutiny of his conduct. 9. Mr Hore is a wealthy man and, in addition to property and other assets, has a collection of valuable cars worth in excess of \$100 million. 10. He first met Mr Valmorbida in June 2016 at a golf club in England. Mr Hore knew very little about the art business in which Mr Valmorbida was involved. Mr Valmorbida told Mr Hore about an arrangement he had with a 'street artist' from the United States of some renown called Richard Hambleton, which allowed him to exploit the intellectual property in Mr Hambleton's artwork. Mr Valmorbida expected high returns from exploiting Mr Hambleton's works, several hundred of which were held in the name of a Swiss company called RH1 (named after Mr Hambleton). Mr Hore said that art seemed like a 'potentially lucrative' and ' fun and interesting investment opportunity which I have not yet explored' . It was not challenged that Mr Hore's knowledge of the art world was very limited and that he would rely on Mr Valmorbida for advice. 11. Mr Hore explained that his approach to investment did not consider diversification as an important consideration. He took the view that to focus upon a particular investment was the best way of achieving "super returns" and accepted that investing in that manner may carry higher risks. 12. Mr Hore was cross-examined about the dispute he had with the Spanish tax authorities some fifteen years ago of which Mr Valmorbida was unaware and led to him agreeing to pay to the Spanish authorities a fine of 5 million euros, following which the charges against him and his wife were dropped. The Court accepted Mr Hore's explanation in relation to these issues and accepted his evidence that he regarded it as important to pay his taxes and was not interested in schemes that were designed to avoid tax. As to the tax affairs of himself and his wife, he said that he and his wife were resident

and domiciled in the UK for tax purposes, they paid their tax in the UK and had never ever had any difficulties with the UK tax authorities. 13. Mr Valmorbida is in his 40s. He completed a business degree and then worked at an investment bank, Morgan Schiff & Co in New York before founding Valmorbida & Co in 2006 which was headquartered in New York. He apparently had lots of famous clients, many of which he named in evidence. He said that he 'disrupted the art world' in New York between 2006 and 2008 and was attracting between five to seven thousand people at the openings of his art shows. 14. He said that the five hundred Hambleton pieces held in the company RH1, which were all originals, were worth up to \$35 million in the retail market although he later accepted that to this day he has not exploited any of this value that he attributed to the pieces. He said that when they were at his home he showed Mr Hore features about him in various famous publications such as The New York Times, Bloomberg, International Herald Tribune and The Wall Street Journal. He said that he was able to generate 'millions in revenue' from a zero-cost base and that before he met Mr Hore he was trading in art and had his 'own trading book' which was 'very profitable'. He agreed that Mr Hore had invested because he trusted Mr Valmorbida. 15. He said that the intellectual property copyright industry for art was very small some years ago but had recently grown to become 'one of the most important movements in the art world'. 16. There were discussions between Mr Hore and Mr Valmorbida over the next couple of months. They agreed to enter into a business relationship which both were happy to term as the 'Co-ownership Agreement', although the precise legal form of the relationship was not reduced to writing and neither of the men were wholly agreed as to all of the terms. 17. One feature of the case was that both parties had substantially changed their pleaded cases during the course of the proceedings. For example, the Plaintiffs began the action by suing on the Settlement Agreement (to which we will return below) but by the time of the trial were alleging that the agreement was void ab initio. The Defendants, by contrast, pleaded at the outset that the Settlement Agreement was void but, shortly before trial, completely changed their position on this issue. 18. In relation to the Co-ownership Agreement, the Plaintiffs pleaded in their Reply that the Co-ownership Agreement pleaded by the Defendants was 'vague and embarrassing for want of particulars'. 19. However, both parties were agreed, and we find, that essential terms of the Co-ownership Agreement were: (i) that it should be a commercial relationship between Mr Hore and Mr Valmorbida; (ii) that pursuant to the arrangement, Mr Hore was to and did acquire a 50% shareholding in the Company which held, or was to hold, a number of artworks that were to be commercially exploited, including the assets of RH1 which comprised the Hambleton portfolio of works; and (iii) that any other works of art purchased by or through the Company were to be sold for a profit and those profits were to be divided equally between Mr Hore and Mr Valmorbida, such payments to be paid by way of dividends in accordance with their respective shareholding. 20. Mr Hore agreed that this was a 'business partnership' and 'joint venture'. 21. Initially it was agreed that Mr Hore would purchase twenty-five per cent of the shares in the Company for \$5 million. It appears from the evidence of both men that that figure was agreed on the footing that it represented twenty-five per cent of the value of the Hambleton artworks as and when they were transferred to the Company. The SPAs 22. The

first Sale and Purchase Agreement ("SPA1") was drafted by Bedell Cristin Jersey on the instruction of Mr Valmorbida . Mr Hore did not take legal advice, inter alia , in relation to SPA1, the second Sale and Purchase Agreement ("SPA2") or, indeed, the subsequent Settlement Agreement. 23. An unfortunate aspect of the evidence was that some of the Agreements reached between the parties were unsigned and most were undated. However, at the end of the oral evidence there was agreement as to who had signed what agreement and when as follows: (i) SPA1 was executed on or around 15 th December 2016. (ii) SPA2 was executed on 1 st February 2017. 24. SPA1 provided that within six months of the completion date (the date of the Agreement), the parties would procure (although it was accepted that this obligation fell squarely upon Mr Valmorbida) that the RH1 Assets (which were listed in a Schedule to SPA1) should be transferred to an affiliate of the Company. 25. Importantly, if this transfer did not take place on or before a date six months following the Completion Date, the agreement automatically terminated as provided in SPA1 at clause 7: "7.

Undertakings and Acknowledgements (1) The parties will procure that, unless otherwise agreed, within six months of the Completion Date (or such other mutually agreed date), all of the RH1 Assets shall be transferred to an affiliate of the Company owned by the parties on such terms and using such structure as may be reasonably acceptable to each of the parties. (2) Unless otherwise agreed between the parties, if a transfer in accordance with clause 7(1) is not effected for any reason on or before the date which falls six months following the Completion Date: (a) this agreement shall immediately terminate with effect from the date hereof and the parties shall be released from any obligations or liability (actual or contingent) to which they may be subject hereunder, save for their respective obligations under this clause 7(2) and clauses 8 (Confidentiality and announcements), 10 (Variation and waiver), 14 (Notices) and 15 (Governing law and jurisdiction) which shall each survive termination; and (b) the parties shall (unless otherwise agreed between them) promptly take all steps as necessary to reverse the transactions undertaken pursuant to this agreement (which steps shall include but not be limited to (i) transfer by the Buyer to the Seller of the Sale Shares, (ii) payment by the Seller to the Buyer of an amount equal to the Purchase Price and (iii) payment by the Buyer to the Seller of an amount equal to the sum of any and all monetary or other value received by the Buyer pursuant to this agreement or the Buyer's ownership of the Sale Shares as necessary to put each party in the position in which it would be at the relevant time had this agreement not been entered between the parties provided that each party shall be liable for any costs incurred by it in connection with the taking of such steps and neither party shall be required to account for any interest on amounts which are repaid pursuant to this clause." 26. The consequence of the provisions of Clause 7(2) of SPA1 are important. Not only did a failure to transfer the RH1 assets lead to an immediate termination of SPA1 (and SPA2), but such termination required the parties to take all steps necessary to "reverse transactions undertaken pursuant to the Agreement". This would extend not only to Mr Hore returning the shares in the Company to Mr Valmorbida but repayment to Mr Valmorbida of any monies that Mr Hore had received by way of a dividend so as to put each party in the position that he would have been had the Agreement not been entered. There was an obligation upon Mr Hore to account for any realised or unrealised

profits in the Company that had accrued by virtue of Mr Hore's investment. SPA1 also contained an obligation upon the parties at Clause 7.4 to enter into a Shareholders' Agreement within six months. This did not occur. Importantly, under Clause 7.5, until such time as the parties entered into a Shareholders' Agreement, Mr Valmorbida agreed that he would not, without the consent of Mr Hore, 'dispose of or create any Encumbrance over any of the Company's Assets, except in the ordinary course of the Company's business'; or 'incur any liabilities, except in the ordinary course of its business'. 27. Clause 12 contained an entire Agreement Clause which provided: "12. Entire Agreement (1) This agreement constitutes the entire agreement and understanding of the parties in connection with the subject matter hereof and supersedes any previous agreements, draft agreements, arrangements or understandings (whether in writing or not) between the parties relating to the subject matter hereof. (2) The Buyer acknowledges and agrees that in entering into this agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this agreement or not) relating to the subject matter of this agreement, save as expressly set out in this agreement and provided that nothing in this clause shall operate to limit or exclude any liability for fraud." 28. As to the RH1 Assets, the Schedule to SPA1 contained over fifty pages of photographs and brief descriptions of several hundred pieces of art mostly, but by no means all, attributable to Mr Hambleton. 29. Pursuant to SPA2, Mr Valmorbida sold 15 further shares to Mr Hore for \$5 million to be paid in cash to Mr Valmorbida and the Company agreed to issue 20 new shares to Mr Hore for a further £5.8 million, of which \$3.8 million took the form of the waiver of a loan previously advanced by Mr Hore to the Company to purchase a painting by Basquiat (of which see below). Accordingly, Mr Valmorbida and the Company together received from Mr Hore an additional \$7 million for their shares sold and issued. The consequence of SPA2 was that Mr Hore became a fifty per cent shareholder in the Company at a cost to him of \$15.8 million. 30. Clause 7 of the Agreement was identical to the equivalent provision in SPA1. Pursuant to SPA2, the date for transferring the RH1 Assets to the Company was extended to 15 th June 2017. Ultimately, owing to a Swiss tax audit of RH1, this date was further extended by agreement to 31 st December 2017. 31. Mr Hore was warned by Bedell Cristin of the risks of entering into these agreements. For example, Bedell Cristin (who were Mr Valmorbida's lawyers, not Mr Hore's) said in an email to him dated 15 th December 2016 that they understood that Mr Hore was not taking "formal legal advice on the content of the documents as you are a sophisticated investor and are familiar with deals of this kind and the legal implications of the documents and you have done your own due diligence. I do note however we went through the agreements in detail yesterday and you confirmed your understanding and satisfaction that they reflect the agreed commercial terms. As a lawyer with professional duties, I note that the effect of these documents is that you are acquiring twenty-five per cent of the shares in an offshore company for USD5m and that the company is yet to acquire RH1 where the art currently sits, so should that not happen within the stated timeframe you have a contractual claim against Andy for the return of the consideration which will have already been paid to Andy". 32. In cross-examination, Mr

Hore said that he had waived taking legal advice and that he believed that both himself and Mr Valmorbida 'owed each other a fiduciary relationship'. He agreed that there was a 'level playing field' between himself and Mr Valmorbida as they were both 'commercial counterparties'. In evidence Mr Hore accepted that the two SPAs and the loan agreements, to which we will turn, were the legal arrangements that governed the relationship between himself and Mr Valmorbida. Mr Russo 33. At about the time that SPA1 was executed, Mr Valmorbida appointed John Russo, an Australian lawyer, as Chief Operating Officer of the Company. Mr Valmorbida described Mr Russo as his 'right hand man and trusted adviser'. 34. Mr Russo, as is clear from the email correspondence, referred to Mr Valmorbida as 'brother' and the extent and the quality of the trust and confidence which Mr Hore and, more especially, Mr Valmorbida reposed in Mr Russo was an important feature of the trial and it was necessary for us to make various findings in relation to him, his relationship between the parties and his bona fides. The Woodbury House incident 35. On 10 th February 2017, Mr Russo wrote to Mr Hore and Mr Valmorbida, copied to the then service providers to the Company (Capita) to the effect that he had received a telephone call from Woodbury House to the effect that police officers, possibly from Scotland Yard, and trading standards officers had visited Woodbury House. Woodbury House was an art gallery which was, inter alia, selling Richard Hambleton prints on behalf of the Company/Mr Valmorbida. 36. The allegation appears to have been that elderly customers of Woodbury House had been pressurised into purchasing artwork including Hambleton prints. Mr Hore said he was told by Mr Russo that the sales force at Woodbury House had been cold calling potential buyers and 'aggressively' trying to sell the prints. It was agreed that Woodbury House would be disengaged by the Company and instructed to suspend marketing Hambleton prints on its behalf. 37. Mr Valmorbida agreed to indemnify Mr Hore and/or the Company in respect of any financial and/or legal consequences that arose from the relationship with Woodbury House. This was one of the early signs, Mr Hore said, that there may be difficulties in the relationship with Mr Valmorbida. 38. Initially, Mr Hore was impressed with Mr Russo. He found him methodical and logical. The Company only ever had a handful of staff and accordingly Mr Russo was important in its operations. Purchases of works of art 39. A key feature of the Co-Ownership Arrangement and one of the causes of the breakdown in the relationship between Mr Hore and Mr Valmorbida was the purchases of various individual and significant pieces of artwork, all of which were identified by Mr Valmorbida and largely funded by Mr Hore. 40. We now consider these purchases in chronological order. Untitled 1991 by Jean-Michel Basquiat 41. Mr Valmorbida claimed that Mr Hore was keen to start investing in artwork 'before the ink was even dry on SPA1'. 42. This painting ("the First Basquiat") was sourced by Mr Valmorbida on 17 th December 2016. For a time it was owned by an American television personality, Ellen de Generes. Mr Valmorbida said he negotiated the asking price down from \$4.5 million to \$3.8 million. Mr Valmorbida told Mr Hore that the First Basquiat would be worth between \$7 million and \$9 million in twelve months' time. Mr Hore agreed to fund the purchase by making a loan to the Company in the sum of \$3.8 million. The invoice dated 19 th December 2016 shows the Company as the purchaser of the First Basquiat. Mr Valmorbida said in evidence that Mr Hore was a 'great partner to start

with by showing trust and getting involved and being able to act so quickly. It started out great. But at the end he was very different'. It was agreed that although the First Basquiat would be an asset of the Company, it would be subject to a charge in favour of Mr Hore . The \$3.8 million was subject to a Loan Agreement drafted by Bedell Cristin from Mr Hore to the Company - although subsequently the loan was forgiven and converted into shares under the terms of SPA2. Message from Hades by Kusama 43. This painting was sourced by Mr Valmorbida from an art dealer called Ivor Braka who, Mr Valmorbida said, was a 'major figure in the art world' . The purchase was recommended to Mr Hore by Mr Valmorbida . The purchase price was \$750,000 and the source of funding was the working capital contributed by Mr Hore to the Company in early February 2017. Study for Portrait (Jose Capelo) by Francis Bacon 44. This painting was called 'the Bacon' in evidence. Again, this potential acquisition was found by Mr Valmorbida and held by Mr Braka . Mr Valmorbida negotiated a price of \$2.85 million. Mr Valmorbida emailed Mr Hore on 2 nd February 2017 indicating that other paintings by Bacon involving studies for portrait had been sold for very substantial sums - between approximately £17 million and £27 million. Mr Valmorbida said that a good re-sale price for this piece of art might be between \$8 million and \$12 million. Mr Hore and Mr Valmorbida agreed to equally contribute to the purchase of the Bacon - both making a loan to the Company of half the purchase price, with Mr Valmorbida's fifty per cent being funded by release of the \$5 million he had recently received under the SPA2. The invoice to the Company was dated 6 th February 2017. 45. On 8 th August 2017, the relevant director at Capita advised Mr Valmorbida and Mr Hore that owing to these and other smaller acquisitions the working capital held by the Company had now fallen to £121,209. In The Brothel by George Condo 46. This work was again sourced by Mr Valmorbida and an invoice was addressed to the Company dated 31 st August 2017. Mr Valmorbida accepted in evidence that by this date he had committed the Company to purchasing 'In The Brothel' . Mr Valmorbida , we find, committed the Company to purchasing the painting before mentioning it to Mr Hore by email on 5 th September 2017. We reject his assertion in evidence that he was going to buy the picture in his personal capacity and then merely offer it to the Company as a gesture of goodwill to Mr Hore ; he had stated that the Company was the buyer. Mr Valmorbida said that the painting would be worth \$3 to \$4 million in the coming years against the price he had agreed of \$850,000. 47. In his correspondence with Mr Hore , Mr Valmorbida did not volunteer that he had already committed to purchase 'In The Brothel'. Mr Hore said that he wasn't against the Company purchasing the painting with a loan, but would prefer to wait and raise the capital needed by selling some of the collection that they already had, which would be consistent with the capital needs identified by the Company's director in the email referred to above. 48. Mr Valmorbida responded by saying that the Condo market was 'about to fly and this could be a fun trade'. In his response, Mr Hore told Mr Valmorbida that he just had a call from Mr Russo who had said that the Company had 'no cash to pay salaries' . He said that whilst the Condo painting was exactly the sort of thing the Company should be buying, it should be doing it with its own cashflow which highlighted the priority of: "(i) securing a loan to pay the salaries; (ii) keeping our costs down to the ABSOLUTE MINIMUM until we can start

generating cash; (iii) freeing the artwork promptly from Switzerland so we can sell some pieces; (iv) sell the art we have available and are happy the sell [sic]." 49. He went on to conclude "It's a shame we are not in a stronger position to buy the Condo, but the reality is that we aren't. We need to get our ship in order first and is perhaps a timely reminder to us all' . Mr Valmorbida replied to the effect that he thought Mr Hore's email was 'very fair' and that he totally understood. He said 'We will let the Condo pass' . 50. This created a problem for Mr Valmorbida as he had committed to purchasing 'In the Brothel' on behalf of the Company. Mr Valmorbida sent the invoice for the painting in the name of the Company to his secretary. She, at the direction of Mr Valmorbida , altered the invoice to show Mr Valmorbida as the purchaser with his London address and not the Jersey registered address of the Company. Mr Valmorbida accepted that what had occurred was that, at his direction, a new invoice had been created purporting to identify him as the buyer and not the Company because Mr Hore had made it plain that he was not prepared to permit the Company to acquire it. 51. On 12 th September 2017, the director of the Company wrote to both shareholders setting out that by the end of the month Company funds would be reduced to \$15,000 and they would be unable to pay salaries or monthly payments due to Richard Hambleton. Funding was now 'critical' and if further monies were not received then the directors would have no alternative but to place the Company into administration. 52. Mr Russo replied on 12 th September 2017, copying both shareholders and identifying various finance options, including obtaining a loan on the art owned by the Company including the Condo work 'recently purchased by AV' . Subsequently, there was an email exchange between Mr Hore and Mr Valmorbida leading to a telephone call during which Mr Hore agreed to fund half the purchase of 'In The Brothel'. 53. In Mr Valmorbida's email to Mr Hore dated 14 th September 2017, the former described the call he had with the latter the day before as 'wake up call' . In evidence, he said that he gave the call that description because he realised from the call that until the RH1 Assets had been transferred into the Company, then the Company needed to get its cash position in order. In the email Mr Valmorbida also said that he would loan \$250,000 to the Company immediately and provide a further \$250,000 in January 2018 if necessary. He said 'strong levels of discipline' were needed and that 'myself, John and the team need to realise this is the last cash injection and we need to start selling copyright / IP content that the Company owns.....'. 54. Mr Hore agreed to lend the Company fifty per cent of the price of 'In The Brothel' on condition that Mr Valmorbida did the same and this was finalised in October 2017. Mr Hore extended a further loan of \$125,000 to the Company as working capital, which was subject to a written Agreement dated 13 th October 2017. 55. The purchase of 'In the Brothel' was made on 27 th November 2017 and the Company is recorded as the purchaser. 56. Fortunately, the Company was able to sell 'In The Brothel' for \$1.5 million in December 2017 and Mr Hore was repaid his loan in the sum of \$425,000 on 18 th December 2017. 57. On 22 nd September 2017 there was an important meeting between the two shareholders in the company of Mr Russo which he later summarised in an email. One of the agreements was that there should be 'no further purchases' and that 'focus should be on RH (Richard Hambleton) for the future rather than exploring mid-level or high-level artists'. There was also an agreement to

look for an alternative fiduciary services provider in replacement of Capita. 58. The fact that this email, setting out the contents of what was agreed, was sent by Mr Russo to Mr Hore was described by Mr Valmorbida as evidence of Mr Russo 'colluding' with Mr Hore. We reject these and other assertions to the effect that Mr Russo was colluding with Mr Hore so as to undermine Mr Valmorbida in relation to this and any other matters. In fact, as will be referred to below, to the extent that there was any collusion to disadvantage either of the shareholders, it was collusion between Mr Valmorbida and Mr Russo. Mr Valmorbida accepted in evidence that the 22 nd September 2017 meeting was further evidence that the Company did not have funds to commit itself to further expensive purchases and should focus on building up the Hambleton intellectual property business. Cubist Priest by George Condo 59. This work was subject to an invoice dated 17 th October 2017 recording the Company as the purchaser for the sum of \$1.55 million. In fact, this transaction, which was arranged by Mr Valmorbida, did not involve the Company and Mr Valmorbida said in evidence that 'it was flipped with someone straight away'. Mr Valmorbida, with the assistance of his secretary, produced an invoice purporting to show that the purchase price of the 'Cubist Priest' was \$1.75 million. Mr Valmorbida claimed that this was for the buyer's insurance purposes. The profit of \$200,000 was retained by Mr Valmorbida when he sold the painting onward to Mr Crawley, a client of his. Mr Valmorbida agreed that he had purchased and sold on the painting without putting up any funds himself and he said that this was a 'personal capacity trade'. He said he did not consider accounting to the Company for the \$200,000 profit and no claim against Mr Valmorbida was made by the Company in relation to it. The members of the Court determined this to be an early example of Mr Valmorbida playing fast and loose with the Company's name and amending documents to suit his own purposes. 60. A similar example of the former (i.e. using the Company name for his own purposes) arose in respect of a purchase by Mr Valmorbida of another Condo painting, 'Elastic Figure 2010', arranged via Frederic Larroque Fine Art on 23 rd November 2017, a sale that did not progress but, where again, Mr Valmorbida said that the buyer was to be the Company. Mr Valmorbida said 'this is just me utilising the Company's name for personal reasons, which was not correct, which I should not have done'. Mr Valmorbida accepted that he had, on the face of it, committed the Company to purchasing a work of art without discussing the same either with the other shareholder or the directors provided by Capita. The Comedian by George Condo 61. On 25 th October 2017, Mr Larroque wrote to Mr Valmorbida confirming that Mr Valmorbida had 'just bought' 'The Comedian' for \$1.025 million. Payment was due within seven days. Mr Valmorbida asked his secretary to prepare paperwork showing that the Company was the purchaser. Again, Mr Valmorbida had not discussed this with Mr Hore or the directors of the Company. Mr Valmorbida then asked his secretary to amend the invoice so that it purported to show that the Company had paid \$1.25 million for 'The Comedian'. He was asked whether he agreed that the invoice should not have been amended because this was a 'recreation'. Mr Valmorbida said 'I will be deadly honest, the person who had bought it was looking at it going 'What did you pay for it?''. Mr Valmorbida agreed that he had had this inflated invoice created to purport to show that the Company had paid \$1.25 million for 'The Comedian' when it had not. Mr Valmorbida said

that he was not sure whether the letter was ever used but plainly it was dishonest to have created this instrument for the purpose for which it was intended. 62. Mr Valmorbida paid \$100,000 deposit for 'The Comedian' on 9 th November 2017 to Mr Larroque . In evidence he agreed that he may have used some of the monies that were expressly provided to him by Mr Hore for the purchase of 'In The Brothel'. Mr Valmorbida had a Mr Shevchenko lined up to buy 'The Comedian' but Mr Valmorbida said that this deal fell through because Mr Shevchenko did not want to pay Mr Valmorbida any 'commission' . This was commission on the price of \$1.25 million which, of course, was inflated and false but nonetheless that is what Mr Valmorbida said. Ultimately, he told Mr Shevchenko that he would sell the painting for 'cost price' which it appears to have been, he claimed, \$1.1 million. Ultimately, Mr Valmorbida sold 'The Comedian' for \$1.35 million and although he purported to agree to buy the painting in the name of the Company and may have used some of Mr Hore's money to pay the deposit, he did not account for the profit to Mr Hore or the Company and kept the proceeds for himself. Blue Expanding Orgy by George Condo 63. On 2 nd November 2017, Mr Valmorbida again committed to buying a painting by Condo which was being sold by the Simon Lee Gallery. The invoice recalls that the painting was to be sold to Mr Valmorbida personally, listing his Hampshire address, at the price of \$925,000. This was another purchase that was not discussed with Mr Hore or the directors at the time. Mr Valmorbida found a purchaser for 'Blue Expanding Orgy' before being required to pay the purchase price, i.e. flipping the work. He resold it for \$1.25 million almost immediately. 64. Mr Valmorbida told Mr Hore about this transaction on 28 th November 2017 and the likely profit. He accepted that he did this in order to get Mr Hore's assistance in relation to the purchase of another work. He said that he thought that he would 'offer some profit in the Blue Orgy' in order to persuade him to assist with the much larger acquisition of another Condo work, 'Iron Man'. 65. On the same day, 28 th November 2017, Mr Valmorbida told him about 'The Comedian' and said 'I fronted the \$1,025,000 - it is currently consigned to Simon Lee for \$1,500,000 - they have a buyer apparently. This painting has nothing owing on it'. The suggestion by Mr Valmorbida that he 'fronted' the purchase price and that the painting has 'nothing owing on it' could only be read by a reasonable person as indicating that he had paid the whole price. In fact, that was not true. He had only paid the deposit. On the same day, Mr Valmorbida sent a separate, third, email to Mr Hore reminding him of 'In The Brothel' and the fact that this picture was 'consigned' for \$1.5 million with a firm bid of \$1.35 million. The fourth and final email of the day to Mr Hore was entitled 'Iron Man!!!' which he wanted to discuss with Mr Hore once he had 'digested the emails and understand the numbers' . Iron Man by George Condo 66. On 22 nd November 2017, Simon Lee agreed to sell to Mr Valmorbida 'Iron Man' by George Condo for \$3.7 million. It was money that Mr Valmorbida did not have at the time and payment was, according to the invoice, due immediately upon receipt. 67. The email of 28 th November 2017 was the first Mr Hore had heard about the 'Iron Man' work and there had been no prior consultation with him or the directors of the Company. 68. Mr Valmorbida accepted that the emails which he sent on 28 th November were targeted so as to persuade Mr Hore to provide funding for 'Iron Man' and, indeed, for 'Blue Orgy' so that it could be purchased before it was sold on at a profit. At the

time, the Company had very limited capital and he was unable to fund the acquisitions himself. 69. By this time, Mr Hore had understandably concluded that Mr Valmorbida 'lacked self-restraint and financial prudence'. He was recklessly committing himself to purchase after purchase without having considered how to finance them either personally or through the Company. 70. While Mr Hore was very frustrated by Mr Valmorbida's actions, he was concerned about the reputational damage for the Company if he was unable to complete on the 'Iron Man' acquisition. He agreed to put up the whole of the purchase price for 'Iron Man' on the basis that the funds would be re-paid as soon as possible and that there would be no further acquisitions and, indeed, that the Company would focus on selling artworks which had been divided into categories B, C and D according to their values. Mr Valmorbida agreed with this and said so in an email on 29 th November 2017 and said 'it is very clear and sensible the stance we both take on selling now the majority of our B, C and D art assets during the next 24 months'. He concluded the email by saying: 'To summarise: Sell down existing art assets Build cash pile Build our only business NO MORE ART PURCHASES PERIOD.' 71. Mr Hore replied "Well said Andy.... We are on track!". The following day, Mr Hore, through Little Wing, advanced the sum of \$4.625 million by way of loan to enable 'Blue Orgy' and 'Iron Man' to be purchased. The loan was made to the Company and \$1.075 million of the loan was repaid after 'In The Brothel' was sold for \$1.5 million on 18 th December 2017. The termination of the Co-ownership Agreement, SPA1 and SPA2 72. Within a few weeks the arrangements between the two partners came to an end. It is not necessary to set out at great length why this was, but the following summary will suffice. First, the RH1 Assets had not been transferred to the Company. Some of the delay was owing to a Swiss audit of RH1. Secondly, Mr Hore had generally lost trust in Mr Valmorbida because of the recent cost of artworks purchased and the fact that none had been sold, nor had the Hambleton material been exploited in the way that they had planned. Thirdly, and this was described as the 'straw that broke the back' by Mr Hore in evidence, he was concerned about the Company's tax status. Mr Hore received tax advice to the effect should he wish to remain involved in the affairs of the Company it was appropriate for the Company to be 'moved onshore', which would have meant, inter alia, the Company having UK based directors. Mr Valmorbida was resistant to this as he claims to be non-domiciled in the UK for tax purposes. Mr Hore said that in respect of the question of the tax status of the Company, Mr Valmorbida 'buried his head in the sands'. Mr Hore said that Mr Valmorbida had a 'blasé approach to record-keeping and accounting generally. His preference is to pay no tax at all, and I would categorise myself as somebody who is quite proud of what I have paid in terms of tax and quite happy...to be whiter than white'. 73. Finally, Mr Hore had lost patience with Mr Valmorbida's habit of committing the Company to purchases when the Company did not have the resources to fund those purchases. 74. The precise terms of conversations that Mr Hore and Mr Valmorbida had at this time, in which they agreed that their business relationship was at an end, are in dispute and as nothing turns on it, it is not necessary for us to make findings as to who said what and when. It would be difficult to do so in any event as there is a relative absence of contemporaneous email communication or notes of what was said. 75. Having taken advice from Mr Russo, Mr Hore wrote to Mr Valmorbida on the th

March 2018 notifying him of his 'intention to terminate our agreement' and referring to Clause 7 which is referred to at paragraph 25 above. The letter was entitled 'Notice of Breach of Contract'. Owing to the failure to procure the transfer of the RH1 Assets, Mr Hore said 'I am terminating our agreement in accordance with Clause 7' and said that he would like to 'commence discussions' so as to ensure that Mr Valmorbida fulfilled his obligations under Clause 7(2)(b) to 'take all steps necessary to reverse the transactions'. 76. In the letter he went on to ask Mr Valmorbida to indicate when he would be 'available for discussions so we can negotiate the specifics of this termination and inform the Directors of [the Company] the terms we have agreed'. 77. The fact that the provisions of Clause 7(2)(a) suggest that the SPA automatically terminated upon the failure to comply with the RH1 obligation was not a point that was taken by either party at the time or at trial - it was accepted that the obligations to, as was ultimately agreed, make repayments were only enforceable (on Mr Valmorbida's case) when the Heads of Terms were agreed or (on Mr Hore's case) when the Settlement Agreement was agreed. 78. Mr Valmorbida made much of the fact that Mr Russo helped Mr Hore draft the Notice of Termination and suggested that indicated that he was disloyal and somehow in Mr Hore's camp. As indicated above, we reject that contention and agree with Mr Hore's observation that if Mr Russo had been putting Mr Hore's interests ahead of Mr Valmorbida then he would have told him about the sale of the First Basquiat - a matter which we will consider further below. The Heads of Terms 79. Between late March and 1 st May 2018, there were three meetings between Mr Hore and Mr Valmorbida in relation to what became the Heads of Terms upon which the partners agreed to separate their interests. All meetings took place at The Dorchester Hotel in London and in the presence of Mr Russo. No notes were made but nonetheless the picture that emerges, having regard to the contemporaneous documentation and the acceptance of various parts of the chronology put to Mr Valmorbida in cross-examination, is as follows. The first meeting, described as 'Shareholder Meeting' at The Dorchester, took place on 21 st March 2018. Both parties agreed that Mr Hore said that Mr Valmorbida owed him \$20.9 million, which he accepted. There was a discussion over what sort of period that this should be paid, with Mr Valmorbida suggesting an extended period of years and the parties ultimately agreeing in principle a shorter period. In return for waiting for repayment (which would not carry interest), Mr Hore wanted to know what security Mr Valmorbida would provide. Mr Hore described this, but no other meeting, as a 'heated' one. Mr Valmorbida agreed that Mr Hore understood at this time that the Company owned the First Basquiat, the Bacon, the Kusama and 'The Iron Man' by Condo. 80. During the negotiations in relation to the Heads of Terms, Mr Valmorbida said that he 'played the game'. He used this phrase frequently in evidence and we came to learn that this meant that he consciously lied to Mr Hore in order to ensure that he would secure an agreement from Mr Hore that repayment of the sum that he agreed to repay could be deferred on the footing that he would provide security which in fact was, as we will explore later in this judgment, for all practical purposes worthless. Mr Valmorbida accepted, when he was cross-examined, that he was unable to provide a security package equivalent to the repayment obligation of \$20.9 million. Ultimately, Mr Valmorbida was able to provide security, or purported to provide security, in the sum of \$14.8 million which Mr

Hore was prepared to accept. After the meeting on 21 st March 2018, Mr Russo sent a draft Heads of Terms to Mr Valmorbida which he sent to Mr Hore and to the Company directors at the same time. 81. All drafts of the Heads of Terms were expressly made "subject to contract" and provided that they were not legally binding except where specifically stated. The draft Heads of Terms recited that the parties agreed to negotiate in good faith, and Mr Valmorbida agreed that he and Mr Hore were obliged to discuss matters in good faith. The Heads of Terms envisaged three separate repayments of \$5.2 million over two years, together with a payment in relation to the sum lent by Little Wing at the end of that period. 82. The second meeting at The Dorchester took place on 24 th April 2018. The Heads of Terms were further discussed. Mr Valmorbida accepted that one of the purposes of this meeting was to discuss the artwork that was to be provided in the schedule to the Heads of Terms by way of security. Mr Valmorbida claimed that he was told by Mr Russo to 'play the game', by which he appeared to mean that Mr Valmorbida should offer security whether or not that security was valuable. On the preponderance of the evidence we conclude that it was agreed at this meeting that the security would consist of seven specific pieces of art worth a total value, according to Mr Valmorbida , of \$14.8 million. 83. The seven works of art identified in this meeting and the values ascribed to them were as follows: (i) Study for Portrait Francis Bacon - agreed value \$2.8 million (ii) Untitled Jean-Michel Basquiat - agreed value \$6 million (iii) Iron Man George Condo - agreed value \$3.75 million (iv) Large Reversal 3 Richard Serra - agreed value \$550,000 (v) Untitled Subway Drawing Keith Haring - agreed value \$400,000 (vi) Message from Hades Kusama

- agreed value \$750,000 (vii) Head of William Feaver Frank Auerbach - agreed value \$500,000
- Total agreed value - \$14.8 million 84. There was no mention at this meeting that the First Basquiat had been sold, the Condo (the subject of the Schedule) had been sold and the Bacon had been pledged to a third party lender. 85. Mr Valmorbida accepted that he knew on 24 th April 2018 what artworks had been identified for the purpose of the Schedule to the Heads of Terms and that he knew their total ascribed value \$14.8 million. 86. The parties signed the Heads of Terms at The Dorchester on 1 st May 2018. Mr Valmorbida claimed that he did not read those terms on the day, nor was he given a hard copy of the document by Mr Russo. 87. But, whether or not he read it on the day, the Court finds, and indeed Mr Valmorbida accepted in evidence, that he was familiar with the terms of the document and knew what the Schedule listing the art contained and why it was provided. 88. The final signed version of the Heads of Terms (undated but signed by the parties on 1 st May 2018) provides that it is 'subject to contract' and purports to be agreed by all four parties to these proceedings. As to whether or not it amounts to a contract or a pre-contractual document, under the title 'Background', it is recited that 'the Parties are interested in entering into settlement (the Proposed Agreement). This Heads of Terms set up the principal terms and conditions upon which the Parties agree to enter into the Proposed Agreement'. Under the title 'Status of Heads of Terms' , it is provided: "The terms in this Heads of Terms are not exhaustive and expressly "subject to contract", and until a written agreement has been entered into. The terms are not intended to be legally binding between the Parties except

where specifically stated." 89. The parties went on to agree that they would sign the "final written Proposed Agreement" before 30 th May 2018 - in fact it took several months. The Heads of Terms provided that either party 'may at any time, by giving notice to the other in writing, terminate negotiations for the Proposed Agreement, without having to give any reasons for so doing'. 90. Under the title 'Basis of Proposed Agreement' , it was provided that Mr Valmorbida would pay to Mr Hore three instalments of \$5,266,666 no later than 1 st November 2018, 1 st May 2019 and 1 st November 2019 and make payments of \$3.5 million to Little Wings by way of assuming various other obligations pursuant to loans made by Mr Hore to the Company referred to above, totalling \$1.55 million, no later than 1 st May 2020. Those payments were to be 'interest free' and Mr Valmorbida was to ' provide assets to be used as security by [him] towards the debt, at a mutually agreed valuation of \$14.8 million'

- reference being made to the Schedule listing the artwork referred to above. Furthermore, under the Heads of Terms, Mr Valmorbida was obliged to inform Mr Hore in the event that any of the artworks were 'sold, damaged, lost or stolen' and in the event that any of the assets were sold, he was obliged to 'distribute all proceeds of the sale to [Mr Hore] as payment towards the debt' . 91. Mr Hore's obligations under the "Proposed Agreement" were to forgive the loans, acknowledge various payments and, perhaps most importantly, relinquish all his shares, rights and ownerships in the Company to Mr Valmorbida . 92. Finally, the Heads of Terms provided that the 'agreement in this heads of terms will remain in effect until superseded by the Proposed Agreement...'. 93. Mr Valmorbida's case was that the Heads of Terms, notwithstanding the clear wording to the contrary, had immediate contractual effect. Mr Hore's pleaded case was that the Heads of Terms had no contractual effect although, in cross-examination, he was inconsistent on this issue. Certainly, it is possible for a document such as the Heads of Terms to have had contractual effect, notwithstanding the fact that the wording of the document agreed clearly says that no such effect was intended. 94. In the circumstances of this case, having regard to the fact that ultimately a Settlement Agreement was negotiated in line with and as anticipated by the Heads of Terms, we have no hesitation in finding that the Heads of Terms did not have a contractual effect, although it did contain various representations made by Mr Valmorbida to Mr Hore upon which Mr Hore relied and without which he would not have entered into the Settlement Agreement later that year. The Settlement Agreement 95. We will briefly touch on the terms of the Settlement Agreement before coming to the events of 2018 which were not known to Mr Hore at the time and would have prevented him from entering into the Settlement Agreement or agreeing to the Heads of Terms had he been aware of them. 96. The Settlement Agreement was dated 31 st October 2018 and was drafted by Bedell Cristin. It was signed by both parties approximately one week later. Paragraph E of the Settlement Agreement recited that the parties had 'agreed to record the terms on which the Co-Ownership Arrangement and certain ancillary matters will be terminated, settled or assigned (as applicable) on a binding basis pursuant to this Agreement' . The payment obligations foreshadowed in the Heads of Terms were repeated, save that Mr Valmorbida agreed to enter into a loan agreement with Little Wings in respect of the \$4.625 million

advanced on 20 th November 2017. The agreement was governed by Jersey law and under the title 'Artworks', the parties agreed that the artworks were valued as set out in Schedule 1 (the same list of artworks as attached to the Heads of Terms and referred to above). Following the agreed assignment of the title of the "Artworks" to Mr Valmorbida clause 4(2) provided that: "AV will hold and not sell, assign, transfer, mortgage, charge, declare a trust of, or deal in any other manner with the Artworks or any of his rights to the Artworks until the total payment has been paid to [Mr Hore] save for any 'permitted sale'." 97. In respect of a 'permitted sale' , the Settlement Agreement provided that Mr Valmorbida was permitted to sell any of the artworks provided the net proceeds of sale were paid within fourteen days to a bank account nominated by Mr Hore , with such permitted sale proceeds being deemed to be an early repayment of the total payment obligation. 98. A failure on the part of Mr Valmorbida to comply with his obligations to make a payment when due was an event of default and in the event of any such default Mr Valmorbida was obliged immediately to make the artworks available for collection by Mr Hore , with Mr Hore then to use all reasonable endeavours to sell them within ninety days and apply the proceeds to the sum outstanding (clauses 4(5) and 4(6)). 99. Clause 8(5) said: "The parties acknowledge and agree that in entering into this Agreement they do not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this agreement or not) relating to the subject matter of this Agreement, save as expressly set out in this Agreement and provided that nothing in this clause shall operate to limit or exclude any liability for fraud." 100. Mr Valmorbida claimed that he did not read this document at the time. But he signed it, knew of the contents of the Schedule and was familiar, in general terms, with his obligations in respect of the artwork to which we have referred. As to Mr Hore's obligation to transfer the entirety of his shareholding of the Company to Mr Valmorbida , he complied with this obligation as soon as the agreement was signed. 101. The first payment of \$5,266,666 was paid by Mr Valmorbida prior to 1 st November 2018. No other payments were made. Mr Valmorbida's dol / fraud 102. By the end of November 2017, as referred to above, Mr Valmorbida had made a number of commitments to Mr Hore , including to build a cash pile, focus on the business and make no further art acquisitions, and Mr Hore had, as accepted by Mr Valmorbida in his evidence, relied upon those promises and was willing to move forward on that basis. Indeed, he agreed to make a loan to fund the purchase of Iron Man and Blue Expanding Orgy. Nonetheless, at this time Mr Valmorbida , with the help of Mr Russo, put together a pack of documentation to persuade Investec to lend him money. In an email discussion in relation to recent trading successes with Mr Russo, Mr Valmorbida said on 29 th November 2017 "Let's put all in my name for Investec" . He accepted in evidence that this was him stating that he wanted to represent various artworks as his for the purpose of taking out a loan in his personal capacity, even though many such artworks were owned by the Company. This included Blue Expanding Orgy and Iron Man - where Mr Hore had only just agreed to pay the purchase price. The works included the Bacon and the First Basquiat, both of which were owned by the Company. This occurred without any disclosure being made to Mr Hore . The directors of the Company were also not consulted. 103. On the 8 th January

2018, Mr Valmorbida wrote to Mr Russo saying 'Where we at with Investec . They need to action this fast as we have everything ready to go on our end and we need the funds or will lose the trades I have lined up for us'. Mr Russo replied to the effect that the bank was 'Much more comfortable now they can take custody of assets' and he hoped for approval from Investec by the end of the week. Mr Russo added 'Takes time to get millions and there's always a dance to be played out. Pending valuation and collection of works, everything should be completed before the end of the month'. When Mr Valmorbida was cross-examined, it was put to him that when he said to Mr Hore 'no more purchases, period' , what he actually meant was ' no more purchases with your knowledge' i.e., that Mr Hore knew about. Mr Valmorbida responded to this by saying he was ' playing the game'

- a phrase to which we have already referred. He accepted that this correspondence was also concealed from Mr Hore and the board of the Company. At about this time, Mr Valmorbida contacted a second potential lender, namely Falcon Fine Art Limited ("Falcon") of London. Falcon wrote to Mr Valmorbida on the 17 th January 2018, saying that Mr Valmorbida's 'required timeframe' of 'two weeks' was 'an extremely tight window for us to structure a deal' . Falcon went on to ask for up to date valuations, images and cataloguing details for all the art. When shown this correspondence in evidence, Mr Valmorbida commented 'I understand this looks very murky... ' . 104. On the 18 th January 2018, Falcon wrote again to Mr Valmorbida . Falcon had had a credit committee meeting that afternoon to approve another transaction and the author of the email took the opportunity to mention that Mr Valmorbida had approached Falcon in order to request finance on 'the Basquiat, Bacon and Condo' . The email went on to refer to the 'disappointment' that Mr Valmorbida had recently suffered as his first attempt to obtain finance from Investec had, for whatever reason, failed. Falcon had said that they would consider financing 'your collection' if the pictures were kept in a fine art storage facility held to their order. In evidence, Mr Valmorbida agreed that the Bacon, Basquiat and Condo referred to in the email were the assets of the Company and not his. He accepted he understood that there was a difference between an asset owned by the Company and an asset owned by him personally and that the Condo (Iron Man) had been purchased by Mr Hore only two months before. 105. In evidence, although this pretence was ultimately abandoned by Mr Valmorbida and was in any event unsustainable, he claimed that he was being controlled by Mr Russo who he said was a 'sociopath corporate lawyer' . Mr Valmorbida completed a questionnaire indicating that he was seeking financing from Falcon in the sum of \$6.5 million. The duration of the proposed loan was five years and the use to which the funding was to be put was stated to be ' business funding for art trading company'. The application, which was signed on 16 th January 2018, identified the three pieces of art referred to above; said that the works were all located at Mr Valmorbida's country home in Gloucestershire; identified Mr Valmorbida as the owner and said there was no third party interest in the artwork. Mr Valmorbida accepted that his declaration as to ownership was false. 106. Mr Valmorbida then began to correspond with Sotheby's, as he needed a valuation from them for the purpose of Falcon's proposed financing. On 17 th January 2018, Mr Valmorbida emailed Sotheby's and stated 'All 3 works were bought in my

name and we will send you invoices and provenance this evening...'. It was at this stage that the Court suggested to the parties that Mr Valmorbida needed to be cautioned. Counsel did not demur from this suggestion and the Court invited the parties to consider whether the witness needed to be cautioned, the terms in which he should be cautioned and retired to give the parties an opportunity to consider this matter. After a short adjournment, counsel for Mr Valmorbida asked for an opportunity to advise Mr Valmorbida as to the effect of the caution, notwithstanding the fact that he was in the course of giving evidence. The Court agreed to that application and adjourned briefly for the purpose of that advice being given. 107. When the evidence resumed, Mr Valmorbida was cautioned in the following terms: "I know that you have taken advice on this but I am now going to tell you that you are not obliged to answer any questions in this case that may incriminate you. But if you choose to do so, then your answers may be given in subsequent criminal proceedings, whether here or in another country. Do you understand?" Mr Valmorbida confirmed that he understood. 108. Having asked for further clarification as to the effect of the caution, Mr Valmorbida was warned: "I can only repeat what I have previously said to you. You are not obliged to answer questions in this case that may incriminate you. That means that you may, if you wish to, decline to answer questions. But if you choose to answer questions that may incriminate you, then your answers may be given in subsequent criminal proceedings, whether here or in another country." 109. Mr Valmorbida then sought a further break to take legal advice which the Court permitted before resuming with the evidence. Notwithstanding the administration of the caution, Mr Valmorbida elected to continue to respond to virtually all questions asked of him, notwithstanding the fact that some of those responses may incriminate him. 110. Mr Russo then emailed Sotheby's with the valuations sought for the Falcon financing, attaching the purported purchase invoices in respect of the First Basquiat, the Bacon and the Condo. All three of these had been doctored to show Mr Valmorbida as the purchaser from his London address in Ladbroke Square. In relation to the suggestion that the invoice had been fabricated to represent himself as the owner, Mr Valmorbida replied 'No comment. But I understand where this is all going, yes'. When it was put to him that the Bacon invoice had been fabricated, he said 'Yes, it has been modified, definitely'. 111. By the end of January 2018, Mr Valmorbida had also contacted another London based company, namely Fine Art Group, for the purpose of seeing if they would lend him money against artwork owned by the Company. He provided them with the same fabricated invoices that he had provided to Sotheby's. He accepted that neither the directors of the Company nor Mr Hore were informed about these attempts, in our view, to obtain property by deception. Towards the end of January 2018, Fine Art Group offered to lend \$4 million, later increased to \$5 million, to Mr Valmorbida . 112. On 28 th January 2018, in order to obtain cash urgently, Mr Valmorbida agreed to borrow £1.5 million for four weeks using the Condo Iron Man as security, even though it was owned by the Company and even though the painting had been purchased with funds provided by Mr Hore . The money was required for a further painting that Mr Valmorbida had 'on hold' . On or about 30 th January 2018, Mr Valmorbida sold the Iron Man by Condo for £1.5 million, even though it had been purchased for \$3.7 million, subject to him having a right to repurchase it for six months. In the sale

agreement he represented that the painting was his - but it was not. Again, he did not tell the Company that he had sold its painting, nor did he tell Mr Hore who supplied the funds to buy it. Owing to the sale of the Condo, the proposed security for the Fine Art Group loan altered and the Condo was replaced by two paintings, including an Auerbach. When Fine Art asked for a copy of the invoice in relation to this picture on 8 th February 2018, Mr Valmorbida forwarded the request to Mr Russo who said 'Need me to create something?' . It was put to Mr Valmorbida that this was a case of Mr Russo fabricating an invoice and he replied 'Yes, he is changing it' . Mr Valmorbida accepted that this was another case of a forged invoice being provided in order to suggest that he owned a painting. At the time, the Auerbach was not owned by Mr Valmorbida or, indeed, the Company, but by a third party who had given it to Mr Valmorbida to sell. For the purpose of securing the Fine Art Group loan, Mr Valmorbida executed a statutory declaration in the presence of a lawyer at Forsters LLP, London on 12 th February 2018, to the effect that he owned the art listed in the schedule to the declaration. The declaration claimed 'Each work of art is 100% legally and beneficially owned by me. I confirm that I am absolutely entitled to pledge them in favour of the Lender'. The lender was Fine Art Luxembourg. He accepted that this statement was false, as the Bacon and First Basquiat were owned by the Company and the Auerbach was owned by a third party. 113. On 14 th February, Fine Art Group sent an email to Mr Valmorbida enclosing a fully executed version of the loan agreement signed by both parties, executed by Mr Valmorbida as a borrower on his own behalf providing that he was taking out a loan of \$5.5 million with the funds to be paid into his personal bank account in the Isle of Man. Clause 8 represented that the borrower was the 'sole absolute legal and beneficial owner of the collateral....'. Mr Valmorbida accepted that this declaration was false. Further, because of the falsity of these representations, an event of default had already been committed under the terms of this agreement which exposed the art to a right on the part of Fine Art Group to sell. 114. Mr Valmorbida accepted that he had granted security over Company assets, made false representations and that those assets could now be sold by Fine Art Group. 115. Having secured funds from Fine Art, Mr Valmorbida began to attempt to sell the First Basquiat without any engagement from Mr Hore or the directors of the Company, although this artwork was probably the jewel in the Company's crown. 116. Towards the end of February 2018, Mr Valmorbida instructed Mr Russo to prepare a draft invoice for the sale of the First Basquiat for \$6 million to an art gallery in Los Angeles, representing that he was owner. Of course, the true owner was the Company and, in any event, Mr Valmorbida could not sell the painting without the consent of Fine Art Group. He accepted that this draft documentation 'completely ignored' the agreement he had signed with Fine Art Group a couple of weeks before and was produced without any discussion of the directors of the Company or Mr Hore and, indeed, was concealed from them both. 117. Having received a first instalment of the \$5.5 million loan from Fine Art in the sum of \$2 million, at the end of February Mr Valmorbida received the balance of \$3.5 million and \$6 million from the sale of the First Basquiat was on its way. On 2 nd March 2018, Mr Russo drafted a notice for Mr Hore to send to Mr Valmorbida terminating the SPA. Mr Hore spoke to Mr Valmorbida on 3rd March 2018. During this call, Mr Valmorbida did not volunteer that he had just sold the First Basquiat or

the Condo Iron Man to Mr Crawley or received \$5.5 million from the Fine Art Group. 118. Mr Valmorbida made no attempt to account to the directors of the Company for the proceeds of the sale of the First Basquiat, but had begun to plan for further expenditure using these funds. 119. By late March, Mr Valmorbida had begun the series of meetings with Mr Hore at the Dorchester to which we have already referred. In those meetings, security was identified and Mr Valmorbida withheld the fact that he had already sold Condo's Iron Man, the First Basquiat and pledged the Bacon to the Fine Art Group. Mr Valmorbida explained this by saying 'I was told to play the game or I would be finished. I played the game'. As to the meeting on 24 th April 2018, during which the Heads of Terms and the schedule of artworks representing Mr Hore's security were discussed, said 'Again I was told to play the game'. Mr Valmorbida then went on to use the proceeds of the sale of the First Basquiat to purchase another Basquiat painting, Sacred Ape for \$7.25 million, which he then sold on 29 th May 2018 for \$9 million less commission, with the proceeds remitted to his personal bank account. On the following day, Fine Art Group sent Mr Valmorbida a notice identifying two grounds of default: first, a failure to pay interest, and secondly, a breach of the agreement by reason of Mr Valmorbida offering collateral (i.e., the paintings pledged as security) for sale to third parties. The collateral in question was Sacred Ape which had been swapped for the First Basquiat by way of security to Fine Art. Fine Art engaged Withers to represent them and claimed \$6.33 million. Mr Russo wrote to Fine Art Group on behalf of Mr Valmorbida saying that Mr Valmorbida was 'In the process of selling artwork from his private collection and last week he received an offer on a George Condo masterpiece (Iron Man) that he has now accepted'. Of course, Iron Man was owned by the Company and not by Mr Valmorbida . Ultimately, Fine Art took control of the sale of the Basquiat work, the Sacred Ape, and received \$6 million, with the balance of \$3 million used to purchase a piece titled Black Diagonal Relief by Ellsworth Kelly. 120. On about 18 th June 2018, Mr Valmorbida sold Iron Man to another gallery for \$6 million

- a profit against purchase of \$2.3 million. Again, the funds were remitted to his personal account and there was no thought that the proceeds might be paid to the Company or Mr Hore . On 24 th May 2018, Mr Valmorbida agreed to purchase another Basquiat, which he thought was better than the ones he had previously purchased, called Water Worshipper. The purchase price was \$8 million. He believed that the purchase would generate a significant profit on sale but did not have the funds to complete the purchase. Having paid a \$250,000 deposit, Mr Valmorbida needed to raise \$7.5 million by 6 th July 2018. An instalment of \$3 million was due on 14 th June 2018. Mr Valmorbida authorised a number of casual lies to be told to the vendor in relation to these funds. Initially, Mr Russo wrote on his behalf saying that the difficulty was owing to bureaucracy with a private bank in Jersey. In evidence, Mr Valmorbida said that this was false. He said 'It was a silly narrative'. The Court asked him 'You used the term 'Silly narrative', but you mean it was untrue, do you?'. Mr Valmorbida replied 'Sorry. When I say untrue, yes, in this case yes'. 121. When the vendor wrote to Mr Valmorbida again on 18 th June 2018 asking for payment confirmation, subsequently chasing Mr Russo, Mr Russo wrote to Mr Valmorbida saying 'What do you want

me to say?' . Mr Valmorbida said that he should say that the bank was not releasing funds until 'AML from Ukrainian client r cleared. Say bureaucracy [spelt incorrectly] at Barclays - any day now'. This was also untrue. Mr Valmorbida accepts that he asked Mr Russo to lie on his behalf. Mr Valmorbida simply did not have the funds so instructed his agent to lie on his behalf. 122. In early July 2018 funds came in, including monies from the sale of Iron Man, and the purchase of Water Worshipper could proceed. Accordingly, funds provided by Mr Hore to buy Iron Man were used to purchase a painting about which he knew nothing at a time when he thought that Iron Man still stood as security for Mr Valmorbida's obligations to him. 123. Mr Valmorbida went on to make various false representations to Sotheby's for the purpose of securing a loan executed on 19 th September 2018 in the sum of \$6.7 million. Again, the funds were paid to Mr Valmorbida's personal account in the Isle of Man and Sotheby's advanced the sum on the footing of various written representations and warranties made by Mr Valmorbida including that he was the sole and absolute owner of the artworks that the loan secured. Further, he agreed with Sotheby's that he would not sell, offer, pledge, transfer, or dispose or agree to dispose of any of the collateral, except with the permission of Sotheby's. As to the collateral offered and accepted by Sotheby's, it included four paintings which were amongst the seven that were agreed security provided to Mr Hore (the Bacon, Frank Auerbach's Head of William Feaver , Richard Serra's Large Reversal and Kusama's Message from Hades); and one painting owned by a third party (the Auerbach referred to above). All of the works which were security for the obligations owed to Mr Hore were of course owned by the Company and not by Mr Valmorbida . The Sotheby's transaction was again not disclosed to either Mr Hore or the directors of the Company (now provided by First Names, not Capita). 124. Sotheby's released the funds on 25 th September 2018. Approximately half of the funds from Sotheby's were used to pay the first instalment due to Mr Hore under the terms of the Settlement Agreement. So, by the time the parties signed the Settlement Agreement on 21 st October 2018 referring to the seven works of art listed, the Bacon was secured to Sotheby's; the First Basquiat had been sold eight months before; Iron Man had been sold in June; Large Reversal was secured to Sotheby's; Message from Hades was secured to Sotheby's and the painting by Auerbach was also secured to Sotheby's. When Mr Valmorbida paid the first instalment due to Mr Hore , but still owed him approximately \$15 million, the security that Mr Hore thought he had was in fact reduced to one painting, namely Untitled Subway Drawing by Keith Haring with an agreed value of \$500,000. Mr Valmorbida accepted this in evidence. Mr Valmorbida went on to accept that Mr Hore had kept his part of the bargain - transferring his shareholding in the Company to Mr Valmorbida

- and agreed that insofar as his obligations were concerned, the security he had offered was 'completely worthless other than the Haring' . 125. These matters only came to light, so far as Mr Hore was concerned, after Mr Valmorbida's sworn affidavit in English proceedings in September 2019. In August 2019, Mr Hore commenced proceedings in England requiring Mr Valmorbida to, inter alia , provide particulars as to the whereabouts, ownership and encumbrances (if any) attaching to each of the artworks identified in the Settlement

Agreement. 126. On 30 th August 2019, Mr Valmorbida's English solicitors notified Mr Hore for the first time that the First Basquiat and Iron Man had been sold on 27 th February 2018 and 18 th June 2018 respectively, and that Mr Valmorbida had received \$12 million from the sales and had used a proportion of those funds to purchase Water Worshipper by Basquiat. Mr Valmorbida went on to swear two affidavits in the English proceedings, the second of which was to correct "errors" in his first. In his first affidavit, Mr Valmorbida suggested that the Sotheby's loan had been used to meet the working capital requirements of the Company. In Mr Valmorbida's second affidavit, sworn on 27 th September 2019, he corrected the suggestion that he obtained the Sotheby's loan in order to fund a shortfall in the Company's working capital. He accepted the loan was procured in his own name, and used inter alia to pay Mr Hore the first instalment due under the Settlement Agreement and to pay other expenses including an American Express credit card bill of his exceeding \$152,000 and to repay a man who had lent him \$640,000 so that he could repay the outstanding debt he owed to Fine Art. 127. In fact, in evidence at trial, Mr Valmorbida accepted that his second affidavit sworn in the English proceedings was also wanting in that it suggested that \$5,266,666 received from Sotheby's had been used to discharge his obligations under the Settlement Agreement to Mr Hore in respect of the first instalment, whereas in fact only \$2.85 million of the Sotheby's loan was used to pay Mr Hore and the balance retained for himself. Accordingly, both affidavits sworn by Mr Valmorbida in the English proceedings were misleading. 128. At the conclusion of his evidence, Mr Valmorbida accepted that had he used the proceeds of the First Basquiat (\$6 million) and the Iron Man by Condo (\$6 million) and sold the Bacon, as he said he could have done for \$4.5 million, that would have produced \$16.5 million which he could have used to discharge his and the Company's obligations to the Plaintiffs. However, he chose not to do so in order he said to trade himself out of trouble. 129. Mr Valmorbida was the second and final witness in the case and, prior to counsel making their closing submissions to the Court, counsel for Mr Valmorbida said that he was instructed to concede the defence of the case in relation to fraudulent misrepresentation. In view of such a concession, which was warranted by the evidence, we can take our findings on the evidence shortly but prior to dealing with those findings it is appropriate to set out the relevant legal principles. The Plaintiffs claims consequent upon Mr Valmorbida's dol 130. We have already found that the heads of terms did not amount to a contractually binding agreement, but that the Settlement Agreement did. 131. The Plaintiffs' claim is that the Settlement Agreement is either void or voidable as a consequence of Mr Valmorbida's (admitted) fraudulent misrepresentations / dol. 132. A fraudulent misrepresentation, in addition to being a form of vice du consentement , is also a form of dol. 133. We need to determine whether the Settlement Agreement was void or not, or if it was merely voidable, whether it had been avoided by Mr Hore or affirmed by virtue, inter alia , of how he originally pleaded his case. Various other consequential arguments flowed from these issues in respect of appropriate compensatory relief. 134. Mr Valmorbida's case, until his late concession, was that the Settlement Agreement disposed of all claims between the parties, was valid and the Plaintiffs were not entitled to treat it as void or avoided and accordingly their only action lay in the claim for repayment of the sums due under the

Settlement Agreement, less the sum paid to date. 135. If the Settlement Agreement was void or voidable and had been avoided subsequently, then the Plaintiffs advanced various claims in relation to lost profit in respect of the monies which Mr Hore and Little Wing invested, which Mr Hore claimed would have been invested in other ways thus entitling the Plaintiffs to compensatory relief including damages, a sum awarded to reflect the loss of investment opportunity or, in the alternative, compensation for breach of fiduciary duty and in the further alternative, compensation for unjust enrichment. The Plaintiffs also made an alternative claim for compound interest. It is not necessary to deal with all the issues raised in relation to damages as the case was compromised subsequent to trial but, as indicated in the judgment that we gave on 30 September 2021, reported at *Hore v Valmorbida*

- [2021] JRC 242 , we do think it appropriate to give our decisions in relation to the facts of this case (which we have done above) and the legal issues of significance that arose in consequence. Contract and vitiation of consent 136. It is well established that consent is one of the four elements that must be present in order for there to be a contract validly formed under Jersey law (see *Selby v Romeril*
- [1996] JLR 210). 137. The objective approach to identifying the question of consent in contract has been held to be appropriate and preferable to the subjective approach. This matter was explored in the judgment given by the Bailiff in *Murray v Camerons Limited*
- [2020] JRC 179 , in which the Bailiff carried out an extensive review of recent authority including the excursus of Martin JA in the Court of Appeal in *Booth v Viscount of the Royal Court*
- [2019] JCA 122 . At paragraph 189 of the Royal Court judgment in *Murray v Camerons Limited* , the Bailiff gave a number of reasons explaining why he held that the objective test to ascertain whether or not the parties had consented to entering into a contract applied. We agree with those reasons and now that the two full-time judges of the Royal Court and the most recent decision of the Court of Appeal are agreed on this issue it is anticipated that this matter is now resolved and need not be revisited. 138. Consent can be vitiated in a number of ways including findings of dol and fraudulent misrepresentation. It was common ground that only such a finding, i.e. of dol or fraudulent misrepresentation, could have the effect of avoiding the Settlement Agreement - indeed clause 8(5) of the Settlement Agreement expressly provided that the 'whole agreement' clause should not operate to limit or exclude any liability for fraud. It was contended by the Plaintiffs, and the Court accepted, that the test for a finding of fraudulent misrepresentation was the same as that for dol, i.e. knowingly making false representations. 139. The starting point for considering the nature of dol and whether or not a proof of dol leads to the affected contract being void or voidable is *Steelux Holdings Limited v Edmonstone*
- [2005] JLR 152 , in which, at paragraphs 9 and 10, Bailhache Bailiff said: "9. Counsel for the defendant submitted that the law was clear and that the applicable legal principles were agreed between the parties. Counsel for Steelux did not demur. Counsel referred us to passages from *Chitty on Contracts* as to what constitutes a misrepresentation under

English law. While English law and Jersey law may often arrive at the same conclusion in relation to the effect of a false or fraudulent misrepresentation upon a contract, the process of reasoning, and the route by which the journey is taken, are sometimes different. We find it necessary therefore to set out what we conceive to be the law in this area. 10. Fraudulent conduct, including the making of a fraudulent misrepresentation, can be a "moyen de nullité", or a cause of the nullity of an agreement. The underlying principle of fraud, which we may say embraces both "dol" and "fraude" is bad faith. Fraud is a "vice du consentement", that is to say, a defect which nullifies the apparent consent between the parties and allows the defrauded party to treat the contract as void. If therefore a party knowingly makes a false statement which induces the other party to sign a document and thereby to enter a contract, there is a defect of consent which allows the other party to treat the contract as void. It may not be necessary that the statement is, at the time it is made, knowingly false; if the statement is in fact false, and the other party acts upon it, there is nonetheless a defect of consent ("vice du consentement") because the other party enters the contract under the mistaken impression that the statement or representation was true. It may be seen therefore, that the distinction between mistake ("erreur") and fraud ("dol") as defects of consent may sometimes be blurred. There is in either event a defect of consent which allows the injured party to treat the contract as void. The burden of proof lies upon the party who asserts that there is in law a defect of consent." 140. The wording used by the Royal Court, namely that dol 'allows the injured party to treat the contract as void', would not appear on its face to exclude prohibiting such a party to affirm the contract if it so wished. 141. However, in *Marrett v Marrett and O'Brien*

[2008] JLR 384, the Royal Court held, although noting at paragraph 55 that 'This is not the time for a detailed analysis of the Jersey Law of Contract...', that: "59. Consent is prevented, amongst other things, by erreur /error (Pothier, *Traité des Obligations*, paras. 17-20, at 13-16 (1827 ed.); Domat, 1 *The Civil Law in its Natural Order*, book 1, title, 1, at 53-54 (Strahan transl., 1722); French Civil Code, arts. 1109-1110). In turn, erreur may be of two kinds: erreur obstacle (erreurs that prevent the meeting of minds necessary to constitute a contract's creation and cause a contract to be a nullity absolue) and erreur vice du consentement (a defect of consent where there is consent/meeting of minds but consent is impeachable for some other reason and which causes a contract to be a nullity relative: as to which see French Civil Code, arts. 1109 and 1118). *Steelux Hldgs. Ltd. v. Edmonstone (née Hall)* (36) is recent Jersey authority for the proposition that a vice du consentement (and, a fortiori, erreur obstacle) will render a contract void ab initio, that is to say, it never existed. Erreur vice du consentement is said to be relevant in this case." 142. Accordingly, in *Marett and Marett*, the Court appeared to take the view that the Court in *Steelux* had held that the effect of any finding of vice du consentement would render a contract void ab initio i.e., a contract 'that never existed'. This is stronger language than was used in *Steelux*, as already noted. 143. In *Sutton v Insurance Corporation of the Channel Islands Limited*

- [2011] JLR 80 , the Royal Court held per Bailhache, Deputy Bailiff, at paragraph 46: 'A fraudulent misrepresentation clearly allows the contract to be avoided' . This is consistent with the English position that even a finding of fraudulent misrepresentation does not mean that the contract is void ab initio but that it may, at the instance of the innocent party, be avoided or, if the innocent party so chooses, affirmed . In Sutton , the Royal Court did not expressly go on to find that that was a consequence of a finding of dol but did in the same paragraph hold that an innocent misrepresentation which induced a contract 'can be another form of vice du consentement just as erreur or dol' . 144. In Hong Kong Foods v Robin Hood Curry Limited
- [2017] JRC 050 , Sir Michael Birt, Commissioner, giving the judgment of the Royal Court, said this at paragraphs 134 to 149: "134. In Kwanza Hotels Limited v Sogeo Company Limited (1981) JJ 59, the Royal Court accepted the following as a definition of a representation: "A statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that is untrue." The Court of Appeal, on appeal in that case (at 1983 JJ 105), must be taken to have agreed with that definition and upheld the Royal Court's decision that, on the facts of that case, there was no misrepresentation as there was no statement of fact. A broadly similar definition was applied in McIlroy v Hustler
- (1969) JJ 1181 at 1185 and Newman v Marks [1985-86] JLR 338 at 351. 135. A statement of opinion (unless not honestly held) is not a representation of fact; nor is a mere commendatory statement e.g. mere puff; accordingly neither of these, even if incorrect, can amount to a misrepresentation. 136. Until fairly recently, it appeared from cases such as McIlroy, Channel Hotel and Properties Limited v Rice (1977) JJ 111, Kwanza and Newman that Jersey law recognised an ability to rescind a contract or award damages in lieu in the case of misrepresentation. In other words a contract induced by misrepresentation (at least if not fraudulent) rendered a contract voidable rather than void. In none of these cases was there any suggestion that misrepresentation amounted to a vice du consentement . Thus: (i) In McIlroy the defendant claimed that the contract had been induced by misrepresentation and sought rescission, alternatively damages. The Court (Ereat , Bailiff) found that the alleged misrepresentations were in fact statements of opinion and therefore did not amount to misrepresentations. The defendant's claim was therefore dismissed. However there was no suggestion that the alternative claim for damages was not something which the Court could award. (ii) In Channel Hotel and Properties, there was no claim for rescission. The plaintiff only claimed damages under the headings of misrepresentation, breach of warranty and negligence. Although the judgment of Crill, Deputy Bailiff, is not entirely easy to follow, the Court specifically held at 115 that the Court had jurisdiction to award damages for innocent misrepresentation (although somewhat confusingly it declined to say whether that extended to negligent misrepresentation). The Court appears in the latter context to have been thinking of a liability in tort for negligent mis-statements rather than misrepresentation inducing a

contract. The Court found for the plaintiff on liability. (iii) In *Kwanza* the plaintiff sought only damages. It did not seek rescission of the relevant contract as it wished to retain the property it had purchased. It was not suggested by *Ereaut*, Bailiff or the Court of Appeal that this remedy was not available for misrepresentation although, on the facts, it was held that the statement relied upon was not a statement of fact but merely a descriptive expression. (iv) In *Newman* the plaintiff sought rescission, alternatively damages for, *inter alia*, misrepresentation as to the age of a horse which she had purchased from the defendant. On the facts, the Court (Tomes, Deputy Bailiff) held that any misrepresentation as to the age of the horse had not induced the contract but at page 359 the Court said "it is clear that under Civil Law, the judge had a wide discretion to decide whether the contract should be rescinded, or the price lessened, or damages paid, or whether any regard at all ought to be had to the complaint." 137. However, in *Steelux Holdings Limited v Edmonstone* [2005] JLR 152 the Royal Court (Bailhache, Bailiff) indicated at paragraph 10 that an innocent misrepresentation which induces a contract amounts to a *vice du consentement*. Thus, having stated that a fraudulent misrepresentation would amount to *dol* and would therefore be a *vice du consentement*, the Bailiff went on to say: "It may not be necessary that the statement is, at the time it is made, knowingly false; if the statement is in fact false, and the other party acts upon it, there is nonetheless a defect of consent (*vice du consentement*) because the other party enters the contract under the mistaken impression that the statement or representation is true. It may be seen, therefore, that the distinction between mistake (*erreur*) and fraud (*dol*) as defects of consent may sometimes be blurred. There is, in either event, a defect of consent which allows the injured party to treat the contract as void. ..." 138. This approach was followed by the Royal Court in *Sutton v Insurance Corporation of the Channel Islands Limited*

[2011] JLR 80 where at para 46 William Bailhache, Deputy Bailiff, having referred to the fact that in earlier decisions the Royal Court had been prepared to investigate whether there had been an innocent misrepresentation which induced the contract, said this: "This must have been taken to have been upon the basis of a *vice du consentement* which goes to the issue as to whether there was any true common will or *volonté* to agree the terms of the contract ... A fraudulent misrepresentation clearly allows the contract to be avoided. But we go further and hold that Jersey's contract cases show that, depending on the facts, including, in particular, the materiality of the alleged misrepresentation to the contract and its actual impact on the party to whom it was made, an innocent misrepresentation which induces a contract can be another form of *vice du consentement*, just as *erreur* or *dol*." It is clear that in this passage the Court was differentiating Jersey law from modern French law. Under French law an innocent misrepresentation which induces a contract can only constitute a *vice du consentement* if it amounts to an *erreur sur la substance*, which in many cases it will not. Thus the Court in *Sutton* held that Jersey law should recognise an additional category of *vice du consentement* in addition to *erreur* and *dol*. 139. The problem with seeking to bring misrepresentation under the rubric of *vice du consentement* is that it may lead to difficulties in connection with remedies. In this

respect, there is an interesting discussion in Section 7 of the Law of Contract Study Guide 2015 - 2016 issued by the Institute of Law. 140. Our understanding is that the consequence of holding that a vice du consentement exists is that the contract has to be considered as 'nul' and is therefore void ab initio. The contract does not and never has existed. Although some vices du consentement lead to nullité relative and some to nullité absolue, this does not affect the consequences for the parties or for third parties to whom any asset may have been transferred in the meantime because whichever type of nullité results, the contract is void; see Nicholas, French Law of Contract, second edition at 77 (1992) quoted with approval by Bailhache, Bailiff, in *Selby v Romeril*

[1996] JLR 210 at 219/220; and see also *Marett v Marett*

[2008] JLR 384 where the Court of Appeal said at para 59 with apparent approval: " *Steelux Holdings Limited v Edmonstone* is recent Jersey authority for the proposition that a vice du consentement ... will render a contract void ab initio, that is to say, it never existed. ...". 141. In our judgment, the Court should, so far as consistent with legal principle and precedent, develop the Jersey law of contract so as to be suitable for the requirements of commercial life in the 21st century and to be as easily ascertainable and understandable as possible. In our judgment, to hold that a contract induced by an innocent (ie non-fraudulent) misrepresentation is void ab initio (nul) would be an undesirable outcome and furthermore is not required by precedent. In the first place, unless one were to introduce for the very first time into Jersey law an exception which modern French law has apparently introduced in connection with movable goods, the consequence of a contract being void is that the purchaser cannot transfer title because he does not have any title himself. Thus, an object purchased on the basis of misrepresentation might have been sold on one or more times before the contract is formally voided and all such sales would also be void because of the nullity of the original contract induced by misrepresentation. 143. Secondly, there are many circumstances where a purchaser induced to enter a contract by misrepresentation does not wish to have the contract rescinded but merely seeks damages to compensate him for any loss caused by the misrepresentation. A typical example is where the purchaser wishes to keep the thing purchased but to claim damages equal to the difference between the value of the thing as it was represented to be and the thing as it actually is. That course is not open to him if the contract is void ab initio. 144. Whilst it appears that under French law, where there is a vice du consentement leading to nullité relative (i.e. dol, erreur, or violence), the contract may be subsequently validated by confirmation by the person protected by the nullité, it is not clear that he can then claim damages for such vice because, once a vice du consentement is proved, the Court has no option but to declare the contract void (see Nicholas (supra) at 77-81). It seems that there may be some alternative type of action available in France to such a plaintiff, namely an action en résolution pour inexécution but this would require the introduction in this jurisdiction of procedures and concepts which are unknown to Jersey law at present, which do not appear to work entirely satisfactorily in France, and which would not conduce to the law being easily

ascertainable and understandable as envisaged at para 141 above. 145. We consider that the preferable solution is to revert to the position which it seems to us was envisaged by the Royal Court and the Court of Appeal in the earlier misrepresentation cases prior to *Steelux* and *Sutton* and to hold that a contract induced by innocent misrepresentation is voidable rather than void. This protects the position of bona fide third parties and also gives the Court and the plaintiff flexibility as to whether rescission and/or damages is the appropriate remedy. It seems to us that that can be achieved by continuing to regard misrepresentation as a principle of Jersey contract law which stands alone rather than seeking to shoehorn it into the structure of a vice du consentement with all the undesirable consequences which may follow. 146. This approach seems to us not only to be preferable as a matter of policy but also to be more in accordance with precedent and principle, in that it is consistent with the Jersey cases prior to *Steelux* and *Sutton*. Furthermore, it also appears to be consistent with the views of earlier writers. Thus Le Geyt, *Constitution, Les Lois et Les Usages* (1946 Edition) Tome 1 at page 119 appears to have drawn a distinction between contracts which were nul ab initio and those which were merely voidable. Thus he refers first of all to various grounds of nullity which lead to a contract being void ab initio. He summarised these grounds as "des nullitez évidentes et perpétuelles, contre lesquelles il n'est besoin de restitution ni de révocation expresse, parce qu'elles sont accompagnées d'un vice inséparable"; in translation "evident and perpetual nullities against which there is no need for restitution or express revocation because they come with an inherent defect". 147. He contrasts these with other types of nullity as follows: "Il y a des Contrats dont les défauts ne sont pas si manifestes, ni d'une si grande importance. Les causes en sont occultes ou douteuses, il y faut de l'examen et de la preuve; tels sont le dol, la lésion d'outre moitié, la crainte, etc de tout quoy, pour se faire relever, on a besoin du ministère de la Justice, et l'on ne déclare pas le Contrat nul ab initio, mais on le casse comme fait injustement." (translation: there are contracts where defects are neither manifest nor of such great importance. Their causes are obscure or dubious and need to be examined and proved, for instance dol, lesion d'outre moitié, violence etc, and all requires the intervention of the Courts to remove them, and it is not possible to declare the contract null ab initio but it shall be terminated for having been made unfairly.)" 148. It seems to us that this approach is also consistent with that of Domat, *Loix Civiles* Volume 1, Book 1, Title 2, Section XI at para XII where, as the Court of Appeal made clear in *Kwanza* (at page 122), he deals specifically with cases of misrepresentation in the following terms: "Si le vendeur a déclaré quelque qualité de la chose vendue, outre celles qu'il doit garantir naturellement: & que cette qualité se trouve manquer, ou que même la chose vendue se trouve avoir les défauts contraires; il faudra juger de l'effet de la déclaration du vendeur, par les circonstances de la conséquence des qualitez qu'il aura exprimées, de la connoissance qu'il pouvoit ou devoit avoir, de la verité contraire à ce qu'il a dit, de la manière dont il aura engagé l'acheteur, & sur tout il faudra considerer si ces qualitez ont fait une condition sans laquelle la vente n'eut pas été faite. Et selon les circonstances, ou la vente sera résolue, ou le prix diminué: & le vendeur tenu des dommages & intérêts s'il y en a lieu Mais si le vendeur a seulement

usé de ces expressions ordinaires aux vendeurs , qui louent vaguement ce qu'ils veulent vendre , l'acheteur n'ayant pas dû prendre ses mesures sur des expressions de cette nature, il ne pourra faire résoudre la vente sur un tel prétexte ." In this passage Domat clearly envisages that, according to the circumstances, the Court in its discretion may rescind the sale or it may simply reduce the price or award damages. Applying modern terminology, he was saying that the contract is voidable rather than void because it is up to the Court whether to rescind the contract (if applied for by the plaintiff) or leave it in place with an award of damages for any loss caused by the misrepresentation. In our judgment the weight to be placed on Le Geyt and Domat on this occasion is greater than that to be placed on modern French law. 149. We can understand that, if one introduces into Jersey law the concept of a vice du consentement , it may be logical to regard misrepresentation as another form of vice du consentement for the reasons described in Steelux and Sutton. However, the law is not built on logic alone. Logic often has to give way to precedent or to the interests of achieving justice. In our judgment, for the reasons we have given, which relate to both precedent and the achievement of justice, we would hold that a contract induced by innocent misrepresentation (by which we mean a negligent misrepresentation or one which is made wholly innocently) is voidable rather than void, with the consequence that the plaintiff may seek rescission and/or damages and the Court has a discretion as to the appropriate remedy. We specifically do not address the position where there is a fraudulent misrepresentation (which may be said to amount to 'dol') and leave that open for consideration when the point arises." 145. We agree with what the Royal Court said at paragraphs 141 and 149 and the analysis of Le Geyt at 146 and 147. We accept that misrepresentation is a form of vice du consentement but find ourselves in the position envisaged by Commissioner Birt in the last sentence of paragraph 149, namely a case of fraudulent misrepresentation where the parties dispute whether or not the consequence of such a finding is that the contract is either void ab initio or voidable - with the innocent plaintiff having the option of retaining the benefit of the contract and seeking damages or treating himself as discharged from the contract and entitled to any other additional remedies. 146. There may be disadvantages to the innocent party in the contract being declared void. For example, on the facts of this case, the contract being void ab initio would leave the Plaintiffs with a claim against Mr Valmorbida for some of the monies advanced and a claim against the Company for the remainder. However, if the Company was insolvent the innocent party might wish to affirm the contract and sue Mr Valmorbida for the entire sum due, bearing in mind that Mr Valmorbida assumed some of the Company's obligations under loan agreements with Mr Hore pursuant to the Settlement Agreement. 147. The Court of Appeal considered the nature and the scope of dol in HRCKY Limited v Hard Rock

- [2019] (2) JLR 47. Bailhache, Bailiff, gave the judgment of the Court of Appeal. The appeal concerned a counterclaim for misrepresentation where the appellant alleged that prior to entering into a franchise agreement, representatives of the respondent had made fundamental misrepresentations to it as to the likely returns of the franchise agreement.

The Court reviewed the authorities including paragraph 10 of *Steelux* (cited above). The Court of Appeal said at paragraph 35: "35. This statement has been criticised for eliding the concepts of *erreur* and *dol* and we appreciate the force of that criticism. In our judgment, there is a considerable difference between a misrepresentation which is innocent or negligent and one which is fraudulent. In the former case, the claim in nullity has to be justified under the law of *erreur* ; in the latter case, where *dol* is established, one will almost certainly have the same *vice du consentement* , but the consequences, including the nature of the remedy, may be approached differently." And at paragraph 42 and 43: "42. Different considerations arise where there is fraudulent misrepresentation or *dol*. 43. In *Steelux* [supra] the Royal Court said this:- "Fraudulent conduct, including the making of a fraudulent representation, can be a *moyen de nullité* , or a cause of the nullity of an agreement. The underlying principle of fraud, which we may say embraces both *dol* and *fraude* , is *bad faith*. Fraud is a *vice du consentement* , that is to say, a defect which nullifies the apparent consent between the parties and allows the defrauded party to treat the contract as void. If, therefore, a party knowingly makes a false statement which induces the other party to sign a document and thereby to enter into a contract, there is a defect of consent which allows the other party to treat the contract as void." 148. Having reviewed various texts including *Pothier* , *Domat* , *Houard* , *Le Gros* and *Poingdestre* , the Court held at paragraph 64: "64. The fact that fraud, falsehood or deception may in a particular case have been constituted by a representation does not matter because the essence of *dol* is fraudulent or false conduct. When a contract is induced by such fraudulent or false conduct then it will be void and the contract will fall. That will mean that each and every one of the clauses, terms and conditions of the contract will be regarded as being void and not enforceable by either party. This will apply as much to an "entire contract" clause as it will to any other clause in the void contract, and it seems to us to mean that the existence of such a clause is no answer to a claim that the contract has been induced by *dol*. If the contract has been induced by *dol*, that is by fraud or falsehood, then the contract falls as a whole and cannot be kept alive by a condition which was as much induced by the fraud or falsehood as any other. The fact that the *dol* may have been committed in the form of a misrepresentation in a particular case does not matter because it will be the fraud or falsehood which vitiates the contract, not the misrepresentation. In that sense, we cannot see how the "entire contract" clauses quoted above can save it." 149. While the judgment of the Court of Appeal, particularly the paragraph 64 cited above, is in clear terms, it is of note that the decision of the Royal Court in *Hong Kong Foods v Robin Hood Curry Limited* appears not to have been cited to the Court of Appeal. Further, there appears to have been no argument before the Court of Appeal as to the consequences of a finding of *dol* in terms of whether or not the contract affected is void on the one hand or voidable on the other. Accordingly, as the point was not argued it is not binding on the Royal Court. We have regard to what was said at paragraph 168 of the decision of the Royal Court in *Murray v Camerons Limited* , where the Court said: "168. We are supported in that view that the [authority] is and was not binding on the Royal Court because the point on which the Court proceeded was not argued before it by the case of *FSHC Group*

Holdings Limited v GLAS Trust Corp Limited

- [2019] EWCA Civ 1361; 2020 1 All ER in which the Court of Appeal of England and Wales, at paragraph 136 of the judgment in a case involving the English law of contract said this:- "Subsequent authorities have clearly established that the suggestion which attracted the Court of Appeal in *Joscelyne v Nissen* is a correct approach and that a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case (even if that proposition formed part of the ratio decidendi of the case). In *Re Hetherington (decd)*, *Gibbs v McDonnell* [1989] 2 All ER 129 at 133, [1990] Ch 1 at 10, Sir Nicolas Browne-Wilkinson V-C held that, as a first instance judge, he was entitled to decline to follow even a decision of the House of Lords in which a proposition of law necessary for the decision was not disputed. After a review of the authorities, he concluded that: "...the authorities therefore clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense." See also *R (on the application of Kadhim) v Brent London BC*
- [2001] QB 955 ,
- [2001] 2 WLR 1674 (para [33]); *Rawlinson v Hunter Trustees SA (as Trustee of the Tchenguiz Family Trust) v Director of the Serious Fraud Office (No 2)*, *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1129,
- [2015] 1 WLR 797 (para [43])." 150. Nonetheless, the Plaintiffs submitted, particularly having regard to paragraph 64 of the judgment in *Hard Rock Café* , that where a contract is induced by dol / fraudulent misrepresentation then the contract is void ab initio . 151. By contrast, the Defendants argued that if the Plaintiffs' claim in dol / fraudulent misrepresentation succeeded, then the effect was to render the Settlement Agreement voidable rather than void. In respect of fraudulent misrepresentation claims under English law, the position is clear. In *Car and Universal Finance v Caldwell*
- [1965] 1 QB 525 , the Court of Appeal held at page 549 and 550 per Sellers LJ: "The general rule, no doubt is that where a party is entitled to rescind a contract and wishes to do so the contract subsists until the opposing party is informed that the contract has been terminated.... An affirmation of a voidable contract may be established by any conduct which unequivocally manifests an intention to affirm it but the party has a right to affirm or disaffirm. Communication of an acceptance of a contract after knowledge of a fundamental breach of it by the other party or of fraud affecting it, of course, evidence establishing affirmation but it is not essential evidence." 152. Upjohn LJ went on to say in the same case that the innocent person must elect whether or not to rescind or disaffirm within a reasonable time and cannot do so after they have done anything to affirm the contract with knowledge of the facts giving rise to the right to rescind. The Defendants relied upon the extract from *Steelux and Sutton* referred to above. Reliance was placed on

the reference in *Steelux* to a vice du consentement being a defect which 'allows the defrauded party' to treat the contract as void. In *Sutton*, as noted above, it was held that a 'fraudulent misrepresentation clearly allows the contract to be avoided'. Both these references suggested that the question of avoidance is a matter for election on the part of the victim. 153. Defence counsel also reminded the Court that it was important to take care when reviewing the authorities, for example, if an agreement is merely voidable rather than automatically void, then the effect of avoiding it by exercising the right to rescind/treat oneself as discharged from the contract is to render it void ab initio. The effect is the same as if the contract had been void from the outset in those circumstances. Defence counsel's starting point was to draw the Court's attention to the reference to *Nicholas*, French Law of Contract in *Selby v Romeril*, where the Court cited the following extract: "A contract vitiated by erreur, violence or dol is null, but the nullity is 'relative', not 'absolute'. By contrast a contract which, for example, lacks a cause or an objet, or of which the cause or the objet is illicit, is absolutely null." Professor *Nicholas* discusses the historical and philosophical origins of the distinction and continues (*ibid.*, at 79): "(b) Effects of nullity These, as we have said, are the same whether the nullity is relative or absolute, and whatever the reason for the nullity. (i) Effects as between the parties The contract, being null, is in principle without effect ab initio and each party must make restitution of what he has received." This quotation appears to draw a distinction between the consequences of a finding of a vice du consentement such as dol and a contract which lacked cause or objet

- only the latter are 'absolutely null', and only such contracts are void in any event." 154. Our attention was then drawn to the case of *Marett* at page 59 (the quotation referred to above) and the reference to a vice du consentement being a 'nullité relative'. 155. The Defendants relied upon the case of *Marett* which also drew a distinction between 'nullité relative' and 'nullité absolute'
- an erreur vice du consentement was said to cause a contract to be a nullité relative per the French Civil Code Articles 1109 and 1118 (paragraph 59 of the judgment in *Marett*). It was submitted that a nullité relative allows the victim to treat the contract as null at their election - i.e., the effected contract is voidable but not void. We note that *Amos and Walton's Introduction to French Law* (2nd Edition - 1963) says under the title "Vices of consent and nullités" at page 157 and 158: "The vices of consent, classified according to their effects, fall into two categories. Either the vice leads to the contract being held to be absolutely null and void ab initio, or to its being held to be merely voidable. Into the first category fall errors as to the nature of the contract or as to the identity of the object and also, although this is less clear, error as to cause. It is sometimes said that contracts affected with such errors are *inexistent*: they have never come into being, and so cannot be revived by adoption or ratification. The nullity, moreover, may be founded upon by anyone. Into the second category fall most other vices of consent. A contract is held to have come into being but it may be rescinded subsequently as a matter of policy in cases where one of the parties was not of sufficiently sound mind to give consent or because his consent was induced by fraud

or violence, or error as to certain characteristics of the contract which, in the eye of the law, are intrinsically important. This possibility of rescission, or 'relative nullity' as it is sometimes called, is regarded as being established in the interest of the party incapax or victim of the error, fraud, or violence. It is he, and he alone, who may found upon the nullity, and he may always validate the contract by subsequent ratification, whether or not express." 156. The footnote for the last sentence includes reference to Articles 1115, 1304 and 1338 of the Civil Code. Accordingly, there are clearly similarities between " nullité relative" in French law and a voidable contract in English/Jersey law, although the precise extent of the differences has not been teased out in the Jersey authorities. Were such a task performed then of course it would need to take into account the fact that French law develops over time and the precise meaning of the time will or at least may depend upon current French case law and any relevant amendments to the French Civil Code. 157. As set out already, the parties were divided as to the effect of the decision in *Steelux* , particularly where the Court held that fraud is a vice du consentement which allows the defrauded party to treat the contract as void. 158. The interpretation relied upon by the Defendants was perhaps supported by paragraph 13 in *Steelux* where the Court said: "If one party, particularly a party who is more experienced and worldly-wise than the other, is silent as to a material fact which, if it had become known to the other party, would have led to a refusal to enter into the contract, that may well amount to a fraud which may lead to a setting aside of the contract . In French law, the concept is known as a reticence dolosive ." 159. The Defendants rely upon paragraph 26 of the decision in *Sutton*, an authority also referred to above, where the Court said: "26. We divide the claims of fraud in this way because different legal principles apply to the different categories, were any such fraud to be established. The first two categories go in large measure to whether the contract should be set aside for dol, for the alleged fraud here would amount to a vice du consentement that would enable the defendant to avoid the contract . The third category of fraud, if true, might lead the insurer to withdraw from further contractual relations and would entitle the insurer not to pay up under the contract

- but the contract itself would remain valid and, subject to withdrawal, in force." (our emphasis) 160. Again, the Defendant asserts that the dicta is consistent with the victim having the opportunity and the choice as to whether or not to avoid the contract. The Defendants relied upon the judgment of Commissioner Sir Michael Birt in *Hong Kong Foods* to which we have already referred, in the context of innocent representation and said that the suggestion that 'to hold that a contract induced by an innocent misrepresentation is void ab initio would be an undesirable outcome and is not required by precedent' is a proposition that is equally applicable to cases of fraudulent misrepresentation. Further, in the *Hard Rock* case, although paragraph 64 to which we have already referred clearly provides that in the case of dol the contract 'falls as a whole' , at paragraph 52 of the judgment of the Court of Appeal, the Court said in the context of an example given by the Court: "The essential elements of the contract were not the subject of a mistake - but the dol or fraud would, it seems to us, enable the purchaser to escape the contract where, had the representation been

wrong but innocent, it might then have been said that the parties accepted that risk ." (our emphasis) 161. Reliance was also placed upon paragraph 147 of the judgment in the Hong Kong Foods case, which we have already set out above, in particular the extract from Le Geyt (1946 Edition) and the distinction he drew between contracts that were 'null ab initio' and those which were 'merely voidable'. The latter category appeared to include contracts effected by dol and violence, all of which required 'the intervention of the Courts to remove them, and it is not possible to declare the null ab initio but it shall be terminated for having been made unfairly' . The Court in Hong Kong Foods went on to say that an extract from Domat was to similar effect. 162. It appears to us that the argument put forward by the Defendants is to be preferred. The recent Jersey authorities in this area do appear to conflict. Some suggest that a contract effected by a vice du consentement such as dol is void ab initio and others, perhaps the preponderance of the authorities, suggest that it is voidable at the election of the innocent party, although the effect of the selection will be that the contract will be treated as void ab initio . However, the passage from Le Geyt is clear - contracts affected by dol are not void ab initio . This is recognised by Duncan Fairgrieve in his book "Contract Law in a Mid-Channel Jurisdiction" (2016), in which he concludes, having referred to the passage from Le Geyt (page 153): "It will thus be clear from this excerpt that in Le Geyt's typology, contracts which are vitiated by a vice du consentement would not be subject to a remedy which resulted in annulment ab initio." 163. Such contracts must be and, in our view, should be, voidable. Indeed, at page 154 Professor Fairgrieve goes on to say "Le Geyt refers explicitly to the vice du consentement of dol as giving rise to a voidable contract". Professor Fairgrieve goes on to suggest at pages 155 to 157 that the introduction of the concepts of ' nullité absolute' and ' nullité relative' from modern French law proceeded on an "implicit assumption" made in Selby -v- Romeril that the two concepts were recognised by Jersey law but that "The Jersey courts have since adopted the void/voidable distinction in a number of subsequent cases ". He observes (page 155) "On the strength of the recent case law, the void/voidable distinction would seem now to be entrenched as the correct remedial dichotomy in the law of Jersey, over and above the notion of nullity" . Furthermore, although not cited in the course of argument, we considered whether there was any material in the works of Pothier , which have always been held in conspicuous regard when considering the Jersey law of obligations, which may assist. In Pothier's " Traité des Obligations" the following passages appear from Chapter 1 paragraph 29 of the title "Du Dol": "29. Lorsqu'une partie a été engage à contractor par le dol de l'autre , le contrat n'est pas absolument et essentiellement nul , parcequ'an concentement , quoi-que surprise, ne laisse pas d'être consentement ; mais ce contra test vieieux , et la partie qui a été surprise peut , dans les dix ans , en prenant des lettres de rescision , le faire rescinder , parceqi'il pêche contre la bonne foi qui doit régner dans les contrats . Ajoutez que si ma promesse m'engage envers vous , le dol que vous avez commis envers moi , en surprenant de moi cette promesse , vous engage à m'indemniser , et par consequent à me décharger de cette promesse . " "29. When a party has been induced to contract by the fraud of another, the contract is not absolutely and essentially void, because a consent, though obtained by surprise, is still a consent; but the contract is vicious, and the party surprised may institute a process for its rescission within

ten years and have it rescinded, because it offends against good faith which must prevail in all contracts. One might add that if my promise binds me towards you, the fraud that you have committed against me, in getting me to make the promise, makes you liable to compensate me, and consequently to discharge me from that promise." 164. Footnotes in 1806 translation of Pothier's *Traité des Obligations* into English illustrative of the English law on the subject at the time were written by William Evans, barrister. The footnote to paragraph 29 above compares English law to civil law and notwithstanding the differences says "but the observation, that fraud does not essentially vacate the contract is true" . He went on to add: "the person defrauding, having once dispensed with the objection after he is fully apprised of the facts is (except in particular cases) concluded by his assent, and the contract is equally valid as if no fraud had intervened". At paragraph Pothier says: "31. Il n'y a que le dol qui a donné lieu au contrat qui puisse donner lieu à la rescission; c'est -à-dire, le dol par lequel l'une des parties a engagé l'autre à contracter , qui n'auroit pas contracté sans cela : tout autre dol qui intervient dans les contrats donne seulement lieu à des dommages et intérêts pour la réparation du tort qu'il a cause à la partie qui a été trompée ." "It is only the fraud which induces the contract that can furnish ground for the impeachment of it; that is, the fraud by which one party induces another to contract who would not have contracted otherwise. Any other fraud only entitles the party to a reparation in damages for the injury sustained." 165. The note as to English law at the time suggests that in fact the English court had a broader power to permit the innocent party to treat themselves as discharged from the contract than the French court. The note says " I conceive that there are many cases in which this proposition would not be adopted by an English court, and that even as a general rule a party may except to the performance of a contract affected by fraud, though it might not appear that he would not have entered into the engagement if that fraud had not taken place. In fact, it would be very difficult to ascertain, in particular cases, what degree of influence the fraudulent act might have had upon the mind of the contracting party, and it is therefore preferable to allow it as a sufficient ground of objection, that the fraud had a tendency to produce such influence" . Nonetheless, at the time that Pothier was writing the French approach seemed to have been consistent with the views expressed by Le Geyt and the proposition contended for by the Defendant in this case. 166. It may be that modern French law is different. There are difficulties in placing reliance on modern French law, which is a product of the Civil Code which is amended from time to time by the French legislature, and is interpreted by case law which is not binding in France and upon which decisions of various French Courts of Appeal may conflict with each other. The decision of the Court of Cassation in 1982 in *Desmares* as to the effect of Article 1384 of the French Civil Code and the extent to which courts were divided thereafter as to the merit of the same is a case in point. There is also difficulty in interpreting French jurisprudence. As Bridget McArthur says in her article on French judicial decisions (1984) 14 V. U. W. L. R. "reliance on principles expressed in a different case decided between different parties is not considered to be a sufficient basis for decision. Previous decisions are never considered to be binding, though they are frequently persuasive authority. Furthermore "the Civil Code prohibits judges from making pronouncements of a general or normative kind on the cases brought

before them. The court must refer to a particular legislative provision as the basis for its decision. Nevertheless, where the law is silent on a particular point, the court may rely on principles of equity, reason, justice or tradition. Judicial decisions are not regarded as an important source of law in France. In most areas of French law, the only formal source of law is legislation. This, coupled with the absence of any principle of binding precedent of the kind that exists in Common Law countries mean that French judicial decisions do not have the same importance as Common Law judgments. This may be one reason for their particular style and structure." As to the style and structure of French judgments, even a cursory examination of French court decisions reveals that they are in strikingly different form from those that we are used to in Jersey, England and Wales, or indeed many Commonwealth jurisdictions. One of the striking features of the judgments is their brevity. As McArthur says, the judgments produced are "often so laconic and terse that they are difficult to understand. Indeed, many would be unintelligible were it not for the explanatory and critical case-note accompanying them". McArthur goes on to consider the structure of French judgments which are divided into distinct parts; the headnote, the reasons for the decision, the decision "usually only a few words in length" and the academic note which usually follows and is not written by the Court. McArthur concludes by saying that "With their unique style and structure, French judgments pose difficulties for the translator". This arises principally from the structure of the French judgments, particularly if they are translated literally. 167. These are additional reasons for adopting a cautious approach to French law. Not only is the case law difficult to interpret, the principles set out in the Code Civil are often in general terms and capable of more than one interpretation. Famously, the French law of tort consists only of five articles in the Code Civil; the rest is case law - difficult to read, interpret and operating in a system where there is no binding precedent. None of this is meant to be critical of the French system, but there are real difficulties in identifying sound principles for the purpose of their introduction into another jurisdiction. 168. We concluded that the contract affected by dol should be voidable and not void. It should be for the victim of dol / fraudulent misrepresentation to elect what course is most desirable or advantageous to them. This may include deciding that they wish to keep the contract alive and claim damages under it. To deny this choice could lead to unfair consequences for the innocent party. For example, the victim of a fraudulent misrepresentation may have acquired shares in a company. Such an acquisition could be set aside by reason of the vice du consentement . Yet if the company, for whatever reason went on to do extraordinarily well, then the innocent party may wish to retain the shares. Similarly, an innocent party may purchase a unique motor vehicle where the defendant has falsely represented some aspect about the car's condition, such as its mileage, which would entitle the plaintiff to treat himself as discharged from the contract and return of the money paid. But if the vehicle is indeed unique then the innocent party may wish to retain the vehicle, notwithstanding the defendant's fraud and sue for damages instead. The position of innocent third parties can also be taken into account when a contract is voidable as opposed to void which, of course, was the position in the Car and Universal case where an innocent third party ended up with the car. Accordingly, we hold that the effect of a finding that a contract is affected by dol as a

vice du consentement /has been induced by a fraudulent misrepresentation is that the contract is voidable at the election of the innocent party and not void ab initio . 169. Further, we note that in the case of rescission for breach of fiduciary duty the innocent party is entitled to treat the transaction as voidable rather than void. Snell (34 th Edition) states at paragraph 7/103: "A principal may rescind a transaction which was entered into by his or her fiduciary in breach of the fiduciary conflict principle, e.g., the self-dealing rule or the fair-dealing rule. The fact that the fiduciary acted with a conflict, without disclosing his interest in the transaction and obtaining fully informed consent from his principal, renders the transaction voidable, rather than void." Waiver, renonciation and election to be bound ("affirmation") 170. That leads on to the question of affirmation, as the Defendants argue that the Plaintiffs affirmed the contract in this case. The parties agree that there was little authority as to the appropriate test in Jersey for considering circumstances in which a party may have been considered to have waived or renounced their contractual rights or, alternatively, affirmed a contract. The allegation in summary (we will consider our conclusion on this issue below) is that the Plaintiffs affirmed the Settlement Agreement in pleadings in this action. 171. As to waiver/renunciation, the Plaintiffs identified two authorities of relevance. They are both referred to in the second case, *Fort Regent Development Committee v Regency Suite Discotheque*

[1990] JLR 228 , where the Court, Commissioner Hamon presiding, held at page 234, line 25 to 35: "We have considered the few Jersey cases that mention waiver. One of these, and upon its authority both counsel relied, is *New Guar. Trust Fin. Ltd. v. Birbeck* . In that case letters of termination were served on the defendant but later a new working agreement was prepared. The court gave some indication that had that new working agreement been acted upon by the defendant then waiver might have applied. As Crill Deputy Bailiff (as he then was) said (1977 J. J. at 84): "The most that could be said of the agreements is that they could be interpreted as a promise not to insist on the plaintiff company's strict legal rights, but for them to act as a legal waiver to prevent the plaintiff company from denying their effect would require that the defendant company should have acted upon them; it did not." On page 235, the Court said this: "We are not yet prepared to say on this preliminary hearing that the doctrine of waiver (or la renonciation) does not apply. We are, however, prepared to rule that we do not accept the rigidity of the English common law test and say that by sending out the invoice of September 28th, the plaintiff had automatically shut itself off from relief even though it instigated the Order of Justice after the sending out of the invoice. Our judicial discretion allows us, in our view, to examine all the circumstances surrounding the sending out of the invoice of September 24th, just as we will, as this matter comes on to trial, examine the possible motivation of both parties and, for example, carefully examine whether the plaintiff, on the facts, is seeking to take advantage of a temporary difficulty in order to avoid what it may now consider to have been a bad bargain." 172. On that authority, the Plaintiffs submitted that the test was a subjective one and the Court needed to consider whether or not Mr Hore intended to waive his rights at the time of the alleged waiver having regard to all the circumstances

that prevailed at the time. When exercising its discretion in order to consider whether or not there had been a waiver of rights, it was submitted the Court should take into account what reliance, if any, Mr Valmorbida placed upon the alleged waiver / renunciation. No such reliance was pleaded by Mr Valmorbida, it was said. 173. It was also submitted by the Plaintiffs (with which the Defendants disagreed) that there would need to be reliance on the part of Mr Valmorbida for there to have been an affirmation of the contract by Mr Hore also. 174. We have already referred to the case of Car and Universal Finance above, in the context of fraud giving rise to the right on the part of the innocent party to treat the contract as terminated; that authority also established that affirmation of a voidable contract may be established by conduct which unequivocally manifests an intention to affirm, though the party has the right to affirm or disaffirm. Our attention was drawn to the decision of Colman J in *Moore Large and Co Limited v Hermes Credit and Guarantee Plc*

[2003] 1 Lloyds Report IR, in which the judge held that the defendants had unequivocally represented an intention to affirm by reference to the contents of pleadings served on their behalf. In that context, a contract of insurance, the Court held: "96. For there to be an effective affirmation or election the insurer must have knowledge of all the facts relevant to his right to avoid the Endorsement: see the *The Kanchenjunga*

[1990] 1 Lloyd's Rep 391. 98. It is stated in authorities binding on this court that a second requirement for there to be a valid election is that the party said to have elected must have had full knowledge of the various rights amongst which he can elect: see *Evans*

v. *Bartlam* [1937] AC 473 at 479 and *Peyman v. Lanjani*

[1985] 1 Ch 457. 99. The burden of proving both aspect of the state of knowledge of the party said to have elected rests on the party alleging election. However, with regard to the electing party's knowledge of the legal rights amongst which he can elect, in the absence of evidence to the contrary, such knowledge may be inferred from the fact that the party had legal advice: see *Peyman v. Lanjani*, supra, at page 487 per Stephenson LJ. May LJ. agreed with the judgment of Stephenson LJ. in general. So did Slade LJ. Although both gave full judgments, neither suggested that Stephenson LJ's observations as to the basis of that inference were wrong. 100. Accordingly, given that the defendant insurers had the benefit of advice of Mr Jamieson, of their solicitors and of counsel when the original defence was served, I have to consider whether it is appropriate to infer that there was knowledge of the right to avoid for non-disclosure at the time when that defence was served. 101. For this purpose it can be assumed that Mr Jamieson, the defendants' solicitors and their counsel were, at the time when terms of the defence were agreed upon, fully conversant not only with the facts, but also with the principle of entitlement of an insurer to avoid for non-disclosure of material facts. On that assumption the omission to plead non-disclosure could have been due to a number of causes, in particular that the point was overlooked, that it was considered and rejected or that it was considered and a decision taken to research it further before re-amending the defence later if necessary. 102. In *Peyman v.*

Lanjani *supra*, Stephenson LJ. attached very considerable weight to the inference to be drawn from access to legal advice: see page 487 D and G: "When a party has legal advice, he will be more easily presumed to know the law and evidence or special circumstances may be required to rebut the presumption, as in this case. and "The plaintiff can therefore rely on his own unchallenged ignorance of the law, unless he is precluded from doing so either by what he has done or by his solicitor's knowledge of the law." Now it has to be recognised that, given that the burden of proof of the constituents of an election, including knowledge by the party concerned of the facts and knowledge by him of the right which could have been, but has not been exercised, rests on the party alleging election, the burden of proof may in practice be very difficult to discharge if legal advice has been taken by the party alleged to have elected. If, as in the present case, that party has been advised by solicitors and counsel in particular to pursue the conduct which unequivocally represents that the right in question is not relied upon, it would, in most cases, be quite impossible to prove that the lay client had chosen to given up rights of which he had knowledge, without access to evidence as to all the legal advice which he had received relating to the matters in issue. That advice would normally be inaccessible because it was privileged. Lord Pearson raised this problem as a powerful objection to the need to establish knowledge of the legal right said to have been waived in his dissenting speech in *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1971] AC 850 at pages 877-878, a passage cited in *Peyman v. Lanjani* , *supra*, by Stephenson LJ. at page 485." "105. In my judgment, in a case where the party said to have elected has been represented by solicitors and counsel whose conduct is relied upon as amounting to an election, it is normally to be inferred that such conduct has been specifically authorised by the client and has been the subject of legal advice. If, on the evidence before the court it is established that either the legal advisers or the client had knowledge of the facts giving rise to the right said to have been waived at the time when the affirmatory conduct took place, there must be the further inference that the party has been given legal advice as to his rights arising out of those facts. If that inference is to be displaced, there must be evidence of the advice, if any, that was given by solicitors and counsel and of the extent to which the party concerned was aware or was made aware of the right which he appears to have abandoned. 106. In the present case, it is beyond question that the insurers were advised as to the contents of their defence by solicitors and counsel. I further infer that, even without that advice, they were generally acquainted with the law of avoidance for non-disclosure and that if, as they now allege and I have held, the facts which had not been disclosed to them were material, it must have been within their contemplation that there was at least an arguable point to be taken that they were entitled to avoid Endorsement No.9. In these circumstances, it is for the insurers to adduce evidence to displace those inferences. They have not done so. 107. Accordingly, I have come to the conclusion that the defendants must be held to have elected to affirm Endorsement No.9 and that they are thereby disentitled to avoid it for non-disclosure." 175. Another insurance case drawn to our attention was *ABN Amro Bank v Royal and Sun Alliance Insurance and Others*

[2021] EWHC 442 (Comm) in which Mr Justice Jacobs held at paragraph 540 and 541: "540. As discussed above, a party's election (to affirm) must be communicated either by words or conduct. It must be communicated in clear and unequivocal terms. As Mance J said in *ICCI v Royal Hotel*, the communication itself or the surrounding circumstances must demonstrate objectively or unequivocally that the party affirming is making an informed choice. 541. I consider that the service of the defence, when viewed in the context of the surrounding circumstances, does demonstrate objectively and unequivocally that the insurers were making an informed choice; i.e. to affirm the policy which had been concluded. The background was that there had been prior correspondence in which reservations of the right to avoid had been intimated. However, when the defence was served, there was no such reservation let alone any plea of avoidance. Instead, reliance was placed upon the terms of the policy and a positive plea was advanced, by all underwriters, that if necessary the policy should be rectified. That plea therefore sought to invoke the court's equitable jurisdiction to rectify the instrument which contained the parties' agreement. In my view, such a plea - unaccompanied by any plea of avoidance or reservation - can only be seen as a positive statement that the contract which the parties have made is binding, albeit that the document containing that contract requires rectification so as to conform with the parties' mutual expressed intentions. As Ms. Sabben-Clare submitted, a plea of rectification is necessarily affirmatory, since it positively avers that there is an enforceable agreement between the parties and seeks to have the documentary record of the contract rewritten." 176. At the conclusion of paragraph 543, Jacobs J observed: "It is incumbent on a party to reserve his position if he takes a step which would otherwise constitute affirmation, and if he does not do so he is at the risk of being held to have affirmed." 177. As to the extent to which the party who has said to have affirmed should know the facts (in our case the dol or fraud), the judge said this at paragraph 487: "*In Insurance Corporation of the Channel Islands v The Royal Hotel Ltd.* [1998] Lloyd's Rep IR 131, Mance J analysed the applicable principles in detail. In his summary of the general principles at p 161, he stated that the party should know sufficient of the facts to know that he has the right to avoid, but it is unnecessary that he should know all aspects or incidents of the facts. The insurers drew attention to passages at page 163 where the judge considered the nature of the knowledge of material facts relevant to affirmation and the communication of an election to the other party. Mance J said that knowledge was essentially a "jury question". It was not to be equated with absolute certainty. But for practical purposes it did pre-suppose the truth of the matters known, and a firm belief in their truth, as well as sufficient justification for that belief in terms of experience, information and/or reasoning. As far as the communication is concerned: this must demonstrate objectively or unequivocally that the party affirming is making an informed choice. The communication itself or the surrounding circumstances must therefore demonstrate such knowledge to the other party." 178. It was submitted on behalf of the Defendants that the case law identified by the Plaintiffs in respect of waiver and renunciation took matters no further on the facts of this case as such authorities were dealing with instances where parties had relinquished their contractual rights during the

currency of the contract and not this sort of case which related to conduct preceding and inducing the innocent party to enter into the contract. The distinction between these two circumstances was drawn out by Lord Wilberforce in *Johnson v Agnew*

[1980] AC 392 where he said: "In this situation it is possible to state at least some uncontroversial propositions of law. First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly, the vendor may proceed by action for the above remedies (viz. specific performance or damages) in the alternative. At the trial he will however have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that, the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance. At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as "rescinding" the contract, this so-called "rescission" is quite different from rescission *ab initio*, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence ." (Our emphasis) 179. This authority emphasises, in the Defendants' submission, that the Plaintiffs on these facts are not assisted by reliance upon authorities on renunciation and waiver - the Plaintiffs' conduct either meets the test for affirmation or it does not. The Defendants contend (and we accept) the question of Mr Valmorbida's reliance is neither here nor there when considering whether or not the Plaintiffs have affirmed the contract. This is not a case of estoppel or reliance upon the representation of another party. Even in the context of affirmation of a contract, a party may still enjoy a claim for damages in *dol* / fraudulent misrepresentation. The Defendants accepted that, in any event, notwithstanding affirmation of the contract, the Plaintiffs would enjoy a claim against the Defendants in the tort of deceit which may sound in damages so long as such remedies were consistent with the remedies for breach of the Settlement Agreement. 180. Snell's Equity (34 th Edition) paragraph 15/013 under the title 'Exclusion of Rescission' describes 'affirmation' in the following terms: "Where a right of rescission exists, it will be lost if the person entitled to rescind elects to waive that right and affirm the contract after material rights conferring the right have come to his notice or he is otherwise freed from the factor which vitiated his consent. Examples are where, with full knowledge of the fraud upon him, the person nevertheless takes the benefit under a contract or claims damages for its breach [the authority referred to in *Insurance Corp of the Channel Islands Limited v The Royal Hotel*

Limited] . Both the facts which give rise to the right of rescission and the existence of that right must be fully known to the party misled before he can consider to waive that right. Affirmation requires express words or unequivocal conduct, but an intention to affirm is not required." 181. Cartwright on Misrepresentation and Non-Disclosure (5 th Edition) says at 2-05: "Rescission is the avoidance of the contract ab initio. The contract is voidable, not void, and so the contract creates rights and obligations which remain valid unless and until it is rescinded; but rescission has the effect of retrospectively making the contract a nullity from the beginning so that the parties are placed back in a position as if there had been no contract. Any performance of the obligations which have taken place under the terms of the contract before rescission must be reversed. Rescission is a general remedy for pre-contractual misrepresentation, but it is subject to various limitations or 'bars': rescission is no longer available (and so the contract remains valid and indefeasible) if, for example, it would prejudice the rights of innocent third parties, or if the reversal of performance (by way of restitution) was no longer possible"" . 182. As to the measure of damages in the tort of deceit where a contract has been affirmed, in such circumstances the party could not recover the monies that (in this case) the Plaintiffs had invested under the SPAs (they would be recoverable but under the contract) but might be able to claim damages in respect of the lost opportunity to invest those funds elsewhere to achieve a greater return. 183. What then should be the test for holding that a party has elected to rely on its contractual rights, notwithstanding the existence of dol / fraud? In our view, the circumstances in which the innocent party can be held to have elected to treat a contract as binding, notwithstanding the presence of dol/fraudulent misrepresentation, prima facie giving them an entitlement to avoid the contract are as follows: (i) The election must be made by the innocent party in knowledge of all the relevant facts i.e. knowledge of the dol / fraud; and (ii) It is for the party alleging that the innocent party has elected to treat the contract as binding to prove that knowledge (or that it should be imputed to the innocent party) and to prove that the innocent party has made the election; and (iii) The Court should be slow in this context, i.e. admitted or proved dol / fraudulent misrepresentation, to hold that the innocent party has made such an election in the absence of clear evidence to this effect. 184. We consider the evidence below with these principles in mind, before making brief observations on the additional pleaded claims for relief made by the Plaintiffs, and the Plaintiffs' claim for damages. Applying these principles to the facts 185. We have summarised above our findings in relation to impressions as to the evidence of Mr Hore . As to Mr Valmorbida , we found him to be a deliberately dishonest witness. He adopted phrases to clothe his dishonesty such as 'playing the game' , which meant acting deceitfully, and spoke of a 'silly narrative' when he meant that he was lying. He admitted forging documents. He accepted deceiving Mr Hore and various other third parties including Fine Art Group and Sotheby's. He lied on oath in the proceedings in England and in Jersey. He blamed others, particularly Mr Russo, for his failure to comply with his contractual obligations. He portrayed himself as the victim when, in fact, he was responsible for the proceedings issued against him. 186. In the circumstances we found on the balance of probabilities (notwithstanding Mr Valmorbida's

admissions to this effect) that Mr Valmorbida made representations to Mr Hore that were fraudulent, by which we mean knowingly false, and that Mr Hore was induced into entering into the Settlement Agreement as a result of those misrepresentations/Mr Valmorbida's dol. We have already summarised our findings above at paragraph 57 to 64 above in respect of the three meetings between Mr Hore and Mr Valmorbida between late March and 1 st May 2018, which led to the Heads of Terms being agreed. During these discussions Mr Valmorbida withheld from Mr Hore the matters that we have found occurred at paragraphs 102 to 129 inclusive above, in particular that he had sold the First Basquiat, sold Condo's Iron Man to Mr Crawley and granted security to Fine Art Limited in respect of the Bacon by the time of the artworks pledged as security were identified and agreed on 24 th April 2018. The representations made by Mr Valmorbida in the Heads of Terms as to ownership of the assets to be used as security and his promise to distribute any sale proceeds to Mr Hore were false and knowingly so. 187. Mr Hore would certainly not have agreed the Heads of Terms, let alone enter into the subsequent Settlement Agreement, had he known the truth. Those representations were repeated in the Settlement Agreement and again were known to be false and made in order to induce Mr Hore to enter into that agreement. Indeed, in evidence, Mr Valmorbida agreed that the security that he proposed to Mr Hore at that stage was 'worthless'. We have no doubt that Mr Valmorbida is guilty of making the most egregious false representations to Mr Hore as pleaded by the Plaintiffs in the Amended Order of Justice and as summarised briefly above. It is remarkable that Mr Valmorbida knowingly continued to represent to Mr Hore throughout the spring, summer and autumn of 2018, vice viSettlement Agreement, two had been sold and four had been pledged in favour of Sotheby's (to whom Mr Valmorbida also lied), leaving only one painting unsecured. 188. We have found that Mr Valmorbida's dol / false representations amounted to a vice du consentement and the Settlement Agreement is accordingly voidable. 189. In those circumstances, in accordance with the test that twicee have set out, we must decide whether Mr Hore elected nonetheless not to avoid the contract but to treat the contract as binding and sue Mr Valmorbida upon it. 190. In this regard, the Defendants say that it is clear that Mr Hore did make such an election in this case. In the Defendant's Answer, which was amended only weeks before trial, it is admitted at paragraph 13.1 that the Plaintiffs are entitled to recover the sums which remain outstanding under the Settlement Agreement and the outstanding balance of loans advanced by the Plaintiffs to the Defendants but to no other relief. Mr Valmorbida says that Mr Hore's own case is that he learnt of the falsity of the representations upon receipt of a letter from Mr Valmorbida's English solicitors on 30 th August 2019 notifying Mr Hore , inter alia , that the First Basquiat and Iron Man had been sold in February and June 2018 respectively. Shortly thereafter, by Mr Valmorbida's affidavit sworn on 10 th September 2019, Mr Hore learnt that Sotheby's had been granted a security interest over the relevant artworks listed in the schedule to the Settlement Agreement on 19 th September 2018 prior to the execution of the Settlement Agreement. Accordingly, it is submitted that on any view, Mr Hore learnt of the dol / false misrepresentations by no later than 10 th September 2019. Nonetheless, two months later, on 22 nd November 2019,

Mr Hore filed a Reply in these proceedings which specifically denied that the Settlement Agreement was void and re-asserted his claim to sue upon it advanced in the Order of Justice, maintained his claim for the possession of the artworks, pleaded Mr Valmorbida's affidavit sworn on 10 th September 2019, the security that Sotheby's had over the relevant artworks and positively pleaded that by virtue of that agreement Mr Valmorbida had 'breached clause 4.2 of the Settlement Agreement in addition to the breaches set out at paragraph 4.2 of the Order of Justice'. It is said that by so doing, Mr Hore unequivocally sought to enforce the Settlement Agreement, rather than purport to accept that he was discharged from the same by Mr Valmorbida's conduct and thereby irrevocably and equivocally affirmed it. 191. It is said that Mr Hore did not seek to avoid the Settlement Agreement until service of the Amended Order of Justice on 1 st June 2020, some nine months after learning of the alleged fraud and seven months after filing a Reply by which he maintained his claim to enforce the Settlement Agreement. 192. In response, the Plaintiffs say that at the time they pleaded the Order of Justice on 12 th July 2019, they knew nothing of Mr Valmorbida's fraud. They refer to the letter written by Mr Hore's advocates to Mr Valmorbida's advocates on 17 th April 2020 which enclosed the draft Amended Order of Justice which added the Second Plaintiff (Little Wing) and the Company (as Second Defendant) and introduced 'a pleading the Settlement Agreement is void ab initio on account of your client having fraudulently induced our client to enter into the Settlement Agreement by the making of representations which your client...knew to be false...' and 'the introduction of an alternative pleading that the Settlement Agreement is voidable as a result of your client's fraudulent representations, and has been declared void by service of the Amended Order of Justice'. The letter goes on to say in relation to the 'timing of the amendments' that: "As should be apparent, these amendments could not have been pleaded in the Order of Justice either: (1) because our client did not have the knowledge, at the time the Order of Justice was filed, that your client had made fraudulent misrepresentations which induced him to enter into the Settlement Agreement or (2) because the events complained of had not taken place at the time." They went on to say 'The step of pleading fraudulent misrepresentation is one which should not be taken lightly' and that since 'gaining knowledge of your client's conduct' Mr Hore had been considering with his legal advisers the consequence of the Settlement Agreement being void and the practical effect of Mr Valmorbida's fraudulent misrepresentations. 193. The Defendant's advocates replied on 1 st May 2020, and in their letter said that although the Defendant did not object to the proposed amendments, Mr Hore had been aware of the information which underpinned them for some seven months and had since filed a Reply which made no reference to his new case on misrepresentation. 194. Mr Hore's advocate responded on 12 th May 2020, noting the agreement to the Amended Order of Justice and saying: "You complain that our client has 'been aware of the information which underpins his proposed amendments for some seven months'. As you will appreciate, a pleading of fraudulent misrepresentation must not be undertaken lightly. Recent decisions of the Royal Court have made clear the consequences of pleading fraud without a proper basis. Accordingly, our client has taken time to ensure that his basis for pleading fraudulent

misrepresentation is sound." The letter went on to reassert that the amendments arose from matters discovered from filings that Mr Valmorbida had made in the English proceedings. 195. We concluded that Mr Hore did not, notwithstanding the knowledge he had of Mr Valmorbida's fraud, clearly and irrevocably elect to affirm the contract and sue upon it by filing the Reply in November 2019. It should not be forgotten that an Answer is not a pleading which calls for a reply, unlike an Order of Justice. Mr Hore was entitled to consider the material that he had, prior to making an election, of the potentially serious costs and other consequences if he was to plead fraud. It would be quite wrong on facts such as these to hold that a plaintiff in Mr Hore's shoes had lost his right to avoid the contract (in this case the Settlement Agreement). Applying the test set out above, we find that Mr Hore did have sufficient knowledge to avoid the contract in that he knew all relevant facts, but that Mr Valmorbida has failed to prove that Mr Hore made an election to treat the contract as binding upon him, bearing in mind that the Court should be slow in the case of dol / fraud to hold that the innocent party has made such an election in the absence of clear evidence. Accordingly, we have no hesitation in finding that, notwithstanding the filing of the Reply in this case, Mr Hore was entitled to amend his Order of Justice (which took place by consent) and seek to avoid the Settlement Agreement on the grounds of Mr Valmorbida's dol / false representations. 196. The consequence of our finding is that the Settlement Agreement has been avoided by the Plaintiffs and is accordingly to be treated as being void ab initio in accordance with the authorities to which we have referred above. Other pleaded claims 197. We will take these matters shortly, as after trial this case settled (as set out in the judgment reported at

[2021] JRC 242). Accordingly, it is not necessary for us to deal with all the points of law or the arguments in relation to quantum that were raised. However, we deal with certain matters briefly as they were ventilated extensively before us. Deceit 198. In view of our findings on the facts, the Plaintiffs are prima facie entitled to damages in the tort of deceit. In *Pell Frischmann v Bow Valley*

[2008] JLR 311 , Beloff JA, giving the judgment of the Court of Appeal, said at paragraph 53: "53. Deceit is established (Clerk & Lindsell, op. cit., para. 18-01, at 1081)- "where a defendant makes a false representation, knowing it to be untrue, or being reckless as to whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable for that loss." 199. In *Derry v Peek*

(1889) 14 App Cas 337 at 374, Lord Herschell said: "First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole

ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." 200. Clarke and Lindsell (23rd Edition) states at paragraph 17-18 under the title 'Continuing Representations': "The tort of deceit is complete only when the representation is acted upon. Where there is an interval between the time when the representation is made and the time when it is acted on, and the representation relates to an existing state of things, the representation is deemed to be repeated throughout the interval. Hence if it is false to the maker's knowledge at the time when it is relied on there will be a deceit at that time." 201. As to the principles for assessing damages in these circumstances, we have regard to the decision of the House of Lords in *Smith New Court Securities Limited v Scrimgeour Vickers Asset*

[1997] AC 254, where at page 266H, Lord Browne-Wilkinson said: "In sum, in my judgment the following principles apply in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property: 1. The defendant is bound to make reparation for all the damage directly flowing from the transaction; 2. Although such damage need not have been foreseeable, it must have been directly caused by the transaction; 3. In assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; 4. As a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; 5. Although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. In addition, the plaintiff is entitled to recover consequential losses caused by the transaction; 7. The plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud." 202. In our opinion, these principles apply when there has been a finding of *dol* / false representation where damages are awarded in deceit. It can be seen that the damages awarded to a plaintiff on such a finding may be more generous than those awarded in breach of contract/tort as the plaintiff may make recovery for damage that was not foreseeable, although it must have been directly caused by the transaction and the plaintiff is entitled to cover consequential losses caused by the transaction. 203. Consequently, a plaintiff can recover as damages the loss of profits he would have made on a hypothetical alternative transaction he would have entered into had he not been induced by the fraud to enter into the transaction in question. Clarke and Lindsell says at paragraph 17-46: "Suppose a claimant is deceived into entering into a transaction by a fraudulent statement as to the profits to be made, and can show in addition that if he had not relied on the defendant's statement he would have made some other gainful

investment (or for that matter would have laid his money out at interest). In such a case it is clear that he can recover the would-be profits or interest, as the case may be, that he would have made from that other investment. Indeed, an action may lie for deceit even in respect of a transaction which turned out highly gainful for the claimant, if by reason of the deceit he was prevented from investing his money elsewhere so as to turn an even greater profit." 204. A good example of these principles in action is *Parabola Investments Limited v Browallia*

[2011] QB 477 . In *Parabola*, the claimant was induced by fraudulent representation made by a broker who said that a particular investment was profitable when in fact it was making disastrous losses. The second claimant lost £3.2 million. The judge held that the claimant was entitled to recover the capital loss by which the trading fund had been depleted as a consequence of the fraud and a sum reflecting the lost opportunity to trade with the full fund and also awarded damages for loss of investment opportunity for a period up to trial, notwithstanding the fact that there was successful trading in the fund during that period but the second claimant had continued to suffer losses from the adverse effects of the fraud. Accordingly, the trial judge awarded damages for the lost investment opportunity in the sum of approximately £15 million in addition to the capital loss of £3 million, even though the claimant was unable to identify specific trades it would have entered into during this period. Dismissing the appeal, Toulson LJ said that the appeal raised a question of law about the recoverability of damages in deceit for loss suffered after the discovery of a fraud through loss of the availability of funds of which the victim was defrauded. As in this case, towards the end of the trial, counsel admitted the allegations of fraud made against the relevant defendant after what the judge described as a 'disastrous three days in the witness box' for the defendant in question during which he was exposed 'not just as a fraudster... but also as a persistent and inveterate liar in almost everything he said...'. 205. Toulson LJ said this at paragraphs 22 and 23: "The judge's assessment of quantum: discussion and conclusion 22. There is a central flaw in the appellants' submissions. Some claims for consequential loss are capable of being established with precision (for example, expenses incurred prior to the date of trial). Other forms of consequential loss are not capable of similarly precise calculation because they involve the attempted measurement of things which would or might have happened (or might not have happened) but for the defendant's wrongful conduct, as distinct from things which have happened. In such a situation the law does not require a claimant to perform the impossible, nor does it apply the balance of probability test to the measurement of the loss. The claimant has first to establish an actionable head of loss. This may in some circumstances consist of the loss of a chance, for example, *Chaplin v Hicks*

[1911] 2 KB 786 and *Allied Maples Group Limited v Simmons and Simmons*

[1995] 1 WLR 1602 , but we are not concerned with that situation in the present case, because the judge found that, but for Mr Bomford's fraud, on a balance of probability Tangent would have traded profitably at stage 1, and would have traded more profitably with a larger fund

at stage 2. The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account. (See *Davis v Taylor* [1974] AC 207, 212 (Lord Reid) and *Gregg v Scott*

[2005] 2 AC 176 , para 17 (Lord Nicholls) and paras 67-69 (Lord Hoffmann))." 206. At paragraph 24 he observed: "The judge had to make a reasonable assessment and different judges might come to different assessments without being unreasonable. An appellate court will therefore be slow to interfere with the judge's assessment." 207. At paragraph 25, Toulson LJ said: "No method of assessment could be perfect, but the method of measurement accepted by the judge as a basis for estimating the lost profit was rational and supported by the opinion of an expert who impressed him." 208. Towards the end of his judgment, Toulson LJ said: "As to the submission that Flaux J's judgment, if upheld, will lead to an avalanche of speculative and unmeritorious claims, it is never an attractive argument that a meritorious claim should be denied because of the risk of unmeritorious claims following it. The argument itself is also speculative. We were given no information to suppose that the courts of Australia have been inundated with speculative and unmeritorious claims since the decision of the High Court in *Hungerfords* . In *Smith New Court* Lord Steyn considered at 284-285 three limiting principles which, even in a case of deceit, serve to keep wrongdoers' liability within practical and sensible limits - causation, remoteness and the duty to mitigate loss." 209. He went on to say that there was one particular investment which the judge held was 'too uncertain and distant to give rise to a recoverable head of loss'. He also said at the end of paragraph 57 that 'Claimants who advance speculative and unmeritorious consequential loss claims face the risk of having to pay the costs of those claims as well as the risk of damaging their credibility more generally' . 210. Applying these principles to the facts of this case there is (and could be) no dispute that the Plaintiffs were entitled to recover the balance of \$15,633,344 that they had paid, one way or another, to the Defendants. Mr Hore went on to plead that had he not invested in this venture, he would have invested his monies in a different way which would have generated returns and that he is entitled to damages for consequential loss for the lost opportunity to make such alternative investments. This is unquestionably correct. The pleaded case suggested that 'During the relevant period, the first plaintiff successfully invested in other artworks' although, in evidence, Mr Hore was unable to make this good and his pleadings did not particularise this or any other alternative investment. However, in the course of his evidence, he did speak about other investments that he said he would have made, particularly in extremely rare classic cars. It was said, on his behalf, that he would have made investment returns of up to \$20 million by investing in this way and he should be entitled to this, in addition to the return of the sum mentioned above. In his evidence, Mr Hore said that he was an experienced and sophisticated investor (which we accept), and that he typically would achieve returns on investments in the region of 15%

per annum. He did not provide any supporting evidence by reference to an investment portfolio or similar. He had said that during the period of the Co-Ownership Arrangement, his investment activities generated an average return of 19% per annum; that his principal investment activity had been to invest in rare and classic cars, and since 2017 he had invested approximately \$8 million in this asset class with annualised "profits" (meaning increases in value, rather than realised profits) of between 8% and 29%. Beyond saying that the cars invested in were 'extremely rare' and 'very identifiable and unique', he gave no particulars and said in his witness statement that he was unwilling to do so, owing to the fact that his ownership of these cars was a fact not readily available to the public. Nonetheless, he did particularise five cars which he described as cars A, B, C, D and E and gave the purchase price and his assessment (it was not independently supported) of their current value and the annualised return from (at the earliest) 2017 to date. In evidence, he told us what sort of cars they were. No discovery was given regarding any of the matters asserted by Mr Hore set out above. It was said that he would be 'very happy' to give disclosure of the evidence in support of his assessed investment returns, but he had not done so. He said that it would be 'challenging' for him to give values of the cars. In total, he owned thirty vehicles and did not invest a set amount a year but did so on an opportunity basis. He said that his collection of cars was worth 'maybe \$150 million' and later on said that was what he paid and when asked if the value was much higher, he said 'It could be, yes'. Thereafter, he said 'Actually, you have put me on the spot a little bit. I would say closer to £100 million as the purchase cost'. When asked what the actual profit on investment had been, he said 'It's a bit like art, really. You can't really get auction prices. Some of these cars are unique. So it is ultimately what somebody is going to pay for them or whether they would like to pay for those'. As to the five cars he had selected for the purpose of his witness evidence, he said that he did not have valuations upon him but could obtain them. Only one of the cars had been sold and that was a vehicle (a particular 1973 Lamborghini) which he had restored which he had purchased for \$1.9 million and sold for \$3.3 million, yielding an annual return of 15%. However, he was unable to say what the cost of the five year restoration project for that vehicle was. 211. As to money he invested with the Defendants, that originated from a stock portfolio, and when asked how that had performed over the years, Mr Hore said he had 'edged out of it over the years so it would have under performed the stock market because I have very little in it anymore'. That money has all gone off to cars and other projects'. Mr Hore went on to state that, currently, cars were the only assets in which he was investing. 212. He described himself as a 'one dimensional' investor who would not be frightened of investing all his assets in one particular asset class as his experience was that would lead to substantial growth if the correct investment was selected. 213. We accepted the evidence of Mr Hore in general terms. But, even applying the approach warranted by the authorities, namely being as generous to a claimant who is the victim of fraud as we reasonably can, his evidence was, in the words of Toulson LJ, 'too uncertain and distant to give rise to a recoverable head of loss'. 214. In the alternative the Plaintiffs said that Mr Hore was entitled to claim compound interest as damages or pursuant to the equitable jurisdiction of the Court.

Compound interest may be recovered as damages. In *Doorstop Limited v Gillman*

[2012] (2) JLR 297, the Royal Court approved the decision of *Sempre Metals v Inland Revenue Commissioners* [2008] 1 AC, where the House of Lords held per Lord Nicholls at paragraph 103: "In the ordinary course the value of having the use of money, sometimes called the 'use value' or 'time value' of money, is best measured in this restitutionary context by the reasonable cost the defendant would have incurred in borrowing the amount in question for the relevant period. That is the market value of the benefit the defendant acquired by having the use of the money." 215. At paragraphs 94 and 95, Lord Nicholls said: "94. To this end, if your Lordships agree, the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth. 95. In the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the proved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law." (our emphasis) 216. We are satisfied that the Plaintiffs in this case would have invested these funds to generate a significant return, certainly one that warrants an award of compound interest, which would go some way to amounting to a "fair measure of what the plaintiff lost" by virtue of the Defendant's conduct. We would have fixed this at the rate of interest that Mr Valmorbida agreed to pay Sotheby's, namely Libor plus 5.25% to run from the dates upon which the payments in question were made to the Defendants, until the date of repayment. We hold that we have power to make such awards pursuant to the equitable jurisdiction of the Court. Breaches of fiduciary duty and trust 217. The Plaintiffs further alleged that the Defendants held the sum contributed to them on trust by virtue of the fact: (a) there was a fiduciary relationship between Mr Hore and Mr Valmorbida, and by failing to account for the sums contributed by Mr Hore or using the sums in his own interest, Mr Valmorbida acted in breach of fiduciary duty and trust; (b) in the alternative, that the monies are held pursuant to a constructive trust; and (c) in the third alternative, a constructive trust arose by virtue of the Settlement Agreement being set aside on the grounds of fraud. 218. These claims were denied by the Defendants. 219. The Plaintiffs claim fiduciary obligations can be owed in a commercial context if warranted by the particular circumstances. Such a duty is not prevented from arising by the presence of a contractual relationship or the fact that sums were paid by one party to another by a way of loan. In *United Dominions Corp v Brian*

- [1995] 157 CLR 1, the High Court of Australia held: "In particular, a fiduciary relationship with attendant fiduciary obligations may, and ordinarily will, exist between prospective partners who have embarked upon the conduct of the partnership, business or venture before the precise terms of any partnership agreement had been settled. Indeed, in such circumstances, the mutual confidence and trust which underlie most consensual fiduciary relationships are likely to be more readily apparent than in the case where mutual rights and obligations have been expressly defined in some formal agreement. Likewise, the relationship between the prospective partners or participants in a proposed partnership to carry out a single joint undertaking or endeavour will ordinarily be fiduciary if the prospective partners have reached an informal arrangement to assume such a relationship and have proceeded to take steps in its establishment or implementation." 220. This passage was cited with approval by Etherton J in *Murad v Al Saraj*
- [2004] EWHC 1235 (Ch) . 221. The core duties of a fiduciary were set out by Millett LJ in *Bristol and West Building Society v Mothew*
- [1998] Ch 1 , where at page 18 the judge said: "The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. The fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of a fiduciary." 222. We were also referred to Snell which stated at 7-051 that: "A fiduciary who has taken an unauthorised profit is obliged to account for the profit that was made in breach of the fiduciary duty without the Court needing to determine whether the principal might have been prepared to give consent, had it been sought." 223. To the extent that Mr Valmorbida may have made secret profits by trading in art using the Plaintiffs' funds, it was accepted by the Plaintiffs at trial that absent finding that Mr Valmorbida was a fiduciary, Mr Hore could not recover any such secret profits. It is asserted that those secret profits could be, on the facts of this case, between \$4 and \$7 million. The Defendants relied upon the fact that the Plaintiffs pleaded that, from the outset, the relationship between Mr Hore and Mr Valmorbida was a 'commercial relationship' , whereby Mr Hore came to acquire a 50% shareholding in the Company, investments were to be made by the shareholders for the purpose of purchasing art and profits were to be realised and divided in accordance with the shareholdings in the Company, with the detail of the parties relationships being set out in SPA1 and SPA2. The Plaintiffs denied in their Reply that there were terms to be implied in the SPA as that would be inconsistent with the entire agreement clause contained within clause 12 of both SPAs. Mr Valmorbida argued that it was 'very ordinary in business for parties to place trust and confidence in each other' but that that was insufficient basis for the founding of a fiduciary duty to arise. This would be 'extraordinary' in the context of a commercial relationship between equal shareholders which was not akin to a partnership. We were referred to *Al Nehayan v Kent*

- [2018] EWHC 333 (Comm) where Leggatt LJ delivered the judgment of the Queen's Bench Division (Commercial Court) and stated at paragraph 157: "157. In considering this submission, I bear in mind that it is exceptional for fiduciary duties to arise other than in certain settled categories of relationship. The paradigm case of a fiduciary relationship is of course that between a trustee and the beneficiary of a trust. Other settled categories of fiduciary include partners, company directors, solicitors and agents. Those categories do not include shareholders, either in relation to the company in which they own shares or to each other. While it is clear that fiduciary duties may exist outside such established categories, the task of determining when they do is not straightforward, as there is no generally accepted definition of a fiduciary. Indeed, it has been said that a fiduciary "is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary": see Finn, *Fiduciary Obligations* (1977), p2, cited with approval by Millett LJ in *Bristol and West Building Society v Mothew*
- [1998] Ch 1, 18. If this is right, it simply begs the question of how to determine when a person is subject to fiduciary obligations if not by analysing the nature of their relationship with the person to whom the obligations are owed." 224. At paragraph 159, Leggatt LJ said: "Thus, fiduciary duties typically arise where one person undertakes and is entrusted with authority to manage the property or affairs of another and to make discretionary decisions on behalf of that person." 225. Our attention was also drawn to *Glenn v Watson*
- [2018] EWHC 2016 (Ch) where Nugee J considered a case where a plaintiff contended that his fellow joint venturer, the defendant, owed him fiduciary duties. The defendant and his agents were specialists in property and identified investments that the plaintiff was to invest in alongside the defendant. 226. At paragraph 131 of the judgment, the judge helpfully summarised categories of fiduciary relationships and at paragraph 131(3) said: "Fiduciary duties will not be too readily imported into purely commercial relationships. That does not mean that fiduciary duties do not arise in commercial settings - indeed they very frequently do, as the example of agency illustrates - but that outside the settled categories, this is not common, it being normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party." 227. At paragraph 131(4), he went on to hold that a joint venture is not one of the settled categories of relationship giving rise to fiduciary duties between the joint venturers, and at 131(5) observed 'in the default position is that no fiduciary duties arise. In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to rise between commercial co-venturers...." 228. At paragraph 131(7), Nugee J gave the following helpful (to our mind) summary: (7) Without in any way attempting to define the circumstances in which fiduciary duties arise (something the courts have avoided doing), it seems to me that what all these citations have in common is the idea that A will be held to owe fiduciary duties to B if B is reliant or dependent on A to exercise rights or powers, or otherwise act, for the benefit of B in circumstances where B can reasonably expect A to put B's interests first. That may be because (as in the case of solicitor and client, or principal and agent) B has himself put his affairs in the hands of A; or it may be

because (as in the case of trustee and beneficiary, or receivers, administrators and the like) A has agreed, and/or been appointed, to act for B's benefit. In each case however the nature of the relationship is such that B can expect A in colloquial language to be on his side . That is why the distinguishing obligation of a fiduciary is the obligation of loyalty, the principal being entitled to "the single-minded loyalty of his fiduciary" (Mothew at 18A): someone who has agreed to act in the interests of another has to put the interests of that other first. That means he must not make use of his position to benefit himself, or anyone else, without B's informed consent." (Our emphasis) 229. In the circumstances of this case we hold that, notwithstanding the trust and confidence that Mr Hore placed in Mr Valmorbida , this was a purely commercial relationship where the default position is that no such fiduciary duty arises. These were two shareholders in a private company and not partners. Their duties to each other were set out in documents they negotiated at arm's length between each other and it would be inappropriate to imply or find that Mr Valmorbida owed a fiduciary duty to Mr Hore . 230. As to the allegation of constructive trust, the first allegation made by the Plaintiffs was that the monies held by the Defendants were held pursuant to a ' Pallant v Morgan Constructive Trust ' [1993] Ch 43. A Pallant v Morgan equity arises where A and B agree that A will acquire some specific property for their joint benefit and, in reliance upon that agreement, B refrains from attempting to acquire the property himself. In such case, equity will not permit A, should they subsequently acquire the property, to keep it for their own benefit to the exclusion of B. It is said that the Plaintiffs failed to plead circumstances necessary to give rise to such an equity and secondly, and more fundamentally, the parties agreement was that the Company would acquire art and they would participate in the Company as equal shareholders - a Pallant v Morgan equity cannot cut across such contractual arrangements. This argument was not pressed by the Plaintiffs in submission, although it was raised by them in their Skeleton Argument and, on the submissions that we have, we find for the Defendant and hold on the evidence we heard that no such equity could arise. 231. It is further argued that a constructive trust arose by virtue of the Settlement Agreement being set aside on the grounds of Mr Valmorbida's dol / fraud. 232. Constructive trusteeship was considered by the Royal Court in *Bagus Investments Limited v Kastening*

[2010] JLR 355 where Birt, Bailiff stated at paragraph 20 of the judgment: "....in English law, the expression "constructive trustee" covers two completely different types of situation. The first is where the defendant acquired the property as a trustee or other fiduciary in an unimpeached arrangement before the conduct complained of when he abused the trust and confidence reposed in him; the second is where the wrongful conduct of the defendant in asserting his interests leads to an equitable obligation being placed upon him. This distinction has been touched upon in a number of cases but has perhaps been most clearly articulated by Millett, L. J. in the case of *Paragon Fin. plc. v. D. B. Thackerar & Co.* (8) ([1999] 1 All E. R. at 408-414). I would refer in particular to the following passage of his judgment (ibid., at 408-409): Regrettably, however, the expressions 'constructive trust' and 'constructive trustee' have been used by equity lawyers to describe two entirely

different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff. A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are *McCormick v. Grogan* (1869), L. R. 4 HL 82 (a case of a secret trust) and *Rochefoucauld*

v. Boustead,

[1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v. Morgan*, [1952] 2 All E. R. 951; [1953] Ch. 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property. The second class of case is different. It arises when the defendant is implicated in a fraud. Equity has always given relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally though I think unfortunately described as a constructive trustee and said to be 'liable to account as constructive trustee.' Such a person is not in fact a trustee at all, even though he may be liable to account as if he were. He never assumes the position of a trustee, and if he receives the trust property at all it is adversely to the plaintiff by an unlawful transaction which is impugned by the plaintiff. In such a case the expressions 'constructive trust' and 'constructive trustee' are misleading, for there is no trust and usually no possibility of a proprietary remedy; they are 'nothing more than a formula for equitable relief': *Selangor United Rubber Estates Ltd. v. Cradock (No. 3)*, [1968] 2 All E. R. 1073, at 1097; [1968] 1 W. L. R. 1555, at 1582 per Ungood-Thomas, J." 21. In a number of cases, the first type of constructive trustee has been referred to as a class 1 constructive trustee and the second as a class 2 constructive trustee. I shall do likewise where appropriate." 233. It is clear that Mr Valmorbida could not be a 'class 1 constructive trustee' on the evidence. However, the Court will intervene to impose a constructive trust in order to protect the victims of fraud - 'class 2 constructive trusteeship'. In *Re Esteem Settlement*

- [2002] JLR 53, Birt, Deputy Bailiff, said: "90. The constructive trust has been used by the courts of England and other jurisdictions as a mechanism to assist in fashioning appropriate remedies to deal with problems of commercial fraud. It accords with the interests of justice. If the fraudster does not hold the property on constructive trust, the victim has to prove his claim alongside ordinary creditors of the fraudster because the assets belong to the fraudster and would be available for such creditors. We have no doubt that Jersey law should draw on the experience of English law and other jurisdictions to impose a constructive trust in a case such as the present. We think that in Jersey too, when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient so that the victim has a proprietary interest in such property. 91. In reaching this conclusion, we recognize the dangers of too liberal an imposition of constructive trusts. Although the observation was made in the context of resulting trusts rather than constructive trusts, the House of Lords in *Westdeutsche*
- (29) counselled against "the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs" ([1996] A. C. at 704). But that would not be the consequence of holding that a constructive trust exists in circumstances such as the present. On the contrary, we would merely be adopting what has long been the position in many other jurisdictions." 234. Further, in *Nolan and Others v Minerva Trust Company Limited*
- [2014] (2) JLR 117, Page, Commissioner, held at paragraph 151: "In our view it is not the law of Jersey that a constructive trust arises immediately if a contract has been procured by a fraudulent misrepresentation. On the contrary, the law of Jersey is, we conclude, the same as English law so that (save in the case of a *Halley* trust) a constructive trust will not arise out of a contract which has been procured by a fraudulent misrepresentation unless and until the contract has been rescinded." 235. In this case the contract has been avoided by reason of Mr Valmorbida's fraud and accordingly, *prima facie*, a constructive trust has arisen in favour of the Plaintiffs. In the Amended Order of Justice, Mr Hore pleads that Mr Valmorbida holds on constructive trust for him, *inter alia* the proceeds of sale of artworks purchased using his money and the traceable proceeds, which include the proceeds of sale of *Untitled*, *Iron Man*, and the profits derived from the sale of *Water Worshipper* and the taking of an account in relation to such additional profits as Mr Valmorbida may have made. The Defendants case was, on the footing that the contractual arrangements were still effective, that the Plaintiffs were limited to the relief set out at paragraph 7.2 of the SPAs or to the repayments set out in the Settlement Agreement. The latter submission would be correct (at least in part) had we found that Mr Hore had elected to adhere to the Settlement Agreement, notwithstanding Mr Valmorbida's *dol* / false representations. However, we made no such finding and in those circumstances we hold that Mr Valmorbida held on constructive trust for Mr Hore (and to the extent necessary, *Little Wing*), all artworks purchased using monies provided by the Plaintiffs; the proceeds of sale; artworks purchased with those proceeds and any other assets, artworks or funds that could be traced therefrom and, had the matter not settled, there would have been an

enquiry to establish the destination of these funds and other assets.

Conclusion

236. For the reasons explored in this judgment, the evidence against Mr Valmorbida was overwhelming. As set out in our judgment published on 14 September 2021, the Court was subsequently notified that the parties had agreed terms of settlement but nonetheless, we elected to proceed and give this judgment. Notwithstanding that the case compromised after trial we were satisfied that it was in the public interest for a judgment to be delivered in this case for the reasons set out in our judgment reported at

[2021] JRC 242 which we do not repeat again here. 237. Further, at the hearing on 14 July 2021, the Court indicated that the case papers were to be transmitted to the Attorney General of Jersey for his consideration as whether or not they should be sent to the Director of Public Prosecutions for England and Wales. This occurred and subsequently the relevant papers were sent to the Director of Public Prosecutions. *Authorities Hore v Valmorbida*

[2021] JRC 242 . *Selby v Romeril*

[1996] JLR 210 . *Murray v Camerons Limited*

[2020] JRC 179 . *Booth v Viscount of the Royal Court*

[2019] JCA 122 . *Steelux Holdings Limited v Edmonstone*

[2005] JLR 152 . *Marrett v Marrett and O'Brien*

[2008] JLR 384 . *Sutton v Insurance Corporation of the Channel Islands Limited*

[2011] JLR 80 . *Hong Kong Foods v Robin Hood Curry Limited*

[2017] JRC 050 . *Le Geyt*, 1946 Edition. *HRCKY Limited v Hard Rock*

[2019] (2) JLR 47. *Car and Universal Finance v Caldwell*

[1965] 1 QB 525 . *Snell*, 34 th Edition. *Pothier's " Traité des Obligations . French judicial decisions (1984) 14 V. U. W. L. R. 463. Fort Regent Development Committee v Regency Suite Discotheque*

[1990] JLR 228 . *Moore Large and Co Limited v Hermes Credit and Guarantee Plc* [2003] 1 *Lloyds Report IR. ABN Amro Bank v Royal and Sun Alliance Insurance and Others*

[2021] EWHC 442 (Comm) . *Johnson v Agnew* [1980] AC 392. *Misrepresentation and Non-Disclosure*, 14 th Edition. *Amos and Walton's Introduction to French Law*, 2 nd Edition - 1963. *Contract Law in a Mid-Channel Jurisdiction* (2016). *Pell Frischmann v Bow Valley*

[2008] JLR 311 . *Derry v Peek*

(1889) 14 App Cas 337 at 374. *Clarke and Lindsell*, 23 rd Edition. *Smith New Court Securities Limited v Scrimgeour Vickers Asset*

- [1997] AC 254 . Parabola Investments Limited v Browallia
- [2011] QB 477 . Doorstop Limited v Gillman
- [2012] (2) JLR 297. Sempra Metals v Inland Revenue Commissioners [2008] 1 AC. United Dominions Corp v Brian [1995] 157 CLR 1. Murad v Al Saraj
- [2004] EWHC 1235 (Ch) . Bristol and West Building Society v Mothew
- [1998] Ch 1 . Al Nehayan v Kent
- [2018] EWHC 333 (Comm) . Glenn v Watson
- [2018] EWHC 2016 (Ch) . Pallant v Morgan [1993] Ch 43. Bagus Investments Limited v Kastening
- [2010] JLR 355 . Re Esteem Settlement
- [2002] JLR 53 . Nolan and Others v Minerva Trust Company Limited
- [2014] (2) JLR 117. Page Last Updated: 09 Nov 2022 Back to top About JLIB Accessibility Contacts Disclaimer Feedback Privacy policy Site map © Jersey Legal Information Board 2001- This website is not compatible with your web browser. You should install a newer browser . If you live in Jersey and need help upgrading call the States of Jersey web team on 440099. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
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