Neutral Citation Number: [2017] EWHC 1820 (Ch)

Case No: HC-2016-000674

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 20/07/2017

Before :

THE HON MR JUSTICE HENRY CARR

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Between :

THE CO-OPERATIVE BANK PLC	**Claimant**
- and -	
(1) HAYES FREEHOLD LIMITED (IN LIQUIDATION)	**Defendants**
(2) DEUTSCHE BANK AG	
(3) SENTRUM (HAYES) LIMITED (IN LIQUIDATION)	
(4) SENTRUM HOLDINGS LIMITED	
And between	
DEUTSCHE BANK AG	**Part 20 Claimant**
-and-	
(1) SENTRUM (HAYES) LIMITED (IN LIQUIDATION)	**Part 20 Defendants**
(2) SENTRUM HOLDINGS LIMITED	

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JONATHAN GAUNT QC and MARK SEFTON (instructed by **Forsters LLP**) for the **Part 20 Claimant Deutsche Bank AG**
BEN VALENTIN QC and GARY COWEN (instructed by **White & Case LLP**) for the **Part 20 Defendant Sentrum Holdings Limited**

Hearing dates: 16,17,18,19,23,25 May, 12 and 13 June 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON MR JUSTICE HENRY CARR

Mr Justice Henry Carr

Introduction

1. This judgment is in respect of a Part 20 Claim by Deutsche Bank AG ("Deutsche Bank") against Sentrum (Hayes) Limited ("Sentrum Hayes") and Sentrum Holdings Limited ("Holdings"). The claim relates to a deed dated 6 August 2015 ("the Deed"), which was entered into by Deutsche Bank, Hayes Freehold Limited ("Hayes Freehold") and Sentrum Hayes. Sentrum Hayes and Hayes Freehold are in liquidation and did not participate in these proceedings.

2. The claim concerns a data centre known as the Digiplex Megaplex Centre, Brookfields, Beaconsfield Road, Hayes, Middlesex ("the Property"). By a lease dated 29 June 2001 made between Digiplex UK Limited and Deutsche Bank ("the Headlease"), the Property was demised to Deutsche Bank for a term expiring on 14 September 2021. By an underlease dated 26 February 2010 and made between Deutsche Bank, Sentrum Hayes and Holdings, ("the Underlease"), the Property was demised to Sentrum Hayes for a term expiring on 11 September 2021.

3. The explanation for these arrangements is as follows. Deutsche Bank had originally entered into the Headlease because it wished to occupy the Property. By 2009, Deutsche Bank no longer had any occupational need for the Property. However, the rent under the Headlease was rising, by fixed increments, to an eventual figure of more than £2.6 million a year. Therefore, Deutsche Bank sub-let the Property to Sentrum Hayes, at a rent which matched the rent under the Headlease. Holdings was the guarantor of Sentrum Hayes' obligations under the Underlease, and in particular the obligation to pay the rent.

4. On 26 June 2012, the shares in Holdings were sold to Digital Stout Holding LLC ("Digital") under a share sale agreement ("the SSA"). Holdings ceased to be a part of the same group as Sentrum Hayes and Hayes Freehold, which were not acquired by Digital. The Property was also excluded from the acquisition.

5. It was a term of the SSA that Sentrum Construction Management Limited (a company in the seller's group) would procure the release of Holdings from its liability as guarantor of Sentrum Hayes' obligations under the Underlease. The SSA also provided that an escrow amount of £10 million was to be held back pending, amongst other things, the procurement of a release of the guarantee. Provided that 36 months had elapsed since completion of the SSA, on release of Holdings' guarantee, the balance of the escrow amount, less certain deductions, would be released to one of the seller companies, Glen Moar Properties Limited ("Glen Moar").

6. On 18 December 2012:

   i) the freehold interest in the Property was transferred to Hayes Freehold;

ii) by a facility agreement ("the Facility Agreement") the Co-Operative Bank plc ("the Co-Op") granted a lending facility of over £25m to Hayes Freehold, which was guaranteed by Sentrum Hayes;

iii) Hayes Freehold entered into a debenture with the Co-Op whereby Hayes Freehold charged the freehold interest in the Property to the Co-Op ("the Hayes Freehold Debenture"). Under the Hayes Freehold Debenture, Hayes Freehold granted a charge to the Co-Op over the Headlease ("the Headlease Charge"); and

iv) Sentrum Hayes entered into a debenture with the Co-Op ("the Sentrum Hayes Debenture") whereby it charged its interest as tenant in the Property created by the Underlease to the Co-Op ("the Underlease Charge"). I shall refer collectively to the Headlease and Underlease Charges as "the Co-Op Charges".

7. Clause 22.2(a)(ii) of the Facility Agreement provided that:

> "No Obligor [which included Hayes Freehold and Sentrum Hayes] shall without the prior written consent of the Lender (such consent not to be unreasonably withheld or delayed): …
>
> (ii) agree to any amendment, waiver or surrender or take any action to lead to forfeiture in respect of any Lease Document".

8. Clauses 6.1 of the Hayes Freehold and Sentrum Hayes Debentures provided that:

> "Except with prior written consent of the Lender (such consent not to be unreasonably withheld or delayed), the [Borrower/Guarantor] shall not enter into a single transaction or a series of transactions (whether related or not) and whether voluntary or involuntary to sell, lease, transfer or otherwise dispose of any Secured Assets."

9. The freehold interest in the Property and the Headlease were "Secured Assets" within the meaning of clause 6.1 of the Hayes Freehold Debenture. Sentrum Hayes' interest in the Leasehold was a "Secured Asset" within the meaning of clause 6.1 of the Sentrum Hayes Debenture.

10. At that stage, the freeholder of the Property and the sub-tenant under the Underlease were part of the same group. Deutsche Bank had opposite but matching obligations under the Headlease and the Underlease and had no use for the Headlease. Holdings was looking to get out of the guarantee. The aim of the Deed was to release Hayes Freehold, Sentrum Hayes, Holdings and Deutsche Bank from their respective obligations in this structure. Therefore, the Deed purported to effect a surrender of the Headlease, a surrender of the Underlease, and a release of Holdings from its guarantee.

11. However, the consent of the Co-Op was required for the surrender of the Headlease due to the existence of the Headlease Charge. The Co-Op did not consent to such

surrender. The absence of consent from the Co-Op meant that the surrender of the Headlease was not effective, with the result that Deutsche Bank was not released from its liability to pay the head-rent.

12. In its evidence and in its opening skeleton (at [4]) Deutsche Bank claimed that the relevant individuals who advised and authorised the bank to enter into the Deed were not aware, when making that decision, of the Headlease Charge; of the Underlease Charge; and that the Co-Op had not consented to the surrenders provided for in the Deed. Holdings submits that relevant individuals within Deutsche Bank did know about these facts. It claims that the problem arose because Deutsche Bank, in the words of one of its witnesses, failed to get its own "*ship in order*", and chose to rely upon the advice of its solicitor, who negligently failed to perform a title search on the Property and advised that the surrender of the Headlease would be effective, and that Deutsche Bank could therefore execute the Deed. It submits that it was for Deutsche Bank, as tenant under the Headlease, and not Holdings, as guarantor of the Underlease, to ensure that the surrender of the Headlease was effective. Holdings submits that in these circumstances Deutsche Bank's remedy (if any) is against its solicitor.

Findings of fact

13. Before considering the claims advanced by Deutsche Bank, I shall make various findings of fact that are relevant to the analysis of these claims. In particular, I will look at: i) the state of knowledge within Deutsche Bank about the Co-Op Charges, ii) the involvement of Deutsche Bank's solicitor, Mr Miscampbell, iii) the relevant decision maker within Deutsche Bank, and iv) the state of knowledge within Holdings about the Co-Op Charges.

The state of knowledge within Deutsche Bank about the Co-Op Charges

14. Various witnesses gave evidence on behalf of Deutsche Bank about their knowledge of the existence and effect of the Co-Op Charges. Certain witnesses were on secondment to Deutsche Bank from specialist property advisers, Jones Lang LaSalle ("JLL"), at the relevant time and others were employees of Deutsche Bank. All of these witnesses gave frank and fair evidence under cross-examination and were doing their best to assist the Court. Unfortunately, the written statements of certain of Deutsche Bank's witnesses were not accurate about their state of knowledge on this issue.

Allen White

15. Mr White was an Estate Manager, seconded from JLL to Deutsche Bank between July 2012 and the end of 2013, who was responsible for the Property during that period. At [17] of his witness statement, he said that "*We were not aware that the [Co-Op] had security over [the Underlease]*." This statement was not accurate, as Mr White frankly acknowledged during cross-examination:

> "Q. And in paragraph 17 of your statement you say: "We were not aware that the bank had security over the Underlease." Is the truth really -- I'm not saying that you were not telling the truth, or didn't believe you were telling the truth when you wrote that,

> but the reality is it is just not right, is it, because in April you had learned that the Co-Op had security over the Underlease, because that's what the letter says at 693?
>
> A. Absolutely, yes."

16. This acknowledgement was inevitable in the light of documents provided on disclosure by Deutsche Bank. In particular, on 14 February 2013, Mr White learnt that Deutsche Bank had received a notice from Sentrum Hayes dated 18 December 2012, which expressly referred to the Co-Op's interest in the Underlease. Further notices of the Co-Op's interest, both in respect of Hayes Freehold and Sentrum Hayes, were received by Mr White in April 2013, and were retained within Deutsche Bank's files. The documents stated expressly that the Co-Op had taken security over Hayes Freehold's interest in the Property and the Headlease and over Sentrum Hayes' interest as tenant in the Underlease.

17. The content of these notices was unlikely to have come as a surprise to Mr White when he learnt of them in February 2013, in the light of communications between Mr White and a Mr Franek Sodzawiczny (who apparently was able to speak on behalf of the Hayes/Sentrum companies) concerning a possible surrender of the Headlease by Deutsche Bank.

18. In particular, on 17 January 2013, Mr Sodzawiczny approached a contact at Deutsche Bank to suggest that they meet to discuss the Property. The approach was passed to Mr White on 18 January 2013, because he was concerned to achieve a surrender of the Headlease. On 24 January 2013, Mr White received an offer in respect of Deutsche Bank's surrender of the Headlease where Mr Sodzawiczny stated that:

> "In reality a surrender premium of £7M is offered for your consideration and we would very much wish to discuss with you when you are able."

19. Mr White sought clarification from Mr Sodzawiczny as to the justification for this surrender premium, and, after some further communications, Mr Sodzawiczny explained in an email dated 7 February 2013 that:

> "The freeholder has obligations to the bank who have insisted on a payment to let DB surrender the lease so I'm afraid unless DB are prepared to contribute there is nothing we can do."

20. During cross-examination, Mr White's evidence was that he found the proposal surprising, but that he was clear that what was being proposed was a surrender of the Headlease for payment of a £7 million premium, and that Hayes Freehold's lender had insisted on a surrender premium because it was in a position, by virtue of the obligations between itself and Hayes Freehold, to permit Hayes Freehold to accept a surrender of the Headlease.

21. On 5 December 2013, in Mr White's final month as Estate Manager, Freshfields Bruckhaus Deringer ("Freshfields"), Deutsche Bank's solicitors at the time, provided Deutsche Bank with an up-to-date Land Registry search of the freehold title, which

showed the sale of the freehold in the Property to Hayes Freehold on 10 January 2013 and the Headlease Charge pursuant to the Hayes Freehold Debenture.

22. These documents explain why, during his cross-examination, Mr White accepted that:

i) In early 2013 he had learned of the Co-Op's security over the freehold title and the Co-Op Charges.

ii) He also knew about the Co-Op's insistence on a £7 million premium from Hayes Freehold to agree to the surrender of the Headlease.

iii) This information was readily accessible from Deutsche Bank's files for anyone subsequently dealing with the Property to see.

iv) Mr White most probably told Mrs Williams (his successor at Deutsche Bank from JLL) of these matters when he handed over to her in late 2013.

Kelly Williams

23. Mrs Williams is a JLL secondee to Deutsche Bank who took over from Mr White in January 2014. She was cross-examined after Mr White had given his evidence. As with Mr White, I found that her oral evidence was frank and candid. However, in common with Mr White, her witness statement was not accurate as to whether she knew about the Co-Op Charges. In particular, at [3(i)(g)] of her witness statement, Mrs Williams stated that "*I was not aware that The Co-operative Bank plc held security over the Headlease and Underlease*". Before confirming the accuracy of her statement she explained that she wished to correct that sentence by deletion of the word "not". The correction meant that, on this issue, her oral evidence was precisely the opposite of the account given in her witness statement.

24. This correction was inevitable, since Mrs Williams was aware of the Co-Op Charges, and of the discussions between Mr White and Mr Sodzawiczny in February 2013, which made clear the requirement for the Co-Op's consent to a surrender of the Headlease. This is apparent from an email dated 11 March 2014, sent by Mrs Williams to Ms Perry, who also gave evidence on behalf of Deutsche Bank. Mrs Williams said:

> "I have seen e-mails between Franek [Mr Sodzawiczny] and Allen from January 2013 discussing a potential surrender of DB's interest.
>
> Franek proposed DB pay a surrender premium of £7m, would not budge from that figure (saying that their lenders were insisting on a surrender premium to surrender DB's interest) and we were not prepared to agree to that."

25. Furthermore, in an email to Ms Perry dated 24 July 2014, Mrs Williams again indicated her awareness that a potential difficulty with the surrender of the Headlease was the lender's insistence on a surrender premium:

> "My predecessor had attempted to negotiate a surrender of our interest but our Landlord (their lender) was insisting on an unreasonable surrender premium."

26. Mrs Williams was also aware of the identity of the lender (the Co-Op), because she had access to Mr White's emails from 2012-2013, and because this fact was expressly referred to by Ms Perry in an email copied to Mrs Williams on 4 March 2014, the contents of which I shall consider below.

Sarah-Jane Perry

27. Ms Perry was a JLL secondee to Deutsche Bank between January and November 2014 and then became, and remains, a Deutsche Bank employee. Ms Perry is, and was in 2015, the Director, Regional Service Delivery Manager, Real Estate, for Deutsche Bank. To the uninitiated, this title is uninformative, but Ms Perry explained that she was responsible for real estate management and transactions in the Americas, the UK and Ireland. This responsibility was considerable.

28. Ms Perry's witness statement asserted that she was not aware that the Co-Op's consent was needed for the surrender of the Headlease, and that she had no knowledge as to what security the Co-Op held. In particular, at [13] and [16] of her witness statement she stated that:

> "I was not aware, nor advised at the time, that the consent of the [Co-Op], was needed for the surrender of the Headlease and the Underlease. I would not have known whether the [Co-Op's] consent was obtained or not."
>
> ….
>
> "I would stress that I had no dealings with the [Co-Op] and had no knowledge as to what security it held. The position of the [Co-Op] was never raised with me, or mentioned by me, during the Surrender Transaction. I had no knowledge as to the implications that this security had regarding the Surrender Transaction and, along with my colleagues, I understood from our negotiations, and the relevant correspondence and documentation that all the other parties (Hayes Freehold, Sentrum (Hayes) and Sentrum Holdings), had all that was required to lawfully proceed with the transaction."

29. During her cross-examination, Ms Perry frankly accepted that she was aware that the Co-Op held security and that its consent was required, and that her statement was not accurate: Day 4/95/13-22. As with other witnesses, her explanation was that she had forgotten about certain documents, and was not shown them before signing her statement:

> "Q. As you said, you weren't shown the documents from 2014 that we have looked at that showed that you were aware of these issues back in 2014?

> A. Yes.
>
> Q. So when you now say "I was not aware at the time that the consent was needed for the surrender of the Headlease and the Underlease", that evidence is inaccurate?
>
> A. It means I had forgotten the previous correspondence that I had had from Kelly."

30. It was clear from Deutsche Bank's disclosure that Ms Perry's witness statement was not accurate. I shall refer to three examples from the many instances relied on by Holdings.

31. First, email exchanges between Mrs Williams and Ms Perry in early 2014 showed concern by Ms Perry about a potential conflict of interest, which put her in a difficult position. She was, understandably, worried about JLL providing advice to the Co-Op in relation to the restructuring of its lending secured on the Property, whilst at the same time giving advice to Deutsche Bank about the Property. Ms Perry was unhappy that she had been copied in on emails relating to an issue which gave rise to a personal conflict of interest, given that she was seconded to Deutsche Bank.

32. During her cross-examination, she explained that she remembered the issue clearly, because it annoyed her at the time. She had not forgotten about the information but it did not cross her mind to pass it on, as she had no reason to think that her colleague, Mr Mitchell, was unaware of the details and this was a minor transaction in comparison with other matters with which she was concerned. She explained that she would not have given it as much attention "*as to enable that sort of trigger in my mind*".

33. Secondly, on 4 March 2014, Ms Perry sent an email to her line manager, Ms Suzanne Heidelberger, which referred to the "*long and complicated history*" of the Property, and the Co-Op's loan and security on the Property. Ms Perry wrote that "*we have also heard they've [i.e. Sentrum] approached the Co-Op to restructure their loan – this was via our data centre and valuations teams who were approached by the Co-Op*."

34. Thirdly, Mrs Williams' emails to Ms Perry of 11 March 2014 and 24 July 2014 (referred to above) made clear that the lenders were insisting on a surrender premium to surrender Deutsche Bank's interest, which must have indicated that their consent was required for the surrender.

Christopher Mitchell

35. Mr Mitchell was another JLL secondee to Deutsche Bank and has now retired. He struck me as a conscientious professional with a firm grasp of detail. He proposed the surrenders of the Headlease and the Underlease to Ms Perry and, with her approval, instructed Mr Miscampbell at Blake Morgan to act on behalf of Deutsche Bank in respect of the proposed surrenders. Mr Mitchell explained that he did not know about the Co-Op Charges, because otherwise he would have communicated that information to Mr Miscampbell. Instead he relied on Blake Morgan's advice that the surrender would be effective. I accept his evidence. He expressed disappointment that Ms Perry had not told him about the Co-Op Charges, since it was for each side in a multi-party

transaction to get its own "*ship in order*". Mr Mitchell explained that he would have understood the need to deal with the Co-Op Charges if he had known about them (although not the legal mechanics of how to do so).

Jennifer Jones

36. Ms Jones is a Deutsche Bank Vice President, whose only involvement was in relation to the presentation of a paper prepared by Mr Mitchell concerning the surrender to Deutsche Bank's European Real Estate Committee ("EREC") on 25 June 2015. Her evidence was that she was unaware of the Co-Op Charges. Nor did she know about the guarantee from Holdings. I accept this evidence, as no-one within Deutsche Bank, including Ms Perry, told Ms Jones about these facts. The paper which she presented contained none of this information.

37. Her evidence gave rise to a lively debate between the parties as to the role of EREC in the approval process. The paper was marked "*For information*" rather than "*For approval*", which suggests that EREC's approval was not required. However, Deutsche Bank points out that neither Mr Mitchell nor Ms Perry would have had the authority to proceed without EREC's imprimatur and Mr Mitchell refused to proceed until he had a copy of the minute of the EREC meeting. Deutsche Bank contends that whether the paper was marked "*For information*" or "*For approval*" depended simply on the value of the transaction. The difference was one of Deutsche Bank terminology, but in both cases it was necessary to have EREC's consent to proceed.

38. I accept that, had EREC objected to the proposal set out in the paper, then it could not have proceeded. This is not, however, the same as requiring approval from EREC, as would be the case with a "*For approval*" paper. This was explained by Ms Jones at [7] of her witness statement and confirmed in cross-examination. She explained in her witness statement that "*The minutes [of the EREC meeting] say "Noted" rather than "Approved" because there was no need for an approval given that the transaction did not involve any payment by [Deutsche Bank]*." She elaborated in cross-examination that the "*For information*" paper, which was approved internally by Ms Perry, simply gave EREC an opportunity to ask questions or to object, and if it did not, the proposal would proceed. It follows that EREC was not, in substance, the decision maker in relation to the execution of the Deed.

Brian Vesey

39. Mr Vesey was another JLL secondee who was the lead transaction manager for the UK. He also gave evidence on behalf of Deutsche Bank. His involvement in the matters relating to these proceeding was limited. He was copied in on Mr Mitchell's email of 14 January 2015 seeking instructions to propose surrendering the Headlease, handled matters in Mr Mitchell's absence in July 2015, and was involved in events after Deutsche Bank learnt that the Co-Op was challenging the validity of the surrender of the Headlease. During cross-examination, he said that he was not aware of the approach from Mr Sodzawiczny in early 2013, that Ms Perry never mentioned it and that Mr Mitchell was not aware of it. I accept his evidence as to his lack of knowledge.

40. Deutsche Bank rely on [17] of Mr Vesey's witness statement, where he said:

> "I would confirm that DBA understood and believed throughout that the Other Parties were able to lawfully and effectively proceed with the transaction. They had together made the joint proposal dated 8 December 2014 and, if they could proceed with a total commutation of the rents, then they could also proceed with a surrender. It was clearly a matter for them to secure any necessary consent from the Co-Operative Bank …"

41. However, during his cross-examination he confirmed that he was not involved in the preparation of the joint proposal to which he had referred and that it was the advice of Blake Morgan at the time of execution of the Deed in August 2015, rather than a proposal made during the previous year, upon which Deutsche Bank had relied; Day 4/135/8-17 and 143/1-17.

The importance of accuracy in witness statements

42. During the course of this trial, I became concerned that three of Deutsche Bank's witnesses, Mr White, Mrs Williams and Ms Perry, had all given inaccurate information in witness statements about their state of knowledge of the Co-Op Charges. I extended an opportunity to Deutsche Bank's solicitors to serve a witness statement explaining the position, if they wished to do so. This opportunity was taken. Apparently, Mr Ross of Forsters met with Ms. Perry, Mrs Williams and Mr White on 12 April 2017 and with Ms Perry and Mrs Williams again on 10 May 2017 to take them through the further documentation that was relied on by Holdings as to their knowledge of the Bank's security and the past surrender negotiations. Mr Ross has explained in paragraph 3 of his third Statement that their statements were not updated to deal with omissions as the relevant facts were considered to be known to Holdings, whose solicitors had raised issues in correspondence concerning the accuracy of the witness statements of Mrs Walsh and others. I am quite satisfied, from the statement of Mr Ross, that these errors were not deliberate, and occurred due to inadvertence. However, the result was that inaccurate witness statements were left unaltered, and either the witnesses verified their accuracy on oath, or corrected them during the trial in oral evidence in chief.

43. In *Aquarius Financial Enterprises Inc v Certain Underwriters at Lloyds* [2001] 2 Lloyds Rep. 542, Toulson J (as he then was) referred to the requirement in the Commercial Court that a witness statement should be, so far as practicable, in the witness's own words and stated:

> "49. …Bad practices, like bad money, tend to drive out good. If bad practices in the taking of witness statements come to be seen as normal, so that witness statements become lawyers' artefacts rather than the witnesses' words, their use will have to be reconsidered. Central to the problem is the ignorance of the court and the other party about how any witness statement has in fact been taken. It might therefore be thought salutary that, where a witness statement is prepared by somebody other than the witness, there should be a written declaration by the person who prepared the statement giving information about how, when and where it was prepared and certifying compliance with any appropriate code of practice."

44. I would add that it is not fair to the witness if he or she is shown documents which reveal that a witness statement is not accurate, and alterations are not made on the assumption that the opposite party already knows about them. As illustrated by this trial, cross-examination in those circumstances can prove a difficult experience for honest witnesses, which should not be the case.

The involvement of Mr Miscampbell

45. Mr Miscampbell is the partner at Blake Morgan who was responsible for advising Deutsche Bank about the execution of the Deed. He caused no search of the freehold title to be performed by Blake Morgan prior to the execution of the Deed and was therefore unaware of the Headlease Charge. Nonetheless, he gave definitive advice to Deutsche Bank that the surrender of the Headlease would be effective. On 24 July he stated in an email that "*For the record I confirm that the transfers when signed by DB will effect the surrender of the leases at Hayes in accordance with requirements of DB*". He repeated this on 28 and 29 July: "*I confirm that the attached achieves the surrender desired by DB*".

46. Blake Morgan have acknowledged their professional negligence in this regard. During his cross-examination, Mr Miscampbell expressed his regret about his failure to perform a title search, and I have no doubt that he was sincere in doing so:

> "Q. Mr Mitchell's evidence was also that he assumed, as the matter proceeded towards completion, that you would confirm that everything was good to complete -- that was a reasonable assumption, wasn't it?
>
> A. Deutsche Bank require me to confirm that the transaction achieves the effect that they intended. That is a requirement that the bank has.
>
> Q. And he also expected you to advise him, or Deutsche Bank in relation to any issues that arose in the course of your work prior to completion?
>
> A. It would be an expectation of the bank that I would deal with any issues that are raised, certainly.
>
> Q. And he expected you to do a title search, didn't he?
>
> A. He certainly suggested at the outset that I obtain the titles and that I failed to do so is a matter of great regret."

47. This evidence shows that Mr Miscampbell expected that Deutsche Bank would rely on his advice when deciding whether to execute the Deed. They did rely on his advice, as was explained by Mr Mitchell and Ms Perry. The cross-examination of Ms Perry was very clear about this:

> "Q. The truth of the matter really is this, isn't it, when we boil it right down, that the reason that Deutsche Bank was able to proceed with the transaction on 8 August 2015 was that its

> solicitors had definitively advised Deutsche Bank that when it signed the Deed it would immediately take effect and give rise to an effective surrender of the Headlease?
>
> A. Yes."

48. This explains why Ms Perry did not raise the issue of the Headlease Charge and the need to obtain the Co-Op's consent with Mr Mitchell, or with others within Deutsche Bank. Deutsche Bank was instructing solicitors to ensure that the transaction would be effective to achieve the surrender of the Headlease, and it was their responsibility, and not the responsibility of Ms Perry.

49. A further issue arises in relation to Mr Miscampbell's evidence concerning a conversation with Mr Johnson, an associate at White & Case. Mr Johnson and Mr Miscampbell have different recollections about what was said, and it remains an issue that I am required to resolve.

50. Deutsche Bank's case is that, on 3 September 2015, Mr Miscampbell telephoned Mr Johnson and asked whether the consent of the Co-Op had been obtained. Mr Miscampbell claims that Mr Johnson told him that there had been a meeting before completion at White & Case to discuss this issue. Originally, Mr Miscampbell claimed in his witness statements that Mr Johnson had told him that White & Case / Holdings had decided to carry on regardless. However, this was corrected by a witness statement served just before he gave evidence, from which it appears that this was Mr Miscampbell's inference, and was not said by Mr Johnson. Deutsche Bank submits that Mr Miscampbell's evidence is supported by an email which he sent to Charlotte Sleeman on 7 September 2015 saying, *"I spoke to the lawyers for the guarantor (Sentrum Holdings Limited) of the undertenant (Sentrum (Hayes) Limited) last week and it is clear that they considered the position on the Co-op charge and decided to proceed anyway"*.

51. Mr Johnson's evidence concerning the call was that, in response to Mr Miscampbell's question concerning the Co-Op's consent, he told Mr Miscampbell that he did not know where the consent was, but suggested that he contact Adelphi Commercial Law ("Adelphi"), on the basis that (as solicitors for Hayes Freehold and Sentrum Hayes) they should have any documents evidencing the Co-Op's consent. He explained that he had no reason to believe that consent had not been obtained in advance of completion. He also denied that there had been a meeting at White & Case to discuss the issue of the Co-Op's consent. Mr Johnson explained that only Mr Dodsworth and he were working on the transaction, so there would have been nobody else with whom a meeting could have taken place.

52. I accept the evidence of Mr Johnson and reject the evidence of Mr Miscampbell about this conversation. Mr Miscampbell had three attempts at recounting the conversation, in three different witnesses statements, and each attempt gives a materially different account. I do not consider that his recollection about this conversation can be relied on. By contrast, I found that Mr Johnson's evidence was clear and credible.

53. In addition, the contents of Mr Miscampbell's email of 7 September 2015 are not consistent with an email that he sent to Adelphi on 3 September 2015, where he gave yet another version of his conversation with Mr Johnson, suggesting that he had been

told by Mr Johnson that all consents had been obtained. I was not satisfied by Mr Miscampbell's explanation for that inconsistency (which is set out below) and I do not consider that the email of 7 September 2015 can be relied upon as an accurate account of his conversation:

> Q. And the terms of that email are not consistent, are they, with the email that you sent to Adelphi on 3 September which we have seen, which said that Mr Johnson had told you that he had understood that all consents had been obtained. That's what you said to Adelphi.
>
> A. When I was writing to Adelphi I was seeking to try and put as much pressure on them to produce a consent. At that stage I knew -- everyone knew no consent had been obtained because we had a letter from the receivers.
>
> Q. And what you were therefore saying to Adelphi was untrue?
>
> A. I was trying to bring pressure to bear on them."

The relevant decision maker within Deutsche Bank

54. I have already dealt with the role of EREC and have concluded that EREC was not, in substance, the decision maker in relation to the execution of the Deed. In my judgment, Ms Perry was the relevant decision maker.

55. In particular, Mr Mitchell repeatedly sought and obtained Ms Perry's approval to pursue the surrender proposal, as well as to instruct Blake Morgan and to waive interest on rent when the transaction completed a few days late. During her cross-examination, Ms Perry acknowledged her role as substantive decision maker in respect of the execution of the Deed, subject to governance steps within Deutsche Bank that needed to take place:

> "Q. So just to summarise where we are on this part of the story, you personally had authority to make the decision yourself in relation to the surrender and the deed, subject of course to the other pieces of governance that needed to take place; that's right, isn't it?
>
> A. Yes, I couldn't execute without the two other steps.
>
> Q. And the other steps were satisfied before completion occurred and those steps, just to be clear, are passage through EREC on a "for info" basis, ensuring there had been legal sign-off, because you said that was necessary from an audit perspective, and seeing the minutes of the EREC committee formally, so that that point of audit governance had also been complied with. Those are all the steps that were needed to be taken within Deutsche Bank to then execute?
>
> A. (Nods)."

The state of knowledge within Holdings about the Co-Op Charges/allegations of fraudulent misrepresentation

56. In order to understand Deutsche Bank's case on this issue, it is necessary to introduce further characters into the narrative. First, Simon McNally, who acted for Sentrum Hayes and Hayes Freehold in relation to the Deed. Mr McNally is or was a partner in the law firm Bridgehouse Partners; and is or was a partner in Adelphi. Mr McNally did not give evidence, and is or was a defendant to a claim in the Commercial Court ("the ORB litigation") in which it was alleged that Mr McNally and his partner had misappropriated property of a Mr Ruhan, the previous owner of the Glen Moar companies. Secondly, James Dodsworth, who is a partner in White & Case who, together with Mr Johnson, acted for Holdings in relation to the execution of the Deed. Mr Dodsworth also did not give evidence, and I am asked by Deutsche Bank to draw adverse inferences from his absence. Third, Valerie Walsh, Vice President of Portfolio Management for the Digital group, who was the individual at Holdings responsible for the execution of the Deed. Mrs Walsh gave evidence on behalf of Holdings.

57. It is Deutsche Bank's case that:

    i) Mrs Walsh, Mr Dodsworth and Mr Johnson at all times knew of the existence of the Headlease Charge, that the consent of the Co-Op was required for Hayes Freehold to accept the surrender of the Headlease, and that the surrender of the Headlease would be ineffective without the Co-Op's consent.

    ii) Although Holdings knew that the Co-Op's consent was required, the indications that Mr McNally / Hayes Freehold would not be able to obtain that consent were glaringly obvious. Mrs Walsh, Mr Dodsworth and Mr Johnson were never told by Mr McNally that he had obtained the Co-Op's consent. It is highly probable that they knew he had not got it or at least shut their eyes to that fact.

    iii) Holdings was prepared to go ahead regardless of whether Deutsche Bank was aware of the Headlease Charge, whether consent from the Co-Op to the surrender had been obtained and whether the surrender of the Headlease would be effective, even though they knew that the lack of the Co-Op's consent would render the surrender ineffective and leave Deutsche Bank with all the liabilities under the Headlease but without the Underlease or the corresponding guarantee from Holdings.

58. There is no doubt that Mrs Walsh, Mr Dodsworth and Mr Johnson knew of the existence of the Headlease Charge. Further, at least Mr Dodsworth and Mr Johnson knew that the consent of the Co-Op was required for Hayes Freehold to accept the surrender of the Headlease, and that the surrender of the Headlease would be ineffective without the Co-Op's consent. The disputed issues are propositions (ii) and (iii) and in particular whether Mr Dodsworth, Mr Johnson and Mrs Walsh knew (or shut their eyes to the facts) that Mr McNally had not obtained the consent of the Co-Op and that Deutsche Bank was unaware of this. Deutsche Bank contends as follows on these issues.

59. First, that although it paid the head-rent promptly, Sentrum Hayes was constantly late in paying the sub-rent. This led to Digital making repeated payments to Deutsche Bank from the escrow account, which was depleting. This led to an increasing concern by Mrs Walsh, from October 2014 onwards, as to Digital/Holdings' exposure under the guarantee, and increased her desire to find a substitute guarantor. This was exacerbated when Digital learnt, in November 2014, that the ownership of the Glen Moar companies had changed, which could have increased Holdings' (and by extension, Digital's) exposure under the guarantee. I accept that this was the case. However, it is not the whole story. Deutsche Bank was also very keen to reach agreement as quickly as possible, in order to save itself from on-going difficulties in recovering the rent.

60. Secondly, that on 30 October 2014 White & Case searched the title of the freehold of the Property at the Land Registry and, insofar as they and Holdings had forgotten about the Headlease Charge, they would have been reminded of its existence and that it was entered into in 2012 to fund the purchase of the freehold of the Property. I accept this, but I do not consider that it advances Deutsche Bank's case. It is common ground that White & Case and Holdings knew about the Headlease Charge. Furthermore, it is only part of the story. As discussed above, in December 2013, Freshfields provided Deutsche Bank with an up-to-date Land Registry search of the freehold title, which showed the sale of the freehold in the Property to Hayes Freehold on 10 January 2013 and the Headlease Charge pursuant to the Hayes Freehold Debenture. So Deutsche Bank was provided with the same information.

61. Thirdly, that when drafting the letter on or by 28 November 2014 proposing the commutation of the rents under the Headlease and Underlease ("the Joint Letter"), White & Case and Holdings knew that the consent of the Co-Op would be required as mortgagee but that no steps were taken by anyone to seek to secure any such consent. I accept this as a part of the story. However, in early March 2015, Mr Dodsworth noted in an email to Mr McNally, which was copied to Mrs Walsh, that: "*the next stage will then be for you to agree a surrender of the DB/Sentrum (Hayes) lease following your ongoing discussions with your lender*." This shows that whilst Holdings was aware of the Co-Op's involvement as lender, it considered that it was for Mr McNally to deal with the Co-Op, rather than Holdings or White & Case. Further, the Joint Letter did not indicate that the Co-Op's consent had been obtained, but merely that the signatories were in agreement in proposing it.

62. In any event, I do not accept that Deutsche Bank placed reliance upon the Joint Letter, or its accompanying email. Mr Miscampbell suggested in one of his witness statements that he had relied on the letter as showing the ability of those who had signed it, lawfully to surrender the Headlease. This was incorrect. During his cross-examination he accepted that he had never seen the letter at the time of execution of the Deed, and that it was dealing with a different transaction. No other witness from Deutsche Bank suggested that they had understood or relied on this letter as representing that the Co-Op had agreed to the proposal. Furthermore, by the time the Deed was entered into, the Joint Letter was water under the bridge.

63. Fourthly, Deutsche Bank relies on a series of allegations to suggest that Mrs Walsh knew or ought to have known that Mr McNally was untrustworthy. It points out that by February 2015, Mrs Walsh had learnt from Mr Sodzawiczny about the ORB litigation which alleged misappropriation by Mr McNally and so had reasons to

suspect, and did suspect, that Mr McNally was potentially dishonest in his dealings. It relies on the fact that a worldwide freezing injunction was granted against Dr Gail Cochrane, the new owner of Glen Moar and its subsidiaries, in the ORB litigation on 20 March 2015 in respect of assets up to £67,323,000 in value and requiring details of the escrow account to be provided to the Court. It further asserts that by 25 March 2015, Mrs Walsh had received further information from Mr Sodzawiczny about the ORB litigation, and had further reasons to suspect, and did suspect, that Mr McNally was potentially dishonest in his dealings.

64. I accept that Mrs Walsh had been given various information about allegations made against Mr McNally. I do not accept that this meant that she knew or ought to have known that Mr McNally was dishonest. The allegations were unproven. Mrs Walsh explained that she understood that Mr McNally was genuinely trying to address the position with the Co-Op. Since he was a solicitor, she took him at his word. She did not think that the discussions with the Co-Op were necessarily limited to obtaining its consent, but were part of a broader conversation. She did not believe that the escrow monies were in jeopardy because of anything that had occurred in the ORB litigation. Once Mr McNally had approved the draft Deed she had assumed that, as a lawyer, he was able to do that; it was not a matter for her to question him. I accept her evidence and her position was a reasonable one to adopt.

65. Fifthly, Deutsche Bank submits that: i) by 11 March 2015, Mr Dodsworth had told Mrs Walsh that Mr McNally's plan was to use the escrow monies to obtain the consent of the Co-Op; ii) Mrs Walsh, on behalf of Digital, assented to that plan and set about calculating the escrow and earn out monies; and iii) Mrs Walsh knew, when she obtained details of the escrow and earn out monies on or about 13 March 2015, that the reason she was obtaining that information was so it could be used by Mr McNally in his negotiations with the Co-Op to secure its consent to the surrender of the Headlease. I do not accept this. Mrs Walsh explained that she had no recollection of Mr Dodsworth telling her about any such plan, and there is no evidence that he did.

66. Sixthly, Deutsche Bank advances a series of allegations against Mr Dodsworth and Mr Johnson, which are relied on to suggest that not only did they behave unethically, but also that they were parties to an implied fraudulent misrepresentation. Deutsche Bank submits that by the time of the execution of the Deed, Mr McNally, Mrs Walsh, Mr Dodsworth and Mr Johnson all knew, or shut their eyes to the fact, that Deutsche Bank was proceeding in ignorance of the Headlease Charge, and of the need to obtain the consent of the Co-Op to surrender the Headlease. It claims that:

    i) Mr Dodsworth spoke to Mr McNally on 30 March 2015 and agreed to prepare the Deed. At that stage Mr McNally had not responded to any of the e-mails dated 3, 24 and 26 March 2015 in relation to securing the consent of the Co-Op. In fact, following the refusal of such consent by the Co-Op on 10 March 2015, when there was only £4.812 million left in the escrow account and not £9 million as offered to the Co-Op on 9 March 2015, Mr McNally had ceased to pursue the obtaining of such consent any further.

    ii) By 2 April 2015, Mr Dodsworth and Mr Johnson were both aware that the escrow monies, which they knew Mr McNally needed to use in order to try to secure the Co-Op's consent, were potentially vulnerable to the freezing injunction.

iii) On 6 May 2015, Mr Johnson was reminded that the freehold was charged to the Co-Op, because he carried out a title search of the freehold interest that day in response to Mr Miscampbell's e-mail and failed to give Mr Miscampbell the title number for the freehold or mention the existence of the Headlease Charge when he must have realised from his exchange with Mr Miscampbell that day, and the lack of any reference by Mr Miscampbell to the Headlease Charge then or subsequently, that Mr Miscampbell had not himself carried out a search of the freehold title and did not know of the Headlease Charge.

iv) By about 21 May 2015, and following formal notification of the liquidation of Glen Moar, when they were pressing Deutsche Bank to complete the Deed, Mrs Walsh, Mr Dodsworth and Mr Johnson all appreciated that Mr McNally was extremely unlikely to have been able to have secured the Co-Op's consent to the surrender of the Headlease as he had no funds to do so and was still unable to pay the sub-rent despite receiving the head rent (which was used to pay the Co-Op its interest due under the Headlease Charge).

v) Mr Johnson and Mr Dodsworth knew that: i) Mr Miscampbell had had no direct communications with Mr McNally (and that Deutsche Bank was also not in contact with him); ii) all of Mr Miscampbell's communications in relation to the Deed were with White & Case (who he thought were acting for all other parties); and iii) Mr Miscampbell had never asked them whether the Co-Op had consented to the transaction.

vi) Prior to completion of the Deed, Mr Johnson realised, as a result of Mr Miscampbell's failure to ask at any time for any evidence of the Co-Op's consent or to raise any enquiries, and because Mr Miscampbell had had no dealings with Mr McNally, that Mr Miscampbell was not aware of the existence of the Headlease Charge and could not have taken any steps to satisfy himself in this regard.

vii) Mr Dodsworth, Mr Johnson and Mrs Walsh all knew that Mr McNally had not obtained the Co-Op's consent; or alternatively that they shut their eyes to the obvious, and deliberately did not ask Mr McNally or the Co-Op whether the consent had been granted because they knew or strongly suspected that the answer would have been no.

67. I do not accept this analysis of the facts, which is not consistent with the detailed findings that I have made. Stepping back, I consider that the central allegation that any of these individuals knew that Deutsche Bank was unaware of the Headlease Charge, or shut their eyes to this fact, and attempted to take advantage of Deutsche Bank's ignorance, is highly unlikely, for the following reasons:

i) First, it was reasonable to expect that a major financial institution such as Deutsche Bank would instruct its own solicitors (which it did) and that those solicitors would perform their own title searches to advise Deutsche Bank as to the effect of entering into the Deed. It was not foreseeable, and none of the individuals against whom these allegations are made could have anticipated, that Mr Miscampbell would negligently fail to perform such a search.

ii) Secondly, this is not a case where there was any attempt to conceal the fact of the Headlease Charge. On the contrary, Deutsche Bank was given notice of the Co-Op Charges in December 2012 and April 2013. It appears that the notices were uploaded to a file on the Deutsche Bank database which was difficult to access, although the reason for this was not explained. They were important documents in relation to the Property. No-one could have anticipated that Deutsche Bank would fail to check its own records, or that there would be a failure of communication between Ms Perry and Mr Mitchell.

iii) Thirdly, Deutsche Bank was an important customer of Digital/Holdings, with whom it wished to maintain close relations. It is therefore most unlikely that Mrs Walsh, or lawyers representing her, would seek dishonestly to cause financial damage to Deutsche Bank.

iv) Fourthly, Holdings knew that Deutsche Bank had a long association with the Property, and, by 2015, had an established relationship with the Sentrum group of companies and Mr McNally: Deutsche Bank, as surrendering tenant, or Blake Morgan acting on its behalf, could have contacted Mr McNally in connection with the Deed but chose not to do so.

68. Mr McNally was acting for Sentrum Hayes and Hayes Freehold in relation to the execution of the Deed, and White & Case were acting for Holdings. Mr Johnson's evidence, which I accept, was that he made clear to Mr Miscampbell that he did not act for the Sentrum parties. I reject Mr Miscampbell's evidence that he believed that White & Case were acting not just for Holdings, but also for Sentrum Hayes and Hayes Freehold. Furthermore, it was Mr Miscampbell's duty to inform himself as to who was acting for whom with respect to the transaction on which he was instructed to provide advice to Deutsche Bank. It was therefore his responsibility to communicate with Mr McNally to ascertain the position of the Sentrum parties, which he failed to do.

69. Mr Johnson gave evidence that, once Deutsche Bank had indicated that it was prepared to agree to the Deed, and to the unconditional and irrevocable release of the guarantee under clause 6, he expected each party to do its own due diligence. Holdings was not a party to the Headlease and from the perspective of Digital and Holdings, the release of the guarantee was in the nature of a post-completion loose-end that needed to be tidied up. He did not consider that it was his role or responsibility to follow up matters with Mr McNally or to enquire on behalf of Deutsche Bank how any issues with the Co-Op had been resolved. He explained his position during his cross-examination, and I accept his evidence:

> "Q. Well, knowing what you did, Mr Johnson, Deutsche Bank were not clearly comfortable, Deutsche Bank were clearly ignorant, weren't they?
>
> A. My mind didn't turn to Deutsche Bank. As I say, they're a sophisticated organisation, they were professionally advised, it didn't occur to me to think from their perspective."

70. On the date of completion, Mr Miscampbell was away, and he left the matter in the hands of a trainee, Ms Andrea Corr, who gave evidence at trial and was clearly very competent. Deutsche Bank alleges that Mr Johnson deliberately withheld the final

version of opinion letters (in respect of Hayes Freehold and Sentrum Hayes) from Adelphi, dealing with capacity to enter into the Deed, and containing the reference to the Co-Op Charges, from Ms Corr until only very shortly before completion, so that she would not have time to notice this reference. This was denied by Mr Johnson, who explained that it was likely that he had sent the opinion letters to Blake Morgan shortly after he had received updated drafts and reviewed them on 6 August 2015.

71. The opinion letters were provided to Blake Morgan in advance of completion, and this theory depends upon the proposition that Mr Johnson believed that Blake Morgan had failed to perform any basic title search (which I have rejected). Further, Mr Johnson could not have assumed that Blake Morgan would fail to spot the references to the Headlease Charge in the opinion letters. Blake Morgan could readily have delayed completion, if they had wished to do so.

72. As to the telephone conversation on 3 September 2015, which is also relied on by Deutsche Bank as evidencing misconduct by Mr Johnson and Mr Dodsworth, I accept Mr Johnson's evidence about this call and reject that of Mr Miscampbell.

73. In summary, I regard Mr Johnson's evidence of these issues as cogent and credible, and it is to his credit that he remained measured and calm when such serious allegations were put to him. Furthermore, I do not accept Deutsche Bank's case that I should draw adverse inferences from the fact that Mr Dodsworth did not give evidence. The only references in Deutsche Bank's pleading to Mr Dodsworth were introduced by a late amendment. They bear very little relationship to the allegations now put against Mr Dodsworth. Mr Ross served a witness statement in support of the late amendment, in which he explained that it would require no further evidence or disclosure. The claim that Mr Dodsworth should have given evidence is not consistent with that witness statement. Whilst Mr Ross subsequently wrote a letter suggesting that Mr Dodsworth should give evidence, this was after Deutsche Bank had made its application for permission to amend on the basis that no further evidence or disclosure was required. Furthermore, this is not a case where there is an absence of evidence on this subject. I have heard from Mr Johnson and Mrs Walsh, and I have accepted their evidence.

74. In the circumstances, I reject Deutsche Bank's case that Mrs Walsh, Mr Dodsworth and Mr Johnson knew that Mr McNally had not obtained the Co-Op's consent to the surrender of the Headlease, or shut their eyes to that fact. Furthermore, I reject Deutsche Bank's case that Holdings were prepared to go ahead regardless of whether Deutsche Bank was aware of the Headlease Charge, whether consent from the Co-Op to the surrender had been obtained and whether the surrender of the Headlease would be effective, even though they knew that the lack of the Co-Op's consent would render the surrender ineffective. Holdings was justified in considering that this was a matter for Deutsche Bank, who had been told about the Headlease Charge and who had instructed solicitors for the purpose of entering into the Deed.

Deutsche Bank's claims

75. Deutsche Bank puts its case in five different ways, which it advances in the alternative:

i) It was an implied condition precedent to the release of Holdings' guarantee that the surrender of the Headlease would be effective.

ii) Deutsche Bank is entitled to and has rescinded the Deed on the grounds of an implicit fraudulent misrepresentation that Hayes Freehold had the power to take the surrender of the Headlease provided for by the Deed.

iii) Deutsche Bank is entitled to and has rescinded the Deed for unilateral mistake under the rule in *Pitt v Holt* [2013] 2 AC 108; [2013] UKSC 26.

iv) The Deed is void for common mistake.

v) Deutsche Bank is entitled to rescind the Deed (or to other equivalent relief) on the ground that Holdings has been unjustly enriched.

76. Holdings denies each of those claims and further submits that Deutsche Bank is estopped from pursuing them against it.

Is there an implied condition precedent, to the release of Holdings' guarantee, that the surrender of the Headlease should be effective?

Legal principles

77. In *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742 the Supreme Court affirmed and explained the settled law that a term would be implied into a detailed commercial contract only if that were necessary to give the contract business efficacy or so obvious that it went without saying; that the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract but was concerned with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed; and that it was a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed to it if it had been suggested to them.

78. At [21] Lord Neuberger set out six comments on the implication of terms, two of which were emphasised during submissions in this case. First, when approaching the issue by reference to the officious bystander it is "*vital to formulate the question to be posed by [him] with the utmost care*"; and second, the test is not one of "absolute necessity":

> "It may well be that a more helpful way of putting Lord Simon's second requirement is, as suggested by Lord Sumption in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence."

79. Lord Neuberger held at [26] that construing the words used in a contract and implying additional words are different processes governed by different rules. He stated at [28] that:

> "28 In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an

> implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term. This appeal is just such a case. Further, given that it is a cardinal rule that no term can be implied into a contract if it contradicts an express term, it would seem logically to follow that, until the express terms of a contract have been construed, it is, at least normally, not sensibly possible to decide whether a further term should be implied. Having said that, I accept Lord Carnwath's point in para 71 to the extent that in some cases it could conceivably be appropriate to reconsider the interpretation of the express terms of a contract once one has decided whether to imply a term, but, even if that is right, it does not alter the fact that the express terms of a contract must be interpreted before one can consider any question of implication."

80. Lord Neuberger observed that, in any event, the process of implication involves a rather different exercise from that of construction. He cited the explanation of Bingham MR in *Philips Electronique Grand Public SA v British Sky Broadcasting* [1995] EMLR 472 at [481] – [482] that:

> "The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power…
>
> The question of whether a term should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which reflect the merits of the situation as they then appear. Tempting, but wrong."

81. Deutsche Bank submits that the question of implication of a condition precedent has to be considered against the admissible factual background. It cites *Challinor v. Bellis* [2013] EWHC 347 (Ch), where Hildyard J stated, in relation to the knowledge of the parties as part of that admissible factual matrix (at [279]):

> "… where it is demonstrated that one or more of the parties did not in fact have knowledge of the matter in question such knowledge is not to be imputed; nor is the test what reasonable diligence would or might have revealed: in either case, that would be inappropriately to introduce impermissible concepts of constructive notice or a duty (actionable or otherwise) to make inquiries or investigations…"

82. These observations were made in the context of the construction of contractual terms, rather than the implication of terms, and, as discussed above, the two exercises are not the same. Nonetheless, I shall bear this in mind when considering the implication of a condition precedent in the present case.

The terms of the Deed

83. The parties to the Deed are Hayes Freehold (defined as "Superior Landlord"); Deutsche Bank (defined as "Landlord"); Sentrum Hayes (defined as "Tenant") and Holdings (defined as "Tenant's Guarantor").

84. The recitals to the Deed provide that:

> "(A) This deed is supplemental to the Superior Lease and the Lease.
>
> (B) The Superior Landlord is entitled to the immediate reversion to the Superior Lease.
>
> (C) The Landlord is entitled to the immediate reversion to the Lease.
>
> (D) The residue of the term granted by the Superior Lease is vested in the Landlord.
>
> (E) The residue of the term granted by the Lease is vested in the Tenant.
>
> (F) The Tenant's Guarantor guarantees the tenant covenants and other obligations of the Lease.
>
> (G) The parties have agreed that the Superior Lease and the Lease are to be surrendered in accordance with the terms of this deed."

85. Clause 1 contains certain definitions of terms used in the Deed. The lease between Digiplex/Hayes Freehold and Deutsche Bank, which I have called the Headlease, is defined as the "Superior Lease". The lease between Deutsche Bank and Sentrum Hayes, which I have called the Underlease, is defined as "the Lease". "Superior Lease Demise" and "Lease Demise" both mean the Property as described in and demised by those leases.

86. Clause 2 is headed "Surrender of the Superior Lease" and provides that:

> "In consideration of the releases by the Superior Landlord pursuant to clause 5 the Landlord surrenders and yields up to the Superior Landlord, with full title guarantee, all its estate, interest and rights in the Superior Lease and the Superior Lease Demise and the Superior Landlord accepts the surrender. The residue of the term of years granted by the Superior Lease shall merge and be extinguished in the reversion immediately expectant on the termination of the Superior Lease."

87. Clause 3 is headed "Surrender of the Lease" and provides that:

> "In consideration of the releases by the Landlord pursuant to clause 6 the Tenant surrenders and yields up to the Landlord, with full title guarantee, all its estate, interest and rights in the Lease and the Lease Demise and the Landlord accepts the surrender. The residue of the term of years granted by the Lease shall merge and be extinguished in the reversion immediately expectant on the termination of the Lease."

88. Clause 4 is headed "Release of the Superior Landlord" and provides that:

> "The Landlord hereby unconditionally and irrevocably releases the Superior Landlord and its predecessors in title (if any) from all the landlord covenants of the Superior Lease and from all liability for any subsisting breach of any of them."

89. Clause 5 is headed "Release of the Landlord" and provides that:

> "The Superior Landlord and the Tenant hereby unconditionally and irrevocably release the Landlord and its predecessors in title (if any) from all the landlord covenants of the Superior Lease and the Lease (respectively) and from all liability for any subsisting breach of any of them."

90. Clause 6 is headed "Release of the Tenant and the Tenant's Guarantor" and provides that:

> "The Landlord hereby unconditionally and irrevocably releases the Tenant and the Tenant's Guarantor and their respective predecessors in title (if any) from all the tenant covenants, indemnities and other obligations of the Lease and from all liability for any subsisting breach of any of them."

91. Clauses 7 and 8 are not relevant for present purposes. The final sentence of the Deed states that:

> "This document has been executed as a deed and is delivered and takes effect on the date stated at the beginning of it."

Construction of clause 6

92. There is no doubt about the correct interpretation of clause 6, which is unambiguous. The clause plainly means that Holdings was released unconditionally and irrevocably from its obligations under the guarantee. The effect of the final sentence is that this release took effect immediately on all parties' execution of the Deed. I did not understand Deutsche Bank to contend that clause 6, as an express term, was capable of bearing any other meaning, which is why it puts its case on the basis of implied condition precedent.

Implied condition precedent

93. Deutsche Bank contends that:

i) There was an asymmetry of knowledge between the parties. Holdings must have known that Mr McNally had not obtained the consent of the Co-Op, and that Deutsche Bank was not aware of this. By contrast, the personnel at Deutsche Bank who negotiated and approved the transaction did not (with the exception of Ms Perry) know of the existence of the Headlease Charge at all. As to Ms Perry, it had come to her attention in another context but she had either forgotten it or did not realise its relevance.

ii) It is so obvious that it went without saying that the parties did not intend the Deed to take effect if Hayes Freehold did not have the power to accept the surrender of the Headlease. Deutsche Bank would not have been prepared to release the guarantee if it would not itself be released from its own corresponding rental obligations. The Deed embodied a composite agreement in which the release of the guarantee was dependent on the release of the Headlease.

iii) The Deed would lack all commercial and practical coherence without an implied condition precedent that Hayes Freehold had the power to take the surrender. It is commercially inconceivable for Deutsche Bank to have intended to release Holdings from its guarantee whether or not the Headlease was going to be surrendered. Deutsche Bank can only have intended to release Holdings if it was itself going to be released.

iv) The word "unconditionally" in clause 6 of the Deed is no answer to these contentions. If it was a condition precedent that Hayes had the power to take the surrender, then clause 6 does not have any effect. The word "unconditionally" only bites if the release takes effect, and the failure of the implied condition precedent means it does not take effect: Deutsche Bank relies on the judgment of Steyn J (as he then was) in *Associated Japanese Bank (International) Ltd v. Credit du Nord SA* [1989] 1 WLR 255.

v) The word "unconditionally" in clause 6 cannot have been intended to mean what Holdings claims it was intended to mean, namely that the guarantee was intended to be released irrespective of whether the surrender was void, because that would ascribe to the parties the commercially absurd intention that, for example, Deutsche Bank intended to release Sentrum Hayes (under the same clause) from the rent payable under the Sublease, irrespective of whether or not the Sublease was being surrendered.

vi) HHJ Hodge, when rejecting a summary judgment application made by Holdings against Deutsche Bank, accepted Deutsche Bank's case and held that the Deed did contain an implied condition precedent; [2016] EWHC 2068 (Ch). Although the Judge's views are not determinative because they were expressed on an interlocutory basis, the conclusion was right and the reasoning highly persuasive.

94. Attractive as these submissions appear at first sight, I do not accept them. I remind myself that it is tempting, but wrong, for the court to fashion a term to reflect the

merits of situations with the benefit of hindsight. I begin by applying the principles set out in the *M&S* case that until it has been decided what the parties have expressly agreed, it is not possible to decide whether a term should be implied and if so what term.

95. In the present case, the parties have agreed that Holdings should be unconditionally released from the guarantee. The language is unambiguous, and it seems to me that I must apply it. Having decided on the correct interpretation of clause 6, in my judgment, the implication of an implied condition precedent would contradict an express term of the contract. Given that the parties have agreed that the operation of clause 6 is unconditional, the implication of a condition precedent would require the clause to be rewritten so that the release of the guarantee became conditional on the effective surrender of the Headlease. That is not consistent with the express term agreed by the parties.

96. In this respect, it is instructive to consider how the condition precedent would read, if it was an express term. Paragraph 21 of Deutsche Bank's defence states that:

> "It was an implied condition precedent to the Deed that Hayes had the power to accept a surrender of the Superior Lease (as well as that Sentrum had the power to surrender the Sub-Lease)."

97. Mr Gaunt QC submitted that this would take effect as a proviso to clause 6. In my judgment, that illustrates the difficulty of implying such a condition in the present case. It would amount to a re-draft of clause 6, which would become subject to a condition before it could take effect. In my judgment it would be wrong in law to circumscribe clause 6 by an implied qualification, given its express language; see *Irish Bank Resolution Corporation v Camden Market Holdings* [2017] EWCA Civ 7 per Beatson LJ at [41] – [42].

98. I do not consider that it is an answer to this problem to say that clause 6 never took effect because the proposed implied term is a condition precedent to its operation. This is merely an attempt to justify the transformation of an unconditional release into a conditional release. In addition, since clause 6 took effect on execution of the Deed on an unconditional basis, I do not consider that it is compatible with the structure of the Deed to imply a condition precedent to its coming into effect.

99. I do not consider that implication of this condition precedent is necessary to give the Deed business efficacy or commercial coherence, nor that its implication is so obvious that it would go without saying that the parties did not intend the Deed to take effect if Hayes Freehold did not have the power to accept the surrender of the Headlease. I approach the question from the perspective of the notional reasonable person in the position of the parties at the time that they contracted and with the knowledge of the parties. I have not accepted Deutsche Bank's factual case and I have referred to the collective knowledge of Deutsche Bank, including the knowledge of Ms Perry, as to the existence and effect of the Headlease Charge. I have not accepted Deutsche Bank's contention that Holdings knew that Deutsche Bank was unaware of the absence of consent by the Co-Op. The problem in the present case was not an absence of knowledge, but rather the fact that relevant individuals within Deutsche

Bank were relying upon the advice of their solicitor that there was no legal impediment to the surrender of the Headlease, which advice was negligent.

100. In those circumstances, where the parties knew that Deutsche Bank, as a sophisticated organisation, was represented by commercial solicitors, the implication of the condition sought by Deutsche Bank is neither so obvious that it would have gone without saying, nor required to give the transaction commercial coherence. A reasonable person might well conclude that it was for Deutsche Bank, as the party seeking to obtain the benefit of the surrender of the Headlease to ensure that it was open to Hayes Freehold to accept such surrender. That is why it had instructed solicitors.

101. As to the surrender of the Underlease, Mr Valentin QC submits that there is a material difference, so far as the impact of the Co-Op Charges is concerned, between the position of the Headlease and that of the Underlease. Hayes Freehold did not have the power to accept a surrender of the Headlease as it had given up the right to do so when it charged its interest in the Headlease to the Co-Op. However, there was no similar impediment to Deutsche Bank accepting a surrender of the Underlease from Sentrum Hayes, because Deutsche Bank's interest was not charged to anyone. Mr Valentin QC contends that the position is analogous with cases concerned with covenants not to assign, where the courts have held that an assignment in breach of covenant is nonetheless treated as valid as between the assignor and the assignee; *Old Rosebery Manor Farm Ltd v Seymour Plant Sales and Hire Ltd* [1979] 1 WLR 1397. Accordingly, the Co-Op would be left with its other remedies against Sentrum Hayes for breach of the covenants contained in the Sentrum Hayes Debenture, but that has no impact on the validity of the surrender of the Underlease to Deutsche Bank.

102. Mr Gaunt QC did not dispute this analysis. In my judgment it follows that the surrender of the Headlease and Underlease are not dependent on each other, since the latter can take effect in circumstances where the former cannot.

103. Turning to Deutsche Bank's remaining submissions, I have considered the decision of Steyn J in the *Associated Japanese Bank* case. In my view, the agreement the subject of that judgment, and its factual background, are clearly distinguishable from the present case. The *Associated Japanese Bank* case concerned a guarantee agreement which purported to lease four textile compression packaging machines, which, in fact, did not exist. The learned judge decided that as a matter of construction, it was an *express* condition precedent of the agreement that the lease related to existing machines. The guarantee was expressed as being given "*in consideration of your leasing four textile compression packaging machines*." No such consideration is referred to in the release in clause 6 of the Deed in the present case (c.f. clauses 2 and 3).

104. Furthermore, in *Associated Japanese Bank*, clause 6 of the guarantee provided that rights under the guarantee would not be affected or prejudiced by variation of the terms of the leasing contract by the substitution of any other goods comprised in such contract, subject to the guarantor's consent.

105. Steyn J concluded in those circumstances that the guarantee was subject to an express condition precedent that there was a lease in respect of the four existing machines. I

am not concerned with a contract containing equivalent terms, and it is not alleged that there is an express condition precedent in the present case.

106. The judge then held that if his conclusion about the construction of the guarantee was wrong, then there was an implied condition precedent that the lease related to four existing machines. He did so on the basis that he was satisfied that reasonable men, faced with the suggested term which was *ex hypothesi* not expressed in the agreement, would without hesitation say: yes, of course, that is so obvious that it goes without saying. He reached his conclusion against the contextual background that both parties were informed that the machines existed, and of the express terms of the guarantee. That contextual background is very different to the case with which I am faced. I note that the guarantee was expressed to be unconditional, but Steyn J did not feel it necessary to consider this when reaching his conclusion as to the implied condition precedent because of the contextual background to which he had referred.

107. Finally, I have considered HHJ Hodge's judgment which rejected Holdings' application for summary judgment. In my view, Judge Hodge was quite right to do so. As this trial has shown, the factual background in this case is hotly disputed, and, for the purposes of the summary judgment application, the judge rightly assumed that Deutsche Bank's pleaded case as to knowledge (or lack of it) was correct. I have not accepted this case. The judge concluded that Deutsche Bank's case was arguable, and I agree with him. He was right to allow the case to proceed to trial, but that does not mean that Deutsche Bank's arguments are correct.

108. For these reasons, I reject Deutsche Bank's contention that the Court should imply a condition precedent into the Deed.

Implied fraudulent misrepresentation

Deutsche Bank's case

109. Deutsche Bank puts its case in respect of this cause of action in the following ways.

110. It contends that Hayes Freehold and Sentrum Hayes knew that the Co-Op's consent was required for the surrender of the Headlease and knew that it had not been obtained. It submits that (i) by putting forward a draft Deed under cover of an email dated 8 April 2015 offering to accept a surrender of the Headlease in return for surrender of the Underlease, thereby releasing the guarantee; (ii) by continuing with the transaction up to completion on 6 August 2015 without mentioning the need to obtain the Co-Op's consent in circumstances where it was clear (from an email to Mrs Walsh from Mr Mitchell dated 6 May 2015) that Deutsche Bank was only prepared to agree to the proposed surrenders if it was left with no residual liabilities; and (iii) by their willingness to execute the Deed; Hayes Freehold and Sentrum Hayes impliedly represented that Hayes Freehold had the necessary power. Since Hayes Freehold and Sentrum Hayes knew that this was not the case, the representation was false and fraudulent.

111. Deutsche Bank submits that since the representation was fraudulent, it is entitled to rescind the release of Holdings irrespective of the state of mind of Holdings, since the release of Holdings was parasitic on the surrender of the Headlease, and it was

therefore a benefit obtained by the fraud of another; see, for example Andrews and Millett on the *Law of Guarantees* at [9-013].

112. If that is not accepted, Deutsche Bank contends that its right to set aside the Deed is an equity which binds and is enforceable against Holdings if Holdings had actual or constructive knowledge of the misrepresentation; *Barclays Bank v O'Brien* [1994] 1 AC 180, at 191, per Lord Browne-Wilkinson.

113. Alternatively, Deutsche Bank claims that Holdings was party to the fraudulent misrepresentation of Hayes Freehold and Sentrum Hayes since it knew that the Co-Op's consent was necessary for the surrender of the Headlease, and it knew that it had not been obtained. It either had actual knowledge, or was to be treated as having known of this, on the basis that it wilfully shut its eyes to the obvious or wilfully and recklessly failed to make the enquiry of Mr McNally as an honest and reasonable person would have done; *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France* [1983] BCLC 325 at 407 per Peter Gibson J.

114. Deutsche Bank contends that it does not matter that it relied on the advice of Mr Miscampbell that the Deed would be effective to surrender the Headlease. It contends that the test for misrepresentation is not reliance but inducement. Nor does the representation have to be the sole inducement, but rather "*an* inducing cause", which led the representee to act as it did; *BP Exploration Operating Co Ltd v Chevron Shipping Co* [2003] 1 AC 197; [2001] UKHL 50 at [105], per Lord Millett. In the case of fraud, it is enough to show that the representee was materially influenced by the representation.

115. Finally, Deutsche Bank also contends that, had it not been led to believe that Hayes Freehold had the power to accept the surrender of the Headlease, it would not have instructed Mr Miscampbell. If, instead of pressing to execute the Deed, Holdings and White & Case had disclosed the impediment to Hayes Freehold's ability to accept the surrender, Deutsche Bank would not have executed the Deed.

Alleged misrepresentation by Hayes Freehold and/or Sentrum Hayes

116. The conditions for a claim of implied fraudulent misrepresentation were set out by Christopher Clarke J (as he then was) in *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2011] 1 Lloyd's Rep 123 at [81] – [87]:

    i) The claimant had to show that the defendant had made a statement of fact upon which the claimant was entitled to rely. Whether any and if so what representation was made had to be judged objectively according to the impact that it might be expected to have on a reasonable representee in the position, and with the known characteristics, of the actual representee; [81].

    ii) In the case of an express statement, the court had to consider what a reasonable person would have understood from the words used in the context in which they were used. In the case of an implied statement, the court had to perform a similar task except that it had to consider what a reasonable person would have inferred was being impliedly represented by the representor's words and conduct in their context; [82] – [83].

iii) It was necessary for the statement relied upon to have the character of a statement upon which the representee was intended, and was entitled, to rely; [86].

iv) Silence by itself could not found a claim in the misrepresentation (fraudulent or otherwise). But an express statement might impliedly represent something; [84] – [85].

v) The claimant had to show that he in fact understood the statement in the sense which the court ascribed to it and that, having that understanding, he relied upon it. That was of particular significance in the case of implied statements; [87].

Was there a misrepresentation?

117. The first alleged misrepresentation is at [3.14] – [3.15] of the Re-Amended Particulars of Claim. This is said to have been made in an email from Mrs Walsh to Mr Mitchell dated 8 April 2015 and in the draft Deed that was supplied in the attachment to that email. Deutsche Bank relies on the fact that Mrs Walsh said:

> "We have now received approval that the Hayes Freehold [sic] agree to the surrender option which is good news. In order to move this along quickly we have drafted a deed of surrender which has been approved by Simon McNally. I now attach for your review and approval and following that we can get all parties to execute."

118. Deutsche Bank contends that the approval by Hayes Freehold and Sentrum Hayes to the proposed transaction contained in the draft Deed constituted a representation to Deutsche Bank that Hayes Freehold had the power to accept the surrender of the Headlease (and Sentrum Hayes had the power to accept or enter into the surrender of the Underlease) for which the draft Deed provided, or alternatively that Hayes Freehold and Sentrum Hayes knew of no reason why the consent of the Co-Op to the surrender of the Headlease and the Underlease would not be forthcoming. It is said that this representation was false.

119. In my judgment neither the email of 8 April, nor the accompanying draft Deed, constituted a statement of fact upon which Deutsche Bank was intended and entitled to rely. In her email of 8 April Mrs Walsh also said: "*Please advise if you would like us to issue this to your legal counsel as we would be happy to have legal talk directly if this works for you*." That sentence made it clear that the draft Deed was put forward on the basis that it would be reviewed and checked by Deutsche Bank's lawyers prior to approval. The email does not represent, or imply, that the Co-Op's consent had been obtained. Rather, it enclosed a draft Deed for Deutsche Bank and its lawyers to consider, which they did.

120. By an email in reply dated 9 April 2015, having obtained Ms Perry's approval to instruct a lawyer, Mr Mitchell informed Mrs Walsh that he would "*get an external lawyer appointed to deal with it [the draft Deed] and revert to you once that is established*". A reasonable person reading this email chain would have concluded that

Deutsche Bank was undertaking the necessary checks to satisfy itself that the transaction would give effect to its requirements.

121. Turning to the draft Deed and having regard to the factual background, this does not make any express or implied representation that Hayes Freehold or Sentrum Hayes had the power to accept the surrender of the Headlease, nor that the consent of the Co-Op had been obtained. It was silent on these issues and they were matters for Deutsche Bank and its lawyers to check.

122. As to inducement and reliance, I do not accept that relevant individuals within Deutsche Bank understood the email or the draft Deed to be making the implied representation which is now alleged, nor do I accept that they were induced by, or relied upon, any such implied representation when entering into the Deed in August 2015. The evidence, which I have considered above, establishes that Deutsche Bank's decision to execute the Deed was based upon the reliance that they placed on Blake Morgan's advice. Ms Perry, whom I have identified as the relevant decision-maker within Deutsche Bank, did not recall ever having seen or read the draft Deed. Deutsche Bank decided to execute the Deed because of its own concerns as to non-payment of rent due under the Underlease and it relied on its own lawyer's advice that the Deed would be effective to achieve its aims.

123. The second alleged misrepresentation is pleaded at [3.16] of the Re-Amended Particulars of Claim. It is alleged that by 6 August 2015 Mr McNally, Hayes Freehold and Sentrum Hayes all knew that Hayes Freehold and Sentrum Hayes had not obtained the Co-Op's consent to the transaction contained in the Deed, and knew that this consent was necessary in order for Hayes Freehold to accept the surrender which the Deed purported to effect. It is further alleged that "*the participation by Mr McNally on the conference call constituted a further representation by Hayes and Sentrum to DBA that Hayes had the power to accept the surrender of the Superior lease for which the deed provided*. *The representation was false and fraudulent*."

124. In fact, Mr McNally did not participate in the conference call on 6 August 2015. He confirmed in an email of that date that there was no need for him to do so as Hazel Dawson, of Adelphi, had full authority to complete the documents. It appears from that email that the participants in the conference call were Mr Dodsworth and Mr Johnson (from White & Case), Hazel Dawson (from Adelphi), Andrea Corr (from Blake Morgan) and Carl Jackson (as joint liquidator of Glen Moar).

125. White & Case participated in the conference call and supplied the draft of the Deed which was being discussed. Participation in the conference call could only therefore constitute an implied misrepresentation if White & Case were parties to the alleged fraud. In other words, if there had been an agreement or understanding between White & Case and their clients, Hayes Freehold and Sentrum Hayes, deliberately and fraudulently, to deceive Deutsche Bank. I have rejected this contention. The conference call of 6 August 2015, and the events leading up to it, establish that Deutsche Bank was keen to complete the deal, and relied entirely upon Blake Morgan's advice that the Deed would be effective to do this.

126. I should add that Deutsche Bank relied at trial upon an email dated 6 May 2015 from Mr Mitchell to Mrs Walsh, although this was not referred to in the pleadings. In that email, Mr Mitchell confirmed that he had local level instructions to proceed with a

surrender of the Headlease and Underlease subject to, amongst other things, "*the Bank being left with no residual liabilities*." In the same email he stated that, "*In the meantime and in anticipation of agreement to proceed from all parties, Andrew Miscampbell of Blake Morgan… has been appointed to act on behalf the Bank and he will revert to White & Case on the draft surrender document(s)*."

127. In my judgment, that email does not advance Deutsche Bank's case. By an email dated 21 May 2015 Mr Johnson reported to Mr McNally and Mrs Walsh that there was an agreed formal surrender with Deutsche Bank relating to the Property. In the draft of the Deed which he attached, Deutsche Bank had made no amendment to clause 6. This would suggest to the reasonable person that Deutsche Bank had made its own investigations, with the benefit of Mr McNally's advice, and had established that all outstanding preconditions to execution of the Deed were satisfied.

Did Holdings have actual or constructive knowledge of implied fraudulent misrepresentation by Hayes Freehold and Sentrum Hayes? Alternatively was Holdings a party to such fraudulent misrepresentation?

128. In the light of my findings, which I have set out above, I do not accept this case. I do not accept that there was an implied fraudulent misrepresentation by Hayes Freehold or Sentrum Hayes, nor that Deutsche Bank was induced by, or relied upon, any such misrepresentation. Furthermore, this aspect of Deutsche Bank's case involves allegations of fraud and dishonesty on behalf of Mrs Walsh of Holdings and Mr Dodsworth and Mr Johnson of White & Case, all of which I have rejected. I have accepted the evidence of Mrs Walsh and Mr Johnson, who denied all allegations made against them, and I have concluded that no adverse inference should be drawn from the fact that Mr Dodsworth did not give evidence. Therefore, I reject the case that Holdings had actual or constructive knowledge of deceit on the part of Mr McNally or that Holdings was a party to alleged fraudulent misrepresentation.

Is Deutsche Bank entitled to rescind the Deed for unilateral mistake under the rule in Pitt v Holt?

129. Deutsche Bank submits that it is entitled to rescind the Deed under this rule because:

i) Holdings gave no consideration to Deutsche Bank for the release of the guarantee;

ii) Deutsche Bank made a mistake when it gave Holdings the release in that it believed that Hayes Freehold had the power to surrender the Headlease when it did not;

iii) the mistake made by Deutsche Bank was fundamental to the transaction as Deutsche Bank would not have given Holdings the release otherwise;

iv) the mistake, if the release of Holdings is not unwound, will have grave financial consequences for Deutsche Bank. Deutsche Bank will be liable for the rent and other obligations in the Headlease without the guarantee from Holdings;

v) because the mistake was central to Deutsche Bank's willingness to grant the release, and will have grave financial consequences if it is allowed to stand, it is unconscionable for Holdings to keep hold of the release; and

vi) it is immaterial who was responsible for the mistake. It does not depend on any fault on the part of Holdings, and it does not matter whether the mistake came about by carelessness or negligence on the part of Deutsche Bank or its solicitors.

Legal principles

130. The rule in *Pitt v Holt* applies to transactions where the defendant has not given consideration for what it has received from the claimant. The law does not bestow the same sanctity on voluntary transactions as it does on contracts and therefore it is possible to rescind a gift on the basis of unilateral mistake in circumstances where it would not be possible to rescind a contract; per Lord Walker in *Pitt v Holt* at [114].

131. The principles applicable to rescission of a non-contractual voluntary disposition for mistake, as explained in detail by Lord Walker in *Pitt v Holt*, were summarised by Sir Terence Etherton C (as he then was) in *Kennedy v Kennedy* [2014] EWHC 4129 at [36]:

> "(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.
>
> (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
>
> (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.
>
> (4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated

> objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."

132. The third and fourth principles set out in *Kennedy* merit further consideration. It is necessary, but not sufficient, to show that a mistake is causative: the mistake must be a causative mistake of sufficient gravity to make it unfair or unconscionable to leave it uncorrected. Since the Court is required to consider fairness, all relevant facts must be taken into account. These considerations are explained in Goff & Jones *The Law of Unjust Enrichment* (9th Edition) at [9.142] where the authors considered "*the incorporation of an additional criterion of "injustice" or "unconscionability" into the test to determine whether the claimant's "mistake" requires correction*":

> "The court, Lord Walker said, was required to undertake an "objective evaluation" of whether it would be "unjust" or "unfair" or "unconscionable" to leave the mistaken transaction uncorrected, "with an intense focus…on the facts of the particular case". What was "unconscionable" "could not be decided by an elaborate set of rules". Instead, the court:
>
> > "… must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case."
>
> On its face, this implies a substantially more flexible approach to the identification of circumstances justifying relief – and a stronger, necessary element of court discretion/judgment – than is true of the process of establishing a cause of action in unjust enrichment. Such flexibility is comprehensible only if – as Lord Walker must have assumed – the equitable jurisdiction to set aside voluntary transactions involves a truly or strongly "court-ordered" model of rescission."

Application to the present case

133. The first question is whether it is correct to characterise the Deed as a voluntary disposition. It is true that its effect was that Deutsche Bank released Holdings from the guarantee and agreed to surrender the Underlease in circumstances where it was not released from the Headlease. However, I do not accept that it follows that the Deed was a voluntary disposition by Deutsche Bank. As discussed above, the surrender of the Underlease was effective. Deutsche Bank accepted surrender of the

Underlease, and in return, obtained release from its covenants as landlord under the Underlease. I do not consider that this amounts to a gift, or a voluntary disposition.

134. I am conscious, however, that I raised this point during closing speeches and that Holdings adopted it. It was open to Holdings to do so, as it had not admitted that the Deed was a voluntary disposition, but until then, no positive case along those lines had been put forward. I shall therefore go on to consider other conditions of the application of the rule, in case I am wrong, and the Deed is a voluntary disposition.

135. In considering whether it is unjust or unconscionable to leave the mistake uncorrected, I need to have regard to all relevant facts. I accept Deutsche Bank's submission that a mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances show that such person deliberately ran the risk, or must be taken to have run the risk, of being wrong.

136. In the present case, I have concluded that the decision to execute the Deed was taken by Ms Perry, who was the authorised decision-maker. She knew the relevant facts, but did not communicate them to Mr Mitchell or to EREC. She did not consider that it was her job to do so, since Deutsche Bank had instructed Blake Morgan to ensure that the Deed was effective to achieve its aims. So she did not turn her mind to the question. Furthermore, Deutsche Bank had repeatedly been told about the Headlease Charge, and documents showing the Headlease Charge were readily accessible from its own files.

137. I have not concluded that the conduct of Deutsche Bank, or any individual within it, was careless. Although conduct, when minutely analysed in Court, may appear unreasonable, in the present case the evidence shows that all of the individuals were solely concerned with getting on with their own jobs. Reliance on a solicitor specifically instructed to ensure that the Deed would be effective to achieve the aims of Deutsche Bank was reasonable. However, it seems to me that in the circumstances, Deutsche Bank must be taken to have run the risk of the surrender of the Headlease being ineffective, including as a result of a charge having been registered against the freehold. Mr Gaunt submits that, as far as Deutsche Bank was concerned, the transaction was risk free, and there was no question of accepting any risk. I disagree. The reason for instructing Mr Miscampbell was to guard against the risk that the surrender of the Deed might be ineffective to achieve the aims of Deutsche Bank. This risk materialised and its remedy should be against the party with responsibility to address this risk, namely Blake Morgan. That, in my judgment, is the just result, having regard to my factual findings.

138. Furthermore, the mistake must be a causative mistake of sufficient gravity to make it unfair or unconscionable to leave it uncorrected. The cause of Deutsche Bank's decision was not the mistake identified in these proceedings, but rather the reliance that it placed on the advice received from Blake Morgan. Therefore, in my judgment, it cannot show that the mistake that it made was causative of its decision to execute the Deed.

139. I accept Deutsche Bank's submission that the consequences of its mistake are serious. However, Deutsche Bank did not dispute that it will have a remedy against Blake Morgan in circumstances where, as I have concluded, the cause of Deutsche Bank's

loss was its reliance on the negligent advice of Mr Miscampbell. Therefore, the seriousness of the consequences of the mistake to Deutsche Bank is mitigated by the availability of an alternative remedy.

140. I also need to consider the consequences for Holdings if the Deed were to be rescinded. Holdings would have no realistic prospect of securing the escrow monies which were released upon execution of the Deed, and therefore its position would have been prejudiced by Deutsche Bank's mistake.

141. Having regard to all relevant circumstances, I have concluded that I should not exercise my discretion to rescind the Deed for unilateral mistake, as I do not consider that it would be just to do so.

Mutual mistake

142. Deutsche Bank contends, in light of the following passage of cross-examination of Mrs Walsh in relation to the conduct of Mr McNally, that i) Deutsche Bank and Holdings mutually shared the mistaken belief that Hayes Freehold had the power to accept the surrender provided for in the Deed, ii) the subject-matter of the mistake was absolutely central to the transaction formalised by the Deed, and iii) there was no allocation to Deutsche Bank of the risk that Hayes Freehold lacked the necessary power to surrender the Headlease.

> "A: It was important that he was able to do the surrender and I took his word that he did.
>
> Q: That he? That he did what?
>
> A: Well, when he approved the surrender and then signed it, I took it that he was able to do that…
>
> Q: So you thought at that stage, did you, that he had got the Co-Op's consent?
>
> A: Yes
>
> Q: Did he ever tell you that?
>
> A: No"

Legal principles

143. The relevant principles may be summarised as follows:

i) There must be a common assumption as to the existence of a state of affairs, which requires the parties to have a positive belief in something which is not true. It is not enough if a party has not thought about the issue; *Chitty on Contracts* 32nd Edition at [6-001] and [6-004].

ii) The effect of a common mistake in a contract depends upon the allocation of risk as to the facts having been as the parties assumed they were. In most situations, one or other of the parties will be considered to have assumed the

risk of the ordinary uncertainties which exist when an agreement is concluded; *Chitty on Contracts* 32nd Edition [6-014].

iii) The non-existence of the state of affairs, which the parties believed existed, must render contractual performance impossible; the mistake must be one which both parties would regard as fundamental; *Great Peace Shipping Ltd v Tsavarilis Salvage (International) Ltd (The Great Peace)* [2003] QB 679 per Lord Philips MR at [76].

Application to the present case

144. The first question is whether the parties each had a positive belief that Hayes Freehold had the power to accept the surrender of the Headlease. In my judgment, the evidence does not establish this. For Deutsche Bank, Ms Perry as the key decision maker did not turn her mind to the question, as she had instructed Blake Morgan to deal with the matter, and did not therefore hold such a positive belief. For Holdings, I have considered Mrs Walsh's evidence, cited above, that she thought that Mr McNally had obtained the Co-Op's consent to the surrender of the Headlease. However, the totality of her evidence, which I accept, suggests that she did not think about the issue at all and did not have such a positive belief either.

145. Secondly, in my judgment, the correct construction of the Deed is that it allocated the risk that the surrender of the Headlease might be ineffective to Deutsche Bank. This is because it provided for an unconditional and irrevocable release of the guarantee which would take effect on execution of the Deed and did not provide (either expressly or impliedly) that it was a condition precedent to such release of the guarantee that the Headlease should be surrendered.

146. Thirdly, I do not accept that contractual performance was rendered impossible by any mistake made in respect of the surrender of the Headlease. On the contrary, I have concluded that the surrender of the Underlease and the release of the guarantee were not dependent on the surrender of the Headlease. Looking at the matter from the perspective of Holdings, there is no reason to believe, and no evidence, that it regarded any mistake with respect to the capacity of Hayes Freehold to accept a surrender of the Headlease as fundamental to the release of the guarantee or the Underlease. Therefore, I do not accept that all parties would have considered the mistake as fundamental, and the defence of common mistake cannot apply.

Is Deutsche Bank entitled to rescind the Deed (or to other equivalent relief) on the ground that Holdings has been unjustly enriched?

147. Deutsche Bank characterises its unjust enrichment claim, with justification, as "*a close cousin of the claim under Pitt v Holt*": Deutsche Bank's closing submissions at [153]. Relying upon the judgment of Lord Steyn in *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221 at 227A-B, it submits that all the elements of unjust enrichment are satisfied, since Holdings has been enriched; the enrichment was at Deutsche Bank's expense; the enrichment was unjust; and there are no special defences.

148. Focusing on the question of whether the enrichment was unjust, Deutsche Bank submits that this enquiry does not involve analysis of the relative degree of fault on

behalf of the claimant and the defendant; *Dextra v Jamaica* [2001] UKPC 50 at [45]. It submits that, on the premise that no consideration was given by Holdings for the release to Deutsche Bank, Holdings would have obtained a windfall, since it would have escaped from the guarantee without having to procure the Co-Op's consent to the surrender of the Headlease, and without having to pay the Co-Op a substantial sum of money to achieve this. Furthermore, it contends that Deutsche Bank had a unilateral defeated expectation that Hayes Freehold had capacity to surrender the Headlease which, in the absence of consideration, means that it is entitled to a remedy in unjust enrichment.

149. In my judgment, it is not unjust to release the guarantee in circumstances where the parties have expressly agreed to do this. When considering the construction of the Deed, I have held that clause 6 expressly provides for the unconditional release of the guarantee upon execution of the Deed, and that the release of the guarantee was not expressed to be in consideration of the surrender of the Headlease. I have rejected Deutsche Bank's case of implied condition precedent. I have also rejected Deutsche Bank's characterisation of the Deed as a voluntary transaction. The doctrine of unjust enrichment cannot be used to relieve a party of the consequences of the bargain that it made. Lord Sumption said in *Swynson Ltd v Lowick Rose LLP* [2017] 2 WLR 1161 at [34] that:

> "Unless the claimant has been defeated in his expectation of some feature of the transaction for which he may be said to have bargained, he does not suffer an injustice recognised by law simply because in law he has no right. Failure to recognise these limitations would transform the law of equitable subrogation into a general escape route from any principle of law which the claimant overlooked or misunderstood when he arranged his affairs as he did."

150. Furthermore, for the same reasons that I concluded that it was not unjust or unconscionable to leave the mistake uncorrected and rejected Deutsche Bank's case under the rule in *Pitt v Holt*, I do not consider that this is a case of unjust enrichment.

151. As to special defences, Holdings submits that it changed its position in good faith as a result of the release of the guarantee when it caused or permitted the escrow agent to release the remaining escrow monies to Glen Moar. Whilst there is force in this point, I accept Deutsche Bank's submission that this defence could only operate partially, because the release of the guarantee was worth more than the funds in the escrow account. Therefore, had I considered that unjust enrichment was established, I would have rescinded the release of the guarantee on terms that Deutsche Bank should give Holdings credit for the amount of the escrow monies.

The claim against Sentrum Hayes

152. After this judgment was released in draft, Mr Mark Sefton, junior counsel for Deutsche Bank, pointed out that I had not expressly determined the claim against Sentrum Hayes for rescission of the Deed on the basis of implied fraudulent misrepresentation by Sentrum Hayes and Hayes Freehold. As Sentrum Hayes did not attend the trial, this received little attention in argument and I am grateful to Mr Sefton for drawing this to my attention. I believe that the findings that I have reached

in this judgment provide an answer to this question. At [67] I have rejected the central allegation on which the claim for implied fraudulent misrepresentation was based in respect of all individuals against whom it was made. At [128] I have rejected the contention that there was an implied fraudulent misrepresentation by Hayes Freehold or Sentrum Hayes, and also the contention that Deutsche Bank was induced by, or relied upon, any such misrepresentation to execute the Deed. Further, I have concluded at [133] that the surrender of the Underlease was effective. Therefore, this claim must fail.

Estoppel

153. Had I found in favour of Deutsche Bank on any of its alternative claims, Holdings contends, as a defence, that Deutsche Bank would have been estopped, by representation, from claiming in these proceedings that clause 6 of the Deed had not taken effect. Its case is that by first proposing a surrender of the Headlease, and then agreeing to the unconditional and irrevocable release in clause 6, Deutsche Bank was impliedly representing to Holdings that it agreed that the release of the guarantee should be unconditional and irrevocable from the moment of execution of the Deed. Had that not been the position, Holdings contends that it would have taken steps to verify and address the issue and would not have permitted the escrow monies to be released. Holdings submits that it was entitled to rely on the fact that Deutsche Bank had agreed to the proposed wording of clause 6.

154. I do not accept that the necessary elements of estoppel would have been established. If I had concluded that Deutsche Bank was correct that, on its true construction, the Deed contained the alleged implied condition precedent, then the estoppel defence could not have arisen. In those circumstances there could have been no representation to the contrary by Deutsche Bank upon which Holdings would have been entitled to rely. Indeed, I cannot see how Deutsche Bank could have been estopped from asserting any of the claims which it advanced in these proceedings. If, for example, I had found that Holdings was party to an implied fraudulent misrepresentation, it would plainly not have had a defence of estoppel.

155. Finally, I do not consider that the necessary condition of reliance would have been established by Holdings, since Mrs Walsh accepted during cross-examination that she did not rely upon Deutsche Bank to tell her whether Mr McNally had secured the Co-Op's consent.

Conclusion

156. I have reached the conclusion that:

i) It was not an implied condition precedent to the release of Holdings' guarantee that the surrender of the Headlease should be effective.

ii) Deutsche Bank is not entitled to rescind the Deed on the ground of an implicit fraudulent misrepresentation that Hayes Freehold had the power to take the surrender of the Headlease provided for by the Deed.

iii) The claim for rescission of the Deed against Sentrum Hayes on the basis of implied fraudulent misrepresentation by Sentrum Hayes and Hayes Freehold should be dismissed.

iv) Deutsche Bank is not entitled to rescind the Deed for unilateral mistake under the rule in *Pitt v Holt*.

v) The Deed is not void for common mistake.

vi) Deutsche Bank is not entitled to rescind the Deed (or to other equivalent relief) on the ground that Holdings has been unjustly enriched.

vii) Had any of these claims been established by Deutsche Bank, Holdings' defence of estoppel by representation would have failed.

157. For these reasons, I shall dismiss Deutsche Bank's claims against Holdings and Sentrum Hayes.