Event Spaces Limited v Paul Richard Gregg v Ingenious Entertainment VCT1 Plc, Ingenious Entertainment VCT2 Plc

No Substantial Judicial Treatment

Court
Queen's Bench Division (Commercial Court)

Judgment Date
3 December 2019

No. LM-2018-00145

High Court of Justice Queen's Bench Division Commercial Court

[2019] EWHC 3447 (Comm), 2019 WL 07562020

Before: Mr Adrian Beltrami QC (Sitting as a High Court Judge)

Tuesday, 3 December 2019

Representation

Mr R. Blakeley (instructed by Reynolds Porter Chamberlain LLP) appeared on behalf of the Claimant and the Third and Fourth Parties..
Mr S. Mills (instructed by Debenhams Ottaway LLP) appeared on behalf of the Defendant.

Judgment

The Judge:

1. This is my *ex tempore* judgment, the argument having finished at one o'clock this afternoon.

Introduction

2. This is an application by notice dated 10 January 2019 by the claimant ("ESL") for summary judgment on the claim; and by ESL and the third and fourth parties ("VCT1" and "VCT2", called together "the VCTs"), on counterclaims. The defendant and counterclaiming party is Mr Paul Gregg. The application was made following the close of pleadings in December 2018, and came before His Honour Judge Pelling QC on 24 October 2019, where the defendant, through counsel, said that he wished to amend the Defence to remove certain allegations and insert some new allegations. In any event, the time estimate of one day was too short. His Honour Judge Pelling QC granted permission to amend insofar as the amendments removed allegations, and adjourned to a date with a longer time estimate, and this is the adjourned hearing. In the meantime, ESL has agreed to the further amendments of the Defence which were left over by His Honour Judge Pelling QC.

3. The claim as set out in the Particulars of Claim is for the sum of £1,278,684.83, said to be due on an indemnity contained in Clause 9.8 of an Investment Agreement dated 17 December 2014 ("the Investment Agreement") as amended by a Novation and Amendment Agreement dated 9 December 2016 ("the Novation Agreement"). Under the terms of Clause 9.8, the parties agreed as follows:

> "To the extent that, immediately prior to the end of each Budget Cycle Period (except with respect to the Budget Cycle Period in which the Maturity Date falls and, in that case, immediately prior to the Maturity Date), the aggregate amount standing to the credit of the Designated Account and the Investment Account is less than the Recoupment Amount (such difference being the **Shortfall Amount**), PG [Mr Gregg] hereby undertakes on a full indemnity basis to pay (without set off, withholding, deduction or counterclaim), at the request of the A Director and only to the extent that the Company has not received sufficient aggregate Anticipated Loss Payment(s) during the then current Budget Cycle Period in accordance with Clause 9.9 an amount equal to the Shortfall Amount to the Designated Account by electronic transfer of immediately available funds at the end of the relevant Budget Cycle Period (or on the Maturity Date as the case may be) (the **Loss Payment**). PG shall fully and effectively indemnify and keep indemnified each of [VCT 1 and VCT 2] on demand for any loss howsoever arising suffered or incurred by him as a result of PG's failure to pay the Loss Payment to the Company when due."

It is ESL's case that the Shortfall Amount under the terms of Clause 9.8 is the £1.2 million figure referred to earlier.

4. By the Amended Defence, Mr Gregg seeks to defend on three bases. First, it is alleged that he is entitled to rescind the Novation Agreement because he was induced to enter into it by representations which are referred to as the "VCT representations", essentially as to the tax status of the transaction represented by the Investment Agreement and the Novation Agreement. Second, it is alleged that no sum is in any event due, even on a unrescinded contract, because the expenditure in question was not, as it was put, "properly incurred", a point which also goes to the tax status of the transaction. Third, there are defences in relation to quantum because the sum of the expenditure claimed is said not to represent liabilities of ESL but of a different company, Kuma Exhibitions Ltd. ("Kuma"), a company of which Mr Gregg is a 70 per cent shareholder.

5. There is also a Counterclaim in two parts: a claim in misrepresentation against ESL and the VCTs, which mirrors the Defence, and a claim against ESL on a contractual warranty under the Investment Agreement as amended.

Background

6. ESL is a company incorporated in England and Wales, funded at least largely by the VCTs pursuant to the Investment Agreement. The VCTs were approved by HMRC as venture capital trusts under section 274 of the Income Tax Act 2007 ("ITA"). Their business involves investment in unquoted companies, for which there are tax benefits, if made in compliance with what was referred to as the VCT rules, in Part 6 of the ITA . The VCTs are part of the Ingenious group, an investment business specialising in the media sector. Mr Gregg is an experienced businessman, said to be a well-known name in the entertainment industry. On 18 August 2010 he was appointed a non-executive director of VCT 2. He was also, as I have mentioned, a 70 per cent shareholder of Kuma, and in December 2016 he was appointed a director of ESL.

7. The parties to the Investment Agreement were VCT 1 and VCT 2, Mr Marcus Weedon, Mr Matt Priest and ESL. Pursuant to the terms of this agreement, the VCTs agreed to invest a total of £1.25 million in ESL, £875,000 for the subscription of Class A shares and £375,000 by way of loan notes, for the express purpose of assisting ESL in carrying on the business. The business as specified was the management and operation of a semi-permanent events structure in accordance with a budget, as defined by Schedule 9, and there was appended a business plan for the business and the expenditure of the investment. By Clause 9.8 of the Investment Agreement, Mr Weedon provided an indemnity to ESL in respect of the shortfall amount, which, broadly speaking, was intended to cover cash losses in the business operated through ESL.

8. In October 2014, Ingenious made an advance assurance application to HMRC in respect of investments in ESL, and that was granted on 26 January 2015. HMRC confirmed by that letter that the investments made by the VCTs in ESL would be regarded as qualifying holdings under Chapter 4, Part 6 of the ITA , that ESL would be regarded as a qualifying company, as described by Chapter 4, Part 6 of the ITA , and that the activities of ESL as described to HMRC would constitute a qualifying trade as defined by sections 290 and 291 of the ITA .

9. In the event ESL commenced trading by investing in an events structure at the London Pleasure Gardens development at Pontoon Dock, but that project was subsequently abandoned. In 2016, a separate business opportunity arose at the suggestion of Mr Gregg. The opportunity involved the operation of an event at the South Bank called The Art of the Brick exhibition, and it was this which led to the Novation Agreement pursuant to which, in broad terms, Mr Gregg and Carol Stenberg acquired the shares in ESL of Mr Weedon and Mr Priest. Also Mr Gregg agreed to undertake the obligations of Mr Weedon and specifically assumed the liability on the indemnity in slightly different terms as qualified by the Novation Agreement. Also the old business plan was expressly replaced by a new business plan at Appendix 2 to the Novation Agreement, in connection with The Art of the Brick exhibition. The business plan specified that the exhibition would be managed by Kuma. In very short form, though I have not had all the details, the exhibition went ahead. It clearly was not a success. ESL has suffered losses on its expenditure and it makes its claim on the indemnity.

10. Reverting to the action, as above, the application came before His Honour Judge Pelling QC and at the time the defendant sought to amend the Defence by the removal of certain allegations of misrepresentation and fraudulent misrepresentation and supplementing the existing remaining allegations. In his skeleton argument, Mr Mills, on behalf of Mr Gregg, referred to these as "modest amendments", but I see them as more significant than that. I will refer to the additions below, but it is important, I think, to make mention of the removals. The Defence and Counterclaim was served on 18 October 2018. This pleaded two sets of representations: the VCT representations, which I shall return to, and a separate set of representations called "the Representations" at para.40 of the Defence. The Representations comprised, first, a representation said to have been made on 17 December 2016 by Nicholas Beveridge, an Ingenious employee, to the effect that Mr Gregg would never be sued under the Investment Agreement. Secondly, a representation said to have been made by Mr Sean O'Keefe, then a trainee solicitor, that ESL would conduct its business in accordance with the business plan appended to the Investment Agreement. This representation was said to have been made by the sending of the Investment Agreement to Mr Gregg under cover of an email dated 14 November 2016, which said the following:

> "I attach the investment agreement that is referred to in the agreements that were circulated on Friday. This will need to be read in conjunction with the novation and amendment agreement (attached again for convenience) as clause 6 of that agreement amends the terms of the investment agreement.
>
> Please note that as we are acting for the VCTs on this matter we are unable to provide any advice to Paul or Carol and it is recommended that they each take their own advice in relation to the terms of the agreement as necessary."

These representations were said to have been false and to have induced Mr Gregg, together with the VCT representations, to enter into the Novation Agreement. They were also alleged to have been made fraudulently by the representors, namely Mr Beveridge and Mr O'Keefe.

11. Those allegations were made in a pleading signed with a statement of truth and supported, or at least not detracted from, by Mr Gregg's first witness statement in opposition to the summary judgment application dated 6 February 2019. They were withdrawn only at the time of the hearing before His Honour Judge Pelling QC a year later. It is apparent from the fact of their withdrawal and from the circumstances that such allegations were always incapable of proof, were untrue and should

never have been made. So far as the Beveridge representation (if I can call it that) is concerned, and apart from issues as to the particular facts, the allegation was that the representation was made on 17 December, yet Mr Gregg had signed the Novation Agreement on 5 December, and it became effective on 9 December, so it could not have been an operative representation, let alone a fraud. As for Mr O'Keefe, it is very difficult to see how the mere sending of an email enclosing the Investment Agreement could constitute a representation of the sort alleged. In context, that allegation becomes impossible when it is understood that Mr Gregg had also been sent drafts and a final version of the Novation Agreement which expressly stated that the business plan appended to the Investment Agreement was deleted and replaced with a different plan attached to the Novation Agreement. As I have mentioned above, the email of 14 November, which is said to amount to the fraudulent misrepresentation, expressly stated that the Investment Agreement and the Novation Agreement needed to be read together.

12. It is also right to note that Mr Gregg has stated in evidence that he operated at a "big picture" level, that he rarely reviewed detailed paperwork, and that he cannot now recall whether he ever looked at either the Investment Agreement or the Novation Agreement, and certainly would not have analysed the detail. So it is, to my mind, inconceivable that he could have been induced by the content of something he has no recollection of reading.

13. These two allegations have been withdrawn, and rightly so, if belatedly so, but it is important, I think, for the court to express its disquiet that allegations of such seriousness, including against a trainee solicitor, should have been made so lightly and on such a misconceived basis. I asked Mr Blakeley, for the claimant, the significance of this as regards the rest of the Defence. He said it was relevant because it underlines the need for close scrutiny of the allegations that are now made and pursued. Within the confines of a summary judgment application, I cannot take that too far. On the other hand, it may properly be said that any allegation of misrepresentation and fraudulent misrepresentation requires close scrutiny, and perhaps particularly so in an application for summary judgment. At the very least, the unfortunate history ought to ensure that I do not overlook the need to do so.

The Law

14. The test for summary judgment is not in dispute. It is set out in various places but often it is cited from a passage in a decision of Lewison J in *Easyair Ltd. v Opal Telecom Ltd. [2009] EWHC 339* , at para.15. I do not think it necessary to read all that out, as the passage is very familiar. So far as representations are concerned, I accept the summary set out in Mr Blakeley's skeleton argument at para.43 as to the constituent elements of a claim in misrepresentation, but, again, I do not believe, for the purpose of my exercise, it is necessary to delve into that in any greater detail. However, so far specifically as the question of implied representation is concerned, that must be an objective question, namely whether by words or conduct the relevant representation can properly be implied, or at least arguably so, when at summary judgment stage. In that respect, it is appropriate to refer to the test as set out by the Court of Appeal in *Property Alliance Group v Royal Bank of Scotland plc [2018] EWCA (Civ) 355, [2018] 1 WLR 3529* , at para.132:

> "The present case appears to be the first in which Colman J's test has been considered by the Court of Appeal. We do think it is a helpful test, in relation to the existence of an implied representation, to consider whether a reasonable representee would naturally assume that the true state of facts did not exist and that, if it did, he would necessarily have been informed of it. To that extent we would approve the dicta of Colman J in *Geest plc v Fyffes plc [1991] 1 All ER (comm) 672* , but that is not to water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied."

15. The VCT representations are pleaded at para.38 of the Amended Defence as follows:

"ESL and/or the VCTs made the following implied representations relating to the VCT scheme …

(1) that at all times HMRC had been made aware of all material facts and matters relating to the VCTs' holdings in ESL;

(1A) that the investments in ESL complied with the VCT rules and were qualifying holdings;

(1B) that the VCTs satisfied the requirements for approval by HMRC as VCTs;

(2) that there was no material risk that HMRC could withdraw, or assert that it was not bound by, its advance assurance that it was satisfied that the investments made by the VCTs in ESL would be qualifying holdings when the investments were made;

(3) that there was no material risk that the investments made by the VCTs in ESL did not, or would not, meet the requirements so as to constitute qualifying holdings;

(4) that there was no material risk that HMRC could withdraw the VCT approval for the VCTs;

(5) that there was no material risk that the VCTs and their investors could lose the tax benefits of a VCT scheme."

16. In broad terms, as I see it, these may be divided into three categories. First, at 38(1), a representation of full disclosure to HMRC. Second, at 38(2) to (5), representations that there were no material risks that the VCTs would fail to satisfy the VCT tax requirements. Third, at 38(1A) and (1B), which were the two additions made by the amendments recently, representations that the VCTs satisfied the VCT tax requirements. Before considering the facts and matters relied upon to generate the representations, it is, in my judgment, important to scrutinise or at least to seek to understand the representations themselves, as to which I have a number of observations.

17. First, and rather obviously, although it sets the context, all of the representations are said to have been implied. Secondly, each of the representations is pleaded as a representation of fact. I am not satisfied that any of them is, on analysis, a representation of fact at all or at least a representation only of fact. Taking them in reverse order, beginning with those at 38(2) to (5), it is, to my mind, difficult to see how the absence of a material risk, for example, that HMRC will withdraw approval, could ever be a statement of fact or, if it were, how it could ever be judged as such. As I see it, this could only ever be a matter of evaluation or assessment. In other words, a matter of opinion. As to 38(1A) and (1B), equally, whether ESL did or did not comply with the rules involves a close assessment of both the rules and the facts, and whilst there is ultimately a single answer to the point, it seems to me unrealistic to view it as anything other than a matter of evaluation or assessment. And as for 38(1), whether there has been disclosure, might, on one view, be seen to be a question of fact, but that involves an assessment of what is material, and again, to my mind, it is more realistically a matter of opinion, at least in part.

18. Third, if that were not right, then for them to be characterised as statements of fact, they would have to take effect as something equivalent to absolute warranties - for example, a warranty that ESL did in fact comply with the VCT rules, so as to impose automatic liability for misrepresentation for non-compliance in the circumstances. So something equivalent, through the medium of a representation, to a contractual allocation of risk. That seems to me deeply unattractive and unlikely as an implied representation when no such contractual term was included, but that is the only circumstance in which, to my mind, those representations could be read, even theoretically, as representations of fact.

19. Fourth, it seems much more likely that if the representations are to mean anything, then the highest the case could be put would be that they are in truth statements of opinion which could be said to carry further implied representations that the opinions were either honestly held or reasonably held. But that is not the pleaded case. Although Mr Mills said that he would like to consider whether to make amendments following some discussion during oral argument, none have been provided, and it is, to my mind, time for the defendant to be held to the case he has pleaded. Further, there is no indication on which I could act as to who may have held the views in question or why any of the views were not honestly and reasonably held.

20. Fifth, there is also an inconsistency in the pleading, following the amendments, which is a further matter of concern, given the consequential need to have a case on inducement. Until October 2019, the representations were alleged at 38(2) to (5) based on the absence of a material risk, which was said to have induced the Novation Agreement. That case has now been amended to include 38(1A) and (1B), which are, on their face, representations of unqualified compliance. Those sets of representations say different things and they could not be cumulative. If Mr Gregg is now saying that he was induced by a representation that the VCTs did in fact comply with the rules, it is difficult to understand how he can also be saying he was induced by a separate representation there was no material risk that they did not. Conversely, in circumstances in which, until October 2019, he was saying that he was induced by representations of no material risk, it is not easy to see how he can now say that he was actually induced by representation of absolute compliance.

21. So I am troubled by an analysis of these alleged representations. They are, in my judgment, inconsistent and, at least to some extent, illogical. I am doubtful that there are any representations of fact at all. If they are representations of fact, they are at such a high, extreme level, that they appear, at least provisionally, to be unlikely candidates for an implication.

22. So that is the context in which I now turn to para.39 of the Defence, which sets out the facts and matters pleaded in support of the implied representations. Before addressing the specific paragraphs, some words in introduction. First, as indicated from the legal analysis earlier, this needs to be assessed against the need for clear words or clear conduct. Second, in terms of context, it is relevant, in my judgment, that in respect of all the communications between the parties, it is common ground that Mr Gregg never raised the subject of the tax treatment, never indicated that it was a matter of concern to him, never asked for any advice or assurance in that respect, and never indicated that he was relying on Ingenious or anyone else in respect of the tax issues. Third, on the contrary, he was told that he was not entitled to rely on Ingenious or indeed Mr O'Keefe for advice, in the email I have already referred to.

23. So far as para.39 is concerned, 39(1) reads as follows:

> "By engaging in e-mail correspondence and/or conversations between the Defendant and [Mr Beveridge] and/or Sean O'Keefe on behalf of ESL and/or the VCTs on the subject of the proposed funding of the Exhibition and/or the Novation Agreement in the period September 2016 to on or about 17 December 2016, ESL and/or the VCTs thereby communicated with the Defendant on matters relating to the tax status of the investment in ESL without informing him that …"

Then there are various matters of non-disclosure.

24. I do not see how this supports the alleged representations. First, no communications are in fact identified from which the representations are said to have been made. Secondly, instead, the allegation is that it is enough that there were communications on matters relating to the tax status of the investment. I consider this allegation standing on its own cannot

justify the representations pleaded. Absent any specific communications relied upon, the mere fact that there are some communications relating to tax status, whatever that exactly means, cannot amount to clear words of conduct creating a series of implied representations of the nature alleged. In argument Mr Mills confirmed that his client's case was that because there were exchanges made in the context of a VCT scheme, this was enough to generate the implied representations. When asked, he appeared to confirm that this would apply in every such transaction, regardless of any specific communications, because that was the context. He then said that it applied in this transaction, at least, because Mr Gregg was in the position of a surety. Assuming that is right, it is still, in my judgment, impossible to see how that makes a difference to the creation of implied representations. There are still no clear words or conduct which can be relied upon. In conclusion, I reject the submission that, in effect, the fact that the context of the transaction was a VCT scheme, means that the VCT representations were made. I regard that as unarguable.

25. 39(1A) is the next pleading, as follows:

> "By [Mr Beveridge] stating to the Defendant that, although the VCTs' investment in ESL had been made nearly two years before, the business originally anticipated for it had not materialised and that unless the company started trading within two years of the investment, it would not qualify as a VCT investment (by which he meant, and was understood to mean, a qualifying holding)."

26. So this is an allegation of an oral statement that unless the company started trading within the two-year period specified in the rules, it would not qualify. As I understand it, this statement represents an accurate summary of the effect of section 291 of the ITA , and it is not said to be false *per se* . Mr Gregg's case would have to be that by stating this correct fact about the timing, Mr Beveridge made a much more widespread representation amounting at its highest, as I have explained, to an absolute warranty that all other aspects of ITA which he did not mention were fully complied with. I see that as fanciful. Mr Mills said it was because the statement which was made concerned the status of the investment. Whether that rather loose description is accurate or not, it does not, in my judgment, justify the representations.

27. 39(1B) is the next particular:

> "By delivering the Investment Agreement and Novation Agreement to the Defendant, and executing the same."

That will be seen as a most unpromising basis for the representations alleged. The Novation Agreement could, at least in theory, have contained a variety of representations or warranties about the tax status of the VCTs or ESL. It did not do so, or insofar as relevant it did not do so, and it did not contain any of the representations now alleged. In such circumstances, it is difficult to understand how the mere delivery of documents which did not contain reference to such matters amounted to positive representations that the matters excluded should be treated as included. If anything, the opposite would follow.

28. 39(2) says:

> "By [Mr Beveridge] asking the Defendant to comment on an e-mail sent on 4 October 2016 from Zainab Najefi of Ingenuous in which she stated that Simon Palmer …did not think it would be necessary to ask HMRC to reconfirm the advance assurance given to ESL if it promoted and operated the Exhibition."

29. This is a reference, as quoted, to an email of 4 October 2016 which cannot bear the weight sought to be attached to it. First, insofar as is involved any communications with Mr Gregg, it was for the express purpose only of seeking his confirmation of three points of fact. He was not asked to comment or even read any of the rest of the email, and there is no indication that he did so. It is difficult from those circumstances to generate the broad representations arising out of another party's email. Second, the statement relied upon comes nowhere near the representations alleged. The statement concerns a view of Mr Palmer about the need to reconfirm advance assurance from HMRC. Whether advance assurance should or should not have been reconfirmed amounts to a specific point of process. I see no link between that point of process and the representations alleged. Third, there is a further difficulty of even trying to identify what it is about this communication that is said to give rise to the representations. Who was making them and about what? It is an email from Ms Najefi to Mr Beveridge, describing the view of Mr Palmer. It was then forwarded by Mr Beveridge. Is this said to be a representation by Mr Palmer of his view, or a representation by Ms Najefi that she was accurately recording Mr Palmer's view, or a representation by Mr Beveridge that he was, without saying so, in some way endorsing anyone else's view? The difficulty in identifying what this statement was supposed to be, underlines the impossibility of constructing the broad representations on top of it. Fourth, Mr Gregg in his first witness statement comments on this email to say that he was asked to address three points. He refers to the second paragraph of the email concerning tax and says that those questions were for Ingenious rather than him, and that he doubts that he even read that part of the email. I do not doubt that evidence, but it does demonstrate the futility of constructing a case of implied representation around this document.

30. Finally, 39(3) is as follows:

> "By providing to the Defendant by e-mail on 8 November 2018 and/or 11 November 2016 and/or 14 November 2016 a draft of the Novation Agreement without informing him that incorrect, incomplete and misleading information had been given to HMRC, which had not been corrected, and which gave rise to a material risk that it would be entitled to assert that it was not bound by the assurance and/or to withdraw the VCT approval."

31. The facts relied upon here are the provision of draft agreements which did not contain any of the representations or warranties, and that is as inconsequential, as I see it, as the allegations at para.(1B) which I have already referred to.

32. In conclusion on this part and applying the summary judgment test, I consider that this Defence has no realistic chance of success, in circumstances where the representations alleged are themselves, as I have explained, inconsistent and illogical, and are not, on my reading of them, properly to be regarded as representations of fact, save possibly at a very high and extreme level. The material relied upon falls a long way short of the clear words or clear conduct to justify such representations.

33. In such circumstances, I do not consider it productive to spend a lot of time disentangling all the other elements of the Defence on the hypothesis that there was a credible case that representations had been implied, when I am satisfied there is no such credible case, and when the nature of even the pleaded representations is, at best, opaque. Nevertheless, at least briefly on the further issues which arise, I take each in turn.

34. First, inducement. I am doubtful that there is any real case of inducement on the evidence. Mr Blakeley emphasised the fact that Mr Gregg never raised any query about tax with anyone, and he suggests that it is incredible that Mr Gregg, in those circumstances, could have relied on something which was unsaid and in which he showed no interest. He also points to the ease with which Mr Gregg was said to have relied on the Representations until they were withdrawn. I am sympathetic to those submissions, though I am equally conscious of the need not to overstep the boundaries of a summary judgment application. Ultimately, this looks more like a factual dispute which, if it stood on its own, might be more suitable for determination at trial, though, given the uncertainties of even the scope of the representations available to be relied upon, I think it is probably appropriate not to make any particular finding either way, as it is unnecessary.

35. Next, falsity. The direction of Mr Mills' argument was to seek to persuade me that for various reasons the transaction was not, or was probably not, compliant with the VCT rules, or at least arguably so. It seems to me - and I think Mr Blakeley accepted this - that if that were the right question, then the point would be incapable of summary determination, as the issues are complex and factual. But that presupposes that the representations were at what I have described as at their highest, amounting to something equivalent to a warranty, i.e. where the issue is whether the rules were in fact complied with. It seems to me that that is a most unlikely scenario. If the real representation, albeit not pleaded, were as to honest or reasonable belief, then there would be a different question of falsity, and, because the case is not pleaded, there is no sensible material to support that case. That is especially so in circumstances in which, at the time of the alleged representations, the advance assurance had been obtained, there is nothing in the evidence to suggest that HMRC were reconsidering the position, and nothing to suggest they will ever do so.

36. So I accept that if the representations were at what I have equated to the high warranty level, there would be a case on falsity fit for trial. If, on the other hand, the real representations were as to honest or reasonable belief, I do not see any material sufficient to persuade me that such a case could be established.

37. Fraud. I have seen no evidence to support a case of fraud; all the more so when the arguments about tax turn on difficult and complex interpretations of tax statues. For example, we had a long discussion orally on section 288 of the ITA , which Mr Mills described as "an extremely difficult provision to unpick". In such circumstances, the allegation of a series of fraudulent representations about tax treatment would require some convincing material in support. There is none. I should also add, because it was the subject of some discussion during the hearing, that I do not consider that the fact or outcome of the Ingenious tax dispute, of which Mr Gregg was also aware at the time of the Novation Agreement, and which did not involve the VCTs, supports a case in fraudulent misrepresentation.

38. Further, Mr Mills said orally that the only dishonest actor his client has been able to identify so far is Mr Beveridge. He identified the factors in support of the allegations of fraud as follows: Mr Beveridge sat on the board of ESL. He knew that PwC had advised in 2016 that the VCTs should not rely on their existing advance assurance. (Just on that, I accept Mr Blakeley's submission that that is not quite what they said, but it may not especially matter). Next, he knew ESL had to start to trade by 16 December. He conducted the negotiations with Mr Gregg. He knew that ESL had abandoned the intention to trade and he knew that Kuma had entered into all of the agreements for the exhibition. Many of those statements are far from certain, and more a matter of argument, and I take Mr Blakeley's point that many, or maybe all, of them were also known by Mr Gregg. But overall I do not consider those matters taken together, even if true, are a basis for saying that Mr Beveridge made false and fraudulent representations to Mr Gregg in order to induce him to enter into the Novation Agreement.

39. Also I must express some disquiet about the suggestion that was made orally that unidentified persons within Ingenious had recklessly misled HMRC in seeking advance assurance and not highlighting in the letter sent to HMRC the existence of the indemnity. As to this, that is an allegation of obvious seriousness, not pleaded or not clearly pleaded. At the time of Mr Mills' skeleton argument, the suggestion only was that HMRC had given its assurance "possibly in ignorance" of the indemnities. That was then converted during the course of the hearing to an allegation that unidentified persons in Ingenious had recklessly misled HMRC, without, so far as I can see, any evidence to support it, and in circumstances where the letter to HMRC dated 30 October 2014 had attached to it a draft of the Investment Agreement, which included the indemnity in question. I do regret to say that that is another instance where serious allegations have been made which should not have been.

40. Rescission is the last point on this aspect of the Defence, which creates a difficulty here in the structure of the Defence. The Novation Agreement was a contract with multiple parties, including parties not joined to these proceedings or responsible for any misrepresentation, and therefore rescission of the Novation Agreement would, at least in theory, involve, for example, the return of shares to Mr Weedon and his continued liability on the existing indemnity which he thought he had extricated himself from several years ago. On its face, it seems to me, quite apart from anything else, that any right to rescind has been lost. Mr Mills pointed me to the prayer which seeks, in the alternative, a form of partial rescission, but I accept the submission made by Mr Blakeley, by reference to **Chitty** , paras. 7-127, that a party may only rescind a whole contract and not part of it. Therefore, quite apart from anything else, it does not seem to me the remedy of rescission would be available.

Contractual Defence

41. This is aside from any question of rescission. Mr Mills says that the monies are not due under the indemnity because the expenditure was not "properly incurred". The reason it was not properly incurred is that, as alleged, the VCTs or ESL has not complied with the tax legislation. In my judgment, this argument fails as a matter of contractual construction. Under the indemnity, there is a process by which the shortfall amount is calculated, and there is an absolute obligation to pay that amount without set off, withholding, deduction or counterclaim. No part of the indemnity qualifies this obligation by reference to expenditure properly incurred, however that term might be defined. Mr Gregg's case is that this limitation is properly to be construed into the indemnity, and Mr Mills made reference to Clause 6.1 of the Investment Agreement, which is to the following effect:

> "The Company warrants to the Shareholders and agrees that (unless otherwise agreed in writing by the Shareholders):
>
> (a) the initial Investment Amount shall be applied by the Company exclusively in funding the Business within the period of 24 months from the date of this Agreement (provided that the business carried on by the Company shall always constitute a Qualifying Trade and subject to the terms of this Agreement and the First Loan Note Instruments);"

42. This is a rather opaquely-worded provision. It is not clear that it contains the warranty relied upon, that the business will always constitute a qualifying trade but, even if it did, that would not support the construction argument on the indemnity, it would merely give rise to a possible claim for breach of warranty. Had the parties wished to qualify the obligation to pay under the indemnity, they would have just said so. Instead, as I read the indemnity, they created an absolute obligation to pay without reference to a Counterclaim. This is therefore one of those cases where the express terms are inimical to the case advanced on behalf of Mr Gregg, and any remedy, if there is one, would lie in the contractual warranty. So whether it is characterised as a matter of construction or, probably more likely, the implication of a term, there is no scope for that argument here.

Quantum

43. Lastly, in terms of the Defence, there is quantum. On the face of the pleading, it seems that the figure of just over £1 million is not in fact disputed, but, whether that is right or not, and I think it may be that Mr Gregg intends to dispute the whole figure, I am satisfied on the evidence that the debts incurred by ESL which are referable to the indemnity comprise that minimum figure of £1,026,005.40, plus £25,560, which are, on the face of the evidence, debts of ESL, plus £79,264.28, which are judgment debts of ESL. That produces a total of £1,125,158.08. There is a dispute over the remainder, and therefore it seems to me that dispute would have to go to trial, if necessary, but I am satisfied that the figure I have just given is due on the evidence.

The Counterclaim

44. Insofar as the Counterclaim is based on misrepresentation, for the reasons given, I reject it. There is then a contractual Counterclaim by reference to Clause 17.1 in Schedule 7 to the Investment Agreement. I will read out, to put this in context, what Schedule 7 says, which is this:

> "In accordance with Clause 17.1, the Company undertakes to and covenants with the Shareholders that the Company shall not and each of the Shareholders separately undertakes to each other and to the Company that they will exercise their respective rights in the Company (whether as Shareholder or via their nominated Director) to procure (as far as they are able) that the Company shall not without the prior written approval …take any action on any of the following matters …"

The matters the subject of that obligation include, at para.23:

> "take or omit to take any action which action or omission is likely to jeopardise the status of the Shares held by any Shareholder as qualifying Holdings;"

45. This is curiously-worded clause, and I can see, as submitted by the claimant, the possibility of a circuity of action issue in circumstances in which both the company and the shareholders, therefore including Mr Gregg, have assumed obligations, but I do accept Mr Mills' submission that the obligations do not exactly match up, and we do not know the full circumstances of what Mr Gregg was and was not able to do, and what he did and did not know. I do not believe I am in a position to say there is no arguable case that the obligation was not breached, and I accept that the damages claimed are prospective, namely any contingent losses to Mr Gregg if investors subsequently bring a claim, but that in itself is not fatal either.

46. So in conclusion on that, I do not give summary judgment on that bit of the Counterclaim because I do not see that it is automatically doomed to fail. However, I do, insofar as it is still sought, reject any application for a stay by reference to that Counterclaim.

47. Finally, it is also alleged on behalf of Mr Gregg that I should refuse summary judgment because there is some other reason for trial. Two reasons are given. The first, if I can quote from Mr Mills' skeleton argument, is that:

> "A just resolution of this case requires a determination of the effectiveness of the VCTs' holdings in ESL, and the VCTs' status as VCTs. HMRC are likely to pay particular interest to the proceedings."

However, I do not accept that this is correct. A just resolution of this case requires the determination of the claim of misrepresentation. I am of the view, as I have explained, that that claim is fanciful, whatever the VCTs' status as VCTs. Second, in any event, having found that there is no real prospect of success, I do not accept that such a defence should go to trial because of the speculative possibility that it might produce something of interest to HMRC. That is not, in my judgment, an efficient use of the court's resources or indeed the parties' funds. If HMRC wish to investigate any further, they will no doubt do so themselves, but of course I make no comment about that either way.

48. The second circumstance alleged by Mr Mills on behalf of Mr Gregg was the possibility of further disclosure being given which might justify, as it was put, some other reason for trial. As to that, the fact that the matter comes to court on a summary judgment application without full disclosure is something which is relevant and to be considered in determining whether there is a real prospect of success. If, applying the test properly, there is no real prospect of success, I do not see any scope for a further bite of the cherry by contending the possibility of disclosure as being some other reason for trial. This is already included in the application of the test. In any event, there is a real problem here in that the primary question on which I spent most of this judgment is an objective one as to what has passed between the parties as giving rise to the implied representations alleged. There is no reason to think, and I was given no basis to conclude, that that question will improve through disclosure, because the material ought already to be available.

49. So in those circumstances I grant summary judgment on the claim in the amount that I have specified. I also grant summary judgment on the Counterclaim for misrepresentation, but I do not grant summary judgment on the contractual warranty.