

Case No: A3/2017/1366 AND A3/2017/1370

Neutral Citation Number: [2018] EWCA Civ 1619

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**Her Honour Judge Walden-Smith**

**HC-2016-001597**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 10/07/2018

Before :

**THE RT. HON. LORD JUSTICE FLOYD**

and

**THE HON. MR JUSTICE BIRSS**

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Between :

**IMAD AL-NESNAS**

**Respondent**

- and -

**(1) MAHMOOD AL-NAJAR**

**(2) FAPHDEV LIMITED**

**(Formerly PRESTIGE HOMES (DEVELOPMENTS)  
LIMITED)**

**(3) PRESTIGE HOMES IMPROVEMENTS LIMITED**

**Appellants**

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**Romie Tager QC** (instructed by **ELS Law Ltd**) for the **Respondent**

The appellants did not appear and were not represented

Hearing dates: 13th June 2018

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**Judgment**

## **Mr Justice Birss :**

1. This is an appeal from the order of HHJ Walden Smith dated 7<sup>th</sup> February 2017 giving summary judgment in the action in favour of the respondent (Mr Al-Nesnas). The judge's reasons are set out in an ex tempore judgment given at the hearing on 7<sup>th</sup> February 2017 ([2017] EWHC 568 (Ch)) and then in her fuller judgment handed down on 24<sup>th</sup> April 2017 [2017] EWHC 902 (Ch).
2. The proceedings relate to claims of fraudulent (or negligent) misrepresentation, repudiatory breach of contract and other causes of action concerning an investment of approximately £1.6 Million made by Mr Al-Nesnas pursuant to an agreement with the first appellant (Mr Al-Najar). The sums were to fund two projects using companies set up for the purpose, respectively the second appellant (Prestige Homes (Developments) Ltd or "PHD") and the third appellant (Prestige Homes (Improvements) Ltd or "PHI"). The first project involved buying, developing and selling on a property at 27 The Bishops Avenue, London. The Bishops Avenue or Bishops Avenue is an expensive and exclusive residential street in North London. The second project involved setting up a franchise of the Porcelanosa ceramics outlet in Milton Keynes. In round figures, the sum invested by Mr Al-Nesnas relating to the first project was £1.4 million and the sum invested by Mr Al-Nesnas in the second project was £0.2 million.
3. The claim form was issued on 24<sup>th</sup> May 2016. Particulars of Claim were filed on the same day. A Defence and Counterclaim was filed on 7<sup>th</sup> July 2016 with a statement of truth signed by Mr Al-Najar. In the Defence the agreement with Mr Al-Nesnas was admitted but misrepresentation, breach and the other claims were denied.
4. The appellants' disclosure list was served dated 30<sup>th</sup> September 2016. By an application dated 4<sup>th</sup> November 2016 Mr Al-Nesnas applied for summary judgment on the entire claim. This was supported by a witness statement from Mr Al-Nesnas himself and one from his solicitor, Mr Spector.
5. At the hearing of the application on 7<sup>th</sup> February 2017 before the judge, the appellants were represented by a solicitor advocate. A witness statement of Mr Al-Najar had been served for use at the summary judgment hearing but it was served very late and counsel for Mr Al-Nesnas resisted its admission into the proceedings. The appellants did not press the point. The summary judgment application was heard and decided without it.
6. The parties asked the judge to rule on the application at the hearing. She found for Mr Al-Nesnas and gave summary judgment in his favour on the fraudulent misrepresentation claim or alternatively the negligent misrepresentation claim. The judge gave a short ex tempore judgment setting out her reasons briefly but indicating that a fuller judgment would follow. The fuller judgment followed two months later. There is no need to consider the ex tempore judgment on this appeal. From now on "the judgment" refers to the fuller judgment.
7. The judge's order required Mr Al-Najar and the companies to pay sums equal to the amounts invested. The order also gave Mr Al-Nesnas permission to conduct an inquiry or account to establish the extent to which the sums paid could be followed

and traced in equity, with permission to apply for directions. Freezing orders were subsequently made against all three appellants.

8. Mr Al-Najar and the companies made separate applications for permission to appeal. On 8<sup>th</sup> June 2017 Patten LJ directed that the applications for permission be dealt with at a hearing, with the appeal to follow if permission was granted. A stay of execution was granted, suspending efforts which had been taken by the respondent in the meantime to secure and enforce the order for payment and to trace.
9. Counsel for Mr Al-Nesnas explained in the skeleton argument filed on his client's behalf that if permission to appeal had been granted, Mr Al-Nesnas would have served a Respondent's Notice giving additional or different reasons for upholding the judge's order. These were that summary judgment should also have been given in Mr Al-Nesnas's favour on the claims based on repudiatory breach of contract claim and unjust enrichment. It is convenient to refer to this part of the skeleton as the Respondent's Notice. There was also an application on Mr Al-Nesnas's behalf to rely on further evidence which had come to light after the judgment below. The evidence was bank statements disclosed as a result of the post-judgment freezing orders. It was said to provide further evidence that Mr Al-Najar had misappropriated the moneys invested by Mr Al-Nesnas by paying the money invested out of the companies' bank accounts, into his personal accounts and dissipating at least some of it.
10. Since the hearing below the first appellant has moved to live in Baghdad in Iraq.
11. At the stage the applications for permission to appeal were made Mr Al-Najar was represented separately from PHD and PHI but a joint skeleton argument for all the appellants was filed on their behalf. Close to the date for the hearing of the applications for permission, the appellants wrote to the court to indicate they were having difficulties funding representation. On Monday 11<sup>th</sup> June 2018 Mr Al-Najar informed the court that neither he nor the companies would be represented at the hearing. However he asked for the hearing to go ahead in any event.
12. At about 6 pm on the 11<sup>th</sup> June Mr Al-Najar sent an email to the court office attaching a 100 page witness statement signed by him and a 145 page exhibit. The material was said to be for the hearing on 13<sup>th</sup> June.
13. We directed that the hearing would go ahead as planned even in the absence of the appellants or a representative.
14. Before us Mr Tager QC appeared for Mr Al-Nesnas. He informed us that on 5<sup>th</sup> June 2018 Mr Al-Najar had been declared bankrupt on his own application. We decided two preliminary matters. First we decided not to stay Mr Al-Najar's application for permission to appeal (with the appeal to follow) under s285 of the Insolvency Act 1986 nor to stay the applications of the companies. The reasons for that decision were given at the hearing. Second we decided not to admit Mr Al-Najar's witness statement under CPR Part 52 r 21(2). No attempt had been made to explain why that evidence was not produced before the judge below. If it was to be relied on the witness statement and its exhibits could and should have been put before the judge in accordance with the rules for evidence on a summary judgment application. Admitting this evidence now would not be in accordance with the overriding objective to deal with cases justly and at proportionate cost. This is not an appropriate

case to examine in any further detail the principles applicable to fresh evidence on appeal.

*Permission to appeal and the appeal*

15. Permission to appeal is sought on three grounds. The first is that the judge erred in failing to make findings essential to justify the order made. In particular the submission is that the judge made no findings about whether and to what extent (i) the specific representations were made and whether they were false, (ii) any of the relevant misrepresentations were made fraudulently, (iii) in relation to any representation which on analysis consisted of a statement of future intention, the appellants did not genuinely hold that intention, and (iv) the respondent was induced to conclude the particular contracts by the misrepresentations. It is submitted that in the light of these shortcomings the judgment and the order cannot stand on its own terms.
16. The second ground of appeal is that if the judge had addressed her mind to the particular findings required she would have been obliged to conclude that the matter was not suitable for summary judgment because the defendant had a real prospect of establishing that the pleaded representations (or certain of them) were not made at all; or if made were not fraudulent; and/or if made did not induce the respondent to enter into any contract.
17. The third ground of appeal is that the judge erred in concluding that she could properly give judgment on the basis of negligent misrepresentation in the alternative to fraudulent misrepresentation.
18. It is convenient to consider the first two grounds together.
19. There is no dispute about the test applicable for summary judgment. CPR Part 24 r 24.2 provides that the court may give summary judgment if it considers that the defendant has no real prospect of defending the claim or issue and there is no other compelling reason why the case or issue should be disposed of at trial. Counsel cited the useful guidance on this topic provided by Lewison J (as he then was) in *Easycare Limited v Opal Telecom Ltd* [2009] EWHC 339.
20. The appellants' skeleton cited *Wrexham Association Football Club v Crucialmove Limited* [2006] EWCA Civ 237 in which at paragraphs 57-58 Sir Igor Judge, the then President of the Queen's Bench Division, emphasised the importance of a finding adverse to the integrity of one of the parties and the need to take that into account in an application for summary judgment notwithstanding the apparent strength of the claim on paper. These were described as wise observations in *Allied Fort Insurance Services Limited v Creation Consumer Finance* [2015] EWCA Civ 841 (paragraph 81). Regrettably the judge was not referred to them.
21. At the outset of this appeal counsel for Mr Al-Nernas realistically recognised the shortcomings of the judgment, accepting that the judge had approached the issues broadly. He argued that although the judgment does not conduct an analysis by reference to the specific elements of the claimant's case and does not make clear findings on those elements, nevertheless when that exercise is conducted it can be seen that the judge was right that the test for summary judgment was satisfied, at least

for the most significant representations relied on. In counsel's skeleton argument the various aspects of the case and the evidence in support were analysed in detail in order to support that submission.

22. Given the approach of the judge, in order to decide this appeal it is necessary to analyse Mr Al-Nesnas's case in some detail.

*Mr Al-Nesnas's case*

23. The Particulars of Claim plead a number of representations. They fall into three categories. The first two categories relate to what happened at meetings in October – December 2012. The first category relates to the position of two further investors, Mr Korshed and Mr Hussain. Paragraphs 2 to 5 of the Particulars of Claim allege that these two were present at two crucial meetings between Mr Al-Nesnas and Mr Al-Najar. Mr Al-Najar represented to Mr Al-Nesnas that Mr Korshed and Mr Hussain had agreed to participate and make substantial investments in the two projects. Mr Al-Nesnas trusted them. Each of Mr Korshed and Mr Hussain were investing 25% in each project, with a further 25% to come from Mr Al-Najar, leaving 25% to be invested by Mr Al-Nesnas. Also pleaded is an allegation that at the meeting(s) both further investors told Mr Al-Nesnas, in the presence of Mr Al-Najar, that they had previously invested in profitable real estate transactions with Mr Al-Najar. Mr Korshed's previous investment had been £4 million in real estate transactions and Mr Hussain's previous investment had been in a development of 12 villas in Milton Keynes which sold for £¾ million each. Mr Al-Najar associated himself with those statements by Mr Korshed and Mr Hussain.
24. The second category of representation relates to the existence of two projects. Paragraphs 2 to 5 of the Particulars of Claim allege that:
  - i) the Bishops Avenue project was described and represented as the purchase of 27 Bishops Avenue, its development into a luxury mansion and its onward sale; and
  - ii) the Porcelanosa project was described and represented as the purchase, development and fitting out of a store in Milton Keynes, to be operated as a retail outlet for the sale of Porcelanosa ceramics, tiles and other products.
25. These two categories of representations are alleged to have induced Mr Al-Nesnas to agree with Mr Al-Najar to invest £2 Million in the two projects by way of a 25% investment in each, with £1.5 million for the Bishops Avenue project and £0.5 million for the Porcelanosa project.
26. The third category of representations relates to two agreements described as Shareholders Agreements entered into on 1<sup>st</sup> February 2013 between Mr Al-Nesnas's agreement with Mr Al-Najar. The parties to those agreements are Mr Al-Nesnas and PHD in one case and Mr Al-Nesnas and PHI in the other case.
27. The representations relied on relating to the PHD agreement are said to derive from the recitals on the face of the agreement. They are:

- i) That PHD has an authorised share capital of £6 million divided into 1,000 shares of £6,000 each;
  - ii) That Mr Al-Nesnas is the registered owner of 250 shares of these shares;
  - iii) That the business of PHD was related to and restricted to the Bishops Avenue project (as defined above).
28. The representations relied on relating to the PHI agreement also arise from the recitals to that agreement and are of the same form as the PHD representations save that the share capital of PHI is said to be £2 million divided into 1,000 shares of £2,000 each, of which Mr Al-Nesnas is the registered owner of 250, and that the business of PHI was related to and restricted to the Porcelanosa project. Subject to an irrelevant point on rectification, the Porcelanosa project was described in the agreement as the purchase, development and fitting out of a store at 3B Winterhill Retail Park, Milton Keynes. The main contractor was to be Prestige Homes Limited, another company in the Prestige group.
29. There is no dispute that after 1<sup>st</sup> February 2013 and between 18<sup>th</sup> March and 9<sup>th</sup> December 2013 Mr Al-Nesnas paid a total of £1,395,333.56 to PHD and £234,053.93 to PHI. These are lower amounts than the figures in the agreements. The difference was made up by a loan from Mr Al-Najar to Mr Al-Nesnas.
30. On 30<sup>th</sup> January 2014 Mr Al-Najar wrote a letter to Mr Al-Nesnas. The letter “*is to confirm that share certificates for [PHI] value £500,000 and [PHD] value £1,500,000 have been issued and handed to [Mr Al-Nesnas]*”. The letter attaches two documents. They are not share certificates, rather they are stock transfer forms relating to PHD and PHI which show transfers of 250 units of 1,000 shares being transferred from Mr Al-Najar to Mr Al-Nesnas. The letter also confirms the loan from Mr Al-Najar to Mr Al-Nesnas to make up the shortfall in the investment.
31. It is alleged that all the representations set out above were false and fraudulently made.
32. In relation to the first category of representation, the Particulars of Claim allege that Mr Korshed had not previously invested £4 million with Mr Al-Najar profitably in real estate or otherwise and allege that Mr Hussain had not invested in a development of 12 villas in Milton Keynes which sold for the sums referred to. The Particulars of Claim also allege that neither Mr Korshed nor Mr Hussain invested or proposed or intended to invest in the Bishops Avenue project or the Porcelanosa project and did not do so.
33. In relation to the second category, it is alleged that in truth there was no Bishops Avenue project and no Porcelanosa project. PHD had not purchased or agreed to purchase 27 Bishops Avenue and the company was in no position to undertake such a purchase and development project. Equally PHI had not purchased or agreed to purchase any premises in Milton Keynes, was not franchised to operate a Porcelanosa retail outlet in Milton Keynes and was in no position to carry out such a purchase and development.

34. In relation to the third category of representation, the Particulars of Claim explains as at February 2013 and up to 2015, PHD had an authorised share capital of only £100 divided into 100 £1 shares of which only two had been issued. Neither in February 2013 nor throughout 2014 was Mr Al-Nernas registered as holder of any PHD shares. Similarly for PHI, in February 2013 and up to the present time its authorised share capital was £100 divided into 100 £1 shares and again Mr Al-Nernas held no shares at all. It is also pleaded that the neither company's business related to the relevant project.
35. At paragraph 22 of the Particulars of Claim further matters are pleaded out in support of the allegations of misrepresentation. The first matter relates to a copy of a document headed "Joint Venture Agreement Heads of Terms" dated 20<sup>th</sup> June 2014 ("the JVA") which was provided by Mr Al-Najar's solicitors to Mr Al-Nernas's solicitors in June 2015. The document emerged because earlier Mr Al-Najar told Mr Spector that PHD had agreed an option to purchase 27 Bishops Avenue. The solicitor pressed for details and the JVA was provided. It is signed by Mr Al-Najar on behalf of PHD and has the name of the counterparty blanked out. Given that the JVA states the address of the counterparty, Mr Spector inferred it was a Mr Kamyad. He is the registered proprietor of the Bishops Avenue property although Mr Al-Nernas alleges he is not the beneficial owner. The project described in the JVA seems to amount to a project in which a contract of sale of the property to a third party purchaser is to be agreed with Mr Kamyad, PHD and the third party purchaser, all three to become parties to the putative sale contract, and with PHD carrying out the development of the property for its sale to the purchaser. The Particulars of Claim plead that the JVA is a sham. The point is also made that it is not an option to purchase the property nor is it a binding agreement at all.
36. The second matter is a brochure for the marketing and sale of 27 Bishops Avenue which was provided by Mr Al-Najar's solicitors in 2015 to support his case a few days after the JVA was provided. The Particulars of Claim allege that the Brochure is a crude forgery that could not honestly be used to market or sell the relevant property.
37. The third matter relates to the shareholding. In June 2015 Mr Al-Najar's solicitors claimed, wrongly, that Mr Al-Nernas had had share certificates. The Particulars of Claim refers to the attachments to the 30<sup>th</sup> January 2014 letter, pointing out they are transfers and not share certificates and that at the time (June 2015) neither company had sufficient share capital to transfer the alleged shares to Mr Al-Nernas.
38. The fourth matter is the position of Mr Korshed and Mr Hussain. The Particulars of Claim allege that neither person has been issued with any shares in either company nor have they contributed to the capital of either company. Certain emails are then referred to which Mr Al-Najar sent between August 2014 and December 2015. These commence "Dear Partners" and will be referred to as the Dear Partners emails. They are clearly addressed to Mr Al-Nernas, Mr Korshed and Mr Hussain as if they are each investors in the Porcelanosa project for £500,000 each. The email on 4<sup>th</sup> August 2014 demands full payment from all partners "as per the shareholding agreement". A later similar email in December 2014 threatens to dissolve PHI if the money is not paid by 31<sup>st</sup> January 2015 because of pressure from the contractors and the landlords. In the email Mr Al-Najar also refers to having had the property that "we" have committed to for 20 years, and to a personal guarantee given by Prestige Homes Ltd to the landlord. The Particulars of Claim allege that the emails falsely represent that

Mr Korshed and Mr Hussain were participants in the Porcelanosa project. It is also alleged that the need to dissolve PHI, the problem with contractors and the landlord, the 20 year commitment to 3B Winterhill Retail Park, and the personal guarantee are a dishonest fabrication. The Particulars of Claim contends that the only contractor which might have carried out construction works at 3B Winterhill Retail Park was Prestige Homes Ltd and no such company had sued PHI or provided a 31<sup>st</sup> January deadline for payment. As for the alleged 20 year commitment, there was no such commitment. All there was was a lease dated 3<sup>rd</sup> February 2014 whereby South Yorkshire Pensions Authority demised 3B Winterhill Part to PHI for 10 years. Other terms in that lease did not correspond to the December 2014 email either.

39. Paragraph 25 of the Particulars of Claim pleads that Mr Al-Nesnas rescinded all the agreements on the ground of misrepresentation by a letter from his solicitors dated 16<sup>th</sup> April 2016. Accordingly Mr Al-Najar is said to be liable to repay the full sums paid by Mr Al-Nesnas. Damages in the alternative are claim in paragraph 26 including the loss of the sums paid and other losses.
40. From paragraph 27 onwards the Particulars of Claim advances alternative claims against the defendant, including repudiatory breach of contract and unjust enrichment. One of the allegations is that Mr Al-Najar dishonestly misappropriated or procured the misappropriation of the money paid by Mr Al-Nesnas, diverting the money for his own ends.

#### *The Defence*

41. A single Defence was filed on behalf of all three defendants, signed with a Statement of Truth by Mr Al-Najar. It is fair to say that the Defence is not well drafted although it does seem to have been prepared with some legal assistance. Counsel for Mr Al-Nesnas both below and before us referred to the Defence as consisting of bare denials but there is more to the document than that. So far as material the Defence includes the following points.
42. First, the Defence admits at least one meeting took place although it denies the others (paragraph 1).
43. Second, the Defence pleads a positive case that the two projects existed and that no fraudulent representation was made.
44. Third, the Defence puts in issue the precise description of the projects as compared to the way they are put in the Particulars of Claim. The Bishops Avenue project did not necessarily involve purchase of the property but rather included the idea that the property be developed with the claimant's investment. In the Porcelanosa project the shop for the Porcelanosa franchise was to be leased. The investment was for the projects but not necessarily for the purchase of property.
45. Fourth the Defence accepts that Mr Hussain and Mr Korshed were present at the meetings but denies that any of the alleged representations relating to them were made. The denial includes a denial of representations that they had previously invested and a denial of representations that they were investing in the two projects. The Defence also pleads that if it was mentioned at any precontractual meeting that Mr Korshed was to invest, it was not relied on by Mr Al-Nesnas when he invested.



The same point is made about Mr Hussain. At no point was investment by Mr Hussain or Mr Korshed a condition upon which Mr Al-Nesnas would invest. The Defence also alleges (paragraph 11(xii)) that Mr Al-Nesnas was aware of the fact that neither Mr Korshed nor Mr Hussain had invested and did not rely on any representations made.

46. Fifth, the agreement between Mr Al-Nesnas and Mr Al-Najar is admitted. Mr Al-Nesnas was to pay £1.5 Million to PHD towards the Bishops Avenue project and £0.5 million to PHI towards the Porcelanosa project. He would acquire a 25% shareholding in each. The investment was to be enabling capital for the development of the Bishops Avenue property and the set up of the retail outlet for the Porcelanosa project. The term in the contract that Prestige Homes Ltd would be the contractor was admitted.
47. Sixth, the representations alleged to arise from the recitals to the two shareholders agreements are denied. The point is put that Mr Al-Najar simply asked for the investment of capital and that this was signified by a 25% share in PHD and PHI. The distinction being drawn is between Mr Al-Nesnas being given 25% of whatever the shares in the company were and the precise terms of the pleaded representations.
48. Another aspect of the recitals bears comment at this stage. Although the Particulars of Claim do reflect the wording of the recitals in that the recitals do state that PHD “has” an authorised share capital of £6 million and that Mr Al-Nesnas “is” the registered owner of 250 shares worth £1.5 million, the recitals also state that all of the shares “are issued and fully paid within 14 days from signing this contract otherwise this agreement is null and void”. So on the face of it the recitals look to the future and appear to contemplate that Mr Al-Nesnas’s investment will be paid within 14 days of signing. They may not support representations of existing fact about the state of the share capital of the companies and Mr Al-Nesnas’s shareholding. It may also be noted that the investment was not paid within 14 days of the 1<sup>st</sup> February 2013.
49. Seventh, the Defence accepts that purchase of the property was not possible but alleges that was because Mr Al-Nesnas did not provide his full investment. It alleges that both projects were seriously compromised by this.
50. Eighth, it is accepted that Mr Kamyad is not the beneficial owner of 27 Bishops Avenue. The Defence contends that the JVA was necessary as an alternative approach to development because Mr Al-Nesnas failed to provide the full investment. It is denied that the investment money was dishonestly appropriated. The JVA was intended to assist with the shortfall of Mr Al-Nesnas’s investment without repudiating the investment agreement or the intended shareholding of Mr Al-Nesnas in PHD.
51. Ninth, as for the brochure, it was provided to demonstrate attempts to develop Bishops Avenue. It was not a forgery.
52. Tenth, the Defence does make a positive point about the 30 January 2014 letter that despite the shortfall in Mr Al-Nesnas’s investment, Mr Al-Najar still agreed to allow Mr Al-Nesnas to have a 25% shareholding and loan him the outstanding sum. It also alleges that the agreement for the Bishops Avenue project was that £1.5 million would secure a 25% shareholding but not that the share capital would necessarily be a

particular amount. The stock transfer forms were intended to be filed at Companies House whilst the full investment was promised.

53. Eleventh, on the Porcelanosa project, the Defence denies that Prestige Homes Ltd was the only contractor who could have carried out the construction and shop fitting at 3B Winterhill Retail Park and admits the 10 year lease over that property.
54. Finally in the Defence there is a brief reference to a Counterclaim but it has not been pursued.

#### *The evidence*

55. The witness statement of Mr Al-Nernas confirmed the Particulars of Claim. The witness statement from Mr Spector dealt with the published accounts and records of the two companies, PHD and PHI. Importantly Mr Spector's evidence showed that on the face of the available company accounts, there was no trace of the money which Mr Al-Nernas had invested. This was relied on to support the allegation that the money had been misappropriated by Mr Al-Najar.

#### *Analysis*

56. On appeal counsel realistically confined his submissions to the first category of representations about Mr Korshed and Mr Hussain and the second category about the existence of the projects. If the appeal is allowed on those two misrepresentations then any remaining findings of misrepresentation cannot stand and attention will turn to the Respondent's Notice.

#### *The first category of representations – Mr Korshed and Mr Hussain*

57. I start with the case based on the representations concerning the involvement of Mr Korshed and Mr Hussain. The judge in paragraph 3(i) of her judgment records that one of the three principal issues is:

“That Mr Al-Nernas was encouraged to invest in two projects in the sum of £1,395,333.56 and £234,053.93 respectively on the basis that two others, who he knew well and trusted, were also investing in the projects for a shareholding of 25% each whereas, in fact, neither have invested in either project.”

58. At this stage the judge is not finding that these allegations are made out. This is simply a summary of the issue. However even as a summary it risks losing sight of the question of what representation(s) were actually made and whether they were false when they were made. For example, the fact that Mr Korshed did not invest does not mean a representation at an earlier stage that he intended to invest or had agreed to invest was false.
59. In paragraph 6 of the judgment the judge notes that the oral agreement between Mr Al-Nernas and Mr Al-Najar is accepted. In paragraphs 8 and 9 the judge refers to the meetings and (in paragraph 9) notes the allegations that it was represented that Mr Korshed and Mr Hussain were investing too, and the allegation that this gave comfort to Mr Al-Nernas and induced him to invest. The judge then turns to the Defence and finds it surprising that the Defence does not deal with the specific allegations made by

the claimant. But for all its faults the Defence does deny that the pleaded representations about Mr Korshed and Mr Hussain were made. Before us Counsel asked the rhetorical question – what else were these other gentlemen there for, since it is admitted they were present at the meetings? That is a legitimate rhetorical question but it is not a sound basis for summary judgment.

60. Also it may be noted that the judge here focussed only on the representation that Mr Korshed and Mr Hussain were investing too. That must mean a representation about the state of Mr Korshed's and Mr Hussain's present intentions at the relevant time. The representations about whether Mr Korshed or Mr Hussain had already successfully invested with Mr Al-Najar are not mentioned even though they would, when they were made, have been representations about existing facts rather than intentions.
61. After paragraph 9 the judgment moves on to other aspects concerning the projects and the shareholdings until paragraph 17 when the Dear Partners emails are addressed. Here the judge notes that the Defence accepts Mr Al-Nesnas's case that there was in fact no investment by Mr Korshed and Mr Hussain and notes that the defendants averred that there never was any representation that either Mr Korshed or Mr Hussain would invest in either PHD or PHI. The judge then finds that this is contradicted by the Dear Partners emails of August to December 2015, which show "that [Mr Al-Najar] was representing that [Mr Al-Nesnas] was not investing alone – emails being address as 'Dear Partners'".
62. After paragraph 17 the judge deals with other matters. Under a heading Factual Conclusions, paragraph 21 states that the judge is satisfied that Mr Al-Nesnas had agreed with Mr Al-Najar that he would invest the sums referred to in the two companies for the two projects. That point and the remainder of the points addressed in paragraph 21 were not actually in dispute. The point on the precise definition of either project as involving purchase or something else such as development (for the Bishops Avenue project) or a lease (for the Porcelanosa project) is not identified or addressed.
63. Paragraph 22 deals with whether the projects continue and what happened to the money. It ends with the statement that while the Defence denies fraudulent misrepresentation, it fails to provide particulars as to what happened to the monies advanced.
64. Next the judgment turns to the law and finally states conclusions in paragraphs 24 and 25 which are not expressed by reference to any particular representation. Judgment appears to have been given on the claimant's entire misrepresentation case on the first category of representations even though a number of them are not mentioned anywhere.
65. Standing back the case for Mr Al-Nesnas boils down to the following. First that the Defence is thin, second that there is no admissible witness statement contradicting anything said by Mr Al-Nesnas in his or Mr Spector's evidence, third that there are clear instances of false statements being made by Mr Al-Najar such as the 30<sup>th</sup> January 2014 letter which states the attachments are share certificates when they are stock transfer forms, and fourth that the Dear Partners email shows that Mr Al-Najar

was representing that Mr Korshed and Mr Hussain were investors, contrary to the Defence.

66. The problem is that this does not support a finding that Mr Al-Najar has no real prospect of defending allegations that at the meetings in 2012 a representation was made that Mr Korshed or Mr Hussain intended to or had agreed to invest or that a representation was made that he, Mr Al-Najar, believed that they had agreed to invest. Nor does it support a similar conclusion that the defendants have no real prospect of defending the allegation that any such representation was false at the time it was made or at any time prior to 1<sup>st</sup> February 2013. Clearly the Dear Partners emails show Mr Al-Najar writing on the footing that Mr Korshed and Mr Hussain had agreed to invest in the Porcelanosa project to the same extent as Mr Al-Nesnas. But that was three years after the representations relied on. The emails are evidence which tends to support parts of Mr Al-Nesnas's case and make it more likely that something might have been said about Mr Korshed and Mr Hussain at an earlier stage but the judge was wrong to find, as she appears to have done in paragraph 17, that the emails demonstrate that relevant representations had been made at any material time or had been proved to be false. Indeed the expression "was not investing alone" in paragraph 17 might indicate that at this stage in the judgment the judge was wrongly treating the emails as contemporaneous with the representations relied on.
67. The pleaded representations that Mr Korshed and Mr Hussain had already profitably invested with Mr Al-Najar might be a more profitable line for Mr Al-Nesnas since they relate to what would have been existing fact rather than intention, but there is no further evidence about this beyond the witness statement of Mr Al-Nesnas to undermine the pleaded Defence that these representations were not made. Moreover there is nothing at all to address whether, if the statements were made, they were false.
68. The judge was struck by what she perceived to be the inadequacies of the Defence as well as three key aspects of the evidence: the Dear Partners emails, and stock transfer forms wrongly described as share certificates, and the company documents analysed by Mr Spector. Amongst other things the company documents confirmed Mr Al-Nesnas's case that he had not received shares and supported Mr Al-Nesnas's case that the funds he had invested had been misappropriated. The Defence is thin and does not deal with every point but I do not believe the judge was entitled to place weight on the way the Defence was put to make up for the inherent difficulties in the claimant's case when considered on a summary basis. Those emails and the stock transfer forms and the company documents analysed by Mr Spector may well tend to undermine the credibility of Mr Al-Najar but they do not support the judge's conclusion that the defendants have no real prospect of success in defending the first category of misrepresentations. The stock transfer forms and the company documents are not probative of Mr Al-Nesnas's case of misrepresentation concerning Mr Hussain and Mr Korshed. The Dear Partners emails have been considered already.
69. The judge was also understandably concerned by the evidence of misappropriation of Mr Al-Nesnas's investment. In paragraph 24 in answer to the possibility that "something might turn up" at trial, the judge noted that this was a case in which Mr Al-Najar knows what happened to Mr Al-Nesnas's money and if the claims to fraudulent misrepresentation were without foundation then Mr Al-Najar ought to have had evidence to support his case and that evidence would have been available before

the summary judgment hearing. I agree with the judge in relation to evidence about what happened to Mr Al-Nesnas's money. No satisfactory explanation has been provided and there is what the judge clearly thought was damning evidence that the funds have been misappropriated, the obvious inference being that the misappropriation was undertaken by Mr Al-Najar. However I believe the judge's natural concern about that aspect has influenced her view on the prospect of success in relation to the particular representations themselves and she lost sight of the question whether the evidence Mr Al-Nesnas had produced was sufficient to justify summary judgment on those matters, especially since the Defence does set out a defence to the misrepresentation claim relating to Mr Korshed and Mr Hussain which is not inherently improbable.

70. In my judgment the material before the judge did not justify the summary judgment on the representations in the first category, whether fraudulent or negligent. I would give permission to appeal on this point and allow that appeal.

*The second category – the projects*

71. I now turn to the representations about the projects. Here Mr Al-Nesnas is in even more difficulty. The Particulars of Claim allege boldly that there was no Bishops Avenue project and that there was no Porcelanosa project. However, as the analysis of the pleadings above shows, the issue is one of definition. There is clear material from which to infer that there was in existence some kind of project concerning 27 Bishops Avenue. The JVA clearly relates to some sort of development project involving the relevant property. Although the JVA is alleged to be a sham, no evidence in support of that has been produced. A different point is that on its face it is not an option held by PHD to purchase the property. Turning to the Porcelanosa project, there is clear material from which to infer that some kind of project concerning 3B Winterhill Retail Park in Milton Keynes existed too. For example, the Dear Partners emails in 2015 are about the Porcelanosa project and the Particulars of Claim itself pleads a lease of 3B Winterhill Retail Park.
72. Despite the stark way in which the Particulars of Claim puts the matter, in fact Mr Al-Nesnas's case is a much narrower one. Turning to the Bishops Avenue project, the allegation is that the project as it was represented involved purchase of the property. It is true that the PHD shareholder's agreement of 1<sup>st</sup> February 2013 does use the word purchase and it is true that by 2014 and the JVA, Mr Al-Najar's approach seems to have been different from outright purchase. But the Defence asserts that that was caused by Mr Al-Nesnas not investing the full amount. Now it is not in dispute that by December 2013 Mr Al-Nesnas had not invested the full £1.5 million. And by January 2014 the parties agreed to treat the shortfall as a loan. None of this demonstrates that a representation that the project would specifically involve the purchase of the Bishops Avenue property was false when it induced Mr Al-Nesnas to enter into the relevant agreements. It could be that the terms of the shareholders agreement were breached because Mr Al-Najar and PHD sought to turn the project into a development scheme via the JVA instead of an outright purchase but that is another matter.
73. The judgment does not grapple with this at all. Paragraph 3(iii) of the judgment summarises the third issue as being that the two projects were not viable because PHD did not have the financial ability to purchase 27 Bishops Avenue and PHI did not

have the financial ability to purchase or invest in setting up a Porcelanosa franchise at Winterhill Retail park. This is not an accurate summary of the pleaded representations alleged.

74. In paragraph 10 the judge deals with the way the projects were introduced to Mr Al-Nesnas at the meetings in 2012. The summary correctly describes them as involving purchase of the properties but says nothing further about that. The Bishops Avenue project is returned to in paragraph 19. Here the judge notes correctly the statement in 2015 that only an option to purchase had been secured and also notes correctly that the JVA is not such an option.
75. Paragraph 19 of the judgment then continues, stating accurately that there is no evidence to support the defendant's case that the money was used for the Bishops Avenue project as the money did not remain in PHD and there is nothing to support the defendants' contention that the money was being held by PHD for use in the development of 27 Bishops Avenue. However while these statements are accurate, they do not demonstrate that the defendant has no real prospect of defending against the allegation in the Particulars of Claim that there was no Bishops Avenue project at all, in fact quite the opposite. The distinction between purchase and development in the context of the alleged representations is not dealt with.
76. In paragraph 20 the judge deals with the Porcelanosa project. The paragraph records that Mr Spector gave evidence that 3B Winterhill Retail Park was an abandoned building site (in February 2016) and that there was no prospect of a franchise being granted by Porcelanosa. However while this no doubt shows the project has failed and may support a claim for breach of contract, it does not undermine the Defence to the claimed representations. In fact Mr Spector's evidence (paragraph 22) recorded that an individual at Porcelanosa had confirmed that some discussions had been entered into with Prestige Homes to become a distributor but no contracts were signed. Now that evidence may support a point on a fine distinction about whatever the terms of the relationship were supposed to be, but positively undermines the allegation in the Particulars of Claim that there was no Porcelanosa project unless one takes a much more refined view of the terms of that project.
77. In the remainder of paragraph 20 the judge focusses on what happened to the money invested by Mr Al-Nesnas, noting correctly that there is no evidence to contradict the claimant's evidence on the issue or to support a finding that the funds were used to pay for any works on the Porcelanosa project. That is a different issue.
78. The material before the judge did not justify the summary judgment on the representations in the second category, whether fraudulent or negligent. I would give permission to appeal on this point and allow that appeal.

### *The third ground of appeal*

79. Since I would allow the appeal on the first two grounds relating to the first and second categories of representation irrespective of whether the representations were fraudulent or negligent, there is no need to consider the third ground. I turn to the Respondent's Notice.

### *The Respondent's Notice*

80. Counsel submitted that the order made by the judge can be supported on two other grounds, repudiatory breach of contract and unjust enrichment. These are pleaded in paragraphs 27 to 37 along with further causes of action.
81. The Particulars of Claim pleads in paragraph 27 that Mr Al-Najar has dishonestly misappropriated or procured the misappropriation by the respective companies of the two sums invested by Mr Al-Nernas. In the second sentence of the paragraph the Particulars of Claim alleges that instead of the money being expended on the Bishops Avenue project or Porcelanosa project the monies were diverted by Mr Al-Najar on either other business ventures or personal expenditure.
82. Paragraphs 28 to 32 plead various repudiatory breaches of the two Shareholders Agreements (assuming the undisputed rectification of the PHI agreement) and the oral agreement. Acceptance of the repudiation is pleaded in paragraph 33 and loss arising is pleaded in paragraph 35. The loss claimed is a sum equal to the total amount invested because the investments have proved worthless. Other losses are mentioned but they are not pursued on this appeal. Paragraph 36 pleads breach by Mr Al-Najar of implied terms and fiduciary duties, alleges that he holds the sums paid in under constructive trusts and deals briefly with tracing. Paragraph 37 alleges unjust enrichment on the part of Mr Al-Najar and liability for restitution for sums equal to the sums invested.
83. Turning to repudiatory breach, many of the grounds for repudiation relied on involve questions relating to the shareholdings and the definition of the projects and would not be any more suitable for summary determination than the issues arises from the representations addressed on the appeal. However one ground does not have this difficulty. That is the allegation that the Claimant's money has been dishonestly appropriated for other purposes (Particulars of Claim paragraph 32(2) last sentence). This allegation applies irrespective of the argument about the definition of the projects.
84. This ground for repudiation rests the repudiatory breach claim on the same foundation as the unjust enrichment claim. The foundation is the misappropriation and diversion by Mr Al-Najar of the investment made by Mr Al-Nernas.
85. While the Defence does present a defence to the misrepresentation claims, albeit not in a very clear way, nothing is put forward in the Defence to address the allegation of misappropriation. In the Defence paragraphs 27 and 32 of the Particulars of Claim are denied but, unlike the case in relation to the misrepresentation claims, nothing is advanced to support the denials or provide an alternative account of events to explain what happened to the money. Indeed the fact that the Defence positively acknowledges that the investments were to be used in the Bishops Avenue project and Porcelanosa projects (as the defendant defines them) makes the fate of the funds paid to the companies all the more inexplicable. This is something which clearly concerned the judge.
86. Mr Spector's evidence provided clear evidence that the investment money had been diverted out of the companies. For example if what had happened was that funds were paid into the companies and then paid out for example as a loan to someone, that ought to have been reflected in the accounts. The money has disappeared without a trace. The fact that steps were being taken by Mr Al-Najar in 2015, after complaint

was made, to record a shareholding for Mr Al-Nesnas does not explain or justify what happened to the money.

87. The judge addressed this issue in a number of paragraphs of the judgment. In paragraph 11 the judge held that there was no evidence that the money invested by Mr Al-Nesnas into PHD had been used for the Bishops Avenue project. In paragraph 18 the judge held that considering the annual returns, abbreviated accounts and other documentation available, it is clear that Mr Al-Nesnas's monies are not shown as investments in PHD or PHI. In paragraph 19 the judge held that "there is no evidence in support of the defendants' case that the invested money was used for the Bishops Avenue project as the money did not remain in PHD and there is nothing to support the defendants' contention that the money was being held by PHD for use in the development of 27 Bishops Avenue."
88. In paragraph 20 the judge noted the evidence of Mr Spector about what had been going on at Winterhill Retail Park but held that neither relevant defendant had provided any evidence to contradict the evidence provided by the claimant and "there is nothing to support the claimant's invested monies of £234,053.93 being used to pay for any works on the site or for the development of a Porcelanosa business." Notably here the judge was taking into account the debate about the scope of the definition of each project and still making the point that no explanation had been provided. In paragraph 22 the judge concluded that despite Mr Al-Nesnas paying over the investment, the defendants have failed to provide any evidence that the approx. £1.6 million had been used for the purposes for which Mr Al-Nesnas invested the money. In the final sentence of the paragraph the judge notes that despite denying misrepresentation the defendants have failed to provide any particulars, either in the Defence or in evidence, as to what happened to the money.
89. All of these findings are right. They show that irrespective of the project definition, the defendants have no real prospect of defending the claims based on the allegation that the money has been diverted. That is sufficient to find repudiation by the companies of the Shareholder's Agreements and repudiation by Mr Al-Najar of the oral agreement. It is not necessary to go as far as deciding that the diversion was dishonest (as pleaded), although there must be a strong case that it was.
90. On these facts the potential difficulty with the unjust enrichment claim against Mr Al-Najar is not whether he has been unjustly enriched, there is no suggestion that someone other than Mr Al-Najar took the money. However what was not explored before us was whether Mr Al-Nesnas has a remedy directly against Mr Al-Najar in unjust enrichment in these circumstances. I prefer to say nothing further about that.
91. The remedy for breach of contract is damages. Counsel submitted that Mr Al-Nesnas's loss caused by the repudiatory breach is the same amount as was invested because what ought to have happened is that the companies should have shown a balance sheet including those sums (and in fact including the loans too) whereas in fact both companies are hopelessly insolvent and illiquid. The matter was not explored in depth before us and I doubt the correct measure of damages for breach of contract in this case is as simple as suggested by counsel. It may be that Mr Al-Nesnas is entitled to a sum close to or equivalent to the amount he paid but the appropriate way to deal with that would be for damages to be assessed on proper



evidence. I would give the claimant liberty to apply for an assessment of damages for breach of contract.

*Conclusion*

92. I would give permission to appeal and allow the appeal in relation to the order for payment, but substitute that order with an order giving summary judgment for breach of contract including an order for damages to be assessed.
93. It is not necessary to resolve Mr Al-Nesnas's application to adduce fresh evidence on appeal.

**Lord Justice Floyd:**

94. I agree.