Neutral Citation Number: 2014 EWHC 2454 (Ch)

Case No: CH/2014/0134

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/7/14

Before :

TIMOTHY FANCOURT QC
Sitting as a Deputy High Court Judge

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Between :

RICHARD EDWARDS	**Claimant/ Appellant**
- and -	
JAHIT AHMET ASHIK	**Defendant/ Respondent**

- -
- -

Mark Warwick Q.C. (instructed by **Kaye Tesler & Co**) for the **Appellant**
Philip Kremen (instructed by **Hughmans**) for the **Respondent**

Hearing dates: 3 July 2014

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JUDGMENT

Mr Fancourt QC :

1. The Appellant, Mr Edwards, appeals from an order of the Central London County Court made on 23 January 2014, upon the trial of preliminary issues in this action by Her Honour Judge Faber. The preliminary issues were directed to be tried by order made on 16 November 2012 and are the liability issues in a claim for rescission of a lease, mortgage and sale agreement on the basis of fraudulent misrepresentation. The lease, sale agreement and mortgage were all made on 8 November 2010 and I shall refer to them compendiously (though technically inaccurately) as "the Contract" and to the lease as "the Lease". The misrepresentations alleged were made in replies to pre-contract enquiries relating to the sale of a business of a nightclub operated from 19, 23 and 25 Lewisham Way, London SE14 ("the Premises") and the grant of a new lease of the Premises, by the Respondent, Mr Ashik, to Mr Edwards. Mr Edwards completed the purchase of the business and went into occupation of the Premises pursuant to the Lease.

2. The issues directed to be tried as preliminary issues were the following:

(1) Whether there were actionable misrepresentations as pleaded at paragraph 5 of the Particulars of Claim;

(2) Whether the Claimant was induced by and relied upon any misrepresentations pleaded in entering into the various agreements pleaded at paragraph 4 of the Particulars of Claim;

(3) Whether the Claimant has lost any right to rely upon any misrepresentations as contended for generally by the Defendant and in particular at para 15(ii) of the Defence;

(4) The legal effect of any actionable misrepresentation in the light of the findings on the above preliminary issues.

Para 15(ii) of the Defence pleaded affirmation by continuing to trade from the Premises with knowledge of the right to elect to rescind.

3. The Judge found that there were fraudulent misrepresentations in the replies to the pre-contract enquiries. There were in fact several different replies to different sets of enquiries, but for the purposes of the appeal it is unnecessary to distinguish between them and I shall refer to them as "the Replies". The Judge concluded:

> "On the evidence in the case, in particular, those points set out above I find that the Defendant knew that there had been a complaint, that the local authority had made recommendations for dealing with the problem and that he had not implemented all of them, that he did not tell the Claimant of this problem and that he deliberately and dishonestly decided not to tell the Claimant about it because he was anxious to sell the club and produce an income from it and the Claimant was the only person who offered for it." (para 186)

There is no appeal by Mr Ashik against those findings.

4. In view of her conclusion, the Judge then proceeded to address the second preliminary issue in the following terms:

> "Thus in the light of the agreed law Mr Edwards has the benefit of a presumption that he was influenced at least to some extent by the defective statements and the burden of proof lies on Mr Ashik to rebut that presumption. So I shall now move to consider whether or not Mr Ashik has rebutted that presumption." (para 187)

In the course of that consideration, the Judge identified as an issue the question of what Mr Edwards would have done had he been told of the noise complaints that had been made to the local authority. She said:

> "If the Defendant can establish that Mr Edwards would have gone ahead with the acquisition anyway then he will have proved that there

> was no reliance on the representations in the pre-contract enquiries." (para 195)

It is the Judge's identification and resolution of that issue that forms the basis of Mr Edwards' appeal.

5. After reviewing the evidence relating to that issue, the Judge made the following findings:

> "the Defendant has established on the balance of probabilities that even had the solicitor told Mr Edwards about the complaints it is more likely than not that Mr Edwards would have proceeded with the purchase. I find that the answers to pre-contract enquiries played no part at all in Mr Edwards' decision to go ahead." (para 204)

6. In view of that conclusion, the third preliminary issue did not strictly arise, but the Judge understandably nevertheless proceeded to decide the issue. She concluded that, if Mr Edwards had a right to rescind, he lost it by affirming the Contract: see paras 216, 217 of the Judgment.

7. Mr Edwards appeals against the determination of the second and third issues, with permission given by the Judge. In giving permission, the Judge gave as her reasons that the decisions on causation and affirmation were difficult and could have gone either way.

8. On the second issue there is in substance a single ground of appeal, presented by Mr Warwick QC on behalf of Mr Edwards, namely that the Judge misdirected herself in treating the issue of inducement as turning on the answer to the question: what would Mr Edwards have done if he had been told the truth about the complaints? Mr Warwick argues that, in view of the presumption in favour of

inducement by a dishonest misrepresentation, and in view of the terms of clause 10.3 of the contract of sale, the Judge should have held that the dishonest answers were a material cause of Mr Edwards' entry into the Contract.

9. On the third issue, Mr Warwick argues that the Judge was wrong to hold that continuation of use of the nightclub was an unequivocal act affirming the Contract in view of the correspondence written by Mr Edwards' solicitors to Mr Ashik at the same time, alleging fraud and threatening legal proceedings.

10. Mr Ashik has served a Respondent's Notice in relation to the second issue. Represented by Mr Kremen, Mr Ashik seeks to uphold the Judge's decision on the additional grounds that –

(1) The Judge should have found that Mr Edwards had no knowledge of the Replies and so could not have been induced thereby;

(2) On the pleaded case, it was not open to the Judge to hold that Mr Edwards was induced by what he had been told by his solicitor, who had read the Replies;

(3) The Judge should have held that Mr Ashik succeeded in disproving inducement by reason simply of the admissions made by Mr Edwards in his cross-examination.

11. I shall deal first with the issue of inducement.

Inducement

12. Mr Edwards' pleaded case was that before the Contract was made, and in order to induce him to enter into the Contract, Mr Ashik made various representations concerning the Premises and the nightclub business, and these representations are set

out in paragraph 5 of the Particulars of Claim. Paragraph 6 then pleads: "the Claimant was induced to enter into the contracts by the Representations".

13. Paragraph 7 of the Defence states:

> "It is denied that the aforesaid statements and replies induced the Claimant to enter into the contract with the Defendant as alleged in paragraph 6 of the Particulars of Claim. The Claimant was fully appraised of the situation regarding noise issues and the Council's recommendations in that regard in May 2010 (see below) and relied on what he had been told in May 2010, not the matters referred to in para 5 of the Particulars of Claim."

In his Reply, Mr Edwards denied the second sentence of paragraph 7 of the Defence, denied the particular factual allegation and then pleaded:

> "Further and in any event it is quite wrong of the Defendant to seek to negate his formal responses to enquiries by relying upon the (disputed) contents of a conversation. The purpose of inter-solicitor pre-contract enquiries is to provide a prospective buyer/lessee with information upon which he can rely. The Claimant repeats that he relied upon the Representations."

14. Mr Edwards gave evidence in chief to the effect that he and his wife had sold their home and were prepared to gamble their life savings on buying a nightclub. He said that they instructed their solicitor to undertake all the usual enquiries on their behalf, and that the solicitor advised them having made those enquiries and agreed the form of the Contract. He further said that they relied upon the solicitor to advise them if anything untoward was found out in relation to the Premises and the lease; that, being inexperienced in such matters, they relied on the solicitor, and that if they had been informed that there had been complaints in the past resulting in visits by officers of the Council then they "most certainly would not have proceeded with the acquisition".

15. Mr Edwards was cross-examined by Mr Kremen on the afternoon of the first day of the trial. I have a full transcript of the cross-examination. The clear impression given by Mr Edwards' evidence is that he was a very unsophisticated purchaser, having no experience of carrying on or buying a nightclub business, but very much liking the idea of it and wishing to proceed with the acquisition. The flavour of this is captured at page 11F-12C of the transcript, where Mr Edwards admitted that he didn't look at any other clubs, didn't inspect the business books, wasn't concerned about the business financial history and didn't commission any survey of the Premises. He said the Premises just looked nice and the club felt right.

16. Mr Edwards was then asked about what he knew in 2010 about the replies to the pre-contract enquiries. He said:

> "As I said, I can't recall anything. I do – the only thing I can recall is just he mentioned about everything was okay and we could proceed and that was it."

The "he" clearly refers to Mr Edwards' solicitor. He was then asked about questions and answers in the enquiries relating to disputes, and the following evidence was given:

> "Q. Were you told by your solicitor in 2010 that he had asked a question of Mr Ashik, whether there were any disputes relating to the property?
>
> A. I got told by my solicitor that he asked Mr Ashik whether there was any disputes to the property. No, my solicitor never told me that, no.
>
> Q. Do you know – so you are not aware what answer was given to that question?
>
> A. No, no.

Q. And were you ever told that he raised any questions about whether or not there had been any complaints in relation to the property?

A. No. As I said before the only thing I was told was that it was okay to go ahead, everything is perfectly fine that's all I was told.

Q. And where do we find – was that given to you in a letter from your solicitor or in a conversation?

A. Err, a conversation.

Q. You see, let me make something clear before I embark upon certain questions. Anything that transpired between you and your solicitors is confidential. I am not asking you to tell me what your solicitor told you or what you said to him, do you understand?

A. Mmm.

Q. But did your solicitor know that you had carried out no survey of the property?

A. No, I don't think he did, no.

Q. Did your solicitor know you had not carried out any checks on the equipment at the property?

A. No. He wouldn't have known that, no.

Q. Did he know that you had not checked whether the equipment listed in the contract ...

A. No. He wouldn't have known any of that, no.

Q. And that is, in reality, is it not Mr Edwards, and to be absolutely fair, given your consistency of your approach, you did not care. You saw the club, you liked it, you wanted it, you were going to proceed?

A. That's right.

Q. And what answer, what questions your solicitors may have given, what answers they may have received did not concern you at all, did they?

A. Err, no."

17. In view of the last two answers, Mr Ashik contended that the Judge should simply hold that, on admissions, Mr Edwards was not induced to enter into the Contract by the misrepresentations.

18. The Judge, while recognising the force of that argument, was apparently not persuaded by it. She said:

> "Although when I first heard those answers I did think that they had the effect for which Mr Kremen contends, they cannot be considered without also taking into account Mr Edwards' earlier written and oral evidence (confirmed by his wife) that his reliance was on his solicitor telling him that it was okay to proceed and if he had known of complaints leading to visits from council officers he would not have proceeded."

She then proceeded to consider the weight to be given to Mr Edwards' evidence in view of what he had done subsequently; his evidence about his approach to the nightclub venture, and the reliability of his evidence generally. Having done that, the Judge reached the conclusion that Mr Edwards would have proceeded with the purchase even if his solicitor had told him about the complaints and that the Replies played no part in Mr Edwards' decision to go ahead.

19. It is common ground that the Judge was right to hold that, in view of the fraudulent misrepresentation that she found, a presumption arose that Mr Edwards was materially induced by the misrepresentations to enter into the Contract. In view of that, the onus shifts to Mr Ashik to prove, on a balance of probabilities, that in fact the misrepresentation was not a material cause of the purchase: see Dadourian Group International Inc v Simms [2009] EWCA Civ 169 at [99]. How does a representor so prove, given the existence of a presumption that the representee was induced by the misrepresentation?

20. This issue was addressed in detail in the judgment of Morritt LJ in Barton v County Nat West Limited [1999] Lloyds Rep. Banking 408. In that case, guarantors claimed that they had been induced to provide a guarantee by a fraudulent misrepresentation of a bank manager as to the amount of a forced sale valuation of security. The misrepresentation was held to be fraudulent and so the presumption applied. The trial judge had not applied any presumption but found, contrary to their evidence, that the guarantors were so keen to proceed that they had not relied on what the bank manager had told them. The judge found that the guarantors would have been prepared to proceed even if the forced sale valuation was less than the figure given by the bank manager.

21. Morritt LJ first rejected a challenge to the Judge's factual findings in that regard. He then went on to consider whether the appellant guarantors were right to say that the Judge failed to apply correctly the presumption on the facts of that case. In the course of doing so, he said:

> "57. The principal issue between the parties is what must be shown to rebut the presumption. Counsel for the Guarantors submitted that for the representor to rebut the presumption it was necessary for him to show that the representee (i) never knew of the statement until after he had entered into the

> contract; (ii) discovered before he entered into the contract that the statement was false; (iii) showed by words or clear conduct that the statement did not influence his decision. Counsel for the Bank submitted that the question of inducement was one of fact so that if, as in this case, the representee gives evidence the presumption has no part to play and the judge, like a jury, must determine the issue on all the evidence.
>
> 58. In my view the differences between counsel are more apparent than real. First, the presumption is one of fact and capable, like any other such presumption, of being rebutted. It would be dangerous in connection with any issue of fact to suggest that it may only be proved in certain specified ways. Similarly it would be wrong to suggest that as a matter of law the presumption can only be rebutted by proof of certain specified matters. Given that the presumption is that the representation did induce the act or omission in question it is hard to imagine facts sufficient to rebut it which do not fall within any of the categories to which counsel for the Guarantors referred. But my inability to imagine them is no ground for limiting the facts sufficient to rebut the presumption. However I do not accept the submission of counsel for the bank that once the representee gives evidence the presumption no longer has any force. The effect of the presumption is to alter the burden of proof; the alteration remains unless and until the presumption is rebutted whether or not the representee gives evidence."

22. In relation to the significance of the Judge's finding that the guarantors would have proceeded even if the forced sale valuation was lower, Morritt LJ said:

> "It is necessary to appreciate that the evidence of the Guarantors was necessarily hypothetical. Its rejection leaves the presumption in operation unless it can be affirmatively established by the Bank that the representation was not an inducement. I have already referred to the matters relied on by the Bank in support of the Judge's conclusion. First, the question of whether the Bank rebutted the presumption is not a question of credibility alone for the evidence of the Guarantors and what they would have done is hypothetical. The

> issue is not so much the credibility of the Guarantors but what was the effect of the misrepresentation." (paras 61, 62)

So the rejection of evidence that the guarantors would have acted differently if told about the true valuation (i.e. a finding that they would have proceeded anyway) does not lead to a conclusion that there was in fact no inducement. Rather, there needs to be positive evidence that the representee was not in fact induced to act by the misrepresentation. The kind of evidence that the Court of Appeal had in mind is illustrated by paragraph 57 of Morritt LJ's judgment.

23. A slight gloss may have been placed on what the Court of Appeal there decided in its later decision in the Dadourian case. At paragraph 99, the Court held that the presumption of inducement is rebutted by the representor showing that the misrepresentation did not play *a real and substantial part* in the representee's decision to enter into the transaction; the representor does not have to go so far as to show that the misrepresentation played no part at all.

24. Mr Warwick QC also relies on the decision of the Court of Appeal in Downs v Chappell [1997] 1 WLR 426, another case of fraudulent misrepresentation. There, the plaintiffs bought a bookshop on the faith of inaccurate turnover and profit figures. The Judge found that the plaintiffs relied upon the figures that they were given in deciding to buy, but held that it did not follow that the plaintiffs would not have bought the bookshop had the true figures been provided. The defendants contended that the plaintiffs would have gone ahead anyway, at the same price, and the Judge held that the plaintiffs had not discharged the burden of proving that they would not have completed the purchase had the true figures been disclosed to them. Hobhouse LJ held that the judge was wrong to ask that question. The plaintiffs had

proved all that they needed to prove. The plaintiffs were never told the truth and so the "what if" question was irrelevant.

25. I agree that the case of Downs v Chappell is consistent with the approach that Mr Warwick QC urges in this case. However, it must be remembered that Hobhouse LJ was there concerned specifically with what a plaintiff misrepresentee needs to prove in order to establish a cause of action in deceit. The issue in this case is rather different, namely what the representor needs to prove in order to show that the representee was not induced to enter into a contract by the representation. I prefer to rely on the analysis of Morritt LJ in the Barton case as being a close analogy and guide to the right approach in this case.

26. On the basis of that approach, Mr Ashik contends that there was evidence that Mr Edwards did not know of the misrepresentation (ground (1) of the Respondent's Notice). Mr Ashik says that although the solicitor received the Replies, Mr Edwards by his own admission knew nothing about them. I reject that argument for the following reasons.

27. First, in principle, knowledge of Mr Edwards' solicitor is treated as Mr Edwards' knowledge for these purposes: Strover v Harrington [1988] Ch 390. In that case, Sir Nicolas Browne-Wilkinson V-C said:

> "In this, as in all other normal conveyancing transactions, after there has been a subject to contract agreement the parties hand the matter over to their solicitors who become the normal channel for communication between vendor and purchaser in all matters relating to that transaction. In so doing, in my judgment the parties impliedly give actual authority to those solicitors to receive on their behalf all relevant information from the other party relating to that transaction. The solicitors are under an obligation to communicate that relevant information to their own clients. At the very least, the solicitors are held out as having ostensible authority to receive such information.

> Whether there be express or ostensible authority, the purchaser is in my judgment estopped from denying that he received the information relating to the transaction which has been communicated to his solicitors acting in the same transaction. In my judgment, such knowledge should be imputed to the principal."

28. Second, on the question of whether the Replies could have induced Mr Edwards to contract, the Judge clearly found that the solicitor did tell Mr Edwards that, in the light of the information gleaned from the pre-contract process, "it was okay to proceed" (Judgment, paras 188-190). The Judge did not find that Mr Edwards' evidence, given in cross-examination, that he recalled having been told orally that "it was okay to go ahead, everything is perfectly fine", was untrue or unreliable. It is clear from para 198 of the judgment that the Judge accepted that evidence and, in the following paragraph, was seeking to weigh it against the admissions on which Mr Ashik relied. In my view, it cannot be right that there is reliance on replies to pre-contract enquiries only where the very words of the replies are shown or communicated to the purchaser. In most conveyancing transactions where the purchaser is unsophisticated, the effect of the replies is summarised, or the solicitor merely advises the client that there is nothing untoward in the replies that should concern the purchaser; in other words, that it is "okay to proceed". In those circumstances, the purchaser knows that there is nothing untoward that his solicitor has discovered in the pre-contract disclosure.

29. On the facts of this case, the effect of the solicitor's communication to Mr Edwards was that the effect of the Replies was summarised to Mr Edwards and Mr Edwards was aware of it before he entered into the Contract.

30. Ground (2) in Mr Ashik's Respondent's Notice is that the Judge should not have allowed Mr Edwards to make out his case on inducement in this way, given that

it was not pleaded. The Judge rejected this contention on the basis that Mr Kremen had not objected to Mr Edwards' evidence in this regard until too late (paras 161, 162). I too would reject the argument, though for different reasons. Reliance on the Replies was adequately pleaded in the Particulars of Claim. The issue raised by the Defence was that Mr Edwards had actual knowledge of the true position. That specific defence failed on the facts found by the Judge. Mr Edwards' evidence in his witness statement proved reliance on the solicitor's advice and that that advice had been given. What Mr Edwards said in cross-examination, in response to being challenged by Mr Kremen, was by way of particulars of his case that his solicitor had advised him, not a different case. Accordingly, in my judgment, this ground in the Respondent's Notice fails.

31. It is appropriate now to address Mr Edwards' appeal and the third ground in the Respondent's Notice issue together. They both relate to the approach that the Judge took in seeking to answer the question posed by her at para 187 of the Judgment, namely whether Mr Ashik had rebutted the presumption that Mr Edwards was materially induced by the misrepresentation to enter into the Contract. In view of the decision in Barton, the relevant parts of which were referred to the Judge at trial, the Judge was in my view wrong to treat that issue as depending on the answer to the question what Mr Edwards would have done if he had been told the truth in the Replies. The right question was whether or not there was positive evidence that, at the time, Mr Edwards was in fact not materially induced to contract by the misrepresentation.

32. It ís at first glance unclear whether in para 204 the Judge was making two separate findings, the first a conclusion on the "what if" question and the second a separate finding of fact as to actual reliance on the Replies. Having considered carefully paras 191-204 of the Judgment, I consider that in para 204 the Judge was

addressing only the "what if" question, and not also the question that I have identified as being the right question. My reasons are derived from the context of the part of the Judgment from para 187 onwards and are the following.

33. The findings in paras 191 and 194 lay the foundations for the Judge's consideration of the "what if" question identified in para 195. In para 196, the question of the admissions is addressed, but in terms of whether anything said "would have made any difference". In para 198, the Judge identifies as the potential significance of Mr Edwards's evidence that "he would not have proceeded". In para 199, the Judge identifies evidence that relates to the credibility of Mr Edwards' evidence that "he would not have gone ahead". The evidence referred to in para 201 is in the context of supporting a conclusion that Mr Edwards would have gone ahead regardless; and paras 202 and 203 are an assessment of the reliability of Mr Edwards' evidence that he would not have gone ahead. These paragraphs all therefore address the "what if" question identified in para 195, leading directly to the conclusions in para 204. There is no separate consideration by the Judge of what evidence overturned the presumption that the Replies did indeed induce Mr Edwards to enter into the Contract, which there would surely have been if she were addressing that question directly and not just the "what if" question. I therefore do not consider that the final sentence of para 204 is a second, separate finding of fact but rather an expression of the consequence of the first finding, as the Judge considered it to be. Even if it were a separate finding, it is not a finding based on an assessment of the evidence that bears on the answer to the right question.

34. In those circumstances, as in the Barton case, the Judge's finding on the question of inducement cannot stand. I can and should therefore substitute my own view, on the basis of the evidence found by the Judge and the undisputed

background, in answer to the question whether in fact the misrepresentation did not materially induce Mr Edwards to enter into the Contract.

35. The starting point is of course the presumption that it did. The onus is on Mr Ashik to prove that, in fact, it did not. This is, for the reasons given above, not a case in which Mr Ashik has proved that Mr Edwards had no knowledge of the misrepresentation, or (on the Judge's findings of fact) where Mr Edwards knew the truth regardless. Mr Ashik therefore needs to prove that it was evident from Mr Edwards' conduct or words that he was not influenced by the Replies.

36. Given that the effect of the Replies was communicated to Mr Edwards (as the Judge found) in terms that "it is okay to proceed", it is very difficult to envisage circumstances in which a purchaser such as Mr Edwards would not be induced to some material degree by such a statement. It is relevant here to note what Morritt LJ said in the Barton case about inducement being able to be of a passive character and not being required to be active and positive: see para 59 of his Judgment. In that case, the guarantors had already made the decision to proceed before they were told about the forced sale valuation. Morritt LJ rejected the argument that the misrepresentation therefore did not induce them; the misrepresentation caused the guarantors to persevere in a decision that they had already taken (paras 60-63).

37. So even where a purchaser is minded and desires to proceed, as Mr Edwards clearly did, a misrepresentation that induces him to continue with his acquisition can be a sufficient inducement. In my view the effect of the Replies was (and in most cases will be) exactly that: if nothing negative emerges, the purchaser will be likely to proceed, both on the basis that he wants to proceed and also on the basis that further comfort for his purchase has been given.

38. In these circumstances, evidence that Mr Edwards was rather reckless in his general approach to buying the nightclub or that, 18 months later, he did not immediately recognise that he had been misled, or that in other respects his evidence was unreliable, is not sufficient to rebut the presumption. On the facts of this case, it will only have been rebutted if the cross-examination of Mr Edwards established an unqualified and clear admission that he did not in fact rely on what his solicitors told him.

39. At the start of the passage of the transcript that I set out in paragraph 16 above, Mr Edwards said that in a conversation with his solicitor he was told that it was okay to go ahead, everything was perfectly fine. The judge accepted that evidence. Mr Edwards was then asked about whether his solicitor knew that he had not had a survey carried out or conducted any checks on the equipment at the property and as listed in the draft contract. Mr Edwards says in reply that his solicitor would not have known about that. He is then asked, in the critical passage relied on by Mr Ashik, about his attitude to proceeding with the purchase. In substance, Mr Edwards is agreeing that he liked what he had seen, wanted to buy it and was intending to proceed. He then agrees that he was not concerned at all with what questions his solicitor had asked or what answers they had received.

40. The question for me is whether those answers are sufficiently clearly an admission that Mr Edwards did not rely at all on what his solicitor told him. I do not consider that they are. In the first place, on careful consideration they did not strike the Judge as such: Judgment, para 198. Had they done so, she would inevitably have accepted Mr Kremen's argument, recorded at para 196, and found for Mr Ashik on that basis. Part of the reason that she did not accept that argument, as is evident from para 198, is that she accepted Mr Edwards' evidence that he recalled being told by his solicitor that it was okay to go ahead and that he relied on his solicitor.

41. In those circumstances, if the Judge had asked herself whether Mr Edwards was admitting in those answers that he was placing no reliance on what his solicitor told him, it is clear in view of her findings of fact to which I have referred that she would have given a negative answer. Instead, by focussing on the "what if" question, the Judge came to a conclusion, on the balance of probabilities, that Mr Edwards would have proceeded with the purchase even if the Replies had been truthful.

42. Second, it seems clear that Mr Edwards was admitting that he was not concerned himself with what had been asked and answered in the documents. But the reason why he was not concerned is that he had employed a solicitor, on whose advice he relied, to take care of that for him. In view of the evidence that Mr Edwards had given only a minute previously, about what his solicitor had told him, he was not admitting that he placed no reliance on his solicitor's telling him that it was safe to proceed with the transaction. Mr Edwards certainly had a surprisingly carefree approach to the proposed acquisition, but that does not mean that he did not rely on what his solicitor told him. It is presumed that he did, in so far as his solicitor's advice encapsulated the misrepresentation in the Replies, and in my judgment there is insufficient evidence to establish that Mr Edwards was not materially induced to act by the Replies, as their effect was communicated to him by his solicitor.

43. Accordingly, in my judgment, the presumption of inducement has not been rebutted and Mr Ashik fails on the third ground in the Respondent's Notice.

44. Mr Edwards also seeks to rely on clause 10.3 of the contract of sale dated 8 November 2010 in support of his argument on inducement. This provides:

> "The Purchaser admits that the Purchaser:
>
> ...
>
> 10.3 enters into this agreement solely as a result of the Purchaser's own inspection and on the basis of the terms of the agreement and not in reliance upon any representation or warranty either written or oral, statutory or implied made by or on behalf of the Vendor (other than the warranties set out in clause 16 and any representations contained in written replies given by the Vendor's Solicitors to any preliminary enquiries raised by the Purchaser or the Purchaser's Solicitors) ...".

45. Mr Warwick QC contends that this amounts to an agreement that Mr Edwards was relying on formal replies to pre-contract enquiries. In my view, it does not have that effect. The purpose of the clause is to negative reliance on matters that the Vendor or persons on his behalf have told the Purchaser. Those matters are described as any representation or warranties *other than* certain identified warranties and replies. The clause operates as an admission by the Purchaser, namely an admission that he has not relied on the specified matters in entering into the Contract. It does not operate as an agreement between the Vendor and the Purchaser that the Purchaser has positively relied on the excepted matters. It certainly recognises that the Purchaser may rely on those excepted matters, but it does not assist on the question of whether or not the Purchaser actually did so.

46. Regardless of that point, Mr Edwards' appeal on the inducement issue succeeds for the reasons that I have given. His ability to rely on the misrepresentations to avoid the Contract therefore depends on his appeal on the Affirmation issue, because the Judge held in any event that Mr Edwards had elected to affirm the Contract and so could not subsequently avoid it.

Affirmation

47. The Affirmation issue is a very narrow one. It is whether the continued business use of the nightclub by Mr Edwards during the period 7 February 2012 (when Mr Edwards knew of his right to elect to avoid or affirm the Contract) to 27 March 2012 (when his solicitors wrote electing to avoid the Contract) amounted to an unequivocal demonstration to Mr Ashik that Mr Ashton intended to proceed with the Contract rather than avoid it: see Peyman v Lanjani [1985] Ch 457. It is not suggested by Mr Ashik that anything other than the continued nightclub use amounted to such an unequivocal act; nor did Mr Edwards pursue his ground of appeal that the continued business use was unknown to Mr Ashik and so could not in law be an election.

48. In this instance, Mr Edwards accepts that the Judge asked herself the right question at para 211. Mr Warwick QC's argument, before the Judge as before me, was that the continued use was equivocal in view of the correspondence being conducted by the parties' solicitors during that period. The Judge held that remaining in the Premises for 6 weeks doing business there, in the knowledge of the right to elect to terminate the Contract, was an affirmation despite the solicitor's threats of legal action and allegations of fraud. Mr Warwick contends that that was a wrong conclusion, given that in the correspondence Mr Edwards was seeking a full response from Mr Ashik to his allegations.

49. I need to refer to the letters relied upon by Mr Edwards.

50. By letter dated 7 February 2012 to Mr Ashik's conveyancing solicitors, Armstrongs, Mr Edwards' solicitors informed Armstrongs of a claim for fraudulent misrepresentation based on the Replies. The relevant Replies were identified.

Armstrongs were told that before Mr Edwards' solicitors proceeded to represent him on a "no win no fee" basis, Mr Ashik should be given an opportunity to respond to the claim. Armstrongs were warned that work on the proceedings would start unless they responded within 7 days.

51. On 13 February 2012, Armstrongs responded to say that they were not instructed to deal with the matter. On 22 February 2012, Mr Edwards' solicitors wrote to Mr Ashik directly, enclosing a copy of the letter to Armstrongs and giving him 7 days to respond.

52. By letter dated 27 February 2012, Pritchard Joyce & Hinds of Beckenham on behalf of Mr Ashik wrote to Mr Edwards' solicitors asking for details and evidence of the alleged falsity of the representations, denying that the Replies were incorrect and denying fraud. They then wrote again directly to Mr Edwards on 7 March 2012, notifying him of default under the Contract and threatening proceedings.

53. By email of 12 March 2012, Mr Edwards' solicitors sent Pritchard Joyce & Hinds a schedule of the complaints made to the local Council, said that they were seeking further evidence and restated the allegation of fraudulent misrepresentation. The email invited the recipient to state whether or not they were instructed to accept service of proceedings on behalf of Mr Ashik. On 19 March 2012, Pritchard Joyce & Hines informed Mr Edwards' solicitors that they were no longer instructed.

54. On 21 March 2012, Mr Ashik's current solicitors sent an email to Mr Edwards's solicitors "utterly refuting" any liability and characterising Mr Edwards' allegations as "spurious". In response to that, Mr Edwards' solicitors wrote on 27 March stating that they had been awaiting a response before commencing proceedings but giving the new solicitors of Mr Ashik a last period of 14 days to

enable them to take full instructions. The email asserted that the lease and mortgage were considered to be void.

55. It is accepted on behalf of Mr Ashik that there is no time limit as such on the exercise of the right to elect between inconsistent remedies. Accordingly, Mr Edwards had the right to elect to treat the Contract as avoided on 27 March 2012 unless he had previously elected to affirm the Contract. Mr Warwick contends that there is no unequivocal act affirming the Contract because at the time that Mr Edwards is making use of the Premises his solicitors are in correspondence with Mr Ashik's solicitors intimating a claim that, as a matter of law, carries with it a remedy of rescission. He submits that it is setting the bar far too high, in terms of the test for an unequivocal act of affirmation, if it requires a representee to cease making use of premises in order to preserve his right to elect.

56. In my view, there is only one question that I have to decide: did continued use of the nightclub after 7 February 2012 in all the circumstances amount to an unequivocal demonstration to Mr Ashik that Mr Edwards was electing to treat the Contract as valid? The answer to that question is fact sensitive, but the Judge's answer to the question was not a primary fact found by her. The relevant primary facts are undisputed. The only question is whether Mr Edwards' continued business use amounted to an unequivocal affirmation.

57. In my judgment, apart from the correspondence passing between Mr Edwards and Mr Ashik, the continued occupation and business use of the Premises by Mr Edwards probably would have amounted to affirmation of the Contract, but the clear indication from the 7 February letter (and repeated subsequently through the period in question) that legal action for fraud was about to be taken made that business use equivocal in all the circumstances. The test is objective and does not depend on Mr

Edwards' intentions, on the impression made on Mr Ashik or on anything that Mr Ashik did in response. In this respect, the doctrine of election is not the same as the equitable doctrine of waiver or estoppel. It depends on what objectively was communicated to Mr Ashik by Mr Edwards' actions.

58. What was communicated very clearly was that unless Mr Ashik provided quickly a good explanation of his conduct, a claim based on fraudulent misrepresentation would be issued. The response to this was delayed through no substantial fault of Mr Edwards. When eventually Mr Ashik's solicitors did respond, they asked for evidence, which was obtained and reasonably promptly provided to them, with a further indication that proceedings were imminently about to be issued. Mr Ashik and his lawyers could have been under no misapprehension that Mr Edwards was reserving his right to exercise his rights in relation to the misrepresentations alleged. Ironically, the letters from his solicitors did not expressly say that all Mr Edwards' rights were reserved, but in my judgment this was implicit in the threat of legal action that was made in the circumstances of the case. The obvious and natural remedy for fraudulent misrepresentation inducing a person to enter into a disadvantageous agreement is rescission of the agreement. There was nothing in the letters to suggest that Mr Edwards was limiting himself to claiming damages.

59. The Judge did not give any reasons for her conclusion that there was an unequivocal act of affirmation other than the fact that Mr Edwards remained in the Premises doing business there. At one stage, I was concerned about the factual foundation for the suggestion that he did do that in the crucial period. At paras 137 to 139 of the judgment, there are factual findings in relation to the Christmas period and then bookings being taken for April and May, but nothing express in relation to February and March. However, in paragraph 32 of Mr Ashik's statement, he says

that "the Claimant continued to remain in occupation of the Property and to take bookings from promoters well into April and even May", which assertion was not rebutted in Mr Edwards' second statement, made in response to Mr Ashik's statement and otherwise taking issue with much of his evidence. The Judge's reference in para 213 to "the continuity of trade from February 2012 up to 28th March 2012" therefore reflects an apparent consensus on the evidence that Mr Edwards did continue to make business use. The contrary was certainly not pressed in argument on Mr Edwards' behalf.

60. But the objective effect of that continuity of business occupation had to be assessed together with the objective effect of the correspondence. On the one hand, Mr Edwards appeared to be wanting to continue to use the Premises; on the other hand, he was writing threatening to bring proceedings against Mr Ashik for fraudulent misrepresentation and was only waiting (perfectly properly) before issuing those proceedings to see if Mr Ashik had any cogent answers to give to what was alleged against him. Despite the strength of the *prima facie* evidence that Mr Edwards had found, there remained at that stage an element of uncertainty about the fraud that was being alleged. When that uncertainty was dispelled by Mr Ashik's 21 March response, "utterly refuting" the allegations as "spurious", but without advancing any factual case, Mr Edwards' solicitors promptly wrote electing to treat the Contract as void, and proceedings followed shortly afterwards.

61. In those circumstances, in my judgment, the Judge was wrong to conclude that the continued business occupation was an unequivocal election to affirm the Contract. It was clear that Mr Edwards was intending to claim remedies for fraud and was only delaying for a while to see what Mr Ashik had to say about the allegations. In those circumstances, continuing to operate the business in the same way that he had for the previous 15 months or so, for a short further period pending

clarification of the legal position, was not an unequivocal act. Had the use continued after the dismissive response of 21 March for a substantial further substantial period of weeks and months then a different conclusion might well have been justified, but Mr Edwards' action on 27 March was consistent with the message given out by his solicitors' previous correspondence.

62. For the reasons that I have given, I consider that the Judge, who was evidently troubled by the point, reached the wrong conclusion on the affirmation issue too. On that basis Mr Edwards' appeal succeeds: Mr Ashik's fraudulent misrepresentations were a material inducement to enter into the Contract and Mr Edwards did not lose his right to elect to rescind the Contract, which he did by the letter of 27 March 2012.

63. In view of her conclusions on these issues, the Judge did not address the fourth preliminary issue, namely the legal effect of any actionable misrepresentation. It therefore appears to me that this issue will have to be addressed at Central London County Court if the parties cannot agree what the effect should be.