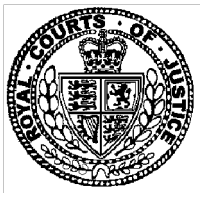

Neutral Citation Number: [2024] EWHC 1133 (Ch)

Claim No. PT-2021-001091

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

13th May 2024

Before :

MR JUSTICE EDWIN JOHNSON

- -

Between :

MCDONALD'S RESTAURANTS LIMITED

Claimant

and

SHIRAYAMA SHOKUSAN COMPANY LIMITED Defendant

- -
- -

Alexander Hill-Smith (instructed by Knights Professional Services Limited, t/a Knights) appeared on behalf of the Claimant
David Holland KC (instructed by Mills & Reeve LLP) appeared on behalf of the Defendant

Hearing dates: 12th, 13th, 14th and 15th February 2024

JUDGMENT

Remote hand-down: This judgment was handed down remotely at 2.00pm on Monday 13th May 2024 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

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Introduction

1. The Claimant is the former tenant of ground floor and basement premises (**"the Premises"**) within the Riverside Building, County Hall, Belvedere Road, London SE1. The Claimant held the Premises pursuant to an underlease (**"the Lease"**) granted on 8th December 1997 for a term of 20 years. The Lease was protected by Part II of the Landlord and Tenant Act 1954 (**"the Act"**). The Claimant sought a new lease of the Premises pursuant to the provisions of the Act, but this was opposed by the Defendant, its landlord. The Defendant opposed the grant of a new lease in reliance upon paragraph (g) of Section 30(1) of the Act and made an application to court, pursuant to Section 29(2) of the Act, for an order for the termination of the Lease.

2. This application (**"the Section 29 Application"**) came on for trial before His Honour Judge Wulwick (**"the Judge"**) in the Central London County Court on 17th and 18th October 2018. The Judge delivered judgment on 12th November 2018. For the reasons set out in the judgment (**"the Judgment"**) the Judge decided that the Defendant had proved the existence of the required intention to occupy the Premises, within the terms of paragraph (g) of Section 30(1). As such, the Defendant was entitled to oppose the grant of a new lease of the Premises and was entitled to an order terminating the Lease. On the same date the Judge made an order (**"the Order"**) terminating the Lease. The Claimant did not seek to challenge the Order, with the consequence that the Lease came to an end on 5th March 2019 and the Claimant vacated the Premises.

3. The Claimant's case is that the Defendant secured this result by deliberate and/or reckless misrepresentation to the court of its intentions in relation to the Premises. The Claimant says that the Defendant did not hold the intention which it said that it had, both in its evidence and in its submissions to the court. The Claimant also says that the Defendant has breached an undertaking which it gave to the court, promising to give effect to the matters which it claimed to intend. The Claimant seeks a substantial award of compensation pursuant to Section 37A of the Act and/or damages at common law in the tort of deceit.

4. The Defendant denies these claims.

5. On 2nd November 2022 Deputy Master McQuail (now Master McQuail) made an order for a split trial of the action on the issues of liability and quantum.

6. This is my reserved judgment on the first part of the split trial, which is concerned only with liability. I will refer to this first part of the split trial as **"the Trial"**.

7. At the Trial the Claimant was represented by Alexander Hill-Smith, counsel, and the Defendant was represented by David Holland KC. I am grateful to both counsel for their assistance in the Trial, by way of their written and oral submissions.

8. The issues in the Trial turned principally on questions of fact, with the consequence that the oral evidence was central to the Trial. There was no formal written transcript of the evidence given at the Trial but, at my request, a member of the legal team on each side kept a note of the evidence. Each note was provided to me. This was immensely helpful

to me, both in assimilating the evidence and preparing this judgment. I should record my gratitude to those involved in producing these notes of the evidence at the Trial.

The conventions of this judgment

9. The following conventions apply in this judgment:

   (1) References to statutory provisions are, unless otherwise indicated, references to the provisions of the Act. I will refer to paragraph (g) of Section 30(1) as **"Paragraph (g)"**.
   (2) Italics have been added to quotations.
   (3) Where I refer to an email I will, unless otherwise indicated, give the time of the email in brackets and by reference to a 24 hour clock.
   (4) The expressions *"lease"* and *"tenancy"* are used interchangeably.

The parties

10. The Claimant is the company which operates McDonald's business in the UK and Ireland. The Claimant also holds the estate of properties in the UK and Ireland from which McDonald's restaurants trade. I was told in evidence that most of the restaurants in the UK and Ireland are operated on a franchised basis, but a minority are operated directly by the Claimant.

11. The McDonald's restaurant at the Premises was operated by a franchisee, on a joint venture basis with the Claimant, until 2016. In 2016 the Claimant terminated the joint venture, bought back the business from the franchisee, and brought the restaurant under its direct control. The reasons for taking back direct control were that the Premises comprised an important strategic location, in Central London, for McDonald's business and brand, which the Claimant wished to retain. In his oral evidence at the Trial Mr Keeling, who is the Claimant's Head of Estates for UK and Ireland, also explained that the Claimant took back direct control of the restaurant business in anticipation of a protracted lease renewal.

12. The Defendant is a company incorporated in Japan. It was founded in 1921 by the Shirayama family. Its business includes property holdings and property dealings. The Defendant's interest in the Riverside Building, formerly County Hall (the home of the GLC) dates back to the 1990s. The Defendant acquired the long leasehold interest in the Riverside Building (**"the Building"**) in 1993 and the freehold interest (with others) in the Building in 1995. The Defendant was registered as the sole proprietor of the freehold interest in the Building in 2012. The Defendant continues to hold both interests in the Building and, over the years, has operated various businesses of its own from the Building, in addition to letting parts of the Building to other business operators such as the Claimant.

The Lease

13. As I have said, the Lease was granted (as an underlease) by the Defendant, in its capacity as long leasehold owner of the Building. The Lease was granted to the Claimant on 8th December 1997. The Lease was granted for a term of 20 years from 8th December 1997. The contractual term of the Lease therefore expired on 8th December 2017. The Lease was protected by the Act as a business tenancy.

14. Pursuant to the terms of the Lease the Claimant fitted out the Premises as a McDonald's restaurant and commenced trading from the Premises. Initially, the Claimant retained direct control of the Premises. Thereafter, the Claimant continued to operate a McDonald's restaurant from the Premises by the franchise arrangement referred to above. The Claimant took the Premises back under its direct control from 2016. The Claimant ceased to trade from the Premises and the restaurant closed on 10th February 2019. I set out below the circumstances in which the restaurant closed. By the time the Lease came to an end the Claimant was paying an annual rent of £379,000.

15. The premises demised by the Lease, which I am referring to as the Premises, were identified in plans attached to the Lease. The Premises are very poorly identified on the plans but, for the purposes of this judgment, precise identification of the extent of the Premises is not critical. Essentially, the Premises are located on the ground floor and basement of the Building comprising, on each level, an area in the shape of a dog leg which is located at what I believe to be the south-western corner of the Building. There is a pedestrian walkway between the Building and the River Thames, known as Queen's Walk. There is direct access at several points into the Building from Queen's Walk, including into the Premises.

The Section 29 Application

16. On 12th December 2016 the Claimant served a notice on the Defendant pursuant to Section 26 requesting a new tenancy of the Premises. The Defendant responded with a counter-notice on 14th December 2016, stating its opposition to the grant of a new tenancy pursuant to Paragraph (g).

17. At this point it is convenient to set out Paragraph (g), including the preparatory words in Section 30(1):

> *"(1) The grounds on which a landlord may oppose an application under section 24(1) of this Act, or make an application under section 29(2) of this Act, are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say:.....*
>
> *(g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."*

18. The Defendant made the Section 29 Application by Claim Form issued on 23rd December 2016. Given the nature of the proceedings, the Claim Form was subject to the requirements of CPR PD56 including the requirement, at paragraph 3.9, to give full details of the grounds of opposition to the Claimant's request for a new tenancy. The details of the Defendant's ground of opposition were expressed, in paragraph 7 of the Claim Form, in the following, relatively brief terms:

> *"That on the termination of the current tenancy we intend to occupy the holding for the purpose, or partly for the purposes, of a business to be carried on by us therein.*

We intend to carry on business as Zen Bento Box or similar which business will be carried on by our wholly owned subsidiary County Hall Cuisine Limited."

19. In its Defence, dated 6th February 2017, the Claimant responded to paragraph 7 of the Claim Form in the following terms:

    "8. Paragraph 7 of the Particulars of Claim is not admitted. The Claimant is put to strict proof as to its intentions and ability to occupy the holding for the purpose, or partly for the purpose, of a business carried on by it therein."

20. The Section 29 Application came before the Judge for a case and costs management conference on 10th November 2017. The Judge directed that the question of whether the Defendant could prove its ground of opposition to the request for a new tenancy, within the terms of Paragraph (g), should be heard as a preliminary issue in the Section 29 Application. As I have already stated, the preliminary issue came on for trial in the Central London County Court on 17th and 18th October 2018. The trial of the preliminary issue (**"the Preliminary Issue Trial"**) occupied one and a half days. Both parties were represented by counsel at the Preliminary Issue Trial.

The evidence before the Judge

21. The Claimant did not call any evidence at the Preliminary Issue Trial. The Defendant called two witnesses, who were cross examined *"extensively"* (to quote from the Judgment) by the Claimant's counsel. I will need to come back to the evidence of these two witnesses in more detail later in this judgment. For present purposes the following summary of the two witnesses and their evidence at the Preliminary Issue Trial will suffice.

22. The first of these two witnesses, who was also the principal witness in the Trial, was Masakuzu Okamoto. Mr Okamoto is a Chartered Property Dealer and is employed by the Defendant as its European Managing Director. Mr Okamoto has day to day responsibilities for the Defendant's affairs in Europe and, in particular, its interests in the Building. Mr Okamoto became a Chartered Property Dealer in 1979. This is a Japanese professional qualification. According to Mr Okamoto's evidence, it is only Chartered Property Dealers who are lawfully permitted to carry out property transactions in Japan. Mr Okamoto has held, for many years, a series of powers of attorney for the Defendant, which have effectively given him full authority to act on behalf of the Defendant in relation to its property and affairs in the UK, including the Building.

23. The second witness for the Defendant was Jitendra Chauhan. Mr Chauhan is a chartered accountant. His evidence was that he had been appointed as the Chief Financial Officer of County Hall Cuisine Limited (**"CHC"**). CHC was a subsidiary company of the Defendant, and was originally identified as the company which would carry on business from the Premises.

24. Mr Okamoto and Mr Chauhan each made a relatively short witness statement in the Section 29 Application. These witness statements were dated, respectively, 8th January 2018 and 6th January 2018. In these witness statements, Mr Okamoto and Mr Chauhan gave evidence that the Defendant (by CHC) intended, on the termination of the Lease, to operate a business at the Premises which was to be known as *"Zen Bento Box"*, which both witnesses abbreviated to *"Zen Bento"*. Mr Chauhan explained in his witness

statement that Zen Bento was to be a Japanese style bento restaurant offering freshly prepared Japanese cuisine.

25. On the first day of the Preliminary Issue Trial the Defendant made an application for permission to rely on supplemental witness statements made by Mr Okamoto and Mr Chauhan, each dated 11th October 2018. The Judge allowed the application and granted permission to the Defendant to rely on the supplemental witness statements, in addition to the main witness statements of each witness. The general purpose of these supplemental witness statements was to update the Defendant's evidence, in terms of

what was described as the Zen Bento project, and to give further details of the Defendant's plans for the Premises. In particular, the witnesses explained that there was to be a change in the identity of the company which would be running the new Zen Bento restaurant from the Premises. Instead of CHC, the business would be run by Aji (Restaurants) Limited (**"Aji Restaurants"**), a subsidiary of CHC.

The Judgment, the Order and the Undertaking

26. The Judge delivered the Judgment on 12th November 2018. I will need to return to the Judgment in more detail later in this judgment, but for present purposes the key elements of the Judgment were as follows.

27. Following the introductory sections of the Judgment, the Judge reviewed the Defendant's evidence of its plans. The Judge then summarised the Claimant's case which, as he recorded, questioned the firmness and genuineness of the Defendant's stated intention. The Judge then summarised the Defendant's case in response to the Claimant's criticisms.

28. At paragraph 20 of the Judgment the Judge gave his assessment of the credibility of the Defendant's witnesses, in the following terms:

> *"20. It is perhaps not surprising that the paucity of documentation, until the late flurry of documents, should have caused the defendant to have doubts about the claimant's intention. However, I am satisfied that Mr Okamoto and Mr Chauhan act in their dealings on the basis of trust and face to face meetings, rather than generating email correspondence. Further, while Mr Okamoto clearly does regard McDonald's food as 'junk food', I am satisfied that he genuinely wants to make County Hall a Japanese destination and to develop quickly serviced hot quality food. I am also satisfied that he sees the development of a Japanese restaurant, Zen Bento, alongside Tokyo Bakery, although the latter is a relatively small business."*

29. The Judge then proceeded to summarise the relevant law and to apply the relevant law to the facts of the case. At paragraph 23 of the Judgment the Judge summarised what it was the Defendant had to prove:

> *"23. The claimant landlord has to be shown to have the requisite intention to occupy the premises for the purposes of a business to be carried on within a reasonable time from the termination of the tenancy."*

30. So far as a firm decision was concerned, the Judge made the following findings, at paragraph 24 of the Judgment:

"24. The central issue in the present case is one of the claimant landlord's subjective intention. The claimant is effectively controlled by Mr Okamoto. I am satisfied that a firm decision has been made by him to occupy the defendant's premises for the purposes of a business conducted by the claimant. In reaching this decision I rely on the following matters in particular:

(1) Mr Okamoto's evidence that he decided in 2016 to proceed, hence the board minute of County Hall Cuisine Limited dated 17 November 2016 and the fact that, as I find, he has remained determined and continues to be determined to open a Japanese restaurant as he has described on the premises following fitting out.

(2) His companies have opened and run food outlets at County Hall before, namely Aji Canteen, and now Tokyo Bakery.

(3) A business plan was produced by Mr Chauhan in 2017. Quotations were obtained from two companies on 27 October 2017. A quotation and programme for the works have now been received from AMP Interior Limited, the claimant's preferred contractor, who has previously worked at County Hall.

(4) As the claimant's counsel asks somewhat rhetorically, what else is the claimant going to do with this valuable unit? It is unlikely in the extreme that the claimant would simply leave the premises empty while it explored its options."

31. At paragraph 27 of the Judgment, the Judge recorded that the Defendant had offered an undertaking to occupy the Premises for its stated purpose:

"27. The offer of an undertaking by the claimant is part of the evidence relevant to the claimant landlord's subjective intention. It serves to reinforce the claimant landlord's intention. I do not see why the undertaking should not be enforceable by contempt proceedings, as accepted by the claimant. It is not an undertaking to continue something requiring constant supervision. Further, I see nothing to prevent the claimant, through Mr Okamoto, giving an undertaking. The current English power of attorney has not expired. The giving of an undertaking now will bind the claimant company for the future. The evidence in any event is that the power of attorney will be renewed, Mr Okamoto having had a power of attorney for over 20 years. This is quite apart from the existence of a separate Japanese power of attorney."

32. In terms of whether there was a reasonable prospect of the Defendant implementing its stated intention, the Judge was satisfied that this had been established, for the reasons which he set out in paragraph 28 of the Judgment:

"28. As to the objective element of the test and whether the claimant landlord has a reasonable prospect of bringing about its intention and opening the business within a reasonable time of the determination of the tenancy, I am satisfied that the claimant landlord does have a reasonable prospect of bringing about its intention and opening the business within a reasonable time of the determination of the tenancy. In particular, I accept the evidence of the claimant's witnesses on the following matters:

(1) The estimate from AMP Interior Limited and the programme for the works. It was not suggested that they could not deliver on time.

(2) The agreement of the executive team to participate in principle. The individuals are clearly known to Mr Okamoto.

(3) The experience of both the claimant's witnesses in the opening of other food outlets on the site.

(4) The absence of any evidence of an impediment to the carrying out of the fitting out works.

(5) The availability of the necessary funds."

33. The Judge therefore concluded that the Defendant had proved its ground of opposition to the Claimant's request for a new tenancy of the Premises, and thus succeeded on the preliminary issue.

34. By paragraph 1 of the Order the Judge directed that the Lease should be terminated and would come to an end in accordance with Section 64(1)(b). The Defendant was awarded its costs of the Section 29 Application, together with an order for an interim payment on account of those costs in the sum of £60,000. The Judge also gave directions for the trial of the Defendant's application for the determination of an interim rent.

35. Section 37A concentrates upon the order which is made for the termination of the relevant tenancy and which does not make an order for the grant of a new tenancy. In the present case this corresponds to paragraph 1 of the Order. I will therefore refer to paragraph 1 of the Order as **"the Termination Order"**.

36. The recitals to the Order included a recital of the undertaking given to the court by Mr Okamoto, on behalf of the Defendant. This undertaking (**"the Undertaking"**) was attached to the Order. I should set out the Undertaking in full:

"I, Masakuzu Okamoto, of The Riverside Building, County Hall, London SE1 7PB offer the following undertaking to the Court on behalf of Shirayama Shokusan Company Limited ("the Landlord"):-

(1) At the termination of the current tenancy the Landlord will occupy the Premises, through its subsidiary Aji (Restaurants) Ltd, for the purposes of a business to be carried on there.

(2) The Landlord will provide the necessary finance to Aji (Restaurants) Ltd to fit out the Premises and to trade therefrom.

(3) The new business (Zen Bento) will commence trading as soon as reasonably practicable after obtaining vacant possession of the Premises.

I am duly authorised to offer this undertaking on behalf of the Landlord. The meaning of this undertaking and the consequences of failing to keep it have been explained to me.

I understand the undertaking that I have given, and that if the Landlord breaks any of its promises to the Court it may be fined and may have its assets seized and that its officers may be sent to prison for contempt of court."

Events after the Judgment

37. In setting out my summary of relevant events after the Judgment it is important to keep in mind that the Defendant did not, following the Judgment, immediately recover possession of the Premises, either in the legal or the physical sense. The effect of the Termination Order was to bring the Lease to an end, but the date on which the Lease

came to an end was determined by the operation of Section 64. The effect of Section 64(1), in a case such as the present case, is to continue the relevant tenancy for a period of three months, beginning with the date on which relevant application to court (in this case the Section 29 Application) has finally been disposed of. Section 64(2) defines the date of final disposal as meaning the earliest date by which the proceedings on the relevant application (including any appeal) have been determined and any time for appealing or for appealing further has expired. In the present case it appears to have been accepted on both sides that this meant that the Lease expired on 5th March 2019, so that the Claimant had to vacate the Premises by that date.

38. On the day after delivery of the Judgment, the giving of the Undertaking and the making of the Order, Mr Okamoto announced the outcome of the Preliminary Issue Trial in an email sent on 13th November 2018 (06:53). The email was addressed to Al

Scott and Sarah Castle of IF_DO, a firm of architects (**"IFDO"**). In his evidence for the Preliminary Issue Trial Mr Chauhan explained that IFDO had been instructed to develop the design and layout for the new Zen Bento restaurant in the Premises which the Defendant, on its case in the Preliminary Issue Trial, intended to open. In his first witness statement Mr Chauhan gave evidence that tender returns for the construction of the new restaurant had been received from two contractors, and that the contract to carry out the works would be awarded in due course, once it was known when the Lease would determine and whether the Defendant could recover possession of the Premises. In his second witness statement Mr Chauhan said that the Defendant had received an up-to-date quotation and draft programme for the works from AMP Interiors Limited (**"AMP"**), and that it was the intention of the Defendant to accept this quotation and appoint AMP to carry out the works.

39. The email of the early morning of 13th November 2018 was not sent to Mr Scott and Ms Castle alone. The email was also sent to a large number of other recipients, said to number some 88 individuals, many of whom had no apparent connection with the Defendant's business, and included persons prominent in the film industry and in politics. The same phenomenon can be observed with other emails sent out by Mr Okamoto in the aftermath of the Judgment. Mr Okamoto routinely shared his emails with the same extended group of recipients who had been included in the email of the early morning of 13th November 2018. In his oral evidence Mr Okamoto explained that the recipients of this and other emails he sent out were persons who shared his commitment and vision for healthy eating and the introduction of Japanese cuisine on the basis of an East meets West concept. I will refer to this extended group of recipients, meaning those recipients of the relevant emails who were not immediately involved with the Premises and/or who were not specifically addressed in the relevant emails, as **"the Recipient Group"**.

40. This email of the early morning of 13th November 2018, which bore the subject title *"BAUHAUS by the River Thames Has Cross Culture Cooking Kaleidoscope Features"*, was in the following terms:

> *"GOOOOOOOOD MORNING*
> *Thanks to a Court Order yesterday, we can now take back the current McDonalds' Riverside Premises, probably the most commercially valuable space in London, and we can open our "own" restaurant.*

PLEASE URGENTLY produce a full set of construction drawings of our new "own" restaurant with the following brief:
AA) "GRAB & GO" restaurant without any seating area inside the building;
BB) Seating area outside on Queens Walk ONLY;
CC) The Entire & Whole Basement space is for Kitchens ONLY;
DD) At this new huge Basemen Kitchen Compound we can cook all the sorts of Far Eastern Dishes and Bakery Products including MOCHI; and
EE) The Ground Floor space is for a "GRAB & GO" Counter for all the sorts ofBENTO Box Meals and "Hello Kitty" "Teddy Bear" branded Food Shop. Are the above brief clear for you?"

41. It should be noted that in this and other emails, from which I quote in this judgment, I have not been able to reproduce the emojis, symbols and pictures of which Mr Okamoto made liberal use in his email communications in the aftermath of the Judgment. I also stress that the emails from which I quote comprise extracts from a

large body of email communications, in a similar vein to those from which I quote, which were sent in the aftermath of the Judgment.

42. MS Castle of IFDO replied the same day (11:46), in the following terms:
*"**Subject:** BAUHAUS by the River Thames Has Cross Culture Cooking Kaleidoscope Features*
Good Morning Mac San
Thank you for your email. This is excellent news.
We are delighted to continue our work on this restaurant and understand your brief clearly.
We will commence work on a construction pack and also commence the drawings and documents required to submit the restaurant fit-out design for listed building consent. We will of course issue this to you for approval before it is submitted. We understand that this is urgent and will provide a programme for this shortly. On a separate note, and by means of an update on other developments within County Hall:
- Chimney Lightwell Classic Coffee House - we will be issuing you with a conceptdesign for this at the end of this week (16/11/18).
- County Hall Lantern (PBB) - we are on target to submit a planning applicationand listed building consent for the County Hall Lantern (PBB) at the end of next week (23/11/18).
- Orchard Courtyard – We have a meeting with glazing contractors tomorrowmorning to develop technical details of the roof and lifts."

43. Mr Okamoto's email of 13th November 2018 was the first of a series of emails which Mr Okamoto sent out, between November 2018 and February 2019, each floating a different proposal for the use of the Premises. The next of these emails was sent by Mr Okamoto on 15th November 2018. The email, which was headed *"County Hall – Restaurant Layout"* was sent to Ms Castle and to various other individuals. One of these recipients was Ken Yokoyama, who had been identified in the Defendant's evidence for the Preliminary Issue Trial as the person who would be the Chief Executive Officer of the Zen Bento restaurant. Other recipients included Tony Pearce of AMP and Ashley

Medway and Geoff Mann of Mann Smith, a firm of Chartered Surveyors who had been consulted by the Defendant in relation to the Premises following the Judgment. In his email of 15th November 2018 (10:18) Mr Okamoto gave the following instruction to Ms Castle, Mr Mann and Mr Pearce:

> *"**Subject:** County Hall – Restaurant Layout*
> *SARAH San, Great Uncle GEOFF San & TONY San,*
> *Please ensure that the above top listed "EIGHT SAMURAI's" shall be also informed of every progress of designing this KRAZY Kitchen Labo for cooking EVERYTHING, in another word "No Menu" "Cooking Everything" "No Seating" "Cooks Only" "Grab & Go" restaurant. hall stress:*
> *AA) Only KITCHENS for cooking ALL the kinds of dishes/meals for the EntireBasement Premises; and*
> *BB) Only a "Handover" Counter and just a Large Open Space with the SimplestFinishes for the Ground Floor Premises. "Handover" Counter must be positioned at the Far End of the Ground Floor. Are the above CLEAR for you?"*

44. On 23rd November 2018, in a series of emails between Mr Okamoto, Mr Yokoyama and Mr Medway, the possibility was raised of running a high class restaurant from the Premises. Mr Okamoto sent various emails (the timings are difficult to disentangle in the email chain), in the following terms, expressing support for this proposal. The last of the emails which I quote here was also sent to the Recipient Group:

> *"YES We shall challenge to open & run such a very top high end Michelin 3 Star Restaurant as a New York SUSHI restaurant shown on your below link.*
> *ASHLEY San will bring a London based High Quality Restaurant Specialised Architect Builder (One Stop) to LCH next week. They can surely work with SANKAKU YA from this very beginning.*
> [Some images are identified in the text of the email]
> *Let's make an absolutely stunning Michelin 3 Star Restaurant at the current McDonalds place by the River Thames"*
>
> *"It sounds TOTALLY INSANE & MAD that we will open & run a Michelin 3 Star Restaurant at the current junk fast food McDonalds outlet located at the most brutally touristic site in LONDON.*
> *But, its position right next to Westminster Bridge & Steps and its stunning views of Westminster Palace & Big Ben (World Heritage) deserves an gorgeously elegant very top end Super Expensive Michelin 3 Star Restaurant.*
> *Please let us know when you will bring your recommended High Quality Restaurant SPECIALISED Architect/Designer/Builder to LCH next week. As discussed and agreed, London County Hall shall now be elevated further up to a Timeless Cross Culture Content Creators' Citadel for Billions Unborn."*
>
> *"**Subject:** A Michelin 3 Star Fast Food Restaurant at the current McDonalds place by the River Thames*
> *ASHLEY San,*
> *Your below suggested Michelin 3 Star Fast Food Restaurant is INNOVATIVE Our headache is HOW to stop yobs and unsophisticated tourists to come in. Naturally looking forward to meeting your recommended High Quality Restaurant Specialised Designer Builders next week."*

45. On 30th November 2018 (13:42) Mr Okamoto sent out the following email to the Recipient Group:

> *"**Subject:** Trilogy Films of HANNAH's ZEN Life Journey and HANNAH's Riverside Restaurant*
> *NIK San & JEREMY San*
> *Our ZEN Arts' Film Editing Studio & Preview Cinema are located right adjacent to the lower level of the current McDonalds riverside space, which we will take back & repossess by next March.*
> *GRACE & HANNAH (Mother & Daughter) shall open & run a Heart of Gold Mother's Home Cooking Dish Restaurant at this riverside space.*
> *Countless number of different drama stories will evolve at/from this amazing riverside restaurant.*
> *We didn't tell anyone before, but actually & truly we have fought (Legal Battles) and taken back the current McDonalds space for GRACE & HANNAH, Children Book Picture Creator MOTHER and Her Only Daughter in your Film Story and Real Life.*
> *With EverGreen Dream & Life ....."*

46. This was followed, the same day (19:10), by the following email to the Recipient Group from Mr Okamoto:

> *"**Subject:** GRACE HANNAH Restaurant fit out - McDonalds space*
> *ASHLEY San, KEN San, ALEXIS San & IÑAKI San,*
> *This afternoon I looked at every room of the current McDonalds space upstairs & downstairs.*
> *The space has even a staff canteen and recreation area. Of course, an enormous strange area.*
> *GRACE & HANNAH can make & run a Kids' Cooking School, Kids' Cooking Contest Theatre, ...*
> *GRACE & HANNAH can certainly develop an unprecedented quality of Heart of Gold MOTHERS' Home Cooking Restaurant for CHILDREN*
> *Let's make it happen by mobilising ALL the resources available"*

47. In terms of progressing matters in relation to the Premises Mr Pearce of AMP sent an email to Mr Okamoto on 4th December 2018 (11:33), asking Mr Okamoto to confirm whether the services of AMP were still required for various projects, including the Premises. Mr Okamoto replied the same day (11:53), telling Mr Pearce to *"forget McDonalds"*.

48. It appears that there was also a meeting between Mr Okamoto and a one stop shop fit out contractor on 4th December 2018, arranged by Mr Medway of Mann Smith. Mr Okamoto made reference to this meeting in an email which he sent to Mr Medway on 5th December 2018 (03:47). The email, which was also sent to the Recipient Group, was in the following terms:

> *"**Subject:** GRACE & HANNAH (G&H) - A Heart of Gold Mother's Home Cooking Kitchen*
> *ASHLEY San,*

Further to our meeting with those "One Stop Shop" Designer/Builder guys yesterday, we now realise that we actually need a very good "Commercial Kitchen Designer & Installer".
As briefed to you, the whole space (entirety) of the current McDonalds premises will be a huge kitchen capable of cooking ALL the dishes/meals in every country on this Planet EARTH, except disgustingly stinky Korean dog foods.
We can do fitting out and decoration by ourselves (DIY) for "Go & Grab" area upstairs.
PLEASE bring an experienced "Commercial Kitchen Designer & Installer" to us as quickly as possible."

49. On 20th December 2018 there was a further exchange of emails between Mr Okamoto and various individuals in which a proposal to use the Premises as a restaurant for children was discussed. In one of these emails (12.20), which was sent to Mr Chauhan, Mr Okamoto characterised the proposal in the following terms:

"Not just ideally, as a matter of fact, the quality of every country and its future can be measured and predicted by Strength & Virtues of MOTHERS and Health & Liveliness of CHILDREN.
You can see it crystal clearly if you see what happened in Japan only in the past 50 years.
Our new huge Kids' Kitchen at the current McDonalds space by the River Thames shall pioneer to develop and cook Healthy, Joyful and Delicious Meals specifically for CHILDREN.
Can you start to suggest such Kids Meals?"

50. Also on 20th December 2018 (15:46) Ashley Medway of Mann Smith emailed Mr Okamoto to recommend Space Group UK Limited (**"Space Group"**) as a one stop kitchen designer. Mr Okamoto replied the same day (16:10) agreeing to Mr Medway speaking to this company. On 18th January 2019 Ben Harrison of Space Group provided some initial block layouts for the Premises. On 19th January 2019 Mr Mann of Mann Smith emailed Mr Okamoto to see if a meeting could be arranged with himself and Mr Medway to discuss the new brief *"so we can get Ben* [Harrison of Space Group] *moving"*.

51. The reply from Mr Okamoto, on 20th January 2019 (07:13) and also sent to the Recipient Group, was in the following terms:

*"**Subject:** Tuesday - Space & Time*
Great Uncle GEOFF San,
Gluten Morgen
Last night I was in the same PanAm airplane with Professor Albert EINSTEIN.
He told me to reuse the existing McDonalds SPACE as it is.
Please don't bother your TIME on Tuesday.
DANKE SCHON"

52. This appears to have been the end of Space Group's involvement. On 30th January 2019 (16:29) Mr Pearce of AMP emailed Dr Daoning Su to suggest JLA Limited (**"JLA"**) as a company which could design and supply, install and maintain kitchen equipment.

53. Dr Daoning Su is a director of County Hall Estate Management Limited (**"CHEML"**), the company responsible for the management of the Building on behalf of the Defendant. Dr Su's evidence at the Trial was that he was asked by Mr Okamoto to manage the building of a new kitchen in the Premises. It is not clear precisely when this instruction was given to Dr Su, but I assume that the instruction had been given by the end of January 2019, when JLA was recommended to Dr Su for the installation of the new kitchen.

54. On 3rd February 2019 (09:26) Mr Okamoto sent an email to Daisuke Shimayame, Mr Medway, Dr Su, a person identified as Mark, and the Recipient Group with further proposals for the Premises. Daisuke Shimayame owned another restaurant and had been identified in the Defendant's evidence for the Preliminary Issue Trial as the person who would be executive chef of the new Zen Bento restaurant. The proposals set out in the email were in the following terms:

> *"**Subject:** GRAB & GO" by the Mother Thames*
> *DAISUKE San, ASHLEY San, Dr Dao Ning & MARK San,*
> *"EKI BEN" of Japanese veggie curry and chicken DON being sold already at ZEN Bakery on Belvedere Road is REALLY GOOD*
> *DAISUKE San can/shall expand range variety of "EKI BEN", and then we will sell the widest range variety of "EKI BEN" at the current riverside McDonalds space after their departure.*
> *We shall make & sell ALL of our original "EKI BEN" under the name & brand of "HA HA", which means MOTHER.*
> *MARK San: Can you register "HA HA" brand for OZU Ltd?"*

55. On 7th and 8th February 2019 Mr Okamoto engaged in an email exchange with Inaki Solaguren-Beascoa, a Spanish restauranteur, who appears to have been consulted on the possibility of turning the Premises into a high-class fish restaurant. Mr Okamoto asked for a budget to be provided in order to install the same kitchen and ovens as those at La Trainera, a fish restaurant in Madrid. In relation to this proposal, on 8th February 2019 (10:35), Mr Okamoto sent the following email, headed *"A Very Top Michelin 3 Star Spanish Fish Cuisine Restaurant in replacement of the current McDonalds by Westminster Bridge"*, to Mr Solaguren-Beascoa, Dr Su, and the Recipient Group: *"Let's make the Finest Spanish Fish Cuisine Restaurant at the current junk fast food McDonalds space by Westminster Bridge upon the Mother River Thames.*

> *London County Hall deserves Very Top Michelin 3 Star Restaurants*
> *Any junk fast food outlet should not have been at the County Hall in the first place*
> *Let's start to build many "Fine Dining" Restaurants not only on Belvedere Road but on the riverside QW"*

56. As I have explained above, while these events were taking place, the Claimant remained in possession of the Premises, pending the Lease coming to an end on 5th March 2019. The Claimant duly vacated the Premises by 5th March 2019. Prior to vacating the Premises the Claimant carried out works to strip out the Premises. The stripping out works were carried out by a company called Galamast Limited (**"Galamast"**). Galamast is a construction company, specialising in civil engineering and shop fitting work. The stripping out works were overseen by Leslie Young, a construction director at Galamast. The Claimant's estate team requested Mr Young to organise the strip out on 21st January 2019.

57. A first site meeting was held on 28th January 2019 between Mr Young and Simon Sheffe, an employee with CHEML. As explained above, CHEML was the company responsible for the management of the Building on behalf of the Defendant. Thereafter there were regular meetings between Mr Young and Mr Sheffe and his team. By agreement between Mr Sheffe and Mr Young, and at the request of Mr Sheffe, a number of items of the Claimant's equipment/fixtures were left on site. The actual works of stripping out commenced on or about 11th February 2019 and were completed on 27th February 2019. On 28th February 2019 a handover meeting took place between Mr Young and Mr Sheffe, at which Mr Sheffe confirmed that he was happy with the condition of the Premises for handover purposes. In his evidence Mr Young, who had worked with the Claimant on a number of construction projects (including stripping out works) over a considerable number of years, described the stripping out works to the Premises as *"a pretty standard strip out"*.

58. On the Defendant's side overall responsibility for the handover was in the hands of Dr Su, as a director of CHEML. As I have noted, direct contact was between Mr Sheffe of CHEML, on the Defendant's side, and Mr Young of Galamast, on the Claimant's side.

59. Mr Okamoto's evidence was that he inspected the Premises, as stripped out, on 23rd February 2019 and concluded that the Premises could be used in the condition in which they had been left by the Claimant, without the need for a complete refurbishment and/or rebuilding. On the same day, and I assume as a result of his inspection, Mr Okamoto sent an email (09:47) to Mr Solaguren-Beascoa and the Recipient Group.
The email, which was headed *"Conversion of the Old McDonalds Space into a Michelin 7 Star Spanish Fish Restaurant"*, was in the following terms:
> *"McDonalds has already removed all of their fittings. Actually, we can reuse ALL of the huge space left without any redesigning or any modification:"*

60. On 25th February 2019 (5:03pm) Mr Solaguren-Beascoa sent a fee quotation from Felipe Alonso for the creation of the equivalent of La Trainera in the Premises. My understanding is that Felipe Alonso is a Spanish architect, whose firm had, I assume, been involved with La Trainera restaurant. The quotation does not appear to have found favour with Mr Okamoto, who emailed Mr Solaguren-Beascoa on the same day (23:16) in the following terms:
> *"Yes, now we can open & see the proposal.*
> *After having seen PELIPE San's proposal, we now realise that we might better use a local English Kitchen Designer as intended originally.*
> *Anyway, our firm intention is to reuse ALL the existing spaces & facilities left by McDonalds. And we ONLY need new Kitchen (Equipments) Installation*
> *BOB Please ask FELIPE San to forget this project completely."*

61. This appears to have been the end of the proposal for a high-class fish restaurant at the Premises. At this stage therefore, no firm decision appears to have been taken on the type of restaurant which would operate from the Premises. A new kitchen was to be installed, but what type of operation it would service had yet to be decided.

62. In relation to the recruitment of staff, on 16th March 2019 (12:07) Mr Okamoto sent an email to an individual called Darran and to Dr Su, and to the Recipient Group, with the following instructions:

> *"**Subject:** Former McDonalds Riverside Space*
> *DARRAN San & Dr Dao Ning,*
> *Further to our discussion about the riverside space to be converted into "ALL About QUALITY" restaurants, please take following actions immediately:*
> *AA) Please place a recruitment advert on the Guardian with the contents agreed;*
> *BB) Please ONLY recruit COOKS, not any waiter/waitress;*
> *CC) Please find aa) Honest; bb) Kind; cc) Quiet) dd) Agile; ee) Consistent, andff) Hard Working COOKS ONLY;*
> *DD) MAMA & LADY COOKS are PREFERABLE. Not any tattoo or long/dyedhair one.*
> *IF we can't find the Best & Finest Cooks, we will just open & run a Veggie Berger restaurant."*

63. As explained above, Dr Su's evidence was that, in addition to the handover of the Premises, he was also asked by Mr Okamoto to manage the installation of a new kitchen in the Premises. Mr Takagi, chef in charge of another restaurant in the Building was found to work with Mr Okamoto in the fit out of the kitchen. The company selected to carry out the work of installing the new kitchen was JLA; the company which had been recommended to Dr Su by AMP. On 25th March 2019 Dr Su had an initial meeting with JLA, also attended by Mr Takagi, at which it was established that

    JLA could design and build the new kitchen. The outcome of the meeting was that JLA was asked to quote for the cost of the new kitchen.

64. It is not necessary to go into the detail of events after the meeting on 25th March 2019. The following outline of events will suffice.

65. Following the meeting on 25th March 2019 progress on the installation of the new kitchen and generally on the process of preparing the Premises to open for business appears to have been slow. It was not until 2nd July 2019 that a contract was signed for the new kitchen. The actual installation did not proceed as planned, as a result of a variety of problems described by Dr Su in his evidence. The new kitchen was ultimately completed, so as to be ready for operation, on 22nd January 2020. A detailed chronology of the project for the design and construction of the new kitchen, from March 2019 to January 2020, together with details of the problems which delayed the project can be found in Dr Su's witness statement for the Trial. The work carried out to the Premises was not confined to the installation of the new kitchen. Electrical and WIFI network installation work was carried out by CHEML itself. Redecoration works were carried out by IDL Colour Coating Limited and Trabur Building Maintenance
    Limited.

66. In the meantime, in November 2019, the Claimant received a report from its external lawyers, one of whom happened to have being walking past the Premises, that the Premises still appeared to be standing empty, with no discernible activity within the Premises. The person within the Claimant who had been immediately responsible for

dealing with the Section 29 Application was Lee Keeling, whom I have mentioned above as the Claimant's Head of Estates for UK and Ireland. Following this report, Mr Keeling decided that the Claimant should monitor the position. Mr Keeling made his own external inspection of the Premises on 29th January 2020. In his evidence Mr Keeling said that from what he could see through the windows of the Premises, no work had been done to the Premises. The Premises looked pretty much as they had when the Claimant had vacated, following the stripping out works.

67. On 6th March 2020 the Claimant's solicitors sent a letter of claim to the Defendant. The letter of claim accused the Defendant of mispresenting its intentions to the court at the Preliminary Issue Trial, and stated a claim for compensation and/or damages pursuant to Section 37A and/or at common law. These claims were denied by a letter in response from the Defendant's solicitors dated 14th April 2020.

68. In the meantime, on 12th March 2020 Aji Restaurants entered into a consultancy agreement with Jun Takagi and Chiyome Kubo. In his evidence Mr Okamoto explained that these gentlemen were both Japanese chefs. Under the terms of this consultancy agreement ("the Consultancy Agreement"), Mr Takagi and Mr Kubo were to provide consulting services which were described in the following terms:

> *"Setting up and managing all aspects required to open and operate a Japanese Restaurant in the basement of the Riverside Building, County Hall, London SE1 7PB. The date of opening shall be the 6th of April 2020."*

69. The Consultancy Agreement was expressed to continue, subject to a right of earlier termination on either side on 10 days written notice, until completion of the consultancy services. Clause 7 of the Consultancy Agreement provided for a monthly

    fee of £20,000 to be paid for the consultancy services. In terms of what work was actually done pursuant to the Consultancy Agreement, the position is unclear. In cross examination Mr Okamoto accepted that there were no documents showing what work was done pursuant to the Consultancy Agreement.

70. Aji Restaurants opened the ground floor of the Premises for business on 30th March 2020, as a restaurant serving Japanese food (including bento boxes) under the name *"Aji Restaurant"* (**"the Aji Restaurant"**). By this time the Government had imposed the first set of lockdown restrictions, with effect from 23rd March 2020, in response to the Covid-19 pandemic. For this reason the Aji Restaurant initially served takeaway food only.

71. On 31st July 2020 the Aji Restaurant opened for the service of takeaway and dine-in food, on the ground floor and basement of the Premises. By reason of the continuing lockdown restrictions the basement premises were closed from September 2020 until February 2021. The evidence of Mr Okamoto was that the incorporation of the basement premises into the dining area of the Aji Restaurant failed to work. For reasons which Mr Okamoto blamed on the pandemic, the basement premises failed to establish themselves as a viable part of the Aji Restaurant. In these circumstances Mr Okamoto decided to use the basement part of the Premises as a bakery, separate to the Aji Restaurant. The documents show that work on designing this bakery commenced in December 2020. The actual

work of fitting out the bakery in the basement of the Premises commenced in January 2021.

72. On 26th February 2021 Aji Restaurants opened a coffee shop and bakery in the basement of the Premises, under the name *"Aji Bakery Café"* (**"the Aji Bakery"**). The Aji Bakery is an English bakery, not a Japanese bakery. The evidence of Mr Okamoto was that the Aji Restaurant continues to make some shared use of the basement; as an additional dining area for customers of the Aji Restaurant.

73. Accordingly, and as matters have now turned out, the Premises are occupied by Aji Restaurants. Aji Restaurants runs a Japanese style restaurant and takeaway service from the ground floor (the Aji Restaurant) and, subject to some sharing of use with the Aji Restaurant, an English style coffee shop and bakery from the basement (the Aji Bakery).

The claims in this action

74. The Claimant's case can be summarised as follows:
    (1) The Defendant made a series of representations to the court in the Section 29 Application, as to its intentions in relation to the Premises. These representations were made in the witness statements of Mr Okamoto and Mr Chauhan and by the Defendant offering the Undertaking.
    (2) The Judge relied upon these representations in his findings in the Judgment in relation to the Defendant's intentions.
    (3) On the basis of the events which occurred, and did not occur subsequent to the Judgment, the Defendant breached the Undertaking, and the representations were shown to be misrepresentations, made deliberately or recklessly, by which the Defendant misrepresented its intentions in relation to the Premises to the court at the Preliminary Issue Trial.

    (4) If the misrepresentations had not been made to the court by the Defendant, the Claimant would have been the successful party at the Preliminary Issue Trial and would have been entitled to a new lease of the Premises pursuant to the Act.
    (5) The Claimant has thereby suffered loss, principally comprising the loss of profits which the Claimant would have been able to realise from the Premises if it had been entitled, as it should have been, to a new 15 year lease of the Premises.
    (6) In these circumstances the Claimant is entitled to an order for compensation pursuant to Section 37A, in the amount of its loss. Further or alternatively the Defendant is liable to the Claimant in deceit at common law, in respect of which the Claimant is entitled to damages in the amount of its loss.

75. This case is denied by the Defendant, for all the reasons set out in its Defence. It is not necessary to set out the detail of the contentions in the Defence, but the essential answer of the Defendant to the allegation that the Defendant made deliberate and/or reckless misrepresentations to the court at the Preliminary Issue Trial can be found in paragraph 53 of the Defence, which reads as follows:

    "It is denied that the Defendant is or has been guilty of deliberate and/or reckless misrepresentation, or any misrepresentation, as alleged in paragraph 54 or at all. Whilst the restaurants opened at the demised premises are not exactly the same as that described in the evidence before the court, as found by the Judge, the

Defendant did at the date of the hearing have a firm and settled intention to open a restaurant as described and take the steps described. The fact that, following the Judgment, the Defendant has changed its mind and opened a different restaurant later than originally envisaged does not falsify the evidence given at trial or the conclusions of the Judge having heard that evidence tested (at length) under oath. The Defendant avers that, having lost at trial, the Claimant is attempting to re-run the same arguments before a different judge."

76. I will use the expression **"the Claims"** to refer, collectively, to the claim for compensation pursuant to Section 37A and the common law claim for damages in deceit.

The issues

77. As I have already mentioned, by an order made on 2nd November 2022 Deputy Master McQuail (now Master McQuail) directed a split trial of the action on the issues of liability and quantum, in the following terms:

> *"1. There be a split trial on the issues of liability and quantum. The trial of the preliminary issues of liability be limited to the issues pleaded at paragraphs 1-57 of the Particulars of Claim; paragraphs 1-54 of the Defence and paragraphs 1-9 of the Reply (the "Preliminary Issues")"*

78. It was common ground between the parties that the issues to be determined in the Trial were restricted to the question of liability. The issues to be determined did not include questions of quantum, which were for the quantum trial, assuming that liability was established.

79. The position in relation to causation is more complicated. If liability is established, I am not concerned with the question of what loss was caused to the Claimant. That causation question is for the quantum trial. In relation to the claim for compensation pursuant to Section 37A, I am however concerned with the question of whether the Termination Order was obtained by misrepresentation on the part of the Defendant, if there was such misrepresentation. This engages the question, which may be said to engage issues of causation, of what has to be demonstrated, and by whom, in order to establish that the Termination Order was obtained by misrepresentation, if there was such misrepresentation. I will return to this particular question when I come to consider the law concerning claims for compensation pursuant to Section 37A.

80. In these circumstances, the issues which I have to decide can be summarised as follows:
    (1) Did the Defendant, in its evidence for the Preliminary Issue Trial and/or by the giving of the Undertaking, misrepresent its intentions in relation to the Premises?
    (2) If the Defendant did misrepresent its intentions in relation to the Premises, was the Termination Order obtained by such misrepresentations?
    (3) If the Defendant did misrepresent its intentions in relation to the Premises, were those misrepresentations made deliberately or recklessly?
    (4) If the Defendant did misrepresent its intentions in relation to the Premises, and if those misrepresentations were made deliberately or recklessly, is the Defendant liable to the Claimant in the tort of deceit?

The evidence

81. This is not a case where it is necessary to resolve conflicts of evidence between witnesses. The principal issues in the case essentially depend upon my assessment of the evidence of Mr Okamoto.

82. The Claimant called two witnesses, both of whom have already been referred to in this judgment.

83. The Claimant's first witness was Lee Keeling, a chartered surveyor who has been employed by the Claimant since 2003. Mr Keeling has already been introduced earlier in this judgment. By way of reminder, Mr Keeling made an external inspection of the Premises on 29th January 2020. Mr Keeling's current position is Head of Estates for UK and Ireland. In his current role, Mr Keeling has responsibility for the management and strategy relating to the Claimant's property holdings throughout the UK and Ireland. Mr Keeling reports to the UK Board of Directors of the Claimant, who are ultimately responsible for deciding upon and implementing strategy.

84. Mr Keeling's evidence was not directly relevant to the issues I have to decide. His cross examination was principally concerned with the question of the Claimant's motivation for bringing this action, which does not seem to me to have much, if any relevance to either of the Claims. Mr Keeling was straightforward and measured in his evidence. Subject to the limitation on its relevance, I accept Mr Keeling's evidence.

85. The Claimant's second witness was Mr Young, a construction director at Galamast, who has also already been introduced. By way of reminder, Galamast is a construction company specialising in civil engineering and shop fitting. Mr Young has worked with the Claimant on a number of projects and, as mentioned earlier in this judgment, was responsible for organising the Claimant's strip out of the Premises on the termination of the Lease. Mr Young's evidence was of limited relevance to the issues I have to decide, and he was only very briefly cross examined. There is no reason to doubt Mr Young's evidence, which I accept.

86. The Defendant also called two witnesses. Again, both witnesses have already been referred to in this judgment.

87. The Defendant's first witness was Mr Okamoto. By way of reminder, Mr Okamoto is a Chartered Property Dealer and is employed by the Defendant as its European Managing Director. Mr Okamoto has day to day responsibilities for the Defendant's affairs in Europe and, in particular, its interests in the Building. By virtue of the series of powers of attorney from the Defendant which Mr Okamoto has held, Mr Okamoto has effectively had full authority to act on behalf of the Defendant in relation to its property and affairs in the UK, including the Building.

88. The Defendant's second witness was Dr Daoning Su. By way of reminder, Dr Su is a director of CHEML (County Hall Estate Management Limited) which, as mentioned earlier in this judgment, has a contract with the Defendant to manage the Building. Dr Su was given the task by Mr Okamoto of overseeing the handover of the Premises by the

Claimant, following the Order. Dr Su was then asked by Mr Okamoto to manage the building of the new kitchen in the Premises.

89. Of these two witnesses the Defendant's principal witness statement, and indeed the key witness in the Trial, was Mr Okamoto. As I need to set out my overall assessment of Mr Okamoto and his evidence at more length, I will deal first with Dr Su.

90. Dr Su's evidence was principally concerned with his performance of the tasks which Mr Okamoto gave him, comprising his management, on behalf of the Defendant, of the handover of the Premises by the Claimant, following the Order, and the subsequent installation of the new kitchen in the Premises. Dr Su was straightforward and clear in his evidence, which I accept.

91. This leaves Mr Okamoto who was, as I have said, the key witness in the Trial. Mr Okamoto made two witness statements and was subject to a lengthy cross examination by Mr Hill-Smith, and substantial re-examination by Mr Holland, which together occupied two days of the four day trial. Although there were breaks mid-morning and mid-afternoon, the process of cross examination and re-examination of this length would be stressful for any witness and, at times, was clearly stressful for Mr Okamoto. I have made full allowance for this in my consideration of Mr Okamoto's evidence and in my general assessment of Mr Okamoto as a witness, which I am about to set out.

92. In terms of my overall impression of Mr Okamoto, I make the following observations, based on Mr Okamoto's oral and written evidence and the documents in the Trial including, in particular, the many emails sent by Mr Okamoto, from which I have already quoted extensively in this judgment.
    (1) So far as the Defendant was concerned, Mr Okamoto clearly was, at all times relevant to the Claims, the decision maker in relation to the Building and, specifically, in relation to the Premises. What he said went. There was no one able to challenge or question his decisions. It was clear that this remained the position at the Trial.
    (2) In cross examination Mr Okamoto accepted that, in practice, he controlled the affairs of CHL and Aji Restaurants, although he was not a director of either company.

    (3) Mr Okamoto is a person who is passionate in his support of healthy eating,Japanese cuisine, the introduction of Japanese cuisine in the West and, more generally, the promotion of relationships between East and West through business and cultural activities.
    (4) Conversely Mr Okamoto is not a supporter of the type of food offered by the Claimant. Mr Okamoto was measured in his criticism of this type of food in his evidence, but it is clear that Mr Okamoto, from the outset, did not want the Claimant's business operating from the Building.
    (5) Mr Okamoto has a style of operation which may be described as eccentric. I refer in particular to the emails sent by Mr Okamoto, from which I have quoted extensively earlier in this judgment. This should not disguise the fact that Mr Okamoto is clearly also a shrewd businessman, with what appeared to be extensive experience of the restaurant trade (including, in particular, Japanese restaurants)

and the more general business of overseeing the Building and the many businesses operating from the Building.

(6) As is apparent from Mr Okamoto's emails, and to adopt phrases used by Mr Holland in his closing submissions, Mr Okamoto fizzes with ideas and is prone to change his mind. The period between November 2018 and March 2019 saw Mr Okamoto consider and abandon a bewildering series of proposals for the Premises, ranging from a Spanish style high class fish restaurant to *"a Heart of Gold Mother's Home Cooking Dish Restaurant"*.

93. Turning specifically to Mr Okamoto's evidence, it was, in various respects, unsatisfactory. At the general level Mr Okamoto frequently failed to answer the questions which were put to him in cross examination. There were three principal reasons for this:

(1) When asked a question in cross examination, Mr Okamoto had a tendency to go straight to a statement justifying his answer to the question, without first giving the answer to the question. It was obvious that this was occurring where Mr Okamoto perceived that the answer which he was obliged to give to the question was or might be unhelpful to the Defendant's cause, with the consequence that Mr Okamoto defaulted straight to his justification for giving that answer.

(2) Mr Okamoto had a tendency to ramble in his answers to questions and/or to make speeches. I was concerned not to prevent Mr Okamoto saying what he wanted to say in answer to questions, but on a number of occasions it was necessary to intervene in order to bring Mr Okamoto back to the question which he had been asked.

(3) Mr Okamoto betrayed irritation in response to a number of questions put to him in cross examination. In particular, in cross examination he complained that he had already answered questions, in circumstances where this complaint was not justified. I ascribe this irritation, in part, to the stress of Mr Okamoto being required to give evidence over a long period of time, but only in part. My impression was that Mr Okamoto is a man who is not used to being contradicted or challenged, and found it irritating when this occurred in cross examination. This impression is borne out by the extensive email communications involving Mr Okamoto which I have seen, parts of which I have quoted earlier in this judgment. There is no sign of any challenge to Mr Okamoto's authority in these communications, and it is clear that no challenge was expected by Mr Okamoto.

94. Beyond this however the difficulties with Mr Okamoto's evidence stemmed from the fact that he often had difficulty in reconciling his own evidence to the evidence of the contemporaneous documents. I will need to come back to this aspect of Mr Okamoto's evidence in more detail when I come to analyse the Claims. For present purposes it is sufficient to make the general point that Mr Okamoto often had difficulty in explaining how his own evidence fitted in with the evidence of the contemporaneous documents.

95. I therefore approach the evidence of Mr Okamoto with caution, mindful of the need to test that evidence against the contemporaneous documents.

96. Finally, a notable absentee from the Defendant's witnesses was Mr Chauhan who gave evidence for the Defendant at the Preliminary Issue Trial, following his appointment as the Chief Financial Officer of CHC. This omission was less significant than it might have been because, as I have said, it is clear that, in relation to and for the purposes of

the Preliminary Issue Trial, Mr Okamoto was the decision maker for the Defendant and, effectively, the controlling mind of the Defendant.

The law (i) The law – Paragraph (g)

97. The relevant law is well-settled, in terms of what has to be proved by a landlord in order to demonstrate intention for the purposes of Paragraph (g). For ease of reference I repeat Paragraph (g):

> *"(g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."*

98. In order to establish an intention for the purposes of Paragraph (g), the landlord must prove two things. First, the landlord must prove a fixed and settled desire to do that which it intends to do. Second, the landlord must prove that it has a reasonable prospect of being able to bring about that result. Statements to this effect can be found in numerous cases, but I find it most convenient to refer to the judgment of Upjohn LJ in *Gregson v Cyril Lord Ltd* [1963] 1 WLR 41, at pages 45-46:

> *"The question whether the landlords intend to occupy the premises is primarily one of fact, but the authorities establish that to prove such intention, the landlords must prove two things. First, a genuine bona fide intention on the part of the landlords that they intend to occupy the premises for their own purposes. So far as this head is concerned, it is not in dispute that the landlords are genuinely intending to occupy the premises for their own purposes. The landlords already occupy 70 per cent, to 80 per cent, of the whole building and obviously, on the evidence, genuinely require to occupy this extra half floor to house some of their senior executives and their staff. Secondly, the landlords must prove that in point of possibility they have a reasonable prospect of being able to bring about this occupation by their own act of volition. This is established by Asquith L.J.'s well-known observations in Cunliffe v. Goodman where he said:*
>
> > *"An "intention" to my mind connotes a state of affairs which the party "intending"—I will call him X—does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable "prospect of being able to bring about by his own act of volition."*

99. In the above extract from his judgment Upjohn LJ made reference to the judgment of Asquith LJ in *Cunliffe v Goodman* [1950] 2 KB 237. *Cunliffe* was concerned with intention in the context of Section 18 of the Landlord and Tenant Act 1927. What was said about intention in *Cunliffe* is however equally relevant to cases involving Paragraph (g). In his judgment in *Cunliffe*, Asquith LJ gave the following useful guidance, at page 254, on the distinction between intention and mere contemplation:

> *"This leads me to the second point bearing on the existence in this case of " intention " as opposed to mere contemplation. Not merely is the term " intention " unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worthwhile."*

100. Applying these principles to the facts of the case before him, Asquith LJ reached the following conclusion, also at page 254:

> *"A purpose so qualified and suspended does not in my view amount to an "intention " or " decision " within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision. In the present case it seems to me that (assuming that the plaintiff was, both before and after November 30, 1945, disposed to demolish and rebuild if she could do so on remunerative terms) she never reached, in respect of the first scheme, a stage at which she could decide on its commercial merits; nor, in respect of the second scheme, the stage of actually deciding that that scheme was commercially eligible—unless indeed she must be taken not merely to have repudiated her architect's authority but to have decided that it was commercially ineligible. In the case of neither scheme did she form a settled intention to proceed. Neither project moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision. For these reasons and those given by my Lord, I think that the appeal should be allowed."*

101. The closing words of this extract, where Asquith LJ referred to a project moving out of *"the zone of contemplation"* into *"the valley of decision"*, are very well-known and often cited. So far as the first limb of intention under Paragraph (g) is concerned, namely the existence of a fixed and settled desire to proceed with the relevant occupation, the requirement that the project must have moved out of the zone of contemplation into the valley of decision is as good a statement as can be found of what must be proved.

102. The existence of the relevant intention must be proved at the date of the trial held to determine whether the landlord can oppose the grant of a new tenancy on the basis of Paragraph (g); see the speech of Lord Denning in *Betty's Café Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20, at page 51. Although it is convenient to refer to the date of the trial in this context, strictly speaking the time for proving the intention is even more specific than this. The intention must be proved at the time when the court comes to make its decision on the trial held to determine whether the landlord can oppose the grant of a new tenancy on the basis of Paragraph (g). I should also mention that *Betty's Café* was concerned with a landlord's opposition to the grant of a new tenancy on the basis of an intention to redevelop for the purposes of paragraph (f) of Section 30(1). This and other cases concerned with paragraph (f) are however, when dealing with intention, equally relevant to intention under Paragraph (g).

103. The burden is on the landlord to prove the existence of the relevant intention for the purposes of Paragraph (g).

104. The intention to occupy must be an intention to occupy the holding for the purposes or partly for the purposes of a business to be carried on by the landlord in the holding, or as the residence of the landlord. The *"holding"* is defined in Section 23(3) to mean the following:

> *"(3) In the following provisions of this Part of this Act the expression "the holding", in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is*

occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies."

105. In the present case therefore, the holding would have comprised the entirety of the Premises. As I understood the evidence, the Claimant made use of the entirety of the Premises for its restaurant business.

106. The intention to occupy must be an intention to occupy on the termination of the current tenancy. This does not however mean that, in the present case, the Defendant had to prove, at the Preliminary Issue Trial, that it intended to occupy the Premises as from 5th March 2019, when the Lease came to an end. The requirement is more flexible than that. The intention must be to occupy within a reasonable time of the termination of the tenancy; see the judgment of Salmon LJ in *Method Development Ltd v Jones* [1971] 1 WLR 168 at 172B-C, cited with approval by Lloyd LJ in *London Hilton Jewellers Ltd v Hilton International Hotels Ltd* [1990] 1 EGLR 112, at 114D-E. What constitutes a reasonable time after the termination of the relevant tenancy, in any particular case, is a fact sensitive question.

107. Mr Holland also stressed three further points, in relation to the operation of Paragraph (g), to which I should make express reference.

108. Mr Holland's first point, which I accept, was that questions of the landlord's motive or purpose in seeking to oppose the grant of a new tenancy in reliance upon Paragraph (g) are of limited relevance. As Lord Sumption JSC explained, in *S Franses Ltd v The Cavendish Hotel (London) Ltd* [2018] UKSC 62 [2019] AC 249, at [16]:

"16 Although the point must be regarded as res integra in this court, I accept the submission of Mr Fetherstonhaugh QC (who appeared for the landlord) that the touchstone of ground (f) is a firm and settled intention to carry out the works. The landlord's purpose or motive are irrelevant save as material for testing whether such a firm and settled intention exists. This is implicit in the abundant case law generated by the Act since Atkinson v Bettison [1955] 1 WLR 1127 and it is the plain meaning of "intention" in both ground (f) and ground (g)."

109. Examination of the landlord's motive or purpose is therefore only relevant so far as it may throw light on the question of whether the landlord genuinely intends to occupy

the relevant premises. Even in that context, it has been said to be of limited value; see the commentary in Reynolds & Clark: Renewal of Business Tenancies (6th Edition) at 7-267.

110. The same points apply to consideration of the commercial viability of the landlord's plans for business occupation of the relevant premises; see further the commentary in Reynolds & Clark at 7-267 and 7-268.

111. Mr Holland's second point, which I also accept, is that intention has to be proved at the date of the trial held to determine whether the intention exists. The intention can thereafter change. The landlord can honestly change its mind, after judgment on the trial,

leaving the tenant with no remedy. Equally, the landlord may not have formulated the required intention until the point when the court comes to make its decision on whether the intention under Paragraph (g) has been established. Provided that the intention can be shown to exist at the time of the decision, it does not matter that it did not previously exist. *Betty's Café* is a notable illustration of this point. In the trial at first instance in that case the decisive event, in terms of proving the intention of the landlord company, took place on what I believe was the sixth and final day of the trial. On that date, at a board meeting, the landlord company passed a resolution to proceed with the relevant development works and to authorise its counsel, on behalf of the landlord company, to give an undertaking to the court to carry out the works. Prior to the conclusion of the trial the resolution was presented to the court and the undertaking was given to the court. This was sufficient to establish the required intention, as at the conclusion of the trial. The question which found its way to the House of Lords, and received a negative answer, was whether the intention had to be proved at any earlier date.

112. Where a change of mind, in terms of intention, is said to have occurred after the relevant trial, the circumstances may provide the tenant with grounds for arguing that there has been no such change of mind, on the basis that the original intention never in fact existed and was misrepresented to the court. In those circumstances the tenant has a potential remedy under Section 37A. The relevant point is however that a Paragraph (g) intention only has to be established at trial. If it genuinely exists then, it can subsequently be changed. It is also relevant to add that the ability of the landlord to change its mind is one reason why the court must be careful to ensure that the intention does genuinely exist at the time when it has to be proved. As Denning LJ explained, in *Fisher v Taylors Furnishing Stores Ltd* [1956] QB 78, at page 84:

> *"For this purpose the court must be satisfied that the intention to reconstruct is genuine and not colourable; that it is a firm and settled intention, not likely to be changed; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession; that the work is so extensive that it is necessary to get possession of the holding in order to do it; and that it is intended to do the work at once and not after a time. Unless the court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention."*

113. Mr Holland's third point was that Paragraph (g) requires intention to occupy for the purposes, or partly for the purposes of *"a business"*, and not any particular business. It seems to me that this point requires some careful analysis. I accept that Paragraph (g) is open, in terms of the business which the landlord intends to operate from the relevant premises. The business can be any activity which qualifies as a business. It seems to me however that this statement requires two qualifications.

114. First, what I have just said does not mean that a landlord can prove an intention, for the purposes of Paragraph (g), by informing the court that it intends to operate an unspecified business from the relevant premises. In theory, a landlord could present a case on intention in these open terms. In theory, a court might accept that the landlord did intend to operate an unspecified business from the relevant premises on the termination of the

current tenancy, with the actual decision of the landlord on what business to operate being deferred until after the trial. In reality, a case of this kind might be difficult to establish. The landlord might be vulnerable to the argument that the leaving of its options open, in terms of what kind of business to operate from the relevant evidence, was good evidence that it had not in fact made a firm decision to occupy the premises for the purposes of a business. The landlord might also be vulnerable to the argument that it could not prove a reasonable prospect of being able to operate a business from the relevant premises on the termination of the current tenancy, in circumstances where no one knew what that business would be.

115. Second, I am not in this case deciding whether the Defendant can prove an intention to occupy for the purposes of Paragraph (g). I am concerned with what the Defendant represented to the court, in respect of its intentions, at the Preliminary Issue Trial. In other words, I am concerned with the specific case put by the Defendant at the Preliminary Issue Trial. The fact that the Paragraph (g) is flexible, in terms of the business which the landlord must intend to operate from the relevant premises, seems to me only capable of being relevant, in the context of Section 37A, to the question of whether an order for termination was obtained by misrepresentation or concealment of material facts, assuming such misrepresentation or concealment. I can illustrate this by an example. A landlord may succeed in proving an intention to operate a very specific business from the relevant premises, and thereby succeed on Paragraph (g). It may then subsequently turn out that the landlord misrepresented the position to the court. The landlord did not have this specific intention. The landlord may however claim that the true position was that it did have an intention, sufficient for the purposes of Paragraph (g), to operate a business from the relevant premises, the precise identity of which had not been settled. If Section 37A requires an examination of what would have happened if the court had been told the truth, which is a question to which I shall come shortly, I can see that it may be relevant to consider whether the landlord could still have succeeded in proving an intention sufficient for the purposes of Paragraph (g), if the court had been informed of the true position.

(ii) <u>The law – claims in the tort of deceit</u>

116. Turning to the Claims themselves I find it convenient to start by setting out what is required to establish the common law claim of deceit. I will then deal with the law relevant to a claim under Section 37A.

117. In his judgment in *ECO3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413 Jackson LJ identified the required elements of the tort of deceit in the following terms, at [77]:

> *"77. I do not agree with the analysis of the authorities which the appellants advance. What the cases show is that the tort of deceit contains four ingredients, namely:*
>
> *i) The defendant makes a false representation to the claimant. ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.*
>
> *iii) The defendant intends that the claimant should act in reliance on it.*
>
> *iv) The claimant does act in reliance on the representation and in consequence suffers loss.*

Ingredient (i) describes what the defendant does. Ingredients (ii) and (iii) describe the defendant's state of mind. Ingredient (iv) describes what the claimant does."

118. In the present case I am concerned with representations made to the court by Mr Chauhan and Mr Okamoto in relation to the intention of the Defendant. I am therefore concerned with the state of mind of Mr Chauhan and Mr Okamoto when they made those representations. In this context there are two points which I should make, relevant both to the claim in deceit and the claim under Section 37A.

119. First, it is clearly established that a statement of a person's intention may engage a misrepresentation. The state of a person's mind, and the question of whether they hold a particular intention at a particular time is just as much a fact as their physical state; see the much-cited statement of Bowen LJ to this effect in *Edgington v Fitzmaurice* (1885) 29 Ch D 459, at page 483. The editors of Chitty on Contracts (35th Edition), in Volume 1 at 10-017, define a misrepresentation as to intention in the following terms: *"A statement of intention may be looked upon as a misrepresentation of existing fact if, at the time when it was made, the person making the statement did not in fact intend to do what he said or knew that he did not have the ability to put the intention into effect; for the promisor's state of mind was not what he led the other party to believe it to be."*

120. Equally, it may be a misrepresentation of fact to make an unqualified statement of intention knowing that it may be subject to change in certain circumstances which are left unexpressed; see the judgment of David Richards J (as he then was) in *Abbar v Saudi Economic & Development Company (Sedco) Real Estate Ltd* [2013] EWHC 1414 (Ch), at [207], where it was accepted, at least in theory, that this could be the basis for a claim in negligent misrepresentation.

121. Second, where one is dealing with an alleged misrepresentation in relation to a statement of intention one needs to bear in mind that a person may make an honest statement of their intention, but then change their mind. In a sense this is a point which I have already made in setting out the relevant law in relation to Paragraph (g). An intention stated to the court, which is found to be sufficient to satisfy Paragraph (g), may subsequently change. If the intention was honestly stated to the court, the tenant has no remedy, notwithstanding the subsequent change of mind.

122. I mention this second point because Mr Holland stressed, in his submissions, that a statement as to a person's present intention, if honestly made, cannot found an action in misrepresentation if thereafter that person genuinely changes their mind. In support of this point Mr Holland cited the judgment of Sir Nicholas Browne-Wilkinson V-C in *Tudor Grange Holdings Ltd v Citibank* [1992] Ch 53, at pages 67-68 and the judgment of Park J in *Inntrepreneur v Sweeny* [2000] EWHC 1060 (Ch) [2002] 2 EGLR 132, at [62]. I accept Mr Holland's submission, but it seems to me that there are some points which need to be distinguished here.

123. The first point is an obvious one. A statement as to a person's present intention, if honestly made, cannot found an action in misrepresentation because there is no misrepresentation. The statement of present intention is true. The statement is not

rendered untrue by a subsequent change of mind. The qualification to this is that there may be circumstances in which the representation as to a person's intention takes effect as a continuing representation and/or in which the person who made the statement is under a duty to communicate a subsequent change of mind, but this qualification does not alter the point that there is no misrepresentation when the statement is made.

124. Equally, a representation as to future conduct which has effect only as a promise has no binding effect unless it also has contractual effect. It may however be possible, in the case of a representation as to future conduct, to find some express or implied representation, which is actionable as a misrepresentation, relating to the circumstances or matters on which the representation as to future conduct was based. There is a valuable analysis of representations of this kind, and the ways in which they may give rise to actionable misrepresentations in the *Inntrepreneur* case, at [62].

125. All this is uncontroversial. What it may be said to overlook is a separate evidential question which may arise where a person claims to have made an honest statement of their intention, following by a rapid change of mind. In such a case the alleged change of mind may be said to have a different explanation; namely that the original intention was not in fact held at the time when it was stated. This is indeed what the Claimant says has happened in the present case. Whether the Claimant is right in saying this is a question to which I shall come. For present purposes I am concerned only to separate out this evidential question from the uncontroversial proposition of law that a statement as to a person's present intention, if honestly made, cannot, in itself and assuming no continuing effect, found an action in misrepresentation if thereafter that person genuinely changes their mind.

(iii) The law – Section 37A

126. Turning to Section 37A, the Claimant claims compensation pursuant to subsection (1), which provides as follows:

> *"(1) Where the court–*
>
> *(a) makes an order for the termination of the current tenancy but does not make an order for the grant of a new tenancy, or (b) refuses an order for the grant of a new tenancy,*
>
> *and it subsequently made to appear to the court that the order was obtained, or the court was induced to refuse the grant, by misrepresentation or the concealment of material facts, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the order or refusal."*

127. A claim for compensation under Section 37A was considered by the Court of Appeal in *Inclusive Technology v Williamson* [2009] EWCA Civ 718 [2010] P.&C.R. 2. To date, and on the basis of the authorities put before me at the Trial, this appears to have been the only decision (or at least reported decision) of the Court of Appeal on Section 37A.

128. The facts of *Inclusive Technology* were not on all fours with the present case. Inclusive Technology was the claimant and the tenant. Mr Williamson was the defendant landlord. The tenant was served with a notice to terminate its tenancy pursuant to Section 25 in June 2006. The Section 25 notice stated that the landlord would oppose the grant of a

new tenancy on the basis that he intended to carry out works to the demised premises falling within the terms of paragraph (f) of Section 30(1). This was confirmed by a covering letter which accompanied the Section 25 notice. Although the Section 25 notice, on its own, would not have had this effect, the judge at first instance found that the covering letter, taken with the Section 25 notice, communicated to the tenant that the landlord had formed the necessary intention to carry out the relevant works at the time when the covering letter and Section 25 notice were sent to the tenant. Subsequent to this, the landlord had a change of mind. By September 2006 the landlord had decided to delay the works until an unspecified date in the future. This change of mind was not communicated to the tenant, which vacated the premises in December 2006.

129. The tenant claimed compensation pursuant to subsection (2) of Section 37A, which provides as follows:

> *"(2) Where–*
>
> *(a) the tenant has quit the holding–*
>
> *(i) after making but withdrawing an application under section 24(1) of this Act; or*
>
> *(ii) without making such an application; and*
>
> *(b) it is made to appear to the court that he did so by reason of misrepresentation or the concealment of material facts,*
>
> *the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of quitting the holding."*

130. The judge at first instance found that there had been no misrepresentation or concealment, essentially on the basis (i) that the landlord's statement of his intention had been true when communicated by the Section 25 notice and covering letter and (ii) that the landlord was not under a duty to communicate his subsequent change of mind to the tenant. The Court of Appeal disagreed, for the reasons set out by Carnwath LJ (as he then was) in his judgment and by Hughes LJ in a concurring judgment. The other member of the Court of Appeal, Smith LJ, agreed with the judgment of Carnwath LJ. The Court of Appeal took the view that the representation that the defendant intended to carry out the redevelopment works was a continuing representation, which the landlord was under a duty to correct if, as had occurred, his intention changed.

131. As can be seen, the key issue in *Inclusive Technology* was whether the representation that the landlord intended to carry out works of development took effect as a continuing representation, which the landlord was under a duty to correct to the tenant, if the landlord's intention changed. This is not an issue which arises in the present case. It seems to me however that the following guidance, relevant to the present case, can be taken from *Inclusive Technology*.

132. First, Carnwath LJ identified the general purpose of Section 37A in the following terms in his judgment, at [18]:

> *"That approach seems to me consistent with what I understand to be the purpose of the provision, which is to encourage fair dealing between the parties. The Act puts a landlord in a special position, in that the disposition of legal rights is determined at least partly by reference to his subjective intentions. Such a formula*

is obviously open to abuse unless the landlord acts responsibly and in good faith. I accept that the landlord is entitled under the Act not to say anything at all; and if he takes that position, the tenant will have to do his best to make his dispositions on the basis of what he knows, and he may be forced to apply to the court. But s.37A recognises that it is desirable to encourage the parties not to invoke the jurisdiction of the court, and to settle matters outside it. In my view, in that context it is no misuse of language to say that here there was either misrepresentation or concealment which led the tenant to give up possession."

133. Carnwath LJ was, of course, addressing a claim for compensation under Section 37A(2) in this paragraph of his judgment. Nevertheless, it seems to me that what was said by Carnwath LJ is also applicable, albeit in a different context, to a claim under Section 37A(1). In particular, the importance of the landlord acting responsibly and in good faith and the need to avoid abuse of the Act seem to me to be matters which apply generally to claims for compensation under Section 37A.

134. Second, Carnwath LJ considered the meaning of the words *"misrepresentation"* and *"concealment"* as they appear in both subsections of Section 37A. At [3], Carnwath LJ said this:

> *"3. The Commission's report gives no guidance as to the interpretation of the words "misrepresentation or concealment", which are the same as in the original section. We have been referred to no authorities directly on the point. I start from the position, therefore, that we should approach them as ordinary English words to be read in context. I note in parenthesis that the section gives the court a discretion whether to award compensation, but it is not suggested that there are any grounds for refusing compensation in this case if the statutory grounds are otherwise made out."*

135. Returning specifically to what has to be demonstrated, in order to claim compensation under Section 37A(1), the following two points can usefully be made at this stage.

136. First, and as I read Section 37A, it does not require that the relevant misrepresentation or the concealment of material facts be deliberate or reckless. In theory, an innocent misrepresentation could found a claim for compensation under Section 37A. That said, in a Paragraph (g) case involving a misrepresentation of a landlord's intention it is difficult to see how a landlord could either innocently or negligently misrepresent its intention. A landlord can be expected to know what is in its mind, when making a representation as to its intention. I note that David Richards J made this point in *Abbar*, at [197]. In the present case the Claimant does not shy away from this. The alleged misrepresentations of the Defendant's intentions are alleged to have been made deliberately or recklessly, and are relied upon also to found the claim in deceit.

137. Second, if compensation is to be claimed under Section 37A(1), it must be *"made to appear to the court that the order* [for termination of the current tenancy] *was obtained, or the court was induced to refuse the grant* [of a new tenancy]*, by misrepresentation or the concealment of material facts"*.

138. Mr Holland submitted that a claim of this kind should be seen as analogous to an action to set aside a judgment on the grounds that it was obtained by fraud. Mr Holland drew my attention to the legal principles which apply in deciding whether a judgment should be set aside on the basis that it was obtained by fraud, as stated by Lord Leggatt JSC in *Finzi v Jamaican Redevelopment Foundation Inc* [2023] UKPC 29 [2024] 1 WLR 541, at [34]:

> *"34 The legal principles to be applied in deciding whether a judgment must be set aside because it was obtained by fraud were summarised by Aikens LJ in Royal Bank of Scotland plc v Highland Financial Partners LP [2013] 1 CLC 596, para 106, in a passage approved by the courts at all levels in Takhar: "The principles are, briefly: first, there has to be a "conscious and deliberate dishonesty" in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment now sought to be impugned . . . Secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be "material". "Material" means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did . . . Put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision . . . Thus the relevant conscious and deliberate dishonesty must be causative of the impugned judgment being obtained in the terms it was. Thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence."*

139. Mr Holland accepted that, in a standard claim in deceit, where A tells lies to B in order to induce B to enter into a contract, it is not generally open to A to submit to the court that, had A told B the truth, B would still have entered into the contract; see Lord Clarke JSC in *Zurich Insurance Co. plc v Hayward* [2016] UKSC 48 [2017] AC 142, at [28] and [36-38]. He submitted however that the situation was different in the present case, both by reason of the wording of Section 37A and by reason of the analogy with an action to set aside a judgment on the basis that it was obtained by fraud.

140. On this basis Mr Holland submitted that, if misrepresentation was established, it was still necessary to consider the counter-factual in the present case; namely what would have happened if the court had been told the truth by the Defendant at the Preliminary Issue Trial. This paved the way for Mr Holland's submission, on the facts and assuming misrepresentation, that if the court had been told the truth there would still have been sufficient to satisfy Paragraph (g) because it would still have been clear that

    the Defendant had the intention to operate a restaurant business from the Premises, sufficient to satisfy the requirements of Paragraph (g).

141. So far as these submissions of Mr Holland were concerned with the meaning and operation of Section 37A, I accept them to this extent. In the present case the Claimant's case is based upon the Termination Order. In a case of this kind, where an order for

termination of the current tenancy has been made, the wording of Section 37A(1) seems to me to be clear in requiring that it be demonstrated that the relevant order of the court was *"obtained"* by misrepresentation or the concealment of material facts. The reference to *"obtained"* seems to me to mean that the misrepresentation or the concealment of material facts must have been causative (in the sense of an operative cause) of the order being obtained. In this sense, causation must be demonstrated by the claimant tenant in order to establish a right to compensation under Section 37A. There is, beyond this, the requirement for the claimant to show that damage or loss was sustained as a result of the order being obtained, but this is a separate requirement and, in the present case, is for the quantum trial, assuming that the Claimant establishes a right to compensation in the Trial.

142. I accept that it follows from the above analysis that it may be legitimate to consider what Mr Holland referred to as the counter-factual; namely what the position would have been if the court had been told the truth. This counter-factual must however be put into its proper context. The counter-factual may throw light on the question of whether the relevant misrepresentation or concealment did have the required causative effect; that is to say whether the relevant termination order was obtained by the relevant misrepresentation or concealment. In this limited sense therefore I accept that the issues which I have to determine, in relation to the claim under Section 37A, engage questions of causation.

143. What I do not accept is that the Claimant is obliged to demonstrate, assuming that misrepresentation or the concealment of material facts is established, that an alternative case based on the true position would also have failed. I cannot see that the Claimant is obliged to address itself to a case which was not put to the court. Indeed, it does not seem to me that the extract from the judgment of Aikens LJ in *Royal Bank of Scotland plc v Highland Finance Partners LP* [2013] 1 CLC 596, as cited by Lord Leggatt in *Finzi*, is stating such a requirement. To the contrary, I note that Aikens LJ made it clear that *"the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence"*. This seems to me to rule out an exercise where one is obliged to consider what would have happened if, assuming misrepresentation or the concealment of material facts, the Defendant had put a different case to the court at the Preliminary Issue Trial. It seems to me that *w*hat is required, in the context of Section 37A(1), is that the misrepresentation or the concealment of material facts was material, in the sense that it had the required causative effect; that is to say that the relevant termination order was obtained by the misrepresentation or the concealment of material facts.

144. It also seems to me that Mr Holland's point fails to distinguish between two situations. First, in a claim under Section 37A(1) the tenant may argue that the entire case put to the court was based on misrepresentation or concealment. If this is established, I cannot see that it is open to the landlord to argue that the termination order was not obtained by such misrepresentation or concealment, because there was an alternative case which the landlord could have put, which would have been a true case and which would have succeeded. The alternative case was never put. Second, one may have a situation where misrepresentation or concealment occurred in relation to part only of the landlord's case. In such a case, in order to determine whether the termination order was obtained by the

misrepresentation or concealment, I can see that it is relevant to consider what effect the misrepresentation or concealment had in persuading the court to accept the landlord's case and also to consider what would have happened if the case had been put without the misrepresentation or concealment. If the misrepresentation or concealment was peripheral, it may be possible to say that the relevant termination order was not obtained by the misrepresentation or concealment.

145. I prefer to rest the above analysis on the wording of Section 37A(1), rather than by direct analogy with an action to set aside a judgment on the basis that it was obtained by fraud. Section 37A contains a self-contained right of statutory compensation, which does not necessarily depend upon establishing fraud. In these circumstances I am wary of too direct an analogy with an action to set aside a judgment on the basis that it was obtained by fraud.

146. Finally, and although this was not directly addressed in the submissions, I note that Section 37A refers to *"misrepresentation or the concealment of material facts"*. It is not entirely clear to me whether the reference to *"material facts"* applies to both misrepresentation and concealment, so that there must be misrepresentation of material facts or concealment of material facts, or whether the reference to material facts is confined to concealment, so that misrepresentation sits on its own. The natural reading of Section 37A seems to me to be that there must be (i) misrepresentation, or (ii) the concealment of material facts. In other words *"misrepresentation"* sits on its own, and is not further described by the words *"of material facts"*. I do not think that this particular point of statutory construction matters a great deal. Assuming that all which has to be demonstrated, in the case of misrepresentation, is a misrepresentation, it does not follow that any misrepresentation will engage Section 37A. It must be demonstrated, in the case of a misrepresentation, that the relevant termination order was obtained by the misrepresentation. It follows that the misrepresentation necessarily has to be a misrepresentation of a material fact or facts. In the absence of this materiality, it is difficult to see how it could be demonstrated that the relevant termination order was obtained by the misrepresentation.

147. With the relevant law in mind, in relation to the Claims, I turn to my analysis of the Claims themselves.

<u>The claim under Section 37A – analysis</u> (i) <u>The claim under Section 37A - the representations</u>

148. The Claimant's case, in terms of misrepresentation, rests upon representations made to the court by Mr Chauhan and Mr Okamoto in their first and second witness statements for the Preliminary Issue Trial.

149. Strictly speaking these representations were made to the Judge. I find it easier however to follow the language of Section 37A, and of the pleaded case in the Claimant's Particulars of Claim and, as a general rule, to refer to the representations as made to the court. The same applies generally in my analysis of the Claims, save where I make specific reference to the reasoning and decisions of the Judge in the Judgment. I intend no disrespect to the Judge in taking this course.

150. The representations are pleaded in paragraphs 21, 22, 23, 25, 26, 27 and 28 of the Particulars of Claim. These paragraphs of the Particulars of Claim are admitted in the Defence, subject to certain points of detail which are corrected in the Defence, also subject to a denial of one sub-paragraph, and also subject to the Defendant reserving its right to make general reference to the witness statements of Mr Chauhan and Mr Okamoto which were filed for the Preliminary Issue Trial. For the purposes of my analysis of the claim of misrepresentation, and for the purposes of understanding the alleged misrepresentations, it is necessary to set out the representations in full. Square brackets and bold print show corrections and the relevant denial, as set out in the Defence.

151. Paragraph 20 of the Particulars of Claim, which is admitted, records that the first witness statements of Mr Chauhan and Mr Okamoto were served in January 2018. Paragraph 21 of the Particulars of Claim deals with the first witness statement of Mr Chauhan. The evidence of Mr Chauhan in that first witness statement was that he had been appointed as Chief Financial Officer of CHL. CHL was identified by Mr Chauhan as the company which would be operating, from the Premises, the Zen Bento Box restaurant described by Mr Chauhan in his evidence. Paragraph 21 of the Particulars of Claim is in the following terms:

> *"21. By first witness statement of Mr Chauhan, the Defendant by Mr Chauhan represented to the Court that:*
>
> *(i) At the termination of the current tenancy of the Claimant, the intention of the Defendant was to occupy the Premises for the purpose, or partly for the purpose of a business to be carried on by it, (paragraph 8 of the witness statement);*
>
> *(ii) "The [Defendant] intends to carry on business at the Premises [defined in the witness statement as comprising the entirety of the demised premises including the ground floor and basement] as Zen Bento Box ("Zen Bento") which will be a Japanese styled bento restaurant offering freshly prepared Japanese cuisine which will be operated by its wholly owned subsidiary County Hall Cuisine Limited", paragraph 9 of the witness statement;*
>
> *(iii) No change of planning use was required to implement that intention. "The only works carried out will be to re-fit the Premises [the ground floor and basement of the demised premises].", paragraph 10 of the witness statement;*
>
> *(iv) "The [Defendant] has instructed IF-DO which is a RIBA chartered architecture and design practice, to develop the design and layout for the new Zen Bento restaurant and tender returns have been received from two contractors. The contract to carry out the works will be awarded in due course when it becomes clearer as to when the [Claimant's] current lease will determine and the [Defendant] can obtain possession.", paragraph 11 of the witness statement;*
>
> *(v) "The [Defendant] has also obtained tenders from two contractors in respect of the computerized food ordering system that the [Defendant] will install as part of the new business. Again the contract will be awarded in due course when it becomes clearer as to*

when the [Claimant's] current lease will determine and the [Defendant] can obtain possession.", paragraph 12 of the witness statement;

(vi) He had prepared a Business Plan for the intended Zen Bento restaurant which included the costs involved in setting up the new venture, paragraph 13 of the witness statement; the Business Plan was exhibited to the witness statement; **[The point is made in the Defence that the Business Plan was described as a *"draft business plan"*]**

(vii) The cost of the works and the setting up costs involved in convertingthe Premises from use as a McDonald's restaurant to a Zen Bento restaurant would be met by the [Defendant] from its own internal resources, paragraph 14 of the witness statement."

152. It will be noted that this paragraph refers to a business plan. This business plan was exhibited to Mr Chauhan's first witness statement. Taking up the point made in the Defence, the business plan was described by Mr Chauhan, in paragraph 13 of his first witness statement, as a draft business plan which he had prepared on the instructions of Mr Okamoto. This draft business plan (**"the Business Plan"**), which was not described on its face as a draft, is summarised in the following terms, in the first part of paragraph 22 of the Particulars of Claim:

> *"22. The Business Plan exhibited to the witness statement of Mr Chauhan was undated and headed "Zen Bento (working title. Quality in a Lunchbox – Healthy Alternative for Fast Food)". It included a Visualisation Sketch that extended to both the ground floor and basement. It gave details of the proposed future Executive Team for the intended business; the CEO was named as Mr Ken Yokamoto, the Chief Financial Officer was named as Mr Chauhan, the Executive Chef was named as Mr Daisuki Shimoyame and the architects IF-DO Architects, "IF-DO"."*

153. Turning to the first witness statement of Mr Okamoto, the representations are set out in the second part of paragraph 22, in the following terms:

> *"By the first witness statement of Mr Okamoto, the Defendant by Mr Okamoto represented to the Court that:*
>
> *(i) He had day to day responsibility for the interest of the Defendant in the Riverside Building, paragraph 2 of the witness statement;*
>
> *(ii) He had been continuously involved in the day to day management of County Hall since 1993, paragraph 8 of the witness statement;* **[Corrected to paragraph 5 of the witness statement in the Defence]**
>
> *(iii) He had read the first witness statement of Mr Chauhan and could confirm that the facts and matters stated therein were correct, paragraph 9 of the witness statement* **[corrected to paragraph 8 of the witness statement in the Defence]***, paragraph 14 of the witness statement."*

154. Paragraph 10 of the first witness statement of Mr Okamoto is dealt with separately, in paragraph 23 of the Particulars of Claim:

> *"23. By paragraph 10 of the first witness statement, Mr Okamoto represented to the Court that the Court could treat his witness statement as the Claimant's*

undertaking that on the expiry of the Lease granted to the Claimant, the Defendant:

(i) Intended to occupy the demised premises for its own business purposes through County Hall Cuisine Limited;

(ii) Would provide the necessary finance to County Hall Cuisine to fit out the demised premises and pay other costs in order to commence trading;

(iii) The new business, Zen Bento, would commence trading from the demised premises as soon as reasonably practicable after obtaining vacant possession, provided there were no technical problems with the fit out works or other matters which were outside the control of the Defendant."

155. Turning to the second witness statements for the Preliminary Issue Trial, paragraph 24 of the Particulars of Claim records the permission obtained by the Claimant to adduce the second witness statements of Mr Chauhan and Mr Okamoto. Paragraph 25 of the Particulars of Claim then deals with the second witness statement of Mr Chauhan. The representations in that second witness statement, which are extensive, are set out in the following terms:

"25. By the second witness statement of Mr Chauhan, the Defendant by Mr Chauhan represented to the Court that:

(i) There had been a change of intention in regard to the identity of the intended trading company; it was now intended that trading should take place through the subsidiary of County Hall Cuisine, Aji Restaurants, paragraph 2; **[corrected to paragraph 3 in the Defence]**

(ii) "Now that the time for vacant possession is approaching, IF-DO will be instructed to prepare the necessary plans and drawings for submission to local planning authority for the necessary consents." , paragraph 7;

(iii) Attached to the witness statement was a programme produced by IFDO showing the time line for obtaining any planning consent and/or listed building consent, commencing on 28 October 2018; in the event that these were found to be required, these would be obtained in the period between the date of the Court's decision and the date of vacant possession, paragraphs 7 and 9; **[The point is made in the Defence that the programme was an *"indicative outline programme"*]**

(iv) The Claimant had received an up-to date quotation and draft programme for the works from a company AMP Interior Limited, "AMP", as attached to the witness statement. The cost of the works was now calculated to be £1,057,951.80 excluding VAT for which a breakdown was annexed to the witness statement;

(v) that the Claimant intended to accept the AMP quote and appoint AMP to carry out the works once the definitive date for possession had been obtained, paragraph 8.

(vi) The draft programme annexed to the witness statement, "theProgramme", gave a generous timetable for the steps to be taken culminating in an opening date for the Zen Bento restaurant of 3

November 2019; paragraph 9; **[This sub-paragraph is denied in the Defence]**

(vii) *As to the matter of Building Control, as advised by IF-DO, this would be dealt with during the period between the date of the Court's decision and the date of vacant possession, save for those aspects which will be dealt with during the course of the works themselves; paragraph 10;*

(viii) *Zen Bento would be adopting an IPOS (i.e. input, processing, output,storage) system, such a system being commercially available, although the branding and software would need to be specifically adapted for the purposes of the proposed Zen Bento restaurant. The intention was that it would be installed in good time for the necessary elements to be incorporated into the fit out, paragraph 11;*

(ix) *Final specific branding for the restaurant would be dealt with as soon as the Court confirms that the Defendant was entitled to possession of the demised premises, paragraph 12;*

(x) *Mr Ken Yokoyama had been selected as CEO for the Zen Bento restaurant and his CV was exhibited to the witness statement. No formal contract had yet been signed and this would be done in the period leading up to the opening of Zen Bento, paragraph 13;*

(xi) *Remaining staff would be recruited on the basis of standard employments which Aji Restuarants would had have prepared by lawyers in spring 2019; staff would be recruited by placing adverts in appropriate trade press; paragraph 14;*

(xii) *It was intended that Zen Bento would serve alcohol and a licence application would be made during the period when the Court confirmed the entitlement to possession and the opening date on 3 November 2019; paragraph 15;*

(xiii) *"I have no doubt that the [Defendant's] plans for Zen Bento can be implemented with the fit out of the [demised premises] commencing as soon as is practicable after possession has been obtained, and trading starting as soon as fit out of the restaurant [is] complete. I have every confidence that the Zen Bento will be a successful enterprise.", paragraph 16."*

156. As I have indicated above, the Defence denies sub-paragraph (vi). I do not think that this denial is justified. In paragraph 8 of his second witness statement Mr Chauhan explained that the Defendant had received an up-to-date quotation and draft programme for the works prepared by AMP, and that the Defendant intended to accept the quotation and appoint AMP to carry out the works. The quotation and the draft programme are exhibited to the witness statement. The draft programme shows an opening date for the new Zen Bento restaurant as 3rd November 2019. The draft programme shows the start date for the works as 1st March 2019. The point may not matter much, and it may be said that the question of whether the timetable was generous was one which fell to be answered by an expert, and by reference to the scale of work shown in the quotation. Nevertheless, it does not strike me as obviously wrong to describe a period of eight months to fit out the Premises for the new Zen Bento restaurant as generous.

157. Paragraph 26 of the Particulars of Claim sets out the following representations, made by Mr Okamoto in his second witness statement:

> *"26. By the second witness statement of Mr Okamoto, the Defendant by Mr Okamoto represented to the Court that:*
> *(i) He had read the second witness statement of Mr Chauhan and confirmed that the facts and matters stated therein were correct, paragraph 2 of the witness statement;*
> *(ii) He was responsible for all of the operations of the Defendant within the United Kingdom and the decision whether and how to proceed with the commissioning and opening of the Zen Bento restaurant was his and his alone, paragraph 5 of the witness statement;*
> *(iii) He was able to direct the operations of County Hall Cuisine and thus also of Aji Restaurants, paragraph 6 of the witness statement;*
> *(iv) He reiterated the willingness of the Defendant to give an undertaking in the terms previously put forward in his first witness statement with the substitution of Aji Restaurants for County Hall Cuisine as the entity that would be operating the restaurant;*
> *(v) The Zen Bento project was a long term one and the investment would be long term as part of a move towards healthier eating, and he was confident that the project would be a long term success, paragraph 9 of the witness statement;*
> *(vi) "There is no doubt that the [Defendant], through its subsidiary had the definite intention, and ability to fit out the [demised premises] and trade from it as soon as possession of it is recovered from the [Claimant].", paragraph 10 of the witness statement."*

158. Paragraph 27 of the Particulars of Claim, which is admitted, records that Mr Chauhan and Mr Okamoto each affirmed the truth of their witness statement at the Preliminary Issue Trial and were cross examined on the same. It is also recorded that Mr Okamoto said in his oral evidence that it was his intention to open the Zen Bento restaurant by November 2019. Paragraph 28 of the Particulars of Claim, which is also admitted, records the offer of the Undertaking, the terms of which I have set out earlier in this judgment, and states that the Defendant represented that it intended to comply with the Undertaking.

(ii) <u>The claim under Section 37A - the alleged misrepresentations</u>

159. The Claimant alleges that the Defendant, by the evidence of Mr Chauhan and Mr Okamoto made misrepresentations to the court and breached the terms of the Undertaking. The actual alleged misrepresentations are pleaded in paragraph 54 of the Particulars of Claim. Before coming to this paragraph, it is necessary to make reference to the immediately preceding paragraphs.

160. In paragraph 50 the Claimant pleads what it alleges was a series of things which were not done, *"contrary to the evidence given to the Court by the Defendant:"*. In paragraph 51 the Claimant alleges breach of the Undertaking, on the following bases:

> *"51. The Defendant was in breach of the undertakings given to the Court in that:*

(i) *The Defendant did not carry out fitting out works to the demised premises as described in evidence to the Court following obtaining vacant possession from the Claimant;*
(ii) *The Defendant did not fund the cost of fitting out works as described in evidence to the Court;*
(iii) *The Defendant did not adhere and made no attempt to adhere to the steps and dates set out in the Programme so as to be able to open the Zen Bento restaurant at the demised premises as soon as reasonably practicable;*
(iv) *The Defendant did not open a Zen Bento restaurant as described in the evidence to the Court at all;*
(v) *The Defendant did not utilise the basement of the demised premises until May 2021 and then for an unrelated purpose."*

161. Paragraph 52 deals with a letter written by the Defendant's solicitors, dated 16th September 2020, which responded to the claim of misrepresentation. Paragraph 52 is in the following terms:

> *"52. By letter from its solicitors dated 16 September 2020, the Defendant had admitted that it has not given effect to the concept of the Zen Bento restaurant presented in evidence to the Court but has offered an explanation in the following terms: "Although our client had drawn up designs for its new restaurant before the trial, there were still unknown factors which could only be considered once our client obtained possession. Our client had not been able to carry out a full and detailed inspection whilst your client was still operating its restaurant business from the Premises. The final details of the works that were required also depended on the state and condition that your clients would leave the Premises when yielding up vacant possession."*

162. The letter of 16th September 2020 is a lengthy letter, which responds in detail to the allegations of misrepresentation. Only a short extract from the letter is quoted in paragraph 52, but for present purposes the relevant point is that the Claimant denies, in paragraph 53 of the Particulars of Claim, the explanation put forward in the letter of 16th September 2020. This denial is put in the following terms:

> *"53. This explanation put forward in the letter of 19* [16] *September 2020 is denied in that:*
> (i) *There were no unknown factors only capable of being considered once the Defendant came into possession and no such unknown factors were referred to in evidence at trial as potentially qualifying the plans put forward by the Defendant in evidence;*
> (ii) *The extent of the demised premises was fully apparent to the Defendant at all material times and the Defendant did not need to inspect in order to ascertain the extent and nature of the demised premises;*
> (ii) *The Defendant could have requested permission to inspect had this been important to the formulation of its plans, which it was not and besides any member of the public was able to enter the demised premises during working hours in any event;*
> (iv) *The Defendant inspected shortly after obtaining judgment in the Proceedings and that inspection revealed nothing that was not fully in*

accordance with what would have been envisaged prior to the trial of the preliminary issue in the Proceedings;

(v) The final detail of the works required for fitting out was not dependent on the state and condition of the premises left by the Claimant in giving up vacant possession, and the Claimant in fact left the demised premises in the state and condition required by the Defendant and no complaint was made by the Defendant as to the state and condition in which the Claimant left the premises."

163. This then leads into the allegations of misrepresentation in paragraph 54 of the Particulars of Claim:

"54. In the premises, by virtue of the failure of the Defendant to act in accordance with its intentions as represented at trial as pleaded at paragraph 50 above, and by virtue of the absence of any other reason for its departure from its stated intentions as pleaded at paragraph 53 above, and by reason of the failure by the Defendant to comply with its solemn undertakings given to the Court as pleaded at paragraph 51 above, the Defendant deliberately and/or recklessly misrepresented to the Court at the trial of the preliminary issue its intentions in connection with the intended carrying on of a business at the demised premises, and the representations and undertakings pleaded at paragraphs 20 to 28 above were false, in that:"

164. The Claimant thus alleges that the Defendant deliberately and/or recklessly misrepresented to the court, at the Preliminary Issue Trial, its intentions in connection with the intended carrying on of a business at the Premises.

165. The particular reasons why the representations are alleged to have been false are set out in the remainder of paragraph 54 of the Particulars of Claim:

(i) The Defendant did not intend to enter into a contract for the carrying out of fitting out works at the demised premises with AMP once judgment in the Proceedings was obtained or at all;

(ii) The Defendant did not intend to carry out fitting works as described in evidence given to the Court and/or to spend £1,057,951.80 excluding VAT on fitting out works to the demised premises;

(iii) The Defendant did not intend to seek planning or other advice from IF-DO in relation to the opening of a Zen Bento restaurant at the demised premises;

(iv) The Defendant did not intend to engage Mr Yokoyama as Chief Executive Officer in connection with the opening of a Zen Bento restaurant at the demised premises;

(v) The Defendant did not intend to engage Mr Shimoyame as Executive Chef at a Zen Bento restaurant to be opened at the demised premises;

(vi) The Defendant did not intend to instruct lawyers in spring 2019 to prepare up draft staff contracts for the purpose of engaging staff to work in the Zen Bento restaurant;

(vii) The Defendant did not intend to install an IPOS or similar system;

(viii) The Defendant did not intend to adhere to the timings or steps shown on the Programme;

(ix) The Defendant did not intend to apply for an alcohol licence within the time shown on the Programme;

(x) The Defendant did not intend to open a Zen Bento restaurant from the demised premises as described to the Court, as soon as reasonably practicable after termination of the Lease, or at all;

(xi) The Defendant did not intend to utilise the basement of the demised premises as soon as reasonably practicable after termination or at all as presented to the court;

(xii) The Defendant did not intend to comply with the undertakings given to the Court."

166. The first part of paragraph 54 of the Particulars of Claim seems to me to be confused in its reference to the Undertaking. The Undertaking was a promise to the court which, if the Claimant is right in its pleaded case in paragraph 51 of the Particulars of Claim, was subsequently breached by the Defendant. In terms of misrepresentation my understanding of the Claimant's case is that the offer of the Undertaking carried with it a representation to the court that the Defendant intended to comply with its obligations in the Undertaking; see paragraph 28 of the Particulars of Claim. My understanding of this particular part of the misrepresentation claim is that the representation alleged to have been made to the court, when the Undertaking was offered, was breached because, so it is alleged, the Defendant did not intend to comply with the Undertaking; see paragraph 54(xii) of the Particulars of Claim.

(iii) <u>The claim under Section 37A - did the Defendant deliberately or recklessly misrepresent its intentions to the court at the Preliminary Issue Trial?</u>

167. The starting point is an analysis of the representations made by the Defendant in its evidence to the court at the Preliminary Issue Trial. The organising feature of these representations was that they were specific. The Defendant did not put its case to the court on the basis that it intended to occupy the Premises for the purposes of a restaurant, the details of which were to be worked out later. The case was put on the basis of a specific set of proposals for a specific type of restaurant.

168. Starting with the first witness statement of Mr Chauhan the evidence of intention was stated in paragraph 8:

"8. At the termination of the Defendant's current tenancy, the Claimant intends to occupy the Premises for the purpose, or partly for the purposes, of a business to be carried on by it."

169. In terms of the evidence in the first witness statement in support of this statement, I note, in particular, the following features of Mr Chauhan's evidence:

(1) The business which the Defendant intended to carry on at the Premises was identified as *"Zen Bento Box"*, which was to be a Japanese styled bento restaurant offering freshly prepared Japanese cuisine, to be operated by CHC. Mr Chauhan used the expression *"Zen Bento"* as a shorthand for the new restaurant. I will adopt the same expression (**"Zen Bento"**) to refer to the new restaurant, as it was referred to in the evidence of Mr Chauhan and Mr Okamoto for the Preliminary Issue Trial.

(2) IFDO had been instructed to develop the design and layout of the new restaurant and tender returns had been received from two contractors.

(3) Two tenders had been obtained for the computerised food ordering system.
(4) The Business Plan had been prepared.

170. While it is true that the Business Plan was described by Mr Chauhan as a draft business plan for Zen Bento, it was a detailed document which gave a thorough explanation of Zen Bento. In particular, the Business Plan introduced Mr Yokomoto (as so identified),

as the Chief Executive Officer, Mr Chauhan as Chief Financial Officer, Mr Daisuke Shimayame as the Executive Chef, and IFDO as the architects. It should be noted that Mr Yokomoto was incorrectly identified in the Business Plan. He should have been identified as Mr Yokoyama. The error is corrected in Mr Chauhan's second witness statement. The Business Plan included spreadsheets showing the intended staffing of Zen Bento, financial projections and costings. Put simply, the Business Plan was a detailed business plan for Zen Bento.

171. Turning to Mr Okamoto's first witness statement Mr Okamoto confirmed that he had read the first witness statement of Mr Chauhan, and confirmed that *"the matters and facts set out therein are correct"*; see paragraph 8. The other particular feature of Mr Okamoto's first witness statement to note is that it offered an undertaking on the part of the Defendant which included the following:

> *"10.3 the new business Zen Bento, should commence trading from the Premises as soon as reasonably practicable after obtaining vacant possession provided that there are no technical problems with the fit out works of the Premises and matters which are outside our control."*

172. The offered undertaking was an undertaking that Zen Bento would commence trading from the Premises. The qualifications in the undertaking related to technical problems with the fit out works and matters outside the Defendant's control. The identity of the new restaurant, that is to say Zen Bento, was not qualified. There was no alternative or fallback proposal.

173. Moving on to Mr Chauhan's second witness statement, the focus was, again on Zen Bento. I note, in particular, the following features of Mr Chauhan's further evidence:
(1) IFDO had prepared a programme showing the timeline for obtaining necessary consents for Zen Bento.
(2) The Defendant had received a quotation and draft programme for the works from AMP. The cost of the works was *"now approximately £1,057,951.80"* excluding VAT, and the anticipated open date was 3rd November 2019.
(3) Mr Yokoyama had been selected by the Defendant as CEO. He had not yet been asked to sign a contract, but would be asked to do so in the months leading up to the opening date.
(4) The remaining staff would be recruited by advertisement in the weeks leading up to the opening of Zen Bento.
(5) It was proposed that Zen Bento would sell alcohol. The application for the required licence would be made in the period between the court confirming the Defendant's right to possession and the opening of Zen Bento on 3rd November 2019.

174. Mr Chauhan concluded his second witness statement in the following terms: *"16. I have previously been involved in the commissioning and opening of food offerings at County Hall on behalf of the Claimant. I have no doubt that the Claimant's plans for Zen Bento can be implemented with the fit out of the Premises commencing as soon as is practicable after possession has been obtained, and trading started as soon as the fit out of the restaurant I complete. I have every confidence that the Zen Bento will be a successful enterprise."*

175. Finally, in terms of the witness statements for the Preliminary Issue Trial, there was the second witness statement of Mr Okamoto. Again, Mr Okamoto stated that he had read the second witness statement of Mr Chauhan and could confirm that the matters and facts set out therein were correct; see paragraph 2. Beyond this I note, in particular, the following features of Mr Okamoto's further evidence:

(1) Mr Okamoto confirmed that the decision as to whether, and how to proceed with the commissioning and opening of Zen Bento was his, and his alone.

(2) Mr Okamoto confirmed that he was able to direct the actions of CHL and Aji Restaurants, given that CHL was a wholly owned subsidiary of the Defendant, and Aji Restaurants was a wholly owned subsidiary of CHL.

(3) Mr Okamoto exhibited a letter from Aji Restaurants dated 10th October 2018, written by Olivia O'Connor, sole director of Aji Restaurants and wife of Mr Okamoto. The letter stated as follows:

> *"As the sole director of Aji (Restaurants) Limited, I am writing this letter to confirm that in accordance with the direction of our ultimate parent company, Shirayama Shokusan Company Limited, that in addition to your operating the Tokyo Bakery at County Hall, we will now be operating the new Zen Bento box restaurant that will be opened in the premises currently occupied by McDonald's Restaurants Limited in place of our group company, County Hall Cuisine Limited."*

(4) Mr Okamoto confirmed his willingness to give the undertaking previously offered in his first witness statement, in the name of Aji Restaurants.

(5) Mr Okamoto concluded his witness statement in the following terms, at paragraphs 9 and 10:

> *"9. Finally, I should make it clear that the Zen Bento project is a long term one. I believe passionately in the move towards a healthier approach to food, and I also believe that the UK market for information dining is moving in that direction. The Claimant intends this project to be a long-term investment in this area, and I am absolutely confident that this project will be a long-term success.*
>
> *10. It is not clear to me on what basis the Defendant opposes the Claimant's claim. I can only assume that it wishes to maintain it occupation for as long as possible before it is required to leave what I expect is a profitable site. There is no doubt that the Claimant, through its subsidiary has the definite intention and ability, to fit out the Premises and trade from it as soon as possession of it is recovered from the Claimant."*

176. I have the benefit of a transcript of the Preliminary Issue Trial, containing the oral evidence of Mr Chauhan and Mr Okamoto and the submissions of counsel. It is not necessary to go through the transcript of the oral evidence. As one would expect both

Mr Chauhan and Mr Okamoto were challenged on the question of intention by Mr HillSmith, who appeared for the Claimant at the Preliminary Issue Trial. There are two important points to make about the oral evidence. The first point is that the cross examination concentrated, as one would expect, on what was said to be the intention of the Defendant; namely to occupy the Premises for the purpose of operating, by Aji Restaurants, Zen Bento. The second point is that both Mr Chauhan and Mr Okamoto essentially stuck to their guns. Both were challenged on the question of whether there was a genuine and sufficient intention to open Zen Bento. Both maintained that there

was. There are many examples of this, but the following extract, not from cross examination but from the re-examination of Mr Chauhan by Mr Watkin (counsel for the Defendant at the Preliminary Issue Trial) is a good example of the tenor of the evidence given by Mr Okamoto and Mr Chauhan at the trial:

> *"Q. You described yourself as the chief financial officer of this undertaking, and you explained that there is no statement of your duties in relation to this. Are you in any doubt as to what you job will be, in relation to this, when – when this project goes ahead?*
> *A. Not at all. I'm very clear on knowing what my role will be.*
> *Q. Has anyone suggested to you that your position in relation to this is in anyway contingent on anything other than getting the property back? A. No.*
> *Q. So in whatever the trade expression (inaudible) express it better. You can't do anything until you get the property back? A. Absolutely, yeah.*
> *Q. So that currently prevents anything happening. Has anyone pointed out anything else which will prevent this project going ahead, or which has to be put in place before this thing goes ahead, that you're aware of?*
> *A. No, other than getting the property back, and go – let's move full steam ahead, and deliver what we've been waiting upon for the last two years."*

177. Finally, there was the Undertaking. The Undertaking was not in the same terms as the undertakings offered in Mr Okamoto's two witness statements. The Undertaking was more tightly drafted. For present purposes however there are three important points to be made in relation to the Undertaking. First, it was offered by the Defendant (by Mr Okamoto) and accepted by the court. Second, the Undertaking was part of the material relied upon by the court in finding that the Defendant had proved its subjective intention; see paragraph 28 of the Judgment. Third, the Undertaking specifically identified the new business, which would commence trading as soon as reasonably practicable after obtaining vacant possession of the Premises, as *"Zen Bento"*. This can only have meant the new restaurant to which Mr Chauhan and Mr Okamoto had spoken in their evidence, which I am referring to as Zen Bento.

178. In his closing submissions Mr Holland referred me to extracts from the transcript of the evidence of Mr Chauhan and Mr Okamoto at the Preliminary Issue Trial which demonstrated, so he submitted, that there was some flexibility in the Defendant's plans for the Premises, which were not set in stone. I understood Mr Holland's essential point to be that it would be wrong, in considering whether the Defendant did misrepresent its intention to the court at the Preliminary Issue Trial, to treat the Defendant's evidence or case as being confined to Zen Bento, with no possibility of variation in the Defendant's plans. In fact, so Mr Holland submitted, the Defendant's plans were, as business plans,

inevitably subject to some flexibility and were presented as such. I am not able to accept these submissions. At the Preliminary Issue Trial the Defendant's case was that it intended to open Zen Bento.

179. This was made clear by the Defendant's counsel, both in his opening skeleton argument for the Preliminary Issue Trial and in his closing submissions. In his written closing submissions Mr Watkin, the Defendant's counsel asked the following rhetorical question:

"What else is C going to with the unit?"

180. This question was not posed in support of an argument that the Judge should find that the Defendant had an intention to use the Premises for some kind of restaurant. The question was posed to support the Defendant's case that intended to open Zen Bento.

181. The same point applies to the oral evidence given by Mr Chauhan and Mr Okamoto at the Preliminary Issue Trial. It is true that there was some acceptance that business plans have to be flexible, but this acceptance occurred in the context of the evidence of both witnesses, both written and oral, that the Defendant intended to open Zen Bento. Neither Mr Chauhan or Mr Okamoto came anywhere near saying that the Defendant's intention was in fact more open than this.

182. In summary, the Defendant's case at the Preliminary Issue Trial was clear and specific. It intended to occupy the Premises for the purposes of operating, by Aji Restaurants, Zen Bento. There was no material qualification expressed to this intention, beyond the condition that the Defendant needed to obtain vacant possession of the Premises.

183. Did the Defendant misrepresent its intentions, or more accurately its intention to the court? As I understand the Claimant's case, it is not said that there is evidence, on or prior to 12th November 2018, which demonstrates that the Defendant misrepresented its intention to the court. Instead, the Claimant relies on the events which took place after 12th November 2018.

184. Given the certainty and precision of the Defendant's evidence that it intended to occupy the Premises, by Aji Restaurants, for the purposes of operating Zen Bento, it is a considerable surprise to find Mr Okamoto, literally within hours of the Judgment being delivered, emailing IFDO and the Recipient Group with a brief for the development of a new *"grab and go"* restaurant, with no internal seating and little or no resemblance to Zen Bento. The email, the terms of which I have set out earlier in this judgment, was sent at 06:53 on 13th November 2018. The terms of the email, and the communication of the new brief to IFDO make it quite clear, in my judgment, that Mr Okamoto regarded himself as being at liberty to develop whatever kind of restaurant he wished in the Premises. The email refers to taking back the Premises from the Claimant, and makes no reference to the obligations imposed by the Undertaking. It seems clear to me, reading the email of 13th November 2018, and I so find, that Mr Okamoto regarded the Termination Order as the equivalent of a possession order.

185. All this is borne out by the subsequent emails sent out by Mr Okamoto with ideas for the use of the Premises. I have set out the relevant emails earlier in this Judgment. In summary those emails show Mr Okamoto floating a series of proposals for the use of

the Premises ranging from a grab and go restaurant with no internal seating, through a restaurant for children, a Michelin 3 star restaurant and a high-class Spanish style fish restaurant, to the Japanese restaurant on the ground floor, and the English bakery in the basement which eventually opened for business. Conspicuous by its absence from these emails is Zen Bento. In saying this, it will be appreciated that my reference to Zen Bento continues to mean the new restaurant which, in the Preliminary Issue Trial, the Defendant had stated that it intended to open at the Premises. I have adopted the same expression to refer to what was said to be the intended new restaurant. I accept that proposals for a Japanese style restaurant did feature in the email communications in the aftermath of the Judgment. What went missing was Zen Bento itself.

186. This is not the only surprising feature of the post-Judgment emails from Mr Okamoto. In his second witness statement for the Preliminary Issue Trial Mr Chauhan identified AMP as the company which the Defendant intended to instruct, for the purpose of carrying out fitting out works costed at over £1 million. On 4th December 2018, in response to an inquiry from Mr Pearce as to whether the services of AMP were still required for various projects, including the Premises, Mr Okamoto emailed Mr Pearce telling him to *"forget McDonalds"*. This brought an abrupt end to AMP's involvement with the Premises. Ultimately, it was JLA which was instructed to install the new kitchen in the Premises, but not before another company, Space Group, had been approached and then discarded.

187. IFDO, the architects instructed in relation to Zen Bento experienced something similar. On 15th November 2018 (09:40) Ms Castle of IFDO emailed Mr Okamoto looking to set up a meeting *"to agree the layout for the exciting new restaurant at London County Hall."*. In cross examination Mr Okamoto accepted that this meeting never took place and that this was the end of IFDO's involvement with the Premises. In the Business Plan IFDO had been identified as part of the Executive Team for Zen Bento.

188. IFDO was not the only member of the Executive Team to disappear from view in the wake of the Judgment. Mr Yokoyama had been named as CEO of Zen Bento. In the post-Judgment emails however Mr Yokoyama appears only infrequently in direct email communication with Mr Okamoto. In this context there is an exchange of emails which took place between Mr Yokoyama and Mr Okamoto on 4th December 2018, in which Mr Yokoyama was seeking to set up a meeting with Mr Okamoto over the Christmas period. The remarkable feature of this email exchange is that it made no reference to Mr Yokoyama's intended role as CEO of Zen Bento. If this role was intended, it appears to have been forgotten by 4th December 2018.

189. The same applies to Mr Chauhan, named as CFO of Zen Bento. While it is true that Mr Chauhan can be found copied into post-judgment emails from Mr Okamoto, his direct communication with Mr Okamoto was minimal. On 20th December 2018 Mr Okamoto had an email exchange with Mr Chauhan, concerning Mr Okamoto's proposal for *"Our new huge Kids' Kitchen at the current McDonalds space by the River Thames"*. As with Mr Okamoto's exchanges with Mr Yokoyama, these exchanges made no reference to Mr Chauhan's intended role as CFO of Zen Bento. Again, if this role was intended, it appears to have been forgotten.

190. The same also applies to Mr Shimoyame, named as Executive Chef of Zen Bento. In his evidence in cross examination at the Preliminary Issue Trial, Mr Okamoto confirmed that Mr Shimayame was going to be involved as Executive Chef. Following the Judgment, Mr Shimayame, who was based in this country, appears to have had no direct involvement with the Premises. Again, if his role as Executive Chef was intended, it appears to have been forgotten once the Judgment had been delivered. I say this not simply because of the absence of evidence of Mr Shimayame having any direct involvement with the Premises in the aftermath of the Judgment. One can also test this by referring to an email which was sent to Mr Shimayame and others, including the Recipient Group, by Mr Okamoto on 3rd February 2019 (09:26). I have made reference to this email earlier in this judgment. The email set out proposals for types of food which might be sold from the Premises. According to the email, Mr Okamoto anticipated that Mr Shimayame would be able to *"expand range variety of "EKI BEN", and then we will sell the widest range variety of "EKI BEN" at the current riverside McDonald's space after their departure"*. I find it impossible to reconcile the terms of this email with the evidence given at the Preliminary Issue Trial, which was that Mr Shimayame was to be the Executive Chef of Zen Bento.

191. In cross examination Mr Okamoto had considerable difficulty in explaining these discrepancies between the evidence given to the court at the Preliminary Issue Trial and his conduct after the Judgment had been delivered. In relation to AMP Mr Okamoto tried to claim that their involvement with the Premises had not come to an end on 4th December 2018, and that he had only ended their involvement in February or March 2019. He suggested that he might have had a meeting with AMP after 4th December 2018. There is however no other evidence either of the meeting or of AMP continuing to be involved with the Premises after 4th December 2018. This would also be inconsistent with the position of IFDO, whose involvement with the Premises had come to an end by 15th November 2018. For these reasons, I reject this evidence of Mr Okamoto.

192. Mr Okamoto also sought to claim that the decision to end AMP's involvement was caused by Brexit related problems, which made it difficult to recruit a suitable Japanese chef. In cross examination Mr Okamoto sought to rely generally on Brexit related problems as the explanation for not proceeding with Zen Bento, following the Judgment. As Mr Okamoto explained in cross examination, Brexit was historically unprecedented and had an impact on everything. Without a Japanese head chef, the Defendant's plans could not be implemented. So, everything had to be reviewed. Mr Okamoto claimed that the Judgment had come as a shock to him. He had not expected the Defendant to win at the Preliminary Issue Trial. When the Defendant did win, and he was faced with the reality of the position, he realised very quickly that Zen Bento was *"mission impossible"*.

193. I regret that I cannot accept any of this evidence. So far as I am aware, there was no mention of Brexit related problems in the evidence given by Mr Okamoto and Mr Chauhan at the Preliminary Issue Trial. There is no mention of Brexit related problems in the Defendant's Defence in this action. I can accept that Zen Bento required the services of an experienced Japanese chef, at least in order to train the chef who would be the actual Zen Bento chef. I can accept that Brexit, or more accurately the

imminence of Brexit was capable of creating problems for the recruitment of specialist chefs from overseas. What I cannot accept is that Brexit only became a problem in the mind of Mr Okamoto after the Judgment. The suggestion that Mr Okamoto only realised that Brexit was a problem for Zen Bento after the Judgment is not credible. Putting the matter at its most extreme it is not credible that Mr Okamoto did not perceive Brexit as a problem on 12th November 2018, but had understood it to be a problem a few hours later, when he despatched his email to IFDO and the Recipient Group at 06:53. There is however an equal lack of credibility if one extends the period over which Mr Okamoto claims to have realised that Brexit was a problem. By way of example, there is an equal lack of credibility if one takes the relevant period as lying between (i) the dates of the Preliminary Issue Trial, in October 2018, and (ii) the date on which Mr Okamoto dispensed with the services of AMP (4th December 2018) or the date of any of the post-Judgment emails in which Mr Okamoto made new proposals for the use of the Premises.

194. Mr Okamoto also sought to claim that it was only when he inspected the Premises that he realised that the Premises could be re-used in their existing condition. Prior to that, so he claimed in his evidence, there was uncertainty in terms of what condition the Premises would be in. The original design for Zen Bento, as presented to the court at the Preliminary Issue Trial, was only possible if the Premises were left in a totally derelict condition and required total refurbishment. Again, I cannot accept this evidence. This was not a qualification which was explained to the court at the Preliminary Issue Trial. Beyond that, this claim is seriously undermined by the email which Mr Okamoto sent to Mr Mann on 20th January 2019 (07:13) in which Mr Okamoto said that he had been told by Professor Einstein to re-use the existing space in the Premises. By way of context, this email was sent in response to Mr Mann seeking to arrange a meeting with himself and Mr Medway to discuss *"the new brief"* for the Premises, in order to allow Space Group to start work. The somewhat eccentric style of Mr Okamoto's reply should not be allowed to obscure the fact that the reply had a serious commercial and professional purpose. Mr Okamoto had decided that he did not need Space Group, because he had decided to re-use the Premises as they were. I am satisfied, and I find that Mr Okamoto was, both in January 2019 and when he gave his evidence at the Preliminary Issue Trial, well aware that re-using the Premises as they were, without the need to spend over £1 million on fitting out works, was a perfectly feasible option.

195. Another striking feature of the evidence in this action is the contrast between the intensive email activity in which Mr Okamoto engaged following the Judgment, and what appears to have been, on the evidence, the almost total absence of such email activity prior to the Judgment. At the Preliminary Issue Trial a single email was produced, from Ms Castle of IFDO to Mr Okamoto, sent on 27th October 2017 (17:20). The email attached tender returns from two contractors for the Zen Bento project. As from 13th November 2018 there is a profusion of emails from and to Mr Okamoto concerning the Premises. This contrast is extraordinary. It is right to say that the absence of emails was put to Mr Chauhan and Mr Okamoto at the Preliminary Issue Trial. Their explanation was that they acted in their dealings on the basis of trust and face to face meetings, which was accepted by the Judge; see paragraph 20 of the Judgment. The Judge did not however have the advantage of being able to compare

the absence of emails with the profusion of email communications following the Judgment.

196. In cross examination the absence of emails prior to the Judgment was put to Mr Okamoto, who essentially repeated his evidence that he preferred to do business over the telephone or face to face. When Mr Okamoto was asked why he was so free with emails after the Judgment he suggested that he had to start sending emails because he was preoccupied with the enormous problems of Brexit. Shortly thereafter he suggested that there was no email correspondence pre-Judgment because his experience had been that people abused emails by taking part of an email and twisting the context. He also claimed, later in cross examination, that he had sent emails to a large number of people as a result of his previous experience of emails being abused. Later again, in answer to a question from me as to the absence of emails prior to 12th November 2018, Mr Okamoto claimed that he had not wanted to think about the Preliminary Issue Trial or the Section 29 Application. He found them depressing, and focussed on other things. I did not find any of these explanations to be credible. None of them make sense, when the absence of emails pre-Judgment is compared with the position post-Judgment. I have already dealt with Brexit. None of the remaining explanations make sense, when set against Mr Okamoto's use of email communication post-Judgment. It is clear that Mr Okamoto is a regular and enthusiastic user of email communication, and that it is an integral part of the way he does business.

197. In his closing submissions Mr Holland referred me to an exchange of emails which took place on 24th October 2018; that is to say after the hearing of the Preliminary Issue Trial but before the Judgment. Mr Holland's submission was that these emails were consistent with what the court had been told, and did not evidence any conspiracy by Mr Chauhan and Mr Okamoto to mislead the court. They were good evidence of Mr Okamoto's state of mind at that time, as Mr Okamoto said in cross examination at the Trial, and were consistent with Mr Okamoto's evidence in the Preliminary Issue Trial.

198. The relevant email exchange commences with an email sent earlier than those to which I was referred by Mr Holland. The first email in this exchange was, I believe, sent by Mr Okamoto on 23rd October 2018 (I cannot find a time) to three individuals, one of whom was Mr Chauhan. The email was in the following terms:

> *"As addressed to you at the BM yesterday afternoon, Cadogan shall invest heavily in "Locally Sourced Fresh Seasonal Food" - Healthy & Tasty Dishes.*
> *We Are What We Eat.*
> *It is now extremely difficult to resurrect LIFE of "Locally Sourced Fresh Seasonal Food", but there are some ways different from those Old Mothers' Home Cooking Days.*
> *Farming, Cooking and Eating are still the Foundation of HUMANITY, CIVILISATION & CULTURE.*
> *Actually, Cadogan has already started "Locally Sourced Fresh Seasonal Food" Ventures at London County Hall. This must be accelerated more vigorously."*

199. Mr Chauhan replied in the following terms, on the same day (10:13):

"As you have always said - we are what we eat; and you have already started such ventures already. I have fully understood this and look forward to delivering many more such ventures not only in London, but wherever opportunity arises ..... based on mothers cooking using locally sourced fresh seasonal foods. Look forward to speaking soon, and thank you for a wonderful dinner last night."

200. Mr Okamoto sent an email on 24th October 2018 (9:14) to four individuals, including Mr Chauhan, Mr Yokoyama and, I believe, Mr Solaguren-Beascoa (the Spanish restauranteur referred to earlier in this judgment):

"When I was extensively and intensively being cross examined about our Seriousness of BENTO Box Meal Venture at Royal Courts of Justice last week, I had got to re-realise "Countless Number of Different BENTO Box Meals" INFINITY.

Let's open and run BENTO Outlets literally EVERYWHERE at the County Hall Complex, not just at one or two places !!

I have already asked TONY San, the Lion King of Bears, to start the required works immediately at the old AJI and Jenny's Bakery Premises to open & run BENTO outlets by ourselves

BENTO embody ZEN and BENTO are Cross Culture Contents.

We MUST make the Entirety of London County Hall flooded with BENTO A Can you get on with this BENTO ZEN Venture straightaway NOW?"

201. Mr Chauhan emailed in reply the same day (09:20) to say that he would get on with this immediately. Mr Okamoto replied by email almost immediately (09:30), in the following terms:

"PLEASE DO SO

Please start BENTO Venture at the former AJI and Jenny's Bakery Premises THIS MORNING!!

No mater how short my rest of life is, I will inject all of my energies into this BENTO ZEN Venture and making "ALL About MOTHERS" Films/Motion Pictures.

ALEXIS San: I shall take you to a very popular BENTO place in St Anne of PARIS on Friday this week."

202. I do not think that this email exchange demonstrates that the Defendant's intention was as represented to the court at the Preliminary Issue Trial. Even if all the email communications which followed the Judgment are put to one side, I find this email exchange decidedly odd, when set against the specific and precise evidence given by Mr Okamoto and Mr Chauhan in their witness statements for the Preliminary Issue Trial. One might have expected Mr Okamoto and Mr Chauhan to be communicating in relation to the implementation of the Business Plan. Instead one has an exchange of emails in which Mr Okamoto is throwing out ideas, in a manner consistent with his email communications after the Judgment. It seems to me that this isolated exchange of emails points up two significant features of the evidence. First, there is a surprising absence of email communications prior to the Judgment, given the volume of email communications in the aftermath of the Judgment. Second, there is a surprising absence of email communications concerning the implementation of what was said to be the

Defendant's intention; that is to say the occupation of the Premises for the purposes of operating, by Aji Restaurants, Zen Bento.

203. Returning to Mr Okamoto's explanation for the absence of emails prior to the Judgment being delivered, I would also be wary of accepting Mr Okamoto's evidence that he does business without contracts, and on the basis of trust. I note that when the Premises came to be fitted out the Defendant, as one would expect, entered into written contracts. Business was not done on the basis of a hand shake or a conversation.

204. Other parts of Mr Okamoto's evidence, at the Trial, were also illuminating. In relation to the Business Plan it was put to Mr Okamoto that he never told the court that he might implement a different plan from the one being described to the court. Mr Okamoto replied that, naturally, he did not say that the Business Plan was just for the Preliminary Issue Hearing. He said his recollection was that when he was in the witness box at the Preliminary Issue Hearing, his interpretation was that Zen Bento did not need to be exact. It would be sufficient if there was to be a Japanese restaurant and Japanese cooking on the Premises. He said that his interpretation was that there was flexibility to modify Zen Bento, as long as a zen bento concept with Japanese food was realised.

205. Later in the same part of his cross examination, when Mr Okamoto was pressed with the point that he never told the court, at the Preliminary Issue Trial, that he would be implementing a different plan, Mr Okamoto gave a series of answers. He said that he did not have time to tell the court the many other things they were thinking. He said he did not have the opportunity to do so. He said that he did not think that they had to do so. Business plans change all the time. He thought that he could not change everything, but that he could modify what was proposed.

206. Mr Okamoto was more direct in the email which he sent to the Recipient Group on 30th November 2018 (13:42). I have quoted the terms of this email earlier in this judgment, but they bear repeating:

> *"Subject: Trilogy Films of HANNAH's ZEN Life Journey and HANNAH's Riverside Restaurant*
> *NIK San & JEREMY San*
> *Our ZEN Arts' Film Editing Studio & Preview Cinema are located right adjacent to the lower level of the current McDonalds riverside space, which we will take back & repossess by next March.*
> *GRACE & HANNAH (Mother & Daughter) shall open & run a Heart of Gold Mother's Home Cooking Dish Restaurant at this riverside space.*
> *Countless number of different drama stories will evolve at/from this amazing riverside restaurant.*
> *We didn't tell anyone before, but actually & truly we have fought (Legal Battles) and taken back the current McDonalds space for GRACE & HANNAH, Children Book Picture Creator MOTHER and Her Only Daughter in your Film Story and Real Life.*
> *With EverGreen Dream & Life ....."*

207. The style is eccentric but, having had the opportunity to assess Mr Okamoto and his evidence, it would, in my judgment, be a mistake not to take seriously the content of this

and other emails sent out by Mr Okamoto in the aftermath of the Judgment. In particular, I do not regard what was said by Mr Okamoto in the last paragraph of this email as a throwaway line. Given the number of ideas thrown out by Mr Okamoto for the use of the Premises, in the aftermath of the Judgment, it seems unlikely to me that Mr Okamoto did have anything approaching a firm intention, when he gave his evidence in the Preliminary Issue Trial, to use the Premises for the *"GRACE AND HANNAH"* concept. Rather it seems to me, and I so find, that this was a potential use of the Premises which Mr Okamoto had in mind when he gave his evidence in the Preliminary Issue Trial.

208. As such, it seems to me that the true position, in terms of Mr Okamoto's state of mind when he gave his evidence at the Preliminary Issue Trial, is illustrated by the final paragraph of the email of 30th November 2018. While it may have been an exaggeration for Mr Okamoto to say that the Defendant had pursued the Section 29 Application in order to take back the space for *"GRACE AND HANNAH"*, I find that it was no exaggeration in the sense that Mr Okamoto clearly pursued the Section 29

Application in order to take back the space, so that Mr Okamoto could then decide what to do with it. I find that Mr Okamoto did not pursue the Section 29 Application in order to open Zen Bento, because that was not his intention. All this is entirely consistent with Mr Okamoto's conduct once the Judgment had been secured.

209. Mr Okamoto was the decision maker and the controlling mind of the Defendant at the time when he gave his evidence at the Preliminary Issue Trial. In my judgment, and I

so find, the evidence in the Trial demonstrates quite clearly that Mr Okamoto did not have the intention, when he gave his evidence at the Preliminary Issue Trial, that the Defendant would, by Aji Restaurants, occupy the Premises for the purposes of Zen Bento. The suggestion that Mr Okamoto did have such an intention is not credible, given Mr Okamoto's conduct following the Judgment. The only way in which this conduct can otherwise be explained is that Mr Okamoto had a change of mind, in terms of his intentions for the Premises, immediately after delivery of the Judgment. In my judgment such an explanation is not credible, and cannot stand with the evidence.

210. In cross examination and in his submissions Mr Hill-Smith also laid stress on the fact that the Premises did not open for any kind of business until March 2020 and that the business which now operates from the Premises is not Zen Bento, but the Aji Restaurant on the ground floor and the Aji Bakery in the basement. His point was that this also illustrated that the Defendant, by Mr Okamoto, had never intended to occupy the Premises for the purposes of Zen Bento. I do not think that these matters, taken on their own, necessarily demonstrate that the Defendant never had the intention to occupy the Premises for the purposes of Zen Bento. As I have said, I regarded Dr Su as an honest witness. I accept his evidence of the difficulties and delays which were encountered in the fitting out of the Premises, following the Defendant recovering vacant possession of the Premises in March 2019. By the time the Premises did open for business the pandemic had begun, and the new business had to cope with the restrictions on trading imposed as a result of the pandemic. I am prepared to accept Mr Okamoto's evidence that the incorporation of the basement into the Aji Restaurant did not work, with the consequence that the decision was taken to open the Aji Bakery in the basement. If these

events and difficulties stood on their own, I can see that it would be plausible to say that they did not demonstrate an absence of intention, at the Preliminary Issue Trial, to open Zen Bento, but rather demonstrated the Defendant reacting to changed circumstances in the aftermath of the Judgment. These events and difficulties do not however stand on their own. They have to be considered together with and in the context of the evidence of Mr Okamoto's conduct on and after 13th November 2018, parts of which I have summarised above. What that conduct demonstrates is that Zen Bento was never opened for business because there had never been any intention to open Zen Bento for business.

211. In my analysis above I have concentrated on the evidence of Mr Okamoto, because Mr Okamoto was the decision maker and controlling mind of the Defendant in the Section 29 Application. I have not concentrated on Mr Chauhan for four reasons. First, Mr Chauhan was not the decision maker or the controlling mind of the Defendant. Second, Mr Chauhan pretty much disappears from view following the Judgment. Third, Mr Okamoto stated, in his witness statements for the Preliminary Issue Trial, that he confirmed the evidence of Mr Chauhan in his witness statements. In other words Mr Okamoto gave evidence that he could confirm and did confirm the evidence of Mr Chauhan. Fourth, I have not heard from Mr Chauhan as a witness at the Trial. Mr Okamoto was asked in cross examination why Mr Chauhan, whom he confirmed to be alive and well, had not been called as a witness. Mr Okamoto said that he did not know. As I have explained, the absence of Mr Chauhan has less significance than might otherwise have been the case, given that he was not the controlling mind or decision maker of the Defendant. It does however follow from my analysis above that Mr Chauhan misrepresented the intention of the Defendant to the court, just as much as Mr Okamoto did.

212. Returning to the Claimant's pleaded case, paragraph 54 of the Particulars of Claim pleads, at sub-paragraphs (i)-(xi) a series of misrepresentations, all of which depend upon the proposition that the Defendant did not intend, at the Preliminary Issue Trial, to take the various steps which it said that it intended to take in order to occupy the Premises for the purposes of operating, by Aji Restaurants, the business of Zen Bento. Applying my analysis of the evidence, it seems to me that the Claimant has made good its case. I find and conclude that the Defendant did, by the evidence given to the court by Mr Okamoto and Mr Chauhan at the Preliminary Issue Trial, misrepresent its intention to the court, at the Preliminary Issue Trial, in each of the ways alleged in subparagraphs (i)-(xi) of the Particulars of Claim.

213. It will be noted that I have left sub-paragraph (xii) of paragraph 54 of the Particulars of Claim out of this analysis. This is because I intend to deal separately with the claim of misrepresentation based upon the Undertaking. I will use the expression **"the Misrepresentations"** to refer to the misrepresentations in sub-paragraphs (i) to (xi) which I have found to have been established.

214. The next question is whether these Misrepresentations were made deliberately or recklessly.

215. The Defendant's skeleton argument for the Preliminary Issue Trial, in explaining the law in relation to Paragraph (g), set out the need for a firm and settled intention, not likely to

change; see paragraphs 15-17 of the skeleton argument. Paragraph 18 of this skeleton argument cited *London Hilton Jewellers v Hilton International Hotels* [1990] 1 EGLR 112 as authority for the proposition that the giving of an undertaking by the landlord to proceed was decisive of the issue of fixity of intention. In cross examination at the Trial Mr Okamoto's recollection was that he had read the skeleton argument and thought that he had understood all the arguments therein. I accept this evidence of Mr Okamoto, which is consistent with my own assessment of Mr Okamoto. To my mind it is clear that Mr Okamoto was well able to understand and did understand what needed to be established in the Preliminary Issue Trial, if the Termination Order was to be obtained.

216. As Mr Hill-Smith submitted, and I accept, the significance of Mr Okamoto's evidence as to his understanding of the legal position at the Preliminary Issue Trial is that if Mr Okamoto did fail to inform the court at the Preliminary Issue Trial of any condition to which the Zen Bento project was subject, such failure can only have been intentional.

217. For his part Mr Holland made a similar and equivalent submission, but for a very different purpose. In his closing submissions Mr Holland pointed out that the allegations made against Mr Okamoto were extremely serious. As Mr Holland put the matter, there were only two explanations for what had occurred in this case. The first was that the Defendant's witnesses gave perjured evidence at the Preliminary Issue Trial. The second was that the Defendant, by Mr Okamoto, genuinely changed its mind after the Preliminary Issue Trial as to the exact nature of the restaurant business it wished to run and suffered delays in opening its business which were largely not of its own making. Mr Holland submitted that the latter explanation was inherently more probable than the former. So far as the former explanation was concerned Mr Holland did not pull his punches. As he put it, if the Claimant was right then Mr Okamoto was

> an accomplished liar who had not only persuaded Mr Chauhan to lie on his behalf at the Preliminary Issue Trial but had also doubled down on his own lies at the Trial.

218. Mr Holland reminded me that, when assessing probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious an allegation is, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. What I have just set out is taken directly from the speech of Lord Nicholls in *Re H and Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, at page 586E-F, as subsequently explained and approved by the House of Lords in *Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35 [2009] 1 AC 11. While these principles were stated in the context of a case involving allegations of sexual abuse, they are clearly of general application. I accept that they apply directly to my consideration of whether the Misrepresentations were made deliberately or recklessly.

219. Mr Holland also stressed, in his submissions, that one thing which was clear was that Mr Okamoto had always wanted and intended to run a restaurant business from the Premises. He understood that there was some flexibility in what was stated to the court at the Preliminary Issue Trial. His intention was to open a Japanese restaurant serving hot food, freshly cooked on the spot, using fresh meat and vegetables and involving the use of the

Japanese bento box concept. As Mr Holland submitted, this intention has been realised, in the form of the Aji Restaurant. None of the evidence was consistent with or capable of supporting the wholesale deceit which Mr Okamoto would have had to have committed if the Claimant was right in its case.

220. The problem with Mr Holland's submissions seems to me to be that they fail to separate out a number of different matters. First, there is the case of the Defendant which was put to the court at the Preliminary Issue Trial. Second, there is the case of the Defendant which might have been put, and might have been put successfully to the court. Third, there is the reasoning of the Judge in the Judgment. Fourth, there is all the evidence of what happened after the Judgment had been delivered and the Termination Order had been made. In deciding whether the Misrepresentations were made deliberately or recklessly, it is necessary to concentrate on the case which was put to the court at the Preliminary Issue Trial. The other matters are or may be relevant to the question of whether this case involved deliberate or reckless misrepresentations.

221. This distinction is particularly important in the context of the Judgment. Mr Holland referred me to various extracts from the Judgment where the Judge expressed his findings as to the Defendant's intention in fairly open terms. An example of this is paragraph 20 of the Judgment:

> *"20. It is perhaps not surprising that the paucity of documentation, until the late flurry of documents, should have caused the defendant to have doubts about the claimant's intention. However, I am satisfied that Mr Okamoto and Mr Chauhan act in their dealings on the basis of trust and face to face meetings, rather than generating email correspondence. Further, while Mr Okamoto clearly does regard McDonald's food as 'junk food', I am satisfied that he genuinely wants to make County Hall a Japanese destination and to develop quickly serviced hot quality food. I am also satisfied that he sees the development of a Japanese restaurant, Zen Bento, alongside Tokyo Bakery, although the latter is a relatively small business."*

222. It looks to me as though there may be some words missing in the last sentence of paragraph 20. The Judge may have meant to say that Mr Okamoto *"sees the development of a Japanese restaurant, Zen Bento, alongside Tokyo Bakery, although the latter is a relatively small business"* as something, which the Judge did not identify. The *"something"* might have been *"desirable"* or *"feasible"*. Alternatively, the Judge may have meant to say *"foresees"* instead of *"sees"*. For the purposes of this judgment, I do not think that this uncertainty matters. The relevant point is that the finding of the Judge was that the thing which Mr Okamoto was seeing was Zen Bento. The Judge did not find that Mr Okamoto saw a restaurant of some kind alongside Tokyo Bakery, because that was not the case put by the Defendant. Nor was that the evidence put before the Judge.

223. It is true that paragraph 20 of the Judgment contains a finding that the Defendant *"genuinely wants to make County Hall a Japanese destination and to develop quickly serviced hot quality food"*. Taken in isolation, I accept that this finding goes further and is wider than a finding that the Defendant intended to occupy the Premises for the purposes of operating, by Aji Restaurants, Zen Bento. This however does not alter the fact that the Defendant's case and evidence at the Preliminary Issue Trial were specific to Zen Bento. Nor does this alter the fact that the Judge's findings, as to what the

Defendant genuinely wanted to do, were made on the basis of the Defendant's evidence that it had the specific intention to open Zen Bento at the Premises. Equally, it would not be correct to take this finding in isolation. It has to be read with the remainder of paragraph 20. As I have already noted, the final sentence of paragraph 20 makes specific reference to Zen Bento.

224. This brings me back to the point that the Defendant's case at the Preliminary Issue Trial was clear and specific. The Defendant intended to occupy the Premises for the purposes of operating, by Aji Restaurants, Zen Bento. The evidence of Mr Okamoto and Mr Chauhan was directed to Zen Bento, not to any generalised desire to open a restaurant at the Premises. There was no material qualification expressed to the intention to open Zen Bento, beyond the condition that the Defendant needed to obtain vacant possession of the Premises.

225. I agree with Mr Holland that one explanation for what occurred post-Judgment is that Mr Okamoto genuinely changed his mind, after the Preliminary Issue Trial, as to the exact nature of the restaurant business it wished to run. I am not however able to accept that explanation, for the reasons which I have already set out in finding that the Misrepresentations were made. On the evidence, and in particular bearing in mind Mr Okamoto's conduct in the aftermath of the Judgment, this explanation is not credible.

226. Once this explanation is put to one side I can see no escape, on the evidence, from the conclusion that Mr Okamoto was aware, when the Misrepresentations were made, that the Defendant did not have the specific intention to occupy the Premises for the purposes of operating, by Aji Restaurants, Zen Bento. Based upon Mr Okamoto's conduct in the aftermath of the Judgment, on 13th November 2018 and in the following months, which I have reviewed in detail above, I find that Mr Okamoto's state of mind, at the time when the Misrepresentations were made, was as follows:

    (1) It is clear that Mr Okamoto wished to recover the Premises from the Claimant.
    (2) It is also clear that the Section 29 Application offered an opportunity to achieve this objective.
    (3) I also accept that what Mr Okamoto had in mind for the Premises was a restaurant. I therefore accept that what Mr Okamoto wished to do, and thus what the Defendant wished to do, was to open a restaurant at the Premises in place of the Claimant's restaurant.
    (4) The identity and extent of that restaurant and the programme for its fitting out and opening were however all up in the air.

227. As such, it seems to me that the Mr Okamoto must have been aware, in his evidence of the Defendant's intention at the Preliminary Issue Trial, that the Defendant's intention was not as represented. What I find happened, consistent with the evidence, is as follows. Mr Okamoto understood, as he confirmed in his own evidence, that the Defendant could only succeed on Paragraph (g) if it could demonstrate the required firm and settled intention to occupy the Premises. Mr Okamoto wanted the Premises back. The Section 29 Application offered Mr Okamoto the opportunity to achieve this objective. In the Section 29 Application, and in the Preliminary Issue Trial Mr Okamoto made the decision that he would tell the court that the Defendant intended to occupy the Premises for the

purposes of operating, by Aji Restaurants, Zen Bento, while he in fact intended to and was keeping the Defendant's options open, in terms of what the Defendant would do with the Premises.

228. Mr Okamoto then proceeded to take this course in his evidence for the Preliminary Issue Trial. I find that there were two related factors which caused Mr Okamoto to behave in this way, both of which emerge clearly from Mr Okamoto's email communications in the aftermath of the Preliminary Issue Trial. The first factor was Mr Okamoto's desire to take back the Premises from the Claimant. In order to achieve this objective Mr Okamoto was prepared to say what he thought was necessary to make the Defendant's case on Paragraph (g), notwithstanding that what he was saying, in his evidence to the court at the Preliminary Issue Trial, misrepresented the intention of the Defendant. The second factor was Mr Okamoto's failure to take his obligations to the court as seriously as he should have done in the Section 29 Application and the Preliminary Issue Trial. In this latter respect it was obvious to me, from hearing Mr Okamoto's evidence in cross examination, that he regarded himself as able to tell the court that he was settled on Zen Bento, for the purposes of winning the Defendant's case on Paragraph (g), while keeping his options open. Putting the matter another way, Mr Okamoto regarded what the court was told in the Preliminary Issue Trial as nonbinding and open to change, notwithstanding that no such qualification was expressed to the court in his own or Mr Chauhan's evidence. Nor was this a state of mind which arose after the Judgment. I find that this was Mr Okamoto's state of mind in the Section 29 Application and in the Preliminary Issue Trial.

229. In these circumstances, it seems to me that the Misrepresentations, as made by Mr Okamoto in his evidence to the court at the Preliminary Issue Trial, were deliberate. I do not consider that it can be said, on the basis of my findings, that the Misrepresentations were made only recklessly, as opposed to deliberately. Mr Okamoto intended to make the Misrepresentations, knowing that they were false.

230. I accept that my finding that the Misrepresentations were deliberate is a serious matter. It follows from this finding that Mr Okamoto misled the court at the Preliminary Issue Trial, and knew that he was doing so. These are findings which I would much prefer not to have to make, not least because the claim for compensation, as I read Section 37A, does not actually require a finding of deliberate or reckless misrepresentation. In my judgment however the evidence in the present case leaves me with no option but to make these findings. It is clear that the Misrepresentations were made by Mr Okamoto, for the reasons which I have already set out. The evidence, which I have reviewed in detail above, is consistent only with a finding that the Misrepresentations were made by Mr Okamoto deliberately. It is not credible to suggest that the Misrepresentations were made innocently or negligently and, as I understand the submissions at the Trial, both counsel proceeded on the basis that the choice was between a genuine change of mind, following the Judgment, or deliberate misrepresentation.

231. The finding that the Misrepresentations were made deliberately is a finding that the Misrepresentations were made deliberately by Mr Okamoto. It does not necessarily follow that the Misrepresentations were also made deliberately by Mr Chauhan. In this context it is of course unfortunate that the Defendant has, it appears, chosen not to call

Mr Chauhan as a witness at the Trial, notwithstanding that it also appears that Mr Chauhan would have been available to give evidence. The non-appearance of Mr Chauhan as a witness at the Trial is consistent with the way in which he fades out of the picture following the Judgment. It does not seem to me that it is necessary for me to make a finding that Mr Chauhan made the Misrepresentations deliberately. Mr Chauhan was not the decision maker for the Defendant, and I have found that the decision maker, Mr Okamoto, did make the Misrepresentations deliberately. I have not heard from Mr Chauhan and Mr Chauhan has not had the opportunity to address the allegations of deliberate misrepresentation. In these circumstances and for these reasons, I have come to the conclusion that it is not necessary for me to decide whether Mr Chauhan made the Misrepresentations deliberately. In this respect I regard it as sufficient to rest on my finding that Mr Okamoto made the Misrepresentations, by his evidence to the court at the Preliminary Issue Trial, and made the Misrepresentations deliberately. It follows from my earlier findings that Mr Chauhan also misled the court in his evidence at the Preliminary Issue Trial, but I do not consider myself able to find that he did so deliberately. The Misrepresentations, as made by Mr Chauhan, may have been innocent misrepresentations.

232. I should also say that I do not regard the situation as being quite as stark as Mr Holland submitted, in the terms of the findings available to me on the evidence. I do not accept that, as Mr Holland put it, I have to find that Mr Okamoto is an accomplished liar who not only persuaded Mr Chauhan to lie on his behalf, but has also doubled down on his own lies to this court. So far as Mr Chauhan was concerned, he was not the decision maker for the Defendant. I have not heard from Mr Chauhan and I do not know what his state of mind was. He may have believed that Mr Okamoto was committed to Zen Bento, and may have given his evidence accordingly. Turning to Mr Okamoto I do not accept that I have to go quite as far as Mr Holland submitted. The position seems to me to be simpler than this. As I have said, Mr Okamoto wanted the Premises back. The Section 29 Application offered Mr Okamoto the opportunity to achieve this objective. In addition to this, and regrettably, Mr Okamoto did not take his obligations to the court as seriously as he should have done. In these circumstances, and in order to secure this objective, Mr Okamoto made the decision that he would tell the court that the Defendant intended to occupy the Premises for the purposes of operating, by Aji Restaurants, Zen Bento, while he in fact intended to and was keeping the Defendant's options open, in terms of what the Defendant would do with the Premises. Mr Okamoto's conduct is not to be excused, but it is not difficult to understand why it occurred.

233. It is worth adding this point, in the context of my findings against Mr Okamoto. I have already quoted what Carnwath LJ said in his judgment in *Inclusive Technology*, at [18], in relation to the general purpose of Section 37A. For present purposes it seems to me that the first part of this paragraph, which I repeat for ease of reference, is particularly relevant:

> *"That approach seems to me consistent with what I understand to be the purpose of the provision, which is to encourage fair dealing between the parties. The Act puts a landlord in a special position, in that the disposition of legal rights is determined at least partly by reference to his subjective intentions. Such a formula is obviously open to abuse unless the landlord acts responsibly and in good faith."*

234. In the present case the evidence leaves me with no option but to find that the Defendant, by Okamoto, did not act responsibly and in good faith. Whether the Termination Order was obtained as a result of this conduct is a question to which I shall come shortly.

235. I have conducted a lengthy analysis of the question of whether the Defendant deliberately and/or recklessly misrepresented its intentions to the court at the Preliminary Issue Trial. I have done so both because there is a good deal of material to go through and because the allegations of deliberate misrepresentation are, I accept, serious allegations which require careful consideration. The outcome of my analysis is as follows:
    (1) I am satisfied, on the evidence, that the Defendant did misrepresent its intentions to the court at the Preliminary Issue Trial.
    (2) I am satisfied, on the evidence, that the Defendant, by Mr Okamoto, made the Misrepresentations, and made the Misrepresentations deliberately, knowing that they were false.
    (3) I am satisfied, on the evidence, that the Defendant, by Mr Chauhan, made the Misrepresentations.
    (4) For the reasons which I have explained, I do not consider myself able to find that Mr Chauhan made the Misrepresentations deliberately.

(iv) The claim under Section 37A - The claim of misrepresentation based on the Undertaking

236. I now return to the misrepresentation alleged in paragraph 54(xii) of the Particulars of Claim, which is that the Defendant did not intend to comply with the Undertaking. It is admitted that, by giving the Undertaking, the Defendant represented that it intended to comply with the Undertaking.

237. In dealing with the Undertaking, I think that some circumspection is required. Mr Holland sought to make something of the point that there was no claim for breach of the Undertaking. This seems to me to be misconceived, on at least three levels. First, it is pleaded that the Claimant breached the Undertaking; see paragraph 51 of the Particulars of Claim. Second, the Claimant does not have a claim for breach of the Undertaking. The Undertaking was a promise or set of promises given to the court by the Defendant. The Claimant cannot sue for compensation or damages on the Undertaking. Third, the allegation that the Undertaking was breached is, as it seems to me, properly a matter for a contempt application, on the basis that breach of the Undertaking would constitute an act of contempt of court. On any such contempt application the criminal standard of proof would apply, and the proceedings would be of a different kind to a set of civil proceedings such as the present action.

238. Given this position, I did not find it surprising that Mr Hill-Smith candidly admitted that the Claimant's priority was not enforcement of the Undertaking. Given that the Claimant is seeking compensation for misrepresentation to the court, I can see that enforcement of the Undertaking will not, from the Claimant's perspective, serve any very useful commercial purpose.

239. It seems to me that I should not decide the question of whether the Undertaking was breached. This is properly a question for a contempt application, in which the criminal standard of proof would apply and in which the Defendant would have the benefit of the procedural safeguards which apply to contempt applications. It also seems to me that a

decision on this question is not required, for the purposes of my decision on the Claims. I do not therefore decide the question of whether the Undertaking has been breached.

240. This however leaves the question of whether the Defendant's representation, by the giving of the Undertaking, that it intended to comply with the Undertaking was a deliberate misrepresentation. This requires some analysis of what it was the Defendant promised, by the terms of the Undertaking. For ease of reference, I repeat the terms of the specific promises given by the Undertaking:

> *"1. At the termination of the current tenancy the Landlord will occupy the Premises, through its subsidiary Aji (Restaurants) Ltd, for the purposes of a business to be carried on there.*
> *2. The Landlord will provide the necessary finance to Aji (Restaurants) Ltd to fit out the Premises and to trade therefrom.*
> *3. The new business (Zen Bento) will commence trading as soon as reasonably practicable after obtaining vacant possession of the Premises."*

241. So far as paragraphs 1 and 2 of the Undertaking are concerned, I do not think that I can be satisfied that there was any misrepresentation. It is convenient to repeat my findings as to Mr Okamoto's state of mind when he made the Misrepresentations: (1) It is clear that Mr Okamoto wished to recover the Premises from the Claimant.
(2) It is also clear that the Section 29 Application offered an opportunity to achieve this objective.
(3) I also accept that what Mr Okamoto had in mind for the Premises was a restaurant. I therefore accept that what Mr Okamoto wished to do, and thus what the Defendant wished to do, was to open a restaurant at the Premises in place of the Claimant's restaurant.
(4) The identity and extent of that restaurant and the programme for its fitting out and opening were however all up in the air.

242. Paragraph 1 of the Undertaking is open in its terms. It refers to occupation *"At the termination of the current tenancy"*. This is a flexible term. Applying the relevant law, as explained earlier in this judgment, it seems to me that this meant within a reasonable time of the determination of the Lease. The promised occupation was for the purposes of *"a business"*. There was not, at least in this paragraph of the Undertaking a commitment to any particular business. There was also a promise that the occupation would be by Aji Restaurants, but I have not made a finding that Mr Okamoto did not intend to implement his plans for the Premises, whatever specific shape they might ultimately take, through Aji Restaurants. In these circumstances I do not think that I am able to find that the Defendant, by Mr Okamoto, did not intend to comply with paragraph 1 of the Undertaking, when the Undertaking was given. Given that Mr Okamoto did have a restaurant in mind for the Premises, there was a possibility (I do not think that the matter can be put higher than this) that paragraph 1 of the Undertaking would be complied with.

243. Much the same analysis applies to paragraph 2 of the Undertaking. There is no reference to any specific business, and no reference to any specific timetable. The Defendant was promising to finance Aji Restaurants *"to fit out the Premises and to trade therefrom"*.

As I understand the position, the Defendant had the means to finance Aji Restaurants. In these circumstances I do not think that I am able to find that the
Defendant, by Mr Okamoto, did not intend to comply with paragraph 2 of the Undertaking, when the Undertaking was given. My reasoning is the same as my reasoning in relation to paragraph 1 of the Undertaking. Given that Mr Okamoto did have a restaurant in mind for the Premises, and given that the Defendant appears to have had the means to finance Aji Restaurants, there was a possibility (again, I do not think that the matter can be put higher than this) that paragraph 2 of the Undertaking would be complied with.

244. In my view the problem for the Defendant comes with paragraph 3 of the Undertaking. This was a promise that the new business, which was identified as *"Zen Bento"*, would commence trading as soon as reasonably practicable after obtaining vacant possession of the Premises. This was specific. As I have said earlier in this judgment, it seems to me that the reference to Zen Bento can only have meant the restaurant business which I am referring to as Zen Bento, which the Defendant was saying it intended to operate, by Aji Restaurants, from the Premises. It follows from my earlier findings that the Defendant, by Mr Okamoto, did not have the intention, when it gave the Undertaking, that Zen Bento would commence trading as soon as reasonably practicable after obtaining vacant possession of the Premises.

245. In these circumstances it seems to me, and I so find that the Defendant did not intend to comply with paragraph 3 of the Undertaking when, by Mr Okamoto, it gave the Undertaking to the court. It also follows from my earlier findings as to Mr Okamoto's state of mind that this misrepresentation of the Defendant's intention was deliberate. Mr Okamoto made this misrepresentation knowing that it was false.

246. It does not follow from this that paragraph 3 of the Undertaking was necessarily breached. The answer to that question would depend upon an examination of what subsequently occurred. For the reasons which I have given I do not consider it necessary to resolve that separate question, nor do I consider that I should resolve that separate question.

247. I therefore conclude that the misrepresentation alleged in paragraph 54(xii) is established as a deliberate misrepresentation. In the remainder of this judgment my references to the Misrepresentations include this additional misrepresentation.

(v) <u>The claim under Section 37A - was the Termination Order obtained by the Misrepresentations?</u>

248. It seems quite clear to me, and I so find, that the Termination Order was obtained by the Misrepresentations. I say this for the following reasons.

249. The effect of the Misrepresentations was to inform the court that the Defendant intended to occupy the Premises for the purposes of operating, by Aji Restaurants, Zen Bento. As I have already noted, the case put by the Defendant at the Preliminary Issue Trial was specific. The Defendant did not say that it intended to operate a restaurant from the Premises, in respect of which the identity and programme remained to be determined. The Defendant said that it intended to operate Zen Bento. Applying the legal principles

which I have identified earlier in this judgment, it seems clear to me that this specific case was not just an operative cause of the Termination Order being obtained, but was the operative cause of the Termination Order being obtained.

250. I accept that there are findings in the Judgment, as to what the Defendant wanted to achieve with the Premises, which are expressed in more open terms than a finding that the Defendant intended to operate Zen Bento. An example of this is paragraph 20 of the Judgment, which I have already quoted. This example also demonstrates however why one cannot say that the specific case put by the Defendant at the Preliminary Issue Trial was not material. To repeat a point I have already made, the Judge's findings in paragraph 20 of the Judgment were made on the basis of the Defendant's evidence that it had the specific intention to open Zen Bento at the Premises. Without that evidence, the reasoning in paragraph 20 of the Judgment does not work.

251. By way of further example, I refer to paragraphs 24 and 25 of the Judgment. I have already quoted paragraph 24 of the Judgment in this judgment, but I repeat the paragraph for ease of reference (the underlining in each paragraph is my own):

> *"24. The central issue in the present case is one of the claimant landlord's subjective intention. The claimant is effectively controlled by Mr Okamoto. I am satisfied that a firm decision has been made by him to occupy the defendant's premises for the purposes of a business conducted by the claimant. In reaching this decision I rely on the following matters in particular:*
>
> *(1) Mr Okamoto's evidence that he decided in 2016 to proceed, hence the board minute of County Hall Cuisine Limited dated 17 November 2016 and the fact that, as I find, he has remained determined and continues to be determined to open a Japanese restaurant as he has described on the premises following fitting out.*
>
> *(2) His companies have opened and run food outlets at County Hall before, namely Aji Canteen, and now Tokyo Bakery.*
>
> *(3) A business plan was produced by Mr Chauhan in 2017. Quotations were obtained from two companies on 27 October 2017. A quotation and programme for the works have now been received from AMP Interior Limited, the claimant's preferred contractor, who has previously worked at County Hall.*
>
> *(4) As the claimant's counsel asks somewhat rhetorically, what else is the claimant going to do with this valuable unit? It is unlikely in the extreme that the claimant would simply leave the premises empty while it explored its options.*
>
> *25. I am satisfied that the claimant, through Mr Okamoto, is determined to fit out the premises once they have possession, and to open a Japanese restaurant as described by him. Mr Okamoto does not simply dislike McDonald's food as 'junk food'. I am satisfied that the claimant does genuinely wish to open a Japanese restaurant."*

252. It is fair to point out that the Judge expressed his findings in open terms in these paragraphs. The Judge referred to Mr Okamoto having made a firm decision to occupy the Premises for the purposes of *"a business conducted by"* the Defendant. The Judge was satisfied that Mr Okamoto was determined to fit out the Premises, once possession

had been obtained, and to open *"a Japanese restaurant"*. Again however, these findings were made on the basis that the Defendant had the specific intention to open Zen Bento at the Premises. Without that evidence, the reasoning in paragraphs 24 and 25 of the Judgment does not work. One can test the matter by reference to the parts of paragraphs 24 and 25 which I have underlined. The Judge did not make his findings on the basis that the Defendant's case was that it intended to open some kind of restaurant. The Judge made his findings on the basis of the Defendant's case that it intended to open what it had described in its evidence; namely Zen Bento. This case, on the basis of which the Judge made his findings, was false and depended upon the Misrepresentations. For the reasons which I have already explained, I do not accept that Mr Okamoto or Mr Chauhan, in their oral evidence at the Preliminary Issue Trial, made any material qualification to their evidence that the Defendant intended to occupy the Premises for the purposes of operating, by Aji Restaurants, Zen Bento.

253. The analysis above assumes that it is not necessary for the Claimant to establish that the Termination Order would still not have been obtained if the court had been told the true position; see my earlier analysis of the relevant legal principles. In other words, the analysis assumes that the counter-factual does not have to be considered. If however I am wrong in my identification of the relevant legal principles, I do not think that the position changes. If the court had been told the truth, it seems to me that the case would have looked utterly different. On this hypothesis one has to assume that Mr Okamoto shared with the court his true state of mind, as revealed by the email communications which followed the Judgment. One can test the question of what would have happened by considering how matters would have looked if Mr Okamoto had shared with the court, at the Preliminary Issue Trial, all of the different ideas which he had for the use of the Premises, in the aftermath of the Judgment. Further or alternatively, one can test the question by considering how matters would have looked if Mr Okamoto had shared with the court, at the Preliminary Issue Trial, that he was not committed to using the services of AMP or IFDO and/or that no one had been appointed either to fit out or operate a new restaurant at the Premises. I accept that the evidential hurdle is set fairly low, in terms of proving an intention under Paragraph (g), but the argument that a Paragraph (g) case could still have been established if the court had been told the truth is, in my judgment, neither realistic nor credible. In my judgment, if the court had been told the truth, the Defendant would not have been to establish a Paragraph (g) intention and the Termination Order would not have been obtained.

254. What I have said in my previous paragraph also seems to me to answer Mr Holland's argument that the Claims constitute a collateral attack on the findings made by the Judge in the Judgment, which were findings made in circumstances where the genuineness of the Defendant's intention had been subject to extensive scrutiny and challenge. This seems to me to ignore the reality. The Judge did not have the benefit of knowledge of Mr Okamoto's conduct in the aftermath of the Judgment. If Mr Okamoto had communicated to the Judge what I have found to have been his actual state of mind at the Preliminary Issue Trial, the Defendant's case would, in my judgment, have looked utterly different.

255. I am conscious that the Defendant's case is that if the Termination Order was obtained by misrepresentation, the terms of any new lease of the Premises to which the Claimant

would have been entitled would have contained a landlord's break clause which would have resulted in that new lease being brought to an end in a fairly short time in any event. I do not decide this particular question, which seems to me to be for the subsequent trial on quantum.

256. Drawing together all of the above analysis, I conclude that the Termination Order was obtained by the Misrepresentations, within the meaning of Section 37A.

(vi) The claim under Section 37A - conclusion

257. For the reasons which I have set out, in my analysis of the claim under Section 37A, I conclude that the Termination Order was obtained by misrepresentation, namely by the Misrepresentations, within the meaning of Section 37A. I therefore conclude that the Defendant is liable to pay compensation to the Claimant pursuant to Section 37A. The amount of that compensation will be for the subsequent trial on quantum.

258. There is one other point which I should mention, by way of a footnote to this conclusion. I note that, in Section 37A, the jurisdiction of the court to award compensation is expressed in terms that the court *"may"* order the payment of such compensation. As such, it may be said that the jurisdiction to award compensation is discretionary. No argument was addressed to me that there was any reason for the court not to award compensation in the present case, assuming that I decided that the Termination Order was obtained by misrepresentation, and assuming that the Claimant will be able to prove, at the quantum trial, that it has suffered loss as the result of the Termination Order. Nor can I see any basis for such an argument. In these circumstances I say no more about this point.

The claim in deceit – analysis and conclusion

259. For ease of reference, I repeat the four elements of the tort of deceit, as identified by Jackson LJ in *ECO3 Capital Ltd v Ludsin Overseas Ltd* [2013] EWCA Civ 413, at [77]:

> *"77. I do not agree with the analysis of the authorities which the appellants advance. What the cases show is that the tort of deceit contains four ingredients, namely:*
>
> *i) The defendant makes a false representation to the claimant.*
>
> *ii) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.*
>
> *iii) The defendant intends that the claimant should act in reliance on it.*
>
> *iv) The claimant does act in reliance on the representation and in consequence suffers loss."*

260. Save for the requirement to prove loss, which would be for the quantum trial, the four required elements of the tort of the deceit are satisfied in the present case, subject to one critical qualification. Applying my findings in relation to the claim under Section 37A, the position is as follows:
    (1) The Defendant made false representations; namely the Misrepresentations.
    (2) The Defendant knew that the representations were false.
    (3) The Defendant intended that the Misrepresentations should be acted upon.
    (4) There was action in reliance upon the Misrepresentations.

261. In relation to the Defendant intending that the Misrepresentations should be acted upon, I have not made a specific finding, in my analysis of the claim under Section 37A, that the Defendant intended that the Misrepresentations should be acted upon. It seems to me that this finding is unavoidable. The Misrepresentations were made in the Defendant's evidence for the Preliminary Issue Trial and by the giving of the Undertaking. The Defendant's evidence was presented to the court, and the Undertaking was offered to the court for the purposes of establishing the Defendant's case on Paragraph (g). As such the Defendant, at least by Mr Okamoto, must have intended that the Misrepresentations should be acted upon.

262. The problem with the above analysis of the position is obvious. The elements of deceit, as identified by Jackson LJ, are only made out if one substitutes *"court"* for *"claimant"*. While it can be said that the Misrepresentations were made to the Claimant, as well as to the court, there are obvious problems with the required elements of intention and reliance, if the elements of deceit are applied in the present case, without the substitution of the court for the Claimant. Those problems are as follows.

263. First, I cannot see that the Defendant intended that the Claimant should act in reliance on the Misrepresentations. What the Defendant was seeking to achieve was that the court should act in reliance on the Misrepresentations, by making the Termination Order. I can see that it might be said that the Defendant also intended that the Claimant should act in reliance on the Misrepresentations, perhaps on the basis that the Misrepresentations were intended to convince the Claimant that it should not resist the Defendant's case at the Preliminary Issue Trial or on the basis that the Claimant should respond to the Defendant's case on the basis that this case was as represented by the Misrepresentations. I do not find either of these analyses convincing. I am doubtful that an analysis of this kind can actually support the proposition that the Defendant intended that the Claimant should act in reliance on the Misrepresentations.

264. Second, and turning to reliance, the problem is even more obvious. It seems quite clear to me that the Claimant did not act in reliance on the Misrepresentations. To the contrary, the Claimant did not accept the Defendant's case and challenged that case at the Preliminary Issue Trial. Mr Keeling gave evidence that the Claimant was regularly involved in lease renewals. His estimate was around 70 a year. He stated that the Claimant would recognise the legitimacy of a landlord's scheme where it had not been contrived to extinguish the Claimant's rights under the Act. The Claimant was usually able to reach agreement with its landlords in such situations. Taking a case to court was very much a matter of last resort. Mr Keeling said that the Claimant's assessment,

> at the time of the Preliminary Issue Trial, was that there was nothing to convince the Claimant that there was a genuine business ready to trade once possession of the Premises was recovered from the Claimant. I accept all this evidence of Mr Keeling. What follows from it is that the Claimant placed no reliance upon the Misrepresentations.

265. In these circumstances it seems to me that the claim in deceit can only succeed if the required elements of deceit, as identified by Jackson LJ, are broad enough to accommodate a situation where;
    (1) The defendant makes a false representation to the court.

(2) The defendant knows that the representation is false, alternatively he is reckless as to whether it is true or false.
(3) The defendant intends that the court should act in reliance on it.
(4) The court does act in reliance on the representation and in consequence the claimant suffers loss.

266. I was not shown any authority by counsel to support the argument that the tort of deceit is sufficiently flexible to accommodate a situation of this kind. Indeed, and with due respect to counsel, the submissions which I received, both written and oral, did not seem to me to get to grips with this particular question. So far as the authorities placed before me were concerned, the only material which I could find which may be said to have been relevant to this question was a footnote in Cartwright: Misrepresentation Mistake and Non-Disclosure (6th Edition). The author sets out the elements of the tort of deceit at 5-05 and then proceeds to a discussion of the requirement for a representation at 5-06. The general requirement for a representation is stated in the following terms:

> *"To succeed in the tort of deceit the representee must show that a misrepresentation was made to him: that is, a falsehood was communicated to him by which he was deceived.[25] Such communication may generally be through the medium of words spoken or written to him; but it can equally well be in the representee's interpretation of the meaning of the defendant's conduct.[26]"*

267. The footnote numbered 25 in this extract contains a discussion of whether and, if so, to what extent a claimant can sue in deceit where the representation was not made directly to the claimant but to a third party. There would appear to be no difficulty in making a claim in deceit where the relevant misrepresentation was made by the defendant to a third party, with the intention that the misrepresentation should be passed on to the claimant, provided that the misrepresentation was in fact passed on to the claimant and was relied upon by the claimant. This however is not the situation in the present case. In the present case the Misrepresentations were made to the court and were relied upon by the court. The discussion in the footnote is, at best, equivocal as to whether a claim in deceit can be made where the representation is made to a third party and is not relied upon by the claimant. Nor does the discussion extend to a case involving facts of the kind which I am considering.

268. It seems clear to me that there is an issue in this context which would benefit from more extensive analysis. My reference to an issue means the question of whether the tort of deceit is sufficiently flexible to accommodate a situation of the kind which I have found to exist in the present case. It may also be that this issue or a similar issue has received

the required level of analysis in an authority or authorities which have not been drawn to my attention.

269. One pointer to the answer to this issue may be the existence of the jurisdiction to award compensation under Section 37A(1). Section 37A(2) deals with the situation where the tenant does not pursue its rights under the Act to a court hearing, but gives up at an earlier stage in the court proceedings or does not initiate court proceedings at all. If it can be shown that the tenant took this course by reason of misrepresentation or the concealment of material facts, the tenant can claim compensation. In such a case one would normally

expect the relevant misrepresentation or concealment to occur as between the landlord and the tenant, as in *Inclusive Technology*. Section 37A(1) is rather different. Section 37A(1) is designed to give a business tenant a statutory remedy, in circumstances where misrepresentations are made to the court, in reliance upon which the court makes an order for the termination of the relevant tenancy. As such, it may be that Section 37A(1) fills a gap in the law which was considered to work unfairly against a business tenant which loses its rights of renewal under the Act, as a result of misrepresentation or the concealment of material facts on the part of the landlord.

270. I have considered whether I should leave the question of the flexibility of the tort of deceit undecided, which would entail leaving the claim in the tort of deceit undecided. I bear in mind that the Claimant has established its right to compensation, subject to quantum, pursuant to Section 37A. In these circumstances it may be said that a decision on the claim in the tort of deceit is not required. If the case goes further, I believe that I have made sufficient findings of fact for the claim in the tort of deceit to be established if, as a matter of law, the tort is sufficiently flexible to extend to a situation of the kind which exists in the present case.

271. I have come to the conclusion that this is not the correct course, in the particular circumstances of this case. I consider that I should decide the question of the flexibility of the tort, on the basis of the legal materials before me. For the purposes of this judgment, and although this is not an evidential question, it seems to me that the burden is on the Claimant to satisfy me, as a matter of law, that the tort of deceit is sufficiently flexible to accommodate a situation of the kind which I have found to exist in the present case. In my judgment the Claimant has failed to discharge that burden. I am not satisfied, on the basis of the legal materials which I have been shown, that the tort of deceit is sufficiently flexible. As such, and for the reasons identified at the outset of this analysis, I consider that I am bound to conclude that the tort of deceit does not extend to the present case, because not all of the required elements of the tort, as identified by Jackson LJ in *ECO3*, are satisfied. In these circumstances I conclude that the claim in deceit fails, on the law.

272. This may be seen as a somewhat unsatisfactory conclusion. I would have preferred to be able to conduct a more extensive analysis of the flexibility of the tort of deceit, but I do not consider that I am properly equipped to do so. More extensive analysis of the flexibility of the tort of deceit will have to await another forum.

Conclusions

273. For the reasons set out in this judgment I reach the following conclusions:

(1) The claim under Section 37A succeeds, so far as liability is concerned. The Defendant is liable to pay compensation to the Claimant pursuant to Section 37A.
(2) The amount of that compensation will fall to be determined at a subsequent trial on quantum.
(3) The claim for damages in the tort of deceit is dismissed.

274. I will hear counsel, as necessary, on matters consequential upon this judgment. In the usual way, the parties are encouraged to agree, subject to my approval, as much as they can in relation to the terms of the order to be made consequential upon this judgment.