JUDGMENT : THE HONOURABLE MR JUSTICE PETER SMITH : Ch.Div. 3rd February 2004

INTRODUCTION

1. This action brought by the Claimant ("Bottin") currently involves a claim by it for damages for breach of a share purchase agreement ("the Agreement") dated 22nd December 1999 and made between the (1) First Defendant Venson Group Plc ("Venson") (1), Grant John Paul Scriven (the Second Defendant) and others (2) and Bottin (3).

2. By the terms of the Agreement Bottin was invited to subscribe for £1 million A preference shares for a consideration of £10 million.

3. Mr Scriven and Mr Lawson-Smith, the Second and Third Defendants, were two of the five covenantors identified in schedule 1, part 1 of the Agreement.

4. They, together with Venson, are the warrantors for the purposes of the warranty obligations set out in clause 3 and the Third Schedule of the Agreement.

PROCEDURAL APPLICATIONS

5. There are five matters before me:-
   (a) The Defendants' summary judgment/strike out application dated 3rd June 2003, in respect of the Particulars of Claim dated 19th March 2003.
   (b) The Claimants application dated 22nd October 2003 (a) to add a claimant and (b) to amend the Particulars of Claim as per the draft amendment and (c) for summary judgment on its claim for a declaration that it is entitled to appoint an independent consultant pursuant to clause 8 of the Agreement.
   (c) The Claimant's duplicate application dated 18th November 2003 to add a further claimant and for permission to amend the Particulars of Claim.
   (d) The trial of a preliminary issue ordered by Master Moncaster on 4th November 2003.
   (e) The Claimant's appeal against Master Moncaster's order in (d) permission to appeal having been given by the Master at the hearing.

6. The strike out application by the Defendants was based on the original Particulars of Claim, which claimed contractual breaches of the Agreement. The proposed amendment by the Claimants seeks to claim damages for misrepresentation and/or negligent misstatement.

7. Mr Carr QC for the Defendants, acknowledged that for his part 24 application to be worth while it would be necessary for him also to attack the proposed amendment on the basis that permission to amend ought not to be granted because there was no real prospect of the Amended pleading succeeding. Accordingly, I determined that Mr Carr QC should open, Mr Wardell QC should reply and Mr Carr QC would have a final right of reply subject to any clarification issues that arose.

8. The order of Master Moncaster was for the determination of the question: "without prejudice to the true construction of clause 19 of the Share Purchase Agreement, did the Claimant deliver the letter of 20th December 2002 to the Second Defendant's home address by posting it through the letter box at that address".

9. As will appear in this Judgment, the question of service loomed large in the submissions before me. These turned first on the construction of clause 19 of the Agreement and second, raised an issue as to whether or not a practice of other forms of service had been agreed between the parties. Mr Wardell QC acknowledged that if his argument as to the construction of clause 19 failed, then there was no valid service on the Second Defendant on 20th December 2002. He did not suggest that there was any other form of service on him, so that the claim against him for contractual breach of warranty, he acknowledged, would fail at that stage.

10. He also acknowledged that if the construction of clause 19 was as he contended, there was an issue as to whether or not service had in any event taken place on 20th December 2002 in accordance with that construction. That is the preliminary issue, which Master Moncaster ordered. Evidence on that preliminary issue was filed before me, which shows there is a serious issue to be tried over whether or not the process server could possibly have served the claim notification document as said in his witness statement. Mr Wardell QC's initial grounds of appeal were that it was unfair to the Claimants to try an issue, which might involve the Second Defendant's credibility when it was limited to such a small compass. In the light of the other evidence (which was from people other than the Second Defendant) Mr Wardell QC was constrained to concede that provided he had a reasonable period to consider that evidence and inspect the Second

Defendant's property, that met his objections. Accordingly on the second day of the hearing before me, I dismissed his appeal and directed that the trial of the preliminary issue ordered by Master Moncaster should be determined by me (if it arose) on a date to be fixed with an estimate of one day. I ordered that the costs of the appeal be costs in the cause of that preliminary issue.

11. With regard to Mr Wardell QC's clause 8 application, as the hearing progressed he acknowledged that it was most unlikely that I would be persuaded to such a degree that he would be entitled to a part 24 Judgment for the appointment of an independent consultant under clause 8 of the Agreement. He sought on the third day of the hearing before me an adjournment of that application to await my adjudication on the rest of the applications. Mr Carr QC did not object to such an order and so I ordered that application to be adjourned to be heard when this Judgment is delivered. I raised at the hearing with Mr Wardell QC the question as to whether or not, even if the entitlement was made out so as to enable the Claimants to seek an order under CPR 24, this kind of order would actually be made by the court, bearing in mind the requirements for constant supervision and the difficulties of enforcing it. That matter is left open depending on the result of the rest of my Judgment.

12. Accordingly, the balance left for consideration is the Defendants' part 24 application attacking the original pleading and the proposed amended pleading and the Claimant's counterpart seeking a permission to amend.

TERMS OF AGREEMENT

13. As is the wont in cases like this, the Agreement was exchanged and completed on the same day, namely 22nd December 1999.

14. The Claimants case is based under the warranties. The preamble to the warranties is set out in clause 3 as follows:-

"*3. Warranties*

(a) Subject to the following provisions of this clause, each of the Warrantors warrants in the terms set out in Schedule 3 to the Investor (and for this purpose the term Investor does not include Permitted Transferee unless this has been consented to pursuance to Clause 3(d)), its Permitted Transferee and to any person to whom the benefit of the Warranties are assigned pursuant to Clause 3(d). The Warrantors acknowledge that the Investor is entering into this Agreement in reliance upon the Warranties and agree that the Investor may treat them as representations inducing them to enter into this agreement. …

(g) Where any Warranty is qualified by the expression 'to the best of the knowledge, information and belief of …' or 'as far as … is aware' or any similar expression it shall be deemed to include an additional statement that it has been made after due and careful enquiry of appropriate officers, employees and such of the Company's professional advisors as the Warrantors consider appropriate in the circumstances.

(h) A Warrantor shall be liable for breach of a Warranty (other than a Taxation Warranty) only if notice of a claim is given to him, specifying such details of the event or circumstance giving rise to such claim as are available to the Investor and estimating (if capable of estimation by the Investor) its quantum, prior to the third anniversary of Completion. …

(m) The liability of the Warrantors in respect of the Warranties shall be as follows:-

(i) firstly the Company shall be solely liable up to a maximum aggregate liability of £10,000,000;

(ii) secondly Grant Scriven and Clive Lawson-Smith, being two of the Warrantors, shall be jointly and severally liable with one another provided that the liability of each of them shall not in any event exceed the aggregate of the cash value of any consideration which the relevant Warrantor receives on the sale, transfer or other disposal of any of his Shares and the amount set opposite his name below:

Name Amount

Grant Scriven £750,000

Clive Lawson-Smith £450,000 …

(o) No claim under the Warranties shall be deemed to have been made unless notice of such claim was made in writing to the Warrantors specifying such detail of the event or circumstances giving rise to such claim as are available to the Investor and an estimate (if capable of preparation by the Investor) of the total amount of the Warrantors' liabilities therefor claimed.

(p) Any claim in respect of which notice shall have been given in accordance with Clause 3(o) above shall be deemed to have been irrevocably withdrawn and lapsed (not having been previously satisfied settled or withdrawn) if proceedings in respect of such claim have not been issued and served on the Warrantors not later than the expiry of the period of 12 months after the date of such notice."

15. The clause 3 the warranties were given in schedule 3:-

"*SCHEDULE 3*

Accounts

1. Information

(a) To the best of the Warrantors' knowledge all written information given by the Company, the Warrantors or their professional advisers to the Investor or to its professional advisers in the course of the negotiations leading up to this Agreement as listed in Schedule 1 to the Disclosure Letter was when given and is at the date of this Agreement true and accurate in all respects and is not misleading in any respect and so far as such information is expressed as a matter of opinion such opinions were when given and are at the date hereof truly and honestly held.

(b) The Budget for the financial year 1 January 2000 to 31 December 2000 set out at Document 8 of Schedule 1 to the Disclosure Letter and the Outline Strategic Plan for the five year period to 31 December 2004 as set our at Document 7 of Schedule 1 to the Disclosure Letter (collectively the "Financial Information") has been carefully and diligently prepared on a basis consistent with that adopted and on the same assumptions as those made in preparing the Last Accounts and:

(i) to the best of the Warrantors' knowledge, information and belief all factual information contained in the Financial Information is true and accurate in all material respects and not misleading in any material respect;

(ii) the assumptions and forecasts and opinions as to the future prospects of the business and affairs of the Group contained in the Financial Information have been carefully considered and are reasonable having regard to the information available to them and to the market conditions currently prevailing;

(iii) the Warrantors have made all reasonable enquiries which are necessary to ascertain all the information and conditions which are relevant to the Financial Information preparation; and

(iv) to the best of the Warrantors' knowledge there is no fact, matter or circumstance which relates to the affairs of the Group the non-disclosure of which would render any information contained in the Financial Information untrue or misleading in any material respect.

2. Accounts

(a) The Last Accounts have been prepared in accordance with generally accepted accounting practice commonly adopted by companies carrying on a similar business and in accordance with all applicable statements of Standard Practice, Financial Reporting Standards and pronouncements of Urgent Issues Task Force; and the bases and policies of accounting, adopted for the purpose of preparing the Last Accounts, are stated therein.

(b) The Last Accounts give a true and fair view of the state of affairs of each Group Company at the Last Accounts Date and its profits for the financial period ended on that date. …

3. Management accounts

To the best of the Warrantors' information, knowledge and belief the Management Accounts for the period ending 31 October 1999 fairly reflect the trading position of the Group for the period to which they relate and are not affected by any extraordinary, exceptional or non-recurring item. …

5. Prior Transactions …

(c) its business has not been materially and adversely affected by the loss of any important customer or source of supply or by any abnormal factor not affecting similar businesses to a like extent and none of the Warrantors is aware of any facts likely to affect the Group Companies in such manner and there has been no deterioration in either its turnover or financial or trading position. …

6. Accounting Records

All accounts books ledgers financial and other records of whatsoever kind of each of the Group Companies:-

(a) have been fully properly and accurately maintained and contain true and accurate records of all matters required to be entered therein by the Companies Act 1985;

(b) do not contain or reflect any material inaccuracies or discrepancies; and give and reflect a true and fair view of the trading transactions and of the financial and contractual position of such company and of its assets and liabilities. …

13. Disclosure of all Material Facts

(a) To the best of the knowledge, information and belief of the Warrantors, there exists no material fact or circumstance relative to the business or affairs of any of the Group Companies which has or is likely to have a material adverse effect on the business of the Group taken as a whole and which;-

(i) should have been and has not been disclosed to the Investor; or

(ii) would render any of the information given in the Disclosure Letter by or on behalf of any of the Covenantors to the Investor or its advisers during the negotiations leading to this Agreement untrue or misleading

and in the case of either (i) or (ii) above if disclosed would have affected or would be likely to affect the decision or intentions of a reasonable and prudent person proposing to acquire the A Preference Shares"

16. The Agreement and the Warranties were clearly negotiated at arms' length by parties of substantial financial standing. In fact given the background to the Claimant, as set out in Mr Bateson's first witness statement of 23rd October 2003, it is possible that Mr Dermot Desmond, the force behind the Claimant is in a stronger financial position than the Defendants.

17. The Agreement follows a familiar structure applicable to agreements like this. The types of clauses are familiar, but not necessarily in identical form to ones which have appeared before the courts and referred to in reported cases.

18. This being a commercial agreement I approach the interpretation of the various clauses from the point of view of a reasonable person having all the background knowledge reasonably available to the parties, including anything which would have effected the way a reasonable man would have understood it, but excluding negotiations and declarations of a subjective intent (***ICS Limited v West Bromwich Building Society [1998] AC H.L.***).

19. I am reinforced in that view, in my judgment by paragraph 21 of Mr Bateson's first witness statement where he said:- *"It was made absolutely clear to both Mr Scriven and Mr Lawson-Smith that Bottin's style of investment was such that an "army of suits" would not be sent in; rather, Bottin would seek to rely on extensive Warranties negotiated within the proposed investment agreement. Against this background I carried out due diligence at Venson's head office in Esher [between 1st and 3rd December 1999 and 8th to 11th December 1999].*"

20. I will revert to Mr Bateson's witness statement and that and the succeeding paragraphs further in this Judgment. The Agreement therefore gestated as a result of negotiations between parties well equipped to secure for themselves the best possible terms that they could secure in such negotiations. I accept Mr Carr QC's submission that part of this exercise involves an allocation of responsibilities and the reciprocal allocation of risk as a result.

21. As part of that exercise the negotiations and the subsequent draft reflecting those negotiations are an attempt to address potential problems that might arise and deal with how those problems might be considered or on whom the risk falls.

22. As is the wont in cases like this, there is a substantial Disclosure Letter, with a significant amount of documents attached. Warranty 1 (a) warrants that all written information given to the Claimants by the Company and the Warrantor is at the date of the Agreement, true and accurate in all respects and is not misleading in any respect, and so far as such information is expressed as a matter of opinion, such opinions were when given and are at the date thereof truly and honestly held.

23. Annexed to the Disclosure Letter in Schedule 1 is an agreed bundle of 27 documents, including, for example the statutory accounts to year end 31st October 1998, (item 6), five year strategic plan (item 7), an information memorandum, which is extremely detailed (item 8), the management accounts to the period ending 31st October 1999, including analysis of trade and other creditors and debtors and turnover analysis (item 19). It is significant however, that the two main documents, which Mr Bateson says determined how he on behalf of the Claimants valued the offer to be made for the shares were the October forecast (which is set out in appendix 1 to the Amended Particulars of Claim) and the December forecast (which is set out at appendix 2). Neither of those documents is warranted in accordance with the Disclosure Letter. In the course of submissions Mr Wardell QC told me on instructions that Mr Bateson at all material times believed they ***had been included***.

24. There is however, no claim for rectification, no claim for relief against a mistaken belief (if any could be sustained) and no allegation that the Defendants misrepresented that these documents were to be warranted.

25. It follows that the parties' respective stances in negotiations involved the statements being made in those documents not being warranted. As I shall show in the next part of this Judgment, there are various clauses in the Agreement designed to reinforce the fall of responsibility and where the risk lies.

26. Part of that balancing exercise is shown by an examination of some of the provisions in clause 3. Under 3(a) the final sentence provides extra protection for the Claimant in that the question of reliance and whether or not the Warranties are representations are deemed to be satisfied. Under paragraph 3(g) knowledge and belief also extends in effect to constructive knowledge that would apply to any warrantor if any claim was based on their warranty. Finally, 3(v) prevents the Claimant from becoming aware of a breach and trapping the warrantors subsequent to the Agreement.

OTHER PROVISIONS IN THE AGREEMENT

27. I will not set out clause 8, because in the events that have happened, that does not arise for consideration before me in respect of this Judgment.

28. Clause 16 provides:-

"*16 Miscellaneous*

(a) Any liability to the Investor or to any assignee or Permitted Transferee under this Agreement may in whole or in part be released, compounded or compromised and time or indulgence may be given by the Investor or the assignee or Permitted Transferee in their or its absolute discretion as regards the Company or any of the Covenantors or any of the Warrantors without in any way prejudicing or affecting its rights against any other party.

…

(d) The Investor acknowledges that it has not relied on any warranty, representation or information in entering into this Agreement other than as expressly set out in this Agreement. This Agreement (and the documents and other information referred to in or annexed to it) constitute the entire agreement between the Parties. No investigations made by or on behalf of the Investor in relation to any of the Group Companies shall in any way affect or be deemed to be a waiver of any of the Warranties".

29. Clause 19 provides:-

"*19 Notices*

Any notice, request instruction or other document to be given under this Agreement to any of the Parties by any of the others shall be in writing and delivered personally or sent by prepaid recorded delivery post to their addresses set out in this agreement. Any Party may change the address to which notices are to be sent to it by giving written notice of the change of address to the other Parties in the manner provided for in this clause for giving notice. Any notice delivered personally shall be deemed to be received when delivered and any notice sent by prepaid recorded delivery post shall be deemed received 5 business days after posting".

30. Clause 21 provides:-

"*21 Entire Agreement*

This Agreement together with the Articles of Association represent the entire agreement of the Parties concerning the subject matter thereof and this Agreement supersedes all previous agreements, arrangements or understandings of the Parties in relation to the subject matter hereof and in particular, but without limitation, this Agreement supersedes the Original Subscription Agreement which shall terminate and be of no further effect and each of the Parties waives all rights, entitlement or claims that it may have thereunder against any of the other Parties with effect from Completion as defined in this Agreement".

31. Clause 25 provides:-

"*25 Dispute Resolution*

(a) Any dispute or difference which may arise at any time between the parties touching the construction of this Agreement or the rights and liability of the parties which cannot be resolved between Grant Scriven or failing him Clive Lawson-Smith on behalf of the Warrantors and the Coventors and John Bateson or failing him Michael Walsh on behalf of the Investor shall be resolved in accordance with the provisions of this Clause 25.

(b) If a dispute has arisen, either party may serve a notice in writing (an "ADR Notice) on the other party stating that in its opinion a dispute has arisen and identifying the reason.

…

(h) If the parties have not settled the dispute by the mediation within 90 days from the date of the ADR Notice, the mediation process shall end and the parties shall be free to issue proceedings pursuant to Clause 20".

32. Mr Wardell QC in his written and oral submissions contended that clause 25 (h) created a separate regime enabling the Claimants to bring a claim for breach of the Warranties after the failure of a reference to mediation without having regard to the condition precedent requirements set out in clause 3. This he abandoned in his reply to Mr Carr QC's opening submissions.

COMMERCIAL PURPOSE

33. It is plain that the purpose of these clauses in particular is to achieve a level of certainty so far as it is possible as between the parties. Thus the purpose of clause 16 (a) is to forestall any argument that a release of one, releases all others. Thus the purpose of Clause (d) is plain, to show that the Claimants are intended to limit any claims to any warranties or representations or information provided by the Agreement and that the Agreement constitutes the entire Agreement. Against that the Claimants are given protection by making it quite clear that they are free to investigate the financial affairs of the group of companies and that will not be a waiver of any of the warranties.

34. When one looks at clause 19, its purpose is to provide a regime for service so that there will be no dispute over service, so far as that is possible. Clause 21 is a familiar clause once again seeking to ensure that everything is merged into the Agreement and that the parties should look to their respective rights and liabilities in that document and that document alone.

35. The purpose of clause 25 is to provide a procedure whereby the parties can attempt to resolve disputes without the recourse to litigation. It was in the light of Mr Carr QC's submissions that clause 25 (a) properly, looked at, provided for an obligation to submit a dispute to mediation before litigating and not a parallel method of dispute resolution, that Mr Wardell QC abandoned his submissions on 25 (h).

DEFENDANTS' CONTENTIONS

36. The Defendants' contentions can be distilled into four distinct arguments:-
    (a) There has been no proper service of a notice of claim required to have been served under clause 3 (o) in accordance with clause 19.
    (b) If there has been proper service of documents, the documents relied upon by the Claimant do not comply with the requirements of clause 3 (o) in any event.
    (c) The pleadings in the original form are not proper pleadings and do not show a case which has any prospect of success.
    (d) The proposed amendments are similarly flawed and permission should not be granted to amend for the same reason.

ANALYSIS OF THE CLAIMANTS COMPLAINTS

37. The first breach is that set out in paragraph 19 of the Particulars of Claim. It is alleged that the figures set out in the forecast for the year ending December 1999 were untrue, inaccurate and misleading. The first formidable obstacle to this is that the December forecast is not part of the documents warranted by the Disclosure Letter. According to Mr Bateson's evidence it was a vital document, which was not included in the warranted documents. I have been given a partial explanation, namely that Mr Bateson believed it was included, but no explanation as to how it became his belief, save an acknowledgement that that belief was not created in any way by the Defendants. That really is a matter I suppose between Mr Bateson and his advisors if anything. Nevertheless, what the plea in paragraph 19 attempts to do by way of amendment is to allege that is should be treated as if it was included (as set out in paragraph 33 of the Reply).

38. This, in my judgment, is hopeless. If that document was to be included then it should have been expressly set out. If it was not expressly set out then it ought not to be treated as being in it unless the omission to include it is a result of some matter that is capable of being laid at the Defendants' door. I do not see how the Claimants can rewrite the Agreement by this attempt.

39. There are further compelling reasons as to why that should not happen. Mr Bateson in his evidence, as I have said, suggests this is a key document. I have considerable doubts about that. In paragraph 18 of his first witness statement Mr Bateson suggests that he was given an October forecast (which is repeated in appendix 1 to the Amended Particulars of Claim) and this was used as his primary basis for valuing Venson at between £21 and £25 million. The document is a slender document for the purposes of any meaningful valuation exercise. Further, this document too, was not warranted in the Disclosure Letter. This was another mistake on

the part of Mr Bateson. This second and significant document to his mind was the December forecast which is an even slimmer document than the October forecast. These are the two documents that Mr Bateson in paragraph 22 of his witness statement said were critical in his thought process. The October forecast showed profits before taxation as being estimated at £1,051,000.00. The December forecast revised the figure downwards to £711,000.00. Mr Bateson did not attribute a critical significance to the October management accounts. I find this surprising. They are the next important detailed document from an accounting point of view from the audited accounts (ignoring documentation provided as part of the due diligence exercise). Those accounts show an actual net profit of £566,554.00 before taxation to date. Those are the accounts for ten months of the year. I do not see how given those figures Mr Bateson could have ever contemplated that the October forecast was correct. It would have required Venson to have made £450,000.00 ***net profits*** in two months, which is an impossible target. Even with the downward revision by the December forecast the gap to be bridged in the final two months is approximately £150,000.00. Even on a reduced rate it is most unlikely, I would have thought, that that profit forecast for that two month period in effect would have been regarded with any credibility by Mr Bateson. The contrast from the point of view of detail of management accounts and these two forecasts is stark. The management accounts provide a profit and loss account, a consolidated balance sheet, which include actual figures up to October 1999, a consolidated cash flow statement, a turnover analysis with commentary and a full overhead statement comparing the actual year to date against the budget. Finally, it included a capitalised cost schedule to date as against the budget. There is a significant difference between the budgeted capitalised cost schedule and the actual (over £1 million adverse).

40. The management accounts are warranted. They show, as I have said, net profits to October 1999 of £566,544.00.

41. The thrust of the Claimants case is a little difficult to discern, but is was extracted during Mr Wardell QC's submissions.

42. As set out in paragraph 32 of Mr Bateson's first witness statement he received a revised forecast on 3rd May 2000. I observe that those figures were therefore provided over two and a half years before the expiry of the period for notification of a claim for breach of the warranties. These documents provide the primary basis for the Claimants case as it is presently formulated. These are the work of Mr Bateson's prognostications, as I understand it; they are not the work of any expert evidence. Further it is suggested on behalf of the Claimant that large amounts of documentation have not been provided by the Defendants and they are unable to quantify losses or their claims until such disclosure is obtained. That does not rest easily with Mr Bateson's fax message dated 16th November 2000. The opening gambit says:- *"Further to our conversation of earlier today I thought it would be useful to send you some analyses which I have designed to aid me in wading through the copious management accounts information sent to us from Esher. Attached, for 2000 year to date please find (1) summary consolidated figures actual and budget (as adjusted for notts not being in operation) … (2) summary quarterly figures … (3) contribution analysis"*.

43. There then follows a number of bullet point observations. Mr Bateson attempts to explain this in paragraphs 11 and 12 of his second witness statement. What he does not address in those paragraphs is the fact (which is obvious when one looks at the proposed amendments to the Particulars of Claim) that he was possessed of a significant amount of information which ought to have enabled him to have provided the Defendants with a somewhat detailed claim notice. As shall be shown later in this Judgment, the claim notices under clause 3 (o) cannot be said to have been detailed.

44. The figures provided to 3rd May 2000 show a loss before tax of £1,486,000.00, which represents an adverse variant from the October forecast of £2,197,000.00. It represents an adverse variant as regards the management accounts of some £2 million. These are significant figures.

45. However, in this context it is important to appreciate that the figures are not guaranteed. The forecasts are warranted as being honestly believed to be accurate having regard to the constructive notice provisions set out in clause 3 to which I have already made reference. They represent however a significant difference which ought to be either explained by the Defendants or form the basis of a justifiable suspicion that the management accounts cannot possibly be accurate as warranted. That appears to me to be self evident when one looks at those accounts, which as I have said showed a profit to date of £566,000.00. The actual out-turn is

£2 million below that figure according to the 3rd May 2000 figures. It follows therefore that if the management accounts were accurate Venson lost £2 million in the next two months, absent any other explanation.

46. That much must have been evident to Mr Bateson as soon as he received these revised figures on 3rd May 2000.

47. It is that comparison that is the primary and sole basis for the Claimants claim as presently formulated. In the Particulars of Claim, comparison details are given by reference to the December forecast. I doubt whether that is the correct basis for comparison; the correct basis for comparison really ought to be the management accounts. Nevertheless, detail is given there of the differences. However, as I have said, since the figures were not guaranteed, it is necessary to fix the Defendants with notice that the figures put forward were not accurate. There is no suggestion of actual notice (that would be tantamount to a fraud allegation). I mention that because Mr Bateson alleged fraud in the correspondence, repeated it in his witness statement and according to Mr Wardell QC believes the Defendants' conduct was fraudulent. Nevertheless, the Claimants are careful not to allege fraud in the Particulars of Claim.

48. The claim therefore, for it to be effectual, requires the Claimants to establish that the Defendants ought to have realised from other information or material and after making appropriate enquiries that the statements made in the management accounts were not true and accurate. The same extends to all other documentation warranted in the Disclosure Letter.

49. The proposed amendment (paragraphs 25 A, B and C) attempts to deal with the question of notice. These paragraphs simply say that the Defendants would have notice because of the roles that they had in Venson and that their roles would give them access to all of the documents summarised in paragraph 25 A (ii), which is in effect virtually every internal document.

50. That to my mind is not a sufficient plea of knowledge. Mr Wardell QC did not accept that. It seems plain to me that under CPR PD 16.82 the Claimants must ***specifically set out the matters they wish to rely upon in support of … (5) notice or knowledge of the fact***.

51. Faced with the breadth of the allegation it seems to me that it is impossible for the Defendants properly to deal with the pleading. Short of reading every document they cannot discern which documents are going to be relied upon by the Claimants as showing they had the requisite knowledge that the warranted documents were not accurate. Even if there are documents of course, it is necessary to show that it would be reasonable for the warrantors to look at them.

52. Mr Wardell QC's riposte was that the Claimants can do no better because they have not had access to documents. I do not understand the relevance of that in the context of the time frame in this case. The Claimant has three years within which to bring a claim. It was plainly alerted to the possibility of a claim by no later than 3rd May 2000. It was given copious documentation as early as November 2000. If there is a complaint that documentation was not made available to it, it had ample remedies open to it before the notice was required to be served. In effect it had two years seven months with which to secure the necessary documentation to formulate a claim. Mr Wardell QC's riposte again was to suggest that that is all right from a litigation point of view, but the Claimants did not wish to fall out with the Defendants. That too, to my mind, is simply not an answer.

53. The procedure requires them to serve a notice of claim, which sets out with full detail all information that they are aware of. I will revert to this further when I come to consider that particular head.

54. Finally in the context of the analysis of the Claimant's claim no clear quantification of the loss is presently given. Mr Wardell QC contends that the Claimant is unable at present to quantify the loss. That is not something which appears in the proposed amended Particulars of Claim. The original Particulars of Claim simply claimed that the entirety of the £10 million had been lost under the head of damages for breach of warranty. As an alternative it sought to claim the difference between the current value and the value it would have had had there been no representation or breach of warranty. In the Amended Particulars of Claim the damages for breach of warranty are based on the difference in value between the value had the warranties been accurate and its actual value, but no figure is now given. The claim for damages for misrepresentation is a difference between the £10 million paid and the true value of its investment. Once again no figures are given.

55. Mr Bateson according to his evidence valued the shareholding to be acquired based on the October and December profit forecasts. He also had the management accounts and the other information revealed under the Disclosure Letter. His original valuation was based on the October forecast.

56. Given the extra information and his examination of it I do not understand why Mr Bateson was not in a position many years before the claim notices were served to provide a view according to his beliefs as to what the shareholding should have actually been worth, as opposed to the price paid. He was quite capable of working out what Venson was worth based on the earlier material and I have had no explanation of any convincing nature as to why that exercise could not have been done before.

57. Mr Carr QC in his closing submissions drew to my attention various suggested explanations as to the apparently startling difference between the management account profit figures for example and the 3rd May 2000 figure. He conceded however, that it was impossible for me to evaluate those and come to any conclusion for the purposes of a part 24 application.

58. Nevertheless, it is right to fasten upon what knowledge Mr Bateson had and whether that knowledge was transmitted into the claim notices that were provided under clause 3 (o). As will appear in this Judgment, I am firmly of the view that the amount set out in the claim notices (which ever one the Claimant seeks to rely upon) does not satisfy clause 3 (o). I should say also that I am not satisfied that the Particulars of Claim as regards the alleged breaches (nor the Amended Particulars of Claim for that matter) provides sufficient particularity in respect of the knowledge required to be attributed to the Defendants.

SERVICE OF CLAIM NOTICE

59. The primary attempt by the Claimant to serve is the letter dated 20th December 2002, expressed to be served "***by hand only***".

60. The pressure for service on the Claimant was by then acute. It could no longer have served the claim notice by registered post because the time for service expired the next day and a letter posted would have deemed to have been delivered five business days after it was posted. This is entirely the fault of the Claimant. It was given three years to formulate a claim and on the last day for service a desperate attempt was being made to serve a notice. It might be said that they were lulled into a false sense of security (in a non-actionable way) because of the mediation. The mediation started in April 2002 and petered out in early December 2002. That does not justify the way in which the Claimant went about the formulation of their claim.

61. The documents were served on Mr Lawson-Smith at an address which he had never lived at since 1996 and which was not the address identified in the Agreement. Under clause 19 the relevant address for service is identified in the Schedule to the Agreement, but a change has to be made in writing. It is self evident why it has to be made in writing so that the ***Claimant*** can have a clear indication as to where the documents ought to be served and any change ought to be given to it in writing. I will not set out in this Judgment how the notification of claim came to be served where it was, as Mr Wardell QC was constrained to acknowledge, whatever else was said between the respective personal assistants, that no change of address notification in accordance with clause 19 had been given. That is the end of any warranty claim against Mr Lawson-Smith.

62. As regards Venson the notice of the claim was left with the receptionist at its Registered Office.

63. As regards Mr Scriven, according to the process server he attended Mr Scriven's premises (as usual it was dark and raining). Access to Mr Scriven's premises is by virtue of locked security gates and there is no post box. Nevertheless, fortuitously a car pulled up with a chauffer in and after a short discussion the process server gained access to Mr Scriven's premises and was able to find a letterbox through which he pushed them. Mr Scriven at that time according to his evidence was on a skiing holiday.

64. This service is as I have said, the subject matter of the preliminary issue if it arises. The Second Defendant's evidence is that it is impossible for the documents to be served through the letterbox, because the letterbox has been sealed for many years. He has adduced evidence from the predecessor in title, which confirms this. I shall say nothing more about this because it may be relevant if that preliminary issue proceeds.

65. The Claimant's case is that the words personal service categorise the Claimant as server and not the Second Defendant as recipient.

66. Thus it is submitted that as long as the Claimant personally serves the document at the specified address, that is sufficient. That is a conclusion, which Mr Wardell QC submits is to be drawn primarily from the last sentence of clause 19, when compared with the deemed service provision as regards recorded delivery service. He points to the deeming effect of personal service to show that it cannot have been intended to cover what the Defendants say is the provision, namely actual handing to the proposed recipient.

67. There are a number of difficulties facing this construction. First the Claimant is a corporation. It cannot do anything personally; it can only do it by agents. Mr Wardell QC was constrained to submit that personal service in the case of the Claimant (the only relevant party for the this purpose) would be achieved by it arranging hand delivery at the address. Mr Carr QC pointed out in his closing submissions that if that was correct it could extend to ordinary postal service. Mr Wardell QC did not submit that it would cover service by ordinary post. He was right to make that concession. It would make a nonsense of the clause. Service by recorded delivery is deemed to be effective five business days after the letter is posted. In the case of service by recorded delivery clause 19 therefore provides a simple and straightforward regime for a server of documents. All that the server has to do is to send the letter by recorded delivery. It is not open to the recipient to complain that the document arrived at a different date, nor is it open to him to complain that it was not actually delivered (thus obviating the frequent occurrence of people who are expecting to receive an adverse recorded delivery refusing to sign for it). If ordinary postal service is covered by personal service, then a bizarre result would occur. Service would be deemed to be effected only when it is delivered. Thus in the case of an ordinary letter (contrast to recorded delivery letter) it would be open to the recipient to adduce evidence to show when it was actually delivered. It would also be open to the recipient to adduce evidence to show that it had ***never been delivered***. If ordinary postal service can fall within the personal service limb of clause 19, the draftsman has wholly failed to provide a regime of certainty; quite the opposite has occurred. However, when one analyses Mr Wardell QC's submissions, I can see no basis for saying, that ordinary postal service would not be personal service as he designates it. Even if ordinary postal service was not designated by that method, what would happen if the Claimants arrange for couriers to deliver it? There are therefore great difficulties as regards the Claimant's construction of personal service. I do not believe its analysis gives any effect to the word ***personal***.

68. To deal with Mr Wardell QC's submission based on the final sentence, it is plain to me that it addresses a difficulty that might arise as between delivery and reading. Once the document is delivered by hand, it does not matter that it is lost, it does not matter that it is not read. I do not see that the clause is designed to achieve any other effect than that.

69. In addition the question as to whether or not the document could be merely left at the address in question was also ventilated in argument. Mr Wardell QC submitted that the construction of clause 19 meant that it would have to be delivered in such a way as there was a reasonable prospect of it coming to the attention of the recipient within a reasonable time thereafter. This inevitably would be bound to lead to factual arguments as to whether it had been sufficiently drawn to the attention of the recipient. It is well demonstrated by the consideration and location of Mr Scriven's property. There is no post box at the entrance. Would it have been sufficient if it had been fastened to the gates? Would it have been sufficient if it had been thrown over the gates? Would those be altered if the Claimants knew Mr Scriven had a vicious dog that was in the habit of eating parcels? One would assume that the purpose of the draftsman would be to devise a method of procedure of service which would avoid fraught factual disputes.

70. That is not to say the Defendants version as contended for is not without its own difficulties. Mr Carr QC's primary submission was that only handing the document to the individual recipient will suffice. That does not address however, further difficulties. Let us suppose that the recipient is in the house and the server knocks on the door and the recipient's wife collects the document. That is not far removed from the way in which the ADR notice served in April 2002 was actually served. When it was thus served the Defendants solicitors Wallace and Partners acknowledged that was proper service in accordance with clause 19. Their belief does not make it so, of course and it is open to the Defendants (absent an estoppel or an arguably agreed variation) to maintain the stance they do. It seems to me that personal service by hand delivery must itself be subject to qualification that if a proposed recipient authorises somebody else to receive it then that would be deemed to be personal service. Anything else would be quite extraordinary. Otherwise a person

could be aware that a document is intended to be served and then authorise it to be served on a third party and subsequently argue that was not valid service. I cannot see a court acceding to such an analysis.

71. Clauses like this are a matter of impression. The arguments are finally balanced. There is no reason why I should not decide this issue on a Part 24 basis, as there is no further information, which justifies delaying this issue to trial.

72. On balance I am of the opinion that the Defendant's construction is correct. It seems to me that the draftsman by that method would have provided an alternative method, which would equally be certain. Thus the Claimant has an option of serving either by delivering it in hand (or to somebody who is authorised to receive it) or by registered post. The Claimant's difficulties and the agile submissions of Mr Wardell QC are driven by its failure to contemplate service in the several years that were open to it.

73. Accordingly, I am of the opinion and conclude that the claim documented on 20th December 2002 was not properly served on Mr Scriven.

SERVICE ON VENSON

74. Both constructions require to be modified in the light of the fact that Venson the recipient is a limited company. Mr Carr QC submitted that service can only be effected on somebody who has an executive role within Venson and that service by leaving at the reception is not enough. Insofar as any analogies are relevant, he refers to the service provisions under CPR 6.4(4), which provide for personal service on a company by leaving it with a person holding a senior position. Although I was not referred to this provision it is significant that under 6.4(3) a document is served personally on the individual by leaving it with that individual. That if significant would of course be contrary to Mr Wardell QC's submission.

75. Mr Wardell QC submits a more relevant provision would be section 725 of the Companies Act 1985, which provides for a document being served by leaving it at, or sending it to the companies registered office. Thus he submits by leaving it with the receptionist at Venson's registered office, personal service was affected.

76. Neither of these provisions has been expressly included in the Agreement, so I find them of no assistance.

77. Personal service on a company under clause 19 in my judgment must be by leaving it at the registered office. In my judgment service at the registered office by leaving it with the receptionist is sufficient. I do not accept Mr Carr QC's submission that the server takes upon himself the risk of a document, which is handed into the receptionist not making its way to the offices of the Defendant. That would not make sense in my judgment and I cannot believe the draftsman would have intended that to happen. In this context it is note worthy that the Defendants have not adduced any evidence as to what happened to the document after it was left at the receptionist. Absent any such evidence I conclude that it was drawn to the attention of the officers of the Venson and that the stance taken is a purely technical one.

78. I therefore conclude that the claim notice dated 20th December 2002 was properly and personally served on Venson.

ALTERNATIVE SERVICE

79. When matters became contentious in 2001, in the sense that Mr Bateson was raising matters he had the habit of communicating by fax, that was complained about by the Defendants as they did not wish confidential material to be sent on an open fax, so a regime was put in place as set out in Mr Bateson's letter of 17th April 2001, whereby instead of sending a fax without warning, a telephone call would be made about an imminent fax to be received. This procedure was followed through 2001 as shown by letter dated 12th June 2001, 2n July 2001, and 21st December 2001. All of those letters cannot in my judgment be regarded as 3 (o) notices as they were not so designated and they do not comply with the requirements of that provision. By 22nd March 2002 a further notice was sent by the same method. The second paragraph says:- *"This letter constitutes an ADR notice under clause 25 of [the Agreement] and identifies the main disputes and difficulties between us …"*

Various misrepresentations are set out. On the second page in the last paragraph it says:- *"Nothing in the disclosure letter of 22nd December 1999 dilutes your liability to Bottin I the particular circumstances of what has transpired and Bottin intends to pursue its full entitlements against the Warrantors in accordance with the terms of the Agreement in accordance with law …"*

80. As a fall back argument Mr Wardell QC submits that this letter is a sufficient letter for the purpose of clause 3 (o). He relies upon the well known House of Lords decision of ***Mannai Investment Ltd. v Eagle Star Life Assurance Co. [1997] AC 749***. I accept that the effect of the ***Mannai*** decision is that a sensible approach should be taken to notices and whatever their form, if a reasonable recipient is left in no doubt as to what the purpose of the notice is they are going to be bound by the effect of that notice whatever its form.

81. In my judgment the only possible conclusion a reasonable recipient can draw upon service of this carefully drafted notice is that it is a notice under clause 25. There is no ambiguity about it and I do not see how a reasonable recipient can be expected to assume that this notice is given as a fall back under clause 3 (o). First that is contrary to the procedure, which Mr Wardell QC conceded. The interrelation between clause 25 and the claim procedure is that when a dispute arises it must be ***first*** considered under the ADR procedure under clause 25 and then when that fails proceedings of a more formal nature can be gone through (clause 25 (h)). Mr Wardell QC's submission involves this notice having a dual and parallel effect contrary to the contract. In fact it does not have that effect. The paragraph on the second page of the letter which I have quoted above shows plainly that the drafter and sender of the letter knew full well that if the ADR procedure failed ***then*** resort would be had to the formal procedure, i.e. ***thereafter*** be a notice under clause 3 (o) a prerequisite to the commencement of proceedings. It would be quite extraordinary to require recipients who receive a clear letter like this to ask themselves whether it could possibly be interpreted or relied upon retrospectively as a completely different form of notice. The reality is that this is a desperate attempt by the Claimant to cover the shortfall in the procedural shambles that existed on 20th December 2002.

82. Further, I accept Mr Carr QC's submission that the informal regime that operated was only intended to apply to communications to obviate the unfortunate if literal effect of clause 19, namely that for every letter which Mr Bateson would wish to send raising questions as to information under the terms of the Agreement, he would have to follow the cumbersome procedure under clause 19. I do not accept that the procedure that was adopted in that regard informally had a general effect. I therefore do not accept that even if the ADR notice could be construed as a clause 3 (o) notice it has been properly served in accordance with clause 19.

83. The issue of service was taken up immediately and the same documents were reserved on 10th April 2002.

84. Wallace and Partners by letter dated 12th April 2002 acknowledged receipt of those letters and in the second paragraph said this:- *"Since receiving your letter of 9th April we are pleased to note that your client has reserved the purported ADR notice in accordance with the procedure required by the Investment Agreement by means of their hand delivered letter yesterday. Accordingly the 14 day period for the parties to seek to resolve the dispute between themselves is now running. It is to be hoped that progress can be made in this respect. Our client will be writing to yours to suggest a meeting in early course. We do consider the formal notices should continue to be served by hand delivery or recorded delivery (rather than faxed) as this eliminates the possibility of misrouting or non receipt."*

85. Mr Wardell QC submits that that is acceptable service in accordance with clause 19 of the ADR notice. I agree because Wallace and Partners have said so. As I understand it those documents were not handed into the hands of either a senior officer of Venson or Mr Scriven (Mr Lawson-Smith was never served). In the case of Mr Scriven they were left with a lady at his address and he duely received them.

86. To my mind that is explicable on the basis of the Defendants' interpretation of the effect of clause 19, namely, that the documents have to be handed personally to either the recipient, or somebody whom the recipient authorises to receive them personally. Therefore a formal notice under clause 25 has been validly served in accordance with clause 19. The letter makes clear that any future documents have to be served in accordance with that procedure.

87. However, for the reasons that I have already set out I do not see how this document can be reasonable relied upon as a notice under clause 3 (o). It follows therefore that whilst I accept they were validly served for the purpose of clause 25, they were not validly served for the purpose of clause 3 (o).

SUMMARIES AS REGARDS SERVICE

88. In conclusion therefore as regards the requirements for service the only document which I determine has been validly served is the one on Venson dated 20th December 2002.

CONTENTS OF A NOTICE

89. I have set out above the requirements of a notice. It is plain to my mind that both the purported ADR notices and the notice of 20th December 2002 are defective in that they do not comply with the requirements of clause 3 (o) as they do not "***specify such detail of the event or circumstances giving rise to such claim as are available to the investor and an estimate (if capable of preparation by the Investor) of the total amount of the Warrantors liabilities therefore claimed***".

90. More information was available and known to Mr Bateson than is set out in the notices. It will be particularly significant that the notices failed to explain how the warrantors had the requisite knowledge. (I have already observed the Amended Particulars of Claim is defective in that regard already). The only attempt as to losses for breach of warranty is clause 22. I do not accept that that is a genuine attempt by the Claimant to quantify the loss. Simply to say that the Claimant has lost £10 million is inadequate. There is no evidence to show that Mr Bateson or anybody else has gone through an exercise and arrived at that figure. In the absence of any explanation as to how it is calculated my assumption is that they simply put an obvious figure in, because they knew they need to put a figure in. It would have been the easiest thing in the world for them to say that they were unable to quantify the loss at present, but they chose not to do so. It will be noted that under clause 22 the claim is not only for the £10 million plus interest, but also the loss of alternative investment opportunities. This does not feature in the Particulars of Claim. Clause 23 of the notice cannot be relied upon as no quantification is set out there.

91. Mr Carr QC submits that this is a disguised rescission claim without rescission. I do not accept that submission. There is no reason why if the appropriate value of the shares is £0.00, the Claimant cannot claim £10 million and retain its shareholding. If that exercise has been gone through the notice would have been good, but as I have said I do not accept any such exercise has been undertaken.

92. The notices therefore fail for three reasons. First they do not specify the detail of the event or circumstances that was then available to Bottin, second they do not explain how the Defendants had the requisite knowledge and third no estimate has been provided. The recipients of such a notice were entitled to receive a detailed basis for the claim and an amount of the quantifiable loss. It is impossible for the recipients of this notice to understand what is being said against them, except in very generalised terms by reference to the movement between the figures in the December 1999 forecast (which of course is not warranted) and a loss figure of £1.4 million, the basis of which is completely unexplained. I accept that there are references to movements between the management accounts, but no attempt is made to identify how the figure of £580,000.00 is wrong; it is simply asserted that it is wrong. The relevant paragraph (paragraph 12) contains a bald assertion that the warrantors knew or should have known that the management accounts gave an unrealistic view of the trading position. This is the summary of the Claimants complaints after they had been complaining for two years and seven months. It is a wholly inadequate document in my judgment.

93. It goes on. Paragraph 14 contains as does paragraph 15 bald assertions of breaches of paragraph 3 of schedule 3 and 13 (a). It is impossible for the recipients of the notice to understand what is being said against them.

94. I therefore conclude that the notices, both in respect of the ADR notices (if it might be argued elsewhere that they can be interpreted as clause 3 (o) notices) and the December 2002 notices fail to provide sufficient detail as required by the clause. It follows therefore that my conclusion is that the essential prerequisites to the commencement of proceedings for breach of warranties have not been made out and the original Particulars of Claim should accordingly be struck out in its entirety.

PLEADING ISSUES

95. In my judgment the original Particulars of Claim in any event did not and still does not provide a proper pleading, especially in regard to the question of the knowledge of the Defendants sufficient to show that the warranted documents are actionable. Mr Carr QC in his skeleton argument (paragraph 10) acknowledges that the Amended Particulars of Claim have cured those pleading defects.

96. It seems to me that the key issues, which are outstanding, are twofold. First I do not accept for the reasons which I have already set out in this Judgment that paragraphs 25 A, and following are a sufficient plea as regards the requisite knowledge to be attributed to the warrantors. I accept Mr Wardell QC's submission that nothing more can be done before disclosure at this stage. However, the reason for the inadequacy is the molasses like approach of the Claimants to this issue. They have had two years and seven months to obtain

access to the Defendants documents to identify the necessary cause or connection. I am not overly sympathetic to such a plea when it is a necessary plea because of the way in which the matter has proceeded with up until the last date for service of the Notice.

97. The second area, which also remains inadequate in my judgment, is the quantification of the claim. I cannot see why Mr Bateson, as I have already said could not have attempted a quantification of the claim with the reservation of a right to alter or add to it in due course.

98. Had the Particulars of Claim survived the inadequacies of the service I would have provided a tight timetable for disclosure by the Defendants and an equally tight timetable for the Claimants properly to plead the requisite knowledge by reference to relevant documents and a properly quantified damages claim. Those do not of course arise because I have determined that the contractual claim ought to be struck out. In case that decision is wrong it seems to me self evident that this pleading even in its amended form is an inadequate document. I entertain great doubts as to the *bona fides* of the Claimant.

NEW CAUSE OF ACTION

99. There are great difficulties with this claim both in fact and in law. The factual difficulties arise from the claim. Paragraph 33 A, adds a negligent misrepresentation/mis-statement claim. It does not follow the procedure conferred on the parties seeking to plead misrepresentation under section 2 (1) of the Misrepresentation Acct 1967, simply enabling them to plead a representation was made and it was false and leave the Defendant to establish it had reasonable grounds for making the representation see ***Howard Marine Dredging v Ogdon and Sons [1978] QB 574*** and ***Chitty 6 – 068 to 6 – 069***.

100. The claim pleads a positive case for negligent mis-statement. It follows that it is necessary (even in the CPR days) to plead a duty of care negligently broken with particulars of negligence. In paragraph 33 C, the material relied upon for the duty of care is "***by reason of the matters aforesaid the Defendants and each of them owed a duty of care to Bottin in making the representations set forth in the December Forecast***". The only matters "***by reason of the matters of aforesaid***" are found in 33 B, that they intended and well knew or ought to have known that Bottin would rely upon and be induced by it to enter in to the Agreement.

101. The particulars of negligence are to be found in 33 A, namely that they failed to make due and careful inquiry, failed to check the accuracy of the management accounts and failed to check the accuracy of the financial information. In 33 E, it said that they made the representations in the December forecast without any or any proper investigation or verification of the information upon which it was based. It is said that the December forecast was inaccurate and misleading and that plea reverts back to the inadequate plea in paragraph 19 to 21 and 25 to which I have already made reference.

102. There is a further formidable obstacle to the claim as a matter of fact in my opinion. I refer to paragraph 21 of Mr Bateson's first witness statement, which I have set out above. I have great difficulty in seeing how it can be said that Mr Bateson relied upon the unwarranted documents when paragraph 21 of his statement makes it quite clear that he was only going to rely upon the warranties. He might have believed that the two share forecasts were warranted documents, however his belief was erroneous and it is not suggest that the Defendants contributed in any way to that belief. I do not see how at the moment this can be regarded as anything other than a disguised claim for rectification or relief from mistake without the requisite grounds for such claims being made. It is just like the attempt to read into the warranted documents these documents when they are not in the list of documents.

103. Mr Wardell QC submits that that is a misreading of his evidence and I should also take into account paragraphs 22 and following which emphasises the critical nature (to Mr Bateson's mind) of the October and December forecasts. I have already observed that I have difficulty in attributing to these documents significance to which Mr Bateson attributes to them. I am extremely sceptical about this allegation made as it is not at the forefront of the Claimants claim, but as an after thought after the contractual pleading claims were subjected to the Defendants Part 24 attack. It hints of a desperation to find another cause of action which never occurred to anybody until a likely failure arose because of procedural inadequacies of the proper claim that should be brought under the Warranties. I also note that Mr Bateson is willing to allege fraud (paragraph 36.1 in his witness statement) but not willing to plead it.

104. Finally in this context of fact there are the clauses in the Agreement (16 (d) and 21), which not only fly in the face of a suggestion of reliance on documents not the subject matters of warranties, but actually support paragraph 21 of Mr Bateson's witness statement. Given the exclusionary nature of those clauses i.e. it is not intended that anything not warranted should be relied upon, Mr Bateson's witness statement makes sense. What happens is that there is a hard bargain over the extent of the warranties. Thus hard bargaining might take place as regards the extent to which the existing factual documents should be warranted. In addition hard bargaining would take place as to whether future profitability would be guaranteed or not. The spectrum is wide ranging. At one end it is quite possible that a warrantor might guarantee future profitability figures within a range. At the other end the Warrantor might not be keen to give any warranty as to regards future profitability. In between is the position under the Agreement, namely that the warrantors have warranted that they have taken all reasonable care *bona fide* in the preparation of the warranted documents.

105. The balance between the parties is a fair one. I have already observed as to the financial strength of the parties. Nothing therefore could be clearer than that.

106. It follows that I do not accept there is clearly a duty of care in relation to unwarranted documents, as alleged by the Claimant in its proposed amendment. I do not accept that whatever Mr Bateson's ***private*** beliefs as to the significance of these documents, there is any evidence, which shows that the Defendants were aware of their significance to such an extent that they knew the Claimants would rely upon them. Whilst Mr Bateson says the documents were critical to his exercise (and I accept that in view of his witness statement) he nowhere in his witness statement says that that critical fact was known to the Defendants. In paragraph 9 of Mr Scriven's second witness statement he expresses astonishment that Mr Bateson regarded the December 1999 forecast as critical to the Claimants decision to invest, emphasising as he does the forecast was not warranted. Mr Bateson's second witness statement addresses that only in paragraph 10, where he refers to paragraph 33 of the Claimants Reply. That does not help him as regards asserting that the Defendants knew that this document was of significance to the Claimants.

EXCLUSION CLAUSES

107. The purposes of these clauses are to ensure as between the parties that the only rights and remedies are those that arise under the express terms of the Agreement. It is difficult to see why that is not an appropriate procedure when negotiating a carefully crafted commercial document between two parties of equal financial strength at arms' length. It enables both parties to know precisely what there rights and liabilities are. As I have said this echoes Mr Bateson's acquisition practice.

108. At first sight therefore in the context of a commercial agreement one would inevitably conclude "*pacta sunt servanda*" and hold the parties to the express terms of the Agreement.

109. The effect of these clauses has been considered extensively in a number of cases. In none of them (so far as I can discern) has any successful challenge been mounted, both as a matter of construction of principle and as a fall back on the basis of a section 3 of the Misrepresentation Act 1967 and the test of reasonableness incorporated in that section from the Unfair Contract Terms Act 1977 ("UCTA 77").

110. The first case ***Thomas Witter Ltd. v TBP Industries [1996] 2 All ER 573 (Jacob J)***. The clause in question (clause 17.2) contained two parts. The first sentence provided that the agreement constituted the entire agreement and understanding. The second part contained an acknowledgement that the purchaser had not been induced to enter into the agreement by any representation or warranty other than the statements contained or referred to in the schedule 6. Jacob J. concluded that the first part did not exclude liability for misrepresentation on its wording. In respect of the second part he concluded that any misrepresentation found in any of the documents could found a misrepresentation, as that was a positive effect. Obiter at page 597 (e) he addressed a misrepresentation of fact not contained or referred to in the relevant schedule. He expressed the view that it was doubtful whether the second part was effective to cover any such situation.

111. He also went on to consider section 3 MA as modified by UCTA 77. Mr Wardell QC acknowledges that the failure to exclude liability for fraud cannot be a basis for striking down the clause. The clause is only struck down to the extent necessary so that if there was an allegation of fraud the clause would in all probability not operate. But that is not the case here.

112. The next case of significance in respect of the impact of clause 16(d) is ***E A Grimstone and Sons Ltd. –v- McGarrigan [27th October 1999] (unreported) C.A.*** The relevant clauses are set out in the judgment (being clauses 2.5 and clause 8) which respectfully say as follows:-
"*2.5 The Purchaser confirms that it has not relied on any warranty representation or undertaking of or on behalf of the Vendors (or any of them) or of any other person in respect of the subject matter of this Agreement save for any representation or warranty or undertaking expressly set out in the body of this Agreement …*"

113. Clause 8.1 provides:-
"*8.1 This Agreement sets out the entire agreement and understanding between each of the parties hereto in connection with the Company and the sale and purchase of the Shares and no party hereto has entered into this Agreement in reliance upon any representation, warranty or undertaking of any other party which is not set out or referred to in this Agreement*."

114. The Judge at first instance found there was a representation, but the Court of Appeal reversed that factual finding. The Court of Appeals observations on the relevant clauses are therefore obiter, but bearing in mind what Chadwick LJ said on what was the second issue:- *"The view which I have expressed in relation to the first issue makes it unnecessary for me to consider the second issue - was the judge correct to hold that that there was nothing in either clauses 2.5 or 8.1 of the agreement which made it clear that the purchaser was to have no remedy for pre-contractual representations? Nevertheless, in the circumstances that the point has been fully argued and is of some general importance, it seems to me appropriate that I should do so.*"

115. His Lordship correctly identified that in the ***Witter*** case, what Jacob J had said about the corresponding clause 17.2 was obiter in relation to representations that did not become a contractual term. The key part of the judgment is where he rejects Jacob J's obiter views as to what would be the result in respect of representation which did not become a contractual terms (see 1996 2 All ER 573 at page 597 E to F). Chadwick LJ said he could not understand Jacob J's reasoning and:-
"*I can see no difficulty in an acknowledgement by a purchaser that a representation which was made was not relied upon; but I cannot see how a purchaser who has acknowledged that a representation was not relied upon can afterwards say that that was nothing more than what he thought was the position at the time. Put another way, I reject the contention that it is open to a purchaser to assert both that he did not rely on a representation, which was made to him and that he did rely upon that representation. He must be taken to know, at the time when he enters in to the agreement, what representations he is relying upon.*
In my view an acknowledgement of non-reliance, in the form which appears in clauses 2.5 and 8.1 in the present agreement, is capable of operating as an evidential estoppel. It is apt to prevent the party who has given the acknowledgement from asserting in subsequent litigation against the party to whom it has been given that it is not true. …"

116. It will be seen that Chadwick LJ does not say the clauses will ***always*** operate as an estoppel they are merely "***capable***" of operating as an evidential estoppel. Thus it is a question of fact on each case

117. On the next page he says that the party seeking to rely upon the clause needs to plead and prove the three requirements identified by the Court of Appeal in ***Lowe v Lombank Ltd. [1960] 1 All ER 611***, namely:-
"*(i) that the statements in those clauses were clear and unequivocal, (ii) that the purchaser had intended that Mr McGarrigan should act upon those statements and (iii) that Mr McGarrigan had believed the statements to be true and had acted upon them*."

118. Further in the judgment he said he would find no difficulty in acknowledging that the clauses were clear and unequivocal and that there would be very little difficulty that the purchaser would have been found to have intended the vendor to rely upon them. However, he, in the absence of evidence would not have been willing to believe that Mr McGarrigan i.e. the party seeking to uphold the clause, believed the statements and acted upon them.

119. The court also went on to consider on the facts of that case section 3 MA 1967 and on that evidence concluded that the clauses would not be invalidated by the operation of the UCTA provisions.

120. Pill and Peter Gibson LJJ's both agreed.

121. The third case is ***Watford Electronics Ltd. v Snaderson CFL Ltd. [2001] EWCA Civ 317 (C.A.)***.

122. The Court of Appeal (comprising again of Chadwick and Peter Gibson LLJ's) were considering the effect of clause 7.3 or 10.6 of two different documents. The effect of them was the same:-

> "*7.3 Neither the Company nor the Customer shall be liable to the other for any claims for indirect or consequential losses whether arising from negligence or otherwise. In no event shall the Company's liability under the Contract exceed the price paid by the Customer to the Company for the Equipment connected with any claim*."

123. Separately from that provision was an entire agreement clause which included provisions to the terms being an entire agreement and that no statement or representation made by either party be relied upon by the other in agreeing to enter into the contract.

124. The judge at first instance held that the limitation of liability clauses to cover to pre-contractual misrepresentations and were unreasonable in there entirety by reason of the provisions of UCTA.

125. The Court of Appeal held that the clause of limitation of liability did not exclude liability for negligent misrepresentation. The Court of Appeal therefore felt able to revisit the case as a whole because of that error and concluded that he limitation of liability clause was not infringed by the provisions of UCTA.

126. Given that conclusion any observations on the entire agreement and misrepresentation clause exclusion was obiter. The ***Grimstead*** case to which I have already made reference had not been cited to the judge at first instance. Chadwick LJ at page 711 repeated the observations he made in relation to ***Lowe v Lombank***. Given that clause attempting to exclude liability for misrepresentation he held that it would be odd that the limitation of damages clause would apply to a misrepresentation that the parties never believed was part of their thought process as they never intended any liability for misrepresentation to arise.

127. It is to be borne in mind that all three cases involved an examination of the issues ***at trial***. I remind myself that this is an application by the Defendants for summary judgment under Part 24. The Claimant to resist that application successfully must show that it has an answer to the matter raised which has a reasonable prospect of success at trial, in accordance with the well established authorities of ***Swain v Hillman [2001] 1 All ER 91*** and ***Three Rivers District Council v Bank of England (No.3) [2003] 2 AC 1***.

128. The cases provide a strong platform for the Defendants in this case. I have already commented on the weakness of the representations.

129. It is undoubtedly apparently the case that Mr Bateson believed the documents as being significant. However, I do not believe that at this stage I have seen all the deployed material necessary to enable me to be satisfied that he Defendants are entitled at this stage to rely upon that contractual provision to shut the Claimant out in respect of its claim based on misrepresentation.

130. Even if I was wrong on that, I do not see how I could begin to embark on that decision at this stage if (as Mr Wardell QC does) he raises the question of section 3 of the Misrepresentation Act 1967. In this context I should make two further observations. First, Mr Carr QC submits that in none of the cases was there an argument based on contract. His submission is that clause 16(d) is a contractual provision, which the Claimant is seeking to resile from. With the case approached that way, he submits that it is not necessary to plead the evidential estoppel. In this context he referred me to the case of ***National Westminster Bank v Utrecht-America Finance Co. [2001] EWCA Civ 658***. There the Court of Appeal appears on an interim basis to have concluded the permanent injunction could be given in favour of the seller, which provided "***the seller shall have no liability to purchaser and the purchaser shall bring no action against the seller in relation to the nondisclosure of [a specified category of] information***". In that case the Court of Appeal concluded that the clause could not be challenged under section 3 MA 1967 because it attempted to exclude liability for fraud. The judge at first instance rejected that submission and the Court of Appeal upheld it concluding that the parties were sophisticated and equal bargaining power the clause was tailor made for the transaction and that the terms included both the clauses so that it might in other circumstances have been ***Utrecht*** and not ***Westminster*** that was relying upon it, and there was nothing unreasonable in giving effect to the principle *caveat emptor* that the price was substantially discounted. It appears that the court were giving effect to Mr Carr QC's submission based on agreement, rather than evidential estoppel. The reason for that of course is that the clause was not an acknowledgement clause it was a straightforward negative provision, preventing them from bringing proceedings. A passing reference is made to the ***Witter*** decision (it is certainly not approved). No reference is made to the later cases to which I have made reference.

131. Once again I can see the force in Mr Carr QC's attractive and well presented arguments, but I remind myself that this is a Part 24 application. It would leave me with a feeling of unease if at this stage the Claimants case was shut out. The case is weak. Part 24 has attempted to redress one of the failings of the old Order 14, in that it was not open to Defendants to seek summary judgment. If this was an application by a Claimant against a Defendant it would have been a classic case for a conditional order. There is no corresponding worthwhile conditional order that can be made against a Claimant on a Part 24 application by the Defendant. The Claimants case is weak, but I do not think it can be said at this stage that it is so fanciful as to enable the Defendant to obtain summary judgment.

132. The key reason for that is the early stage of the proceedings. Disclosure has not taken place. Of course that is significant because of the casual way in which the Claimant approached this potential claim. However, I do not believe that I should punish the Claimants because of the inadequacy of the way in which it has gone about bringing the contractual claims and thus deprive them of a potential claim based on misrepresentation.

133. The circumstances of the handing out of the October and December forecast require to be investigated. In that context the Defendants also ought to be entitled to deploy the evidence that they would wish to deploy. That evidence would be twofold. First after disclosure the Claimants would be required properly to plead the case alleging the significance of these documents in contrast to the large amount of material which was made available for it, in exchange for the warranties. They would also need as part of that exercise to plead a positive case of negligence which will involve them tying the Defendants into specific negligence mis-statements by reference to the other internal documentation which the Claimant would contend would show that no reasonable statement could have been made based on the October and December statements. Third the Claimants case requires completion (as it is based on a tortious claim) by a properly pleaded case based on loss and damage.

REDRESS TO DEFENDANTS LEGITIMATE CONCERNS

134. It seems to me the way to address this is not to give the Claimant the luxury of necessarily taking this case to trial. The Defendants are entitled to know fully what the case is against them along the lines that I have set out above. In view of the way in which the Claimants have casually approached this affair already, it is right to impose a vigorous timetable on the Claimants. I therefore propose that after the Defendants have provided disclosure the Claimants should be required, within a short compass of time after that (1) to serve a properly Amended Particulars of Claim dealing with the matters of concern that I have set out above and (2) accompanying it with an expert report and the evidence which address this issues to the like effect.

135. In this case it would not be inappropriate for the Defendants to be given a further opportunity at that time to seek summary judgment again if the Claimants case does not properly address those requirements.

136. That is the best way to my mind in which I can address the weakness of the Claimants case. I should also say that I do not exclude the possibility of the Defendants arguing the effect of the clauses again in the light of the evidence that appears complete at that stage of service of the Claimants case.

137. I will hear submissions in respect of the time limits on the timetable of events that I have set out above. I appreciate that this part of the decision will come as a disappointment to the Defendants especially bearing in mind the skilful way in which Mr Carr QC presented his case, but the skill of presentation does not to my mind enable me to ignore the necessity to evaluate factual matters, which cannot be evaluated at this stage. For this reason the Claimants application to amend based on misrepresentation succeeds, but that is not on the basis that the pleading is a proper pleading; it is on the basis that it is the best pleading the Claimants can put forward at this stage.

138. I will hear submission as to the consequences of my Judgment and its working out.

Mr John Wardell QC and Mr Tom Lowe (instructed by DLA) for the Claimant

Mr Christopher Carr QC and Mr Charles Samek (instructed by Wallace & Partners) for the Defendants