Neutral Citation Number: [2018] EWHC 755 (QB)

Case No: HQ16X03119

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/2018

Before:

MR JUSTICE LAVENDER

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Between:

Michael Antony Tuke	**Claimant**
- and -	
J D Classics Limited	**Defendant**

- -
- -

Sean Brannigan QC and **Alexander Wright** (instructed by **Wilmot & Co Solicitors LLP**) for the **Claimant**
Christopher Pymont QC and **Siward Atkins** (instructed by **Gowling WLG**) for the **Defendant**

Hearing dates: 20 to 22 March 2018

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. The Claimant, Michael Antony Tuke, says that the Defendant, J D Classics Limited ("JD"), acted as his agent in connection with the sale by Mr Tuke of 18 classic cars ("the Sold Cars") between April 2011 and January 2016. JD says that it was in fact the purchaser of the cars in all cases except one. In that case, JD says that it arranged the sale and was paid a commission, but did not act as Mr Tuke's agent.

2. The only issue for me to decide is whether Mr Tuke is correct in his allegation that JD acted as his agent. It is accepted that, if that is the correct position, then Mr Tuke is entitled to the relief claimed, namely:

   (1) an order for delivery up of documents (as identified in paragraph 14 of the Re-Amended Particulars of Claim) in respect of each of the Sold Cars; and

   (2) directions for the taking of an account and an order for the payment of the sum shown to be due at the foot of the account.

3. For reasons which I will explain, the trial was unusual, in that only one witness gave evidence, namely Mr Tuke. The other evidence which was put before me consisted of:

   (1) emails passing between Mr Tuke and Derek Thomas Hood of JD;

   (2) certain invoices produced by JD; and

   (3) certain parts of the statements of case in three related actions ("the Related Actions"), in each of which Mr Tuke is the Claimant and the Defendants are either JD alone or JD and Mr Hood.

4. There was little dispute about the applicable law. In particular, the following six propositions of law, advanced by Mr Brannigan, were not contested:

   (1) Agency is a fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation: see *Bowstead & Reynolds on Agency* (2018), 21st Edn, para 1-001.

   (2) There is no particular formality to the creation of agency. In cases not involving ratification, agency arises by the conferring of authority by the principal on the agent, which may be express or implied from the conduct or situation of the parties: *Bowstead*, para 2-001.

   (3) Agency may be implied where one party has conducted himself towards another in such a way that it is reasonable for that other to

infer from that conduct assent to an agency relationship: *Bowstead*, para 2-029.

(4) In determining whether or not there is an agency relationship between the parties, the Court may look at the matter objectively: *Bowstead*, paras 2-030 to 2-032.

(5) As Lord Pearson said in *Garnac Grain Company Incorporated v HMF Faure & Fairclough Ltd* [1968] AC 1130, at p. 1137, the question for the Court is whether the parties:

> "have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in *Ex parte Delhasse*. But the consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important."

(6) As set out by Donaldson J in *Teheran-Europe Co Ltd v S. T. Belton (Tractors) Ltd* [1968] 2 QB 53, at pp. 59-60, in principle an agent may contract on behalf of his principal in one of three ways:

(a) by creating privity of contract between the third party and his principal without himself becoming a party to the contract;

(b) by creating privity of contract between the third party and his principal, whilst also himself becoming a party to the contract; and

(c) by creating privity of contract between himself and the third party, but no such privity between the third party and his principal.

(2) The Parties

5. Mr Tuke is now 70 years old. He is an engineer. Forty years ago, in 1978, he was working as a research assistant at Imperial College London when he set up a company called Finsbury Orthopedics Limited to develop and market artificial joints, primarily hip and knee joints. That company was successful, so much so that Mr Tuke sold it in 2009 for a total consideration of over £60million.

6. JD is a company which deals in classic cars. It was formerly known as J D Classics Holdings Limited. It has premises in Essex, with a large showroom and a large workshop for repairing and restoring classic cars. It is

acknowledged that Mr Hood was at all material times the "owner and/or controller and/or directing mind and will" of JD.

7. JD had in its showrooms cars which it did not own. These came to include several of Mr Tuke's cars. Contrary to Mr Pymont's submissions, the mere fact that JD was a car dealer does not assist in determining whether it was acting as principal or agent in any particular transaction. Moreover, there was no evidence for, and I do not accept, JD's pleaded case that it had a policy always to buy and sell stock as principal.

8. Mr Tuke was interested in classic cars. He had had some limited dealings with JD before he sold his company in December 2009:

   (1) In February 2006 he went to JD's premises. He met Mr Hood. He bought a Jaguar XK140 for his own use. He paid £85,000. He still owns this car.

   (2) In October 2007 he bought a Jaguar SS90 at auction. He asked JD to appraise the car and to carry out some minor work. He still owns this car.

9. Mr Tuke decided to invest the proceeds of the sale of his business in classic cars, with the intention of making a better return than was otherwise available. That is why he went to JD's premises on 18 December 2009, when he spoke to Mr Hood. I will refer to this as "the First Meeting".

10. As I have said, Mr Tuke was the only witness who gave evidence at trial. It was not suggested that he was anything other than, and I find that he was, an honest witness doing his best to assist the Court. However, in considering his evidence, I bear in mind that:

    (1) His evidence was limited in scope. His witness statement was only 4 pages long. The only specific conversation to which he referred was the First Meeting.

    (2) He acknowledged that it was difficult to recall words spoken as long ago as December 2009.

    (3) At trial, his evidence consisted at times of saying what he believed or expected, rather than what was said, at the relevant time.

    (4) He is not a lawyer, and it was not suggested that he consulted a lawyer or anyone else in connection with the legal structure of his purchases or sales of cars. He acknowledged that he found some of the transactions to be very complicated.

11. Mr Tuke's subjective belief is largely, if not wholly, irrelevant to the issues which I have to decide. However, I find that Mr Tuke believed, in relation to each of the Sold Cars, that:

    (1) JD, acting by Mr Hood, was selling the car for Mr Tuke; and

(2) Mr Tuke was selling the car to a third party buyer and not to JD.

12. Mr Hood did not give evidence. As I will explain, this was the result of a deliberate decision by JD.

(3) The Sold Cars, the Sales Transactions and the Related Actions

13. It is convenient to identify at this stage the Sold Cars and the relevant transactions by which they were sold ("the Sales Transactions"). As I have said, Mr Tuke sold 18 cars. He sold one of them twice. He sold four of them in one transaction. So there were 15 Sales Transactions in total. In most of the Sales Transactions, he acquired another car or cars (whether by way of part exchange or otherwise). I have numbered the Sales Transactions for the sake of convenience. They took place on the following dates and involved the sale (and acquisition) of the following cars:

	Date	Cars Sold by Mr Tuke	Cars Acquired by Mr Tuke
1	28 April 2011	(a) Allard J2X (b) Jaguar Costin Lister (c) Lotus Elite (d) Jaguar XK120 Alpine Rally Car	Jaguar XJR11 Group C (chassis no. 189) Jaguar XJR11 Group C (chassis no.490) Jaguar XJR11 Group C (chassis no. 590) Jaguar XJR9 Le Mans Group C Jaguar XJR10 Group C
2.	24 June 2011	Aston Martin	Jaguar Competition Alloy XK120
3.	29 July 2011	(a) Jaguar V12 Broadspeed XJ12C (b) Jaguar Mk II (reg. no. GSL 675)	Jaguar MK II (reg. no. 423 XUH) Jaguar XK150S LHD
4.	14 September 2011	Jaguar C Type	Jaguar Costin Lister
			Allard J2X
5.	6 December 2011	Jaguar XK150S Drophead (reg. no. OVL 150)	Jaguar XK150S Fixed Head (reg. no. 285 AXT)
6.	6 December 2011	Jaguar XJ220	Jaguar XK150S Drophead (reg. no. 1552 MW)
7.	16 December 2011	Bugatti Veyron	Jaguar E Type (reg. no. 128 YUH)
8.	28 February 2012	Jaguar XKSS	Lister Jaguar Knobbly
9	25 May 2012	Jaguar Lightweight E Type	

10	5 December 2012	Ford GT40	Ferrari 250 Testarossa
11.	7 March 2013	Jaguar Costin Lister	Jaguar SS100 (reg. no. CXH 944) Jaguar XK150S (reg. no. 661 XUP)
12.	7 March 2013	Jaguar SS100 (reg. no. 364 YUB)	BMW 3.0 CSL Art Car
13.	15 July 2013	Jaguar XK120SS	Jaguar E Type (reg. no. 140 FPX)
14	5 December 2012	Mercedes 300SL Gullwing	-
15.	28 January 2016	Jaguar XK150S Fixed Head (reg. no. 285 AXT)	-

14. The information in this table is taken from a schedule which was helpfully agreed by the parties. It is to be noted that:

(1) The dates of the Sales Transactions are taken from the invoices produced by JD. These are not always consistent with the contemporary emails reporting when a deal was done.

(2) I will refer to the first of these transactions as the Group C Transaction. The five cars which Mr Tuke acquired as part of that transaction were referred to as the Group C cars.

(3) In the case of all of the Sales Transactions except the Group C Transaction, the cars which Mr Tuke acquired were acquired, or at least it was agreed between Mr Tuke and JD that they would be acquired, in part exchange for the cars which he sold.

(4) Sales Transaction 9 (i.e. the sale of the Jaguar Lightweight E Type on 25 May 2012) was the transaction in respect of which JD accepts that it was not the purchaser.

(5) The car which Mr Tuke sold twice was the Jaguar Costin Lister:

(a) He bought this car on 5 March 2010 for £770,000.

(b) He sold it as part of the Group C Transaction on 28 April 2011, when the value ascribed to it was £1.6million.

(c) He re-acquired it as part of Sales Transaction 4 on 14 September 2011 in part-exchange for a Jaguar C Type, when the value ascribed to it was £1,350,000.

(d) He sold it again in Sales Transaction 11 on 7 March 2013, when he exchanged it for two cars with a value ascribed to them of £1.2million.

(6) There is an issue whether Sales Transaction 10 included the sale of a second car, referred to as the Ford GT40 Road Car, as well as the Ford GT40 Race Car. Nothing turns on that dispute and I say no more about it.

15. Some of the Sales Transactions are also the subject of the Related Actions:

(1) The Group C Transaction is the subject of Claim No. CL-2016-000799 ("the Group C Action"), which was commenced on 20 December 2016. The Defendants to the Group C Action are JD and Mr Hood.

(2) Sales Transaction 2 (sale of the Aston Martin and acquisition of the Jaguar XK120 on 24 June 2011) is the subject of Claim No. CL-2018-000109 ("the XK120 Action"), which was commenced on 26 April 2017. The Defendant to the XK120 Action is JD.

(3) Sales Transactions 7 (sale of the Bugatti Veyron: "the Bugatti"), 8 (sale of the Jaguar XKSS), 10 (sale of the Ford GT40 Race Car: "the Ford") and 13 (sale of the Jaguar XK120SS) are the subject of Claim No. CL-2018-000106 ("the Additional Cars Action"), which was commenced on 8 November 2017. The Defendants to the Additional Cars Action are JD and Mr Hood. The Additional Cars Action also concerns two purchase transactions, namely:

(a) the purchase by Mr Tuke of an AC Aceca on 17 March 2010 ("the AC Aceca Purchase"); and

(b) the purchase by Mr Tuke on 6 April 2010 of the Mercedes 300SL Gullwing ("the Mercedes") which was subsequently the subject of Sales Transaction 14.

16. In each of the Related Actions, Mr Tuke alleges that JD made misrepresentations in relation to the relevant transaction. In the Group C Action and the Additional Cars Action, Mr Tuke alleges that JD and Mr Hood made fraudulent misrepresentations. He has produced draft Particulars of Claim in the XK120 Action from which it appears that he wishes to make a similar allegation in the XK120 Action, but that document is currently only a draft.

(4) Procedural Issues

17. This action has an unusual procedural history, both in itself and in connection with the Related Actions. It is appropriate to address certain procedural issues at the outset of this judgment.

(4)(a) The Particulars of Claim

18. The Claim Form in this action was issued on 5 September 2016. The Particulars of Claim were the subject of some criticism at trial, so I set out the principal material parts.

19. Paragraph 3 of the Particulars of Claim states as follows:

> "In the circumstances further set out below, in or around November 2009 the Claimant and the Defendant entered into an agency relationship pursuant to which it was agreed that the Defendant would purchase classic cars with an investment value on behalf of the Claimant, and subsequently sell those cars as the Claimant's agent, for a 10% commission on the profit made from each car."

20. I note that the date of November 2009 is obviously wrong, since Mr Tuke did not go to JD's premises until December 2009. Regrettably, this error has not been corrected, despite the amendment and re-amendment of the Particulars of Claim.

21. Paragraph 4 of the Particulars of Claim is in the following terms:

> "At or around the end of 2009, the Claimant sold his business and approached the Defendant (whom he knew having purchased a Jaguar XK140 with registration number MSL 690 from it in February 2006) and asked it for advice and assistance in investing in classic cars. The Defendant confirmed that it could and would provide that advice and assistance."

22. Paragraph 5 of the Particulars of Claim then states:

> "The said advice and assistance consisted of:
>
> (a) The Defendant sourcing classic cars for Mr Tuke to purchase (either for cash and/or as a part exchange for other cars) and advising on the same;
>
> (b) The Defendant undertaking servicing, maintenance and restoration works to these cars;
>
> (b) The Defendant finding potential buyers for the Claimant's cars (either for cash and/or as a part-exchange for other cars), and advising on the same."

23. Turning to paragraph 8 of the Particulars of Claim, this states as follows:

> "With reference to paragraph 5(c) above:
>
> (a) On 2 February 2010 Mr Tuke emailed Mr Hood and said: "... I will have to see how much the market can be wound up and what our "arrangement" if I agree to a sale process for a short term gain. I guess you work on a % ?"
>
> (b) The Defendant did not disagree, but the matter was left in abeyance under September 2010 because the Claimant did not wish to sell any of his classic cars at that time. In September 2010 the Claimant wished to raise funds and so on 24 September 2010 wrote to Mr Hood as follows: "... How it work for JD on selling, 10% on uplift from purchase seems sensible ?"

> (c) Mr Hood responded on 27 September 2010 stating: "I am on the case with the sale of cars, more interested in moving cars for you that think of my uplift on the profit at the moment but 10% seems fair."

24. I will refer to the two emails quoted in sub-paragraphs 8(b) and (c) of the Particulars of Claim as "the September 2010 Email Exchange".

25. Paragraph 9 of the Particulars of Claim then draws together the threads as follows:

> "9. The proper meaning and effect of the relationship referred to at paragraph 5(c) as further set out at paragraph 8 above was that:
>
> (a) The Defendant would act as the Claimant's sale agent for the sale of the classic cars, identifying potential buyers of those cars and advising on the sale. The relationship was thus one of principal and agent.
>
> (b) The Defendant would be remunerated for this service by a commission of 10% on the "profit", being the difference between (1) the aggregate of the price paid (either in cash and/or by a part exchange for other cars) by the Claimant for a particular car and any charges for servicing, maintenance and restoration, and (2) the price paid (either in cash and/or by a part exchange for other cars) for that particular car by the purchaser."

26. Paragraph 10 of the Particulars of Claim then goes on to say that the existence and terms of the alleged relationship is further evidenced by some of the subsequent email correspondence and by one of the invoices produced by JD.

27. Mr Pymont submitted that, in the light in particular of paragraph 3 of the Particulars of Claim, the Claimant could only succeed if it could show that the alleged agency relationship was formed at the First Meeting. I do not accept that submission. In my judgment, it is also open to the Claimant to rely on the September 2010 Email Exchange as constituting the alleged agency relationship.

(4)(b) No Consolidation of this Action with the Related Actions

28. As I have said, the Additional Cars Claim, which was the last of the three Related Actions, was commenced on 8 November 2017. Mr Tuke applied for an order that this action and the Related Actions be consolidated. This application was resisted. It was heard on 10 November 2017 by HHJ Waksman QC, sitting in the Commercial Court. He declined to make an order that this action be consolidated with the Related Actions. Instead, he ordered that the XK120 Action and the Additional Cars Action be transferred to the Commercial Court and gave directions with a view to the Related Actions being managed and tried together.

(4)(c) The Particulars of Claim in the Related Actions

29. The Particulars of Claim drafted for Mr Tuke in the first two Related Actions contain allegations which are inconsistent with Mr Tuke's case in this action. In particular:

    (1) In paragraph 20(b) of the Particulars of Claim in the Group C Action, it is alleged that in the Group C Transaction Mr Tuke sold the four relevant Sold Cars to JD. In paragraph 29 it is alleged that JD was a party to the Group C Transaction and on that basis Mr Tuke claims damages, inter alia, under section 2(1) of the Misrepresentation Act 1967. That subsection only applies to a misrepresentation made by another party to the relevant contract.

    (2) In paragraph 1 of the Amended Particulars of Claim in the XK120 Action, it is alleged that JD sold to Mr Tuke the Jaguar XK120 which Mr Tuke acquired as part of Sales Transaction 2 and which in this action says he acquired, or understood that he was acquiring, in part exchange from a third party buyer of Mr Tuke's Aston Martin. On that basis, Mr Tuke claims damages under section 2(1) of the Misrepresentation Act 1967, alternatively for breach of contract.

30. The Particulars of Claim in the Additional Cars Action are drafted differently. They make clear that Mr Tuke's primary case is that JD was acting as agent and not as principal in the relevant Sales Transactions (i.e. nos. 7, 8, 10 and 13). Paragraphs 30, 46, 74 of 99 of the Particulars of Claim make clear that Mr Tuke's claims for damages, inter alia, under section 2(1) of the Misrepresentation Act 1967 are made in the alternative, if, contrary to JD's primary case, JD was acting as principal rather than agent in the relevant transactions.

31. Mr Brannigan accepted that further thought would have to be given to the statements of case in the Related Actions in the light of my judgment. Mr Pymont submitted that the fact that Mr Tuke had made allegations in the Related Actions which were inconsistent with his case in this action meant that he could not pursue a case in this action which was inconsistent with those allegations.

32. I do not accept Mr Pymont's submission. The present state of Mr Tuke's statements of case is unsatisfactory and requires resolution. This is the sort of issue which might perhaps have been resolved in advance of trial if the four actions had been consolidated. However, having regard to all four Particulars of Claim, I do not consider that Mr Tuke should be treated as having, in effect, irrevocably elected not to treat JD as his agent in respect of some of the Sales Transactions. He continued to pursue this action at the same time as the Related Actions. At worst, he was advancing two cases which could properly be advanced as alternatives, but which were not expressly being put on that basis.

(4)(d) The Defences in the Related Actions

33. Defences have been served in the Related Actions as follows:

(1) JD and Mr Hood served a Defence and Counterclaim dated 7 June 2017 in the Group C Action. They denied that Mr Tuke was entitled to the relief claimed.

(2) JD served a Defence dated 28 June 2017 in the XK120 Action. JD denied that Mr Tuke was entitled to the relief claimed.

(3) JD and Mr Hood served a Defence dated 25 January 2018 in the Additional Cars Action. The Defence is set out in a conventional manner in response to those parts of the Particulars of Claim which concern five of the six transactions covered by the Additional Cars Action. However, in relation to Sales Transaction 7 (sale of the Bugatti), the only response made by JD and Mr Hood to Mr Tuke's allegations of fraudulent misrepresentation is as follows (in paragraph 35 of the Defence):

> "The Defendants have offered to settle the claim at paragraphs 33 to 47 in full without any admission of liability. That offer has yet to be accepted. If it is accepted that will be the end of this part of the claim. If it is not accepted the Defendants will make an application to strike out this part of the claim as an abuse of process. Hence the Defendants do not plead to this part of the claim."

34. I will have to refer to the potential implications of this pleading in due course.

(4)(e) Witness Statements

35. Mr Tuke signed a witness statement dated 21 August 2017 and served it on JD. It was 58 pages long. Mr Tuke also served statements from two other witnesses. JD took the view that Mr Tuke's statement in particular included many allegations which were irrelevant to this action. JD itself served a witness statement by Mr Hood which was 19 pages long.

36. On 30 January 2018 Walker J ordered that none of these witness statements should stand as evidence at trial. Walker J's order provided that this should not prevent reference to these statements if permitted by the trial judge. In the event, I was not referred to any of these statements during the trial. They were not put in evidence and I have not read them.

37. Walker J gave the parties until 20 February 2018 to file and serve witness statements which they contended complied with CPR 32.4. As a result:

(1) Mr Tuke served the 4-page statement to which I have referred. Mr Tuke did not serve statements from any other witnesses.

(2) JD served a 7-page witness statement by Mr Hood. However, since Mr Hood did not give evidence, this statement did not become evidence in

the case. Mr Brannigan asked me to read one part of this statement. Since Mr Pymont did not object to my doing so, I read it, but it is not in evidence and I have not relied on it in any way.

(4)(f) Facts Relied on by Mr Tuke

38. Walker J ordered Mr Tuke to file and serve by 6 February 2018:

> "... schedules specifying those facts which are relied upon:
>
> (1) As constituting the factual matrix (of matters which were or could reasonably be expected to be known or not known to both parties) during the period up to and including 17 December 2009;
>
> (2) As constituting the factual matrix (of matters which were or could reasonably be expected to be known or not known to both parties) during the period after 17 December 2009 up to and including 27 September 2010;
>
> (3) As arising after 27 September 2010 and tending to prove or disprove the Claimant's assertion in paragraph 9 of the Re-Amended Particulars of Claim;
>
> (4) As constituting words used by either Mr Tuke or Mr Hood orally from which a relationship amounting to agency was spelt out or is to be inferred, specifying the grounds on which such inference is said to be justified within the parameters of the existing statements of case."

39. Mr Tuke filed and served these schedules ("the Schedules of Facts") and JD served schedules in response. The Schedules of Facts consisted largely of lists of the emails relied on by Mr Tuke. They included reference to the First Meeting, but, with the exception of one telephone conversation, no other discussion between Mr Tuke and Mr Hood or anyone else was relied on. They did not include any allegations of fraud.

(4)(g) The Scope of Cross-Examination

40. It was apparent, however, by 30 January 2018 that Mr Tuke would want to put various allegations of fraud to Mr Hood at trial. Accordingly, Walker J made the following order:

> "If the Claimant desires to cross-examine Mr Hood at trial on the basis of any allegations that he was guilty of fraud, then by no later than 4pm on Tuesday 13 February 2018 a schedule must be filed and served listing the assertions of fraudulent misrepresentation proposed to be advanced, and evidence proposed to be relied on as showing dishonesty. Insofar as any additional witness evidence is proposed, that evidence must accompany the schedule. ..."

41. Pursuant to this order, Mr Tuke served a schedule of assertions of fraudulent misrepresentation. It was not accompanied by any additional witness statements. It listed six alleged fraudulent misrepresentations ("the Six Fraud Allegations") made in connection with six different transactions, namely:

(1) four of the six transactions which were the subject of the Additional Cars Action, i.e.:

(a) the AC Aceca Purchase;

(b) Sales Transaction 7 (sale of the Bugatti);

(c) Sales Transaction 8 (sale of the Jaguar XKSS); and

(d) Sales Transaction 10 (sale of the Ford);

(2) Sales Transaction 14 (sale of the Mercedes); and

(3) one other proposed transaction involving a Jaguar D Type which did not complete.

42. The Six Fraud Allegations included some, but not all, of the allegedly fraudulent misrepresentations relied on in relation to the relevant transactions in the Additional Cars Action.

43. In accordance with Walker J's order, the question whether Mr Hood could be cross-examined on the Six Fraud Allegations was considered at the pre-trial review. That took place on 5 March 2018 before Julian Knowles J. In his judgment of 16 March 2018, he held that Mr Hood could be cross-examined on the Six Fraud Allegations, because they were relevant to his credibility as a witness.

(4)(h) No Evidence from Mr Hood

44. As a result of seeing Julian Knowles J's judgment in draft, JD decided on 14 March 2018 not to call Mr Hood as a witness. Consequently, as I have said, Mr Hood's witness statement was not in evidence. Nor were any of the statements made by him in the emails which he sent to Mr Tuke evidence of the truth of their contents. The fact that Mr Hood said what he did in those emails is in evidence and is potentially relevant to the issues which I have to decide. But no hearsay notices were served under CPR 33.2(3). If they had been, Mr Tuke would have been entitled to call Mr Hood to be cross-examined, pursuant to CPR 33.4.

(4)(i) Invoices

45. Julian Knowles J also decided to extend the time limited for service by Mr Tuke of a notice to prove documents pursuant to CPR 32.19. The notice related to certain invoices disclosed by JD ("the Disputed Invoices"). Mr Tuke did not accept that these invoices were genuine or were sent to him at the time. The effect of the notice to prove was that he was not deemed to accept that they were genuine. Moreover, one effect of the decision not to call Mr Hood was, as Mr Pymont acknowledged, that JD has not proved that the Disputed Invoices were genuine or were sent to Mr Tuke. Accordingly, I have disregarded them.

46. Some of the invoices which were in evidence were provided to Mr Tuke at the relevant time. Others plainly were not: they were not addressed to him and JD had redacted the names of the addressees. Mr Brannigan provided a schedule of those invoices which Mr Tuke accepted that he received at the relevant time. I proceed on the basis that these are the only invoices which were sent to him at the relevant time.

(4)(j) Fraud Allegations at Trial

47. It appeared from Mr Tuke's Skeleton Argument that his counsel intended to advance the Six Fraud Allegations at trial. However, although Mr Tuke had permission to put these allegations to Mr Hood in cross-examination, they were not part of his pleaded case. They were not referred to in the Particulars of Claim or in the Schedules of Facts. (There was reference to Sales Transaction 14 (sale of the Mercedes) in Mr Tuke's Reply, but this did not go so far as to allege fraud.)

48. The fact that the Six Fraud Allegations were not included in the Schedules of Facts was brought into focus by JD's decision, shortly before trial, not to call Mr Hood. Mr Brannigan contended that he should be allowed to advance the Six Fraud Allegations, albeit only on the basis of the evidence already contained in the trial bundles.

49. In the event, it was agreed that, on the basis that no additional evidence would be adduced by Mr Tuke, he could amend the Schedules of Facts so as to rely on four of the Six Fraud Allegations. Accordingly, I gave leave for such an amendment. These four ("the Four Fraud Allegations") concerned:

(1) three of the six transactions which were the subject of the Additional Cars Action, i.e.:

(a) the AC Aceca Purchase;

(b) Sales Transaction 7 (sale of the Bugatti); and

(c) Sales Transaction 8 (sale of the Jaguar XKSS); and

(2) Sales Transaction 14 (sale of the Mercedes).

50. I will deal with each of the Four Fraud Allegations when I deal with the relevant transactions.

(5) The First Meeting

51. Mr Tuke went to JD's premises on 18 December 2009. He spent several hours with Mr Hood. He told Mr Hood that he had sold his business and that he was interested in investing in classic cars because he was dissatisfied with the rate of interest otherwise available. I accept what Mr Tuke said in paragraph 7 of his witness statement:

> "Mr Hood enthusiastically offered to help and said that classic cars were much better than banks, and he could advise both on buying

> and selling, both in relation to the price and type of cars to invest in, and when and how to sell them. I recall a comment along the lines that played right, he could double my money for me."

52. I also accept Mr Tuke's evidence that Mr Hood proposed a campaign of investing in racing cars which he said would increase their value. Mr Hood was particularly keen to emphasise to Mr Tuke that racing cars would be good investments.

53. They looked at several cars and Mr Tuke agreed to buy four cars, for a total of £5.4million. These were:

    (1) A Jaguar Mark II, bought for £140,000 and subsequently sold in Sales Transaction 3.

    (2) A Jaguar C Type, bought for £3million and subsequently sold in Sales Transaction 4.

    (3) The Bugatti, bought for £860,000 and subsequently sold in Sales Transaction 7.

    (4) The Ford, bought for £1.4million and subsequently sold in Sales Transaction 10.

54. Mr Tuke bought three of these cars from JD. He was told that the Bugatti belonged to a third party, namely the racing driver, Jenson Button. As to that, I accept Mr Tuke's evidence that Mr Hood told him that he would have to discuss prices on Mr Tuke's behalf with Mr Button.

55. JD subsequently produced a single invoice for the four cars. The invoice identified Mr Tuke as the buyer. It did not expressly identify a seller or sellers.

56. Mr Tuke accepted that there was no detailed discussion at the First Meeting of how they would go about selling cars. Accordingly, I am not persuaded that JD became Mr Tuke's agent for the purpose of selling cars in the course of the First Meeting. Indeed, Mr Brannigan accepted that the words which were used at the First Meeting were not determinative of Mr Tuke's claim and that he would need to rely also on the September 2010 Email Exchange.

(6) Relevant Events in 2010

57. In 2010 Mr Tuke bought a number of cars, but increasingly he came to focus in his email discussions with Mr Hood on the need to sell cars.

(6)(a) Car Purchases in 2010

58. In 2010 Mr Hood proposed various cars to Mr Tuke which he recommended that Mr Tuke buy. Mr Hood persuaded Mr Tuke to buy a further 17 cars for a total of over £14.5million. These included many of the Sold Cars:

Purchase Date	Car	Price Paid	Sales Transaction
15 January 2010	Jaguar XKSS	£3,400,000	8
15 January 2010	Jaguar XK120SS	£1,200,000	13
26 January 2010	Jaguar XK120 Alpine Rally Car	£510,000	1(c)
5 February 2010	Aston Martin	£680,000	2
17 March 2010	Lotus Cortina Mark 1	£150,000	-
5 March 2010	Jaguar Costin Lister	£770,000	1(b), 4 and 11
17 March 2010	AC Aceca	£254,000	-
22 March 2010	Jaguar XK150S (reg. no. OVL 150)	£275,000	5
6 April 2010	Mercedes 300SL Gullwing	£1,800,000	14
23 April 2010	Jaguar Lightweight E Type	£2,941,176	9
3 June 2010	Jaguar E Type (reg. no. FWK 136C)	£50,000	-
23 June 2010	Jaguar XK220	£200,000	6
23 June 2010	Jaguar V12 Broadspeed XJ12C	£550,000	3(a)
24 June 2010	Lotus Elite	£80,000	1(c)
2 August 2010	Allard J2X	£1,300,000	1(a)
24 August 2010	Jaguar SS100 (reg. no. 364 YUB)	£400,000	12
27 September 2010	Jaguar E Type (reg. no. JUL 959 K)	£50,000	-

59. Mr Hood's emails to Mr Tuke about many of the cars purchased in 2010 presented him as negotiating the price with a third party seller on behalf of Mr Tuke and as concluding the purchase from that third party seller on Mr Tuke's behalf. The prices which Mr Hood discussed with Mr Tuke were presented on the basis that the price paid to the third party buyer was the price which would be paid by Mr Tuke. In some cases (i.e. in relation to the Jaguar Costin Lister and the AC Aceca), Mr Tuke proposed counter-offers for Mr Hood to make on his behalf.

60. JD's role in effecting purchases on Mr Tuke's behalf appears particularly from the following emails, in which Mr Hood reported back to Mr Tuke on transactions which Mr Hood had effected:

(1) On 14 January 2010: "The XKSS is yours."

(2) On 3 February 2010: "With a lot of ear bending this afternoon I have done the deal at 680. You now have the rarest road Aston."

(3) On 17 March 2010: "I have got the car [*the AC Aceca*] for 254K. Do you want the invoice sent to home?"

(4) On 23 April 2010: "After two hours last night I got the Lightweight for $4.5, you have the best car of the 11 …"

61. The invoices produced by JD in 2010 in relation to these purchases did not contradict the impression given by Mr Hood. They were on JD's headed notepaper. They identified Mr Tuke as the buyer, but they did not expressly name the seller.

62. Mr Pymont sought to rely on Mr Tuke's evidence as to what he thought about these invoices and, in particular, his evidence that he believed that they showed that he had title to the cars which he bought. However, Mr Tuke's subjective belief is not relevant and, in any event, it was also his evidence that he did not believe that JD was the seller of these cars.

63. I find that JD was authorised by Mr Tuke to act, agreed to act, and either did act, or purported to act, as agent for Mr Tuke in negotiating and concluding the purchase of cars by Mr Tuke in 2010.

(6)(b) The AC Aceca Purchase: The First Fraud Allegation

64. The first of the Four Fraud Allegations concerns the AC Aceca Purchase. In this action, Mr Tuke alleges that JD dishonestly induced him to buy the AC Aceca by misrepresenting its provenance. In summary:

(1) JD has admitted (in paragraph 79 of its Defence in the Additional Cars Action) that by emails dated 11 and 17 March 2010 it represented, inter alia, that there was a third party owner of the AC Aceca who was prepared to sell it on a private basis for £325,000.

(2) However, JD has admitted (in paragraph 81(1) of its Defence in the Additional Cars Action) that it acquired the AC Aceca on 22 February 2010 from a Mr Charles Fripp. (The value ascribed to the AC Aceca on the invoice issued by JD to Mr Fripp was £84,000. JD asserts (in paragraph 81(3)) that this value did not represent what JD considered the car was worth.)

(3) On that basis, Mr Tuke contends that JD's representation was false, because JD owned the AC Aceca when Mr Hood represented to Mr Tuke that it belonged to a third party.

(4) However, JD contends (in paragraph 81(2) of its Defence in the Additional Cars Action) that by 11 March it had agreed to sell the AC Aceca to an unidentified third party (referred to as "Z") for £250,000, so that Z was the owner of the car by 11 March 2010. No documents

have been produced evidencing the alleged sale to Z. Nor, of course, did Mr Hood give evidence about it.

65. I do not propose to decide the First Fraud Allegation. I consider that it is more appropriate for it to be dealt with in the Additional Cars Action. What is primarily relevant for present purposes is that JD admits that it represented to Mr Hood that the AC Aceca belonged to a third party and that that third party was prepared to sell the car. Whether Mr Hood was lying about that is not something which was known to Mr Tuke at the time. What Mr Hood did not say was, "JD will be buying (or already owns) the car and will be selling it to you."

(6)(c) Mr Tuke's Need for Cash

66. Mr Tuke needed to raise cash towards the end of 2010, both because he faced a large tax bill and because there arose an opportunity for him to buy back part of his old business. Starting on 3 June 2010, Mr Tuke repeatedly referred in his emails to Mr Hood to his forthcoming need for cash and his consequent need to sell cars.

(6)(d) JD's Role in Selling Cars for Mr Tuke

67. Only a few weeks after Mr Hood negotiated and concluded the purchase of the Jaguar XKSS by Mr Tuke, he reported to Mr Tuke on 2 February 2010 that he had received enquiries from potential buyers of the car. This is what prompted Mr Tuke to send the email relied on in paragraph 8(a) of the Particulars of Claim, in which he wrote:

> "... I will have to see how much the market can be wound up and what our "arrangement" if I agree to a sale process for a short term gain. I guess you work on a %?"

68. By this email, Mr Tuke indicated to Mr Hood that it was his understanding that Mr Hood would sell cars for him in return for a fee calculated as a percentage. I reject Mr Pymont's submission that the reference to an "arrangement" and a percentage was limited to sales "for a short term gain".

69. It was open to Mr Hood to correct Mr Tuke's understanding and to say, "If you sell a car, JD will be the buyer. JD's remuneration will come from making a turn when it resells the car." But Mr Hood did not do so. The discussion in relation to selling the Jaguar XKSS went no further, because on 3 February 2010 Mr Hood advised against selling it at this stage.

70. However:

(1) Mr Hood also said:

(a) On 16 February 2010, speaking more generally:

> "... I will advise you when the time is right to sell ..."

(b) On 2 June 2010:

"I will think about what car to sell if need be …"

(2) Mr Hood also spoke of the steps which he could take to promote sales. For example, on 22 April 2010 he reported that *Classic & Sports Car* magazine wanted to include Mr Tuke's Jaguar XKSS in a forthcoming feature, and he said of the Jaguar Lightweight E Type:

> "This car will be worth £5M plus next year. More with the publicity I can generate for it."

(3) Mr Hood also spoke of sales opportunities. For example, they discussed a potential sale of the Jaguar Lightweight E Type, with Mr Tuke telling Mr Hood on 7, 8 and 23 June 2010 what to say to a potential buyer.

(4) Mr Hood repeatedly referred to the prospect of his selling a car or cars for Mr Tuke (rather than buying cars from Mr Tuke). Thus:

(a) On 29 July 2010 Mr Hood wrote:

> "I have put some feelers out on your collection, I would rather sell a car for you under the radar than start advertising them at the moment."

(b) Later the same day he wrote:

> "If you can hold the cars you have bought you will get very good returns on your investment including the racing costs, I have been doing it for years now, I sell my personal cars to buy better cars and improve the quality of my investment and only sell outright if I think the cars value has peaked. I will do the same with you if I believe values have peaked."

(c) On 23 August 2010 he wrote:

> "I am on the case with the car sales …"

(d) In the same email, he proposed that Mr Tuke buy the Jaguar SS100 (which Mr Tuke bought on the following day) and said:

> "If you want it I will sell it for you and give you a profit …"

71. These email discussions formed the background and context for the September 2010 Email Exchange.

(6)(e) The September 2010 Email Exchange

72. As has been seen, the September 2010 Email Exchange consisted of two emails:

(1) On 24 September 2010 Mr Tuke sent an email to Mr Hood which read as follows:

> "£50k on E type Ok but must have around £5m back by end Nov from something, preferably not C Type, JWK, AM or XKSS. Rest are up for go with racers top of the list to lower my adrenalin levels. …
>
> How it work for JD on selling, 10% on uplift from purchase seems sensible?"

(2) This email began with Mr Tuke approving the purchase for £50,000 of the Jaguar E Type, which was the last car he bought before the Sales Transactions commenced. He then repeated the point which he had been making since June that he needed to sell cars to raise cash. The question which then he asked was a proposal as to the fee which he was prepared to pay to JD for selling any of his cars for him. In contractual terms, it was an offer.

(3) Mr Hood replied in an email of 27 September 2010. As in February, Mr Hood could have replied by saying, "If you sell a car, JD will be the buyer. JD's remuneration will come from making a turn when it resells the car." But Mr Hood did not do so. Instead, Mr Hood wrote as follows:

> "I am on the case with the sale of the cars, more interested in moving cars for you than think of my uplift on the profit at the moment but 10% sounds fair.
>
> If you want me to steer away from selling the C XKSS, AM and XKSS my avenues get a bit tighter. Lightweight E is a car to sell next year as it's the 50th Anniversary and an invite to Pebble."

(4) Again, Mr Hood spoke of selling or moving cars "for you". In saying that 10% sounds fair, he agreed to Mr Tuke's proposal and, in contractual terms, accepted Mr Tuke's offer.

73. For reasons which I will develop later, I find that by this exchange of emails the parties made a contract by which Mr Tuke agreed to pay JD a fee calculated as 10% of his "uplift from purchase" if JD sold a car for him, i.e. as his agent. Moreover, whether or not this agreement constituted a contract, it involved Mr Tuke conferring authority on JD to act as his agent in negotiating and concluding the sale of Mr Tuke's cars and receiving payment on Mr Tuke's behalf.

74. I do not accept Mr Pymont's submission that the agreement was too uncertain to be valid. Nor am I persuaded that there is any material significance in the fact that Mr Hood used the phrase "uplift on profit" rather than "uplift from purchase" or commission. It is plain that he was agreeing to Mr Tuke's proposal and, while there is no magic in the word "commission", it is an apt description of what was agreed.

75. I agree with Mr Brannigan's submission that this would be an odd and unlikely arrangement to make if it was intended that JD would be acting as a principal in buying cars from Mr Tuke which JD could then resell at a profit for JD. By contrast, if JD was acting as Mr Tuke's agent, it was entirely understandable that they should agree that JD should receive a fee for so doing and that that fee should be calculated on a percentage basis.

(7) Events after September 2010

76. Both parties invited me to consider the emails and invoices produced after September 2010. However, Mr Pymont's primary submission was that they were not relevant or admissible evidence, since they post-dated the alleged contract or the alleged creation of the agency relationship between the parties. It is appropriate to consider the potential relevance and admissibility (or otherwise) of this material before considering it in detail:

(1) Mr Tuke's case, as set out in the paragraphs of his Particulars of Claim which I have quoted, was that he appointed JD as his agent for the purpose of selling cars by no later than the September 2010 Email Exchange. He relied on the subsequent email exchanges as confirming or evidencing that appointment, not as constituting in themselves the appointment of JD as his agent if JD had not already been appointed by September 2010.

(2) Mr Brannigan accepted that communications between the parties after the alleged appointment of JD as Mr Tuke's agent were less significant than communications before or at the time of the alleged appointment. Nevertheless, I accept that they are relevant to the consideration of whether JD was appointed as Mr Tuke's agent: see *Garnac Grain Company Inc v H.M.F. Faure & Fairclough Ltd* [1968] AC 1130, at 1137D (per Lord Pearson):

> "Later words and conduct may have some bearing, though likely to be less important."

(3) Although a contract is not a necessary requirement for the appointment of an agent, it was, in effect, Mr Tuke's case that he made a contract with JD in September 2010. Subsequent communications between the parties to an alleged contract are relevant and admissible in relation to the issue whether a contract was made: see *Chitty on Contracts* (2015) 32nd Edn, para 13-129 & fn 624; and *Global Asset Capital Inc v Aabar Block SARL* [2017] 4 WLR 163, at [28]-[38].

(4) Moreover, if, as I have found, the parties agreed in September 2010 that JD would act as Mr Tuke's agent in selling cars, it was open to them to vary or terminate that agreement thereafter. JD has alleged in its Defence that what it called the commission charge was only agreed for the Group C Transaction. It is relevant to consider, therefore, whether the agreement made in September 2010 was varied or terminated before any of the subsequent Sales Transactions were effected. For example, on 20 December 2011 Mr Tuke made a

proposal (which was not accepted) for a larger commission to be paid in relation to the proposed sale (which did not proceed) of the Group C cars.

77. As for the emails exchanged by the parties after September 2010:

(1) Mr Tuke continued to say that he needed to sell cars. By 30 November 2011 he was saying that he was desperate to do so.

(2) Mr Hood continued to report to Mr Tuke on the efforts which he was making to interest third parties in the purchase of Mr Tuke's cars, many of which remained at JD's premises and were entered in races by JD. With few exceptions, Mr Hood did not name these third parties.

(3) Mr Hood repeatedly sought to discourage Mr Tuke either from selling his cars at auction or from using anyone else to sell his cars. This led to the following exchange:

(a) On 1 December 2011 Mr Tuke wrote:

> "I have not appointed another agent, you are bloody paranoid!"

(b) This was an indication by Mr Tuke that he regarded JD as his agent. Mr Hood did not dispute that. Instead, he replied on the same day:

> "I am not paranoid, Tony O'Keefe [*of Jaguar Heritage*] said to me yesterday you had appointed an agent."

(4) Mr Hood also repeatedly described himself as acting for Mr Tuke, e.g.:

(a) "I really am pushing for you." (17 December 2010.)

(b) "I am going to get you a good return on the cars." (11 January 2011.)

(c) "Today I have negotiated a buy back for you on the C type …" (3 August 2011.)

(d) "… last week you wanted me to sell cars to get money …" (3 August 2011.)

(e) "Mike I have sold more than three cars a year for you …" (5 September 2011.)

(f) "… do you want me to sell some modern cars for you?" (5 September 2011.)

(g) "do you want me to fire sale some cars?" (30 October 2011.)

(h) "I am not pulling the strings, I am trying to get you deals." (29 November 2011.)

(i) "I played it the way I did to stop the world knowing you needed cash so I could get you a profit." (30 November 2011.)

(j) "Mike the car looks like shit and I have 6 hours to rectify paint and get the car looking as it should, drop everything and dip into my own pocket to sell it for you ..." (30 November 2011.)

(k) "I do not need any incentive, I have thought of nothing else other than getting you money in case you decided to go back into business.

I have moved heaven and earth to get you deals ...

... I fought bloody hard and rushed around like a bloody servant to get that Bugatti deal done.

Mike I have worked very hard for the XKSS deal ..." (20 December 2011.)

(l) "... how many cars have I sold for you this year, how many cars have sold outside JD?" (2 October 2013.) (Mr Tuke replied on the following day, "... you have sold 3 cars for me this year ...")

(m) "I would like the opportunity to sell more of your cars ..." (15 November 2013.)

(n) "As I have said before, get the car here and I will sell it." (19 December 2013.)

(o) "The Group C's and Lister need to come off public sale now. I will then have a chance to get them sold for you." (15 January 2014.)

(p) "JD does not have the money to buy the [*Group C*] cars at the moment, it may later in the year, in the meantime you will be better advised to remove all your major cars from sale and leave the selling to me. I will be able to sell the cars but I must have an agreement from you that no-one else is engaged to sell them ..." (24 January 2014.)

78. I note that in this last email Mr Hood drew a distinction between JD buying cars itself from Mr Tuke (which he said was not possible, at least at that time) and JD selling cars for Mr Tuke, which is what Mr Hood proposed should be done.

(8) The Sales Transactions

79. I turn now to the fifteen Sales Transactions. Before considering them individually, it is relevant to note that:

(1) JD did not produce a sales contract or contract note for any of the Sales Transactions where it claims that it was the buyer.

(2) I will refer in more detail to the invoices which JD produced. As Mr Brannigan observed, neither party contended that these invoices were contractual documents. Nor was there any evidence that they were produced contemporaneously with the relevant transaction, rather than

in the days or weeks thereafter. For reasons which I will explain, I find that they do not support JD's case.

(3) The Sales Transactions were all presented to Mr Tuke on the basis that there was a third party buyer (or buyers) of Mr Tuke's car(s) and that the price paid by the third party buyer(s) (after any part exchange) would be the price paid to Mr Tuke.

(4) There was never any suggestion that JD would make a "turn" by buying the cars itself from Mr Tuke and selling them on. JD says that it sold the Sold Cars for its own account (sometimes at a profit and sometimes at a loss). Whether JD was entitled to do so is a consequence of the issue which I have to decide.

(8)(a) The Group C Transaction: 28 April 2011

80. In the Group C transaction:

(1) Mr Tuke sold four cars for £4million, having paid a total of £2,660,000 for them.

(2) Mr Tuke bought five Jaguar Group C cars ("the Group C cars") for a total of £10million.

(3) Mr Tuke borrowed £8million from Close Brothers on the security of the Group C cars. I was not shown the agreement with Close Brothers. Neither party suggested that it was relevant to the issues which I have to decide.

81. The Group C Transaction therefore released £2million in cash to Mr Tuke, but left him with a debt of £8million.

82. Mr Hood first proposed the Group C Transaction on 20 January 2011, when he said:

> "The plan to buy the Group C collection, with the sale proceeds I have arranged for the purchase of [*seven of Mr Tuke's cars*] which gives you a profit of around £1.1 Million on the sale of these cars. …"

83. When asked who owned the Group C cars, Mr Hood explained (on 31 January 2011) that he had "put a deal together with four owners individually". As to the cars which he had proposed that Mr Tuke sell as part of the Group C Transaction, he said (on 31 January 2011):

> "I put the list together so you kept the long term high growth cars and sold cars that have had a very good return in less than a year. I will wait on your list but remember I am dealing with four individuals."

84. JD produced two invoices. One identified Mr Tuke as the seller of the four Sold Cars, but did not name the buyer(s). The other named Mr Tuke as the buyer of the Group C cars, but did not name the seller(s).

85. JD also produced two versions of an invoice dated 4 May 2011 for its "commission charge of 10% on your sale of vehicles":

(1) The first version of the invoice incorrectly set out the sale price of the Sold Cars as £4.8million rather than £4million.

(2) The invoice set out Mr Tuke's "Profit after all invoicing for each vehicle". This was incorrectly stated on the first version, but correctly stated on the second version as £1,155,020. This was less than the difference between the purchase price and the sale price for the four Sold Cars, because the parties also included in their calculation of Mr Tuke's profit the money which he had spent on, for instance, repairing or restoring the cars. (This was confirmed in an exchange of emails on 5 May 2011.)

(3) The "JD commission" was 10% of the profit, i.e. £115,502 in the revised version of the invoice. Mr Hood referred to this (on 5 May 2011) as "my 10% uplift on your profit on the cars you sold as we agreed early last year".

(4) An amount of £80,000 due to Mr Tuke was deducted from this. That left a balance of £35,502 plus VAT of £7,100.40 in the revised version of the invoice.

86. Both versions of this invoice are dated 4 May 2011. The first may have been produced on 4 or 5 May 2011, at a time when it was thought that the Group C Transaction would include a fifth Sold Car. It is not clear when JD produced the second.

87. Mr Tuke did not want to pay VAT on the commission. There was an exchange of emails about this:

(1) On 18 May 2011 Mr Tuke wrote:

> "We will need to re do paperwork for me paying fees directly, I can issue a cheque direct or via you I guess. Same is true for your commission I would have thought cannot this come off the price?"

(2) On 19 May 2011 Mr Hood replied:

> "What fee paperwork?
>
> Send a cheque for £35500 made out to JD and I will re-do commission invoice 3635."

(3) On 20 May 2011 Mr Hood wrote:

> "Can I have the commission cheque please for £35500 no VAT."

88. Mr Pymont suggested that Mr Tuke's question in his email 18 May 2011 involved a recognition by him that he was selling the cars to JD, because that was the only basis on which reducing the price by the amount of the commission could have avoided the need for JD to charge VAT. I do not accept that this was Mr Tuke's understanding. Nor did his question in fact lead to a change either in the purchase price or in the way in which JD documented the transaction. After 20 May 2010, either: (a) JD produced the second version of the commission invoice dated 4 May 2010; or (b) if that second version had already been produced, JD did not issue a further revised commission invoice. In either case, JD did not revise the invoice concerning Mr Tuke's sale of the four Sold Cars. The sale price for the four Sold Cars remained as £4million.

89. In its Defence, JD described the agreement that it would be paid 10% of Mr Tuke's profit on the four sold Cars as "a simple profit-sharing agreement". This is potentially misleading. JD was to receive a sum calculated as a share of Mr Tuke's profit, but that leaves open what the payment was for. This was not a case of a joint venture. The payment was a commission for selling the cars. Moreover, as acknowledged by Mr Hood in his email of 5 May 2011, it had been agreed in 2010, i.e. in the September 2010 Email Exchange.

(8)(b) Sales Transaction 2: 24 June 2011

90. On 24 June 2011 Mr Tuke sold his Aston Martin in return for £200,000 in cash and a Jaguar XK120. In presenting this transaction to Mr Tuke, Mr Hood said as follows on 22 June 2011:

> "Spoke to the guy who wanted to do a deal on the Alloy 120 and Lister again last night. I have talked him round to doing a deal with 120 Alloy race car plus ?200K for the Aston."

91. The invoice issued by JD named Mr Tuke as the buyer of the Jaguar XK120, with the Aston Martin in part exchange, but did not name the seller. The value ascribed to the Jaguar XK120 was £650,000. On that basis, Mr Tuke sold the Aston Martin for £850,000 and therefore made a profit, having bought it for £680,000. After allowing for other expenses, Mr Brannigan submitted that the profit was £141,080 rather than £170,000. Mr Pymont did not propose an alternative figure. I make no finding as to the precise figure. If commission was due to JD, the amount of the commission was no more than £17,000 and, on Mr Brannigan's figures, was only £14,108.

92. JD did not produce an invoice for commission on Sales Transaction 2 and Mr Tuke did not pay commission. There was no discussion of whether commission should or should not apply to Sales Transaction 2. Given what was said about commission before and after Sales Transaction 2, and given the comparatively modest amount of commission, I find that the collection of commission on Sales Transaction 2 was simply overlooked.

(8)(c) Sales Transaction 3: 29 July 2011

93. On 29 July 2011 Mr Tuke exchanged two cars for two others, with no cash changing hands. In presenting this transaction to Mr Tuke, Mr Hood said on 13 July 2011:

> "I have managed to get a deal to exchange the JD Sports MK2 and 150 R Roadster for the Broadspeed and your MK2. ..."

94. The invoice issued by JD named Mr Tuke as the buyer of the Jaguar Mk II (registration no. 423 XUH) and the left-hand drive Jaguar XK150S, with the Jaguar V12 Broadspeed XJ12C and the Jaguar Mk II (registration no. GSL 675) in part exchange, but did not name the seller. The values ascribed to these cars were as follows:

(1) For the cars sold by Mr Tuke:

(a) £550,000 for the Jaguar V12 Broadspeed XJ12C; and

(b) £140,000 for the Jaguar Mk II (registration no. GSL 675).

(2) For the cars received by Mr Tuke:

(a) £500,000 for the Jaguar Mk II (registration no. 423 XUH); and

(b) £190,000 for the left-hand drive Jaguar XK150S LHD.

95. The values ascribed to the cars sold by Mr Tuke were the same as the price which he had paid for them. He made no profit on these cars. Indeed, he lost the money which he had spent on them. Since there was no profit, no question arose of his paying 10% of his profit to JD.

(8)(d) Sales Transaction 4: 14 September 2011

96. On 14 September 2011 Mr Tuke sold the Jaguar C Type which he had bought at the First Meeting for £3million. He sold it for £1million plus two cars in part exchange, each of which Mr Tuke had previously bought and sold, i.e.:

(1) the Lister Costin Jaguar, with a price ascribed of £1,350,000; and

(2) the Allard J2X, with a price ascribed of £1,150,000.

97. On this basis, Mr Tuke was selling the Jaguar C Type for £3.5million. However, he had spent over £500,000 on it and so he had not made a profit on it. Nevertheless, they spoke of commission when discussing Sales Transaction 4. The Allard J2X and the Lister Costin Jaguar were to be valued, for a fee of £50,000. Mr Tuke wrote on 5 August 2011:

> "I presume you will stand the 50k therefore, it can come out of uplift commission on XKSS if there is any. C Type deal I reckon is negative by around 500k so arguably has negative commission of

> 50k which would probably leave us neutral if XKSS does sell, and which in the circumstances is fair I think."

98. As to the identity of the buyer of the Jaguar C Type:

(1) In presenting this transaction to Mr Tuke, Mr Hood said on 1 August 2011:

> "May have a deal on the C Type, will you take £1M and take back the Allard and Moss Lister?
>
> Subject to Close substituting the C with these two cars."

(2) Mr Tuke asked, inter alia, who were the owner of the Allard J2X and the Lister Costin Jaguar. Mr Hood replied on 2 August 2011:

> "I have pulled the deal together so that both the owner of the Allard and Lister pay 500k each plus the two cars for the C Type, …"

(3) Mr Tuke referred to the other party to the transaction on 3 August 2011 when he said:

> "… whoever it is has a bargain."

(4) Mr Tuke repeatedly asked what was happening with the sale of the Jaguar C Type. Mr Hood replied on 25 August 2011 in terms which indicated that he had reached an agreement on Mr Tuke's behalf:

> "I have agreed the sale on the C Type as we discussed before I left if they got finance and the cars inspection was satisfactory …"

99. JD produced an invoice which named Mr Tuke as the seller of the Jaguar C Type and said that he had acquired the other two cars in part exchange, but did not name the buyer(s). In addition:

(1) JD also produced an invoice addressed to Mr Tuke which related solely to the sale of the Lister Costin Jaguar and the Allard J2X.

(2) There was an invoice (number 160911) dated 16 September 2011 addressed by Mr Tuke to JD, and which he signed, which purported to relate to the sale of the Jaguar C Type for £3.5million, and which referred to a "Deposit Received" of £2.5million and a balance due of £1million, with instructions to pay £500,000 of that to Close Brothers.

(3) JD produced an invoice dated 19 September 2011 addressed to an unknown third party (whose name was redacted from the disclosed copy) and not sent to Mr Tuke, which again referred to the sale of the Jaguar C Type for £3.5million, to a "Deposit Received" of £2.5million and a balance due of £1million and concluded:

> "Please settle invoice number 160911 dated 16th September 2011 from Mr Michael A Tuke, for the sum of £1,000,000-00 remitting a balance to JD Classics (Holdings) Limited for the sum of £NIL."

100. There was no explanation from JD for this additional set of invoices, which was inconsistent with the agreed position that this transaction was a part exchange transaction. I find that this set of invoices was produced by JD to give a certain impression of the transaction to Close Brothers. The emails show that Mr Tuke was under pressure to make a substantial repayment due to Close Brothers. Mr Tuke's evidence was that the Jaguar C Type was on the security to Close Brothers and that that was the explanation for what he called "a process which got involved in a complex way" but which was "not the true process, to my mind, of what was happening in my transaction on those cars."

(8)(e) Sales Transaction 5: 6 December 2011

101. On 6 September 2011 Mr Tuke gave the Jaguar XK150S Drophead (registration number 285 AXT), which he had bought on 22 March 2010 for £275,000, in part exchange for a Jaguar XK150S Fixed Head (registration number OVL 150), for which he also paid £100,000 in cash. The value ascribed to the Jaguar XK150S Drophead was £140,000, so Mr Tuke made a loss on that car.

102. The invoice produced by JD mistakenly named Mr Tuke as the buyer rather than the seller of the Jaguar XK150S Drophead, stating that the Jaguar XK150S Fixed Head was given in part exchange, but did not name the actual buyer.

(8)(f) Sales Transaction 6: 6 December 2011

103. On 6 December 2011 Mr Tuke exchanged the Jaguar XJ220 which he had bought on 23 June 2010 for £200,000 for a Jaguar XK150S Drophead (registration number 1552 MW) and £40,000. The value ascribed to the Jaguar XK150S Drophead was £160,000, so Mr Tuke made no profit on the Jaguar XJ220.

104. The invoice produced by JD named Mr Tuke as the buyer of the Jaguar XK150S Drophead, but did not name the seller.

(8)(g) Sales Transaction 7: 16 December 2011

105. On 16 December 2011 Mr Tuke exchanged the Bugatti, which he had bought for £860,000 at the First Meeting, for a Jaguar E type and £320,000. The value ascribed to the Jaguar E Type was £200,000, so Mr Tuke made a loss on the Bugatti. The invoice produced by JD was headed "Invoice from" Mr Tuke. It did not name the buyer of the Bugatti.

106. Mr Hood first proposed this transaction to Mr Tuke on 28 November 2011, when he wrote:

> "I have pushed the new Veyron guy in the last hour to do a deal. I sold him the 7000 mile E Type S1 3.8 Litre Roadster I offered you last year. He paid £285K for it plus getting it road worthy and UK registered which has just been completed. Car owes £330K he has offered the E Type and £320K, I may get him up another £10K or £15K subject to him seeing the car here on Wednesday with payment Thursday. Your call. ..."

107. On the following day Mr Hood wrote, "Veyron deal with E Type is done." Again, Mr Hood was reporting back on a transaction which he had effected for Mr Tuke.

108. However, on 1 December 2013 Mr Hood wrote:

> "Just got off the phone to the Veyron guy, I am trying to stop the guy from backing the car, I told him it had 9000kms it has 9960kms, I will keep you posted as the day goes on."

109. The parties were here proceeding on the basis that a misrepresentation made by JD to the third party buyer of the Bugatti could result in the rescission of the sale of the Bugatti by Mr Tuke. That is consistent with JD acting as Mr Tuke's agent and representations made by JD being made on behalf of Mr Tuke. It is inconsistent with JD's case that it was selling the car in its own right.

110. JD did not pay the £320,000 to Mr Tuke until JD had received it from the buyer of the Bugatti. This prompted Mr Tuke to write on 20 December 2011:

> "Please do not let another of my cars go to anyone till we have secured their money."

111. The parties were treating Mr Tuke as bearing the risk that the third party buyer would be late in paying or would not pay at all. That is inconsistent with JD's case that it was the buyer of the Bugatti from Mr Tuke.

112. Sales Transaction 7 is the subject of the second of the Four Fraud Allegations and is one of the subjects of the Additional Cars Action. Mr Tuke alleges that the Jaguar E Type actually belonged to JD and not to the buyer of the Bugatti and that it was only worth £100,000.

113. The only evidence to that effect relied on by Mr Tuke in this action is paragraph 35 of JD's and Mr Hood's Defence in the Additional Cars Action, which I have already quoted. They have offered to settle Mr Tuke's claim in full and say that for that reason they do not plead to this part of the Additional Cars Claim. Mr Brannigan submitted that JD was deemed to admit the facts alleged by Mr Tuke in the Additional Cars Action, pursuant to CPR 16.5(5), which provides as follows:

> "Subject to paragraphs (3) and (4), a defendant who fails to deal with an allegation shall be taken to admit that allegation."

114. However, CPR 16.5(5) is subject to CPR 16.5(3), which provides as follows:

> "A defendant who –
>
> (a) fails to deal with an allegation; but
>
> (b) has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant,
>
> shall be taken to require that allegation to be proved."

115. It may be that paragraph 30 of the Defence to the Additional Cars Action falls within CPR 16.5(3) rather than 16.5(5). I do not need to decide that issue because, in any event, I do not consider that it is appropriate to decide this allegation of fraud on the basis of a deemed admission. I leave this issue to be resolved in the Additional Cars Action.

(8)(h) Sales Transaction 8: 28 February 2012

116. On 28 February 2012 Mr Tuke exchanged the Jaguar XKSS which he had bought on 15 January 2010 for £3.4million for a Lister Jaguar Knobbly (also known as the Ecosse Jaguar) and £2million. The value ascribed to the Lister Jaguar Knobbly was £1.5million. However, taking account of his expenditure on the Jaguar XKSS, Mr Tuke made a loss on that car.

117. The invoice produced by JD identified Mr Tuke as the buyer of the Lister Jaguar Knobbly, with the Jaguar XKSS in part exchange, but did not identify the seller.

118. Mr Hood first mentioned this transaction to Mr Tuke on 5 December 2011, when he wrote:

> "I also may have a deal with the Ecosse Lister at £2M plus £2M cash but I have not got further with this one. Talking again tomorrow.
>
> Getting a straight cash deal is not happening at the moment."

119. Mr Tuke replied as follows on 8 December 2011:

> "I do not know the Ecosse Lister, why it worth 2m given what we are experiencing? If it really is then the argument to him is that he should sell it for that to pay me all cash and I would want you to push him at 4.5 cash.
>
> If he prefers it as a PEX then his car should be valued at 1.5 and he pay 3m cash."

120. Mr Tuke thereby indicated his understanding that the Lister Jaguar Knobbly belonged to the third party who had offered to buy the Jaguar XKSS and that it was the third party who was wanting to give the Lister Jaguar Knobbly in part exchange. In fact, the Lister Jaguar Knobbly belonged to JD, who had acquired it in or around August 2005. That is admitted by JD in paragraph 50(2) of the Defence in the Additional Cars Action. Consequently, I find that the prospective buyer of the Jaguar XKSS was offering a "straight cash deal",

contrary to Mr Hood's statement in his email of 5 December 2011 that getting a straight cash deal was not happening, i.e. not possible.

121. However, Mr Hood did not correct Mr Tuke's misunderstanding. On the contrary, he encouraged it:

(1) On 11 December 2011 he wrote:

> "Mike everything seems to be P/ex at the moment. Ecosse Lister is a very famous car and ready to race, it's has had the JD treatment. It is a good deal. We could include a buyback so once some other cars move on you can have it [*i.e. the Jaguar XKSS*] back."

(2) Then on 16 December 2011 Mr Hood wrote:

> "… the £2m cash in the deal is the limit."

(3) And on 22 December 2011 Mr Hood wrote in relation to the Lister Jaguar Knobbly:

> "When my finances are more secure I would have it."

122. As to the conclusion of the deal with the third party:

(1) On 22 December 2011 Mr Tuke wrote:

> "OK go with XKSS please. When will it be through?"

(2) On 23 December 2011 Mr Hood wrote:

> "Deal is done just got to nail down the buy back as low as I can.
>
> Don't spend anything until the money is in the bank."

123. The Jaguar XKSS was charged to Close Brothers. Its sale required their approval. This was given in an email from Mark A Walker of Close Brothers on 14 February 2012 in which Mr Walker set out his understanding that the Jaguar XKSS was being sold to Mr Hood and that the Lister Jaguar Knobbly was currently owned by Mr Hood. This prompted Mr Tuke to send an email to Mr Hood on the same day in which he asked:

> "Why do they think you own the Ecosse and XKSS being sold to you Derek?"

124. Mr Hood replied as follows on 14 February 2012:

> "Typo it should be JD.
>
> I am having to transfer the current debt on the Lister to my D type. The Lister ownership then transfers from its current owner to JD then to you then to Close as security, I will then have a £500K debt on my

> D Type, Close also get ownership of my D Type until the £500K is paid off. I have done this to get the XKSS deal done and get you cash. JD then pass the XKSS to its new owner."

125. Once again, these were presented as steps being taken by JD to satisfy Close Brothers. They did not affect the nature of the relationship between Mr Tuke and JD. Mr Hood again reinforced Mr Tuke's understanding that the Lister Jaguar Knobbly belonged to the third party and not to JD.

126. I note that, if the allegation in paragraph 50(3) of the Defence in the Additional Cars Action is correct (as to which I make no finding), then it may be that the third party buyer of the XKSS had already pulled out of the proposed purchase. If that was the case, Mr Hood did not tell Mr Tuke. However, that is an issue for the Additional Cars Action.

127. This transaction is the subject of the third of the Four Fraud Allegations and is one of the subjects of the Additional Cars Action. Mr Tuke contends that JD and Mr Hood falsely represented in the December 2011 emails which I have quoted that the Lister Jaguar Knobby belonged to the third party buyer of the Jaguar XKSS. JD denies that it made such a representation in those emails.

128. In my judgment, JD did make such a representation:

(1) By the email of 5 December 2011, JD falsely represented that it had been unable to get a straight cash deal. In that context, JD was representing that the part-exchange proposal came from the third party buyer of the XKSS. That is how Mr Tuke read the email, and it was reasonable for him to do so.

(2) Moreover, Mr Tuke made clear in his email of 8 December 2011 that that was his understanding. It would have been easy for Mr Hood to say, "You have misunderstood. The Lister Jaguar Knobbly belongs to JD. It is JD who is insisting that you take it in part exchange." But Mr Hood did not do that. Instead, Mr Hood encouraged Mr Tuke's mistaken belief.

(3) Seen in context, his email of 11 December 2011 included a representation that it was the third party buyer who was insisting on the part exchange and his email of 16 December 2011 included a representation that the third party buyer was not prepared to pay more than £2million in a cash.

(4) Moreover, against that background, his email of 22 December 2011 was also misleading, in stating that he, Mr Hood, would like to buy the car without mentioning that his company, JD, already owned it.

129. Why did Mr Hood paint a false picture of the transaction? JD had the opportunity to call Mr Hood to give evidence and be cross-examined about this transaction. It chose not to do so. So I have no explanation from him to assist me.

130. However, the answer to my question is clear: because Mr Hood thought that he was more likely to get Mr Tuke to agree to buy the Lister Jaguar Knobbly if he misrepresented the position than if he told the truth. He knew that by this stage Mr Tuke was desperate to sell cars and had no interest in buying a car like the Lister Jaguar Knobbly. He knew that he would have got nowhere if he had said to Mr Tuke, "Would you like to buy this car from JD?" Consequently, he knew that his only chance of selling this car to Mr Tuke was to pretend that it was being offered in part exchange by the buyer of the Jaguar XKSS. So that is what he did. This was deliberate and dishonest conduct by Mr Hood.

131. The parties disagreed about the relevance to the issues which I have to decide of any misrepresentation made by Mr Hood. The context is that things said and done after September 2010 are acknowledged to be less significant in any event and that the parties' subjective beliefs about the nature of their relationship are irrelevant. Whether the representation was true or not, it is relevant that Mr Hood represented that it was the third party buyer of the Jaguar XKSS who was insisting on the part exchange. This was another example of Mr Hood giving the impression that he was reporting back to Mr Tuke on negotiations which he had been conducting on Mr Tuke's behalf.

132. As to the fact that the representation was false:

(1) Mr Brannigan submitted that the relevance of the false representation is that it is inconsistent with JD's case. JD's case is that all of the Sales Transactions involved Mr Tuke dealing with JD as principal, whether selling cars to, buying cars from or giving or receiving cars in part exchange to or from JD. Yet here was Mr Hood deliberately concealing from Mr Tuke the fact that the car which he was acquiring belonged to JD.

(2) Mr Pymont submitted that any misrepresentation was simply motivated by a desire on Mr Hood's part to get a deal done and did not shed any light on the issue whether, objectively analysed, the relationship between Mr Tuke and JD was one of principal and agent.

(3) I do not consider that it would be helpful or relevant for me to try to analyse Mr Hood's belief as to the nature of the relationship between JD and Mr Tuke. An objective analysis of the nature of that relationship turns on what passed between the parties. The fact that what Mr Hood represented on this occasion was untrue may be evidence of a breach of fiduciary duty, if JD was Mr Tuke's agent, but it did not make JD Mr Tuke's agent.

(8)(i) Sales Transaction 9: 25 May 2012

133. On 25 May 2012 Mr Tuke sold the Jaguar Lightweight E Type which he had bought for £2,941,176 on 23 April 2010. The sale price was £4.5million. After expenses, Mr Tuke made a profit.

134. The purchaser of this car was Morris & Welford UK Limited ("Morris & Welford"). This is the only one of the Sales Transactions for which there exists a written contract, signed by Mr Tuke and by Mr Welford of Morris & Welford. JD admits that it arranged this sale. I am sure that, if a contract had not been produced requiring Mr Tuke's signature, JD would also have completed the deal, as it professed to do with other Sales Transactions.

135. JD prepared two invoices:

(1) One was addressed to Morris & Welford, who was identified as the buyer of the car. The seller (i.e. Mr Tuke) was not named on the invoice. The price was £4.5million, with £3million to be paid direct to Close Brothers and £1.5million to be paid to JD. JD must have received this money as agent for Mr Tuke.

(2) The second invoice was addressed to Mr Tuke. He was also named as the buyer, but this was simply a mistake for seller. The actual buyer (i.e. Morris & Welford) was not named. The purchase price was stated to be £4,392,360. This was not the actual price, but £4.5million less £107,640 which JD had deducted in respect of its commission.

136. Since JD had received Mr Tuke's money, it was appropriate for JD to produce a document which accounted for that money. JD did so by producing an invoice. It is striking that the invoice issued to Mr Tuke in this case, when JD was not the buyer, was in the same form as the invoices issued in the case of the other Sales Transactions, when JD contends that it was. It follows that one cannot treat those invoices as an indication that JD was, or even that JD believed that it was, the buyer in any of these transactions.

137. There was an exchange of emails about JD's commission:

(1) On 2 July 2012 Mr Tuke wrote:

> "Does return to me of 4.5 m allow your 10% on uplift (first full return deal) which is from costs to me of £3,423,619.77?"

(2) On the same day Mr Hood replied:

> "My 10% uplift comes out the balance due back to you."

138. Mr Hood accepted Mr Tuke's figure for expenses and used that to calculate the commission payable to JD. He deducted this from the actual sale price of £4.5million to give the sale price figure in his invoice. It may be that he did this in order to avoid charging VAT, although he would not have been justified in taking that course. It was JD's own case, in paragraph 3(3) of its Defence, that the commission was a finder's fee, i.e. a fee for JD's services in having arranged the sale. I reject the submission made by Mr Pymont at trial that this was a profit share arising out of a joint venture.

(8)(j) Sales Transaction 10: 5 December 2012

139. On 5 December 2012 Mr Tuke sold the Ford, which he had bought at the First Meeting for £1,400,000, for £500,000 in cash and a Ferrari 250 Testarossa ("the Ferrari") in part exchange. The value ascribed to the Ferrari was £1,300,000. On that basis, the Ford was sold for £1.8million, but Mr Tuke had spent so much on it (and on the associated Road Car) that he did not make a profit on the Ford.

140. The invoice produced by JD was in its standard form, identifying Mr Tuke as the seller of the Ford, with the Ferrari in part exchange, but not identifying the buyer of the Ford.

141. On 13 November 2012 Mr Hood wrote that the £500,000 cash would be paid at the rate of £100,000 per month. On 28 November 2012 Mr Hood reported that "GT deal is done …" On 12 December 2012 Mr Hood wrote that "GT40 stays with me until £500k is paid to you in full …" The premise for this email was that Mr Tuke would only be paid for the Ford if and when the third party buyer paid, and so needed protecting against the credit risk which he was running. That is inconsistent with JD's case that it had bought the Ford from Mr Tuke.

142. This transaction is one of the subjects of the Additional Cars Action. JD has admitted in that action that it bought the Ferrari for £680,000 on or around 6 January 2012. Mr Tuke alleges a similar misrepresentation to that made in relation to the Lister Jaguar Knobbly. JD denies any misrepresentation, alleging that it had agreed to sell the Ferrari to the third party buyer of the Ford, but that he pulled out of that purchase before the sale of the Ford took place, and that therefore JD sold the Ferrari to Mr Tuke. (I note that, if this is correct, JD never told Mr Tuke that the buyer of the Ford no longer wanted to give the Ferrari in part-exchange. This is admitted in paragraph 25(5)(c) of the Defence in the Additional Cars Action.) This transaction was the subject of one of the Six Fraud Allegations, about which Mr Hood would have been cross-examined if he had given evidence. But is it not the subject of any of the Four Fraud Allegations, and so I do not have to consider any allegation of fraud in relation to this transaction.

(8)(k) Sales Transaction 11: 7 March 2013

143. On 7 March 2013 Mr Tuke exchanged the Lister Costin Jaguar, which he had previously bought, sold and reacquired in part exchange (in Sales Transaction 4, when the value ascribed to it was £1,350,000), for two cars: a Jaguar SS100 and a Jaguar XK150S. The values attributed to these cars were as follows: £1.3million for the Lister Costin Jaguar, £850,000 for the Jaguar SS100 and £350,000 for the Jaguar XK150S. On this basis, Mr Tuke made a loss on the Lister Costin Jaguar.

144. The invoice produced by JD identified Mr Tuke as the seller of the Lister Costin Jaguar, with the other cars being in part exchange, but did not identify the buyer. The invoice issued to Mr Tuke is dated 7 March 2013. Curiously, JD also issued an invoice dated 26 February 2013 to a third party whose name

has been redacted. This invoice records the third party selling a Porsche 550 Spider for £1.5million cash and £1.5million in value attributed to the Lister Costin Jaguar, which was being given in part exchange. There may perhaps be an error here, since on their face these documents suggest that JD sold, or arranged the sale, of the Lister Costin Jaguar to an unknown third party while it still belonged to Mr Tuke. I have already mentioned that there is reason to doubt the accuracy of the dates on JD's invoices.

(8)(l) Sales Transaction 12: 7 March 2013

145. On 7 March 2013 Mr Tuke sold the Jaguar SS100 (registration number 364 YUB) which he had bought on 20 August 2010 for £400,000. He sold it for £50,000 plus in part exchange a BMW 3.0 CSL Art Car ("the BMW"), with a value ascribed to it of £400,000. After allowing for money spent on the Jaguar SS100, Mr Brannigan calculated that Mr Tuke only made a profit of £7,644 on this car. Mr Pymont did not propose an alternative figure. I make no finding as to the precise figure, but I accept that any profit was modest.

146. The invoice issued by JD named Mr Tuke as the buyer of the BMW, with the Jaguar SS100 in part exchange, but did not identify the seller of the BMW. JD did not issue an invoice for its commission. I will consider the reasons for this when dealing with Sales Transaction 13.

147. The invoice issued to Mr Tuke is dated 7 March 2013. Curiously, JD also issued an invoice dated 29 January 2013 to a third party whose name has been redacted. This invoice records the third party buying the Jaguar SS100 for £180,000. Again, there may perhaps be an error here, since on their face these documents suggest that JD sold, or arranged the sale, of the Jaguar SS100 to an unknown third party while it still belonged to Mr Tuke.

(8)(m) Sales Transaction 13: 15 July 2013

148. On 15 July 2013 Mr Tuke sold the Jaguar XK120SS (registration number JWK 651) which he had bought on 15 January 2010 for £1.2million. He received £750,000 in cash plus in part exchange a Jaguar E Type. The value ascribed to the Jaguar E Type was £1million.

149. On that basis, Mr Tuke sold the Jaguar XK120SS for £550,000 more than he paid for it. Mr Brannigan calculated that, after allowing for money spent on the car, Mr Tuke only made a profit of £85,975 on this car. Mr Pymont did not propose an alternative figure. I make no finding as to the precise figure, but I accept that any profit was of this order of magnitude.

150. The invoice produced by JD showed Mr Tuke as the seller of the Jaguar XK120SS, with the Jaguar E Type in part exchange, but did not identify the buyer.

151. As with other transactions, Mr Tuke had to wait until the third party buyer paid for the Jaguar XK120SS before he was paid. That is why Mr Hood wrote to him on 26 July 2013 to tell him that the cash would be with Mr Hood next week. Then on 7 August 2013 Mr Hood wrote that he had transferred

£100,000 of his own money to Mr Tuke and was promised funds early next week. On 16 August 2013 Valerie of JD wrote that she was still chasing the buyer for funds and that Mr Hood had instructed her to pay Mr Tuke as soon as the funds came in. On 30 August 2013 Mr Tuke was still asking, "What news of cash?"

152. Mr Hood spoke of selling the E Type on 2 July 2013, when he said:

> "My commission is as before 10%."

153. This was an acknowledgment that the agreement reached in September 2010 continued to apply. There was further correspondence in September and October 2013 about commission in the context of Sales Transactions 9, 11, 12 and 13:

(1) On 29 September 2013 Mr Hood wrote (by reference to Sales Transaction 9):

> "I have put major amount of time into all of the cars taken in exchange at my expense so you could get cash when you needed it which has been taken for granted. The Qvale E Type proved my point that raising a car's profile in a subtle way and being patient adds value, a £1M return on the E Type proved my point. By the way I made only the commission you gave me on the sale. Like you I am not complaining either."

(2) On 2 October 2013 Mr Tuke replied in red on the same email:

> "My commission offer was 10% ON THE UPLIFT, i.e. on the difference between my purchase and sale price. It was never agreed as 10% on everything, totally different incentive. …"

(3) On 2 October 2013 Mr Hood wrote:

> "You said 10% on cars that sell for a profit."

(4) On 3 October 2013 Mr Tuke wrote:

> "… the principle I put in writing was 10% on the profit, not on the gross."

(5) In the same email, Mr Tuke wrote as follows in relation to Sales Transactions 11 to 13:

> "To answer your questions, you have sold 3 cars for me this year but I have 4 cars in return and only 2 of the cars sold got me some cash but only £800k on 3 deals totalling 3.3m, did you get 10% of this?"

(6) On 3 October 2013 Mr Hood wrote:

> "Deal has always been 10% on the profit on any cars you sell that you bought from me.
>
> ... I never got any commission on the £3.3M."

154. In the light of this exchange, it is not surprising that Mr Hood decided not to submit an invoice for commission on Sales Transactions 12 and 13. However, Mr Hood confirmed that the deal in relation to commission had always been the same.

155. Sales Transaction 13 is one of the subjects of the Additional Cars Action. In that action, Mr Tuke alleges, inter alia, that JD and Mr Hood:

(1) falsely represented that the third party buyer of the Jaguar XK120SS wanted to give the Jaguar E Type in part exchange, when in fact the Jaguar E Type belonged to JD or Mr Hood; and

(2) falsely represented that the Jaguar E Type was an original competition car, when in fact (as is admitted in paragraph 68(8)(d) of the Defence in the Additional Cars Claim) it was a new car with an original chassis plate and body tag attached to it.

156. JD and Mr Hood deny that they made any fraudulent misrepresentations. They say, inter alia, as follows:

(1) JD had agreed to sell the Jaguar E Type to the buyer of the Jaguar XK120SS, but he pulled out of that transaction before the completion of Sales Transaction 13. (Again, if this is correct, JD did not tell Mr Tuke.)

(2) JD and Mr Hood believed that the Jaguar E Type had been rebuilt around the original monocoque and were misled by the man commissioned to do that work.

157. These are matters to be determined in the Additional Cars Action. In addition, there is an allegation of fraud in the Additional Cars Action concerning a sales transaction proposed by Mr Hood before Sales Transaction 13, which would have involved the exchange of the Jaguar XK120SS for a Jaguar D Type, which Mr Tuke contends was a replica owned by Mr Hood. That allegation was one of the Six Fraud Allegations about which Mr Hood would have been cross-examined if he had given evidence, but it is not one of the Four Fraud Allegations relied on in this action and I therefore disregard it.

(8)(o) Sales Transaction 14: 5 December 2013

158. On 5 December 2013 Mr Tuke sold the Mercedes, which he had bought on 6 April 2010 for £1.8million. He sold it for £1.5million, with no part exchange. He made a loss on this car.

159. On 9 October 2013 Mr Hood wrote as follows in connection with this proposed sale:

"All cash, 10% of profit for me."

160. This was further confirmation that the agreement reached in September 2010 remained in force.

161. On 14 November 2013 Mr Hood wrote that the proposal was that the £1.5million purchase price should be paid in instalments, with the car remaining at JD's premises until paid for in full. Mr Tuke replied that for him to take this kind of risk and delay, the price would have to be £1.8million. Following further correspondence, Mr Hood wrote on 15 November 2013:

"As I said I will act as guarantee for the payments."

162. This offer by Mr Hood to act as guarantor is inconsistent with JD's case that JD was the buyer of the car. A guarantee would not be required if JD was acting as principal in its transaction with Mr Tuke. Moreover, if, as I find, Mr Hood meant that JD (rather than Mr Hood personally) would act as guarantor, JD could not act as guarantor of itself.

163. Mr Pymont relied on Mr Hood's email of 17 November 2013, in which he said as follows:

> "The deal will be monthly stage payments and the car and documents stay with JD until the car is paid for in full. Deal will be with JD as the buyer is offshore. Draw up a basic agreement and I will take a look at it with as you say a two month later drop dead clause."

164. Mr Pymont submitted that when he said, "Deal will be with JD", Mr Hood was proposing that there would be a contract between Mr Tuke and JD as principal. In my judgment, the email was ambiguous. Mr Hood could equally have been talking about the deal with the offshore buyer being with JD (in which case Mr Tuke would be an undisclosed principal) as the deal with Mr Tuke. However, even assuming that Mr Pymont were correct in his reading of this email:

(1) It is striking that this was the only transaction in respect of which Mr Hood made such a proposal. The premise for this email is that the norm was that Mr Tuke's deal was not with JD.

(2) Mr Hood's email of 17 November 2013 was only a proposal. Mr Hood went on in that email to invite Mr Tuke to draw up an agreement, but this did not happen. The proposal was not implemented.

(3) Thereafter, Mr Hood continued to deal with Mr Tuke on the basis that Mr Tuke would get paid when the money came in from the buyer: see Mr Hood's emails of 22 November and 3, 5, 11, 14 and 19 December 2013 and 24 January and 5 February 2014.

165. Sales Transaction 14 is the subject of the fourth of the Four Fraud Allegations. Mr Tuke alleges that JD falsely represented that it had sold the Mercedes to an American third party buyer, when in fact it was JD who bought the car. It is

admitted that JD sold the car at auction at Bonhams on 12 July 2014 for €2.1million (equivalent to £1,662,000 after deducting Bonhams' fee). On 20 May 2014 Mr Tuke complained that the Mercedes had been entered in the Bonhams auction. Mr Hood replied on 21 May 2014, "Owner's decision." He did not state that the owner was JD, yet it was JD who sold the car in the auction.

166. I have heard no evidence from Mr Hood as to how this came about or to confirm the existence of the alleged American buyer. In the schedule to its Defence, JD listed the transactions involving the Mercedes, but did not include a sale to an American buyer. Mr Pymont submitted that there was a sale to an American buyer which fell through, but there was no evidence to this effect. No documents have been disclosed by JD which refer to the alleged American buyer or the sale to him. There has been no disclosure of any invoice issued to the alleged American buyer, or any emails to or from the alleged American buyer or any records of payments received from him. Given the extent of the email communications between Mr Hood and Mr Tuke about this transaction, this is very surprising.

167. In short, I have not seen any evidence to support JD's representation that it sold the car to the alleged American buyer. However, given that Mr Tuke's allegation that the alleged American buyer did not exist was only included in the Schedules of Facts by an amendment made at trial, it seems to me that I should be cautious before relying on an absence of disclosure. Moreover, as with Sales Transaction 8, I do not consider that the alleged falsity of Mr Hood's representation about the alleged American buyer, even if established, would assist me to decide whether, objectively analysed, the relationship between Mr Tuke and JD was one of principal and agent. Accordingly, I prefer not to decide whether the representation made by Mr Hood and JD was false and fraudulent. I leave that allegation to be determined, if necessary, in subsequent proceedings.

(8)(o) Sales Transaction 15: 28 January 2016

168. On 28 January 2016 Mr Tuke sold the Jaguar XK150S Fixed Head which he had acquired in Sales Transaction 5, when the value ascribed to it was £140,000. He sold it for £200,000, making a profit of £60,000.

169. The invoice produced by JD named Mr Tuke as the seller but did not identify the buyer. JD did not produce an invoice for commission on this sale. I was not shown any emails about this transaction.

(9) Conclusion

170. Having considered all of the evidence and submissions, I am satisfied that Mr Tuke did appoint JD as his agent to negotiate and conclude the sale of cars and receive payments on his behalf. He did so in September 2010, when the parties agreed that JD would receive a commission for doing so. That agreement remained in force throughout each of the subsequent Sales Transactions.

171. In reaching this conclusion, I have taken account of the parties' dealings after September 2010, but I have given them little weight compared to the terms of the September 2010 Email Exchange itself and the context in which it took place. In relation to the parties' subsequent dealings:

(1) As I have pointed out, there are a number of features of those dealings which are inconsistent with JD's case. In particular:

(a) The parties conducted themselves on the basis that the agreement made by the September 2010 Email Exchange continued to apply throughout.

(b) The parties conducted themselves on the basis that Mr Tuke bore the credit risk of the third party buyer. This included JD proposing to act as guarantor of the buyer of the Mercedes in Sales Transaction 14.

(c) The parties conducted themselves on the basis that representations made by JD could affect Mr Tuke's sale of the Sold Cars.

(2) None of the parties' dealings after September 2010 are inconsistent with Mr Tuke's case.

(3) Overall, the parties' dealings after September 2010 are substantially more supportive of Mr Tuke's case than of JD's case.

172. Accordingly, I will grant the relief sought and I invite the parties to agree a form of order.

173. In conclusion, I repeat my thanks to all counsel and solicitors for their efforts in ensuring that their respective cases were presented so efficiently and effectively, which has been of considerable assistance to me.