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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
HIS HONOUR JUDGE THORNTON QC, SITTING AS A HIGH COURT JUDGE
HQ08X04724

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2012

Before :

LORD JUSTICE RIX
LORD JUSTICE SULLIVAN
and
LORD JUSTICE LEWISON

- -

Between :

Mercedes Travis Brewer	Claimant / Respondent
- and -	
(1) Stanley Mann (2) Fortis Lease UK Limited (3) Stanley Mann Racing Limited	Defendants / Appellants

- -
- -

Mr Raoul Downey (instructed by Layzells Solicitors) for the Claimant / Respondent
Mr Oliver Ticciati (instructed by Wilmot & Co Solicitors LLP) for the First and Third Defendants / Appellants
Mr Paul Brant (instructed by DWF LLP) for the Second Defendant / Appellant

Hearing dates : Tuesday 11th October 2011
Wednesday 12th October 2011

Thursday 13th October 2011

- -

Approved Judgment

Lord Justice Rix :

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Introduction

1. This is the judgment of the court. This appeal is about the sale and hire purchase of a vintage Bentley, at a price of £425,000. Large as that sum is, the damages at issue are comparatively small and have been dwarfed by the costs of the litigation. After a year of happy motoring the purchaser stopped paying the hire instalments, while she considered down-sizing her commitments. She then consulted Bonhams, the well-known auction house, with a view to selling the car, and received what she considered to be disturbing news about the nature of her purchase and its value. As it happens, there is no issue in this litigation about value: it is accepted that the car was (more than) worth its price. There are, however, substantial issues as to whether the car was properly described either by the Bentley dealer (by which I refer to both the man and his company) in his dealings with the purchaser, or in the hire purchase contract. The finance house terminated its contract with the purchaser for non-payment. The car was returned or repossessed by the finance

house. The dealer made a swift offer to repurchase the car for the price for which he had sold it to the finance house, namely the £425,000[1]. That offer was in the end accepted, but not, as it was originally intended, as facilitating a tripartite settlement of the whole dispute. (The car has since been resold by the dealer, after further work on it, for £675,000.) That repurchase has ensured, at any rate ultimately, that the financial remedies sought by the parties are comparatively small. The purchaser claimed £94,555 (the deposit and instalments paid by her under the hire purchase contract) from both the dealer and the finance house. The finance house counterclaimed £61,224 (a sum much reduced by reason of the resale of the car back to the dealer), mainly made up of the expenses of recovery, storage and such like. The judge awarded the claim of £94,555 against the dealer and the finance house, and dismissed the finance house's counterclaim.

2. In its advertising, which brought the car to the attention of the purchaser, the dealer described the car as a "1930 Bentley Speed Six". In an invoice to the finance house on the basis of which the purchaser paid a deposit of £40,000 (subsequently reduced to £35,000), the car was simply described as a "Bentley motor car". In the hire purchase contract between the finance house and the purchaser the car was described as a "1930 Bentley Speed Six car".

3. The purchaser's claim against the dealer was founded in collateral warranty. She asserted an oral warranty, that "the Bentley was a genuine 1930 Speed Six containing an authentic Speed Six engine", given at a meeting on 20 May 2007. The dealer did not dispute that he described the car as a 1930 Bentley Speed Six, but he submitted that this was a statement of opinion and not a contractual warranty (and that it was given on behalf of his company, not himself personally). He did, however, dispute that he had warranted that the car's engine was a "Speed Six engine" (authentic or otherwise). He accepted only that he had said that the engine had been prepared to Speed Six specification.

4. Among the many issues at trial were the questions: What was needed to entitle a seller to describe a car as a "1930 Bentley Speed Six"? Did such a car need to have in it an authentic Speed Six engine? What had the dealer said to the purchaser at the critical meeting on 20 May 2007?

[1] Nominally £430,000, but there was a rebate of £5,000

5. The purchaser's claim against the finance house was founded on the hire purchase contract, which she submitted had been breached by the finance house since the car did not comply with its description. Her claim was in damages, not in rescission or repudiation. The finance house submitted that there was no "bailment by description" within the meaning of section 9 of the Supply of Goods (Implied Terms) Act 1973.

6. Both the dealer and the finance house in any event submitted that, on the evidence of the expert witnesses at trial, the car complied with any warranty that it was a "1930 Bentley Speed Six". In addition, the dealer said that the engine had been prepared to Speed Six specification (which is all that he accepted that he had said about it), even if it was not a Speed Six engine in its origins.

7. The judge decided all points argued (and some that had not been) in favour of the purchaser. He referred to the dealer in the most unflattering of terms, tantamount to findings of dishonesty (which had not been alleged). Unfortunately, it is submitted on behalf of the dealer that the judge lost his objectivity, or at any rate appeared to do so, and did not afford a fair trial.

The judgments

8. The trial took place over four days on 22-25 February 2010. After the conclusion of the evidence, the trial was adjourned for written submissions, which took place in two rounds and were completed by 17 March. There were no oral concluding submissions.

9. The judge, HHJ Anthony Thornton QC, delivered five judgments to the parties, to which I will refer as judgments 1, 2, 3, 4 and 5.

10. Judgment 1 was a draft, and was emailed to the parties on 9 August 2010, dated "[ ] September 2010". It contained 124 paragraphs. The parties were requested to submit corrections for the purposes of its handing down on a date to be arranged in late September. On 25 August 2010 the judge emailed the parties judgment 2, intended for handing down on, and dated, 5 October

2010. It was described as "Amended and Replacement DRAFT JUDGMENT": and its title-page contained the following:

> "This draft judgment super[s]edes the draft judgment previously sent to the parties on 8 August 2010. That earlier judgment should be discarded. The changes between the two judgments do not affect or alter the decisions, findings or reasoning set out in that previous judgment."

Judgment 2 contained 203 paragraphs. The judge described it in his email as "the final version of the judgment which replaces the earlier draft". It was twice as long as judgment 1. The judge was subsequently to explain (in his judgment 5) that judgment 1 was sent out in error for judgment 2.

11. On 5 October the parties appeared before the judge for the handing down of judgment 2. The judge produced and handed down judgment 3, dated 5 October 2010. Its title-page described it as the "Approved Judgment" and it was given the neutral citation [2010] EWHC [2444] QB. It also contained 203 paragraphs, was in essentially the same form as judgment 2, but had been amended in ways which went beyond the correction of errors and editorial revisions. Consequential matters were debated before the judge. Among those matters were the dealer's and the finance house's applications for permission to appeal. Lengthy draft grounds of appeal had been submitted in advance of the hearing on behalf of the dealer and briefer grounds were put forward on the day of the hearing on behalf of the finance house. Those draft grounds were responding to judgment 2. They were already essentially in the form before this court. Among the grounds put forward on behalf of the dealer were those that must have made unpleasant reading for the judge, viz that he had failed to address important submissions, that there was the appearance of bias, and that the trial had been unfair. A retrial was requested.

12. The judge raised the question as to how he was to proceed in such circumstances, for instance whether he should provide further reasons to deal with the complaint that he had ignored submissions that had been made to him. On behalf of the dealer, Mr Oliver Ticciati said that he was not requesting further reasons or a further judgment. He submitted that it would be inappropriate for the judge to produce a further judgment. The judge nevertheless said that –

> "My present inclination is to address the application for permission to appeal, which is fully made, in a written decision with brief reasons which, if I consider it appropriate, will include any additional reasons on the areas of complaint raised in the notice of appeal" (at 1520).

13. That is not, however, what he did. In addition to a brief further judgment (judgment 5, below) on the questions of permission to appeal and costs, the judge substantially rewrote his trial judgment, which he had already handed down. Thus on 14 October 2010 the judge emailed the parties judgments 4 and 5. Judgment 4 was described in the email as "the updated version of the above Judgment as a result of the hearing of 5 October 2010". Its title-page contained the same neutral citation as judgment 3, but its date was now given as 14 October 2010. It was also described as the "Approved Judgment". It contained 248 paragraphs and was half as long again as judgment 3. There were many entirely new paragraphs, but also much rewriting of previously existing paragraphs.

14. Judgment 5 ("Approved Judgment No 2") was dated 12 October 2010, was given the same neutral citation as judgments 3 and 4, and contained inter alia the judge's reasons for granting or refusing permission to take to appeal the requested grounds of appeal. He refused permission for the dealer's grounds 13-21 (relating to the conduct of the trial, on the basis of which a retrial had been requested) and ground 24, but granted permission for grounds 1-12 and 22-23; and also granted permission for the finance house's six grounds. As for the dealer's ground 24 he said:

> "11. I also refuse permission on ground 24 which complains that I made findings of dishonesty against Mr Mann [the dealer] which were unjustified and irrelevant. These findings were necessary, fully addressed in the evidence and counsel's submissions and could not be avoided if the issue for determination relating to what was said and warranted was to be determined."

15. The judge also said that he had "published a significantly fuller judgment than the draft handed down on 25 August 2010" in the light of which he requested counsel to review their grounds for which permission had been granted "since the additions to the judgment that have occurred…may have the effect of removing at least some of the grounds from contention" (at paras 9 and 13).

16. Judgment 5 also dealt with costs and the judge's final order. The purchaser's draft skeleton bill of costs exceeded £210,000. The judge made an order for an interim payment of £110,000.

17. The judge's final order is also dated 14 October 2010. He awarded damages of £100,811 (being £94,555 principal and £6,256 interest at 3% from 7 August 2008 to the date of the order) against the dealer, his company and the finance house. He also granted a stay on terms that the defendants fully secure by payment into a joint account in the names of the parties' solicitors the full amount of the purchaser's estimate of costs.

Jurisprudence concerning alterations to judgments

18. We have not been shown authority on the situation where an approved and handed down judgment has been replaced or substantially amended by another judgment, albeit before perfection of the judge's final order and without affecting it.

19. There is of course the well-recognised, if more or less exceptional, jurisdiction for a judge to change his mind or to be asked to reconsider his judgment before its perfection by way of order: see *In re Barrell Enterprises* [1973] 1 WLR 19 (CA), where judgment was given orally. However, the present case does not involve a situation where either a party asked the judge to reconsider his decision or a judge decided of his own initiative to do so. This was a case where a judge rewrote his judgment (without changing his decision) in order to meet criticisms that had been made of it by way of grounds of appeal to a higher court.

20. In *Stewart v. Engel* [2000] 3 All ER 518 (CA), in the era of the Civil Procedure Rules, it was held that a judge could alter his order even after his judgment had formally been handed down, but only in exceptional circumstances which did not there exist. The judge, having dismissed an application for summary judgment on a claim pleaded in contract and negligence, and having said moreover that the claim as so pleaded was bound to fail, had altered his order, after judgment but before his order's perfection, so as to grant permission to the claimant, on her post-judgment application, to

amend her pleading so as to claim in conversion and thus to save her action for the future. On appeal this court held by a majority that the alteration did not fall within the exceptional nature of the jurisdiction: the appeal was therefore allowed with the consequence that the action was dismissed. However, there was there no change in the judge's judgment, other than in the ultimate outcome: indeed the judge had invited the claimant to amend her pleading to claim in conversion, but it was not until after the judge's order made in court that, following new advice, she had expressed any wish to do so.

21. In *Robinson v. Fernsby* [2003] EWCA Civ 1820 (unreported) a draft judgment was altered before its formal hand-down: the judge had been invited to reconsider it, he had withdrawn it and substituted a different judgment producing a different result. This court held that he was entitled to do so, indeed "since he was persuaded that his initial view was wrong, he was positively obliged to alter it" (at [98] per May LJ, see also [113] per Mance LJ). There were exceptional circumstances, if they were required (at [98]). As for the judge's final judgment, that on balance survived what May LJ thought in the circumstances was the "inevitable, or at least highly likely" appeal (at [95]). The subject matter of the dispute was a claim under the Inheritance (Provision for Family and Dependants) Act 1975 concerning which a trial judge had to make an assessment which, because it involved the weighing of various factors, was not easily interfered with by a higher court. It was emphasised that neither party requested a retrial (at [75] and [114]).

22. Although in that case there had been no alteration to a formally handed down judgment, this court considered whether that would have made a difference. Peter Gibson LJ said that it would not eliminate the jurisdiction to reconsider prior to the sealing of an order, citing *Millensted v. Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717 (CA) and *Pittalis v. Sherefettin* [1986] QB 869 (CA). In both those cases the judgments given were oral. May LJ, however, with whose judgment Peter Gibson LJ also agreed, thought that the formal handing down of a written judgment would affect, even if it might not eliminate, the jurisdiction. Thus he said:

> "[94] Once a judgment has been handed down or given, there are obvious reasons why the court should hesitate long and hard before making a material alteration to it…The cases also acknowledge that there may very occasionally be circumstances in which a judge not only can, but should make a material alteration in the interests of justice. There may for instance be a palpable error in the judgment and an alteration would save the

parties the expense of an appeal. On the other hand, reopening contentious matters or permitting one or more of the parties to add to their case or make a new case should rarely be allowed. Any attempt to do so is likely to receive summary rejection in most cases. It will only very rarely be appropriate for parties to attempt to do so. This necessarily means that the court would only be persuaded to do so in exceptional circumstances, but that expression by itself is no more than a relatively uninformative label. It is not profitable to debate what it means in isolation from the facts of a particular case.

[95] The practice of providing the parties' legal representatives with a draft of written reserved judgments a day or two before the date appointed for handing them down is intended to promote efficiency and economy. Typographical corrections may be made so that the judgment is available in its final form for publication on the day it is handed down. The parties are enabled to agree the form of any order and consequential order, for instance as to costs. The court time taken in delivering the judgment is reduced to a minimum. In many cases, the parties are relieved from the expense of their lawyers attending when the judgment is handed down. The standard notice on a draft judgment states the purpose of making it available and the limitations on its use and publication. It is not provided so that the parties may reopen its substance. If a draft judgment is altered materially after it has been provided to the lawyers but before it is handed down, that fact will become known to the clients. As a minimum, disappointment may ensue. The possibility of an appeal based on the differences between the draft judgment and the handed down judgment is increased. This was certainly so in the present case in which, as Rix LJ indicated in *Noga v Abacha*[2], an appeal became inevitable, or at least highly likely.

[96] It scarcely needs saying that judges should not send draft judgments to the parties' legal representatives in accordance with the Practice Direction, if they themselves perceive a risk that they may want to change them materially before they hand them down. More importantly, perhaps, parties should understand that this procedure is not an invitation to the court to reopen or add to contentious matters. The court will only exceptionally make material alterations to a draft judgment provided in this way. So perhaps the uninformative label "exceptional circumstances" needs to be appended to the exercise of the jurisdiction. I personally prefer Rix LJ's "strong reasons", but that again is only a label. The question whether to exercise the jurisdiction can only depend on the circumstances of the particular case...

[2] [2001] 3 All ER 513

> [98] The circumstances of the case will usually include the possibility and appropriateness of an appeal. The court in which the problem arises may be a consideration, since appeals in lower courts are generally less troublesome and expensive for the parties than appeals at higher levels. I have indicated my view that there is a material distinction between a judgment which has been handed down or given and a draft judgment which has not yet been handed down. There is also, in my view, a significant difference between a case in which one or more of the parties want to persuade a reluctant judge to reconsider a draft judgment; and a case where the judge himself has decided that his draft judgment is wrong. In the latter case, at least where the judgment is only a draft, I consider that the judge is positively obliged to alter it, however the consequences of doing so may appear. It cannot be right for the law to require a judge to hand down for the first time a judgment which he believes to be wrong..."

23. The present case places before the court novel circumstances. The judge was not having second thoughts about his judgment: on the contrary he had formally handed down judgment 3 despite the criticisms made of it (in the form of judgment 2) in the draft grounds of appeal which had been supplied to him. Nor were any of the parties requesting him to reconsider or amend his judgment. He had already adopted in that judgment 3 all the corrections which had been suggested to him by the parties in the light of the distribution of draft judgment 2, as well as made some other not insubstantial changes. On the contrary, the appellants here, the dealer and the finance house, were asking for his permission to appeal from his judgment, on the grounds that it contained errors of law and fact, and in the case of Mr Ticciati's grounds, that the whole process of trial had displayed unfairness and apparent bias. In as much as any of those grounds complained of the judge's failure to deal with matters at trial which had been made the subject matter of submissions to him, Mr Ticciati made it clear that he was not saying that he required further reasons. He wanted to go to appeal.

24. The judge nevertheless considered that he should address some of the criticisms made by reference to his failure to deal with points which had been argued before him at trial, in particular on the matter of the witnesses' credibility. In this connection, on 5 October 2010 he mentioned *Malaba v. Secretary of State* [2006] EWCA Civ 820, which had been cited in Mr Ticciati's draft grounds of appeal. He considered that *Malaba* entitled him to add to his judgment what he referred to as further reasons (5.10.10

transcript at 1517ff). However, *Malaba* was concerned with criticising an immigration tribunal for failing to give reasons for finding an asylum seeker lacking in credibility: it was not concerned with inviting a judge or tribunal to add to a judgment which had been handed down.

25. On the other hand, in the course of submissions to the judge on that occasion, Mr Raoul Downey, on behalf of the purchaser, mentioned the case of *English v. Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 as encouraging a judge, to whom an application for permission to appeal on the ground of lack of reasons is made, to consider whether he can supply the reasons whose absence is complained of and thus avoid having to give permission to appeal (at 1519). The judge chose to adopt that course: but it was a dangerous course to take in circumstances where this was not the sort of case discussed in *English* (or *Flannery v. Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (CA)), which was one where a judgment might be argued to be devoid of reasoning (see below). This was rather a case where the judge had handed down a lengthy judgment but, unfortunately, it was being submitted that his judgment, by reason of errors of both commission and omission, demonstrated apparent bias, all of which required review on appeal. In such a case, and where there was no request for further reasons from him but on the contrary a request that he do not add to his reasons, the judge ought to have been extremely cautious about revisiting his judgment.

26. In *English*, Lord Phillips of Worth Matravers MR said, at [19]:

> "It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one had manifestly a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

27. It is plain that in *English* this court was considering (i) a relatively straightforward case, (ii) where an appeal might be avoided altogether if further reasons were promptly given by the judge, and (iii) where the judge was effectively invited by the applicant for appeal or the appeal court to supply further reasons. Thus Lord Phillips continued:

> "[24] We are not greatly attracted by the suggestion that a judge who has given inadequate reasons should be invited to have a second bite at the cherry. But we are much less attracted at the prospect of expensive appellate proceedings on the ground of lack of reasons. Where the judge who has heard the evidence has based a rational decision on it, the successful party will suffer an injustice if that decision is appealed, let alone set aside, simply because the judge has not included in his judgment adequate reasons for his decision…
>
> [25] Accordingly, we recommend the following course. If an application to appeal on the ground of lack of reasons is made to the trial judge, the judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings."

28. It does not seem to be contemplated that the judge should alter his existing judgment, but should simply supply what is missing.

29. As it is, the judge's provision of a new and substantially altered judgment, judgment 4, has added alleged grist to Mr Ticciati's mill. It is not clear whether or not Mr Ticciati makes the formal submission that the circumstances for the exercise of the *Barrell* jurisdiction have not arisen, for the *Barrell* case has not been cited or included in the parties' bundles of authorities. However, it seems reasonably clear from Mr Ticciati's submissions as a whole that he would submit that the necessary conditions for a proper exercise of that jurisdiction are lacking. If that is so, then we suppose that in one sense the proper judgment on the basis of which this appeal should be conducted would be judgment 3 and not judgment 4. Be that as it may, however, he relies on the new judgment as part of all the circumstances of the case to support his submissions that the judge had erred fundamentally in his appreciation of the case and has done so at least in part because of a demonstrable apparent

bias or unfairness in his conduct of the trial and his progress to final judgment.

30. We will have to advert in due course to the significance or otherwise of the judge's manifold changes in his judgments. For the present, we propose to regard judgment 4 as though it was the formal judgment under appeal, or at any rate one such judgment. Indeed, whichever is the final judgment as a matter of form, all the judgments have to be considered for the purposes of Mr Ticciati's fundamental submission.

31. It is necessary therefore to suspend for the while our decision on the status of judgment 4. However, we feel that we can provisionally state that where a judge has received no request from the parties to reconsider his judgment or add to his reasons, and has not demonstrated the need in conscience to revisit his judgment, but on the contrary has received grounds of appeal and an application for permission to appeal on the basis of the alleged inadequacies of his judgment, then it would be most unwise for him to rewrite his judgment (other than purely editorially) and it would take the most extraordinary reasons, if any, to justify such a course on his part. It is also plain to us that this was not the case of a short judgment on a straightforward issue where an appeal might be avoided if the judge supplied further reasoning which had been requested of him.

Permission to appeal

32. The dealer renewed to this court its application for permission to appeal on the grounds on which the judge had refused permission. The application came before Richards LJ on paper. He refused permission. He considered that they added nothing to the grounds for which permission had been granted. If, however, application were to be renewed, they should be made to the full court on the hearing of this appeal. That is what has happened (save that grounds 18/19 have been withdrawn). We invited Mr Ticciati to address us on all his grounds as a whole, since (in the main) the substantive grounds for which permission has been granted and the procedural grounds for which permission has been refused were to a great extent different sides of the same coin.

33. We shall have to consider those submissions in due course: but we think that they need to be considered as a whole and we therefore give permission to appeal to Mr Ticciati (ie to the dealer and his company) to include the renewed grounds as part of this appeal.

The parties

34. It is time to introduce the parties. The claimant and purchaser of the car is Mrs Mercedes Brewer, a practising US attorney and a practising English solicitor. In this court she is the respondent. She married her husband, Mr Peter Brewer, in 2002. He was a modern car dealer in the 1960s and 1970s and is now a business consultant. He has been a vintage Bentley car enthusiast for many years. He has owned a number of vintage cars, including a 1926 3-litre Bentley. He is particularly knowledgeable about Bentley Speed Sixes. Following her marriage, Mrs Brewer acquired from her husband an enthusiasm for vintage racing Bentleys in general and Speed Sixes in particular. When we say that she is the purchaser, we mean that she took the car on hire purchase from the finance house, having agreed a price with the dealer. There was of course no sale by the dealer to her.

35. The dealer and seller of the car is Mr Stanley Mann and/or his wholly-owned company, Stanley Mann Racing Limited ("SMRL" or the "company"). They are respectively the first and third defendants and in this court the first and third appellants. Mr Mann is perhaps the foremost dealer in England in vintage Bentleys, about which he is both an enthusiast and a connoisseur. He has been maintaining and restoring vintage Bentleys and dealing in them since 1975. He has his business premises in Radlett, Hertfordshire. He carries out his business through SMRL. If any liability attaches to the seller in respect of Mrs Brewer's claim, there is an issue as to whether it rests on Mr Mann personally, or on his company, or on both. The judge found that it rested on both. It was SMRL which sold the car to the finance house, having agreed a price with Mrs Brewer of £430,000, subsequently reduced to £425,000. Mrs Brewer paid a deposit of £40,000 directly to SMRL and subsequently received a rebate of £5,000, which was repaid to her by SMRL by cheque. It is convenient to finesse the issue concerning the party responsible for any collateral warranty given to Mrs Brewer by speaking generally of the "dealer", but we will also refer to Mr Mann and to his company, by which we will not necessarily intend to exclude the other.

36. The finance house is Fortis Lease UK Limited, the second defendant and here the second appellant ("Fortis"). It bought the car from SMRL, for £430,000, and let it on hire purchase to Mrs Brewer, on terms which required her to pay it £390,000 by instalments over five years, following a deposit of £40,000. It made no complaint about the £5,000 rebate. The financing charge was approximately 8% with an effective rate of some 8.5%.

37. Mrs Brewer used a broker to obtain and negotiate her finance from Fortis. He was a Mr Neil Hardiman of Stoke Park Finance Ltd. He was introduced to her by Mr Mann, but he was her agent.

The car and its engine

38. Since so much is in dispute about the facts of this case, even to the extent where it is said that the judgment(s) of the trial judge cannot be relied on as arrived at without an apparent loss of objectivity, as exemplified for instance by his findings that Mr Mann had been dishonest where no dishonesty had been alleged, there is a certain difficulty in presenting an account of the facts which is not immediately overwhelmed by disputes deriving from the trial process itself. For instance, it is submitted in the appeal that the judge fundamentally erred in his dealing with the credibility of the main witnesses, Mr and Mrs Brewer and Mr Mann, and misunderstood or misinterpreted the evidence of the experts; and that he created issues where there were none. We are conscious of course that there are grave difficulties for any appellant who wishes to challenge the essential findings of a trial judge, especially where they derive from his views as to the credibility of the witnesses he has heard. However, it can be said in this case that the judge did not found himself on the demeanour of the witnesses. He said of the three main protagonists (at judgment 4, para 128):

> "Their demeanour when giving evidence must also be considered but all three witnesses gave their evidence with confidence and, therefore, demeanour was not itself much of a guide to the credibility or reliability of any of them."

39. In these circumstances, in setting out the facts at this stage of our judgment, we seek to confine ourselves to those which are based on written records, or which are not in dispute, highlighting on the

way certain aspects of the case where the findings of the judge are said to be controversial.

40. There is no issue but that the car was referred to, by Mr Mann to Mrs Brewer, and in Fortis's contract with Mrs Brewer, as a "1930 Bentley Speed Six". It was so described in the dealer's advertisements. However, one of the central issues in the case was whether any contractual warranty was given to Mrs Brewer by the dealer in those terms, and whether the reference to such a car in Fortis's contract with Mrs Brewer rendered that contract a bailment "by description": and if so, whether the car complied with that description. Be that as it may, it is convenient to refer to the car as a "1930 Bentley Speed Six", without prejudice to those issues. The judge himself began his judgment (para 1), in a sentence which goes back to judgment 2 and survived into judgment 4, by saying that "The car was delivered from the Bentley Cricklewood works in 1930". However, by the end of his judgment, he had concluded that "there was no way that the car could be authenticated as a Speed Six or, indeed as a vintage Bentley" (judgment 4, para 189) and that "Part of the front section of the chassis and its attached chassis number is the only surviving part of the 1930 Speed Six car that had originally been delivered to Miss Unwin" (its first owner) "in February 1930" (para 247(5) of judgment 4).

41. In 1929 and 1930 W O Bentley's Cricklewood works produced his Speed Six model, regarded generally as the finest vintage racing model which Bentley ever produced, (hence the dealer's reference to "W O's Finest" in his literature) but they did so in tiny numbers. Only 69 were produced in 1929, and 108 in 1930, a total of 177. Today, a mere 40 or so Speed Sixes remain extant.

42. Inevitably, over the years such cars have undergone an enormous amount of modification and restoration, even rebuilding. It is not unusual to find that the superstructure, that is to say the bodywork, itself the masterwork of various coachbuilders, has been completely replaced, as had occurred in the case of the car with which we are concerned. It had started life in 1930 with a saloon body built on the Weymann principle by a coachbuilder known as Freestone & Webb. However, as sold to Mrs Brewer, the car had (as of 1980 or thereabouts) been fitted with a new, replica, bodywork in the style of the coachbuilder Van de Plas's Le Mans (1929-1930) body. Mrs Brewer knew that, and it is not a matter of complaint. Other parts of the car have inevitably had to be replaced with entirely modern equivalents: as an example we mention the car's braking system which, in order to meet modern MOT requirements

(if the car was to be raced, which it was restored to be capable of), is on modern hydraulic principles.

43. In such circumstances, what does it mean to say that a vintage Bentley is a "1930 Speed Six"? And did the car meet that description, if it was a warranted description? Mr Mann's case in this respect was essentially in two parts. First, he says that the definitive test of a car being a Bentley Speed Six is that it contains some part of the original chassis with its original chassis number stamped upon it. In all other respects the car may have been more or less entirely rebuilt. It is only in this respect that the car need be or can perhaps be said to be original or authentic. This is a definition which he says is accepted and acknowledged by the prestigious Bentley Drivers Club (BDC) and by the DVLA authorities and is recognised in the market generally and internationally. He says that he is supported in that approach by the evidence of both expert witnesses at trial. Secondly, if one goes beyond that, he says the question becomes philosophical, and a matter of opinion rather than fact, bound up with the question of how much restoration or rebuilding (reference is also made to "reconstruction") is permitted before it becomes impossible to say of a car that it is what it once was. However, it is not necessary, he says, for a 1930 Bentley Speed Six to have a 1930 Bentley Speed Six engine in it.

44. The car did contain at any rate some part (how much is disputed) of an original 1930 Speed Six chassis, namely chassis number SB 2770. The car with that chassis number was originally sold to a Miss Unwin in 1930. At that time it contained its original Speed Six engine, NH 2732. These details are known because there is a bible, Hay's *Bentley: The Vintage Years*, which describes Bentley production during the classic period of 1921-1931 ("*Hay*"). Its second edition was published in 1997. The entry for Miss Unwin's car is listed among the pages concerned with Speed Sixes, and headlines as follows:

> "SB2770 NH2732 PG6345 February 30
> Saloon (W) Freestone & Webb
> Miss Unwin"

There "SB2770" is the chassis number, "NH2732" is the engine number, "PG6345" is the registration number, "February 30" is the delivery date ie February 1930, "Saloon (W)" is the body type where "W" refers to Weymann, "Freestone & Webb" are the original coachbuilders, and "Miss Unwin" is the first owner. It follows that anyone who consults the relatively small number of Speed Six

entries in *Hay* will know immediately that the car's original engine had the number NH 2732. The entry contains two photographs of the car, described as "Chassis SB 2770": one as it was in 1938, when owned by a Mr Charles Mortimer, that photograph being reprinted from "an article about the four Speed Sixes he owned in 1937/39, published in *The Autocar*, 27 October 1944"; the other as it was in the late 1970s "outside Stanley Mann's workshop during rebuild in VdP four-seater form with Le Mans petrol tank and hydraulic brakes".

45. There is another bible, although perhaps not quite as eminent or as detailed as *Hay*, namely Sedgwick's *All the pre-war Bentleys – As New*, published by BDC, which is sub-titled "A survey of 5438 Bentleys built between 1919 and 1940" ("*Sedgwick*"). Mr Stanley Sedgewick had been president of the BDC. The line in *Sedgwick* which concerns chassis SB 2770 reads as follows:

> "SP SB2770 NH2732 PG6345 2/30 Saloon (W) Freestone & Webb Miss Unwin"

Where "SP" stands for "Speed Six" and the remaining details are as in *Hay*.

46. However, in 1936 the original engine NH 2732 became fitted into another Bentley, as appears from the Bonhams sale particulars of a car auctioned in California in August 2008. The judge regarded those particulars as being correct, on the basis of which it can be said that the engine was removed from Miss Unwin's car at some time between its delivery and 1936. Thus chassis no 2770 and engine number NH 2732 did not spend long together. After the 1944 *Autocar* entry, the car is lost sight of until the corroded chassis, with two axles and a steering column, were bought by Mr Mann in July 1976 for £2,100 from a Mr Tony Townshend, who was a restorer of vintage cars. Mr Townshend told Mr Mann that the chassis and the axles and steering column came from the same car. Mr Mann had wanted to go racing with a Speed Six, was looking for an original to rebuild, and was told by Mr Townshend that he had a Speed Six chassis. Thus, as the judge accepted, Mr Mann first acquired the chassis for himself, as an "original Speed Six which he could restore, rebuild or reconstruct to his own specification" (judgment 4, para 54). The July 1976 purchase is evidenced by a contemporary purchase note in Mr Mann's manuscript. It reads: "PG 6345 Chassis SB 2770 (Speed Six) with axles and steering column. In need of restoration." Mr Mann spent the next four years on that restoration. A 1978 invoice from his expert restorer, Mr Julian

Ghosh of Sutton Coalfield, referred to "repair work on Bentley Speed Six chassis SB2770 so as to be suitable for vintage racing".

47. As for the car's engine, it is common ground that it started life, for it too has an original engine number stamped upon it, in a 1927 Bentley Standard 6½ litre car. That was just before the development of the Speed Six and its engine. It is also common ground therefore that the engine could not be described as a "1930 Bentley Speed Six engine" or even a "Speed Six engine". However, Mr Mann's case is that the engine was not so referred to, but as a replacement engine "prepared to Speed Six specification". This is what Mr Mann wrote about the engine in his response dated 14 August 2008 to Mrs Brewer's letter before action:

> "For the avoidance of doubt, let me explain right away the difference between a standard Six engine and a Speed Six engine. Both have the same crank case design, both have the same block design, save for improved porting for better gas flow on the Speed model engine, Both have the same sump design, both have the same ignition. The Speed model has two carburettors instead of a single unit. The Speed model has uprated compression pistons, while a choice of camshaft was available. The horsepower output was increased by virtue of these modifications by around 15%. The car in question has all of the features, including the single port Speed model block, which the Speed model specification offered. It has the uprated horsepower. Only the crank case is from a standard car, but is identical to the Speed Six crank case. This part of the engine bears the engine number WK2671."

48. We believe that description to be correct and not faulted by any evidence or findings in the case, at any rate as concerned the engine's physical specification. Thus both the Standard and the Speed Six engines were of 6½ litre. The Standard engine crank case and the Speed Six engine crank case had always been identical. The superimposed engine block in the case of engine number WK 2671 had been modified to Speed Six specification, and thus had the physical appearance of a Speed Six engine. The critical feature of the Speed Six specification in this respect was a single large port inlet manifold, but all other physical features of a Speed Six specification were also present in the engine. The performance specification of a Speed Six engine was superior to that of a Standard engine, but there was no pleaded complaint about the car's or the engine's performance. On the contrary, the Brewers had nothing but compliments for the car's performance. In his judgments, however, the judge criticised the engine's performance

capabilities, essentially it would seem as having been unproven. Mr Ticciati (for Mr Mann) complains that in this respect the judge committed two serious errors: one was to hold an unpleaded complaint against the dealer; the other was in any event to reverse the burden of proof.

49. The Standard 6½ engine number WK 2671 had started life in a Bentley Standard model with chassis number FW 2614, which had been delivered from the Cricklewood works in January 1927 to its first owner Mr G T Applethwaite. This too is to be found documented in *Hay* (and *Sedgwick*). *Hay* comments: “Engine and f/axle fitted to other cars”. The next that is heard of this engine is that it was bought by Mr Mann from Mr Ulf Smith, a Swedish collector and restorer of vintage Bentleys, in March 1978, for £2,000. The invoice from Mr Smith to Mr Mann refers to “Bentley 6½ litre engine no. WK2671.” Mr Brewer got in touch with Mr Smith for the purposes of the trial. In an email dated 27 January 2010 Mr Smith described himself as “a Bentley fanatic, have owned 27 W.O. Bentleys and rebuilt 21, most of them complete rebuilds”. In another email dated 5 February 2010 Mr Smith recalled having two 6½ litre engines which he sold to Mr Mann. One of them came from a Mr Waldie Greyvensteyn, a South African. Mr Smith also said that one of them “had been upgraded to Sp. 6 spec. which, of course, was done to a large number of them, some by Bentley motors, some by H.M. Bentley and so forth”. The reference to Mr Greyvensteyn is relevant to engine number WK 2671, for Mr Mann recalled in his evidence that it was shipped to him directly from South Africa, and that Mr Smith, who had bought it from Mr Greyvensteyn, had never even seen it. When it arrived, said Mr Mann, it was already in its modified form to Speed Six specification; which is what Mr Smith had said in his email, but he must have got that from Mr Mann, for he had never seen it himself. The judge, however, was to find that this was untrue, and that the modification was carried out by Mr Mann himself, after its purchase. The judge regarded this as going to Mr Mann’s credibility. It was not otherwise a legally relevant issue in the case. The engine had been advertised by Mr Greyvensteyn in BDC’s December 1976 newsletter, for exchange, as a “Touring 6½-litre engine, no WR 2671” with missing parts and damage (where “WR” was simply a mistake for “WK”). The judge relied in part on the fact that both Mr Greyvensteyn’s advertisement and Mr Smith’s invoice had not referred to the engine as a “Speed Six” engine. But then it was not a Speed Six engine.

50. In early 1981 Mr Mann advertised the car as a Bentley Speed Six, “Presently being restored, ready soon. Buy now and save a fortune”. In anticipation of this advertisement Mr Mann had applied

to the DVLC (as the DVLA used to be called) to register the car. Such applications for the registration of vintage cars are carefully scrutinised. The DVLC's response dated 6 February 1981 has survived. The letter reads as follows:

> "BENTLEY SPEED 6 CHASSIS NUMBER SB 2770
>
> 1. I am in receipt of your letter and V55/5 application for registration and licensing the above vehicle, and enclosing a copy of "All the Pre-War Bentleys" by Stanley Sedgwick, for which latter item I am extremely grateful.
>
> 2. I note the body has been restored as a tourer, not as in the original form of the vehicle, a saloon. Please let me know of any particular reasons for this deviation.
>
> 3. I shall also require the receipt from the previous owner for the sale of the vehicle to yourself, please. Alternatively, if you will let me know the full name and address details of the preceding owner, I will contact that owner direct.
>
> 4. I would also like to know the antecedents of the engine unit which differs from the original – an invoice indicating its origin, or alternatively a statement from yourself in that regard.
>
> 5. In the meantime, arrangements will be put in hand for examination at your premises."

51. It appears from Mr Mann's manuscript markings on this letter that he informed the DVLC about his purchase of the chassis etc from Mr Townshend and of the restoration work by Mr Ghosh. There is also a note of an engine number TW 2710. This was the number of the other engine which Mr Mann had bought from Mr Smith, possibly in 1979, although there is a purchase note dated 9 March 1981, written up by Mr Mann and countersigned by Mr Smith, reading "Purchased from UJG Smith Engine for Speed Six PG 6345 Eng No TW2710. Now paid for…£2480". PG 6345 was of course the original registration number of chassis number SB 2770 (see *Hay* etc and the purchase note of the chassis from Mr Townshend. It might be that this registration number was also to be found on the chassis, which was Mr Mann's evidence). Engine number TW 2710 was regarded by the judge as a Speed Six engine, but that would not seem to be correct for it is said by *Hay* to come from chassis number TW 2705, which was a Standard 6½ litre car. The suggestion put to Mr Mann in cross-examination was that engine number TW 2710 was Mr Mann's first thoughts for installation in the car with the chassis number SB 2770. That is supported by the

fact that *Hay* refers to chassis number SB 2770 as “Now VdP 4 seater with engine TW 2710 ex ch. TW 2705”. Mr Mann said he had been indecisive about which engine to install, but ultimately installed the engine number WK 2671, the modified Standard engine.

52. Certainly, that engine, number WK 2671, was the engine finally installed, and remains in the car to this day. Moreover, Mr Mann’s application form to register the car, to which the DVLC letter just cited was a reply, referred to engine number WK 2671. That application form has a manuscript notation on it, put there by the DVLC: “Vehicle inspected...Reg. Mark confirmed by ‘All the Pre War Bentleys’ p52 written by S Sedgwick”. Moreover, on 7 April 1981 a registration document in the number PG 6345 was issued to Mr Mann recording its engine number as WK 2671. The judge found that –

> “to ensure that an apparently moribund previously issued registration number was not reissued to a different car, [the DVLC] had always adopted the policy of only reissuing such a number to a car which had within it the original chassis number irrespective of what other changes had occurred to the car” (at judgment 4, para 85).

As for the significance of a DVLC registration as supporting the car’s description as a 1930 Bentley Speed Six, see at para 139 below.

53. In the circumstances, the slight uncertainty over the at most temporary role of engine number TW 2710 would not seem to affect the essential history of the car with which we are concerned.

54. To revert: the 1981 advertisement led to a quick sale to a Mr Ian James, who kept the car with both pleasure and profit for some 26 years. Mr James remembered buying it in 1980, but he may have been mistaken about that. His October 2004 DVLA registration certificate said that he had acquired it on 22 March 1981. He paid in the region of £30/35,000 for it (as Mr Mann recalled), but arranged at the end of 2006 that Mr Mann would take the car on sale and return, for £325,000. In his letter dated 20 December 2006 (which of course goes back to before any current dispute) he speaks in his own words:

> "SPEED SIX 1930
> PG 6345…
>
> We've had more fun with this car than any of my 14 cars. We bought it in 1980 as a running chassis and you kindly arranged for a body to be built and fitted.
>
> The chassis was finished to a very high standard as you used it as a showroom attraction. I saw it in Motor Sport and came up to chat and managed to persuade you to finish it for me. The engine was also in very good condition with a repair to the L.H. mounting lug.
>
> You accepted monthly payments until it was ready in 1981…
>
> …I used it for continental rallies and once parked next to Paul Sydowsky's Speed Six en route to Venice only to learn that he had the original engine from the car [NH 2732]. We became very good chums…
>
> Up to 1986 I used it to go to Cape St Vincent (Portugal), Czech Republic, and all over Europe on rallies…
>
> Very sorry to part with her but lack of time means she no longer gets the use she deserves."

Mr James would appear to have known all about his car, as he should have done after 26 years, and he described it as a "Speed Six 1930".

Towards Mrs Brewer's hire purchase

55. Mr Mann placed an advertisement in the June 2007 *Classic & Sports Car* under the heading "Stanley Mann Racing" which had become the trading name of his company, Stanley Mann Racing Ltd (although the judge held critically against him the absence of the "Ltd"). The advertisement referred to a website www.stanleymann.com which made no mention of SMRL. Four cars were advertised with photographs: the first was our car, described as "1930 Bentley Speed Six, restored by Stanley Mann 1980, one owner since then (well he liked her)". Another car was described as "1924 Bentley 3 ltr rare original". A third was described as "1928 Bentley 4½ ltr Le Mans with all her original matching bits Perfect Restoration Good History". It may be observed that nothing was said in relation to the 1930 Speed Six about its being original or with original matching

bits or about a good history. We would assume that buyers of such cars would like to have (and would have to pay for) original features and a good history; but that every car is different. Some antiques and collectibles come with a good provenance, but most do not.

56. Mr Brewer saw the advertisement and phoned Mr Mann. He knew of him and of his reputation as a leading vintage Bentley expert, dealer and restorer and he had met him at various events. On the phone he was told that the asking price was £425,000. Mr Mann referred him to his website, which Mr Brewer visited. Under a photograph of the car, the website said:

> "Registration No. PG 6345
> Chassis No. SB 2770
> Engine No. WK 2871
> Price A pleasant surprise
> This Speed Six Bentley was restored by Stanley Mann in our old work shop in 1980.
>
> At the time I was rebuilding this Bentley with the intention of racing her but this friendly chap walked in and said, "No, I want one of these because I want to do rallies and continental touring and that Speed Six ticks all my boxes."
>
> So the next day we were finishing the car for him.
>
> I think he must have liked her because he is the only owner she had in those 26 years...
>
> Recommended if you want W.O.'s finest and not at a break-bank price."

57. The reference to the engine number in that website material in error misstated it as WK 2871 instead of the correct number WK 2671. The error went unnoticed for the while but in due course the correct number WK 2671 was entered into all the transactional documents.

58. Soon after that initial phone conversation, Mr Brewer viewed the car on a Sunday morning at Mr Mann's premises. He was given some sales literature, which contained the additional information:

> "Fully rebuilt some 15,000 miles ago by Stanley Mann (1979-81) both mechanically and bodily
> New correct fitted full V.D.P. Le Mans body to drawings of the 1929 Le Mans Cars. Four seater with racing wings, fold flat screens and Le Mans tank.
> Engine rebuilt at this time and has proved very reliable still not showing any signs of heating problems and constant 45 psi oil pressure all perfect.
> Rebuild included new radiator core, fully remetalled engine, new bearings all round (engine, rear axle, gearbox and axles).
> Trimmed in best materials and still in excellent condition
>
> All brakes functioning well and with a rear axle ratio of 3-1
> This Speed Six will happily run all day at 3100 which is its cruising gate of 100 mph."

59. The judge was heavily critical of these advertisements and sales material, repeatedly calling them "misleading" (but in large part because of the extended meanings which he ascribed to them). However, Mrs Brewer's case, as confirmed on her behalf at this appeal by her counsel, Mr Raoul Downey, was *not* based on this advertising or sales material. There was moreover no case of misrepresentation at trial (although one had been pleaded). It was common ground that the car had been sold as a 1930 Bentley Speed Six, and a critical issue at trial was what that entailed, and whether the car conformed. The other main element of Mrs Brewer's case was what had been said at a meeting of 20 May 2007, for which she relied on the collateral warranty that the car contained an authentic Speed Six engine. Nevertheless, Mr Downey submitted that the judge was entitled "to take account" of the misleading nature of this material. We will refer to the state of the pleadings and of the submissions at trial below, as well as to the judge's findings.

60. It was Mr Brewer's evidence that on that Sunday visit he had asked Mr Mann whether the car's engine was a Speed Six engine, and that Mr Mann said it was. Mr Mann denied this. At any rate Mr Brewer said that the car would be for his wife and she would have to come and see it. Although that was Mr Brewer's evidence, ultimately issue was joined, here and below, on what *Mrs* Brewer was told by Mr Mann (see below).

61. That led to a further meeting, on 20 May 2007, which Mrs Brewer as well as Mr Brewer attended, and which is the crucial meeting about which the judge had to make up his mind.

62. For the present, we will express the dispute in terms of the formal letter before action which Mrs Brewer's solicitors (the same firm in which she was working as a practising solicitor) wrote to Mr Mann/SMRL on 8 August 2008, and of Mr Mann's reply.

63. The letter before action, which does not refer to Mr Brewer's visit on the Sunday, states:

> "Mrs Brewer and her husband Peter then came down to see you, and obtained from you a more detailed explanation of what had been done to the Bentley namely that it had been rebuilt some 15,000 miles ago by Stanley Mann both mechanically and bodily including an engine rebuild. Mrs Brewer was told by Mr Mann that the engine was not the original engine. *Mrs Brewer then specifically asked Mr Mann if the car was a Speed Six* since it did not have the original engine and Mr Mann said it was and that Bentley often changed engines if a customer came back with a problem. Mr Peter Brewer also posed the same question to Mr Mann on a number of occasions and was reassured that the engine was a Speed Six" (emphasis added).

64. Mr Mann's personal reply dated 14 August 2008 contains the following:

> "...you recount part of the conversation I held with your Clients. I most certainly did say that the engine had been changed during the car's long life and I am pleased that there is no dispute about what I said. It is true that Mrs Brewer then asked if an engine change meant that it was no longer a Speed Six, to which I correctly answered that it most certainly was a Speed Six, but that it had undergone changes in the last 75 years, as was often the case, but the engine was prepared to Speed Six specification. Both factory and agents as well as private owners frequently undertook changes, not all of which were recorded, while some were inexplicable."

65. It will be observed that on being told that the engine was not the car's original, Mrs Brewer, as recounted in her letter before action, does not ask whether the *engine* is a Speed Six, but whether the *car* remains a Speed Six. That in itself suggests that the replacement engine might not be a Speed Six; but be that as it may, it is a

question about the car and not the engine. We will recount below how the status of the car's engine, which it was known was not the car's original engine, became an issue between the parties. (The letter then went on to say that *Mr* Brewer was reassured a number of times that the engine was a Speed Six: however, in their witness statements and at trial the Brewers were to say that Mr Brewer did not participate in the critical part of the conversation of 20 May, and no reliance has been placed on appeal on any other conversation than that at the meeting of 20 May.)

66. One other aspect of the meeting needs to be mentioned at this stage, for it also comes from Mrs Brewer's letter before action, and it concerns the value of the car. Her solicitors' letter put the question of value in these terms:

> "Our client asked Mr Mann how many Speed Six Bentleys were made and she was told about 100 and something (in fact the true figure is 177) and she further enquired as to how many were left and Mr Mann said about 40. She told Mr Mann this was important to her because if there were only 40 in the world the car would hold its value (subject, of course, to market fluctuations). At this point Mr Mann said "I tell all my customers that if they ever want to sell their car I will buy it back for what they paid me."…
>
> After further consideration and discussions, Mrs Brewer decided to proceed with the transaction and detailed terms were then discussed. E-mails were exchanged with Stoke Park Finance Limited who was approached on your recommendation to finance the transaction and who in fact required a valuation which Mr Mann said he would arrange. This consisted of a letter from Bentley Drivers Club of 24th May 2007 (attachment 5) addressed to Mr Mann stating that they had examined the Bentley and confirmed its value of £550,000. This valuation itself was most influential in our client's decision to proceed with the transaction as she regarded Bentley Drivers Club as being of the utmost good standing and importance."

67. The outcome of the meeting was, as that letter stated, a decision by Mrs Brewer to proceed towards a financed hire purchase transaction, with the assistance of Mr Hardiman of Stoke Park Finance Limited. For some reason which has never been explained the price agreed was £430,000 with a rebate of £5,000 (it will be recalled that Mr Mann had quoted Mr Brewer £425,000). Mr Hardiman's first quote, addressed to Mr Brewer ("Dear Peter") was of a "Day one lend" of £375,000.

68. On 24 May 2007 the BDC valuation referred to in Mrs Brewer's letter before action was written, addressed to Mr Mann (personally), following an inspection of the car. The inspection and valuation was performed by Mr Brian Fenn, who signed it as a director and "official valuer" to BDC. Mr Fenn was an expert witness at trial for Mr Mann and we will refer to the experts' evidence below. For the present, we observe that Mr Fenn's BDC valuation has not been challenged in these proceedings. His valuation is headed "1930, Bentley Speed Six, Chassis # SB.2770. Engine # WK.2671. Registration Mark, PG. 6345." The engine number was correctly stated there. The valuation was provided to Mrs Brewer. The judge mentions that valuation at judgment 4, para 192, but without referring to the fact that the engine number was expressly stated in it. Mr Fenn's valuation was not referred to in judgment 1 at all (see at para 108), and was referred to in judgments 2 and 3 but without identifying it as Mr Fenn's and without mentioning its reference to the car's engine number (see at para 168).

69. This is what the judge said about Mr Fenn's expertise (at judgment 4):

> 30. Mr Fenn is now aged seventy seven. His expertise relates to Bentley vintage cars and has been acquired as a result of a life-long passion for the Bentley Marque. He passed his driving test in about 1950, aged seventeen, in a 3-litre Bentley and he has owned vintage Bentleys ever since. He has been a director of the Bentley Drivers Club ("BDC") for over thirty years and has been the BDC's Vintage Valuer since 1966 and, in that capacity, provides informal valuation advice to BDC members about vintage Bentleys. He has also been chairman of BDC's Eligibility Committee since 1979. His knowledge of Bentley vintage cars has been acquired from this enthusiastic involvement with them for sixty years. Save for a five-year apprenticeship as an electrical and mechanical engineer, he has no professional qualification and there was no evidence that he has actively involved himself in maintaining, repairing, rebuilding and reconstructing Bentleys[3].
>
> 31. Mr Fenn, therefore, has and demonstrated an expert and possibly unrivalled knowledge of the history of Bentley vintage cars and of how they have been raced, looked after and

[3] The judge had originally written in his earlier judgment 2 that Mr Fenn "had not actively involved himself maintaining" etc, but when it was pointed out to him that there had been no evidence to support that observation, he amended his judgment to read in the form cited above. However, Mr Sibson had assumed that Mr Fenn did his own repairs.

> described by the BDC and as to how they have been repaired, maintained, rebuilt and reconstructed over time."

70. On 25 May 2007, Mr Hardiman sent another email to Mr Brewer in which he discussed a price of £430,000, a deposit of £40,000 and a day one lend of £390,000. On 29 May 2007 he wrote to Fortis with a formal proposal on behalf of Mrs Brewer.

71. Fortis required certain conditions precedent to be met, including a valuation in the form of a "desk-top appraisal" (ie without physical inspection) and an insurance cover note showing fully comprehensive cover on the Bentley.

72. The desk-top appraisal was carried out by SHM Smith Hodgkinson (the trading name of SHM (UK) Limited). Their report dated 31 May 2007 is headed "Re: 1930 Bentley Speed Six" with references to registration, chassis and engine numbers. It refers to Mr Mann's website's information. It is a mixture of rather general and specific observations regarding the market (as distinct from the car). As for the general: "Research indicates that vehicles with original bodies demand a premium and that detailed records for each vehicle should be available", which may possibly amount to a suggestion that the provenance of each vehicle can be researched (eg through such records as *Hay* and *Sedgwick*). As for the specific:

> "A recent example of a Speed Six, chassis no SB2773 was sold in the USA at auction in August 2006 for $1,815,000. In July 2004 the sum of $5,109,665 was paid for a Speed Six at Christies in London. This vehicle had an exceptional racing provenance having been placed second at Le Mans in 1930 and a Double Twelve Winner in the same year…A price range between $400,000 and $5m USD has been attributed to this particular model depending on condition and provenance."

The report also said:

> "Typically, high quality classic cars are seen as an investment hence depreciation is not attributable. This assumes that the vessel is kept in appropriate storage and has all relevant documentation."

73. This report was not seen by either Mrs Brewer or Mr Mann. A specific value was not provided because the report advised that a full inspection would have to be carried out before that could be done. However, Fortis was also provided with Mr Fenn's valuation, which had followed an inspection.

74. Judgment 4 is the only judgment to refer to the desk-top appraisal report (at paras 193/194). The judge comments (at para 194):

> "The appraisal, although not based on an inspection, was clearly based on the assumption that the car had a 1930 Speed Six engine, a continuous history and other significant Speed Six parts..."

75. We do not think that the judge was entitled to comment as he did. The report does not expressly refer to any such assumption. The report refers to the availability of records, which if consulted would show what was known of the relevant chassis and engine numbers quoted. In those circumstances it is hard to see why anything is assumed. It states that vehicles with original bodies demand a premium, but the firm would not have known from the website whether the car had an original body or not. It states that price may vary enormously (by a factor of more than twelve) depending on condition and provenance. The firm knew nothing about either, other than that the car was restored by Mr Mann in 1980 and had been with its last owner for 26 years. It knew nothing about whether or not it had "a continuous history and other significant Speed Six parts". The huge disparity of possible valuations, and the specific valuations cited of cars sold in 2004 and 2006, would naturally suggest that our car was not in the same league as the two examples, and came towards the bottom end of the range of value.

76. As for the insurance of the car, that was arranged as from 4 June 2007, on comprehensive terms. It was in Mrs Brewer's name and she was the sole named driver. The estimated value notified to the insurer was £500,000. Mr Brewer could not drive on that insurance. However, it emerged that Mr Brewer had done nearly all the driving of the car over the 15 months or so that it was in Mrs Brewer's possession. Mr Brewer claimed that he was entitled to drive it on his own car insurance.

The contractual documents

77. On 30 May 2007 Mr Hardiman emailed "invoicing instructions for the Bentley Speed Six". These were instructions coming from his client, Mrs Brewer, as to how she desired the dealer's invoice to Fortis and thus her contract with Fortis to be worded. He attached a draft invoice accordingly, addressed to Fortis, the relevant details of which stated –

> "To sale of One 1930 Bentley Speed Six Car
> Chassis Number SB2770
> Date of first Registration 31.12.1930
> Registration Number PG 6345"

together with a reference to Mrs Brewer as the person to whom the car was supplied. It may be noted that there is no reference to an engine number in these instructions.

78. On the same day Mr Mann drew up an invoice on his standard stationery, headed "Stanley Mann Racing" with a reference at the foot to "Stanley Mann Racing Limited". It described the car simply as "Bentley Motor Car" not "1930 Bentley Speed Six", but it separately stated its "Year" as "1930". It gave chassis number, engine number (WK 2671, the correct number) and registration number. It was signed by Mr Mann "For and on behalf of Stanley Mann Racing Ltd". This was the first specific evidence in the case of SMRL being involved. However, it is clear that a copy of that invoice was emailed to Mr Hardiman and by Mr Hardiman to Mr Brewer on that day, from which time Mrs Brewer must be assumed to have known of Mr Mann's company. As for the invoice's "Bentley Speed Six", the judge said that it was "in blatant disregard of Mr Hardiman's request" (at judgment 4, para 160(6)(d), not found in the earlier judgments). But Mr Mann has never disputed that he presented the car to the Brewers as a 1930 Speed Six.

79. On 5 June 2007 Mr Brewer arranged and signed a CHAPS transfer of the deposit of £40,000 to SMRL at its account. As will be seen, this was paid as agent on behalf of Fortis, for Fortis was buying the car from SMRL for £430,000.

80. On 6 June 2007 Fortis issued its hire purchase agreement to Mrs Brewer. In form it invited her to offer to enter into the contract, and that offer was then open for Fortis's acceptance in order to complete the contract. That is typical of such transactions and enables the finance house to line up its purchase and letting arrangements. Mrs Brewer signed the Fortis agreement on 6 June 2007, witnessed by Mr Hardiman, and Fortis accepted her offer on 7 June 2007, on which day it paid SMRL the balance of £390,000.

81. In accordance with the instructions given on Mrs Brewer's behalf via Mr Hardiman to Fortis, Fortis's hire purchase agreement described "The Goods" as "One 1930 Bentley Speed Six Car". It also stated the car's registration and chassis numbers. The engine number was neither requested nor stated. The price was £430,000 and the deposit of £40,000 was credited as paid.

82. On the same day, 7 June 2007, Mrs Brewer countersigned SMRL's invoice to Fortis "For and on behalf of the Purchaser". Also that day, SMRL returned the £5,000 agreed rebate to Mrs Brewer by cheque, and a new SMRL invoice was drawn up relating to its return.

83. Thus on 7 June 2007 Fortis both purchased the car from SMRL for £430,000, pursuant to SMRL's invoice dated 30 May 2007, and let it on hire purchase to Mrs Brewer pursuant to its hire purchase contract with her. She had meanwhile, through her husband, paid a deposit of £40,000 to SMRL on behalf of Fortis in anticipation of those contractual arrangements. In as much as Mr Mann either on his own behalf or on behalf of SMRL had made any representations relied on as collateral warranties, ie as warranties collateral to Mrs Brewer's hire purchase contract with Fortis, such warranties, as we would tend to think, could not have taken effect before either 5 June 2007 at the earliest, when Mr Brewer paid the £40,000 deposit, or 7 June 2007, when the anticipated contracts between SMRL and Fortis, and between Fortis and Mrs Brewer, were completed. We make those points because, as will be seen below, the judge developed a much more complicated contractual analysis, whose development continued between judgments 3 and 4. These dates and analysis are relevant to the question of whether the collateral warranties were given by Mr Mann personally or by SMRL.

84. On 8 June 2007 SMRL issued a purchase invoice to Mr James for the purchase of the car, which Mr James countersigned, for £325,000. Its details were otherwise the same as the sale invoice

issued to Fortis, that is to say it referred to a "Bentley Motor Car", of year 1930, and gave its registration, chassis and engine numbers. The judge held it against Mr Mann that he (or SMRL) did not have title to the car when it was sold to Fortis. That is not a point taken by Fortis, or indeed anyone. No one said that SMRL was in breach of a condition to give good title at the point when title was intended to pass. It is likely to be a bad point. The car was left with Mr Mann or his company, we do not really know which, on sale and return. That would in all probability have authorised Mr Mann or SMRL to sell the car when they had a purchaser. We do not know what conversations Mr Mann and Mr James may have had in the run-up to 7 June 2007. It is clear law that a seller does not need title simply to agree to sell something, only at the time that title is intended to pass under any such agreement. In any event, there is no real evidence of a sale by Mr James to Mr Mann and by Mr Mann to SMRL, only of a sale by Mr James to SMRL.

85. On 8 June 2007, Mr Brewer emailed Mr Hardiman to thank him for his assistance. He wrote: "We picked up the Bentley yesterday…The car is wonderful…"

SMRL's terms of business

86. On the reverse of SMRL's invoice, seen by both Mrs Brewer and Fortis in advance of the transactions, were inter alia the following "Terms and Conditions":

> "These Terms and Conditions shall apply to any Contract of Sale between Stanley Mann Racing Ltd (the "Seller") and the Purchaser, including any related part-exchange. The subject-matter of the contract is referred to as "goods" below.
>
> 1. Any motor vehicle sold by the Seller is sold as a collector's item and not as a means of transport. Purchasers are specifically warned that any vehicle sold as such may well have had parts replaced and paint renewed or be made up of parts from other vehicles, the condition of which may be difficult to establish. Accordingly, the Seller cannot and does not guarantee the serviceability of all or any of the parts of which the motor vehicle being the subject of the contract is made up.
>
> 2. The Purchaser is specifically warned that when any motor vehicle is described as "original" this does not necessarily

mean that the motor vehicle has the original parts or finish with which it was manufactured since the term is often used to denote vehicles which have naturally evolved over the years as distinct from those which have been entirely rebuilt or renewed and the Seller can accept no liability arising out of the use of the word "original" in relation to any motor vehicle...

8. The liability of the Seller under this contract shall be limited to the invoice value of the goods.

These terms were referred to on the front of the invoice, viz "The terms and conditions overleaf form part of this contract."

87. These terms were pleaded in Mr Mann's defence, but ultimately not pressed at trial against Mrs Brewer because (a) they referred to "Contract of Sale", whereas Mr Mann personally entered into no contract of sale; and (b) any contract of sale made on these terms was made only by SMRL with Fortis. However, as will appear below, at the beginning of the trial, the judge encouraged Mrs Brewer to amend to bring into the case, for the first time, SMRL in addition to Mr Mann. This was opposed by both Mr Mann and by Fortis. Previously, Mrs Brewer had clearly elected *not* to sue SMRL. Previously, Fortis had elected not to third party SMRL. Both Fortis and Mr Mann submitted to the judge, from their respective and opposing viewpoints, that if there was any question of SMRL being joined, it should only be joined on terms that either Fortis should be entitled to bring a third party claim against SMRL (Fortis's submission) or that it should not be so entitled (Mr Mann's submission). The judge, in a manner which is heavily criticised on this appeal, overlooked the problematic consequences for Fortis and Mr Mann of joining SMRL, and ordered joinder of SMRL without deciding, or even adverting to, the third party issue. Later, but only in his judgment, he gave permission to Fortis to bring a third party claim against SMRL. The issues which would then arise between Fortis and SMRL have never been capable of being litigated. Plainly, as it seems to us, SMRL's terms would be potentially relevant to any such issue. They also seem to us to have been potentially relevant to issues of collateral warranty and the meaning of what was said by Mr Mann to the Brewers, but, as they were not relied on for that purpose, we ignore them. They have been cited because the potential future issues between Fortis and Mr Mann are in play in this appeal, in the sense that some proleptic consideration may have to be given to them.

Fortis's terms of business

88. We will refer to these as may be necessary to deal with specific issues discussed below. For the present it is sufficient to say that Mrs Brewer undertook to make all the scheduled payments and that Fortis was entitled, if she failed to make any such payment, to terminate the contract on the basis that such non-payment was a repudiation of it, and to receive all payments already accrued due and compensation for its loss of profit thereafter. The contract also provided that Fortis had bought the car at Mrs Brewer's request and that she therefore agreed that no implied condition or warranty of any kind was given to her by Fortis.

During the hiring

89. In July 2007 the Brewers returned to Mr Mann. They were going to spend some time abroad and they were taking the opportunity for the car to be serviced. Mr Brewer drove the car to Mr Mann's showrooms (with Mrs Brewer following in another car), just as he had driven the car away from the showrooms on 7 June. On the occasion of the July 2007 visit Mr Mann presented them with a copy of *Hay*, which he had promised to give them. On return home the Brewers consulted *Hay* and found the references to chassis number SB 2770. They noted that the car's original engine number had been NH 2732. They noted that the car was now stated to be "VdP 4 seater with engine TW2710 ex ch TW2705" (as recorded above). Mrs Brewer knew that her car's engine number was not TW2710. Her witness statement said: "I assumed that my engine was but another change at Bentley Motor Works and I still believed my engine was a genuine Speed Six engine…we found it impossible to find the details [of engine number WK 2671] in the Hay Book without the chassis number, but at that point I had no reason to believe I had anything but a genuine Speed Six engine." Mr Brewer's witness statement is in identical terms. However, they did not raise any question with Mr Mann at that time or at any time until August 2008 in the circumstances set out below.

90. After the Brewers' return from abroad, Mr Brewer went to collect the car from the showrooms. The Brewers also stored the car with Mr Mann on their travel abroad over Christmas 2007. While abroad, in the United States, the Brewers negotiated to buy another Speed Six, in an attempt to persuade its owner to sell. There was another visit to Mr Mann's showrooms in May 2008, for the purpose of renewing the car's MOT. The car had been driven about 2500 miles

in just under the year since its letting to Mrs Brewer. As usual, it was Mr Brewer who drove the car to and from the showrooms.

91. As 2008 wore on the Brewers' financial position appears to have become less stable. In February 2008, there was an enquiry about the cost of settling the outstanding balance due to Fortis. Mr Brewer spoke to Mr Hardiman, who obtained the figure of £385,843.23. It may be that the Brewers were contemplating selling the car. However, nothing was done at that time.

92. In spring 2008, on the other hand, Mrs Brewer cancelled the direct debit which she had been asked to set up for Fortis and paid by cheque instead. That was, we think, the April instalment.

93. By July 2008 Mrs Brewer was two months in arrears with her payments and Fortis wrote to her on 28 July 2008 a letter headed "Final Notice". The arrears were £7,802. The Brewers acknowledge that this was "Due to cash flow problems we had in the June and July". Fortis's notice stated:

> "…we hold you to be in Default under the terms of your agreement and I will have no option but to commence the recovery process unless you take action now to clear the arrears within seven days from the date of this letter.
>
> Failure to make payment within seven days will result in the full outstanding balance of £448,347.00 becoming due, we will then repossess the vehicle, offset any sales proceeds received against this amount and you will be liable for the shortfall.
>
> I look forward to hearing from you by return."

A further £3,901 would fall due on 6 August 2008 and monthly thereafter. Moreover, the repayment schedule provided for a once yearly payment of £28,901 in January 2009 (and each January).

94. In any event, according to the Brewers' witness statements, Mrs Brewer had already decided (it might fairly be inferred that the Brewers decided) that the car would be sold by putting it into a September auction with Bonhams. As Mr Brewer said in his statement: "I had known of Bonhams for years…and therefore

supported my wife's decision". The judge said (judgment 4, para 207) that "she was concerned to reduce the overall level of her financial commitments following the collapse of the world's financial markets in late 2007". Mrs Brewer said in her witness statement that she had asked her husband to contact Mr Mann about repurchasing the car and that Mr Mann had merely said he would put it in the showroom; but Mr Brewer's witness statement said nothing about this, and Mr Mann's contemporary correspondence (see below at para 112) indicates that he was not contacted.

95. Mr Brewer knew a Mr William Gilbertson well. He was a family friend and a dealer in vintage cars. He had a client who was very interested in a vintage Bentley and said that he would like to show the car to him. The car was therefore taken to Mr Gilbertson on 31 July, and his client saw it and "was very impressed". Mrs Brewer quoted to Mr Gilbertson a price of £650,000 net to her. The client said he would return on 18 August for another look. We take this material from the Brewers' witness statements.

96. Mr Gilbertson's son, Sholto, was also contacted. He worked in the vintage car department at Bonhams. He came by arrangement to the Brewers' home on 2 August to take photographs for the auction catalogue. He had already discussed the car with his boss at Bonhams and knew that the engine had come originally from a Standard 6½ litre and not a Speed Six. As a result of that and his visit he wrote a letter to Mr Brewer in the form of a draft valuation, dated 4 August 2008. The letter was as follows:

> "Valuation of 1930 Bentley Speed Six – Chassis Number SB: 2770
>
> Dear Peter
>
> The following letter confirms the official Bonhams Auctioneers valuation of the 1930 Bentley Speed Six. Upon inspection of the vehicle (Chassis Number: SB 2770) we have found that the car in question has been subject to an engine change, the replacement engine (Engine Number: WK 2871)[4] is according to the Bentley records from a 1927 Bentley 6½ Litre (Chassis Number: TW 2705)[5] purported to be up-rated to Speed Six specification. The Bentley Speed Six was not introduced until

[4] In fact WK 2671

[5] This is not correct. *Hay* said that engine number TW 2710 was from chassis number TW 2705. This would indicate that TW 2710 also came from a Standard 6½ litre car: see at para 51 above. Engine number WK 2671 in fact came from chassis number FW 2614, as reference to *Hay* demonstrates.

1928 so we can conclusively confirm that the car does not contain a Speed Six engine. The car originally carried Saloon coachwork by Freestone & Webb, which has been converted to a 'Le Mans Replica' Open Tourer.

From this information we would place the auction valuation on this car as a 1930 Bentley Speed Six with a 1927 Bentley 6½ Litre engine, fitted with 'Le Mans Replica' coachwork:

Auction Value: £300,000 – £350,000"

97. On 5 August 2008 Sholto Gilbertson sent his formal valuation to Mrs Brewer, as above but amended so that WK 2671 was referred to as the car's correct engine number. It may be noted that the valuation refers to the car's engine as "purported to be up-rated to Speed Six specification". It is not clear where Sholto Gilbertson took this phrase from. He did not give evidence at the trial. It was common ground at the trial that his valuation figure was incorrect.

98. The judge accepted that Sholto Gilbertson's valuation of 5 August revealed to Mrs Brewer for the first time that the car did not have a 1930 Speed Six engine and led her to taking legal advice (judgment 4, para 207). The original intimation about the engine and the valuation would have come as early as his visit to the Brewer home on 2 August, or even before (see para 96 above).

99. On 4 August there was a telephone conversation between Mr Brewer and Fortis, as a result of which Fortis emailed Mr Brewer to confirm Fortis's acceptance of his payment proposals: to make a TT payment of the arrears of £7,802 on 5 August, to remit the August instalment due 6 August no later than 14 August, and to reinstate a direct debit "to continue each month thereafter until the vehicle is either sold or the agreement runs to the expiry date". In addition, Mr Brewer advised Fortis, as recorded in its email, that Bonhams had confirmed their interest for inclusion of the car in their September auction; that a Swiss gentleman had shown interest and was returning with his wife for another look on 18 August; and that a settlement figure from Fortis may be required in two weeks – "which will assume all payments are fully up to date at that point".

100. On 5 August Mrs Brewer did not pay the arrears of £7,802 as promised by her husband.

101. On 6 August Mrs Brewer had a telephone conversation with Fortis after which she wrote a letter, enclosing inter alia Mr Fenn's and Bonhams' valuations. In that letter she complained that she had been misled about the car: she put it on the basis that "I believed that my Bentley was a 1930 Speed Six, meaning that both the chassis and the engine were Speed Six". She said that she fully intended to pursue Stanley Mann, and requested a moratorium in the meantime ("I indicated we would wish a moratorium on the agreement whilst this can be done"), and for the car to be securely stored in the meantime.

102. However, Fortis was clearly unwilling to give Mrs Brewer more time or to be involved in a legal dispute, but preferred to exercise the self-help remedies available to it under its agreement. On the next day, 7 August, it therefore sent Mrs Brewer a "Notice of Termination", noting arrears of £11,703, and giving formal notice of termination and of repossession of the car. That placed Mrs Brewer in a difficult position.

103. On 8 August Mrs Brewer's solicitors sent off her letters before action, both to "Stanley Mann Racing Limited" and to "Stanley Mann, Stanley Mann Racing Limited", from which we have quoted above (see at para 63). The letters also stated:

> "the Bentley has been subject to an engine change, and the replacement engine is according to Bentley records from a 1927 Bentley 6½ litre Chassis Number FW 2614[6] purported to be updated to Speed Six specification...there has been misrepresentation by you and it is considered that since you would have known of the true position concerning the engine that accordingly the misrepresentation was fraudulent...Mrs Brewer has a claim against you for breach of a collateral contract and requires..."

and the demands there set out were for payment of the deposit, the instalments paid to Fortis, any further liability to Fortis, and other expenses such as insurance, interest and legal costs. Despite the reference to the Bonhams' valuation and to fraud, there was even then no claim for loss on any higher value that the car would have had if it had been worth more than the £425,000 price on the basis of which Mrs Brewer had entered into her contract with Fortis.

[6] This is now correct

It will be recalled that Mr Mann replied on 14 August 2008 to say that he had told Mrs Brewer that the engine was not the car's original but had been prepared to speed Six specification (see para 64 above). He had a few days earlier told Mrs Brewer on the telephone, on 11 August 2008, that Mrs Brewer knew what engine was in the car (see at para 111 below).

104. No letter before action was sent at that time to Fortis. However, on 9 August 2008 Mrs Brewer sent her own letter to Fortis in which she now said that it was her "clear impression" that Fortis had agreed, in her telephone conversation on 5 August, a moratorium and joint storage of the car for their mutual benefit. She said that a similar agreement had been reached with Mr Brewer during a further conversation with Fortis on 6 August. She asked to know whether or not Fortis was proceeding with its termination. On 11 August her solicitors wrote to Fortis suggesting that Fortis as well as Mrs Brewer had been the victim of misrepresentation "possibly fraudulent", and therefore requesting co-operation and "that you grant a moratorium of say six weeks to see how matters progress". That letter was sent for the attention of Ms Isobel McEwan of Fortis, with whom Mrs Brewer had had her telephone conversation with Fortis on 6 August and to whom she had sent her letter to Fortis of the same day. On 11 August Fortis wrote by fax to Mrs Brewer confirming that their agreement had been formally terminated on 7 August and asking for co-operation in the matter of repossession, which had been arranged for 13 August. On 12 August Mrs Brewer replied to that letter, referring to a telephone conversation between its writer (Mr Mark Samson) and her the previous day. The letter did not dispute Fortis's termination or insist that a moratorium had been agreed, but, in answer to the request for co-operation in repossession, said that she would not be at home on 13 August, that the car was not at her home, but had been "housed for our mutual benefit in a safe, secure storage". She said further communications would come from her solicitors.

105. On 14 August 2008 Mrs Brewer's solicitors wrote a letter before action to Fortis which began with "formal notice rescinding the above Agreement" for breach of the condition implied by section 9(1) of the Supply of Goods (Implied Terms) Act 1973. The letter referred to the previous letter before action to the dealer, a copy of which had been sent to Fortis previously, and made the point "In summary" that the car did not contain a 1930 Speed Six engine but an earlier engine from a Standard 6½ litre Bentley so that the car could not properly be described as a 1930 Bentley Speed Six. The letter said:

> "Our client would never have entered into the Agreement had she known the true situation as she never wanted a hybrid car worth very substantially less than the genuine article especially since one of the side benefits of owning a genuine Speed Six is appreciation in value, subject to market fluctuations."

106. This letter before action made no reference to an agreed moratorium. A further letter of the same date from Mrs Brewer's solicitors said that the car would be returned by Mr Brewer. It reminded Fortis of the need to obtain the best price for the car, and to bear in mind that Mr Mann had said he was always willing to buy back the car at the original price. It was not suggested that he had already been asked and had refused.

107. It seems clear on the face of this correspondence that there was never any agreement of a moratorium suspending Mrs Brewer's obligations under the hire purchase agreement.

108. When Mrs Brewer came to sue Fortis as well as Mr Mann, there was no plea that any moratorium had been agreed. On the contrary, it was pleaded that "On or about 6 August 2008 the Claimant orally rejected the Bentley in a conversation with Mrs Isobel McEwan of [Fortis]. By a letter from the Claimant's solicitors dated 14 August 2008 the Claimant formally rescinded the Hire Purchase Agreement…" There is no sign of any allegation of an oral rejection of the car on 6 August in the correspondence discussed above. Alternatively, it was pleaded that the agreement was void for mutual mistake. All that was said about Fortis's termination of 7 August was that Fortis "purported to terminate the Hire Purchase Agreement on 7th August and repossessed the Bentley thereafter".

109. At trial Fortis relied on its termination in the face of Mrs Brewer's non-payment as a complete answer to Mrs Brewer's submission that it was she who was entitled to rescind or terminate the agreement; and also for its counterclaim, the quantum of which was agreed, subject to liability. Mrs Brewer for her part did not claim damages for rescission or repudiation, or a right to reject the car, but "reliance" damages for breach of a warranty of compliance with description. The judge nevertheless appears to have considered that she *was* entitled to reject the car, even if her claim was not dependent on that right (judgment 4, para 216); and that for its part Fortis was *not* entitled to terminate the agreement, for a variety of reasons, first amongst which was that Mrs Brewer had

"no outstanding liability to pay the outstanding hire charges because Fortis did not terminate for non-payment but instead terminated in an attempt to pre-empt Mrs Brewer's intimated claim to rescind the agreement and to reject the car" (judgment 4, para 223). He also rejected the defendants' plea that in any event Mrs Brewer had to give credit for the use of the car during the 15 months in her possession.

Attempts to settle the dispute

110. The documents discussed in this section of our judgment were all disclosed and admitted at trial, even if any of them had originally been privileged. We refer to them because to some extent they express the attitude of the parties to the facts and allegations of their dispute at a time well before trial; and partly to demonstrate a regrettable truth. Namely that, for the comparatively small sums in issue in this case, the parties should have been more than capable of settling their dispute without taking to trial, at huge expense, issues which were largely either the inevitably troublesome question of what was said at a meeting which had occurred three years before trial, or else raised some difficult questions of law and of the exercise of judgment.

111. On 11 August 2008 Mr Mann telephoned Mrs Brewer. That was more or less immediately after receiving Mrs Brewer's letters before action. She was unavailable and returned his call. She took contemporaneous notes of the telephone conversation and addressed it in detail in her witness statement. Her notes read as follows:

> "he says he wants to settle it amicably, but of course he has in mind £425,000. I told him I would be looking for my costs and Fortis' settlement figure. He tried to say I knew the engine in the car. I said I knew the engine number not what it was. He tried to explain to me technically how the top of the engine has been modified and the bottom not. I said I relied on what he told me and the appraisal (which the bank relied on as well). I told him that the car should never have been marketed as a Speed Six, and explained how Bonhams says it should be defined. I said that I did not know I had a 1927 6½ litre engine. Stanley tried to say why it's a speed six, I said it is not. I told him that Fortis is owed roughly £380,000 and I have £94,000+ in the deal. He said "well you have had the benefit of the car for a year." I said so what, I do not have what I thought I bought. He complained

> that I financed the car and thereby the costs are higher. I said how I paid for it was my business and that did not change that I do not have what I thought I was buying. He said he would have to see the car. I told him he saw it recently and it is in as good if not better condition than when we got it from him…he said he would call in a couple of days…He ended by saying he would rather not go to court (I don't blame him because whatever reputation he has left would be seriously damaged by this case). He seemed very worried."

A conversation like this suggests the value of mediation.

112. On 14 August 2008 Mr Mann replied to the letter before action which had been sent to him or his company. We have briefly referred to it already above (at para 47). In his reply he also said:

> "Your Clients have purchased and have had the use of a most attractive and very reliable car of utmost quality for the past fifteen months. If they have decided to sell for profit or because they need to, they could have approached me. If they were unhappy or misunderstood the description of the car they could have put it to me directly…
>
> In accordance with the concept of seeking to resolve these matters without recourse to Court proceedings however, we both have to demonstrate that we remain willing to talk. I am prepared [to] talk to you and or your Clients direct and may be willing to reach an accommodation with them.
>
> May I suggest that upon receipt of this letter, you, or your Clients call me within the next ten days?"

113. On 21 August 2008 Fortis wrote to SMRL as follows:

> "It is understood that there has been an indication by you that you may be willing to make a proposal which sees the vehicle being sold back to you. We are writing to ascertain whether you would be prepared to buy the vehicle back at the price paid to you for it, namely £430,000. If you are, we would propose to Mrs Brewer's solicitors that £390,000 be paid to our clients and £40,000 to Mrs Brewer. Our clients will then accept that sum in full and final settlement of their claim against Mrs Brewer for the outstanding balance under the Agreement but Mrs Brewer must

> also accept the £40,000 in full and final settlement of her claim against our clients and against yourselves."

114. On 26 August 2008 Mr Mann responded essentially in those terms, with each party bearing its own costs (and pointing out that the deposit was £35,000). On the same day Mrs Brewer's solicitors also responded to the Fortis suggestion, but insisting that any settlement "must be on terms whereby she is reimbursed for all of her losses" (ie capitulation not compromise). Thus:

> "Subject to the precise figure our client might be willing to accept a payment from [Fortis] in full satisfaction of any claims against them but only on the strict understanding that this would leave her open to pursue Stanley Mann for any shortfall."

This letter also re-emphasised the importance to Mrs Brewer of Mr Fenn's valuation: "The valuation was crucial to our client's decision to proceed and she placed heavy reliance on this."

115. If Mrs Brewer believed in the Bonhams valuation, she was taking a huge risk by declining any compromise. The settlement she was offered would have recovered for her the deposit of £35,000, eliminated any potential liability to Fortis, and secured her freedom from all further expenses of dealing with the car and all further legal costs. It would also have wiped out her liability for further payments already accrued due to Fortis in the sum of £11,703. It would have left her only out of pocket to the tune of some £60,000 in respect of instalments already paid, plus some legal costs, in return for which she would have enjoyed some 14 months happy motoring in the car, and a future freedom from any further liability for a car which she no longer wanted (or could afford) and which in her view could not be sold into the market without a large loss. Moreover, at about this time the world's financial markets were about to descend into chaos, and Fortis's claim against her amounted to nearly £450,000.

116. It was only on 3 September 2008 that the car was recovered from Mrs Brewer.

117. On 4 September 2008 Fortis's solicitors communicated to SMRL Mrs Brewer's solicitors' response to them. Their letter pointed out

that since Mrs Brewer "is intent on being reimbursed for all of her losses", no deal was possible at that time, since what was needed was a "global compromise". However, Fortis remained interested in such a compromise.

118. Mrs Brewer commenced her proceedings against Mr Mann and Fortis (not against SMRL) on 28 November 2008.

119. On 27 July 2009 the car was shortly to come up for auction on the instructions of Fortis, when SMRL bought it from Fortis for £425,000, pursuant to its offer dated 3 July. Since no global compromise with Mrs Brewer had been possible, this repurchase was without prejudice to the parties' rights, save that there was a side arrangement that any commission to be paid to the auctioneers for the car's late withdrawal (in the event £25,000 was payable) was Fortis's responsibility. The sale was as seen, no warranties given or implied, but the car was described as a "1930 Bentley Speed Six car – PG3645 – SB2770 – WK 2671". Mrs Brewer was consulted about the sale, and her solicitors' wrote that she "agrees the figure of £425,000" but only as going to the question of Fortis's mitigation. In the circumstances, Fortis's counterclaim fell by £425,000, but included the costs of the aborted auction.

The pleaded issues

120. Mrs Brewer brought proceedings against Mr Mann personally (but not SMRL) and Fortis. In her original particulars of claim, there was no mention of or reliance on Mr Brewer's visit to Mr Mann's premises on a Sunday before 20 May 2007, ie the dispute about what was said by Mr Mann was limited to the meeting on that day. Her case was also limited to the plea that on that day Mr Mann had represented and warranted that "although the engine inside the Bentley was not the original engine, it was still a Speed Six engine". It was alleged that Mr Mann had made that representation "when he knew, or ought to have known" that the engine inside the Bentley was not a Speed Six engine but an earlier 1927 6½ litre engine. Reference was also made to Mr Fenn's valuation as a matter of reliance, and to the Bonhams valuation, but there was no claim in respect of value. The reference to Mr Fenn's valuation appears to have been part of a plea of mistake (based on "mutual understanding") undermining her contract with Fortis. There was a claim in misrepresentation (which ultimately was not pursued). The essential claim was for damages for breach of Mr Mann's "warranty"

(in the singular, and relating only to the engine and not the car) and of the Fortis contract (for breach of the implied condition of correspondence with description, again limited to a complaint about the engine, viz that the car did not correspond with its description as a 1930 Bentley Speed Six with a Speed Six engine because the engine was not a Speed Six engine). As stated above, there was a claim to have rejected the car in a conversation with Fortis on 6 August 2008. The primary claim against Fortis was a declaration that the hire purchase agreement was void or not binding (that was not pursued at trial), with damages claimed in the alternative.

121. It would seem that the primary basis of that pleading was the Bonhams valuation. It was not at that time alleged that the car was not a 1930 Speed Six aside from its engine.

122. On 22 July 2009 the particulars of claim were radically amended, but the claim remained one against Mr Mann personally and not against SMRL. It was now alleged that Mr Mann had told Mr Brewer on a date before 20 May 2007, in answer to Mr Brewer's question if the engine was a Speed Six engine, that it was. Mrs Brewer also pleaded that on 20 May 2007 Mr Mann had represented and warranted the following, that:

> "(a) he had restored the Bentley;
>
> (b) the Bentley was not a matching number car and that it did not have its original engine but it was still a Speed Six and that the Bentley factory often changed engines if a customer came back with a problem;
>
> (c) the engine was a Speed Six engine;
>
> (d) the chassis had been shortened to comply with the specifications of another Bentley known as Old Bentley No 2 and the rear axle had been modified to the Old Bentley No 2 specifications of 3 to 1; and
>
> (e) the Le Mans body was a replica of Old Bentley No 2."

123. Mr Mann's warranty, pleaded now implicitly as well as expressly, was that the Bentley "and specifically the engine inside it, was a genuine 1930 Speed Six", or that "the Bentley was a *genuine* 1930 Bentley Speed Six with an *authentic* Speed Six engine". Allegations of breach now extended to the overall complaint that the car "was not

a 1930 Speed Six that had been rebuilt and restored by the First Defendant but was actually a reconstruction by him of a Le Mans type Speed Six replica using what remained of the chassis of a Speed Six Saloon which he had acquired without the engine". It appears that these reformulations reflected the first report of Mrs Brewer's expert, Mr Sibson (see below).

124. It may be observed, however, that if, contrary to Mrs Brewer's case, Mr Mann had not said that the car's engine was a Speed Six engine but had said that it was an engine prepared to Speed Six specification, there was no plea that the engine had *not* been prepared to Speed Six specification, either physically or in terms of performance.

The expert evidence

125. Mr Dennis Sibson gave expert testimony on behalf of Mrs Brewer, and Mr Fenn gave expert testimony on behalf of Mr Mann and (when it was joined at trial) SMRL.

126. We have already introduced Mr Fenn (see para 69 above). The judge described Mr Sibson as follows (at judgment 4, paras 24/25):

> "He is now aged sixty-four and is qualified to act as an expert in the engineering of Bentley cars by a five-year Motor Vehicle Technician apprenticeship, which he started when he was fourteen, and by over forty years' working experience with vintage cars...He has had a great wealth of practical qualifying experience to act as an expert."

127. Mr Sibson's evidence was submitted to criticism by Mr Ticciati (on behalf of Mr Mann) at the trial, as lacking in independence and impartiality. This was partly on the ground that he worked for about two days a week for Mr William Gilbertson, with whom the Brewers were friendly, and whose son, Sholto, had given the Bonhams' valuation which had controversially precipitated the litigation. The judge rejected these and other criticisms as undermining his credibility. It could have been said on the other side that Mr Mann and Mr Fenn had known each other during their professional lives, and Mr Fenn had been involved in providing his May 2007 valuation.

(Mr Fenn said that he had known Mr Mann for 40 years, but had never done a transaction with him, and that “He is regarded in the Club as a quintessentially honest trader. Otherwise he would not have been around that long.”) Neither witness had given expert testimony before. We suspect nevertheless that the judge was on the whole well served by two considerable experts in a field which, being quite small, was likely to involve witnesses who were not wholly divorced from some greater or lesser acquaintanceship with the parties.

128. On the other hand the two experts, although they complemented one another, perhaps had different strengths. Mr Sibson appears to have been the more hands-on engineer, although his specific experience with Speed Six Bentleys was perhaps limited, while Mr Fenn had what the judge described as “possibly unrivalled” knowledge of Bentley vintage cars and their histories. These different strengths may have played to different aspects of the issues about which they were asked to give evidence. The major issue was how our car could be properly or at any rate adequately described, and in particular whether the expression “1930 Bentley Speed Six” involved a promise about its engine. On that issue, it might be that Mr Fenn could be particularly authoritative. Other matters debated in the experts’ evidence were as to the physical state of the car’s chassis and engine. As for the chassis, if it were the definitive component which gave to the car its status as a Speed Six, did it matter whether the chassis was not in its original state? And as for the engine, granted that it was common ground that it could not be described as a Speed Six engine, was it nevertheless to Speed Six specification, as Mr Mann had described it? (It must be emphasised, however, that the latter issue was not pleaded, even if it grew out of Mr Sibson’s evidence.[7]).

129. On these issues the two experts gave the following evidence.

130. On the question of the car’s description, Mr Sibson’s first report (dated 8 April 2009) stated its conclusions as follows:

> “4.1 Having read the information given to me prior to my inspection, I fully expected to see an original Speed Six Bentley in excellent condition, the literature describes a rebuild and a restoration but not a vehicle that does not have its original body

[7] A question was however put to the experts in the immediate run-up to trial, as to whether the engine was “built to Speed Six specification”: see at para 135 below. That appears to have been directed to its physical properties, rather than its performance.

nor its original engine. The specification of the present engine has not been confirmed either. The Chassis having been shortened to replicate another vehicle leads me to believe it is not as described and the sole purpose of such conversion is to inflate the value.

4.2 Throughout the motor trade, the word **restoration** describes a vehicle which has been overhauled to as far as possible, its exact specifications and condition as when new. To me, this vehicle obviously does not meet this criteria.

A **rebuild** is a description of a vehicle that has been overhauled but not necessarily restored back to its original condition.

I believe the only way to describe this vehicle is that it has been the subject of a **conversion** from a Saloon to a Le Mans type replica.

Therefore I conclude that the vehicle represents a mere reconstruction meaning a car which stems from a single original component or a collection of components from a variety of cars and where there is little left of the original except the chassis and registration number."

131. We confess that, although of course we were not present at trial to hear and see Mr Sibson give evidence, this was not on the face of it impressive evidence. Mrs Brewer knew that the bodywork was new (in 1980 or thereabouts) and as such a replica of a Le Mans style open tourer; and she also knew that the chassis had been shortened to enable the car to be presented in this style. She also knew that it did not have its original engine. She had been told these matters. Moreover, the car had not been given this style to "inflate" its value, but because Mr Mann had wanted to race the car, when he had started to restore it for himself, and because it appealed to Mr James. And there was no question of the value being "inflated", for there was no issue at trial about value. As for the engine, granted that it was not an original Speed Six engine, but had it been prepared to Speed Six specification? Mr Sibson does not say it had not, only that its specification "has not been confirmed". He did not start up or road test the car. Some at least of his language appears to have originated in the instructions given to him by Mrs Brewer's solicitors in their "Terms of Engagement", viz

"You should attempt to conclude whether or not the work performed in the 1979/80 restoration (a) represents a Vehicle which evolved over a period of time as a continuous entity and can still be properly regarded as a legitimate manifestation of

PB6345 or (b) represents a mere reconstruction meaning a car which stems from a single original component or a collection of components from a variety of cars and where there is little left of the original except the Chassis and registration number."[8]

132. However, Mr Sibson did not address the question repeatedly asked in his instructions, which was "whether the car can be adequately described as a '1930 Bentley Speed Six'", otherwise than through his conclusion that "the only way to describe this vehicle" is that it has been the subject of a conversion from saloon to Le Mans type replica; which is to concentrate almost entirely on the (uncontroversial matter of the) bodywork.

133. Mr Fenn's first report, dated 17 August 2009, was not written to terms of engagement, but addressed Mrs Brewer's particulars of claim as well as Mr Sibson's report. The essence of it is in the following passages:

> "6.14...I am quite satisfied that this car is a rebuilt speed Six Bentley, and not a "reconstruction". It is difficult, in any event, to be exact about these terms, but the fact is that this car has an original chassis with original parts on it, and all the driving gear, engine etc were originally Bentley parts. It has a Bentley Speed Six spec engine...
>
> 6.15 In the vintage and classic car world generally, the chassis is regarded as the identity of the car in any event. This is partly historical because Bentleys and other major manufacturers of quality cars, generally sold their cars in chassis form, together with the bulkhead engine, gear box and running gear, and it was up to the owner then to decide what body, interior fittings, lights etc, he would install on that chassis. Chassis might undergo a number of different body styles during their life. Provided, however, the chassis remains intact, it is accepted that the car's identity remains as it was when it was manufactured.

Paragraph 6.15 was agreed by Mr Sibson in a joint report dated 23 February 2010.

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[8] This appears to have been taken from the judgment of Otton J in *Hubbard v. Middlebridge Scimitar Limited* (unreported, 27 July 1990), albeit it appears there in relation to the identity of a specific famous car "Old Number One" (see at paras 301/302 below).

134. Mr Sibson wrote a second report, dated 2 October 2009, at the request of Mrs Brewer. His conclusions remained essentially the same. There is further comment to the effect that the engine's dynamic specification remained unproved, and even that without taking the engine apart it could not be certain whether the engine met Speed Six specification. As for the chassis, he went somewhat beyond his first report, which had said that he was "a little concerned that the rear section is thinner metal. It could possibly be from a different chassis altogether", to state, albeit without a further inspection, that it was of "an entirely different thickness altogether" and "therefore could possibly be from a different chassis altogether". However, he concentrated, as before, on the shortening of the chassis to say "The chassis is not original as it is definitely not the same length as when it left the factory so cannot be described as original". Of course, the word "original" had not been used in describing the car.

135. Subsequently, and shortly before trial, Mr Ticciati posed seven questions, which Mr Sibson answered on 23 February 2010, of which the first was whether the engine was built to Speed Six specification. He said this could not be verified in certain respects. The second question related to the rear end of the chassis, and he now said that it did not appear to be part of the original chassis as indicated by thinner metal and welds. In answer to question 6(a), he said that the gearbox was of C type, which was appropriate to a Speed Six engine specification. Question 7 asked whether the description of the car in Mr Mann's sales literature was a reasonable description, to which he gave the answer "No".

136. Mr Fenn did not write a second report (Mr Sibson's second report was, we believe, permitted simply to allow him to address some evidence about registration by the DVLC/A, even if he did range much more widely than that). Mr Fenn answered the seven questions on 16 February 2010. To the first, he said that the engine was built to the latest (ie 1930) Speed Six specification. As for the chassis, he said that the rear section was to specification and had always been part of chassis SB 2770. He agreed about the gearbox. He said that the sales literature gave a reasonable description of the car.

137. Mr Fenn had also been asked a series of questions about his BDC valuation, by a letter from Mrs Brewer's solicitors dated 13 March 2009. His reply dated 18 March 2009 began:

> "you state that engine # WK.2671 has been re-built with unidentified spares to look like a Speed Six engine. This is not the case; using parts made and supplied by Bentley Motors Ltd. it has been brought up to the specification of engine # NH.2732 originally fitted to chassis SB.2770. Modifications of this nature have been carried out on 6½ litre Bentley engines for the past 79 years!"

In answer to the questions, he confirmed, as his valuation had stated, that he had inspected the car before providing the valuation; and also that his valuation would have been no different if the vehicle had been described as "a 1930 Bentley with a 1927 6½ litre Bentley standard engine purported to be modified to Speed Six modifications".

138. It was in any event clear that he had understood at the time of his valuation that engine number WK 2671 had originally derived from a Standard car in 1927. Thus his letter dated 30 September 2008 to Mr Mann was also before the court, which said:

> "1930 Bentley. Speed Six
> Chassis No. SB.2770. Engine No. WK.2671
> Registration Mark. PG.6345
>
> I have examined this car in the recent past and can confirm that although the engine fitted was manufactured in 1927, it has been modified to the full Speed Six specification. This would include a single port cylinder block, up-rated connecting rods, twin type U. HVG5 carburettors and testing. This work was often undertaken by Bentley Motors Ltd. after they had introduced the Speed Six model in February, 1929. Others have done so since.
>
> From all engineering aspects this vehicle can be regarded as a Speed Six Bentley and I value it as such. To replace it would cost at least £550,000."

Mr Fenn referred to this letter in his report to the court and confirmed it.

139. At trial, however, Mr Sibson departed from his report as to how the car should be described. He then adopted the description put forward in Sholto Gilbertson's Bonhams' valuation, a description which he said was "excellent". Since that letter, before going on to refer to the engine, referred to the car as a "1930 Bentley Speed

Six", Mr Sibson was asked: "So it is fair to call it a Bentley Speed Six?" To which he replied an unqualified "Yes" (Day 4.1423/4). A little later Mr Sibson accepted that the DVLC's acceptance of the car as deserving of its original registration number was that that "is a very important indication of authenticity", although they also made a lot of mistakes (Day 4.1428). The cross-examination then continued as follows (Day 4.1429):

> "Q. If they are in doubt about matters they go to Mr [Fenn] did they not?
> A. I think with Bentley, yes.
> Q. Then, you are not dealing with an office worker, you are dealing with possibly...
> A. Yes, I'm not suggesting...what actually happens. I'm not questioning what you say.
> Q. So far as someone purchasing the car is concerned, that event in this vehicle's life, it has been given by the DVLA that imprimatur, is a very important fact, is it not?
> A. It is. It is indeed, and one of my greatest concerns is the fact that you can build a special, go to the DVLA, take Mr Fenn's statement...chassis number on that vehicle, and you can...
> Q. No-one is suggesting that is what happened in this case, are they?
> A. No.
> Q. Taking the evidence in its totality, you accept that it is perfectly acceptable to call this car a 1930 Bentley Speed Six, because it has got the...
> A. That's true, it is a 1930 Speed Six, with reservations over the engine.
> Q. Precisely. Its engine is to Speed Six specification, is it not?
> A. It might be; I have seen no proof of that."

There was no re-examination.

140. Mr Fenn's evidence at trial was in accordance with his written material. For instance, he gave these answers in cross-examination:

> "Q. Do you consider that if you have a chassis of a 1930 Speed six, and you add a Standard 6.5 engine, you have a Speed Six?
> A. Yes, the chassis dictates what the car is?" (Day 4.1437)
>
> "Q. Surely an engine is the key thing with the Speed Six. That is the big feature, is it not?

A. No. It has to be the chassis, because if you have a Speed Six engine on an ordinary 6.5 chassis, that becomes a 6.5; it doesn't become a Speed Six…" (Day 4.1438)

"Q…All I am trying to put to you is you do not simply define a car by a chassis?
A. The Vintage Drivers' Club leadership does, so do all the…as I have said in Europe." (Day 4.1440)

"Q. One of the problems you have is that if you have an engine that has been put together by Bentley and comes out of Bentley, you have an assurance of quality and that it is up to spec. But once you have a situation like this, which is a mixture of all sorts of engines, it starts off as a Standard engine, you add in other features to make it up to Speed Six spec, you do not have that assurance, do you?
A. It isn't a mixture of all sorts of engines, with all due respect. As we have said before and in this court and it is in the bundles, it is a 1927 engine brought up to the latest 6.5 litre specification, Speed Six, using Mr Bentley's components." (Day 5.1444)

"Q…you knew at the time [of Mr Fenn's valuation] that what the engine was that it had started out as a Standard 6.5 litre engine which had been modified, you were aware of that?
A. Yes." (Day 4.1447)

"Q. If you were describing this car, the accurate description would have been to point out that you have got a 1930 Speed Six chassis and a modified 1927 6.5 litre engine up to Speed Six specification?
A. Or use the words which I put in my second valuation[9], which describes exactly what it is…you have to tell the person, the prospective buyer, what the engine had happen to it. It's a 1927 engine brought up to Speed Six specification." (Day 4.1450/1)

141. Mr Fenn was not cross-examined at great length on the technical details of the car, apart from the chassis and the ability of the car's engine to meet the 1930 performance specification for a Speed Six. As for the chassis, he did not accept that the rear end was not original. The chassis had to be cut, to shorten it[10], and he had measured another 1930 Speed Six and found our car's chassis measurements in tolerance with the other's. In any event, the critical thing was that the chassis part with the chassis number on it

[9] His second letter dated 30 September 2007, which said the engine fitted was manufactured in 1927 and modified to the full Speed Six specification.
[10] As the Brewers had been told.

was there.[11] As for performance specification, unlike Mr Sibson, he had been able to carry out a compression test, which had entirely satisfied him that the engine met its performance criteria, demonstrating 140 psi (8 to 1). He said that on Mr Sibson's demand for 225 psi, "it would blow the head off it. Really, you couldn't possibly have an engine that was 16 to 1" (Day 4.1439).

142. Mr Ticciati relies on those passages in this appeal, especially Mr Sibson's evidence, for his submission that, by the end of the trial, it was common ground that the car was, and could fairly be described as, a 1930 Bentley Speed Six, even though there might be a reservation about its engine. (It was common ground that the engine was not a Speed Six engine. That had not been an issue at trial.) As to whether the engine was to Speed Six specification, it was not asserted that it had been proved otherwise. Mr Ticciati submits that on these two critical questions debated in the evidence (even if the second issue was unpleaded), namely whether the car was a 1930 Bentley Speed Six, and whether its engine was to Speed Six specification, the judge not only got the answers wrong, but did so in a way which calls in question his objectivity.

Are the complaints about the judge's treatment of the expert evidence justified?

143. For these purposes, on the basis of Mr Ticciati's submissions, reference may be made to the following aspects of the judge's judgments.

144. The judge dealt with the expert evidence and the question of whether the car could properly be described as a 1930 Speed Six in separate parts of his judgments. It appears that he ultimately considered that the expert evidence was not relevant at all to that question, although that is not entirely clear.

145. In judgment 1 the judge said this (at para 19):

[11] As Mr Ticciati pointed out to us, it was common ground that the chassis number appeared in three places: on the chassis, on the steering box and on the rear axle, and the car had all three chassis number markings.

> "Given their respective lengthy working experiences of Speed Six cars and engines, both experts were highly qualified to give evidence and both assisted the court considerably in relation to their evidence of technical opinion. I accepted Mr Sibson's evidence in its entirety. It was considered, authoritative and based on his detailed inspection of the car's engine. I also accepted Mr Fenn's historical and valuation evidence in its entirety. I also accepted his view as to how factually the car should be described."

146. That paragraph survived into judgment 4 (at para 33), with this significant change: the last two sentences had become the following single sentence[12]:

> "I also accepted Mr Fenn's historical evidence, his evidence as to the value of the car and his summary of the physical changes that had been made to the 1927 engine."

147. In judgment 1, the judge did not thereafter refer much to the evidence of the experts. On the contrary, contrary to the view he was to develop later, he stated (at judgment 1, para 49) that –

> "By the end of the trial, much but not all of the history of the car's engine, chassis, bodywork and DVLA number had been ascertained and was not the subject of any significant on-going disagreement between the parties."

By judgment 2 that had become (para 49):

> "By the end of the trial, as much but not all of the history of the car's engine, bodywork, and DVLA number had been ascertained as it is now possible to ascertain but there are still significant gaps in knowledge about the car's continuous history up to 1981."

That survived to judgment 4 (para 72).

[12] The change was made in two stages, in judgments 2 and 3.

148. The judge did however refer to a disagreement between Mr Sibson and Mr Fenn about the rear section of the chassis. He felt himself able to make a firm decision that the rear section of the chassis plainly came from “a Standard Bentley or similar chassis” (judgment 1, para 56; now judgment 4, para 80) and not from the original chassis. As for the engine’s specification, the judge did not, as far as we can find, deal with this in any detail (having satisfied himself that Mr Mann had said nothing about an engine to Speed Six specification), but included the following matters as reasons why in his opinion the car could not be described as a 1930 Speed Six (at judgment 1, para 102), all of which put the burden of proof onto Mr Mann:

> “(2) The changes that had been made to the 1927 engine were not documented, the contents of the Speed Six specification the engine was said to conform to had not been identified and no formal check or certification of the engine’s compliance with the performance specification relied on had ever been undertaken.
>
> (3) There was no continuous history available for…the adaptation of the 1927 engine…
>
> (4)There was no evidence in the form of a test certificate or test results that the car in fact complied with the Speed Six specification and the details of the applicable specification were never established or proved.”

149. An altered version of that has survived into judgment 4 (para 202), but judgment 4 also refers *passim* to the failure of proof of the engine’s specification. The judge also there said that “the evidence showed that the performance parts of the BDC 1930 Speed Six specification were not capable of being satisfied by the engine that was currently in the car” (para 202(2)). Mr Ticciati submits that simply does not square with Mr Sibson’s “It might be [to Speed Six specification]. I have seen no proof of that”, let alone Mr Fenn’s evidence.

150. As for the description of the car as a 1930 Speed Six, the judge concluded that, despite Mr Fenn’s evidence, which at any rate in judgment 1 the judge said that he accepted (see above), Mr Fenn’s BDC view of things did not carry weight as a matter of contract between a seller and a buyer or hirer of a car (judgment 1, paras 101/106). The reasons why the car could not be described as a 1930 Speed Six were because of the survival of only the front section of the chassis and the deficiencies relating to the engine

(para 102, cited above). By judgment 4, however, the judge had deleted any reference to accepting Mr Fenn's evidence "as to how factually the car should be described", and had written the following two paragraphs which were almost entirely new to judgment 4, in the face of Mr Ticciati's grounds of appeal. The judge now *rejected* Mr Fenn's evidence.

151. It is necessary in the circumstances to set out these paragraphs in full:

> "37*. Expert evidence – description of the car.* Overall, Mr Sibson contended that the car could not be described as a Speed Six and the engine could not be described as either a Speed Six engine or as one which was to Speed Six specification. Mr Fenn contended that the car could be described as a Speed Six car but only if that description included reference to the additional fact that it had a 1927 Standard 6½-litre engine which had been modified to Speed Six specification. I accepted Mr Sibson's opinion and rejected Mr Fenn's opinion on these matters. Mr Sibson had carefully examined the engine and had concluded that it could not satisfy the performance requirements of the BDC specification, which it would have had to be able to do if it was to comply with that specification. Mr Fenn was unable satisfactorily to answer Mr Sibson's well-made explanations for his opinion[13].
>
> 38. The experts had been instructed to express their opinion as to how the car and the engine should be described, Mr Fenn's evidence was somewhat rigidly based on how the BDC would describe the car. This evidence was clearly relevant to the question of how the car might be described within the BDC but was only of marginal relevance on the question of whether the contractual descriptions of the car satisfied the applicable statutory and contractual provisions relating to the need for the car to comply with those descriptions. This wider question must be based on the intentions of the contracting parties, all relevant facts and a correct application of those facts to the relevant statutory and contractual provisions. Mr Sibson did not confine himself to the BDC method of describing Bentleys in general and Speed Sixes in particular. Indeed, Mr Fenn came close to accepting the gist of Mr Sibson's reasoning when admitting in cross-examination that the car's description should have included a reference to its reconstructed 1927 Standard engine. However, these matters of description, being the

[13] The judge here, by his footnote 5, cross-referred to paragraphs 97-99 of his judgment 4, where the judge went into further detail about the performance component of a Speed Six specification.

ultimate issues that I had to decide and being mixed questions of law and fact, were not matters on which the two experts could give admissible expert opinion evidence about notwithstanding the procedural orders that had been made for the adducing of expert evidence.[14]"

152. Mr Ticciati submits: (i) that the judge had overlooked that, whatever Mr Sibson had "contended", he had agreed in cross-examination that the car could be described as a Speed Six car, even though it did not have a Speed Six engine; (ii) that the judge had overlooked this or chosen to overlook this, even though Mr Ticciati's grounds of appeal had brought this evidence to his attention; (iii) that Mr Fenn and Mr Mann had given similar evidence and that even Sholto Gilbertson in his Bonhams' valuation had described the car as a 1930 Speed Six, while decrying its engine; (iv) that Mr Fenn had said that the car could be described as a Speed Six irrespective of its engine, on the basis of its chassis number, and was only agreeing that the engine could not be described as a Speed Six engine when it was not, as was common ground; (v) that on the evidence in the case the judge could not properly have "rejected" Mr Fenn's opinion, even if that was expressed as the judge had done, viz that the car could only be described as a Speed Six if the engine was described as a modified 1927 Standard engine; (vi) that there was no pleaded issue that the engine did not comply either physically or in performance terms with Speed Six specification; (vii) that Mr Sibson's evidence regarding compliance with the Speed Six specification could in any event only be properly categorised as "not proven" and that in this connection the judge had reversed the burden of proof which was on Mrs Brewer; (viii) that if Mr Mann had said at the meeting on 20 May 2007 that the engine had been prepared to Speed Six specification, a matter which had yet to be decided, then there could in any event be no complaint about what he had said about either car or engine; (ix) that the judge was quite wrong to say that these matters of description "were not matters on which the two experts could give admissible expert opinion", since, even if the judge was not ultimately bound by such opinion, he was required to take it into account and give it appropriate weight, which in the circumstances and given the expertise concerned was very considerable; (x) that in any event the judge was wrong to think that these matters were simply matters of law and fact, since the proper or adequate descriptions of items of connoisseurship were essentially matters of opinion rather than fact, which had to be judged by the standard of honesty, not accuracy (see *Cartwright,*

[14] The judge here by his footnote 6 cross-referred to paragraphs 175-182 of his judgment 4 where he entered into further discussion of Mr Fenn's and Mr Mann's opinions that the car could properly be described as a 1930 Speed Six on the basis of its chassis number.

Misrepresentation, Mistake and Non-Disclosure, 2nd ed, 2007, at para 3.15, *Harlingdon and Leinster Enterprises v. Christopher Hull Fine Art Limited* [1991] 1 QB 564 (CA), *Drake v. Thos Agnew & Sons Limited* [2002] EWHC 294 (Buckley J)[15]; (xi) that the judge had misled himself by failing to ask first, what was said, and next, whether it was an adequate description in all the circumstances, and instead had asked himself what would be a perfect description, and in this connection had wrongly treated the contract as one of the utmost good faith, rather than one in which "buyer beware" is the order of the day; and (xii) that the judge's approach was very damaging to the other critical question which he had to decide, namely what had been said at the meeting of 20 May 2007, since that question could only be fairly judged without the wrong assumptions about what needed to be said.

153. These submissions were interrelated with a further passage in the judgment where the judge summarised his reasons for saying that the car could not be described as a "1930 Bentley Speed Six Car". The judge's final version of this was at judgment 4, paragraphs 202 (cf his earlier version at para 148 above) and 203:

> "202. The reasons why the car could no longer be described in this way may be summarised as follows:
>
> (1) The 1930 Speed Six engine had been substituted with a reconstructed 1927 standard 6½-litre engine.
> (2) The changes that had been made to the 1927 engine were not documented, the contents of the Speed Six specification the engine was said to satisfy had not been identified and no formal check or certification of the engine's specification relied on had ever been undertaken. Moreover, the evidence showed that the performance parts of the BDC 1930 Speed Six specification were not capable of being satisfied by the engine that was currently in the car.
> (3) The chassis was, to a very significant extent, different from and constructed to a different specification from, the original chassis.
> (4) There was no continuous history available for the car or its chassis, its Standard engine and 1930 chassis or the racing characteristics and Speed Six performance capabilities that it was said to have been provided with.
>
> 203. The only accurate description that the car could have been provided with would have been one that explained in detail all four of these changed aspects of the car. Alternatively, these

[15] See below at paras 277-282

aspects would have had to have been listed in a schedule and the description would have had to have referred to the contents of that schedule."

154. As to this passage, Mr Ticciati submits that: (i) reason (1), and aspects of the other reasons, ignore all the submissions made with respect to the earlier passage at paragraphs 37/38 of the same judgment; (ii) reason (2) relates entirely to the engine and therefore, on the same basis, does not detract from the description of the car as a 1930 Speed Six; (iii) in any event, the requirement imposed in reason (2) of the need for historic documentation is beside the point: documentary provenance may be better or worse, or complete or completely absent, and that may of course affect the value of a car for better or worse, but unless such documentation has been promised, its absence cannot undermine the description of the car; (iv) the judge has again ignored the absence of any pleading in relation to compliance with Speed Six specification and in any event again reversed the burden of proof, all in circumstances where there was in any event a lack of evidence for the judge's finding; (v) as to reason (3), it was disclosed that the chassis had been shortened, Mr Sibson's view about the rear end of the chassis had been put only tentatively and had not been accepted by Mr Fenn, and in any event Mr Sibson had agreed that the car could properly be described as a 1930 Speed Six; (vi) as to reason (4), the absence of a continuous history, which was a recurrent theme throughout the judgment, was a red herring: there was no promise of a continuous history, Mrs Brewer was provided with such documents as were available at the time of the transaction, which was not much, and it was therefore plain that the car did not have available a continuous history.

155. These were formidable sets of submissions, but we can take them relatively shortly, for three reasons. The first is that, on behalf of Mrs Brewer, Mr Downey did not challenge Mr Ticciati's submission about the overall, but essential, outcome of the experts' evidence concerning the acceptability of the expression "1930 Bentley Speed Six" in relation to the car (whatever might be said of the engine). His submission rather was that, as a matter of law, to describe the car as a 1930 Speed Six involved a promise as to the car having an original Speed Six engine. Indeed, he made it clear to us that, *as against Mr Mann and SMRL*, *he did not rely* on any finding of a collateral warranty concerning the car itself as distinct from its engine. He did, however, rely on the description of the *car* as against Fortis, for the hire purchase agreement itself described the goods as a 1930 Bentley Speed Six. Therefore, for the purposes of the Fortis appeal, we still have to resolve, if we can, an issue as to whether the car complied with its description. However, the judge's

findings in this respect are much undermined by Mr Downey's lack of challenge to Mr Ticciati's submissions concerning the proper assessment of Mr Sibson's and Mr Fenn's evidence.

156. Secondly, Mr Downey had no answer to the complaint that the condition of the engine, if it had to be judged against a Speed Six specification, had not been pleaded. In this respect, certain specific criticisms about the car had been identified, in reliance on Mr Sibson's report, in para 13 of the July 2009 amended particulars of claim: for instance the point about the rear section of the chassis, or points about the car's petrol pump, or steering drop arm, or gearbox. However, no point was pleaded about the engine's physical or dynamic conformity with the specification of a 1930 Speed Six engine. (At most there had been a question put to the experts, in the immediate run-up to trial, asking if the engine had been built to Speed Six specification: but Mr Downey placed no specific reliance on this.) It is true that in his evidence Mr Sibson did suggest that the car's engine could not be said to live up to its specification: however, his bottom line was always that it could not be proved or had not been proved to be within specification. Mr Downey sought to support the judge's findings in this respect, but in our judgment unsuccessfully. Thus, the judge agreed with Mr Sibson's suggestion that a test (made in 2009) of pressure at 140 psi was inadequate, and that the result ought to have been 225 psi. However, Mr Fenn's evidence was that that was ridiculous (see above at para 141), and there was no reason to accept Mr Sibson's view in preference to Mr Fenn's, a fortiori on an unpleaded point on which the experts could not be regarded as formally locking horns. There was no specification ingredient in terms of psi, only in terms of compression ratio (5.1 to 1) and brake horse power (180). Mr Downey also relied on Mr Sibson's complaint that he had not been given the chance to test the engine dynamically, since he had not been invited to the 2009 compression test made by Mr Fenn, and that thereafter Mr Mann had dismantled the engine (presumably to prepare it for the car's resale). The suggestion was that Mrs Brewer and Mr Sibson had been prevented from proving their case. That, however, would have been an unfair inference in circumstances where no such case had ever been pleaded.

157. The third reason lies in the essential nature of this appeal, at any rate so far as Mr Mann and SMRL are concerned. Mr Ticciati recognises that the best he could probably hope for, however successful he is in this court on behalf of his clients, is an order for a retrial. This is because he acknowledges that at least SMRL, even if not Mr Mann personally, would be liable for breach of collateral warranty if Mr Mann had assured Mrs Brewer that the engine in the car was a Speed Six engine: but that issue, about what was said on

20 May 2007, cannot finally be resolved in this court. Therefore the gravamen of his appeal, without detracting from any points that this court might find it possible to resolve finally, is to the effect that an overall consideration of the way in which the judge dealt with the numerous issues demonstrates that the judge failed to approach his task with the necessary objectivity, with the result that his judgment cannot stand. The position is, he submits, that on nearly every issue between the parties at trial, whether of fact, or credibility, or preference for one expert over another, or of the application of some potentially difficult law to the facts as they might be found, the judge had to make an evaluation or assessment which required care and objectivity. It was, however, his duty to submit that the judge had failed in that duty, or at least gave the appearance of that failure.

158. Under the present heading, we would accept that the judge's treatment of the expert evidence was, in many of the respects complained of, difficult to comprehend. We will revert below, to matters such as specification, continuous history, the question whether the description of the car is one of fact or opinion, and the law of correspondence with description. We also bear in mind that the ultimate issue can only be considered in the light of all the material in the appeal. For the present, however, it sufficient to say that on the complaints made about the judge's treatment of the expert evidence, there must be serious concern as to the way in which he summarised the experts' essential evidence about how the car should be described, which the judge misstated; about the fact that he rewrote his assessment of Mr Fenn's evidence at judgment 4, para 37, after complaint had been made to him about the coherence of his assessment of the expert evidence; and in this connection about the fact that his summarised reasons for finding that the car did not correspond to its description (para 202) are so much bound up with the state of its engine and with other matters which are at least highly questionable, such as an unpleaded and unproved failure to comply with specification, a lack of continuous history, and an absence of documentation.

The concession that Mr Mann and SMRL were not responsible for a collateral warranty about the car, as distinct from the engine

159. We have made the point above that Mr Downey accepted that he had and made no case on this appeal against Mr Mann and SMRL based on a collateral warranty about the car as distinct from the engine. This came as something of a surprise to the court, for Mr Mann had always made it clear that he accepted that he referred to the car as a 1930 Bentley Speed Six and was, through his company,

ready to stand by that (for what he said it amounted to), and we had been inclined to read the judge's judgment as holding him and his company responsible not only for a warranty about the engine, but also about the car. Nevertheless, when Mr Downey was pressed by us about this, he was adamant and clear that he had no case on appeal against Mr Mann or SMRL based on any collateral warranty about the car, as distinct from the engine; and that even if there were aspects of the judge's judgment which might have supported an argument otherwise (such as judgment 4, para 188), he did not rely on them.

160. Mr Downey pointed out that he had no finding from the judge of a collateral warranty about the car. Thus he referred to the judge's opening paragraph (judgment 4, para 1): "The principal issue is whether or not this car had been contractually warranted to be or described as, a "1930 Bentley Speed Six with a Speed Six engine"; to the judge's definition of the contractual warranty alleged (at para 6): "Mrs Brewer contends that she was induced to buy the car by Mr Mann when he warranted in this critical pre-contract meeting that the car had a 1930 Speed Six engine"; and to the judge's conclusion on this issue (at para 145):

> "*Conclusion – collateral contractual warranty.* I therefore conclude:
> (1) Mr Mann did state unequivocally that the engine was a Speed Six engine;
> (2) Mr Mann did not make any reference to the engine being to Speed Six specification;
> (3) If Mr Mann used the phrase "to Speed Six specification", this would reasonably have been taken to have been a reference to an original 1930 Speed Six engine that had been renovated to Speed Six Specification and that phrase would have been an erroneous misrepresentation; and
> (4) The statement "the engine is a Speed Six engine", in its context, amounted to a collateral warranty..."

Similarly, see para 172 (under the heading of "Breach of collateral contractual warranty"): "As recorded already, it was accepted by SMRL that it would be liable to Mrs Brewer if, as I have found, Mr Mann made an enforceable collateral warranty to the effect that the car had a 1930 Speed Six engine".

161. There are many obscurities about the judge's complex (partly because so often rewritten) judgment. The question of what collateral warranty the judge found proved (which is clear enough in

the passages just cited) is overlaid by his separate analysis, which was entirely of his own making and not put forward by Mr Malek QC on behalf of Mrs Brewer at trial, of a so-called "deposit contract" which Mrs Brewer and SMRL had made at the time when Mrs Brewer paid the deposit. That was itself bound up with the judge's theory, again entirely of his own making, that SMRL's responsibilities under this deposit contract mirrored the responsibilities undertaken by Mr Mann by reference to his collateral warranty and by Fortis when it described the car in its contract with Mrs Brewer as "One 1930 Bentley Speed Six Car": see judgment 4, paras 159-171. Thus para 171 concludes:

> "The description "Bentley Motor Car" in the deposit contract between SMRL and Mrs Brewer [which the judge derived from SMRL's invoice to Fortis] and "1930 Bentley Speed Six Car" in the hire purchase agreement between Fortis and Mrs Brewer are contractual descriptions which have the meaning: a "1930 Bentley Speed Six with a Speed Six engine".

162. The judge's development, of his own motion, of this deposit contract was heavily criticised in Mr Ticciati's submissions. Mr Downey conceded that he placed no reliance on the judge's analysis in this respect. That is entirely understandable. In the circumstances, we will not have to say much about the deposit contract. However, we will have to say something (see paras 213ff below), for it is relevant to Mr Ticciati's overriding submission that the judge appears to have lost his objectivity.

163. In sum, we are content to proceed on Mr Downey's basis, and we compliment him on a fairly made concession about something which we might otherwise have lost sight of amid the complexities of this case. In the light of his concession, we note that passages in which the judge appears to hold the dealer responsible for the description of the *car* as a Speed Six (such as judgment 4, paras 188 and 201/2) are bound up with or premised on his deposit contract theory.

Mr Mann's credibility

164. We turn next to another subject which was crucial for the outturn of the trial, and that was Mr Mann's credibility. That was certainly vital to the Brewers' case against Mr Mann and SMRL, and against

Fortis as well, since it too was held to bear the burden of what Mr Mann told the Brewers. Of course the judge's impression of Mr Mann's credibility bore directly and profoundly on his findings on the issue of what was said at the meeting of 20 May 2007.

165. The judge thought ill of Mr Mann's credibility and was impressed by Mr and Mrs Brewer. Normally, such assessments lie very much within the province of a trial judge. However, in this case, the judge said that demeanour did not assist him, and he found his markers elsewhere. The essential complaint by Mr Ticciati is that the judge found Mr Mann's lack of credibility in incidental matters about which he considered that Mr Mann had been untruthful and dishonest, where dishonesty had never been asserted or cross-examined to – and then carried that over to his judgment as to the critical meeting. Moreover, the judge seems to have come to his decision first, and to his reasons second, rather than the other way round

166. We set out below some of the critical findings of the judge in this regard.

167. In his judgment 1, the judge said nothing whatsoever about credibility. He went directly to a discussion of the meeting of 20 May and simply stated that he was "satisfied, taking the evidence as a whole, that Mrs Brewer's account was correct" (para 78). His reasons were based on what he regarded as the nature of the conversation, viz (i) that the expression "Speed Six specification" had not been shown to have been used by any one else or to have had any valid content (para 81); (ii) that the crucial feature of a Speed Six engine was not in its specification but was existential, in its being originally delivered as a Speed Six engine by the Cricklewood works (para 82); and (iii) that the Brewers would not have been content with a non Speed Six engine which had been adapted to look like and perform like a Speed Six engine (para 84). Therefore, the judge reasoned, Mr Mann had not used the phrase "Speed Six specification", or, if he had, it would have been objectively understood as merely referring to his rebuilding of what was already a Speed Six engine (para 84). As for Mr Mann's description of the car as a Speed Six car, that reflected the standpoint of the BDC, which did not suffice on an objective construction of the term (para 106).

168. That reasoning, the reasoning contained in judgment 1, was more or less consistent (perhaps reason (i) less consistent) with the parties

simply being at cross-purposes. We will revert to this reasoning under the next heading of this judgment, concerned with the 20 May meeting.

169. In his judgment 2, the judge introduced for the first time a series of comments which seemed to have relevance if any – but for the most part silent relevance – only for the sake of undermining Mr Mann's credit (at paras 78/98). Thus, before he arrived at his account of the meeting of 20 May, the judge had already, first, castigated Mr Mann for being untruthful about saying that he had bought the engine in its already modified form, whereas the judge regarded him as having modified it himself (at paras 81-85). The judge then added:

> "This conclusion is highly relevant in assessing the truthfulness and reliability of Mr Mann's evidence as to what he stated to Mrs Brewer about the engine" (at para 85).

Mr Ticciati submitted that this was a wholly unjustified finding on an otherwise collateral and irrelevant matter. Moreover, no one had given evidence to the contrary of what Mr Mann had said.

170. Next the judge blamed Mr Mann for telling the Brewers that the few documents he provided to them about the background to the car were all he possessed: but *not* because Mr Mann had more documents (although there were some further invoices about his work on the car which he said he had overlooked and only found later), but because of the very opposite reason, that he had *wrongly implied* that "there were a variety of other documents that provided a continuous history of the car that had existed but were not in his possession" (at para 89). In other words the judge found an (implied) representation that the car was well documented, when it was not. That is in our judgment an impossible implication. We suppose that the car must have had its history, such as it was, over the years even it largely consisted in having been dismantled at some quite early stage. But in any event it was an acknowledged gap in the history and provenance of the car that all that Mr Mann could say about it was that he had rebuilt it in the late 1970s before selling it to its previous owner in 1981. The Brewers knew that. Although the judge kept on repeating that Mr Mann had somehow failed Mrs Brewer by not providing a continuous and documented history of the car, that was a wholly unjustified theory about the nature of their contract. Mrs Brewer *knew* that the history of the car before its 1980 rebuild was essentially unknown; and Mr Mann made no other promise.

171. Thirdly, the judge blamed Mr Mann for not making the car available during the course of the litigation for testing (at paras 91-93). The inference left hanging in the air, but not stated, was that Mr Mann had something to hide: but there was never any pleaded case that the car could not or did not perform to specification, and, in any event, the fact that the car had been prepared to Speed Six specification at some uncertain time in the past had promised absolutely nothing about its current performance (nor was it said to).

172. Fourthly, the judge suggested that Mr Mann had "somewhat misleadingly" said that he bought the car from Mr James in 2006 (at para 94). However, what Mr Mann was accurately referring to was that he had taken it on sale or return (in 2006). The judge built a theory, of his own making, that Mr Mann had somehow been deceptive because he had not had title to the car when he sold it to Fortis. However, as remarked at para 84 above, there is likely to be nothing, and certainly nothing dishonest, in this point.

173. Fifthly, the judge criticised Mr Mann severely for suggesting in his evidence that there would have been little difference in value between the car with its Standard 6½ litre engine modified to Speed Six specification and the car with a substituted Speed 6 engine. The judge said –

> "Mr Mann sought to persuade the court in his oral evidence that there was no significant difference in value between a car with a Standard 6½-litre engine with an unproved ability to satisfy a Speed Six specification and one containing one of the few surviving W.O. Speed Six engines that had been rebuilt and which was still in good condition. This evidence is both self-evidently wrong and highly damaging to Mr Mann's general credibility and reliability."

That is a curious passage. Mrs Brewer had no case to make on value, even though she had initiated her claim on the back of the discredited figure given in the Bonhams' valuation. It had always been open to her, therefore, to seek to advance a case that, if the car had had the promised virtues with which she alleged it had been presented to her, it would have been worth even more than the price she had agreed. However, she did not do so, and presented no evidence to that effect. The judge was therefore wrong to suggest that Mr Mann was "self-evidently wrong" and even dishonestly so in

giving the evidence he did. There was no evidence to the contrary given in the case. Mr Fenn's evidence on valuation supported Mr Mann's. The judge in any event was not comparing like with like, for he was assuming an inadequate engine in one case and a good engine in another. For him expressly to hold this against Mr Mann's credit in a case which to a large extent turned on a disputed oral conversation was, in our judgment, unfair.

174. Sixthly, the judge referred to the car's lack of a continuous history (at para 98). He implicitly blamed Mr Mann for that lack, as though he had promised such a continuous or documented history, which he did not.

175. Subsequently, there was an entirely new passage (at paras 107/108) headed "Misleading nature of the advertising material" which picked apart what in the judge's view were the misleading inadequacies of that literature. It is true that some (only) of Mr Mann's sales literature had been pleaded by Mrs Brewer for the purpose of a (limited) plea of misrepresentation and warranty focused on the genuineness and authenticity of the car and its engine; and that it was also pleaded that Mr Mann "knew or ought to have known" that the car was "not a 1930 Speed Six that had been restored by him but was actually a reconstruction of a Le Mans type replica using what remained of the chassis of a Speed Six saloon". That was a *sub silentio* but formally inadequate plea of fraud. However, as Mr Downey made abundantly clear to us, the only complaint was as to a collateral warranty to the effect that car and engine were a Speed Six car and engine, and there was no attack on Mr Mann's honesty in the transaction, nor on the honesty of his sales literature. Our reading of Mr Mann's relatively brief cross-examination confirms Mr Downey's assurance, even if there was a passing reference to Mr Mann's advertising being "misleading" in the closing written submissions provided to the judge on behalf of Mrs Brewer.

176. In the circumstances, it is worrying to read the judge's new introduction (at para 105) and conclusion (at para 108) to this passage, that –

> "I will set out these three pieces of sale literature in full. I have highlighted the relevant critical passages in each which are, in the light of my findings, both significantly misleading and substantially inaccurate."

> "In summary, these representations inaccurately and misleadingly conveyed the meaning to an informed reader such as Mrs Brewer that the car retained its original Speed Six engine and chassis which had been rebuilt but still survived as a Speed Six engine with a proved capability of satisfying all aspects of the Speed Six specification."

Inaccuracy is one thing, but the additional phrases "significantly misleading" and "misleadingly" were, in context, intended to convey a more sinister meaning. Why Mr Mann should be blamed in this way for representing that the car retained its original engine, when the material did not expressly claim originality (although his advertisements of other cars did) and when he was to tell Mrs Brewer expressly on 20 May that the car did *not* contain its original engine, we do not know.

177. It was against this background that the judge came to the passage of his judgment 2 in which he considered the meeting of 20 May. This passage (at paras 114-124) was almost entirely rewritten as against judgment 1. It began, as before, with an immediate acceptance of Mrs Brewer's evidence (at para 114) and a rejection of Mr Mann's evidence (at para 115). He deleted his previous reasoning for those conclusions and reasoned as follows. First, he said that the background was Mrs Brewer's desire to have a Speed Six engine originally delivered as a Speed Six engine by the Cricklewood works and thereafter documented for any changes to ensure that it could still be correctly described "as the original engine" (at para 116). We comment: that is not a reason for preferring Mrs Brewer's evidence, but an acceptance of it. Secondly, or what he described as "another crucial reason why I do not accept Mr Mann's account of the meeting", he said that the Brewers "particularly wanted to buy one of the very few surviving Speed Six engines. Mrs Brewer was therefore bound to question the provenance of the engine..." (at para 117). However, that is again an acceptance of the Brewers' evidence, not a reason for its acceptance. Thirdly, the judge said that "I also take into account the misleading nature of his advertisements" (para 118). Therefore the judge held against Mr Mann that his advertisements had been "misleading" (with regards to the engine), even though Mr Downey assures us that it had not been part of the Brewers' case that they were.

178. Fourthly, the judge rejected Mr Mann's evidence that he had used the expression "to Speed Six specification". He gave two reasons for that finding. The first was that Mr Mann was under a duty in the circumstances to have been clear and unambiguous that the engine

had started life as a Standard 6½ litre engine, instead of using an expression that was "fraught with ambiguity and...unduly terse and its meaning unclear" (at para 120). That may be a statement about what may or may not have been, in law and in the circumstances, a sufficient disclosure: but we do not think it was a reason for preferring the Brewers' account to Mr Mann's *unless*, implicit in that reasoning, is the unspoken premise that, by breaching his duty, Mr Mann displayed himself as untrustworthy. The judge's second reason for rejecting Mr Mann's use of the expression "to Speed Six specification" (and this was reasoning that had been used in judgment 1) was that "there is no surviving official or formal Speed Six specification" (at para 122).

179. Now, it is true that WO Bentley did not publish his own specification (albeit he must have known what he was building). However, BDC did publish a specification for a 1930 Speed Six engine and that was the specification which was used at trial when, for instance, Mr Sibson was saying that the car's engine had not been proved to comply with its performance criteria. Its details had been set out by the judge in judgment 2, paras 58/59. At para 58, the judge had said "The Speed Six specification comes in two versions, being the 1929 and the 1930 versions, and the parties accepted that the 1930 version was the appropriate one to use for the car". Moreover, Mr Sholto Gilbertson in his Bonhams' valuation had said that the engine "purported to be up-rated to Speed Six specification". Mr Sibson and Mr Fenn had repeatedly referred to Speed Six specification. For instance, Mr Fenn referred to it in his report at para 6.14 (see at para 133 above), in his reply dated 18 March 2009 to Mrs Brewer's solicitors' letter (see at para 137 above), and in his letter dated 30 September 2008 (see at para 138 above). Mrs Brewer's letters before action had referred to the car's engine as "purported to be updated to Speed Six Specification" (see at para 103 above). Her solicitors' letter to Mr Fenn dated 13 March 2009 had referred to an engine "purported to be modified to Speed Six specifications" (see para 137 above). The first of the seven questions put to the experts shortly before trial was whether the engine was built to Speed Six specification. In these circumstances, the question may be asked whether Mr Mann's first reply to Mrs Brewer's challenge, and his evidence, that he had spoken of the engine as "prepared to Speed Six specification" are to be doubted on the basis that in 1930 W O Bentley might have published no formal specification? We doubt that this could be a valid reason. The expression "Speed Six specification" is clearly used by everyone in the trade. The judge's rejection of the expression is strange.

180. Finally, the judge reasoned that even the expression claimed to have been used by Mr Mann would in the circumstances have either meant that he was confirming that the engine was a Speed Six engine or would have been inaccurate. But that is not a reason which goes to explain a preference for the Brewers' evidence.

181. In sum, the judge accepted the Brewers' evidence without any explanation other than that he regarded Mr Mann's credibility as weakened by his misleading advertisements, the inadequacy of his description of the car, and the absence of anything that could properly be called a Speed Six specification. Although the judge did not expressly bring back into his reasoning directly concerned with the 20 May meeting all the complaints, express or otherwise, that he had made elsewhere in his judgment against Mr Mann, it is nevertheless a natural inference that he held all of this material against Mr Mann in evaluating what had been said by Mr Mann. And having rejected Mr Mann's account, he accepted everything that the Brewers gave evidence about. Or was it the other way about? That having accepted, without analysis, everything the Brewers said, he rejected Mr Mann's evidence?

182. It was judgment 2 which led to Mr Ticciati's original grounds of appeal presented to the judge at the hand-down hearing of 5 October 2010. In those grounds of appeal, Mr Ticciati submitted that the judge had wholly ignored his submissions inter alia regarding Mrs Brewer's and Mr Mann's respective credibility. As for those matters, they were addressed in detail as ground 9 at paras 70-82 of that document. In brief, Mr Ticciati referred to the evidence as to Mr Mann's excellent reputation, his lack of incentive to lie, his good faith in offering to repurchase, the distinction between the advertisement for our car, which did not use the word "original", as distinct from what was said about other cars, the ease of checking the origin of engine number WK 2671 in *Hay*, the absence of any allegation that Mrs Brewer had asked about the *engine* as distinct from the *car* in her letter before action, and the circumstances which led to the dispute precipitated as they were by the Brewers' financial difficulties and the erroneous valuation by Bonhams. At what was then ground 20 he submitted that the judge had put forward inadequate reasons for convicting Mr Mann of lying about whether the conversion to Speed Six specification had been done by him or before he had acquired the engine; and at what was then ground 21 he complained similarly about the judge's finding that Mr Mann's evidence about the value of the car with the engine it had as against its value with a Speed six engine was "both self-evidently wrong and highly damaging to his general credibility and reliability". He submitted that these findings were unjustified and irrelevant and were unfairly destructive of a reputation for honesty

that Mr Mann had spent decades building up (and of which Mr Fenn, who had reason to know, had given evidence, see para 127 above). That, he submitted, was in itself another compelling reason why permission to appeal should be granted.

183. The result of these and other submissions was judgment 4. On the question of credibility, judgment 4 proceeded as follows.

184. First, as for the passages at judgment 2, paras 78/98, the judge both maintained them, but developed them in order to meet Mr Ticciati's arguments: see judgment 4, paras 82/105 and elsewhere. Thus, as for the matter of whether or not Mr Mann had himself modified the engine from Standard to Speed Six specification, the judge found additional reasons to support his conclusion, such as that Mr Mann would have disclosed to the Brewers the provenance of the engine from Mr Greyvensteyn *if* the engine had been already modified to Speed Six specification. However, that seems to us, like the judge's earlier reasons, to be a weak basis on which to condemn Mr Mann as a liar in this regard. As for the question of valuation, the judge had recourse to adding a citation of the desk-top appraisal of SHM Smith Hodgkinson for its mention of Speed Sixes sold for $1.8 and $5.1 million. He referred to this as "snatches of evidence" which supported his condemnation of Mr Mann in this regard. We would regard this, on a matter not in issue, and with almost total ignorance of these cars, and without expert evidence to assist, as being of insignificance. As for the car's lack of continuous history, he again relied on the desk-top appraisal, which he cited in full for the first time (at para 194), for the additional comment that it confirmed the importance of the "need for full documentary evidence of the relevant history of a Speed Six". But that begs the question of whether such documentary history has been promised. Of course such a history is a desirable thing to be able to offer to a customer. That is all the appraisal was saying.

185. Secondly, at judgment 4, paras 128-134, over the course of 9 single spaced pages, the judge inserted an extended passage on the subject of credibility. This passage immediately followed paras 117/127 (which reproduced paras 110/120 of judgment 2) in which the previous reasoning for accepting the Brewers' account and for rejecting Mr Mann's account of the meeting of 20 May had been set out. This passage commenced as follows:

> "*Credibility.* On this crucial issue of what was said and the context and consequence of what was said at the meeting of 20

May 2007, I must assess and reach a conclusion as to the credibility and reliability of the evidence of Mr and Mrs Brewer and Mr Mann. This involves my taking account of what they stated in their written and oral evidence and testing that against their statement and actions generally, their motives as revealed by the evidence, the consistency of their evidence with their other statements and actions and their general creditworthiness. Their demeanour when giving evidence must also be considered but all three witnesses gave their evidence with confidence and, therefore, demeanour was not itself much of a guide to the credibility or reliability of any of them."

186. Thus, the judge's professed approach was as if he was approaching the issue of the meeting of 20 May for the first time, and was resolving issues of credibility *before* coming to a conclusion on the disputed issue of what was said. In fact, he had already made up his mind, and had expressed his reasons for doing so, as far as they went, before writing this passage.

187. The passage ends with this conclusion (at para 134):

"*Credibility – conclusion.* The matters set out above are all relevant to the assessment of the credibility of the three participants in relation to what Mr Mann stated at the 20 May 2007 meeting. My overall conclusion is that both Mrs Brewer and Mr Mann had obvious and clear reasons why they would wish to preserve their respective professional and personal reputations and that Mr and Mrs Brewer and Mr Mann's evidence should be approached with caution. Adopting those starting points, I concluded that there were no obvious reasons for regarding the evidence of Mr and Mrs Brewer as being unreliable, particularly since the factual matrix to the meeting on 20 May 2007 clearly pointed to the probability that Mrs Brewer's evidence was correct. Thus, there was no reason for regarding Mr Brewer's supporting evidence as being unreliable. However, and most significantly, Mr Mann's evidence was inherently unreliable given all the unsatisfactory aspects of his evidence that are summarised above. Taking all these matters into account, I was unhesitatingly able to reach the conclusions that I have set out above[16]. Thus, I find that Mrs Brewer's evidence of what was said by Mr Mann at that meeting was correct and Mr Mann's evidence of what he said was incorrect."

[16] The judge refers back, in his footnote 35, to his paragraphs 121-127.

188. In between that introduction and conclusion to the subject of credibility, the judge dealt in detail with the criticisms that had been made by Mr Ticciati of the Brewers, and reformulated what he found wanting in Mr Mann. The judge's treatment of the former subject is too long to deal with in detail: we will therefore select sparingly from it. The judge's treatment of the latter is briefer, for it is a summary of what has gone before, but we will need to consider it carefully.

189. We regret to say that we can feel no confidence that the judge's explanations for some of the difficulties in Mrs Brewer's case avoid giving the appearance of a loss of objectivity. We do not speak of her evidence, but of her case. Her case was that she was interested in authenticity and genuineness and that that was as true for the engine as for the car. Although she knew little about such matters herself, she was properly advised by her husband. Moreover, she wanted a good investment, and therefore wanted "WO's finest". If she had been told that the engine was a modified Standard 6½ litre engine, she would not have been interested. Not only was she not told that, however, but she was directly assured that the engine was a Speed Six.

190. Some of the forensic difficulties in that case are these. If not Mrs Brewer, then at any rate Mr Brewer must have known that the chassis and engine numbers could be checked with *Hay*. The Brewers may not have had a copy of *Hay* at the time of purchase, for they asked Mr Mann to get them a copy, which he promised to do, but they knew about *Hay* and obtained their copy from Mr Mann only shortly after the purchase. They say they immediately checked the book, and confirmed, what they had been told, that engine WK 2671 was not the car's original engine. However, they did not check to see where WK 2671 came from. This was despite their evidence that the genuineness and authenticity of the engine were vital to the purchase. They kept the car another year or more without attempting to find out about the engine's origin. When they decided to sell the car, hoping to get a net £650,000 for it, it would have come as a great shock to be told by Bonhams that it was only worth between £300,000 and £350,000 gross. That was only half of their expectations; and at a time when they were facing financial difficulties even in maintaining the hire purchase payments. If they had been told specifically that the engine was a Speed Six engine, then it would be very strange that this allegation would not have been at the very forefront of Mrs Brewer's immediate letter before action. It was, after all, the nature of the car's engine that was given by Bonhams as the reason for the disappointing valuation. That was something that Bonhams had researched immediately even before Sholto Gilbertson had come to photograph the car (see

the terms of his letter valuation). And as the letter before action only a few days later stated engine number WK 2671 came from a Standard 6½ litre chassis number FW 2614. However, the argument addressed in that letter before action was *not*, as one would expect, a direct complaint that Mrs Brewer had been told, in answer to a specific question, that the engine was a Speed six engine, but rather that it was the description of the *car* as a Speed Six car that led her to think that the car's engine would be an original Speed Six engine, even if not, as she knew, the car's original engine. Moreover, it was on the basis of the *car's* description as a Speed Six that the letter before action went straight to the allegation of fraud. However, that was a weak allegation of fraud compared to the allegation that might have been made if Mrs Brewer had been told specifically that the *engine* was a Speed Six. It might also be said that Mrs Brewer's reaction to Mr Mann trying to explain to her about the modified engine in their telephone conversation of 11 August 2007 is consistent with her letter before action. Her line remains that she had been misled by what had been said about the *car* as a Speed Six: "I told him that the car should never have been marketed as a Speed Six". But if she had been told directly that the *engine* was a Speed Six, in answer to her specific question, her rejoinders would very likely have been in different terms.

191. Now, the judge nowhere in his lengthy exposition in judgment 4 deals with the point about what the letter before action says, even though that point was directly addressed in Mr Ticciati's grounds of appeal before the judge. That is striking. Moreover, the judge only addresses the Brewers' failure to investigate the car before the purchase, and does not comment on their failure to address the provenance in the almost immediate aftermath of the purchase. We are deliberately concentrating on the nature of Mrs Brewer's case, and not on her evidence: but it has to be said that the judge's acceptance of her evidence, namely that she had not been influenced by Mr Fenn's valuation *at all* (whereas her letters before action and witness statement tell a different story, see at paras 66, 105 above), as evidence "adding to rather than differing from her earlier written evidence and her solicitor's statements" (at para 131(8)) is unconvincing and very charitable.

192. On the other side of the argument, Mr Mann knew that the engine had started life as a Standard not a Speed Six engine. If therefore, in answer to a direct question about the engine, he had assured Mrs Brewer that it was a Speed Six engine, it would have been a lie. Why should he lie? The car did not belong to him, it was on sale and return. He could make a profit on it, of course, but his capital was not tied up in it. If, however, he lied, and the car came back to him, he would be stuck with it. Moreover, because of the engine number,

his lie could not escape detection, because *Hay* would reveal all. And he offered to provide the Brewers with a copy of *Hay* and not long later did so. That would have been an extraordinary risk to take with his reputation and business. His immediate reaction to Mrs Brewer's complaint was to explain that he had told the Brewers that the engine was "prepared to Speed Six specification". That was at a time when Mrs Brewer had not yet said against him that he had said specifically, in answer to her direct question, that it was a Speed Six engine. Therefore his explanation is not defensive. His other immediate reaction was to say: Well, we can work this out. If Mrs Brewer had not wanted a complete indemnity, and had been prepared to compromise her claim, this litigation would have been unnecessary. As it is, he bought the car back for the full price from Fortis. But if he had lied at the time, he must have been conscious of it, in which case his failure to close the gap (no doubt with Fortis's help), would have been taking an extraordinary risk. Anything is possible, and sometimes the most reputable of dealers turn out to have feet of clay, but this does not sound like a case of dishonest dealing (and was not even, at any rate at trial, alleged to be).

193. How did the judge summarise the case against Mr Mann on the subject of credibility? He now (judgment 4) listed no less than sixteen matters (at para 133). He described them as "Preliminary findings of facts allegedly going to credit": but of course the judge had made up his mind long since. They are a mixture of old points and some new ones. We have described many of them previously. They amount not only to a rejection of Mr Mann's credibility *as a witness*, but to a wholesale attack on the honesty of his dealings *as a dealer*, in a case where his honesty as a dealer was not in question.

194. Mr Downey submits that the judge was entitled to form a view of Mr Mann as a witness, and, if necessary, to conclude that he had not been telling the truth in the witness box. We agree. That is what has been described as the melancholy duty of any judge at trial. However, it is another matter for a judge to accuse a party of dishonesty, when none has been alleged against him by the other party at trial, and then to use that finding of dishonesty to undermine the credibility of the party as a witness on the critical factual issue in the case. As it is, despite Mrs Brewer's early accusation of fraud (in her letter before action), at a time when she had not even formulated her case of an express description of the engine as a Speed Six engine in answer to her specific question, and despite the implicit (but not express) allegation of dishonest knowledge in her particulars of claim, no allegation of dishonesty was put to Mr Mann in cross-examination, and we have Mr Downey's

commendably open assurance that there was at trial and is no allegation of dishonesty in these proceedings.

195. However, the judge's judgments proceeded by stages to elaborate what ended up as a sustained assault on Mr Mann's honesty. He regarded even Mr Mann's case, that he had described the car's engine as "prepared to Speed Six specification", as an "economy with the truth" (judgment 4, para 87, also judgment 2, para 83). He justified his approach as "necessary, fully addressed in the evidence" (judgment 5, para 11, see para 14 hereof above), when it was neither.

196. Jurisprudence tells us, however, that it is unfair for a judge to make findings of dishonesty without such dishonesty being put properly in issue.

197. In *Co-operative (CWS) Ltd v. International Computers Ltd* [2003] EWCA Civ 1955, Tuckey LJ said this:

> "38...Put bluntly the judge's findings are obviously unfair. CWS never had an opportunity of considering, (with the assistance of its legal advisers) or answering a case of dishonesty which had never been put. It is an essential safeguard of our judicial process that the judge 'should hear the other side' (*audi alteram partem*). Where a judge acts, without warning, on his own view of an extended case of bad faith as providing a critical explanation of events...it is a matter of fundamental fairness that the judge's concern should be broached to the parties, above all to the party prejudiced by his view of things. Without that safeguard, the judge is likely to fall into error not only on the matter which is causing him particular concern, but also on other ramifications of the case. He simply has not heard what the party most affected has to say about what concerns him."...
>
> "85...It must often be the melancholy duty of a judge to conclude that the truth, and the legal merits too, lie on only one side of the dispute; and to say so in necessarily clear and strong terms. In the present case, however, what is so troubling is that the judge has made findings of bad faith and false evidence, against CWS and its principal witness, Mr Brydon, and against Mr Melmoth who was not even a witness, when no bad faith had been pleaded or suggested, and then has inevitably been drawn, consciously or unconsciously, into utilising his conclusions about CWS' or its employees' bad faith for the purpose of deciding

> other disputed issues of fact and law. In this way the focus of the judge's objective vision was distorted."

See also *Vogon International Ltd v. The Serious Fraud Office* [2004] EWCA Civ 104 at paras 28 and 29 per May LJ; *The Mayor and Burgesses of the London Borough of Haringey v. Hines* [2010] EWCA Civ 1111 at para 39 per Rimer LJ, citing *Abbey Forwarding Ltd (in liquidation) v. Hone* [2010] EWHC 2029 (Ch) at paras 46-49 per Lewison J; and *Driver v. Air India Ltd* [2011] EWCA Civ 830 at para 92 per Rix LJ.

The meeting of 20 May 2007

198. It is against this background that it is necessary to look again at the judge's rationale for his findings as to the meeting of 20 May 2007. We have set them out above (at paras 177-181 and 184-189,193, dealing with judgments 2 and 4 respectively). In our judgment, that reasoning is seriously flawed by a combination of assuming the truth of the Brewers' account of the meeting and doubting Mr Mann's credibility. Of course, the one thing is an aspect of the other. Moreover, what we do not find is an examination of the parties' different accounts of the meeting by reference to matters of more contemporaneous documentation or undisputed findings of fact (see at paras 190-192 above).

199. We recognise the difficulties of finding the truth where parties give conflicting evidence about an undocumented meeting which took place a number of years before trial. It is all the harder because, as every judge knows, once an issue has arisen, it is all too easy to persuade oneself, entirely honestly, that one was in the right, or that it was not one's own failure that let one down, but someone else's fault. This is a frequently observed pattern of human behaviour. Thus, once Sholto Gilbertson had identified the car's engine as pulling the car's value down (albeit he was wrong about his valuation), it was entirely natural for the Brewers to think (and of course we allow it possibly to be true) that what they really wanted was a car with an original Speed Six engine, and that that was what they had been promised. Therefore, on either hypothesis, namely that it was true or that it was thought to be true, the case was made that "Speed Six car" *means* or includes "Speed Six engine". That was the essential case made in Mrs Brewer's letters before action, to both Mr Mann/SMRL and to Fortis. That was the burden of Mrs Brewer's telephone conversation with Mr Mann a few days later.

200. However, it was only later, when she came to plead her particulars of claim, in November 2008, by which time she had to take into account Mr Mann's response that he had told her that the engine had been "prepared to Speed Six specification", that she pleaded, albeit entirely baldly, that he had said that the car had a Speed Six engine. At that time no further details of the conversation were given. As the case made its way to trial, further details appeared about Mrs Brewer's case. Thus, in her witness statement of April 2009, which she re-signed in September 2009 and thus did not alter after the substantial amendments made to her particulars of claim in July 2009, she gave this account of the conversation:

> "I asked Mr Mann if it was a matching number car[17]. Mr Mann said it was not and that it did not have the original engine which we later came to learn was number NH2732. I then asked if the car was a Speed Six since it did not have the original engine. Mr Mann said yes. Mr Mann went on to say that Bentley often changed engines if a customer came back with a problem. I then asked if the engine was a Speed Six engine. Mr Mann said yes. These questions and the answers Mr Mann gave me clearly led me to the conclusion that the car had at one time or another gone back to old Bentley Motor works and had an engine change to another original Speed Six engine. Mr Mann then went on to describe some of the work he had done in the restoration. He explained that the engine was up to Speed Six racing specifications and that the chassis had been shortened to comply with the specifications of Old Bentley No 2, which was another famous Bentley racing car. He explained that the rear axle had been modified to the Old Bentley No 2 specifications of 3 to 1. Lastly he explained that the Le Mans body was a replica of Old Bentley No 2."

201. It will be observed that in that account she asked *both* whether the car was a Speed Six *and* whether its engine was a Speed Six engine, and was told Yes to both questions. But she also said that Mr Mann had spoken of the engine as up to Speed Six racing specifications. However, in her pleaded Reply, she had earlier said, in March 2009, that "It is specifically denied that [Mr Mann] stated that the 'engine was prepared to Speed Six specification'".

202. Mr Mann's first written account of the conversation was contained in his reply to Mrs Brewer's letter before action, which is cited

[17] A new formulation.

above (at para 64). It will be recalled that he said that he was asked whether the fact that the engine was not original, which he had volunteered ("the engine had been changed during it's long life"), meant that the car was no longer a Speed Six, to which he said that it was, even though it had undergone changes in the last 75 years, but the engine was prepared to Speed Six specification. He added "Both factory and agents as well as private owners frequently undertook changes, not all of which were recorded, while some were inexplicable." His defence stated that he had said that the engine was prepared to Speed Six specification. His witness statement (June 2009) gave this account of the conversation in very much the terms of his August 2008 letter:

> "There was a discussion at some stage with both of them about the engine, but it was certainly not the conversation which Mrs Brewer now alleges took place. I simply said that the engine was not original to the car, and one of them did ask if the engine change meant that the car was no longer a Speed Six motor car. I said it most certainly was a Speed Six motor car but like all cars of that age, of 75 years old, it had undergone changes during its life, but the engine was prepared to Speed Six specification. As I pointed out in my letter to her solicitors dated 14th August 2008...both factory and agents as well as private owners frequently undertook changes, not all of which were recorded, whilst some were inexplicable. Neither Mr nor Mrs Brewer gave me any indication at all that this part of the discussion was critical to their decision to buy the car, and I certainly had no problems about describing the car absolutely accurately. I could have sold the car several times over at that time...It has been asserted that Mr Brewer asked me several times whether the engine was a Speed Six engine...That is not true."

203. It is equally possible for Mr Mann to have persuaded himself, wrongly, that he had addressed the question of the engine correctly, by describing it as prepared to Speed Six specification. It is possible that, if further questions had been asked, he would have given a further explanation of what "Speed Six specification" meant in that context. However, it seems to have been common ground, on the witness statements at any rate, that Mr Mann did say something about Speed Six specification(s).

204. Now the judge does not seem to have approached the question of what was said at the meeting about the engine by reference to any of this material, but to have proceeded directly to accept Mrs Brewer's case about the importance to her of an authentic Speed

Six engine. As the judge said (at judgment 4, para 124, and this goes back in its essence as far as judgment 1, para 83): “The Brewers particularly wanted to buy one of the very few surviving Speed Six engines. Mrs Brewer was therefore bound to question the provenance of the engine...” But what persuaded the judge of the fact that they wanted to buy one of the very few surviving Speed Six engines? This looks very much like a *petitio principii*, a begging of the question.

205. It is not even as though the judge chose between the witnesses on the basis of their demeanour. It is hard to escape the impression that the judge’s preference for the Brewers’ evidence is because he considered, for the reasons which he developed over the course of his judgments, that Mr Mann had been dishonest in his dealings with the Brewers, as well as therefore dishonest in the evidence which he gave to the court.

The outcome of Mr Mann’s and SMRL’s appeals

206. It was for these reasons that we have considered that we should give permission to appeal for all the grounds for which Mr Ticciati renewed his application, since they are all ultimately connected with his overriding submission that the judge demonstrated unfairness and an apparent loss of objectivity in his approach to the trial.

207. We also consider that in the circumstances we are bound to allow the appeals of Mr Mann and SMRL and order a new trial. The judgment and order of the judge as against Mr Mann and his company ultimately rest, as Mr Downey accepts, exclusively on the oral collateral warranty found by the judge to have been given by Mr Mann on 20 May 2007. However, the judge’s conclusions about this issue are wholly bound up, as we would conclude, in the judge’s apparent loss of objectivity and unfairness in relation to his dark view of Mr Mann’s honesty and of his evidence. On the central issue of the meeting of 20 May, the judge has combined an unfair, because unheralded, attack, of his own making, on Mr Mann’s honesty with an otherwise unstructured and unaccountable discussion of the opposing cases. It also seems to us that there was similar unfairness and apparent loss of objectivity in the judge’s errors in presentation of the expert evidence which he had heard from Mr Sibson and Mr Fenn; as well as in his finding that the car had been represented and sold, or ought to be treated as if it had

been represented and sold, on the basis of a mysteriously but impossibly implied promise of a continuous and documented history.

208. We consider that the judge's apparent loss of objectivity is also demonstrated by his re-writing of his judgment 4 in the face of the grounds of appeal presented to him. He was not being invited to give more reasons, where he had given none. He had in fact handed down a highly wrought, carefully considered, lengthy and detailed judgment (judgment 3). He had done so in the face of the criticisms contained in those grounds of appeal. The fact that his reasoning may have been inadequate, if it was, was not a reason to have another go at re-writing it, especially on an issue as sensitive as the parties' respective credibility. We regret to say that we think that the judge's extensive re-writing of his judgment was not for the purpose of conducting a reconsideration which his conscience as a judge drove him to undertake, as may exceptionally happen, but for the purpose of providing further material – some of it, such as his "deposit contract" analysis, of a highly idiosyncratic nature not foreshadowed in any argument from the parties – to support the conclusions to which he was already committed. We think that a successful appeal requiring a retrial was almost inevitable from that moment, but we rest our judgment more broadly on all the matters relied on above.

209. Despite these criticisms which we have had to make of the judge's judgment, we consider that at the re-trial, if that were to take place, the issue of what was said at the meeting of 20 May must be regarded as entirely open. We have felt it right to make some comments on the structure of the issue, as it was presented to the judge at trial, but otherwise we have been concerned only with the validity of the judge's conclusions, and not with the ultimate task of a trial judge, of finding facts on the basis of all the evidence, which is not and cannot on such an issue be our task.

210. In the circumstances, it is strictly unnecessary to go further into the many other complaints of Mr Ticciati. We would however mention two other inter-connected matters which necessarily affect the ongoing structure of this litigation, and which we have taken into account in our conclusions thus far.

The date of the collateral warranty and the issue of which party, Mr Mann and/or SMRL, gave it

211. Among other grounds of appeal not so far discussed is the question of Mr Mann's personal liability for any collateral warranty given by him on 20 May 2007. The issue at trial was whether any such warranty was given by him personally, or on behalf of his company, SMRL. The judge found that both were liable: Mr Mann, because he had presented himself to Mrs Brewer as an individual dealer, and not as the representative of a limited company, alternatively because he was liable as the agent of an undisclosed principal; and SMRL because "Mr Ticciati accepted on its behalf that it would be liable to Mrs Brewer if and to the extent that any breach of warranty was established" (judgment 4, para 156).

212. Mr Ticciati submitted that the judge's analysis was undermined by his view that responsibility for what was said on 20 May was to be fixed as of that date, rather than as of the date when the primary contract to which the warranty was collateral was concluded (see judgment 4, para 155(4)). Until then, he submitted, the alleged warranty was merely an offer, of the "if" variety: viz, "if you buy (hire purchase) this car, I will warrant that…". If no primary contract is ever made, then the collateral warranty never becomes contractual, for the hypothesis is never fulfilled. He therefore argued that the time to consider whether the warranty was given on behalf of Mr Mann personally or on behalf of his company was at the time of contract, and not before. Mrs Brewer's contract with Fortis was made on 7 June 2007. The earliest possible time when Mrs Brewer might have given any consideration for the promise constituted by the warranty was on 5 June when Mr Brewer paid the £40,000 deposit on her behalf, in anticipation of her contract with Fortis. But by that time, and as from 30 May 2007, Mrs Brewer knew about SMRL from its invoice to Fortis, provided to Mrs Brewer through Mr Hardiman and her husband; and on 5 June, when the £40,000 was paid, it was paid to SMRL itself.

213. We would agree that in principle that submission is correct, and that will change the parameters of the enquiry as to whether Mr Mann was speaking for himself or for his company. Ultimately the question will be whether, in the light of its appearing on the scene as the party contracting with Fortis and receiving the deposit from Mrs Brewer, SMRL supplants Mr Mann as the party on whose behalf any representation amounting to a collateral warranty was made, or whether, any such representation having been originally made by Mr Mann before his company was on the scene, it continues to bind him personally ever thereafter. That, however, is a question, involving a broad-based factual enquiry, that we are unable on this appeal to determine. It will be an issue for any re-trial. However, we

also observe that the judge's constantly shifting analysis of the contractual situation is further ammunition for Mr Ticciati's case, for it shows the judge utilising changing reasoning to support his previous conclusions, and again calls into question his objectivity.

214. Thus, in judgment 1 the judge proceeds on the basis that Mr Mann is liable as from the time of his representation, which was prior to Mrs Brewer finding out from the SMRL invoice on 30 May 2007 that it would be receiving the deposit and selling the car to Fortis: judgment 1, paras 88/89. The judge also reasons ("A further reason why Mr Mann is additionally liable personally") that his personal liability follows from the fact that "he did not buy the car from Mr James until after SMRL had sold it to Fortis", judgment 1, para 90. However, this was said on the assumption that Mr James was himself dealing with Mr Mann personally and not with his company, whereas it is SMRL which buys the car from Mr James and pays him (para 84 above). The natural inference is that Mr James was transacting throughout with Mr Mann's company rather than with Mr Mann personally. The judge then goes on to describe four inter-related contracts: (i) a contract between Mrs Brewer and SMRL as of 5 June 2007 whereby she provides a deposit of £40,000; (ii) a contract between SMRL and Fortis as of 6 June 2007, whereby SMRL sells the car to Fortis for £390,000 (in fact £430,000, finalised on 7 June); (iii) a hire purchase contract between Fortis and Mrs Brewer made by Mrs Brewer's signing their agreement on 30 May 2007 (in fact on 6 June 2007) and by Fortis countersigning on 6 June 2007 (in fact on 7 June); (iv) the sale of the car by Mr James to SMRL. On that analysis, Mrs Brewer finds out about SMRL on 30 May, signs the Fortis contract form on the same day, and pays the deposit to SMRL on 5 June.

215. In judgment 2, despite much rewriting, that essential analysis remained, save that contract (i) between SMRL and Mrs Brewer is now referred to as a "contract of sale", subordinate to the sale by SMRL to Fortis, and thus itself subject to an implied term that the car conformed to the description of it in the SMRL invoice to Fortis (described as an invoice to Mrs Brewer): see para 138(1).

216. In judgment 3, (at Mr Downey's request) the judge deleted reference to an SMRL "contract of sale" with Mrs Brewer, but persisted in the finding that the payment of the deposit by Mrs Brewer constituted a contract with SMRL which was subject to an implied term that the car conformed to its description in the invoice (now correctly referred to as being made out) to Fortis (para 138(1)).

217. In judgment 4, however, there was further wholesale rewriting of these passages (at paras 146/156). Thus the judge stated a submission that Mr Ticciati had repeated as part of his grounds of appeal:

> "148. Finally, Mr Ticciati contended that the collateral contract containing the warranty could only have taken effect when the hire purchase agreement was concluded. That contract was made after the 6 June 2007 which was after Mrs Brewer knew that SMRL was the contracting party for the provision of any warranty."

It will be recalled that Mrs Brewer knew of SMRL as from its invoice of 30 May 2007, which she saw on that day. Nevertheless, the judge opined (at para 153) that *even if this submission was correct*, Mr Mann remained liable personally as having induced Mrs Brewer to enter into her contracts. The judge's footnote 41 then referred to para 159 "for a finding as to when those contracts took effect". On the way to para 159, the judge stated at para 155(3) that, in his view, even before the hire purchase contract was made by Mrs Brewer, she had entered into the so-called "deposit contract" (the judge's term). He said:

> "Although [Mr Ticciati] was referring to the hire purchase agreement as the relevant agreement that brought the contractual warranty into effect, the relevant contract in this case must be Mrs Brewer's earlier deposit contract. In a conventional situation, that [ie Mr Ticcati's submission] will usually be the case. However, in this case, the deposit contract and SMRL's sale contract to Fortis took place on the same day as Mrs Brewer was sent a copy of the invoice which would have alerted her to the existence of SMRL so that that requirement would have been fulfilled, if that event was indeed what brought the contractual effect of the warranty into effect."

218. So there it appears that the judge is saying that Mrs Brewer's deposit contract was contemporaneous with the invoice which would have alerted her to the existence of SMRL. That, however, would place the deposit contract on 30 May, whereas in previous judgments the judge had dated it to 5 June, the date on which Mr Brewer paid the deposit to SMRL. That the judge now has in mind the earlier date of 30 May is highlighted by a footnote to para 155(3), footnote 43, which reads: "Fortis stated in its evidence that the sale agreement was entered into on 30 May 2007. See

further paragraph 159(2) below." So the judge is now suggesting that SMRL's sale to Fortis was on 30 May 2007, whereas he had previously found it to be made on 6 June 2007 (and it was in fact made on 7 June).

219. We now come to paragraph 159 of judgment 4 which is where the judge restates his theory of "four separate but inter-related contracts" and to which the judge had referred in his footnote 43. He now finds (i) a "deposit contract" between Mrs Brewer and SMRL "entered into on 30 May 2007 when the sale contract was made and SMRL issued the relevant invoice" (he had previously dated this contract, at one time called a "contract of sale", to 5 June, which was of course the date on which the deposit was paid); (ii) a contract between SMRL and Fortis by which SMRL sold the car to Fortis "made on 30 May when SMRL sent out its invoice of the same date" (he had previously dated this contract to "on or about 6 June when Fortis transferred £390,000 to SMRL", which in fact occurred on 7 June); (iii) the hire purchase contract between Fortis and Mrs Brewer, which he now said took effect on 6 June when Mrs Brewer signed it and Fortis paid £390,000 to SMRL (in fact the contract took effect on 7 June, when Fortis countersigned the agreement and also paid SMRL); and (iv) the contract between Mr James and SMRL of 8 June 2006.

220. Why, one asks, did the judge, in fact inaccurately, advance to an earlier date, 30 May 2007, his contracts (i) and (ii), namely the so-called deposit contract and the sale by SMRL to Fortis? It is by no means clear, if only because the rationale of this part of the judge's judgment 4 is obscure, but there must be a strong inference that he did this for the purpose somehow of being able to reason that, as of 30 May, Mr Mann's personal representation was given contractual effect before Mrs Brewer could have had an opportunity to realise that SMRL was on the scene. Thus in an entirely new paragraph 160 (extending over nearly three pages and twelve sub-paragraphs) headed "Deposit contract", the judge said this about the invoice to Fortis dated 30 May 2007:

"(6) There are three particular matters to note about this invoice:

(a) The statement contained in this document that the offer that was being made was being made "for and on behalf of Stanley Mann Racing Ltd." was the first time that Mr Mann had drawn attention to the fact that the car was being sold by SMRL. *Mrs Brewer only first had sight of this invoice after she had paid the deposit and after SMRL had purported to pass title to*

Fortis when she collected the car with her husband on 7 June 2007" (emphasis added).

221. That finding is wholly wrong, and indeed inconsistent with other parts of the judge's judgment (such as para 155, cited above). However, it appears to have been in the judge's mind as the reason why Mrs Brewer was not affected by the invoice of 30 May (albeit incoherently, since that invoice is used as the basis of her deposit contract with SMRL as of 30 May). We fear that the more such matters are investigated, the more difficult the exercise becomes.

222. In any event, the clear basic law is as stated in *Chitty on Contracts*, 30th ed, 2008, at para 18-008 as follows:

> "To be enforceable as a collateral contract, a promise must be supported by consideration, and in the cases considered in paragraphs 18-005 to 18-007 above there is no difficulty in explaining how this requirement was satisfied...in the hire-purchase case it is the entering by the customer into a hire-purchase agreement with the finance company..."

To similar effect is the classic statement of a collateral warranty to be found in Denning LJ's judgment in *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd* [1965] 1 WLR 623 at 627 –

> "...it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act on it, *by entering into the contract*, that is prima facie ground for inferring that it was intended as a warranty" (emphasis added).

The judge himself cited this passage in his judgment (for instance para 142 of judgment 4). In our judgment, in this case that time of contract might be advanced to the date of payment of the deposit in anticipation of the hire purchase agreement, but that takes one back only to 5 June 2007, which is where the judge started from, but did not finish. Moreover, the undisclosed principal rule relates to the time of contract: as *Chitty* states at para 9-012: "Where the principal is undisclosed at the time of contracting, the contract is made with the agent..."

223. It is hard to escape the conclusion that in all these perambulations the judge again shows, at any rate to all appearances, that he had lost his objectivity, and was concerned to arrive at an analysis which would support his conclusion that Mr Mann ought to have personal liability for a collateral warranty of which he was in breach.

224. That also appears to be the point of his argument at his judgment 4 para 155(3) (cited above). This is supported by his next sub-paragraph, para 155(4), which begins "In any event" and seeks to make the point that the relevant time for considering the status of the representor in a case of collateral warranty is the time of representation and not, as Mr Ticciati submitted, the time of effecting the contract to which the representation is collateral. Thus the judge there argued:

> "(4) In any event, the relevant contractual relationship was a collateral warranty which induced another contract which it was collateral to. The relevant point of time to consider whether the principal, on whose behalf the warranty was provided, was undisclosed in such circumstances was when the warranty was first provided and the inducement to contract first arose. That is because, from that moment, the induced party such as Mrs Brewer becomes potentially liable for loss arising from the inducement in the way of pre-contractual expenditure or other loss flowing from the inducement…Mrs Brewer was unaware that Mr Mann had provided his warranty as an agent for SMRL when the warranty was provided on 20 May 2007 and remained unaware of that relationship when she unequivocally agreed to proceed with the acquisition of the car at the same time. Since the first time she could have discovered that SMRL was the contracting party for the deposit contract was on receipt of a copy of SMRL's invoice to Fortis on 30 May 2007 and since she never subsequently made an election to treat SMRL as the sole warranting party, Mr Mann remains personally liable to Mrs Brewer for any breach of the warranty on the undisclosed principal basis."

225. The difficulty with that reasoning, however, is that as of 20 May Mrs Brewer had committed herself to nothing. The judge did not advance a theory that by agreeing to proceed with the acquisition of the car on 20 May the contract to which the warranty was collateral had become effective.

Joinder of SMRL

226. The joinder of SMRL on only the second day of trial is a large subject on its own, and was among the first of the grounds (for which permission to appeal was given by the judge himself) addressed to us on this appeal. Since there has to be a re-trial, and the joinder was only made at the trial itself, we consider that the judge's ruling, reasons for which he incorporated in his main judgment, must fall together with his judgment and order as a whole, even though the joinder order was dealt with separately and given a date of 24 February 2010 (the third day of trial). We will therefore deal with this subject somewhat more briefly than its importance would otherwise deserve. It is the second matter to which we referred at para 210 above.

227. It will be recalled that Mrs Brewer brought her proceedings against Mr Mann and Fortis. She did not make any claim against SMRL. The claim form was issued on 28 November 2008. Mr Mann's original defence dated 9 January 2009 took no point that any liability was with the company rather than Mr Mann; but on 8 May 2009 his solicitors wrote to Mrs Brewer's solicitors to suggest that the proceedings should have been brought against SMRL and not Mr Mann, and this was formally pleaded in an amended defence dated 17 August 2009. It appears that the suggestion in the solicitors' letter not only represented the defence which Mr Mann was minded to make, but he was also to point out in the ensuing correspondence that he was anxious that the liability to pay VAT on legal fees should rest on his company not him: for only SMRL could set off VAT paid against VAT collected. Mr Mann was also concerned that any liability should fall against the company, to be off-set against company profits, whereas he would have no similar recourse in respect of his personal taxation. The assets, such as the property from which he operated, were owned by SMRL. We are not sure whether that was strictly in evidence, but we are prepared to assume that we have been accurately informed that that is the case: nothing to the contrary was suggested.

228. On 13 May 2009 Mrs Brewer's solicitors replied to resist the suggestion that her claim should be against the company rather than Mr Mann, arguing that she had dealt with Mr Mann personally, and did not know of SMRL until she saw the Fortis documentation. On 30 June 2009 Mr Mann's solicitors again requested that SMRL be substituted for Mr Mann. On 1 July 2009 Mrs Brewer's solicitors again declined. On 6 July 2009 Mr Mann's solicitors served in draft his amended defence which took the point that the company was responsible for the advertisements, the website, and for the

transaction as a whole; and that Mr Mann dealt through his company. The stand-off on this issue continued down to trial.

229. However, on the first day of trial, 22 February 2010, the judge himself initiated a dialogue about the possible joinder of SMRL. He said:

> "Should we not address here and now once and for all whether or not there is an issue and a claim, albeit an alternative claim, against Mr Mann's company and, if so, whether it is now too late to advance that as an alternative claim?" (Day 1.1111)

So, Mr Malek QC, leading counsel for Mrs Brewer at trial, was effectively required to say that "of course there is a risk that we could fall between two [stools], as your Lordship has indicated. The safest way of dealing with this perhaps is just simply to say that we have leave to amend..." (Day 1.1112).

230. The judge next suggested to Mr Malek that he might like to consider the possibility of claiming against Mr Mann the difference in value between the car as it was and the car as Mrs Brewer claimed it was represented to be! That demonstrated that from the outset the judge had in mind that Mrs Brewer ought to be claiming, and would profit from claiming, on the basis of loss of value. In that respect, however, he was stopped in his tracks by Mr Malek's firm rejoinder: "No, it is not a difference in value case" (Day 1.1112).

231. A little later in the discussion the judge turned to Mr Paul Brant, who was representing Fortis, as he does again on this appeal, in order to suggest a claim by Fortis against its contracting party (SMRL) in the current proceedings. It was to emerge in the discussion that Fortis had chosen not to make a third party claim against Mr Mann (with whom it had no contract), nor against his company (with which it did) in the absence of it being a party, but, as Mr Brant remarked to the judge, if SMRL had been a party, a claim over against it would have been pleaded (Day 1.1124).

232. However, these matters were left in the air, and after that first day's short adjournment Mr Malek called his first witness, Mrs Brewer, to give her evidence: at which point Mr Ticciati, for Mr Mann, said that he first needed to know the position about SMRL

and whether Mr Malek was indeed proposing to apply to join it (Day 1. 1129). Mr Malek then suggested that the judge had indicated "that he would deal with it in his judgment" (which we do not think was the case), and the judge adopted that suggestion and volunteered:

> "It is an application to add that party as a third defendant and any objection to that being done and any submissions as to whether there is a claim against that party the proposal is it should be dealt with in closing submissions."

233. Such a manner of proceeding would have been most unsatisfactory, and Mr Ticciati understandably said this:

> "My Lord, my understanding was that if that course were taken by Mr Malek, Mr Brant would want to make a claim over against the new party, and if there is going to be a claim over against the new party I would like to know what it was now, before I start cross-examining witnesses." (Day 1.1130)

Mr Brant confirmed, simply and clearly, that –

> "If your Lordship does order the limited company is joined in then we will wish to bring a claim against the limited company, my Lord, yes." (Day 1.1131)

234. Mr Ticciati then confirmed his position that that would cause a fundamental change in the proceedings, to which he would object. The judge, however, said that "I am not going to start making orders now" and invited the parties to sort it out between themselves, expressing the view that he was trying to find a practical way of ensuring that "all potential claims, defences and claims over" were brought within the trial. So Mrs Brewer took the oath and gave evidence (Day 1.1133/4) without any of these matters being resolved.

235. The next morning, nothing further was said about these matters and Mrs Brewer continued with her evidence. Well into the second day of the trial, when Mrs Brewer had completed her evidence, it was the judge who initiated a further discussion. He said (Day 2.1217):

> "Before we move on to other evidence, I feel that we should seek to resolve whether there is in play an actual or putative claim over by [Fortis] against [Mr Mann]."

Mr Brant said:

> "I am not quite sure what your Lordship means by the term "in play"? There is no additional claim between [Fortis] and [Mr Mann] in this action."

236. The judge asked: "And none is going to be brought?" and Mr Brant confirmed that "I can envisage no such claim arising in the circumstances of this case, no." The judge remarked that it could not be brought subsequently, and Mr Brant, without finally committing himself, said that that was also his understanding of the position. We observe: that was the position vis a vis Mr Mann, with whom Fortis had no contract. Its contract was with SMRL.

237. Mr Malek then resumed the suggestion of joining SMRL, and Mr Brant immediately made it clear again (as he had already done on Day 1) that, if that were done, Fortis would not exclude the possibility of a third party claim over against the company. However, he pointed out, correctly, that the judge had made no order joining SMRL. The judge simply said: "Can we turn to Mr Brewer's evidence?", and Mr Brewer was called. However, before his evidence got going, there was an objection to the admission of his second statement. That had not been resolved by the time the short adjournment on the second day arrived, but the judge said that after it he wanted to resolve the "uncertainty" of whether a claim over was contemplated by Fortis against SMRL (Day 2.1224/5). We do not understand why there was any uncertainty. Mr Brant had made it clear: without the joinder of SMRL, there was no wish by Fortis to bring a third party claim against it; the position would change, were SMRL to be joined; but SMRL had not been joined.

238. In due course Mr Ticciati made it clear that he opposed the joinder of SMRL because of the danger that it would bring a third party claim from Fortis in its wake, and because if it was going to happen, it should have been done at the pre-trial case management conference when he had suggested it (but Mrs Brewer had declined): as it was he had cross-examined Mrs Brewer without SMRL being a party. As he said: "We are in this difficulty because

the claimant chose consciously and on legal advice not to join the company...they are now seeking to go back on it – not, if I may say so, at their own invitation but at your Lordship's invitation." And Mr Brant confirmed that he also opposed the joinder of SMRL because he would then need to bring a claim over against it (in case he would be barred in the future from doing so). He made it clear that previously Fortis had taken a deliberate decision not to involve SMRL.

239. The judge then allowed the joinder of SMRL, saying that he could deal with the lateness of the joinder as a matter of costs. He otherwise disregarded the deliberate decision of Mrs Brewer not to join SMRL. He gave as his reason the "wholly unsatisfactory" possibility that after these proceedings were over "there would have to be further litigation after today with regard to a claim by [Mrs Brewer] against the limited company, particularly, as is not impossible, if a situation arose in which Mr Mann was personally liable in relation to the claim in tort but his company was liable in relation to the breach of warranty claim" (Day 2.1235). We find it difficult to understand this reasoning: Mr Malek's written opening had said nothing about a claim against Mr Mann in tort; his skeleton was founded entirely on collateral warranty. Moreover, the premise of the judge's reasoning is hard to follow. If Mrs Brewer had succeeded against Mr Mann, why should she want to start fresh proceedings against his company? And if she had failed against Mr Mann (a hypothesis the judge did not expressly envisage), it is indeed hard to think that there would have been any possibility of Mrs Brewer starting fresh proceedings against SMRL. The same is, in practice, true, had she succeeded, or failed, against Fortis. Further proceedings would either have been unnecessary, or at least most unlikely.

240. The judge then continued as follows (Day 2.1236):

> "I finally conclude that since there is no wish or current application by [Fortis] to mount a claim over against [SMRL] (if that company is joined into the proceedings), I say no more about it. But I would reiterate what I said during the course of Mr Brant's submissions that it would be most unfortunate and possibly even an abuse of process if hereafter the situation arose that fresh proceedings were brought by Fortis...against [SMRL] since the issues that would be raised would, in relation to the core issue of breach of warranty, as I see it, be very similar if not identical to the equivalent issue in these proceedings. The possibility that the evidence would have to be called all over again in a different trial, particularly if it were

> before a different judge, only has to be raised to indicate the practical, procedural and possibly substantive difficulties that would arise. *However, since Mr Brant does not wish to pursue further at the present time the possibility of a claim over, I say no more about it*" (emphasis added).

241. On this pronouncement, we are told that silence fell in the court; until Mr Brant rose to his feet to remind the judge that he had explained that, if SMRL were joined, he would wish to make a claim over against it. The judge said:

> "I make no comment as to whether you made it clear. That position did not impinge itself into my conscious or sub consciousness. Why are you rising to your feet now? Are you making an application?"

Mr Brant said that he was. The judge said that he wanted it in writing. The matter was then left over, and the evidence resumed.

242. Mr Brant resumed his application on the opening of Day 3, reminding the judge that Fortis had been prejudiced by the joinder of SMRL *without* a favourable decision on the bringing in of a claim over by Fortis against SMRL. The judge adjourned Mr Brant's request until the completion of Mr Mann's evidence.

243. Late on the third day, the subject of Mr Brant's application was mentioned again. Mr Ticciati continued to make clear his opposition to it. It raised entirely new issues under the contract between Fortis and SMRL, which had not had to be considered before. After discussion, the judge left the matter over for further consideration, directing the application be made in writing.

244. On the fourth and final day, Fortis served the witness statement of Mr John Irvine, a solicitor in the firm representing Fortis, supporting its formal application to bring a third party claim against SMRL. Mr Irvine's statement made it clear that, in the prior absence of SMRL from the litigation –

> "it was felt that [Mrs Brewer's] claim[s] against [Mr Mann] and [Fortis] were misconceived in law. As such [Fortis] elected to

avoid the cost consequences of commencing a Part 20 claim against [SMRL], when they had not been sued by [Mrs Brewer]."

245. In the result, the trial ended before the question of Fortis's application had been dealt with. There were no final oral submissions, and closing submissions were dealt with on paper. The judge said he would deal with the Fortis application in his judgment. Mr Ticciati submitted a separate submission (incorrectly dated 19 February 2010) to oppose Fortis's application, explaining the additional issues and costs which would arise if it were granted, as well as the opportunities for settlement which late joinder of SMRL by Mrs Brewer had thrown away.

246. In his judgment 1, the judge said this about these issues:

> "121. *Joinder of SMRL.* I ruled that SMRL should be joined as a third defendant because there was no discernible prejudice to SMRL since all aspects of its defence had already been prepared in relation to Mr Mann's defence, because it had only become apparent at a late stage that SMRL had no title to the car when it sold it to Mrs Brewer and because it was proportionate to allow that course to be taken to avoid the possibility of further proceedings following the conclusion of the trial.
>
> 122. *Joinder of SMRL to the third party proceedings.* For the same reasons, it is fair and reasonable that Fortis should be entitled to join SMRL into the third party proceedings as defendant to Fortis's claim over against SMRL."

247. We do not understand the relevance of SMRL's title to the car in this context, (and it is in any event, as discussed above, probably a bad point, of the judge's own making); nor is it understood how there could be no prejudice to SMRL when its joinder became the occasion for Fortis's (successful) application to bring third party proceedings against it when it would not otherwise have done so, at any rate in these proceedings, and probably would never have been permitted to do so. Nor is it understood why the joinder of SMRL to third party proceedings brought by Fortis was "fair and reasonable" and "for the same reasons", when the considerations were very different, and the judge had failed to grapple with the points raised before him by Mr Ticciati on behalf of SMRL and Mr Mann.

248. In judgment 2 these reasons were expanded and changed, and came through with only editorial changes into judgment 3, as follows:

> "244. *Joinder of SMRL.* During the trial, I ruled that SMRL could and should be joined as a third defendant. This was because:
>
> (1) All issues that were already in play in Mrs Brewer's proceedings against Mr Mann and Fortis were also raised in Mrs Brewer's proposed claim against SMRL and no additional reasons would arise if SMRL was joined into Mrs Brewer's claims;
>
> (2) There was no discernible prejudice to SMRL since its defence was the same as Mr Mann's defence which had already been fully prepared;
>
> (3) There was no discernible prejudice to Fortis who was already a party to the action and it could readily have joined SMRL as a third party to enable it to claim an indemnity from SMRL;
>
> (4) Throughout the dispute SMRL had been, and would continue to be, represented by the same legal team as was representing Mr Mann;
>
> (5) It had only become apparent at a late stage that SMRL did not own the car and had had no title to it when it sold the car to Mrs Brewer; and
>
> (6) It was proportionate to allow that course to be taken at such a late stage to avoid the real possibility of further proceedings having to be taken against SMRL by Fortis following the conclusion of the trial.
>
> 245. *Joinder of SMRL to the third proceedings.* For the same reasons as have resulted in SMRL being joined as a party, it is fair and reasonable that Fortis should be entitled to join SMRL as a third party and to plead a third party contribution or indemnity claim against it."

249. It will be observed that the reasons given in para 244 cross the boundaries between the consequences for Mr Mann/SMRL vis-a-vis both Mrs Brewer and Fortis. As to these reasons, Mr Ticciati submits that reason 2 omits the real prejudice to SMRL vis-à-vis Fortis; that reason 3 begs the question, since the matter at issue was the prejudice to SMRL, not to Fortis, but that even Fortis would have been (arguably) prejudiced if the decision had been *not* to allow it to claim over against SMRL (even if it had only itself to blame for that); that reason (5) was entirely irrelevant; and that reason (6)

again begged the question, since the issue was whether *Mrs Brewer* could join SMRL: as to that issue, as on the second day of trial when the judge first gave his reasons for allowing Mrs Brewer to join SMRL, he had completely omitted the background of Mrs Brewer's previous decision *not* to join SMRL. The judge had therefore effectively ignored the two main grounds on which Mr Ticciati had objected to SMRL's joinder: first, Mrs Brewer's deliberate tactical and strategic approach to the case, and secondly the prejudice of having to face a claim over from Fortis.

250. As for the reasons given in para 245, these remained incoherent, and perhaps all the more so now that the judge recognised that the third party claim had not even yet been formulated and pleaded.

251. Submissions to this effect were made to the judge by Mr Ticciati in his grounds of appeal and on 5 October 2010: and he also pointed out to the judge that, although the claim over by Fortis against SMRL had not yet been formulated, yet alone tried and adjudicated, the judge had already in his handed down judgment determined that SMRL *was* liable to Fortis. For the judge had determined that the description of the car in the SMRL sale to Fortis ("Bentley Motor Car") meant such a car "containing a 1930 Speed Six engine and a 1930 Speed Six chassis", and that that contract had been broken, and in coming to that conclusion had intruded Mr Mann's collateral warranty into the meaning and effect of the contracts of sale and of hire purchase (see the judge's "Principal findings" at judgment 3, para 202 (14) – (19)), and had done so without considering additional issues which arose between SMRL and Fortis (such as the description of the car in SMRL's invoice to Fortis, SMRL's conditions of contract, the absence of any collateral warranty to Fortis, and questions of damages). The judge said that if he had gone too far in expressing any liability as between SMRL and Fortis, that was a "procedural slip" (5 October 2010 transcript at 1474).

252. In the result, in judgment 4 the judge added a new para 246 as follows:

> "SMRL and Fortis have reached agreement that the third party proceedings should be stayed until after the conclusion of any appeal proceedings or any failure to reach agreement as to how the contribution proceedings should be determined in the light of this judgment. I have therefore stayed the third party proceedings and have not made any binding findings about the liability of SMRL to indemnify Fortis or contribute to its loss."

253. So the judge sought to undo the gravamen of Mr Ticciati's complaint that he had effectively resolved the third party claim before it had even been granted entry into the proceedings, by stating that he had not made "any binding findings" between those parties. However, unavoidably, in our judgment, much damage had been done to the fair disposal of any claim by Mrs Brewer against SMRL and any claim over by Fortis against SMRL by the judge's failure to grapple properly and fairly with the two, inherently interlinked, aspects of any application to implead SMRL for the first time at trial. Mrs Brewer's application to join SMRL, which was in any event a difficult one, given its procedural history as explained above, could not be decided without taking into account the submissions of potential prejudice arising out of the possibility of a third party claim between Fortis and SMRL. Although the judge said he was acting out of a concern to ensure that all matters were dealt with in one set of proceedings at one trial, he managed to bifurcate Mrs Brewer's claim and Fortis's potential third party proceedings, and to leave SMRL to the unresolved prejudice of third party proceedings, prejudice which he ought to have taken into account and resolved before he had even determined to allow any joinder of SMRL.

254. In response to these matters, Mr Downey, on behalf of Mrs Brewer, without debating, as he was not concerned to do, the difficulties and prejudice of the judge permitting Fortis to bring a third party claim against SMRL, submitted that there was nothing to complain about in allowing Mrs Brewer to join SMRL. Once that had been done, it was nothing to do with Mrs Brewer what Fortis did in those new circumstances. We reject those submissions. It was made plain to the judge that he could not decide the question of SMRL's joinder by Mrs Brewer without also dealing with Fortis's desire in such a case to bring a claim over against SMRL, and thus with the ensuing prejudice to SMRL. The matters were linked.

255. In sum, it is difficult to understand the judge's determination to allow Mrs Brewer to bring SMRL into the proceedings, while showing such lack of attention to resolving the inherent and potentially prejudicial consequences. We regret to find in these matters as well, when taken with everything else that we have had to discuss, an apparent lack of objectivity and fairness in the judge's conduct of the trial. In truth, SMRL could not be fairly joined without taking full account of the procedural history of the proceedings down to trial and of the potential consequences for Fortis and SMRL.

The outcome of Mr Mann's and SMRL's appeals

256. We conclude therefore that the judge's judgments and orders against Mr Mann and SMRL cannot stand, and, that there must, regretfully, be a re-trial.

257. It is difficult in these circumstances to see how Fortis's appeal could be dealt with other than, at the very least, by allowing it to the extent of requiring a re-trial as well. However, there are additional arguments raised by Fortis, to the effect that there is no possibility of any liability on its part, and that this court should say so without requiring it to participate in any re-trial.

Fortis: the structure of its appeal

258. In the first place, Fortis joined with Mr Mann and SMRL in their concern over the manner in which the judge dealt with the joinder of SMRL. Mr Brant had opposed its joinder, unless Fortis were permitted to bring a third party claim against it. Mr Brant accepted that the judge could not properly consider the fairness of permitting that without having the third party claim pleaded out. It could not be predicted what additional witnesses, such as the broker, Mr Hardiman, might be needed. Therefore, with the position of the third party claim in its inchoate state, Mrs Brewer should never have been permitted to join SMRL.

259. Secondly, Mr Brant submitted that there was no bailment by description and thus no implied term of correspondence with description. There was no bailment by description, because there was no reliance on the description of the car as a Bentley Speed Six. The language of the Fortis contract with Mrs Brewer was merely for the sake of identification, not description. For these purposes, the Fortis contract terms were relevant. As part of this submission, we also had to take account of the way in which Mr Ticciati had argued a similar point, which Mr Brant also prayed in aid, to the effect that any description of the car was a matter of opinion and therefore was not to be regarded as intended to become a term of the hire purchase contract: with the result again that there was no bailment by description.

260. Thirdly, the judge was wrong to find that the collateral warranty as to the car's engine relied upon by Mrs Brewer as against Mr Mann and SMRL was of any relevance to the hire purchase contract between Fortis and Mrs Brewer. Fortis was not privy to the conversation between Mrs Brewer and Mr Mann of 20 May 2007, and nothing then said by Mr Mann could prejudice Fortis. The judge was wrong to regard all the contracts as being in the same form or of the same effect.

261. Fourthly, even if the contract involved a description of the car as a "Bentley Speed Six", that went no wider than the car and did not involve any description of the car's engine as a Speed Six engine (or as being prepared to Speed Six specification) and was certainly no warranty as to performance.

262. Fifthly, even if there was an implied term of the contract which required correspondence with the description "1930 Bentley Speed Six", the car did comply with that description and there was no breach. In this connection, Mr Brant joined with Mr Ticciati in submitting that upon the expert evidence by which the judge should have been guided the car was entitled to be called a Speed Six car even with the engine it had in it.

263. Sixthly, Mr Brant joined with Mr Ticciati in submitting that, even if Mrs Brewer were entitled to say that there had been a breach of the implied term of correspondence with description, nevertheless, in circumstances where Mrs Brewer had repudiated her hire purchase contract, or had at any rate entitled Fortis to terminate the contract for non-payment of the instalments due under it, Mrs Brewer was not entitled to any damages. She put forward no claim for loss of value (even if such a claim could survive loss of her contract), and there was no other claim which survived the loss of her contract and/or the contract's exclusions.

264. Seventhly and in any event, any damages to which Mrs Brewer might otherwise have been entitled were to be reduced by reason of a discount to take account of the 14/15 months of enjoyment of the car which Mrs Brewer had experienced. This was also a submission made by Mr Ticciati.

265. Eighthly, Fortis was in any event entitled to recover its counterclaim of £61,224, a sum the quantum of which was not in dispute, by reason of Mrs Brewer's loss of the contract through termination of it by Fortis for her failure to keep up her monthly instalments.

266. In sum, Mr Brant submitted that his appeal should succeed in total, or at least in part, by reason of aspects of the case which stood apart from the matters upon which a re-trial might otherwise be required for all the reasons put forward by Mr Ticciati.

Joinder of SMRL and the third party claim against it

267. We agree, for the reasons which we have already discussed, that the question of SMRL's joinder to these proceedings, which has to go back into the melting-pot of a re-trial of Mrs Brewer's claims, equally affects Fortis, if, as a result of its appeal, there either has to be a re-trial of Mrs Brewer's claim against it, or any liability of it to Mrs Brewer survives which it wishes to pass on to SMRL. However, it does not affect the direct issues between Mrs Brewer and Fortis, which we discuss below.

Bailment by description

268. Section 9 of the Supply of Goods (Implied Terms) Act 1973 provides:

> "(1) Where under a hire-purchase agreement goods are bailed or (in Scotland) hired by description, there is an implied term that the goods will correspond with the description...
>
> (2) Goods shall not be prevented from being bailed or hired by description by reason only that, being exposed for sale, bailment or hire, they are selected by the person to whom they are bailed or hired."

269. Mr Brant submits that there was no bailment by description, because Mrs Brewer bought the car such as it was, without any reliance on any description. It was a sale of specific goods, and as between Fortis and Mrs Brewer, between whom, unlike the position between Mrs Brewer and Mr Mann or SMRL, there was no discussion as to the car, their contract's reference to the goods as "One Bentley Speed Six Car" had been put forward by Mr Hardiman (Mrs Brewer's agent) merely for the sake of identification. Mrs Brewer may have relied on Mr Mann and/or SMRL, but not upon Fortis. Fortis knew nothing about the car; it was a finance house not a dealer in vintage Bentleys. Mr Mann and SMRL were not Fortis's agents (this was an unregulated hire purchase transaction). In this connection Mr Brant relied upon Fortis's contract terms, even though the judge found them to be unfair and thus excluded by section 6(2) of the Unfair Contracts Terms Act 1977 and there was no appeal from that finding: because he could rely upon them not as an exclusion but as negativing reliance.

270. Thus Fortis's contract terms included the following:

> "*3. The Goods*
> The Customer agrees:
>
> 3.1 that it selected the type, quantity and manufacturer(s) and/or supplier(s) of the Goods and has not relied on the skill or judgment of the Owner in relation to the acquisition of the Goods...
>
> *5. Warranties and Exclusions*
> 5.1 In view of the terms of the Customer's declaration in the Schedule and Clauses 1.4, 1.5 and 3.1 and the fact that the goods have only been acquired by the Owner at the Customer's request to enable it to enter into this agreement with the Customer, the Customer agrees:-
>
> 5.1.1 That (apart from any of the following which have been expressly given by the Owner itself to the customer in writing) no condition, warranty, stipulation, or representation whatsoever of any kind has been given by the Owner...
>
> 5.1.2 That all implied conditions, warranties, stipulations and representations relating to the Goods, whether statutory or collateral hereto, at common law or otherwise and whether relating to their capacity, age, quality, description, state, condition or use, or to their satisfactory quality or suitability or fitness for a particular purpose are hereby excluded and extinguished..."

271. The "declaration" referred to in clause 5.1 was on the front page or face of the hire purchase contract form and read:

> "3. My attention has been drawn to clauses 5 and 6 overleaf which deal with the exclusion of certain conditions and warranties or, in Scotland, stipulations. To the extent necessary I have taken advice from an independent source as to the performance and condition of the Goods. I have considered the need to obtain remedies elsewhere and have obtained those I require. I agree that such exclusions are fair and reasonable, although nothing in this Agreement will affect any statutory rights I may have if I am a consumer."

272. In our judgment, if matters are considered purely in terms of reliance, which was the primary way in which Mr Brant put his case under this heading, we do not think that Fortis can avoid the conclusion that this was prima facie a bailment by description, so that, having failed to appeal against the judge's view of its terms as unfair, Fortis is unable to rely on them as negativing reliance by Mrs Brewer. Indeed, Mr Brant barely pressed that point of reliance on Fortis's terms. He rather relied on some citation of treatises and jurisprudence. However, subject to one important consideration, we do not consider that such citation assists him.

273. That one important consideration relates to the alternative way in which Mr Brant's point can be put, namely that, to the extent that the description of the car can be viewed as a matter of opinion, rather than as intended to become a term of the contract, then the proper inference to draw is that, irrespective of any reliance on the part of Mrs Brewer, there could be no bailment by description.

274. That point can, we think, be considered in the following way. An opinion, for instance as to the attribution of a painting to a particular artist, may plainly be relied on by a person, particularly a potential buyer, to whom that opinion is expressed, *but* the essence of an opinion is that, although if given negligently, and a fortiori if given dishonestly, it may give rise to a breach of *duty* owed to the buyer on which the buyer may sue, nevertheless it would not generally give rise to an expectation that it would become a *term* of any contract into which the buyer entered in reliance on it. For a discussion of the situation in which, for instance, an auction house may be liable in breach of duty for an opinion as to the description

of an antique, see the well-known case of the pair of Louis XV urns, *Thompson v. Christie Manson & Woods Ltd* [2005] EWCA Civ 555, [2005] PNLR 38. We will revert below to the issue of whether, correspondingly, the description of the car contained in the hire purchase contract is better regarded as an opinion rather than a warranty.

275. On the subject of reliance, however, Mr Brant referred us to *Benjamin's Sale of Goods*, 8th ed, at para 11-011 where a quote from Benjamin's *Sale of Personal Property* (1906) is cited, under the introduction "It is clear that sales other than by description are comparatively rare", thus:

> "It follows that the only sales not by description are sales of specific goods *as such*. Specific goods may be sold as such when they are sold without any description, express or implied; or where any statement made about them is not essential to their identity; or where, though the goods are described, the description is not relied upon, as where the buyer buys the goods such as they are."

276. However, although Fortis's terms may, if they had been valid, have had that effect, in their absence we think it is impossible to think that Mrs Brewer did not rely, at least in part, on the description of the "Goods" contained in her contract with Fortis, albeit that description was generated by her and the contract was in form an offer by her to Fortis to take the goods so described on hire purchase. Even so, Fortis knew that, in the run-up to their contract, the Customer had been attracted to the car by the salesmanship of an expert dealer, and that the description of the car in all probability derived from that dealer. Fortis knew who that dealer was, and itself entered into a contract with it. A 1930 Bentley car for £430,000 is not an apple plucked by a buyer off a tree. Thus in *Joseph Travers & Son Ltd v. Longel Ltd* (1948) 64 TLR 150, Sellers J had quoted from an earlier passage from Benjamin's treatise (see *Benjamin's Sale of Goods* at para 11-007) which read:

> "Sales by description may…be divided into sales (1) of unascertained or future goods, as being of a certain kind or class, or to which otherwise a 'description' in the contract is applied; (2) of specific goods, bought by the buyer in reliance, at least in part, upon the description given, or to be tacitly inferred from the circumstances, and which identifies the goods."

277. We would have thought that the second category there stated applies to this case: despite a submission that Mrs Brewer had relied from beginning to end on Mr Fenn's valuation and on nothing else, we think it inevitable that she relied at least in part on a description of the car as being a 1930 Bentley and a Speed Six model (which was the most famous of WO Bentley's productions). The fact that the description also identifies the goods therefore does not detract from a sale or bailment by description; and the reliance can be tacitly inferred from the circumstances.

278. Mr Brant also relied on *Harlingdon and Leinster Enterprises v. Christopher Hull Fine Art Limited* [1991] 1 QB 564 (CA). That concerned the sale of two paintings described as being by Gabriele Münter, which turned out to be forgeries. The trial judge found that the buyer plaintiff had not relied on the description of the paintings as being by the artist and so he held that it was not a sale by description. But that was a case where the buyer as well as the seller was an art dealer, the seller had said that he knew nothing about the paintings or the artist, the buyer relied entirely on his own judgment, and was found to have bought them such as they were (see at 570E/G and 575C). That is not this case and we conclude as such, irrespective of any disputed findings by the judge.

279. It was in that context that Nourse LJ said (at 574H):

> "For all practical purposes I would say that there cannot be a contract for the sale of goods by description where it is not within the reasonable contemplation of the parties that the buyer is relying on the description."

But here it would have been within the reasonable contemplation of all parties that Mrs Brewer was relying on a description of the car.

280. Slade LJ was possibly still more demanding of the "by description" test, when he said (at 583H/584B):

> "the fact that a description has been attributed to the goods, either during the course of the negotiations or even in the contract (if written) itself, does not necessarily and by itself

> render the contract one for "sale by description." If the court is to hold that a contract is "for the sale of goods by description," it must be able to impute to the parties (quite apart from section 13(1) of the Sale of Goods Act 1979) a common intention that it shall be a term of the contract that the goods will correspond with the description."

281. That was the test adopted by Buckley J in *Drake v. Thomas Agnew & Sons Ltd* [2002] EWHC 294 at [26], where again it was held that an attribution of a painting to an artist, in that case to Van Dyck, was not intended to be a term of the contract but was only an expression of opinion (so we are now getting closer to the question of opinion reserved for further consideration). That was a sale by a dealer to a collector, of a painting acquired by the dealer at auction for £30,000 and sold to the collector for £1.5 million. The collector had used the services of a professional agent to help him acquire the painting (albeit the agent's expertise was vastly outweighed by the dealer's). The dealer's brochure had described the painting as by Van Dyck, as did the invoice, and that was the firmly expressed belief of the dealer. However, the dealer had set out in its brochure a full account of the history and scholarship of the painting, including the contrary opinion of a distinguished Van Dyck scholar that the painting was not by Van Dyck himself but had been painted in his studio under his eye. Unfortunately, the agent, too keen to earn his commission, had misrepresented some of the information to his principal, the collector. However, Buckley J held that the buyer was bound by his agent's knowledge and that a fair reading of the brochure was that there was a contrary opinion by a distinguished scholar, and that there was only limited reliance by the agent. In the event, it was held that the sale was not a sale by description and that it was not intended to be a term of the contract that the painting was by Van Dyck. The case illustrates the subtlety with which such issues may have to be decided.

282. If Fortis's conditions were effective against Mrs Brewer, it could readily be said that one way of giving them force would be to conclude that there was no common intention that it should be a term of the contract that the goods would correspond with the description inserted into the contract. Indeed, that would not be surprising where such terms expressly purported to exclude the statutory conditions. However, we repeat, the judge has found such terms unfair and there is no appeal from that finding. We think that, in the absence of such exclusions, the natural inference of inserting the description of the car into the contract was prima facie for the purpose of making correspondence with that description a term of the contract – *unless* the proper view is that adopted by Buckley J in *Drake v. Agnew*, building on what Slade LJ said in the *Harlingdon*

case, namely that the description is better regarded as an expression of opinion recorded in, rather than as a promise made under, the contract.

283. In that connection, it is perhaps relevant, in looking into the *Harlingdon* case, to bear in mind the wise words of Nourse LJ about the relevance of specialised markets and of expert evidence as to such markets, for these observations may in due course also be relevant upon the question of what is meant by a Speed Six car. He said (at 577/8):

> "All this is a matter of common knowledge amongst dealers in the art market, and, I would expect, amongst all but the most inexperienced or naïve of collectors. It means that almost any attribution to a recognised artist, especially of a picture whose provenance is unknown, may be arguable. In sales by auction, where the seller does not know who the buyer will be, the completeness with which the artist's name is stated in the catalogue, e.g. "Peter Paul Rubens," "P.P. Rubens" or "Rubens" signifies in a descending scale the degree of confidence with which the attribution is made. Nowadays an auctioneer's conditions of sale usually, perhaps invariably, so declare and, further, that any description is an opinion only. But in sales by private treaty by one dealer to another there is no such practice. That would suggest that there the seller's attribution is not a matter of importance. Indeed, Mr. Evelyn Joll, who gave evidence at the trial as to the professional practices of art dealers, went further. The effect of his evidence was that neither of the conditions implied by sections 13(1) and 14(2) could apply by a sale by one dealer to another. He said that an art dealer's success depended on, and was judged by, his ability to exercise his own judgment. It was not customary for a dealer to rely in any way on the judgment or representations of the dealer from whom a picture was being purchased.
>
> Understandably enough, the judge was not satisfied on Mr. Joll's evidence that there was any usage or custom in the London art market which would exclude the application of the material provisions of the Act of 1979. But he did, I think, accept it as showing that many dealers habitually deal with each other on the principle caveat emptor. For my part, being confident that that principle would receive general acceptance amongst dealers, I would say that the astuteness of lawyers ought to be directed towards facilitating, rather than impeding, the efficient working of the market. The court ought to be exceedingly wary in giving a seller's attribution any contractual effect. To put it in lawyer's language, the potential arguability of almost any attribution, being part of the common experience of the

contracting parties, is part of the factual background against which the effect, if any, of an attribution must be judged."

284. Although Mrs Brewer was not a dealer (and see also Slade LJ at 586 on the difference between dealers and consumers), and the description of a vintage Bentley is not the same as the attribution of a painting to an artist, nevertheless these observations are still pertinent to our class of case. Mr Brewer had been a dealer in cars, albeit modern cars, and had been a vintage Bentley enthusiast for many years and was particularly knowledgeable about Speed Sixes (para 34 above), and he was arguably an important influence in the background, even in the foreground, of these transactions. The Brewers knew about *Hay*. Expert opinion was available to the judge as to how such cars were described, even if the judge thought that it was of no relevance to the questions of law he had to decide. There is an intrinsic difficulty about how to describe a car which has in its past been more or less dismantled and is then rebuilt, in part out of an original chassis, in part out of a process of cannibalisation, in part by the fitting on of a replica body, and so on. Such rebuilding is we suspect part and parcel of the survival of all but the rarest of such cars. We applaud the judge in expecting high standards of honesty (even if we fear we have had to criticise him in finding dishonesty where none was alleged). But it is not for the law to destroy a market by demanding some perfect correspondence or authenticity which, save possibly in the rarest and most price-demanding of cases, can no longer be achieved. The intrinsic difficulty of such cases is illustrated in the *Harlingdon* case itself by the fact that Stuart-Smith LJ there dissented. In any event, it is a given that the law requires (at least) honesty. What is in issue in this case is whether, where no allegation of dishonesty, or negligence, has been made at trial, Mrs Brewer can rely on a contractual promise.

285. The important consideration to which our observations so far are all subject, therefore, is this. If, which pending re-trial we cannot anticipate, Mr Mann were able to satisfy the court upon re-trial of the submission made by Mr Ticciati to this court, namely that what Mr Mann said to the Brewers would have been properly and objectively understood as a matter of opinion on the philosophical question of what constitutes a Bentley Speed Six, then it would be an open question whether Mrs Brewer could rely on the description, which she herself introduced into her contract with Fortis, as intended to be a term of the contract on which she relied. In this respect, however, so much depends on the nature of the knowledge which Mr or Mrs Brewer displayed to Mr Mann, and to a proper understanding of the full details of the conversation which the Brewers and Mr Mann had together on 20 May 2007. Plainly Mrs

Brewer could not rely on the description of the car in the Fortis hire purchase contract to complain, for instance, of the fact that the car had a replica body on it. Similarly, if Mr Mann had not said, as Mrs Brewer alleges he did, that the car had a Speed Six engine, but had rather said that it had an engine prepared to Speed Six specification, as he alleges, and if, objectively understood, that would have told the Brewers, or put them on notice, that the car did not have a Speed Six engine as distinct from an engine prepared to Speed Six specification, then, even if it were to be the case, which is in dispute, that the description of the car as a 1930 Bentley Speed Six would otherwise prima facie mean that the car also had to have a 1930 Speed Six engine in order to comply with that description, we do not think that Mrs Brewer could contend that she had an implied term in her contract to the effect that the car must, in order to correspond with its description, contain a 1930 Speed Six engine. Ultimately, therefore, the issue currently under discussion cannot, we think, be divorced from the nature of the information which Mrs Brewer obtained from Mr Mann, and the proper understanding of the expert evidence. Therefore, for the reasons which we have set out above relating to our concerns as to how the judge approached the evidence that he heard, we conclude that this issue cannot ultimately be decided save upon a re-trial.

What does a description of the car as a “1930 Bentley Speed Six car” cover? In particular, does it extend to the car’s engine?

286. Under this heading, we propose to deal with Mr Brant’s third and fourth submissions stated (at paras 260/261) above, namely that the judge was wrong to import into the hire purchase contract between Mrs Brewer and Fortis any collateral warranty given by Mr Mann as to the car’s engine, or any implicit warranty as to the engine whereby a reference to the car as a 1930 Speed Six involved a requirement that the engine be an original 1930 Speed Six engine. Mr Downey on the other hand submitted that the judge was right in both these conclusions. For these purposes we assume, differently from our conclusion under the previous heading whereby we suspended judgment pending re-trial, that the description “1930 Bentley Speed Six Car” was intended to be a term of the hire purchase contract and therefore involved an implied condition requiring correspondence with that description.

287. The current issue depends, as it seems to us, in part on legal analysis and in part on the expert evidence of Mr Sibson and Mr Fenn and other evidential indications of what it might mean in the present context to say that a car is a 1930 Speed Six.

288. The judge appears to have adopted three different or perhaps cumulative routes to his conclusion that the car's description required an original 1930 Speed Six engine. One was that he seems to have imported into the hire purchase agreement the collateral warranty which he found Mr Mann to have given at the meeting of 20 May 2007. A second was that he rejected the expert evidence as being irrelevant to the question – although he appears to have accepted that, if it were relevant, it would answer the question by saying that the description did *not* extend to the engine. A third was his view that the question about the extent of the description depends not so much on what the words in question mean, but rather on the different question as to what a completely accurate description of the car might require.

289. Thus elements of all three strands appear in this critical passage of judgment 4:

> "186. Thus, to take this case, the generic description "1930 Speed Six" was one which was capable of covering any car with an authentic Speed Six chassis whatever the provenance of its engine. In this case, the description was intended by the seller to describe a car which started life with a Speed Six [engine] but which had subsequently been provided with a replacement engine which had not started its life as a Speed Six engine. However, Mrs Brewer communicated to Mr Mann prior to the sale of the car that she wanted a car whose engine was a 1930 Speed Six engine that was directly associated with the Speed Six golden age and with W.O.'s racing, speed, engineering and mechanical skills. Mrs Brewer's evidence, which I have accepted, was that she made it clear to Mr Mann that she wanted a 1930 Speed Six engine for investment, historical and emotional reasons. It was therefore an integral part of the description that she relied on in entering into the deposit contract and hire purchase agreement that the car's engine was a Speed Six engine, albeit a replacement Speed Six engine, that had been installed into the car in 1930 by the Cricklewood works subsequent to its first delivery earlier that year and which had thereafter retained the essential features of that original engine despite a rebuilding of the car in 1979-1980 with the necessitous use of some new parts.
>
> 187. Given, Mrs Brewer's wishes that she had communicated to both Mr Mann and through him to SMRL, the warranty and the contract description that were provided by Mr Mann could only have been complied with if the engine was an original Speed Six. For SMRL or Fortis to avoid liability, the relevant contractual

description would have had to have referred expressly to the replacement engine actually in the car and would also have had to have described the physical changes that had occurred to that engine and its current performance capabilities by reference to a defined specification and the tests that had been carried out to prove those capabilities.

188. *Conclusion – sale by description.* Thus, the description for the purposes of the express and implied terms in the deposit contract and the hire purchase agreement is to be considered and mean: a "1930 Bentley Speed Six with a Speed Six engine". By necessary implication, that description in the context of these contracts was also stating that the car's chassis was 'a 1930 Speed Six chassis' and that the car had a continuous history. I have already found that the phrase had the same meaning as, or incorporated, the phrase warranted by Mr Mann, namely that the car's engine was a "Speed Six engine". There was a breach of the various implied terms that the car conformed to this description in that no part of the extended description was complied with. Since this judgment is not concerned with any breach by SMRL of the sale contract with Fortis, this finding does not extend to that breach."

290. In that passage the judge reasoned: (i) that without the background of Mrs Brewer's conversation with Mr Mann the ordinary words "1930 Speed Six" would *not* have required an engine of any particular provenance; but that (ii) Mrs Brewer had made clear to Mr Mann that she did require an original Speed Six engine; and (iii) therefore, that requirement entered into the meaning of those words ("1930 Speed Six") not only as between Mrs Brewer and Mr Mann, but by extension into the hire purchase contract; and (iv) that by necessary implication there was also a requirement "that the car had a continuous history"; so that, (v) by one means or another an "extended description" had to be complied with. Para 186 had in the main gone back to draft 2, para 187 was amended in judgment 4, and para 188 was new to judgment 4. Significantly, the first sentence of para 187 in its judgment 3 version (there para 158) had read: "The generic description of the car as a 'Speed Six car' was sufficient to describe either type of car", but that was deleted from the beginning of judgment 4's para 187.

291. Another passage in which the judge appears to have conflated Mr Mann's (alleged) collateral warranty as to the car's engine with the terms of the hire purchase contract are to be found in that part of his judgment where, following his analysis of "four separate but inter-related contracts" which begin with his deposit contract

(judgment 4, para 159), he turns to the question of contractual description (at paras 162ff) and says:

> "162. *The deposit contract between SMRL and Mrs Brewer*...
>
> 165. The description in the invoice issued to Mrs Brewer under the deposit contract was clearly intended to be subject to the contractual warranty made by Mr Mann. This warranty had the meaning and effect that the Bentley Motor Car in question was a Speed Six with a Speed Six engine. Therefore, the description contained in this deposit contract must be subject to, read together with and have the same meaning as that contractual warranty.
>
> 166. Thus, the description, in context, was intended to mean, and did mean, a "1930 Bentley Speed Six with a Speed Six engine".
>
> 167. *The contract of sale between SMRL and Fortis.* This described the car as a "Bentley Motor Car". This description was provided by Mr Mann and he and Mrs Brewer clearly intended this description to have the same meaning as the description in the related deposit contract entered into by SMRL with Mrs Brewer, given their close connection.
>
> 168. *The hire purchase agreement.* This was filled in by Mr Hardiman using the description of the car as a "1930 Bentley Speed Six Car" that had originated from Mr Mann's advertising material and contractual warranty and which he had been provided with by Mrs Brewer...All parties clearly intended that the same car was being described in all three related contracts...
>
> 171. *Conclusion – contractual description.* The description "Bentley Motor Car" in the deposit contract between SMRL and Mrs Brewer and "1930 Bentley Speed Six Car" in the hire purchase agreement between Fortis and Mrs Brewer are contractual descriptions which have the meaning: a "1930 Bentley Speed Six with a Speed Six engine"."

292. In our judgment, this strand of the judge's reasoning is impermissible. It is not possible to carry over into the hire purchase contract between Mrs Brewer and Fortis an oral warranty which emerges out of the conversation between Mr Mann and Mrs Brewer on 20 May 2007. Fortis was not privy to that conversation.

293. The second and third strands of the judge's reasoning are also addressed in the following extract from his judgment 4, which contains a lengthy passage as to the extent to which he both accepts but ultimately rejects, or rather side-steps, Mr Fenn's expert evidence:

> "175. *Discussion.* The only reason why Mr Mann persisted in describing the car as a 1930 Speed Six was because he, supported by Mr Fenn, insisted that once a chassis had been incorporated into the car with a Speed Six chassis number, any car thereafter that incorporated the same chassis number was to be regarded as a Speed Six car. Mr Fenn's support for Mr Mann's position was significantly eroded when he accepted in cross-examination that the car's description should have been a "Speed Six with a 1927 Standard engine modified to Speed Six specification". This approach to describing the car was said to have been confirmed by the fact that the DVLA had been prepared to re-register the car with its Speed Six registration number and the BDC and other European vintage car clubs would classify the car as a Speed Six car...
>
> 177. It is, of course, for the BDC, other vintage car clubs and the DVLA to decide how they will categorise a vintage car for their own particular purposes. Those descriptions or categorisations are not, however, definitive in relation to the meaning of a car's contractual description, particularly where the contract is subject to the Sale of Goods (Implied Terms) Act. Thus*, although Mr Fenn's repeated insistence that the car was a Speed Six might be correct if the description of the car is being considered purely from the standpoint of the BDC, it is wholly incorrect for the purposes of a contractual description* or for a bailment by description since the necessary contractual description must describe the car factually and accurately in a way that encapsulates the car that the seller is purporting to sell and the buyer has agreed to buy. As a result, a Speed Six's contractual description will usually need to be very different from and much more detailed than the generic description promoted by Mr Mann and Mr Fenn in reliance on the BDC method of categorising vintage Bentleys. [Emphasis added]
>
> 179. The BDC's limited definition of a Speed Six, or of any other vintage Bentley type, that was championed by Mr Fenn does not include any reference to the car's continuous history. This means, in the context of the vintage Bentley trade, an authentic documentary record of the car throughout its history since 1930. These documents should identify the registered owner of the car and its use throughout that history and should also identify and authenticate the parts introduced into the car since it left the Cricklewood works. I would add that the car's

continuous history also entails the production of a certified or authenticated test certificate or test results which proves that the car satisfies any stated and accepted applicable specification following any significant change to either its engine or chassis.

179. The BDC's limited definition without reference to continuous history clearly provides a satisfactory method of classifying a car as being a particular vintage Bentley type for BDC's purposes. These purposes are to define who may be a member of the BDC and which car may enter any particular race, competition or rally that it sponsors. The method of classification used by the BDC was not formally established in evidence but I am satisfied that the broad and somewhat rudimentary system of classification used by Mr Fenn with its reference to chassis number without any reference to continuous documentary history is used within the BDC and is workable for its limited purposes...

180. However, the BDC's method of describing a Speed Six is not a sufficient method of describing the Speed Six car type for contractual purposes o[r] for the purposes of a sale by bailment by description. This is because the Speed Six car type has a limited membership of no more than 181 cars but all, or the vast majority of those cars have now been substantially changed and are no longer capable of being accurately described for contractual purposes, without qualification and elaboration, as a 1930 Speed Six car.

181. All cars that started life as a Speed Six car are unique and are approximately eighty years old. Each surviving Speed Six has changed significantly over the years, some beyond recognition, from the car that left the Cricklewood works on first delivery. The Speed Six characteristics or qualities that any one potential buyer or Speed Six enthusiast are looking for in any one of these unique cars include some of the intangible features of the car: its performance during its active racing lifetime; its being the product of the design, engineering and mechanical skills of W.O. and his unique team of assistants in the vital production years between 1929 and 1930; its having been produced in the Cricklewood workshop; its current performing capability; its present standard of upkeep and appearance; its current value as an historic and unique vintage car and its future potential for keeping or increasing its current value as a collector's item in a changing and unpredictable market.

182. Thus it is a necessary, but not a sufficient, characteristic of a car that is described as a 1930 Speed Six that its original chassis number is to be found on part of its original chassis within the car."

294. This is an important passage. Paras 175 and 177 of it are new to judgment 4 and the balance of it goes back to judgment 2. It may be observed that Mr Fenn's evidence is in essence accepted, including his firm evidence that the car was, at any rate according to the BDC test, a Speed Six because it incorporated at least part of the chassis with its chassis number; but his evidence is side-stepped. Even so, Mr Ticciati, joined by Mr Brant, would submit that this passage, to the extent that it accepted Mr Fenn's evidence, omitted to observe and give credit for the fact that such evidence was effectively confirmed also by Mr Sibson where he agreed in cross-examination that the car, even with the engine it contained and such as he found it and the car to be, could still be described as a Speed Six (see at para 139 above). The judge's acceptance of Mr Fenn's evidence is also confirmed by the first sentence of his para 186 cited above.

295. The third strand of the judge's reasoning also needs emphasising. It is alluded to in a number of places in his judgment, for instance in his comment at judgment 4 para 38 that "Mr Fenn came close to accepting the gist of Mr Sibson's reasoning when admitting in cross-examination that the car's description should have included a reference to its reconstructed 1927 Standard engine" (an observation repeated in the judge's para 175 just cited above). It is emphasised in full flourish in the passage cited above. In our judgment, however, the judge is confusing two separate issues. One is what "Speed Six car" means and whether our car corresponded with that description. The other is how the car might best be described so as to avoid any argument as to whether such a description might be said to be inadequate, negligent or worse. The second issue raises a question which might arise in the context of a claim in misrepresentation, or for breach of a *Hedley Byrne* duty of care, or in fraud, or, where a contract is one of the utmost good faith, in non-disclosure. However, none of those matters are in question in this case, and least of all in the claim against Fortis. The first issue asks, more prosaically (however difficult such questions may be): "What is the description in question? Did the object correspond with it?" The second issue asks a normative question: "What is the defendant's duty? What should he have said or done? Did he say or do what he should have said or done?" The first issue does not ask a normative question, but raises a question of construction followed by a question of fact.

296. What is the judge saying in the extended passage just cited? On any view, his is an extremely demanding test for a car described as

a Bentley Speed Six. It may be doubted whether there are many, if any, surviving Speed Sixes which could successfully meet every aspect of this test: at any rate that would have been an interesting matter to put to Mr Fenn and Mr Sibson. There are aspects of the judge's test, indeed, which do not seem to go to description at all, but to quality. Still other aspects seem to go not to description, but to a means of evidencing performance. The important emphasis placed on a car's continuous history, required to be proved by "an authentic documentary record…throughout its history since 1930", reflects a theme which, as we have observed above, is repeatedly played throughout the judgment: but we are unable to acknowledge this requirement as coming within the concept of description of a car, however much such a record would be valuable evidence of provenance. However, in our judgment proof of provenance or of history has to be negotiated for: it does not come for free, and it is not inherent in an article's description. If a seller sells a Hepplewhite chair, and even if in context that means a chair from Hepplewhite's workrooms and not just a period chair in the style of Hepplewhite, he does not by that description promise anything further about the chair's history, provenance, or documentation over the last two centuries and more. As for the aesthetic and romantic aspects of ownership of a Bentley Speed Six, we are not sure these have a role to play in description: but again, if a buyer wants to negotiate for knowledge about "its performance during its active racing lifetime" (if any), then he must stipulate for it. Nothing of this seems to us to be inherent in the car's description. A Bentley Speed Six would, as it seems to us, be a Bentley Speed Six even if it had spent the whole of its life mouldering in a Maharajah's garage, and disintegrating there into dilapidation, before being rebuilt in the modern era from its disintegrated parts. Perhaps there is romance even in such a case, but it has nothing to do with description.

297. It is relevant in this context to bear in mind the judge's own findings about the state of Speed Sixes down the decades. He recorded (at judgment 4, para 48, in a passage going back to judgment 1, para 29) that:

> "W.O.'s vintage Bentleys are all collectors' items but the pride of place for any enthusiast of these Bentleys from the 1920s Cricklewood era inevitably goes to the Speed Sixes. So far as is known, none of the surviving Speed Sixes remain in the condition that they were in when they left the Cricklewood works given the racing and hard driving that many were subjected to and the relatively short life of the bodywork. Many would also have been adapted in the early years of their life to incorporate the ever-changing and improved specification of Speed Six parts. After 1931, most of the surviving Speed Sixes

were abandoned, mothballed and cannibalised such that, by 1939, a Speed Six had no calculable trade value."

298. In our judgment, each of the three strands in the judge's reasoning was in error. As for his first, it was not permissible for the judge to import into the hire purchase contract between Fortis and Mrs Brewer a separate warranty which may have been given by Mr Mann to Mrs Brewer as a result of a private conversation to which Fortis was not privy. It would seem therefore that without importing into the hire purchase contract between Mrs Brewer and Fortis the effect of the conversation between Mrs Brewer and Mr Mann, as controversially found by the judge, the judge would not have been in the position to conclude that Fortis's responsibilities under its contract with Mrs Brewer extended as far as the judge considered that they did.

299. Secondly, the judge was wrong to ignore and set aside the evidence of both Mr Fenn and Mr Sibson as to the common understanding of what is meant by a "Speed Six car". To adopt and adapt the reasoning of Nourse LJ in the *Harlingdon* case, that common understanding was part of the factual background against which the description of a Speed Six is to be judged. As we have observed above (at para 284), Mrs Brewer was not a dealer, nor was she a member of the BDC. However, her husband who advised her in the purchase was knowledgeable about Speed Sixes, and she knew about the BDC and, as her letter before action said (see at para 66 above), "she regarded the Bentley Drivers Club as being of the utmost good standing and importance". The evidence of Mr Fenn and Mr Sibson in this respect was supported also by the evidence of Mr Mann, but also by the evidence regarding the DVLA registration of the car, and by the fact that Mr James, and even Bonhams, described the car, knowing of its ramifications, as a 1930 Bentley Speed Six. None of them could have described the car in such a way if, in truth, its description as such necessitated that it contain a 1930 original Speed Six engine. The law will go amiss if it sets itself up against the understanding of the market in the way in which the judge thought himself obliged to do.

300. It might or would be different if the expression "1930 Speed Six car" had, as a matter of the necessity of language, to mean "containing a 1930 Speed Six engine". However, it seems to us that no such necessity exists. One might sell a "1990 Volvo", but there would, we suggest, be no requirement that it contain a 1990 Volvo engine. The engine might have been replaced in 2000 or 2010, and the replacement engine might differ somewhat from the original,

without there being a misdescription. It might again be different if a car were described by its engine size, as in a "Herald 1200", where a replacement engine might be of a smaller version. In such a case, there might be a failure to correspond with description. However, as has famously been said, context is everything.

301. And thirdly, the judge was wrong to address the issue of description through the lens of the question of what duty might require a seller to disclose, as explained above.

302. It seems to us that in this connection, and elsewhere in his judgment, the judge has perhaps been over-influenced by *Hubbard v. Middlebridge Scimitar Limited*, (unreported, 27 July 1990, Otton J), the case of the famous Bentley known as "Old Number One", which the judge attached to his judgment as Appendix 1. The judge referred to it first in his judgment 1 (at paras 25/26), in an essentially historical context. In judgment 2, he annexed the report of *Hubbard* to his judgment (see at para 41), because it was unreported and unavailable on the internet (footnote 4). His reference to *Hubbard* has come down to judgment 4, paras 44/45, in more or less unchanged form. It is not apparent from its citation that it was of legal, as distinct from historical, significance to the judge: but it is hard to get away from the feeling that it has influenced him, particularly in the context of a continuous documentary record. The judge concluded his reference to the case by saying:

> "Without that continuous history, the buyer would have succeeded in resisting specific performance or in rejecting this car and rescinding the contract since the authenticity and verification of the car as "Old Number One" would not have been possible."

303. The point about *Hubbard*, however, was that that case involved the sale of the most celebrated of all Speed Sixes, which has always been known as Old Number One. It was only the second of all Speed Sixes to be built and it was extraordinarily successful in racing during the 1929 and 1930 and subsequent seasons. In 1990 it was sold for £10 million (we emphasise the price) as "Old Number One" itself. Thus the case was argued on the basis that the car had to be that very car. The buyer subsequently resiled from the purchase because he suspected its authenticity, but Otton J held that its authenticity had been proved (rather like the proverbial grandfather's axe) in that it had never completely lost its identity. It

was not the "original" Old Number One (because it was not composed of the same parts). It was not the "genuine" Old Number One, for it had changed its character. However, it had never disappeared into limbo or from view, had never died or been abandoned or cannibalised, and therefore was not a "resurrection" or "reconstruction". Its identity was proved with the help of its logbook and service records at any rate down to 1939; and successive owners could be identified. It had been rebuilt a number of times. The case was decided very much on the basis of expert views as to how to consider such matters. Otton J concluded that "There is no other Bentley either extinct or extant which could legitimately lay claim to the title of Old Number One or its reputation. It was this history and reputation, as well as the metal, which was for sale…". In our judgment the decision in *Hubbard* is of very little assistance to us. However, we note that both its chassis had been modified (although its chassis number survived) and its engine had been completely substituted (from a 6½ litre to a 8½ litre engine). One important witness "knew it by the chassis number which, as he told me, is the true identity of any car". The judge said that "the expert evidence is all one way". Mr Hay was one of the witnesses. The car had passed through the hands of Mr Mann, who had sold it to the seller, who had himself rebuilt it. Mr Mann was described as "a celebrated vintage car dealer".

304. In sum, we conclude that on any view, and whatever be the outcome of any re-trial of Mrs Brewer's case against Mr Mann, the description of the car in the hire purchase contract with Fortis did not require a 1930 Speed Six engine; and that it would suffice if, in accordance with Mr Fenn's evidence, the car's chassis with its chassis number was incorporated in the car. However, we would also observe that, if we were wrong in that conclusion, it would not automatically follow that Mrs Brewer could hold it against Fortis that the engine in the car was what it was. That would depend on the outcome of a re-trial. For if Mr Mann were to succeed on such a re-trial, so that it was accepted that he did tell Mrs Brewer that the engine was "prepared to Speed Six specification", and that that signified that the engine was not an original Speed Six engine, then we doubt that Mrs Brewer could complain to Fortis that the engine was not an original Speed Six: just as she could not complain that the bodywork was not original.

305. We would also hold that in any event the judge's extremely rigorous and extended test of what was required of a car described as a 1930 Speed Six, and his insistence on a continuous and documentary history, were erroneous.

Was there a breach of the description "1930 Speed Six Car"?

306. For these purposes, we assume that the description of the car was not properly to be regarded as a matter of opinion but had become a term of the hire purchase contract, but that the meaning of that term is as we have concluded it to be in the preceding section of this judgment. On that basis, was there a breach of the implied condition requiring correspondence with description?

307. In our judgment, the answer to this question has been effectively answered above. Once the judge's extended description and requirements for the contract are stripped away, as in our judgment they must be, the evidence, which lies essentially in the hands of the two experts, is that the car complied with its description as a "1930 Bentley Speed Six". We are not concerned with its engine (or with whether any complaint could in certain circumstances be mounted as to whether a car with the "wrong" engine failed to comply with an implied term as to satisfactory quality). Nevertheless Mr Sibson said that only the front part of the chassis (with its chassis number) was original, and the judge accepted that evidence. The judge's view on that question must, for the reasons given above, fall as part of the need for a re-trial. However, solely for present purposes we assume that his finding survives. Even so, we conclude that on the expert evidence of both experts, the car corresponded with its description. Mr Fenn was clearly of that opinion, and the judge was prepared to accept that, adopting Mr Fenn's, BDC orientated, stance, the car could be called a 1930 Speed Six. But Mr Sibson, for all his criticisms of the car, ultimately acknowledged a similar conclusion. As he was asked and answered (see para 139 above):

> "Q. Taking the evidence in its totality, you accept that it is perfectly acceptable to call this car a 1930 Bentley Speed Six, because it has got the...
>
> A.That's true, it is a 1930 Speed Six, with reservations over the engine..."

308. On the basis on which we ask the current question, we conclude therefore that in any event Mrs Brewer has no claim against Fortis, and it follows that the Fortis appeal must be allowed in full, irrespective of re-trial. The next section of our judgment assumes, however, that a breach has been established against Fortis, and

goes on to ask what damages Mrs Brewer would have been entitled to.

If there was a breach of the implied term alleged, what, if any, damages would Mrs Brewer be entitled to?

309. Mr Brant submitted that in circumstances where Mrs Brewer had not kept up her payments under her contract with Fortis, and had suffered the termination of that contract by Fortis under its terms, she could claim at most only nominal damages. Ex hypothesi, there was no claim for loss of value, and no claim to reject or rescind. For the same reason there could be no claim for repudiation damages. The judge had therefore been wrong to award Mrs Brewer her full claim of £94,555, made up of her deposit of £35,000 and instalments paid under the contract. In any event, even if Mrs Brewer were entitled to more than nominal damages, she had to give credit for the value of the enjoyment of the car for the period it was in her possession, some 14/15 months.

310. In this connection, Mr Ticciati made similar submissions as to any damages claim by reference to the collateral warranty relating to the engine alleged against Mr Mann and/or SMRL. Since in their case the only possible breach could relate to the engine, and not the car, and since there was no claim for loss of value, the only effective breach was, he submitted, the entirely nominal one that the engine had started life as a Standard 6½ litre engine rather than a Speed Six engine. Indeed, unless the modified engine failed to match the specification of a Speed Six engine (which, it will be recalled, was said to have been neither pleaded nor proved) Mrs Brewer's complaint came down to one about the absence of a stamp of an original Speed Six number mark on the engine. In the absence of any claim based on value, that was an essentially trivial claim which could sound at most in nominal damages. In any event, Mr Ticciati relied on doctrines of causation and remoteness to submit that Mrs Brewer's damages claim by reference to what she had paid out to Fortis could not have been anticipated. It could not have been anticipated that she would have lost her contract and the car by her own deliberate decision to stop payments under the Fortis contract. Finally, Mr Ticciati also advanced the submission that at very least Mrs Brewer's claim must give credit for the enjoyment of the car while in her possession.

311. Mr Downey on the other hand submitted that Mrs Brewer was entitled to what he called reliance damages as awarded in *Yeoman Credit Ltd v. Odgers* [1962] 1 WLR 215 (CA) and *Charterhouse Credit Co Ltd v. Tolly* [1963] 2 QB 683 (CA). Although Mrs Brewer had not accepted Fortis's repudiation, she would have been entitled to do so, and thus came within those authorities. As for damages under the collateral warranty, those were of a similar nature, for, but for the warranty, she would never have entered into the hire purchase contract with Fortis. As for the alleged credit for use of the car, Mr Downey submitted that Mrs Brewer should not have to give any credit for the hire of an asset which she did not want and which she would never have hired if she had known the truth. Mrs Brewer had had nothing save for some intangible enjoyment which it was impossible and therefore improper for the law to value.

312. The judge found that Mrs Brewer was entitled to recover her full claim from either Fortis, or Mr Mann and/or SMRL. He dealt with the claim against Mr Mann and SMRL in judgment 4 at paras 217/219, and against Fortis at para 225. He relied on *Yeoman Credit v. Odgers* for both conclusions. He had previously found (at paras 210/216) that Mrs Brewer had retained the right to reject the car at the time when Fortis terminated their contract, even if her claim was not based on such a right but was limited to damages for breach of the statutory implied term. Thus he said:

> "215. Moreover, the submission that Brewer had lost the right to reject is irrelevant to her current claim. This is because she is claiming damages from Fortis and is not claiming the right to reject the car nor to rescind the agreement. This is because Fortis retook the car and Mr Mann and SMRL then agreed with Fortis that SMRL would repurchase it from Fortis and have now done so. In consequence, Mrs Brewer is confining her claim to one for damages for breach of warranty and of the implied term..."

He held that the moneys paid out by Mrs Brewer under her contract with Fortis were recoverable from Mr Mann and SMRL under the first rule of *Hadley v. Baxendale*, as well as under *Yeoman Credit v. Odgers*; and that she was entitled to recover the same from Fortis "since she was entitled to rescind the contract and such payments are recoverable as reliance damages in accordance with the principle identified in *Yeoman Credit Ltd*" (at para 225).

313. We confess to finding the judge's reasoning regarding Mrs Brewer's "right to rescind" most obscure; and we do not see how *Yeoman*

Credit v. Odgers assists Mrs Brewer in respect of either claim. In *Odgers* the dealer warranted that the car was “in perfect condition”, and the customer, in reliance on that collateral warranty, entered into a hire purchase agreement with the finance house. The car was in fact incurably unroadworthy, and the customer only drove 100 miles in it before losing all confidence in it (not unnaturally, since the brakes had failed and the car had crushed a perambulator). He therefore refused to pay any more instalments and asked the finance house to take the car back. He had in truth accepted its repudiation of their agreement. Unfortunately, he was persuaded by the finance house that it was all the same (under the contract) whether the customer returned it or if it repossessed the car under its clause 8, which entitled it to outstanding instalments and damages as though the *customer* had repudiated the agreement. At trial, the finance house was awarded its claim but the customer recovered all his loss against the dealer. No issue arose in that case as to whether the 100 miles unsafely driven in the unroadworthy car should constitute some discount. The finance house, having recovered its claim, drops out of the story; but the dealer appealed, submitting that the damages against him should be reduced because (a) the true measure of the customer’s loss was to be found only in the reduced value of the car; and (b) that the way in which the finance house had taken advantage of the contractual situation was not to be held against him. Therefore, *Odgers* has absolutely nothing to say about damages against a finance house: the finance house itself recovered damages. Nor can we find the concept of reliance damages discussed in the case.

314. As for the dealer’s two submissions, the first was rejected and the second brushed aside. It seems to us that in essence they were submissions about the customer’s failure to mitigate and/or causation. The court was of course entitled to say that a difference in value claim is not the only way in which a customer may suffer loss in such a situation. And the ultimate issue was whether the larger loss that he had suffered because the finance house had successfully bamboozled him about the consequences of the situation was to be at his risk or at the dealer’s. Not surprisingly this court held that it was to be at the dealer’s risk. Holroyd Pearce LJ said (in a passage cited by the judge at judgment 4, para 219) at 222:

> “Here we are not dealing with a breach of warranty on a sale where the purchaser can sell an unsuitable article at its diminished value and where, therefore, he is adequately compensated if he receives as damages the diminution in value. In the present case the hire-purchase agreement was the purpose and the product of the warranty. To assess the damage, one has to consider the difference between the

defendant's position if he had entered into such an agreement in respect of a car as warranted and his position when he has entered into it in respect of a persistently and, as it seems, incurably unroadworthy car. The difficulty with regard to the return or retaking of the car was clearly foreseeable and the loss under the agreement was loss directly and naturally resulting from the breach of warranty. That loss includes the wasted instalments and the amounts payable under clause 8. Therefore the judge was entitled to hold as he did."

315. It seems to us that *Odgers* is of no assistance on the facts of our case, whether for the purposes of considering the claim here against Mr Mann, or a fortiori for the purposes of Mrs Brewer's claim against Fortis.

316. Before coming to *Charterhouse Credit v. Tolly*, we would mention *Yeoman Credit v. Apps* [1962] 2 QB 508 (CA). That involved the hire purchase of a second-hand Ford. The car as delivered was unusable, unroadworthy and unsafe and required the spending of some £100 to put it into reasonable condition. The customer complained but paid the first three instalments, then stopped, and the finance house terminated the agreement. The customer was sued, but counterclaimed for £170, the sums paid under the agreement, as money paid on a total failure of consideration. The court held that the customer would have been entitled to accept a repudiation of the agreement, and that had he done so there would have been a total failure of consideration and he could have recovered everything he had paid under the agreement. As it was, however, he had kept the car and could recover only the cost, £100, of putting the car into a roadworthy condition, less the August instalment which had fallen due before the termination. In other words, *Yeoman Credit v. Apps* is not authority for the recovery of the whole of the money expended under a hiring contract, on the contrary, it is against such recovery. The award was to restore the car to the condition to which the customer had been entitled to have it put: the claim that succeeded was only a value claim or its equivalent. In that case, however, the car could be made roadworthy.

317. *Charterhouse Credit v. Tolly* was another case where a customer had hired an unroadworthy car and had failed to pay the instalments, and the finance house had terminated the contract. The customer had used the car only twice. The trial judge had awarded the customer the estimated costs of repairs, £81, as in *Yeoman Credit v. Apps*. This court, however, held that that was not

the correct measure of damages, but that the customer should recover what he had paid (or was required to pay up to termination) in respect of the hiring, less a discount of £5 in respect of the two trips he had made in the car (a total of some £132). *Yeoman Credit v. Apps* caused some difficulty, but, as both counsel were agreed that the trial judge's award of damages was wrong (and thus that *Yeoman Credit v. Apps* should not be followed, but was *per incuriam*), the judges in this court were able to conclude that, although it was not *per incuriam*, it "ought not to be regarded as laying down any general principle" (*per* Donovan LJ at 707) or "I cannot find any principle of law laid down in that conclusion" (*per* Upjohn LJ at 712) or "decided cases are only authority for the principles of law they decide" (*per* Ormerod LJ at 717).

318. The logic of the award in *Charterhouse Credit v. Tolly* was, for Donovan LJ, that a hire purchase contract was different from both a sale and a straightforward hiring contract: because the cost of the ultimate option to purchase the car at the end of the hiring for the nominal amount of £1 was built into the transaction. If a defective car was the subject of a straightforward sale, the loss was the difference in value of the car as it ought to have been and as it was, which may be represented by the cost of repairs. If a defective car was simply hired, the loss was prima facie the cost of hiring, for that was all the hirer was supposed to be getting. But under a hire purchase contract, the hirer was also buying the option to purchase the car: therefore what the hirer lost by being provided with a totally defective car was not only the cost of hiring a similar car (for which the finance house contended) but the "cost of hiring a similar car on similar terms as to the eventual option to purchase for £1" (at 706): for which purpose the cost under the contract which was the subject matter of the litigation could stand as an adopted exemplar. However, that was on the basis that "For this outlay…he has received nothing, owing to the company's breach of contract, except the two rides to Greenwich" (*ibid*, *per* Donovan LJ). For those rides, the customer had to give credit for £5 (see 711, 713 and 717). It would seem therefore that, for Donovan LJ, the finance house in breach must repay by way of damages that element of the hire which represents the cost of the option (ignoring the fact that the reason why the customer has lost the value of that option is his own fault in not maintaining his payments).

319. Upjohn LJ, however, had a different rationale. He said (at 710/711):

> "What, then, is the measure of damages which the hirer has suffered in this case? He has contracted to hire, in the event

> which has happened, a motor-car for three months. *He cannot complain, I think, that he no longer has the option to purchase it, because it was his own breach of the contract which entitled the finance company to determine the hiring.* But having had the motor-car for three months, he has had practically no use from it. My Lord has assessed the use he has had at £5, which I regard as a figure on the high side, but from which I will not dissent…
>
> …On the other hand, it is perfectly true, of course, that the hire-purchase rent contains a very substantial element represented by the option to purchase at the end of the hiring for the sum of £1 (*for the loss of which right, for the reasons I have given, the hirer cannot complain*), and, in a sense, the monthly rental does not measure the value of the hire per month. But the assessment of damages has never been an exact science; it is essentially practical, and a contracting party who has wholly failed to deliver that which he has contracted to lend cannot complain if the court takes a somewhat severe view of his failure to implement his promise and makes the punishment fit the crime. This case, in my judgment, will lay down no principle of law in the assessment of damages, though it may form a useful guide in similar cases. But for the fact that the car moved briefly and sporadically during the hire the hirer could have reclaimed the money he has paid as on a total failure of consideration. What is the practical answer?" [Emphasis added]

And at 713, he said: "His measure of damages is his loss on the transaction, and taking a robust view of that loss, I would call it the sum of £132 4s 0d already mentioned."

320. Ormerod LJ agreed in the result, but expressed no rationale of his own (at 717).

321. Thus this court awarded damages, not it seems to me on any principle of reliance, but having very much in mind that the defects in the car were so serious that, with the exception of the two rides, the hirer had derived no benefit at all from his contract. Donovan LJ had stressed the rationale that, by analogy with both simple sale and simple hire, the prima facie damages in such a case ought to be what it would cost to get elsewhere what had been promised. Upjohn LJ had disagreed with the view that that principle could be applied in a situation where the premium cost (above that of hiring) of the option to purchase had been lost, not by reason of the breach by the finance house but by reason of the hirer's own non-payment entitling the finance-house to terminate the contract.

However, he was prepared to reach the same financial conclusion as Donovan LJ on the basis that the hirer had derived next to no benefit from his contract, and that a robust and severe penalty (making "the punishment fit the crime") would do justice even if such an assessment was practical rather than principled.

322. That is clear authority at least for the proposition that a customer in the position of Mrs Brewer must give credit for use to which even a defective car is put. The present is plainly an a fortiori case for the application of that principle.

323. What is not clear is how the differing rationales of Donovan LJ and Upjohn LJ would apply to the situation in the present case, where the car is not wholly defective, but there is, let us assume, a breach of collateral warranty or a breach of the implied statutory condition. Because the car was wholly unlike the cars in *Odgers*, *Apps*, and *Tolly* in that our car was in good condition and capable of giving the Brewers 14 or so months of highly pleasurable motoring (that much is clear on the Brewers' witness statements), during which they (or rather Mr Brewer) drove the car for something like 2900 miles, which Mr Mann said in evidence was the equivalent for a modern car of some 40,000 miles, it is not at all clear to us that the *Charterhouse Credit v. Tolly* solution is appropriate here. After all, Upjohn LJ articulated the thought, which seems to us to be correct, that, although a hire-purchase contract contains an important element built into the price of its hiring for the option to purchase at the end of the hiring, the hirer cannot complain of the loss of that element in circumstances where, as in our case, the contract is lost due to the hirer's own failure to keep up payments under his contract. It seems to us therefore to be entirely feasible that Mrs Brewer has lost nothing. She has had full use of a fine car which has given her and her husband nothing but pleasure, until the Bonhams valuation which only arose because Mrs Brewer had decided to sell the car, and she has lost nothing of value in terms of the car, which was worth every penny which she agreed to spend on it. It is true that she has lost, on the present hypothesis, the chance which she thought she had, of acquiring a Bentley Speed Six, or a car with a warranted Bentley Speed Six engine, which for personal reasons of her own she prized even more highly, for sentimental or aesthetic rather than financial reasons, than the car which she hired for the period of the hire purchase contract. However, how is that loss to be assessed? We have had no submissions from Mr Downey on that subject other than a reliance on *Yeoman Credit v. Odgers* and *Charterhouse Credit v. Tolly* together with the submission that, despite the latter, no credit need be given for the use enjoyed. Even that sentimental or aesthetic feeling was disappointed only at the very end of the time of possession of the car, when Mrs Brewer

had in any event decided to sell the car. As for any investment value bound up with the correct configuration of car and/or engine, there is, as we have remarked before, no claim.

324. Nor is it clear to us that the damages for breach of any collateral warranty given by Mr Mann and/or SMRL must be on the tortious basis that, but for the warranty, Mrs Brewer would never have entered into the transaction with Fortis. Normally, the basis of damages in contract is for the difference between the claimant's position on the basis that the warranty in question is fulfilled and the position faced in the light of breach. Mrs Brewer's claim is not for negligent misstatement or in misrepresentation: and even if it were, *South Australia Asset Management Corporation v. York Montague Ltd (SAAMCO)* [1997] AC 191 is a modern warning that there are no automatic damages for all the consequences of such misstatements (while damages under the Misrepresentation Act presents its own peculiarities). In any event, if, on the rationale of Upjohn LJ, not even the finance house is prima facie liable for the loss of the purchase option element in the hiring price in circumstances where the customer is himself responsible for the loss of the hiring contract, it would seem to be an a fortiori position that the dealer who gives a warranty to the hirer, and is at one remove from the hire purchase contract, should not be liable for that element either.

325. It is however clear to us, and we so hold, that any damages to which Mrs Brewer might be entitled against any of the three defendants must be subject to the requirement to give credit, in the sum which we assess at £45,000, for the use to which she put her car during the period of the hire purchase contract and until its repossession.

326. One way of quantifying the amount of this credit is to consider that for some 14 months Mrs Brewer had the use of £390,000 finance for which she had been willing to pay what we would regard as a market driven rate which has been calculated to be at 8.59%. That would provide a sum of approximately £39,000. Another way of looking at the matter is to suppose that it would have cost many hundreds of pounds a day, perhaps as much as £800 a day to hire a valuable car of this nature (although such a rate would almost certainly fall for a lengthy hiring period of 14 months). In such circumstances, it was submitted on behalf of both Mr Mann/SMRL and Fortis that a rate of £100 a day would be on any view an appropriate amount for which Mrs Brewer could properly be required to give credit. She possessed the car from 7 June 2007 to 7

August 2008 under the contract, and retained the car despite the termination of the contract until 3 September 2008. That is 428 days under the contract and a further 28 days after its termination. We consider that Mrs Brewer ought to give credit for £45,000, and that no complaint could be made of such an assessment. That is not raised as a matter of counterclaim, but as an element in the assessment of her own damages.

327. In sum, Mr Downey claims “reliance” damages, on the basis that but for the promises about car and/or engine, there would have been no transaction. He does so even though the cases relied on for that submission do not, as it seems to us, support that rationale in a case such as ours; and even though those cases are concerned with cars which were so defective that they provided no value (or next to no value) to the hirer in circumstances, however, where the hirer could not claim a total absence of consideration. In these circumstances, and given the uncertainty, pending re-trial, of what Mr Mann told Mrs Brewer and therefore of the background of Mrs Brewer’s hire purchase of the car from Fortis, we are not minded to go any further into the question of what damages might have been available to Mrs Brewer on any of a number of possible alternative hypotheses.

328. What is, however, clear is that if Mrs Brewer had been entitled to any damages from Fortis, or were to be entitled to any damages from Mr Mann/SMRL, she would have to give credit against such damages for £45,000.

Fortis’s counterclaim

329. Is Fortis entitled to recover its counterclaim of £61,224 under the termination provisions of its contract with Mrs Brewer? The judge held that it was not: see judgment 4 at paras 221-224 (a passage very heavily re-written in comparison with judgment 3’s paras 192-194). He set out the relevant provisions of the Fortis contract (clauses 8 and 9) which provided that non-payment of any instalment by the hirer was a breach of a fundamental condition and repudiation of the agreement entitling Fortis to terminate, and that upon such termination by Fortis the hirer would have to pay both any arrears due and, without prejudice to the right to any damages, (i) any demand made (provided it was made) by Fortis in an amount certified by Fortis “equal to the loss or costs sustained by [Fortis] in breaking fixed deposits or for re-employing funds” and (ii) “as

agreed compensation for [Fortis's] loss of profit, the total of all Payments (exclusive of VAT) which would have been payable during the unexpired period of this agreement, discounted at three per cent per annum...".

330. The judge then dismissed the Fortis counterclaim by a blanket acceptance of Mrs Brewer's submissions about it, thus:

> "223. Mrs Brewer's response, which I accept and apply, successfully refutes Fortis's counterclaim on the following five [*sc* six] cumulative grounds:
>
> (1) She has no outstanding liability to pay the outstanding hire charges because Fortis did not terminate for non-payment of hire but instead terminated in an attempt to pre-empt Mrs Brewer's intimated claim to rescind the agreement and to reject the car.
>
> (2) Further, Mrs Brewer may recover any recovery by Fortis of all its claims and of all payments it has received from Mrs Brewer, whether these for unpaid amounts or for charges or for damages. Mrs Brewer's recovery is for damages flowing from Fortis's misdescription so that Fortis's claim fails either because it is eliminated by Mrs Brewer's cross-claim or by defence open to Mrs Brewer of circuity of action.
>
> (3) Fortis did not purport to terminate the agreement on the ground that Mrs Brewer had repudiated it as a result of her non-payment and has not claimed damages based on her repudiation. This is because Fortis did not purport to rely on clause 8 or to refer to it in its termination notice when terminating the agreement and reliance on clause 8 cannot be inferred or presumed.
>
> (4) Mrs Brewer did not, in any event, repudiate the agreement.
>
> (5) Fortis's claim is based on an entitlement to claim sums pursuant to clause 9.4 of the contract but no demand or correctly formulated demand has ever been made for payment under that clause and a demand, or if made a correctly formulated written demand for payment, is a condition precedent to such payment. It is clear from the wording of that clause that a demand in writing is a condition precedent to claiming payment under that clause.
>
> (6) If, contrary to this finding, a written demand was made, it was not one that complied with the requirements of that clause. It is not sufficient for a mere demand for payment to have been

made, the necessary demand must be for a precise sum calculated in accordance with clause 9.4 of the agreement. The clause makes it clear that the demand must be a demand for "the following payment", that is a demand which identifies the sum, or sums, that are being claimed under each of the three heads specified in clause 9.4. Fortis have not pleaded that such a demand, or any demand, was made and no such demand was proved to have been made."

331. Mr Brant however submits that the judge had gone fundamentally astray on this issue. He points out that the quantum of the counterclaim was agreed. The evidence for it was contained in the second witness statement of Mr Mark Samson, Fortis's broker manager. That statement was agreed and Mr Samson was not required to attend trial. The statement was based on Fortis's original claim, post termination, then gave credit for the £425,000 received from SMRL, and ended by adding the costs of the abortive entry of the car into auction, which were £25,895. Fortis had made the required demand under clause 9.4 of the contract, which was not required to be in any form (see for instance the Fortis statement included with its solicitors' letter to Mrs Brewer's solicitors dated 15 October 2008, as further explained in Fortis's solicitors' letter dated 20 October 2008 with its specific reference to clause 9.4.2 of the contract). He also points out that there was no pleaded defence by reference to the lack of any contractual demand, and that the point was only raised out of the blue at trial (after agreement between the parties as to the amount of the counterclaim had been arrived at).

332. On behalf of Mrs Brewer, however, Mr Downey submits that the judge was right for the reasons which he gave in his judgment. He said that agreement on the quantum of the agreement was subject to liability, which was always denied.

333. In our judgment there is no answer to Fortis's counterclaim. We have already held that Fortis was not in breach of its contract with Mrs Brewer. Mrs Brewer on the other hand was in breach of the payment provisions of her contract. Whether or not she was at common law in repudiation of her contract, the contract's terms are clear (and understandable) that failure to pay the contract instalments is to be treated as a repudiation and permits termination, with the contractually agreed consequences. Although Mrs Brewer had pleaded that she had orally rescinded the contract before Fortis had terminated it, there was no attempt at trial, so far as we have been shown, to support that plea (nor Mrs Brewer's

allegation in correspondence that Fortis had agreed a moratorium), and on this appeal Mr Downey has not made any submission in connection with it. Therefore it must be taken to be established that Fortis terminated the contract for Mrs Brewer's repudiatory breach, and it is irrelevant with what motive it did so. It is in fact entirely understandable that a finance house should terminate its contract in the face of non-payment first explained as being due to cash flow difficulties and then sought to be supported by an allegation of breach. The judge's terse statements that Fortis did not terminate for non-payment of hire (when that it was precisely what Fortis's letter of termination stated that it was doing, citing clause 8.2.1.1 of the contract) and that Mrs Brewer did not repudiate the contract are not understood. Mrs Brewer for her part made it plain that she did not seek damages on the basis of her acceptance of a Fortis repudiation or on the basis of rescission, but only on the basis of damages for breach. That means she accepted that she had not herself terminated the contract for Fortis's breach.

334. What the consequences of termination may mean in the way of payments required of the customer within a hire purchase agreement is a different, and often a difficult, question. Particularly in an area of understandable concern for consumers, there has over the years been much litigation over such issues. In the present case, however, there was no dispute: it was agreed between Mrs Brewer and Fortis that, if Fortis was entitled to terminate and had properly invoked the termination provisions of its contract, then the amount of the payment to which it was entitled was the figure counterclaimed of £61,224, a sum which, as we have said, had been much reduced by reason of the resale of the car back to the dealer and was mainly made up of loss of finance profit on future instalments and the expenses of recovery, storage and the abortive move to auction the car and such like.

335. On any view, therefore, Fortis is entitled to recover its counterclaim of £61,224.

The appeal as concerns Mrs Brewer's claim against Fortis, overall

336. In sum, we consider that Fortis's appeal from the judge's judgment must succeed. Thus we hold that (i) Mrs Brewer's claim to recover £94,555 fails outright; and that even if her claim had not been capable of being resolved until after a re-trial, it could not in any

event have succeeded for more than £49,555 (ie £94,555 less the credit for £45,000 in respect of use of the car); and that (ii) Fortis's counterclaim succeeds in the sum of £61,224.

337. It follows that although the issue of joinder of SMRL falls to be part of any re-trial between Mrs Brewer and Mr Mann, there is and will be no need to consider further the question of any claim over by Fortis against SMRL.

Conclusion

338. There must, therefore, be a re-trial before this litigation can finally be resolved between Mrs Brewer and Mr Mann, at which re-trial the question of joinder of SMRL may be considered afresh: unless those parties are able to find a solution for themselves.

339. We express our regret at this unhappy outcome, but in circumstances where the trial as a whole was undermined by the judge's apparent loss of the necessary objectivity, no other solution has been possible. We have tried, as far as we properly might, to assist the parties either by a final judgment as to certain aspects of the case where that has been possible, or by expressing tentative views as far as we safely might on outstanding features of the case: but not for the purposes, as we would emphasise, of anticipating a result, which must, if that is necessary, depend on re-trial, but only for the purposes of highlighting what we understand to be relevant considerations.

340. We revert to the question of the status of judgment 4. We conclude, in the light of all that has gone before, that there was no justification for the judge to rewrite his handed down judgment 3 in the light of the criticisms that had been made of it. The special circumstances which, whether under the doctrine of the *Re Barrell* jurisprudence or the learning of *English* and *Flannery*, might justify a judge to alter his judgment, do not apply here. Ultimately, as it seems to us, judgment 4 has no status other than as a lens through which to investigate what may have gone wrong in this case.

341. We would also express our regret, even if in so doing we are ignorant of everything there might be to know about the course of these proceedings, that the parties did not manage to settle their disputes without litigation, or at least prior to trial. The duty of the court is to decide the issues that parties bring to it, but it is also a responsibility of the court, with all the experience it has of litigation, to warn litigants in general of the dangers and difficulties of the process. The sums at issue were not large, at any rate when once the car had been bought back by SMRL, something which Mr Mann had offered from an early stage. The dangers of litigation in terms of costs were considerable, to which might be added the additional dangers of increases in expense as the car lingered in storage and suffered the cost of being entered into and then pulled from auction. There were four potential parties to share in the possibilities of settlement, namely Mr Mann, SMRL (even if that company was eschewed as a defendant by Mrs Brewer), Fortis, and, of course, Mrs Brewer. It might be said that Mr Brewer was also, potentially, in the wings for these purposes. As for the issues, they were numerous and some of them were difficult. An agreed list of issues drawn up by the parties in the course of the proceedings numbered in excess of 20, which does not surprise us. The issues spanned issues of fact, such as the critical issue of what was said between Mrs Brewer and Mr Mann on 20 May 2007, of opinion, and of law. The critical issue of fact, which required the reconstruction of an oral conversation which had not been noted in writing, was always going to give rise to difficulty and uncertainty. The issues of expert evidence included the important and difficult one as to how the expression "Speed Six car" may properly be understood: the difficulty of this area is demonstrated, even if the context there was more or less different, by what Nourse LJ said about the attribution of paintings in the *Harlingdon* case. The same case illustrates the difficulty of legal analysis in a somewhat similar context. These complexities suggest that, unless of course Mr Mann did promise a Speed Six engine, the ultimate merits of the dispute(s) were not obvious. Even if Mr Mann did make that promise, there remained the problems of whether he or SMRL were liable for its breach, and whether Fortis was as well, and on top of that questions as to the extent of damages. In these circumstances it seems a shame that the parties could not have found for themselves a solution which sufficiently satisfied them all, so as to avoid much trouble, distress and risk. Litigation of this kind is or ought to be a matter of last resort.