IN THE HULL CROWN COURT

R -v- WILLIAM FLANNIGAN

RULING ON SUBMISSIONS OF 'NO CASE TO ANSWER

OUTLINE

1. The defendant is facing ten counts of fraud by false representation. Submissions have been made to me in relation to each count that there is no case to answer against him. I have heard submissions on behalf of the defendant and the prosecution over two days and I indicated that I would prepare a written judgement in support of my ruling.

2. The defendant was a successful businessman who owned a number of mobile home parks across the country. His business is based in Cheshire in the corporate form of Mossways Park Limited of which he had his wife were directors. In 2005 he became aware of a caravan site (Lakeminster Park) in Beverley east Yorkshire which was in a run-down condition and was in need of renovation and modernisation. He clearly saw it as an ambitious business opportunity. Enquiries were made with the local authority (ERYC) as to the likelihood of planning permission to upgrade the site being granted ('pre-app' enquiries) and in the light of the positive responses he received he purchased the site and made application for planning permission. Permission for redevelopment was granted in 2006. It was clear from the planning consent granted that the site was to be used for holiday occupation and not for full time residential use.

3. The essence of the prosecution case is that the defendant falsely represented to various purchasers of homes on the site that they could reside there permanently and that the homes could be occupied on a full time residential basis. The prosecution allege that in 2011, some three years after the first occupants moved in, ERYC began enforcement proceedings on the ground that the homes were being occupied in breach of the 'holiday' condition and that the result has been that the purchasers have been evicted from the homes they thought they would be able to occupy for the rest of their lives.

4. The defence case centres around the suggestion that each of the purchasers did in fact know of the existence of the 'holiday' provision and that what was said to them as to the nature of the permitted

occupancy was not false and was entirely in keeping with the permission granted by ERYC.

5. In the case of each count on the indictment the allegation against the defendant is that he made false *oral* representations to the purchasers in the terms set out in each individual count. The wording of the count is drawn in such a way as to reflect the contents of the witness statements of the purchasers. For example, count 1 alleges that the defendant made false representations to Alan and Karen Roberts '*namely that Lakeminster Park was a development for retired and semi-retired people who would have 12 months occupancy rights and that a home in the Park could lawfully be occupied by the buyer as a sole permanent residence'.* The italicised words being taken directly from the statements given to the police.

6. The case has always been put on the basis that the representations made to the purchasers by the defendant were verbal. At the outset of submissions I asked Mr Gordon to confirm that:

   a) The prosecution case was based on the oral representations made by the defendant and that,

   b) There were <u>no</u> instances of misrepresentations having been made in writing to any of the purchasers.

   He confirmed both of those things, subject to the qualification that the question of the 'misleading' nature of the oral representations had to be judged in the light of the circumstances in which it was made, including, he contends, the *silence* of the defendant on the 'holiday' restriction. I will return to this qualification later.

<u>THE BACKGROUND</u>

7. To understand something of the nature of the defence submissions it is necessary to consider the case in some more detail. The planning permission which was granted in 2006 was unusual, and possibly unique at the time in that, prior to 2005 it had been conventional in the ERYC area to grant planning permission for holiday parks subject to a condition that they closed down for a period (usually 4 weeks, but in some cases

less) during the winter season. Partly the reason for this was to ensure that people did not use the homes as permanent residences (although the evidence was that, as means of enforcement this enjoyed only limited success), and partly because, historically, the build quality of typical park homes was not of sufficient standard to render them suitable for winter occupation.

8. However with the increase in the build quality of park home units, and the market for all year round tourism (something ERYC were clearly seeking to encourage) the planning permission granted to the defendant did *not* require the occupants to vacate the homes for a fixed period, or at all. It simply approved 'a change of use of land from the siting of static and touring caravans…to the siting of 169 park homes *for holiday use* (my italics) together with associated landscaping etc'. By conditions 9, 10 and 11 of the consent (pros bundle 1 p. 72) the park was to be used for holiday purposes only, not as a main residence, and the proprietor (the defendant) was required to keep a register of addresses of the principal residence of the occupants of the park homes, which had to be kept available for inspection at any time by ERYC.

9. In November 2008 a site licence was issued by the council. The site licence (Caravan Sites and Development act 1960) specified that the park homes 'shall be used for human habitation **All Year Round** and for Holiday use only' - the capitals and bold type are as they appear in the site licence. It was a further requirement that the site licence should be prominently displayed in the site office and the evidence is that it was - at least there is no evidence that it was not.

10. As well as the site licence, each purchaser was required to enter into a licence agreement which regulated the occupation of the park home on site. It was common ground that the licence agreement used by the defendant was modelled on a standard form produced by the British Holiday and Home Parks Association. It was also common ground that the terms of the licence agreement made it clear that LMP was a site for holiday use.

11. It was at the heart of the prosecution case that the defendant sought to keep the terms of the licence agreement hidden from the prospective purchasers until after they had moved in or, at least, it was too late to back out of the purchase. Mr. Ryan (count 2), for example, said (in chief) that he was only given the licence agreement on the day they actually

moved in to their park home, at a time when it was too late to do anything about it. Mr and Mrs Roberts (Count 1) said it was weeks or months after they moved in that they received it.

12. It was also the prosecution case that in each (except one) of the transactions between the purchasers and the defendant the purchasers entered into a part exchange or 'assisted sale' arrangement with the defendant in relation to their existing homes. In the case of a part exchange, the arrangement was that the purchaser would sell their home to Mr Flannigan at an agreed price and that would be used to fund the purchase of the home on LMP. If the house was worth more than the park home, the defendant would remit the balance to the purchaser. If the house was worth less than the park home the balance would usually be funded by an interest free loan made by D to the purchaser.

13. In the case of an assisted sale agreement Mr. Flannigan would agree with the purchaser a notional value of their house. Once agreed he would then take over the marketing of the property. If it sold for less than the agreed amount, the defendant would 'take' the loss. If it sold for more that the notional value, the balance would be split (usually 80/20 in the purchasers favour) between D and the purchasers.

14. In each case (p-ex or assisted sale) the purchaser would, of course, be selling real property which would need conveyancing. The defendant routinely suggested to the purchasers that they use a solicitor, Mike Adams, who worked for a well-known and reputable firm in Hull known as Cooper Wilkin Chapman. It is clear from the evidence that the recommendation to use this solicitor was just that; a recommendation. There was no obligation to use this solicitor and the purchasers were at liberty to use their own solicitors if they chose. There was no element of coercion or inducement in the recommendation. The defendant did agree to pay the legal fees of the purchasers but there was no evidence that this was dependent on the purchaser using Mr. Adams' services. It is commonplace that builders and developers routinely offer to pay for professional fees as an incentive to a prospective purchaser.

15. All of the purchasers, save one, named on the indictment did use Mr. Adams but in evidence it emerged that not all of the LMP purchasers did

do so[1]. I will return to deal with the situation of Mr. Adams later in this judgement.

16. The defendant, in the case of the part-exchange transactions had his own solicitor, Mr. James Hickey of Messrs Hacking Ashton. Mr Hickey was a prosecution witness, though primarily only to deal with the production of a document - PEA/21. However, what he said in cross examination about the material which was sent to the purchaser's solicitors was revealing and I will return to this point later. We will also return to PEA/21.

17. In 2007 when the site was very much in its infancy in terms of development (no-one had moved in to any of the homes at this time), the trading standards department of ERYC became aware (through an anonymous communication) that the signage at the entrance to the site was potentially misleading. They visited the site and were concerned that the wording of the signs was capable of giving the impression that the site was available for residential occupation, which it was clearly not. They raised their concerns with the defendant who, through his professional planning advisor, Mr. Carl Copestake – also a prosecution witness – negotiated a compromise solution which was to impose onto the signage the words 'for holiday living'. This was acceptable to the trading standards department. Thereafter the evidence is that the signs – very large signs - one at each side of the entrance – contained the words 'for holiday living' in the same text and size as the words '12 month occupancy' and were there throughout the entirety of the marketing period for homes on LMP.

18. It should also be noted that the marketing of LMP was not being undertaken by the defendant himself but by a well-known estate agents in Beverley known as Beercocks. The principal partner, Mr. Robert Beercock was also a prosecution witness. Beercocks produced *another* sign which was placed on the main Hull road about 150m from the entrance to LMP. It can be seen in draft on the document at Defence bundle 2A – p. 12. This sign stated clearly that the site was for 'HOLIDAY LIVING – 12 MONTH OCCUPANCY'. Given the terms of the planning permission that had been granted – together with the site

[1] See the very telling email exchange between Alan Thomas, a retired solicitor and Anne Prendergast, D's secretary in which Mr. Thomas is specifically asking about the 'holiday' restrictions and received an entirely truthful and accurate answer. DB2 Tab 1 - p. 12-14.

licence which the council had issued – this was neither false nor misleading. It reflected the true position. Indeed, the defendant's planning consultant, Mr. Copestake (another prosecution witness) had observed, in February 2007, that in his professional view the words '12 month occupancy' did not invite contravention of the planning permission.

19. After their involvement in 2007, which resulted in the signage at the entrance to the Park being changed, the Trading Standards department of ERYC did not become involved with LMP again until enforcement proceedings began in 2011.

20. In May 2008 the first of the LMP purchasers, Mrs Fay Bell, moved in to her park home. She was followed by others, in particular Mr and Mrs Roberts (the first of the named purchasers on the indictment) who moved in to their home in July of that year. They had been living on site, then, for nearly three years when ERYC began enforcement proceedings. Though not strictly relevant to the submissions which have been made to me at this stage, it is instructive to note that from an early stage the occupants of these 'holiday' homes were paying council tax to ERYC. Indeed, in June 2008 (not long after Mrs Bell had moved in), an employee in the Billing and Collection section of ERYC council tax department emailed the principal enforcement officer, Mr. Simmonds to advise him that Mrs Bell had advised the council that she was occupying her park home as a main residence, and so had been reported to the valuation office for council tax to be assessed. Mr Simmonds passed that on to one of his enforcement officers (Mr. Gibson) but thereafter the trail goes cold. What is clear though is that the council were clearly on notice that park homes on LMP were being occupied on a residential basis in breach of the planning consent from the middle of 2008 [2] but did not bring enforcement proceedings until 2011.

21. Between 2008 and the early part of 2011 the purchasers of homes on LMP occupied their homes without hindrance. The development blossomed into a well organised and well run park home site. Substantial investment was made by the defendant into the development, roads and landscaping on site. A communal clubhouse was built and was a popular

[2] See also the 12 November 2008 email from Claire walker (an employee of D working at LMP) in which she tells ERYC in plain terms that 'the following people are living full time on site' and sets out a list of named occupants DJB T1 p. 11

feature of life on the site. It was described by one of the eventual purchasers as 'beautiful'. The residents were charged a 'ground rent' by D, but when they fell liable to pay council tax, the defendant paid a rebate to each occupant to account for any council tax paid by them. He in turn was paid a rebate by ERYC for the proportion of business tax which he had paid which was accounted for by the council tax paid by the occupants.

22. In late 2010 the defendant (who, if the Crown are right, had successfully swindled the purchasers of, by now, several millions of pounds) made application to ERYC to extend the operation at LMP to include tourers and non-static homes. This caused a degree of consternation amongst the existing park home occupants who believed that such an extension would have an adverse effect on their lifestyle and would damage the residential nature of the site. There is no doubt but that this was the trigger for the debacle which followed. In short, ERYC began enforcement proceedings to prevent permanent occupation. That triggered an application by D for retrospective planning permission for residential use. That application was refused. D appealed to a planning inspector who upheld the planning authority's decision. That decision was, itself, overturned on review and another planning appeal was heard resulting in the confirmation, again, of the planning authority's decision. However, in the course of the appeal it emerged that one of the pre-conditions of the grant of the planning permission had not been complied with (this was the subject of much consideration in the course of the trial) which meant that the permission itself was void *ab initio* and so there was no planning permission at all. The site, in planning terms, was no more than a field.

23. Of critical importance, in my view, is the fact that before the council took the enforcement action they did in May 2011 no purchaser – not a single one – had taken any steps to complain about having been mis-sold their home on LMP. No complaints to the police. No complaints to Trading Standards. No complaints to any consumer protection organisations. Nothing at all. Yet in the case of every single complainant on the indictment, they had been given their copy of the licence agreement – even on their own account – no more than weeks after they had moved on to the site. Each of them said in chorus from the witness box that they had been 'surprised', 'shocked', 'horrified', or 'devastated' when they received their copy of the licence agreement which limited

their right of occupation in the home which they had invested their life savings to buy to holiday use only. Yet not one of them took any positive steps to remedy the situation.

24. What happened in 2011, when ERYC began enforcement proceedings, was that many of the residents gathered together and instructed a local firm of solicitors (Gosschalks) to act on their behalf in an attempt to obtain compensation for the plight in which they found themselves. A group action was begun against the solicitors (Cooper Wilkin Chapman) who had acted for the purchasers and the developer, Mr. Flannigan. The action was funded on a 'no win-no fee' basis. It is clear from the evidence[3] that the solicitors decided, from an early stage, that the prospects of successfully proceeding against ERYC were remote and thus a cordial working relationship began between Gosschalks and ERYC which, understandably, the Council were eager to promote[4].

25. Each of the complainants named on the indictment was a client of Gosschalks.

26. In 2011, after the enforcement proceedings had begun, the Trading Standards department became involved again. ERYC, it seems, were being substantially blamed, in the early stages after enforcement had begun, by the residents. Trading Standards sought, with varying degrees of success to take statements from the purchasers in an effort, no doubt to see whether a prosecution for either trading standards offences or Fraud Act offences should be considered. They did not bring any charges. Perhaps realising the potential scale of an investigation, they sought to refer the matter on to the City of London Police, the SFO and eventually to the Humberside police who took up the investigation into the defendant's activities.

27. It is impossible not to feel some sympathy for the situation in which the Humberside Officers found themselves in investigating this matter. On the one hand they were anxious, for obvious reasons, to take statements

[3] I have in mind the email from Mr. Blake Barnard (ERYC Legal) dated 26/10/11 in which he reports a conversation with Mr Dillon of Gosschalks to the effect that Mr Dillon has assured him that they do not see ERYC as the 'villain of the piece' and instead will focus attention on Flannigan and legal advisers (ie Mr Adams of CWC). DB 2 T3 p. 20. This email also speaks of the level of 'mistrust' of ERYC

[4] In the same email, Mr. Blake Barnard speaks of Mr Dillon asking that if ERYC were considering enforcement action 'could Gosschalks be instructed to assist in softening the blow'. I don't know what this means. Is he asking for ERYC to instruct Gosschalks?

from the ‘victims’ of the defendants allegedly fraudulent activities and to investigate their allegations and uncover, where possible, evidence which would support (or refute) their allegations. But there was a difficulty which the OIC, DS Abbott, acknowledged was unique in his experience. Gosschalks solicitors had adopted an aggressive ‘driving seat’ position in relation to the police investigation. They plainly did not want material falling into the hands of the police (which would then fall to be either served upon or disclosed to the defendant in any criminal proceedings) which might undermine the position of their clients in the *civil* proceedings which were being brought against D.

28. That this was the position of Gosschalks is beyond doubt. There are communications between that firm and the police to the effect that where statements were taken by the police those statements should be submitted in draft form to Gosschalks who would then ‘vet’ them and return them to the police in a form which they were content was acceptable before allowing their clients to sign them. There are several illustrations of occasions in which statements were re-submitted to the police for alteration Indeed, in at least one case we had an example of Gosschalks advising their clients to, in effect, pull out of the criminal investigation because to have continued further could have compromised their prospects in the civil case against Mr. Flannigan.

29. I will return to the position of Gosschalks and their aggressive involvement in this police investigation at a later point.

30. The defendant was arrested in May 2013 and interviewed in the presence of a solicitor. He exercised his right to silence in the course of that interview. However, in a pre-prepared statement made in May 2014 he made it clear that he had acted in good faith and that the purchasers were aware that they were buying a holiday home. He suggested that the involvement of Gosschalks in the ‘no win-no fee’ litigation in which he was a defendant provided a financial motivation on the part of the complainants to ‘distort’ the representations, which they were now alleging had been made, but which had not been mentioned prior to the enforcement proceeding being commenced by ERYC.

THE EVIDENCE OF THE PURCHASERS

31. Mr and Mrs Roberts (count 1) gave evidence of the background of their purchase of the park home, including the fact that they needed to borrow money in order to fund the purchase of the park home. They said that D had said he would take their 'bricks and mortar' home in part exchange. The equity would be used to fund the purchase and any shortfall could be funded by an interest free loan. They moved in in June 2008. Only some time after they had moved in (Mr. Roberts said 3-4 months) did they receive any paperwork including the licence agreement. Mr Roberts said 'it was a shock. Not what we thought we had bought into'. However, he said, he was mollified by the defendants assurances verbal assurances that he would 'sort the matter out'.

32. Mr Roberts said that he had asked the defendant if they could live there 'even though they were not of retirement age' whereas Mrs Roberts said that 'we were concerned that this was a place we could live permanently and he (D) said 'yes'. Neither recalled seeing the signage ('for holiday living') referred to above. Nor had they seen the copy of the site licence in the site office. Mr Roberts had produced to the police a copy of the site licence ('**All Year Round** and for Holiday use only') but he did not recall where he got it from or when. When he was shown a copy of a licence agreement purportedly bearing his signature he would only say that the signature 'looks like mine'. When asked about a letter from LMP to his new home on the Park thanking him for the return of the 'signed licence agreement' he said he had no recollection of receiving it.

33. Mr and Mrs Ryan (count 2): they had been to other sites but those sites were restricted by the 'closure' provisions – see above. In the summer of 2009 (so after the license agreements had been sent out to the purchasers who had moved in in 2008) they visited the site and spoke to people who lived there. Mr Ryan said 'we asked D if we could live here all year round and he said 'yes'. He said the homes had 12 months occupancy'.

34. They were part exchanging their home and asked Mr Adams for assistance but 'he said we didn't need legal advice. It was like buying a boat or a caravan'. They were asked to sign the licence agreement on the day they moved in. They did so but only because of the reassurances they received from D that everything would be 'sorted'. "We took him at his word". Mr Ryan refuted the suggestion that a document, purporting to be signed by him and acknowledging receipt of the licence agreement had in fact been signed by him and returned to LMP, even though he had not been asked to do so. It was suggested to him that his signature on the

document showed conclusively that he had prior knowledge of the 'holiday' conditions, but he maintained that he would not have purchased the home if he had known of them.

35. Mr and Mrs Long (count 3) first looked around the site in the autumn of 2008. They were interested in a particular plot and the defendant told them when they asked about living in the property all year round that they could live there all year round 'just like your house now'. The purchase was to be funded by part exchange on their house and they instructed Mr. Adams to act on their behalf. They moved in to their park home on 12th March 2009. That, of course would have been 6 months after the Roberts' (on their account) received the licence agreement which had so alarmed them.

36. The Longs said that they first became aware of the holiday condition in April 2009 when they received a letter through the post. According to Mrs Long she 'went ballistic' when she discovered that their occupation of the home was limited to holiday use. She and her husband refused to sign the form sent to them requesting details of an alternative address. They continued to live on the site, however, until May 2011 when the enforcement process was begun.

37. The Longs had signed a deposit agreement[5] when they paid the deposit to secure their purchase of the Park Home on 29th November 2008. They agreed that they would have been given a copy at the time. The deposit agreement contained the words 'for holiday use'. But Mrs. Long said that they had not seen that. They were not concerned when in February 2009 they had received a letter from Mr. Adams advising them that the unit they were purchasing would be occupied on a 'caravan licence' basis. They had seen the signage at the entrance to the park but had not seen the words 'holiday living' (even though those words were added in 2007), and had not seen the site licence on the wall in the office.

38. Mr. and Mrs Hurst (count 4) bought their park home in July 2009. They had met the defendant on site when they made their first visit and had asked him if the 'could live there full time' to which D had relied 'yes'. They entered into an assisted sale agreement to sell their home in Hull. In order to do so they instructed Mr. Adams to do the conveyancing for

[5] DB1 - T3 p1

them. Several days after moving onto the site at LMP they received the site licence in which they said they were, for the first time, informed that the site was for holiday use. Mr. Hurst said he was 'stunned'. However, he said, he was reassured by the defendant that he was in contact with ERYC and that everything was in hand. Because of this reassurance, he had signed the licence agreement.

39. Mr Hurst believed that the signage outside the park had used the words 'residential' but when he was shown the signs he agreed that they did not. It was possible, he said that he had interpreted the use of the words '12 month occupancy' as 'residential' He also denied that he had ever seen a copy of a blank licence agreement which was (or would have been) attached to the assisted sale agreement sent by D's solicitor to Mr. Adams.

40. In the case of the Hurst's it is worthwhile to bear in mind that their home was not sold until December 2009 and so remained in their name (this was an assisted sale agreement, not a part ex arrangement) for some six months after they had received the documents which had 'stunned' him in July 2009. Yet he had not sought to disengage from the purchase.

41. It should also be noted, in relation to the Hursts that on 14th April 2009, Messrs Hacking Ashton had sent to Mr Adams a copy of the site licence as an attachment to the assisted sale agreement. Three days later, Mr. Adams wrote back to say that he had discussed the papers with his client 'and they are broadly acceptable'. In evidence Mr. Hurst said that this was not true. Mr. Adams had not discussed the terms of the licence agreement with him, either in April 2009 or at all.

42. Graham Jefferson (count 5) said that he and his wife became interested in buying a park home in June 2009. He had written to Beercocks (estate agents) in an email dated 16th June 2009 with a series of questions. He said in evidence that he had enquired as to '365 day occupation' but it is clear from the email that there was no mention of that. What he *did* ask

was whether the site had a licence 'under the 1983 Act'[6]. He also enquired as to liability for council tax. In reply, on the same day, Clare Walker (employed by D as a sales assistant on LMP) advised him that the 'site has a 12 month licence under the Caravan Sites and Control of Development Act 1960[7], section 3' and that 'All homes are currently valued [for council tax] Band A.. That reply, of course was entirely true and accurate. The Jeffersons moved in to the park home in December 2009.

43. The Jeffersons did not enter into a part exchange or assisted sale agreement but sold their house privately to fund the purchase of a park home on LMP. They did, though, use Mr. Adams as their solicitor. In his evidence in chief Mr. Jefferson said nothing about any specific false representations being made to him by D. However, the prosecution rely in relation to this count on his evidence in cross examination in which he confirmed the truth of the contents of the statement he made to Gosschalks (he was the first Gosschalks client). He had stated there that he and his wife were assured by D that if they purchased a park home they would be 'purchasing a property on a site that had permission for 12 months occupation (ie. Where we would be able to live for 12 months and that it was not a property that could only be used as a holiday home for a restricted period of the year'.

44. Significantly, in an email dated 1/6/2011 to Alan Menzies, Director of Planning, complaining of the conduct of ERYC enforcement officers is serving the PCN's in May, Mr. Jefferson said as follows:

" Every single person on here looked at the licence agreement (sic) and it clearly stated that it was 12 months occupancy otherwise why would we have sold our previous homes"

Later in the same email he said:

"LMP is something that you as a planning department should be proud of as a development which is positive for this are and a great improvement on what was here previously"

[6] A reference to the Mobile Homes act 1983 which deals with residential park homes.

[7] Which deals with caravans and non-residential units.

In referring to the 'licence agreement' he was clearly referring to the *site licence* but more importantly, at that stage he was NOT claiming that he had purchased his park home because of any false representations made to him by D. Nor was he remotely suggesting in the second quotation that any of what had happened was the fault of D or due to any deception.

45. In answer to the obvious question as to whether, if he had seen the site licence he had not seen the words 'for habitation **All Year Round** and for Holiday use only'. He maintained that he had not seen any site licence until after they had moved in and that he hadn't meant to express himself in the terms set out in the email.

46. Mr and Mrs Headlam (count 6) purchased a home on LMP and moved in in April 2010. By that time, of course the site had been open for two years. All of those occupants named in the indictment (and, of course, many who are not) had been on site for some time. All had received their copies of the licence agreement. Mr. Headlam said that he had mentioned to D that a local postman had told him that LMP was a 'caravan site' and D had assured him that it was not. He said it was open all year. He said (importantly, in my view) that he 'took it from (D) saying it was open 52 weeks a year that you could live there all year round. He later said 'we took it as read that when we moved it was to be permanent'.

47. The Headlams entered into an assisted sale agreement in relation to their house in Leeds and instructed Mr. Adams to act on their behalf. In a letter to the Headlams dated 10 February 2010, Mr. Adams pointed out that 'for reasons explained' (he had met with the Headlams the previous day) he would not be acting for them in relation to the purchase of the home – merely in connection with their sale of the Leeds home. Mr. Headlam said that a copy of the licence agreement only arrived a few days after they moved in and on reading it, they went to speak to Clare Walker who reassured them that it was nothing to worry about.

48. It should be noted that the Headlams had friends (Mr. and Mrs Wrighton) who had already been living on the site for about a year. They had visited them when they first went to view it. Mr Headlam said 'we had a cup of tea. We talked about the park. What they said was all positive and encouraging. They did not say anything about the license agreement or express any concerns about holiday use'. The evidence is that the Wrightons were sent a copy of the site licence, which they signed

and returned, in April 2009. Mr Headlam said that he did not see the words 'Holiday Living' on the signs at the entrance to LMP, although they had seen the words '12 month occupancy'. As I have explained above, the evidence was that from the end of 2007 the signs had the words 'for holiday living' *as well as* '12 month occupancy' on them.

49. In cross examination, Mr Headlam was at some pains to make it clear that their belief that they could live there permanently was something of an assumption derived from a number of things – mains gas, council tax being due, 12 month occupancy – and he could not say that the defendant had ever used the words 'residential' or 'permanent residence' in his discussions with him.

50. Elaine Platten (count 7) said that she had looked at homes on other sites in 2010 but they required her to vacate the homes for two weeks. That was not what she wanted. She spoke to D and said she was looking for somewhere permanent. D said that 'here you would have to pay council tax because it is not a holiday home'. She was encouraged to speak to other residents, which she did. They all told her that they 'loved it'. Some told her that *they* had spoken to the council telling them that they were living there full time. The council had said 'no problems'. She moved on to the Park in September 2010 having bought with the benefit of an 'assisted sale agreement' – see above.

51. Mrs Platten had instructed Mr. Adams to deal with the sale of her home in Hedon. There were clearly problems selling that house because a buyer was not found until April 2011. That, it will be recalled, is the month *before* the PCN's had been served by the Council on the residents at LMP. But the conveyance was not completed in April 2011. On the 27th May 2011 Mr. Adams wrote to Mrs Platten to tell her that 'the planning situation on this site is not as it should be' and enclosing a letter in which he told her that:

"It has come to our attention this week that enforcement action is being taken by ERYC as local planning authority to reinforce (sic) the planning permission for the use of the Lakeminster site. The current Planning permission authorises the use of the site for holiday accommodation only and does not permit it to be used year round for permanent residential use.

In the circumstances you may wish to reconsider your purchase of the Park Home to be sited at the Lakeminster property, if, indeed you intend to use that Park Home as your only residence.

The covering letter advised her to consider the above before taking any step to commit to the sale of her Hedon property.

52. She went ahead with the sale of her Hedon property and did not take any steps to rescind the contract for the purchase of the park home.

53. She said that when, shortly after she moved in, a copy of the licence agreement came through the door she was 'shocked'.

54. Mr Winstanley (Count 8) at first insisted that he had been attracted to LMP by the use of the words 'residential park homes' on the signs on the Hull Road (these would have been the Beercocks signs) although it was common ground that *no* advertising had ever used the word 'residential'. He said that he had met the defendant and had asked him questions about the site. He asked for a copy of the site licence. D had explained that the Licence had not been put up for display but gave Mr Winstanley a copy of the document he had received from the Council. He asked D about occupation and was told that they could reside on the park as it had 'full 12 months occupation'.

55. The defendant offered to purchase Mr. Winstanley's home in part exchange for the park home and he opted to use the services of Mr. Adams. The defendant gave him a copy of a blank licence agreement for him to take to the solicitors for discussion[8]. Mr Winstanley has made various comments on the document in what he agreed was his handwriting. On this document he placed asterisks and question marks to indicate that he was querying the terms of the document. For example, next to the heading 'Licence agreement for an Holiday Park Home Pitch' he has placed a question mark and an asterisk, as well as writing in the word '(Residential)'.

56. He said that he had raised these concerns with D who referred him to the wording 'for 12 month occupancy' on page 3. He said it was not a holiday site and would never be a holiday site.

[8] Prosecution bundle - p. 1118

57. Later on in the document[9], alongside the words 'f. To use the Park Home only as a holiday accommodation and not as your only or main residence' he has written the words 'SEE NOTE' and then at the foot of the page he has written 'understanding between Mr Flannigan-planning and ccl (council). Residency after 5 years. He said that he had written these words on the document. He said that once development was completed he had an understanding with the council that he would have 'Band A' planning permission in 5 years and there would be full residential status.

58. He took a copy of the document to Mr. Adams who told him that *he* had spoken to the council and to the defendant and that as far as he was concerned there was an agreement between D and ERYC that once the site was fully developed there would be a 'Band A' planning permission. We do not know, of course, whether Mr Adams ever had such a conversation. However, it was clear that *unlike any of the other purchasers who gave evidence* Mr. Winstanley was saying that he <u>did</u> know of the terms of the licence agreement before he moved on to the site. He had a copy and had sought legal advice on it. His marginal notes are the <u>only</u> contemporaneous record of any discussions with the defendant which appear in the case.

59. At the time Mr. Winstanley moved in to the Park home the house which had been taken in as part exchange had not sold. It had not sold by the time enforcement proceedings were begun and had still not sold at the time that he withdrew instructions from Mr. Adams and asked Gosschalks (who were by now acting for him in the civil 'group' action) to take over the conveyancing aspect as well. He chose not to seek to rescind the contract to purchase the Park Home – we do not know if he was advised to do so – because, he said, his former home was no longer in a fit state to return to.

60. Mr and Mrs Pollard (count 9) had previously been living in Turkey but they were looking to return to the UK in order to settle. They had seen an advertisement in the Hull Daily Mail and so visited the LMP site in late 2010. She spoke to Margaret Charlton who was a representative of Beercocks estate agents, working on site. She said she asked Ms Charlton whether you could live on the site and she replied 'yes'. She

[9] P. 1123

said that they could live there all year round and mentioned two people who had already been there two years.

61. She then spoke to D and told him that they had looked at other sites but they had limited occupancy. He replied 'we are different, we have a 52 week a year licence'. They agreed on a purchase (there was no part ex or assisted sale agreement) and moved in on 10/12/2010. They said that three weeks later they received the documentation which indicated that the homes were for holiday use. Mrs Pollard said she spoke to D and told him that she was not prepared to sign the license agreement as she wanted to live on site permanently. D, she said, replied that there was nothing to worry about. They did sign the licence agreement. However, of course, only a few months after they moved in the council served the PCN's on each of the residents including them. There was a meeting of residents at the clubhouse on site and that is when they first saw the planning permission and in particular, paragraphs 9, 10, and 11. She said that if she and her husband had known of the 'holiday' restriction, they wouldn't have bought.

62. In cross examination she accepted that she had seen the signs at the entrance of LMP that contained the words 'for holiday living', though she agreed that, although she had mentioned this to Trading Standards dept. when *they* began to conduct an investigation in 2011, she had not mentioned seeing the signage in her police statement. She refuted the suggestion that that was anything to do with any advice she may have received from Gosschalks.

63. On the subject of Gosschalks, although Mr. and Mrs Pollard had only put down as a deposit on the park home the sum of £20,000 (the balance being repayable by an interest free loan) the claim brought against D on behalf of the Pollards for contractual damages was for £115,000!

64. Mr and Mrs Brookes (count 10) attended a park home exhibition in Hull to look at park homes with a view to downsizing. They spoke to Margaret Charlton of Beercocks and later that month visited LMP. They spoke to various people on site (this is now the latter part of 2010) who convinced them that LMP was a good place to live. No-one, it seems told them or warned them of the 'holiday' condition, just that 'you could live her 12 months'. Mr Brookes said that 'all of the people we spoke to said that they lived there all year round'.

65. On 24th October 2010 they visited the site and spoke to the defendant. He said:

> " we asked him some specific questions. Were we allowed to stay on the site for 12 months? And did the site have residential status? He replied 'its as good as – and 'will be'. He added 'its only a matter of process with the council. People have been living here for over two years'

66. The Brookes' agreed to enter an assisted sale agreement and decided to use Mr. Adams to convey their house on their behalf. In his letter of instruction dated 1st November 2010, Mr Adams specifically advised the Brookes that the 'park home is neither freehold nor leasehold and is akin to purchasing a caravan on a site licence'. Mr Brookes said he contacted Mr. Adams about this who confirmed what he had said in the letter – although the terms of the letter make it clear that he was telling them that this was just like buying a caravan on a site with a site licence.

67. When they moved on to site on 31/3/11 their home had not sold. Shortly after they moved in, a package of documents was pushed through their letterbox containing the licence agreement which made it clear that the site was for holiday use. However, they were reassured by Mrs Charlton that they could live there '12 months' and 'not to worry about it'.

68. Their home in Goole had not been sold by the time of the enforcement notices. Importantly, though Mr Adams wrote to them on 16th June 2011[10] advising them that as enforcement action was being taken by ERYC they "may wish to reconsider their purchase of the Park home at LMP if you intend to use that park home as your only residence'. The Brookes' did not reconsider.

THE SUBMISSIONS

69. On behalf of the defendant Mr. Harding submits that in relating to counts 2, 5, 6 and 9 there is no evidence of any false representation at all and that those counts should be stopped under the first limb of Galbraith. In relation to the remaining counts he submits that, firstly, no jury could be sure of the precise terms of any representation which was made and,

[10] Prosecution bundle p. 1265

secondly that 'the facts of the case are incapable, when seen in context as set out above, of driving a jury to the inference that any representation made was made with the necessary intention and was dishonest'.

70. On behalf of the prosecution, Mr Gordon submits that the points made by the defence are jury points and do not singly or collectively provide a reason to withdraw the case from the jury. In relation to the specific counts he submits that there is clear evidence in each case from which a jury could convict.

THE INDICTMENT

71. The indictment alleges fraud by misrepresentation.

Section 2 of the Fraud Act 2006 provides:

1) A person is in breach of this section if he—

(a) dishonestly makes a false representation, and

(b) intends, by making the representation—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if—

(a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or misleading.

(3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of—

(a) the person making the representation, or

(b) any other person.

(4) A representation may be express or implied.

In each case the verbal representations said to have been made by D are alleged to have been false and made with the intention of making a gain for himself or causing loss to another. Mr. Gordon submits that a

representation is false if it is either untrue or misleading. As to whether a statement is misleading or not he submits that a jury is entitled to have regard to *all* of the circumstances surrounding the making of the statement *including* things which the defendant has not said. As he puts it in his written response to the defence submissions:

'The question for the jury is whether the words spoken (and crucially – my emphasis- *what went unspoken misrepresented the status of the site and if so whether D made these statements dishonestly'*

72. However, it should be noted that this extract follows immediately after Mr. Gordon has submitted that *'the present case depends upon the direct, not circumstantial, evidence of a number of witnesses who speak of what Mr Flannigan said to them (*my emphasis*) as regards the status of LMP.'* This is no more than a restatement of what he said in opening the case to to the jury:

'The prosecution case is that he was well aware of the true position and deliberately made untrue statements to many customers over a period of several years'

In other words, the case is about what was said. The case could have been put on the basis of representations implied by the defendant's conduct, but it was not.

73. Mr. Harding, rightly in my view, cautions anyway against an over-reliance on things which are not said by the defendant. To do so, he points out runs the risk that what is essentially a fraud by failure to mention (section 3) becomes dressed as a fraud by false representation. In such a way the requirement in section 3 that there must be a legal duty to disclose facts, can be sidestepped by indicting it as a fraud by misrepresentation and relying on silence as a feature which made any representations which were made 'misleading'.

74. I am conscious of this risk and, it seems to me, even if silence can make something which is strictly true 'misleading' the first question in any alleged fraud by misrepresentation is 'what was represented?' If that question cannot be answered then a failure to mention facts cannot rescue the case. After all, if what was represented was clearly and unambiguously true any criminal liability for a failure to mention would have to be under section 3. If D, for example, had said to a purchaser 'you can use the park home all year round', that would have been clearly

true. If there was any criminal liability (under the Fraud Act) it would only be by reason of section 3. As I have said, for liability under section 3 the prosecution would have to prove that there was a legal duty to disclose that information.

75. In this way it can be seen that what *is* crucial, particularly in the case of an oral representation is just what the representation was. Again, as an example, if the defendant had said 'you can live here as your sole residence' that would have been untrue. There would be no need to refer to what was not said to decide whether the statement was misleading because the statement itself is untrue. Similarly with an expression such as 'you can live here permanently'. Arguably, the statement 'you can live here all year round' may or may not be untrue (it is at least ambiguous) but it might be thought of as misleading without the qualification 'as long as you are on holiday'. But what of 'you can use the park home all year round'? That is not very different from 'live here all year round' but, just as arguably, unambiguously true. If the expression 'you can use the home all year round' is true (which from the terms of the site licence it would have been) does the failure by the defendant to add the rider 'as long as you are on holiday' make it misleading? In my view it does not.

76. In this way it can be seen that the precise nature of what was represented may be of considerable importance. Slight differences in what was actually said and what is alleged to have been said may make a very significant difference. In many (though by no means all) frauds the representation is made in writing and so clear, at least as to what was said. But when the representations are alleged to be oral with no documentary support (as with all but one alleged representations here – the arguable exception being Mr. Winstanley - the need for the jury to be sure of what was said is ever greater.

77. In my view there are in this case several reasons for considerable caution in considering the precise nature of what was represented to the purchasers. Firstly there is the length of time which has elapsed from the alleged representation being made to the statement first being recalled and recorded. Although some people gave statements to Trading Standards as part of their 2011 investigation, those statements are not in evidence and would, in any event, have been made months or even years after the things alleged to have been said by D. Certainly the police

statements were not taken until years after the alleged representations had been made.

78. Secondly there is the fact that each of these witnesses is engaged in a civil claim against the defendant based upon alleged misrepresentation. Their claim for damages may depend upon proving that the defendant misrepresented the true situation to them. The scope for distortion of what was said – even if subliminal – is obvious.

79. Thirdly there is the possibility of collusion. That does not necessarily imply a deliberate attempt to 'put heads together' and come up with a collective account – it can be the product of innocent and unconscious contamination. Given the close proximity which all of these witnesses were living to one another at the time they made statements to the police, the possibility that they have spoken together about what was said to them by D is self evident.

80. On this topic the involvement of Gosschalks cannot be ignored. Each of the purchasers named on the indictment became a client of this firm in their civil action against D and the solicitors who had acted for them, Cooper Wilkin Chapman (Mr. Adams). As I have touched upon above, this firm had considerable input into the police investigation, a situation which placed the police 'between a rock and a hard place'. Gosschalks received all relevant documentation from their clients. What the police got was what Gosschalks gave them. All police witness statements were taken in draft form and then submitted to Gosschalks for approval. Only when Gosschalks had amended, and approved the statements were they sent back to the police so that they could be signed. This was a rigid approach adopted by Gosschalks from which they were reluctant to depart.

81. For example, in the case of Mr. Winstanley (count 8), when, at one point, there was a disagreement between him and his solicitors as to what he should say to the police, the solicitors threatened to discontinue acting for him and to bill him for costs to date.

82. I have already referred to the close working relationship which was nurtured between Gosschalks and ERYC once Gosschalks had decided that the best 'target' for litigation was Cooper Wilkin Chapman and the defendant or his company.

83. Mr. Gordon argues that the unhappy situation which arose so far as Gosschalks is concerned is cured by reason of the fact that all of the draft statements (ie before alteration) were disclosed to the defence so that a comparison could take place. I disagree. The risk is not one of distortion from the draft statements, but one of collusion or contamination and a 'shaping' of the case before police witness statements are taken, and certainly before they are signed. The Gosschalks 'protocol' with the police is illustrative of a clear 'party line' which Gosschalks had created and maintained, even quite vigorously when the need arose[11]. This is of paramount importance, it seems to me, when one is considering the reliability and accuracy of the evidence of the representations made by D to the purchasers.

84. As an example, one of the LMP purchasers, Mrs Boys (not on the indictment, produced a bundle of documents, SJB/1. The material was given to the police (which of course meant that it was prosecution material which would fall subject to the disclosure regime) but Gosschalks requested its return. The documents were returned to Gosschalks and then returned to the police. However what came back to the police was not the entirety of SJB/1 and on 10th October 2012, Mr. Dillon emailed the police to tell them that 'the exhibit contains sensitive and confidential material that would prejudice the civil claims'.

85. Of the material which was returned by Gosschalks, the police had no way of knowing what had been removed as 'sensitive and confidential. On advice from Mr Dillon, Mr and Mrs Boys then withdrew their police complaint.

86. Police item PEA/21 is the assisted sale agreement between D and Mr. and Mrs Hurst (count 4). When he made his police statement in March 2013, Mr. Hurst produced two documents, firstly the licence agreement, which he said he saw only for the first time after he and his wife moved to LMP and secondly a copy of a loan agreement which he had his wife had entered into with D. These documents were part of the Gosschalks material.

[11] See also the remarkable email from Mr. Dillon of Gosschalks to the SIO DCI MacFarlane dated 19th September 2012 demanding assurances from the police as to adherence to the 'protocol' or he will no longer release documents to the police - *" you are putting me in a position where the only way I can ensure [my clients civil claims are protected] is to advise [them] not to provide any further evidence or assistance"*

87. However, when the police were going through the Cooper Wilkin Chapman material they came across Item PEA/21. It makes clear reference to, and encloses a copy of, the licence agreement which makes it clear that the LMP is for holiday use. In February 2014, DS Abbott (OIC) took the paperwork to show to Mr. Hickey, who had acted as the defendant's solicitor in all of the conveyancing transactions. He confirmed its authenticity and told the police that he would, as a matter of course in his early dealings with Mr. Adams send a copy of the licence to him with the other conveyancing paperwork. The licence agreement was part of the assisted sale process. It had not formed part of any of the material from Gosschalks, and so either had not been handed to them by their client or had not been handed by them to the police. It matters not. It only emerged from the CWC material.

88. The existence and content of PEA/21 was not raised with the Hursts and the first time they were ever asked about it was in cross-examination.

89. The significance of all this is twofold. Firstly, it raises the spectre that material which was inimical to the civil claim may not have always found its way into the hands of the police, and secondly that it confirms that the purchaser's solicitor, Mr. Adams, was fully aware of the terms of the licence agreement, and thus, the holiday restriction. The reason we know that he was so aware is that Mr. Hickey the defendant's solicitor made it his routine practice to provide Mr. Adams with the documentation which made the position clear!

THE PURCHASERS' SOLICITOR

90. Mr Michael Adams was himself arrested by the police and interviewed in relation to his involvement in the part-exchange/ assisted sale transactions. He has not been charged with anything and has not been called as a witness by the Crown. This, in my view, gives rise to an unhappy state of affairs which, although not strictly relevant to the issue I have to decide now, is of such significance that I should mention it.

91. Mr. Adams was (he is now retired) a conveyancing solicitor of considerable experience working for a reputable firm of solicitors in Hull. There is, as I have already mentioned no evidence whatsoever of any criminal misconduct by him in relation to LMP. He was, we know, fully aware of the limitations on occupation at LMP imposed by the planning

consent and the site licence. He was acting, of course, for the *purchasers* and not for the defendant. We have seen two examples of how, when the council were contemplating enforcement proceedings and having served PCN's in May 2011, he urged caution by his clients before going ahead with either the purchase, or sale of their previous home.

92. The jury know that Mr. Adams' firm have settled the litigation brought against them by Gosschalks. They do not know on what grounds settlement was made or whether there was any admission of liability. For all that we know the settlement may have been made on purely economic grounds or out of a desire to preserve the reputation of the firm. The risk, of course is that the jury may conclude from the fact that the case has been settled that he was somehow culpable. From that it is but a short step to concluding that he was complicit. After all, as a matter of common sense, it is hard to see how, if this was a pre-conceived fraudulent scheme to defraud prospective purchasers by falsely representing their rights of occupation, such a scheme would have had any hope of success *without* the complicity of the solicitor. How could the defendant, for example, be assured that their solicitor would not tell them that they could only occupy the park homes on a holiday basis? After all he had been advised as such by D's solicitor, acting on his behalf! How could D be assured that the solicitor would not give competent advice on the licence and its terms? He was in no position to prevent it and there is no evidence whatsoever that he sought to do so.

93. If that point is right, any direction to the jury along the lines of

'you must not speculate about the involvement of Mr. Adams. In the absence of any evidence whatsoever of his complicity with D, you should assume that he was working on a legitimate, professional and arms-length basis. Nothing he did or did not do can be attributed to the defendant'

would be tantamount to a direction to acquit.

94. I have felt it necessary to mention this because there has been an unspoken and implied sense in this trial (not generated, I hasten to add, by anything said or done by Mr. Gordon who has been entirely fair and realistic in this regard), that Mr. Adams was in some way 'in on it'. I wish to publicly dispel any such notion and to make it clear, as Mr.

Adams is not here to defend himself (and so we do not know what he would have said about what advice he actually gave these purchasers) that there has been no evidence whatsoever of his complicity in any wrongdoing by anyone.

95. CONCLUSIONS

In my view, in the absence of any contemporaneous note or documentation whatsoever, and given the history of this case as I have summarised above, no jury properly directed could conclude with the required degree of certainty that the defendant said what he is alleged to have said in each (but one) of the counts on this indictment. If count 8 were amended to read 'falsely represented that existing state of affairs was such that there was a reasonable expectation that within five years from opening, the Park would acquire residential status and that he then intended to apply for such' there is evidence, which is capable of confirming Mr. Winstanley's recollection.

96. Because I take this view in relation to all of the counts, except count 8, I do not need to consider Mr. Harding's submissions which specifically relate to counts 2,5,6 and 9.

97. Apart from count 8, though this entire prosecution rests on the recollection, months or years later, of what was said by D to the purchasers. I do not agree that the fact that D did not mention the existence of the 'holiday' restriction means that the jury are less concerned with what the defendant did say than what he omitted to say. The accuracy of what was said by D is critical in establishing, what is after all criminal liability. This is not a case of the judge deciding matters which are more rightly the province of the jury, it is an assessment of the evidence as a whole and a conclusion as to whether a properly instructed jury could, not would, convict. In my view they could not and I allow the submissions in relation to all counts except count 8 as to which I will hear submissions as to whether amendment should be permitted.

98. In relation to count 8, though, I should say that even if amended and the prosecution intended to proceed, my view would be that it could not, given all of the evidence they have heard in relation to the other counts, be properly determined by this jury and I would propose to discharge them.

99. The prosecution are now entitled to consider this ruling and decide, within 24 hours whether to appeal the terminating ruling to the Court of Appeal.

3rd April 2017