Neutral Citation Number: [2017] EWHC 1928 (Comm)

Case No: CL/2015/000691

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2017

Before:

THE HON. MR. JUSTICE LEGGATT

- -

Between:

MR JEFFREY ROSS BLUE	**Claimant**
- and -	
MR MICHAEL JAMES WALLACE ASHLEY	**Defendant**

- -

Mr Jeffrey Chapman QC and **Mr Simon Atrill** (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Mr David Cavender QC and **Ms Tamara Kagan** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing dates: 3 – 6, 10 and 12 July 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR. JUSTICE LEGGATT

Mr Justice Leggatt:

1. The question in this case is whether, as a result of a conversation in the Horse & Groom public house in Great Portland Street, London W1, on the evening of 24 January 2013, a contract was made between the claimant, Mr Jeffrey Blue, and the defendant, Mr Michael Ashley, under which Mr Ashley owes Mr Blue £14 million.

2. This judgment follows the trial of Mr Blue's claim and is arranged as follows:

I. OVERVIEW OF THE EVIDENCE

Background

3. Mr Blue's background is in investment banking. From January 2001 until March 2007 he worked for Merrill Lynch specialising in corporate finance. At the end of that period he worked on an Initial Public Offering ("IPO") of shares in Sports Direct International Plc, a company which is the UK's largest retailer of sporting goods. Mr Ashley is the founder of Sports Direct and still owns more than 60% of its shares. Mr Blue first met Mr Ashley, and had regular contact with him, when he worked on the IPO. As part of that process, Mr Blue travelled with Mr Ashley and the then Chief Executive of Sports Direct, Mr David Forsey, on a management "roadshow" for two weeks to present the business to potential investors.

4. In March 2007 Mr Blue left Merrill Lynch and joined a group of Icelandic investors. However, that business collapsed in the financial crisis. In August 2009 Mr Blue established Aspiring Capital Partners LLP as a vehicle through which to provide his services as a consultant. In March 2010, he acted as an advisor to Sports Direct in connection with a proposed acquisition of Blacks Leisure Group, which ultimately did

not proceed. In May 2011 Mr Blue joined DC Advisory, a firm which provided corporate finance advice. In December 2011, in that capacity, he again assisted Sports Direct in connection with a potential bid to acquire Blacks Leisure Group. Also in late 2011 and early 2012, Mr Blue was involved in a joint venture project to open Sports Direct stores in Iceland and Denmark.

The Management Services Agreement

5. Following discussions with Mr Forsey, on 25 October 2012 Mr Blue entered into a Management Services Agreement with Sportsdirect.com Retail Limited (a wholly owned subsidiary of Sports Direct) on behalf of Aspiring Capital Partners, which agreed to provide Mr Blue's services as a consultant for a minimum of three days per week at a fee of £12,500 plus VAT per month. In the event that Mr Blue worked for any additional days, the fee was to be increased *pro rata*. The agreement was to continue for an initial period of two years after which it could be terminated by either party giving three months' written notice.

6. Mr Blue started working for Sports Direct on 19 November 2012. From the outset, he spent at least four days a week working for Sports Direct and Aspiring Capital Partners was paid under the Management Services Agreement on that basis. From April 2014 this increased to five days a week.

7. I accept Mr Blue's evidence that his discussions with Mr Forsey before the agreement was signed envisaged that his role would be focussed on looking at potential strategic opportunities and acquisitions in the UK and Europe. This is reflected in a draft announcement which Mr Blue prepared in relation to his appointment and also in the terms of the Management Services Agreement itself, which described the services to be provided as "consultancy and advisory services on strategic development opportunities and related matters, as requested by the Company from time to time." In practice, however, the work that Mr Blue did for Sports Direct went well beyond this. An area in which he became involved almost immediately was investor relations, although this was not an area of which Mr Blue had any previous direct experience.

Finding a corporate broker

8. As soon as he started work, Mr Blue learnt from the Finance Director of Sports Direct, Mr Bob Mellors, that, although it had not yet been formally announced, Bank of America Merrill Lynch had resigned as Sports Direct's corporate broker. This left a much smaller firm, Oriel Securities Limited, as the only corporate broker retained by Sports Direct. Mr Blue was asked by Mr Mellors to assist in identifying and retaining a new corporate broker to replace Merrill Lynch. To that end Mr Blue drew up a shortlist and contacted a number of institutions to invite them to pitch for the role. However, none of them was interested in doing so. Some of them expressed concerns that, because of Sports Direct's poor reputation in the City, acting as a corporate broker for Sports Direct would risk damaging their own reputation.

9. One of Mr Blue's former colleagues at Merrill Lynch was Mr Peter Tracey. Mr Tracey had led the corporate broking team that worked on the IPO for Sports Direct and he therefore already knew Mr Ashley, Mr Forsey and Mr Mellors. Mr Tracey was now the Head of Corporate Broking at Espirito Santo Investment Bank ("ESIB")

and Mr Blue approached him to find out if ESIB would be interested in acting as Sports Direct's corporate broker. Mr Blue and Mr Tracey met at a café at Waterloo Station on their way into work on 7 December 2012 to discuss this proposal. Mr Tracey was keen to work with Sports Direct and in an email sent to Mr Blue after their meeting suggested some other services that ESIB could offer Sports Direct as well as corporate broking. Mr Tracey proposed that, to cement the relationship and as part of what he called the "bonding process", it would be a good idea to arrange an informal meeting between Mr Ashley and the senior members of ESIB's capital markets team. They worked closely with ESIB's corporate brokers in seeking to interest investors in buying shares in companies which the corporate brokers represented, and Mr Tracey regarded their support on the trading floor as important to the success of the relationship with Sports Direct. He thought the best way to get them to "buy in" to the relationship was to arrange for ESIB's Head of Market Making, Mr Simon McEvoy, and Head of Sales Trading, Mr Russell Clifton, to meet Mr Ashley. As Mr Tracey explained in evidence:

> "I didn't want [Sports Direct] to just be a faceless client to Mr McEvoy and Mr Clifton, I wanted them to feel like they were working for 'someone' rather than 'a PLC'."

On that basis, Mr Tracey asked Mr Blue to arrange for Mr McEvoy and Mr Clifton to meet Mr Ashley for a drink. This was the genesis of the meeting on 24 January 2013 at the Horse & Groom. All five individuals who were present on that occasion – that is to say, Mr Blue, Mr Ashley and the three representatives of ESIB – gave evidence at the trial.

The 24 January 2013 meeting

10. On 24 January 2013, Mr Tracey, Mr McEvoy and Mr Clifton came to Sports Direct's London offices in New Cavendish Street at around 6pm. Mr Ashley and Mr Blue met them in the ground floor lobby area. After making introductions, the group walked to the nearby Horse & Groom public house around the corner in Great Portland Street. The plan was to meet for half an hour or an hour for a chat. In the event the occasion lasted much longer and turned into an evening of drinking. Mr Blue left the pub at around 8:30pm and some time around 9pm the others moved on to a bar in Soho. The gathering broke up after midnight. Mr Clifton then went home, but Mr Tracey and Mr McEvoy left Mr Ashley talking to some other people he knew and went on by themselves to another bar in the same street, where they stayed until two or three o'clock in the morning. Mr Clifton estimated that over the course of the evening he drank at least 8 to 10 pints of beer and it is likely that Mr Ashley drank a similar amount of alcohol. Mr McEvoy probably drank somewhat less. Mr Blue accepted that he drank at least two or three pints of lager before he went home. Mr Tracey was the sole member of the party who did not drink alcohol that evening.

11. From Mr Tracey's point of view the evening was a fantastic success. Mr Clifton and Mr McEvoy had a really good time and enjoyed meeting Mr Ashley. There was a lot of conversation about football and in particular about Newcastle United Football Club, which Mr Ashley owns. Mr Tracey also remembers that, while Mr Blue was present, Mr Ashley was talking enthusiastically about Mr Blue, praising him a lot to Mr Clifton and Mr McEvoy. Mr Tracey thought that Mr Ashley was doing this to

make Mr Clifton and Mr McEvoy see Mr Blue as important because he wanted Mr Blue to be the main point of contact for ESIB at Sports Direct.

The alleged oral agreement

12. At one point in the evening, probably around an hour to an hour and a half after the group had started drinking at the Horse & Groom, there was discussion of Sports Direct's share price and what level it might reach if the company continued to perform well. Mr McEvoy recalls that it was Mr Tracey who initiated this discussion. I think that he is likely to be right about this, as bringing up this topic would have fitted in with Mr Tracey's game plan for the meeting. At the time, shares in Sports Direct were trading at around £4 per share. Mr Ashley, Mr McEvoy and Mr Clifton all recall discussing how high the Sports Direct share price might go and what the market capitalisation of the company and consequent value of Mr Ashley's shares would be if the share price reached various levels. Mr Clifton and Mr Blue both remember Mr Ashley pointing out that, if Sports Direct's share price were to double to £8 per share, the company would have the same market capitalisation as Marks & Spencer.

13. In the course of this discussion, the topic came up of offering Mr Blue an incentive based on the Sports Direct share price. Mr Blue's evidence was that Mr Ashley said words to the following effect:

> "What should I do to incentivise Jeff? If he can get the stock to £8 per share why should I give a fuck how much I have to pay him, as I will have made so much money it doesn't matter. So let's say if Jeff can get the stock to £8 per share in the next three years, I'll pay him £10 million. Jeff: what do you think?"

Mr Blue gave evidence that he was taken by surprise when this was said, as he had not previously discussed any incentive or been expecting any such discussion. However, he stated that he did some quick mental calculations and came back with a proposal that he should get the £10 million if the share price reached £7.20 per share. According to Mr Blue, Mr Ashley then asked Mr Tracey what he thought and Mr Tracey expressed the view that £10 million would be immaterial compared with the increase in the value of Mr Ashley's shares if the share price doubled – a view with which Mr Clifton and Mr McEvoy concurred.

14. Mr Blue stated that, not long after the initial discussion, either Mr Clifton or Mr McEvoy returned from the toilet and said words to the effect of:

> "Look Mike, I've given this some more thought and given how much money you stand to make if Jeff can get the stock to £8 per share, you should really pay him £20 million."

Mr Blue stated that, in response, Mr Ashley said something like: "Now that's more like it, but I'll tell you what let's split the difference and call it £15 million if the stock gets to £8 per share in the next three years." According to Mr Blue, he agreed to this proposal by saying words to the effect of: "Yes, that sounds fair."

15. Mr Ashley gave evidence that he recalls talking about the Sports Direct share price and how much he would be worth at different hypothetical share prices but does not recall any discussion of paying Mr Blue a sum of money if the Sports Direct share price reached £8 per share. Mr Ashley accepted that such a conversation may have taken place but said that, if it did, it would have been in the context of the general banter that he was having with Mr McEvoy and Mr Clifton about the share price and it would have been obvious that he was joking. Mr Ashley also claimed that he was trying to get drunk that evening, that Mr McEvoy stood at the bar and "kept the pints coming like machine guns", that they must have had four or five rounds in the first hour and that he (Mr Ashley) was making Mr Blue keep up with the others. I reject most of these claims as a flight of fancy but I do accept, based on the evidence of the three investment bankers as well as Mr Ashley, that the drinks were flowing freely and that, by the time when the discussion of incentivising Mr Blue took place, Mr Ashley had probably consumed four or five pints. It is also evident that the atmosphere at that stage was extremely jovial.

16. Mr Tracey said in evidence that he remembers Mr Ashley, Mr Clifton and Mr McEvoy talking about what Mr Ashley should do to incentivise Mr Blue and whether Mr Ashley should pay Mr Blue an amount of money if the share price hit a certain level. Mr Tracey thinks that they settled on a figure of £8 million as a good incentive for Mr Blue if he got the Sports Direct price to £8 per share within 18 months or two years. He recalled Mr Ashley asking everyone whether they thought he should be giving Mr Blue such an incentive. They all agreed that he should and were all laughing about it. Mr Tracey also recalled that during the conversation Mr Blue had a big grin on his face and was looking "over the moon".

17. Mr McEvoy's recollection was that Mr Blue suggested a bonus payment for himself if a particular share price could be achieved and talked about targeting £7 per share. Then someone suggested £8 per share and Mr Ashley said words to the effect of: "If the shares go to £8, I'll give you £10 million myself". Mr McEvoy said that everyone was laughing at this. Mr Blue then shook Mr Ashley's hand and said something like, "I'll hold you to that" and everyone continued laughing. When cross-examined, Mr McEvoy said that he also recalled Mr Clifton returning from the toilet and suggesting doubling the amount to be paid to Mr Blue, and Mr Ashley then splitting the difference.

18. Mr Clifton's evidence was that he instigated the discussion of a bonus for Mr Blue linked to the Sports Direct share price by saying to Mr Ashley in a mischievous spirit something along the lines of: "Well, how are you going to reward Jeff for doing well?" Everyone then started making suggestions. Mr Clifton said that he left the bar to go to the toilet and thinks that, when he came back, they were talking about £5 million for Mr Blue if the share price reached £8 per share. According to Mr Clifton, he was a bit boisterous and said to Mr Ashley something like:

> "Hang on a minute, if it reaches £8 you'll have made something like a billion quid yourself, that seems a bit cheap – you should double it up."

Mr Clifton's recollection was that the figure was then doubled to £10 million, which was the number they settled on. He said that he thought the conversation was no more than banter or "pub chat".

Mr Blue's later conversations with Mr Tracey

19. Mr Blue did not make any written record of the conversation in the Horse & Groom. Nor in the following days and weeks (or months) did he raise the topic of an incentive payment and what Mr Ashley had said in the pub again with Mr Ashley. He did, however, discuss it several times with Mr Tracey. Mr Tracey's recollection is that on the second or third time that the subject came up it became clear to him that, although he did not think that Mr Ashley had been serious about paying Mr Blue an incentive payment, Mr Blue was taking the conversation very seriously. Mr Tracey recalled one particular occasion when he was invited to Mr Blue's house for a barbecue and was standing outside smoking a cigarette and talking to Mr Blue. Mr Blue made a reference to wanting to buy the next door house and join it up with his own (or something like that) and said that he hoped to be able to do so if his payment from Mr Ashley came through. Mr Tracey said that, once he realised that Mr Blue was taking Mr Ashley seriously, he wanted to help Mr Blue if possible and introduced the idea of aiming to keep the share price above the £8 target for more than 30 consecutive days. This was mentioned in an exchange of text messages between Mr Tracey and Mr Blue on 7 August 2013. In one of the texts, Mr Tracey also referred to seeing Mr Blue on Saturday (10 August 2013) and asked: "What time? What can we bring?" It is agreed that this was the occasion of the barbecue that Mr Tracey recalls.

20. The Sports Direct share price, which at the time of the 24 January 2013 meeting in the Horse & Groom had been around £4 per share, rose by £1 in late April and early May. It then climbed further in July. When Mr Blue was exchanging text messages with Mr Tracey on 7 August 2013, the share price was standing at £6.55. By then, a price of £8 per share, which on 24 January 2013 might have seemed a remote prospect, had started to look a real possibility.

Alleged discussion with Mr Forsey

21. Mr Blue stated that on one occasion during 2013 (which he cannot date any more precisely), when he was working at Sports Direct's head office in Shirebrook and was travelling to the office one morning with Mr Forsey, Mr Forsey, completely unprompted, asked him: "So Jeff, what is your deal with Mike?" Mr Blue said that he was taken by surprise at this, as he had not mentioned to Mr Forsey any arrangement with Mr Ashley. He inferred that Mr Forsey's knowledge of such an arrangement must have come directly from Mr Ashley. Mr Blue said that he then referred to the evening at the Horse & Groom and told Mr Forsey that Mr Ashley had agreed to pay him "a sum of money" (thinking it tactful not to specify the amount) if he could help get the Sports Direct share price above £8 per share within three years.

Alleged December 2013 conversation with Mr Ashley

22. Mr Blue claims that he first raised with Mr Ashley the subject of what he considered to be their agreement on around 19 or 20 December 2013. On 11 December the Sports Direct share price had reached an all time high of £7.71 per share and on 20 December 2013 the closing price was £7.18 per share. Mr Blue's evidence was that he approached Mr Ashley towards the end of the day in Sports Direct's London offices after Mr Ashley had finished a meeting and said something like: "Mike, can I have a word? … I just want to make sure that we are still on with our agreement." According to Mr Blue, Mr Ashley replied with words along the lines of: "Jeffis, I've

got it, I've got it. We're cool, we're cool." Mr Blue said that he understood this to mean that Mr Ashley was acknowledging the existence of their agreement and confirming that he would honour it. Mr Blue made no record of this conversation.

The Lion Hotel: 14 January 2014

23. On the evening of 14 January 2014, a meeting of the Sports Direct Brands Division took place at the Lion Hotel in Worksop to receive an update on performance. As well as Mr Ashley and Mr Blue, two other people who were present at the meeting were called as witnesses by Mr Ashley at the trial. They were Mr Barry Leach, who at the time was the head of the Sports Direct Brands Division, and his colleague, Mr Peter Wood, who gave the main presentation that evening. On the day before the meeting it had been announced that Sports Direct had acquired 4.6% of the shares in Debenhams Plc. Mr Blue had been working on that acquisition and gave a short presentation on it. Mr Ashley and Mr Wood said in evidence that the only conversation that they recall from that evening was about the Debenhams transaction. But Mr Blue gave evidence that at one point when he and Mr Ashley were walking back from the toilets to the bar at the same time Mr Ashley began a conversation by saying something like: "I can't believe how quickly the share price has reached almost £8." Mr Blue said that he then explained to Mr Ashley how much time and effort he had invested in improving Sports Direct's relationship with the City.

24. Again, Mr Blue made no record of this conversation but some support for his claim that such a conversation took place comes from the evidence of Mr Leach. Mr Leach recalled seeing Mr Ashley and Mr Blue come out of the toilets and walk over towards the bar where the others were standing. He remembered Mr Ashley "talking with his hands", as he often does, and saying to Mr Blue: "If we can move the share price from here to here [gesturing], why wouldn't I pay?"

25. When Mr Leach spoke to Mr Blue's solicitors in January 2016, he also recalled a conversation with Mr Blue in a car the following Tuesday, on the way to the next week's management meeting, in which he mentioned having overheard Mr Blue's conversation with Mr Ashley and said to Mr Blue words to the effect of: "If you've got any sort of deal like that with Ashley, you should get it in writing." Mr Leach said that Mr Blue responded with a look which he interpreted as "easier said than done".

Mr Leach's evidence

26. In a witness statement given to Mr Ashley's solicitors in July 2016, Mr Leach referred to the meeting at the Lion Hotel but made no mention of either of these conversations. In his oral evidence at the trial, Mr Leach confirmed what he had told Mr Blue's solicitors about what he had witnessed at the Lion Hotel but said that he assumed that Mr Ashley had been talking about the Debenhams transaction. Mr Leach was unable to explain how the words that he recalled Mr Ashley saying could have related to that transaction. He also said that he recalled the subsequent conversation in the car but (in contradiction to what he had previously told Mr Blue's solicitors) said that it was Mr Blue who brought up the subject of a deal with Mr Ashley. I had the impression that Mr Leach wished to row back from things he had previously said to Mr Blue's solicitors which were unhelpful to Mr Ashley's case.

27. Mr Leach also gave evidence that he remembered an occasion at the Sports Direct offices in Shirebrook at around the end of January 2014 when Mr Ashley and Mr Blue walked in together and were talking about the next employee bonus share scheme. He recalled Mr Ashley saying to Mr Blue words to the effect that: "You would be on the million shares, same as the rest of them."

The share price reaches £8

28. At around 1:04pm on 25 February 2014, Sports Direct's share price rose above £8. Mr Blue was monitoring the share price closely on the Bloomberg terminal in the office that he shared with other Sports Direct managers and saw that the share price had reached this level. According to Mr Blue, when Mr Ashley entered the office a few minutes later, he asked Mr Ashley whether he had seen that the share price had hit £8, and Mr Ashley replied that he had seen it. Mr Blue then made a note in a Moleskine notebook that he kept, which reads:

> "25/2
>
> 801.0p Acknowledged
>
> 13:13"

Mr Blue said that this was a record of Mr Ashley's acknowledgment that the share price had reached £8 per share and – by implication, as he saw it – that Mr Blue had become entitled to a payment of £15 million.

29. Mr Blue's wife had also been watching the Sports Direct share price keenly as it approached £8 and exchanging text messages with her husband which showed mounting excitement. At 1:32pm she sent a message to say: "It's hit 8!!!!!" At 2:07pm Mr Blue texted to say: "Yes. Mr Ashley acknowledged as much just now." His wife replied: "bingo is our nameo!!!" She went on to say: "…but he needs to send you an email today to back this up." Mr Blue did not follow his wife's suggestion. His explanation in evidence was that she did not have his experience of dealing with Mr Ashley and he needed to be cautious in finding the most appropriate opportunity to discuss the matter with him.

Conversation with Mr Hellawell

30. Two days later on 27 February 2014, Mr Keith Hellawell, the Chairman of Sports Direct, and Mr Blue were due to meet representatives of Goldman Sachs at Claridge's Hotel. The Goldman Sachs representatives did not show up and Mr Hellawell and Mr Blue spent some time talking before they left for their next meeting, which was with Citi Group in St James's. Mr Hellawell gave evidence that he recalled Mr Blue telling him that he had an agreement with Mr Ashley to be paid £1 million if he could get the Sports Direct share price to £8 per share. Mr Hellawell recalled Mr Blue expressing concern that, although the share price had reached £8, Mr Ashley was being slow in paying him the £1 million which he thought might be because he had hit the £8 share price target more quickly than Mr Ashley had anticipated. When it was pointed out to Mr Hellawell in cross-examination that the share price had only reached £8 two days earlier, he revised his evidence to say that Mr Blue might have been expressing concern that Mr Ashley might not pay rather than that he was being

slow in paying. Mr Blue did not recall this conversation and said that he would not have mentioned the figure of £1 million to Mr Hellawell as that was not the figure which had been agreed on 24 January 2013 and it is very unlikely in any case that he would have told Mr Hellawell the amount of money that Mr Ashley had agreed to pay him.

The Manicomio Café: 7 March 2014

31. Mr Blue says that he discussed the subject of his bonus payment in a conversation with Mr Ashley in March 2014. In his evidence at the trial he identified the place and time of this conversation as the Manicomio Café in Gutter Lane on the morning of 7 March 2014. At that time Mr Ashley and Mr Blue were spending two days visiting shareholders of Sports Direct to seek to generate support for a new executive bonus share scheme (along similar lines to the scheme previously proposed in September 2012) under which Mr Ashley would have the right to receive eight million additional shares in Sports Direct if certain performance targets were achieved. Mr Blue gave evidence that he and Mr Ashley went to the café to pass time in between meetings and that in their conversation Mr Ashley acknowledged that the £8 per share price target had been achieved and that £10 million was payable to Mr Blue. Mr Blue said that he reminded Mr Ashley that the figure ultimately agreed had been £15 million and not £10 million. He said that Mr Ashley then sought to re-negotiate their deal and said something like:

> "It doesn't matter anyway as what I am going to do is make you Finance Director of Sports Direct so that you can get one million shares under the current executive bonus share scheme, which, based on a share price of £8.50, is worth plus or minus £10 million, and besides you will also then roll into the next executive share scheme."

32. Mr Blue said that he pointed out that, as the salary of the Finance Director was £150,000 a year, which was less than his income under the Management Services Agreement, he would have some cash flow issues until he received his bonus shares and could sell them. Mr Ashley's response was to suggest that he could lend Mr Blue £1.5 million in two tranches – £750,000 on his appointment as Finance Director and another £750,000 in April 2015 when shares were awarded under the executive bonus share scheme.

33. Mr Blue said that his conversation with Mr Ashley was reflected in text messages that he exchanged with Mr Tracey on 27 March 2014. In a message sent that day Mr Blue told Mr Tracey: "I have news but Sandy Lane may be slightly postponed." Mr Tracey replied: "What news?" Three minutes later Mr Tracey texted Mr Blue again to say: "You got the CFO role which means you have to roll into LTIP [long term incentive plan]." In this last message Mr Tracey was anticipating that Mr Blue had learnt that he was to be made Chief Financial Officer – which was a role that Mr Blue had previously told Mr Tracey that he was hoping to get. The reference to "Sandy Lane" was to a resort in Barbados where Mr Blue had often said to Mr Tracey that he would go to celebrate with his family, and would take Mr Tracey and his family with them, when he received his bonus payment from Mr Ashley. According to Mr Tracey, this was something of a running joke between them.

The £1 million payment

34. A major plank in Mr Blue's case is the undisputed fact that on 27 May 2014 Mr Ashley transferred £1 million to Mr Blue's bank account. Mr Blue says that he understood this payment to be a sign of Mr Ashley's commitment to their agreement.

35. Mr Blue's evidence was that this payment was made following a conversation with Mr Ashley at the Sports Direct London offices on 23 May 2014 in which Mr Blue expressed frustration that nothing had happened and said that his wife was also becoming increasingly annoyed and concerned that Mr Ashley might not honour their agreement. According to Mr Blue, Mr Ashley replied that he still intended to honour it. Mr Blue then asked for a sign that he remained committed to doing so and Mr Ashley agreed to pay Mr Blue £1 million as a sign of his commitment. Mr Blue said that, while he was texting Mr Ashley his personal bank account details, Mr Ashley asked whether he wanted anything in writing. Mr Blue replied that it would not be necessary – at which point Mr Ashley commented that Mr Barnes (who also worked as a consultant to Sports Direct) insisted on having everything in writing.

36. The explanation given by Mr Ashley in his witness statement for why he paid £1 million to Mr Blue was that the payment was to reward Mr Blue for his contribution in helping to get shareholder approval for the inclusion of Mr Ashley in the Sports Direct employee bonus share scheme. By the beginning of April 2014 it had become apparent that the executive bonus share scheme for Mr Ashley was not going to get the support of a majority of Sports Direct's shareholders (excluding Mr Ashley, who could not vote on the scheme). An announcement made on 2 April 2014 indicated that the proposal would not be pursued and instead the 2015 employee bonus share scheme, to be voted on at the Annual General Meeting, would include Mr Ashley. Mr Ashley was very unhappy with this, as he believed that there should be a separate scheme for him based on achieving much higher profit targets than the employee scheme. He was forced to accept, however, that such an arrangement for him was not going to receive shareholder approval and that he would have to settle for inclusion in the employee share bonus scheme instead.

37. Mr Ashley stated that Mr Blue asked him for a discretionary bonus of £1.5 million to reflect his efforts in gaining approval for Mr Ashley's inclusion in the employee share bonus scheme. Mr Ashley's evidence was that he thought the amount too high and offered Mr Blue £1 million as a lump sum, which Mr Blue accepted and Mr Ashley paid. In his oral evidence at the trial, Mr Ashley asserted that the payment also took account of other work that Mr Blue had done for him in his personal capacity, including a property transaction in which Mr Ashley had invested around £8 million to receive 50% of the ground rent in a portfolio of 400-500 properties. Mr Ashley said that the £1 million payment was intended to reward Mr Blue for everything that he had done or was in the process of doing for Mr Ashley personally by wrapping it all up in a single payment.

Mr Blue resigns

38. After receiving the £1 million payment, Mr Blue made no further approach to Mr Ashley for several months. Mr Blue was still hoping to be appointed the Group Finance Director. To clear the way for this by removing a potential conflict of interest, Mr Blue – at the suggestion of Mr Forsey – transferred to Sports Direct some

shares that he owned in the Icelandic joint venture in which he had been involved before joining Sports Direct. Mr Blue asked for and received only the cost price of the shares, which was £50,000. By the autumn of 2014, however, nothing further had happened about Mr Blue's appointment. It seems that, while Mr Ashley favoured appointing Mr Blue to succeed Mr Mellors as Finance Director, Mr Forsey was blocking the appointment and a stalemate had developed.

39. On 28 November 2014 Mr Blue raised the issue in a conversation with Mr Ashley, of which he made a more or less verbatim note at the time in his Moleskine notebook. According to Mr Blue's note, Mr Blue told Mr Ashley that he was "frustrated by the lack of clarity" and asked: "How are you getting on with Mr Forsey?" Mr Ashley replied that he had "heard nothing". Mr Blue then said that he was "not happy if it's a game or we are kicking the can down the road". The rest of the conversation, as noted by Mr Blue, went as follows:

> "MA: If I say I am going to sort it out that's what I am going to do.
>
> JB: I can't sit in front of investors without knowing where I stand.
>
> MA: You want me to bring it on with Dave, then I'll bring it on … and I don't give a fuck which way it goes … have a good weekend – goodbye."

40. It appears that following this conversation Mr Blue still heard nothing further about whether he would be made Finance Director and came to the conclusion that it was not going to happen. To add to his frustrations, Mr Blue had sent a new consultancy agreement to Sports Direct on 26 September 2014 (as the two year initial period of the Management Services Agreement was approaching its end) but the new agreement had not been signed. He also found that strategic development work which had been his responsibility was increasingly being done by Mr Barnes. On 24 December 2014 Mr Blue wrote a letter on behalf of Aspiring Capital Partners, addressed to Mr Ashley, giving notice of termination of the Management Services Agreement. In the letter he explained his decision by saying:

> "Recent changes in role and responsibilities, combined with a complete lack of clarity in regards to my position going forward make the current situation untenable."

The tape-recorded conversation and the letter of claim

41. During his three months' notice period, Mr Blue attempted to arrange a meeting with Mr Ashley in London. On two occasions in February 2015 meetings were arranged but Mr Ashley did not show up. On 13 March 2015 Mr Ashley was in the London office and Mr Blue accosted him. Mr Blue secretly tape-recorded the conversation. Mr Blue had written a letter which he handed to Mr Ashley and asked him to read. The letter began as follows:

> "As you know, we agreed an incentive bonus arrangement in January 2013. The terms of our agreement were clear: you

> agreed to pay me £15 million if the Sports Direct share price reached £8 per share.
>
> This arrangement was subsequently discussed between us on numerous occasions as the share price increased towards and eventually above the £8 per share target, including March 27th, 2014 (where you proposed that I become Finance Director at Sports Direct) and May 28th, 2014 (where you made an interim payment to show your ongoing commitment to our agreement). It was originally agreed that, once the target had been achieved, you would pay me personally in cash. In March 2014 you raised the possibility of settling the amount due to me via the Sports Direct Executive Bonus Share Scheme. However, that never came to fruition."

The letter went on to say that Mr Blue wanted to find "a mutually agreeable solution in terms of the outstanding payment".

42. Mr Ashley scanned the letter and said that he would have to take it away and read it slowly and properly and then think about it. Mr Blue emphasised that he did not want to fall out with Mr Ashley and the conversation ended.

These proceedings

43. Mr Ashley did not respond to Mr Blue's letter. On 7 April and again on 29 May 2015 solicitors instructed by Mr Blue wrote to Mr Ashley. The second of these letters was a formal letter of claim. In June Mr Ashley also instructed solicitors but still no substantive response was provided on his behalf. During this period Mr Blue had a conversation (on 12 May 2015) with Mr Peter Cowgill of JD Sports Fashion plc in which he mentioned his claim against Mr Ashley. Mr Cowgill was called by Mr Ashley as a witness and gave evidence about this conversation at the trial. Mr Cowgill recalled Mr Blue saying that he had a deal linked to increasing the Sports Direct share price under which Mr Ashley should have paid him a sum of £8 million. In addition, in August 2015 representatives of Mr Blue's solicitors spoke on the telephone to each of Mr Tracey, Mr McEvoy and Mr Clifton, to ask them about their recollections of the meeting in the Horse & Groom. Mr McEvoy and Mr Clifton were not prepared to assist but Mr Tracey answered questions asked by Mr Blue's solicitors. The attendance notes of these telephone conversations were put in evidence by Mr Blue. No challenge was made by counsel for Mr Ashley to the accuracy of these notes as a record of what was said.

44. Mr Blue commenced this action in the High Court on 23 September 2015.

II. THE DISPUTE

45. Mr Blue's claim is simple. He claims that in the conversation in the Horse & Groom on 24 January 2013 to which I have referred Mr Ashley made an oral agreement with him – the essence of which was that, if Mr Blue deployed his experience, skills and contacts in relation to corporate finance to get the Sports Direct share price above £8 per share within three years, Mr Ashley would pay Mr Blue £15 million. Mr Blue contends that this agreement was legally binding, that he duly deployed his skills and

contacts and undertook various initiatives in reliance on the agreement and that, pursuant to it, Mr Ashley became obliged to pay him £15 million when the share price closed above £8 on 25 February 2014. He says that Mr Ashley acknowledged this obligation by paying him a sum of £1 million on 27 May 2014 as an interim payment, but that Mr Ashley has since reneged on the deal.

46. Although (as mentioned) Mr Ashley says that he does not remember it, he does not positively deny that there a discussion in the Horse & Groom of incentivising Mr Blue and of Mr Ashley paying him a large sum of money if he could get the share price to £8. But Mr Ashley's case is that, if did say anything to that effect, it was just banter which was not meant seriously and was not capable of giving rise to a legally binding contract; nor was there the necessary certainty of terms to create a contract. He also argues that, even if there was a binding contract on the terms alleged, to qualify for the payment Mr Blue would have to show that his actions caused the share price to rise above £8 per share, which he cannot do.

47. In short, whether Mr Blue is entitled to be paid the money that he is claiming from Mr Ashley depends on the answers to three questions:

    i) What was said in the Horse & Groom on 24 January 2013?

    ii) Did what was said create a legally binding contract?

    iii) If so, what had to happen for Mr Blue to become entitled to payment under the contract and did that event occur?

48. Before addressing these questions, I will first outline the legal requirements which have to be satisfied in order to establish that a contract was created.

III. THE REQUIREMENTS FOR A CONTRACT

49. Generally speaking, it is possible under English law to make a contract without any formality, simply by word of mouth. Of course, the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded. But those are matters of proof: they are not legal requirements. The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable: see e.g. Burrows, "*A Restatement of the English Law of Contract*" (2016) section 2. Points have been taken by Mr Ashley in relation to each of these requirements.

(i) Agreement

50. In general, the agreement necessary for a contract is reached either by the parties signing a document containing agreed terms or by one party making an offer which the other accepts. Acceptance may be by words or conduct. Typically, acceptance involves promising to do something but in one kind of contract known as a "unilateral contract", where the offer made by A is to reward someone for doing something, a contract is established when the recipient of the offer (B) starts to perform the action

required to earn the reward, even though B does not promise A to do anything. The example of a "unilateral contract" taught to all first year law students is an offer by A to pay B £100 if B walks from London to York.[1] B is not obliged to walk to York, but if B sets out on the journey, A's offer becomes contractually binding.

51. Counsel for Mr Blue submitted that the most accurate legal characterisation of the offer which they say was made by Mr Ashley in this case is that it was a unilateral offer: Mr Blue did not undertake on 24 January 2013 to do any work directed towards increasing the share price of Sports Direct, but the offer became binding once Mr Blue began to undertake such work.

52. For the purpose of the law of contract, an offer is an expression, by words or conduct, of a willingness to be bound by specified terms as soon as there is acceptance by the person to whom the offer is made: see e.g. Burrows, "*A Restatement of the English Law of Contract*" (2016) section 7.3; and *Chitty on Contracts* (32nd Edn, 2015), vol 1, para 2-003. There can be circumstances in which a person uses the language of offer without expressing a genuine willingness to be bound. For example, if someone says at a party "I will give you a million pounds, if you can speak for a minute on [a random subject] without hesitation, deviation or repetition", this is unlikely to be interpreted as an offer despite the literal words used. That is because it is unlikely that anyone would reasonably have thought that the words were meant seriously. In such circumstances the words uttered would not be capable of creating any obligation, even a purely moral obligation, let alone one that is legally enforceable.

53. This point can be illustrated by *Carlill v Carbolic Smoke Ball Co* [1892] 1 QB 256, another case which all law students learn. In that case the defendant company published an advertisement offering to pay £100 to anyone who contracted influenza despite having used one of the company's smoke balls three times daily for two weeks according to the printed directions supplied with each ball. The plaintiff dutifully followed the instructions but nevertheless contracted influenza. She claimed the sum of £100, which the company refused to pay. One of the company's defences was that the statement made in the advertisement was not intended to be a promise or offer at all, as it could not reasonably be supposed that the company seriously meant to promise to pay money to anyone who contracted influenza at any time after using one of its smoke balls. That argument failed on the facts, not least because the advertisement stated that the company had deposited a sum of £1,000 with a bank to show its sincerity in the matter. But it is clear that on different facts such an "offer" might be regarded as a mere "puff".

54. A key question in this case is whether what Mr Ashley said in the conversation on 24 January 2013 was a serious offer which expressed a willingness to be bound.

(ii) Intention to make a legally binding contract

55. Even when a person makes a real offer which is accepted, it does not necessarily follow that a legally enforceable contract is created. It is a further requirement of such a contract that the offer, and the agreement resulting from its acceptance, must be intended to create legal rights and obligations which are enforceable in the courts, and not merely moral obligations. Not every agreement that people make with each

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[1] The example is based on the old case of *Rogers v Snow* (1573) Dalison 94.

other, even if there is consideration for it and the terms are certain, is reasonably intended to be enforceable in the courts. For example, if two people agree to meet for a drink at an appointed place and time and one does not turn up, no one supposes that the other could sue to recover his wasted travel expenses. Examples of agreements which have been held not to amount to contracts for this reason include an agreement to give a prize to the winner of a golf competition where "no one concerned with that competition ever intended that there should be any legal results flowing from the conditions posted and the acceptance by the competitor of those conditions": *Lens v Devonshire Club*, The Times, 4 December 1914, referred to in *Wyatt v Kreglinger & Fernau* [1933] 1 KB 793, 806. The same conclusion was reached in relation to an agreement between members of a band who were also friends to share publishing income from songs credited to one of the band members: *Hadley v Kemp* [1999] EMLR 589, 623. Many other examples can be found but it is not helpful to multiply them as each case depends on its own facts.

56. Factors which may tend to show that an agreement was not intended to be legally binding include the fact that it was made in a social context, the fact that it was expressed in vague language and the fact that the promissory statement was made in anger or jest: see *Chitty on Contracts* (32nd Edn, 2015), vol 1, paras 2-177, 2-194 and 2-195.

57. Again, it is in issue in this case whether, if any genuine agreement was made as a result of anything said by Mr Ashley on 24 January 2013, that agreement was intended to be legally binding.

(iii) Consideration

58. It is traditionally said that, to be legally binding, an agreement (unless made by deed) must be supported by consideration. The basic idea is that English law will not enforce a promise for which nothing at all has to be done in return. Thus, an offer to pay Mr Blue £15 million if the Sports Direct share price reached £8 per share which Mr Blue merely said that he was accepting without doing or promising to do anything at all on his part could not give rise to a legally binding contract. On any view of what was discussed, however, Mr Blue had to "get" the Sports Direct share price to £8, or at least to do work which was aimed at increasing the share price to that level, in order to qualify for the payment. The requirement of consideration therefore does not cause a problem. It would be unusual if it did, as I am not aware of any case in the twenty-first century in which a claim founded on an agreement has failed for want of consideration.

59. In Mr Ashley's statement of case a defence was put forward that there was no consideration for his alleged offer of payment because the services which Mr Blue says that he provided in reliance on it were services that he was already obliged to provide under the Management Services Agreement. There used to be a rule that a promise to perform, or actual performance of, a pre-existing duty could not constitute consideration. That rule may sometimes have helped to protect contracting parties against exploitation through the other party refusing to do what it had contracted to do unless some extra payment or other benefit was provided. But it is now recognised that this mischief is better addressed by other doctrines such as economic duress and public policy. The decision of the Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1999] 1 QB 1 effectively rendered the rule obsolete by

accepting that performance or a promise to perform an existing duty can satisfy the requirement of consideration by providing a practical benefit to the other party, which it will invariably do. In any event, the purported rule could not have applied in this case as the duties under the Management Services Agreement were owed by Aspiring Capital Partners to Sportsdirect.com Retail Limited, whereas any duty to provide services under the alleged oral agreement would have been owed by Mr Blue to Mr Ashley.

60. The defence of lack of consideration was accordingly hopeless and was quite rightly not pursued by counsel for Mr Ashley at the trial.

(iv) Certainty and completeness of terms

61. Vagueness in what is said or omission of important terms may be a ground for concluding that no agreement has been reached at all or for concluding that, although an agreement has been reached, it is not intended to be legally binding. But certainty and completeness of terms is also an independent requirement of a contract. Thus, even where it is apparent that the parties have made an agreement which is intended to be legally binding, the court may conclude that the agreement is too uncertain or incomplete to be enforceable – for example, because it lacks an essential term which the court cannot supply for the parties. The courts are, however, reluctant to conclude that what the parties intended to be a legally binding agreement is too uncertain to be of contractual effect and such a conclusion is very much a last resort. As Toulson LJ observed in *Durham Tees Valley Airport v bmibaby* [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep 68, at para 88:

> "Where parties intend to create a contractual obligation, the court will try to give it legal effect. The court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give to the agreement (or that part of it) any sensible content." (citing *Scammell v Dicker* [2005] EWCA Civ 405, para 30, Rix LJ)."

62. It has nevertheless been argued on behalf of Mr Ashley that the alleged oral agreement on which Mr Blue's claim is based was so vague and uncertain that, even if it was intended to create a contractual obligation, it cannot be given any sensible content and is unenforceable for that reason.

The objective test and evidence of subjective belief

63. In determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, English law applies an objective test. As stated by Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14; [2010] 1 WLR 753:

> "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to

> create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."

As with all questions of meaning in the law of contract, the touchstone is how the words used, in their context, would be understood by a reasonable person. For this purpose the context includes all relevant matters of background fact known to both parties.

64. There is, at least arguably, a limitation on the objective nature of the test where one party's subjective intention is actually known to the other: see *Novus Aviation Ltd v Alubaf Arab International Bank BSC(c)* [2016] EWHC 1575 (Comm); [2017] 1 BCLC 414, para 56. But no reliance has been placed on any such principle in this case. What is accepted by counsel on both sides is that where, as here, the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis. In the case of an oral agreement, unless a recording was made, the court cannot know the exact words spoken nor the tone in which they were spoken, nor the facial expressions and body language of those involved. In these circumstances, the parties' subjective understanding may be a good guide to how, in their context, the words used would reasonably have been understood. It is for that reason that the House of Lords in *Carmichael v National Power Plc* [1999] 1 WLR 2042 held that evidence of the subjective understanding of the parties is admissible in deciding what obligations were established by an oral agreement.

IV. EVIDENCE BASED ON MEMORY

65. It is rare in modern commercial litigation to encounter a claim, particularly a claim for millions of pounds, based on an agreement which is not only said to have been made purely by word of mouth but of which there is no contemporaneous documentary record of any kind. In the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements or discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint. In the present case, however, such a footprint is entirely absent. The only sources of evidence of what was said in the conversation on which Mr Blue's claim is based are the recollections reported by the people who were present in the Horse & Groom on 24 January 2013 and any inferences that can be drawn from what Mr Blue and Mr Ashley later said and did. The evidential difficulty is compounded by the fact that most of the later conversations relied on by Mr Blue were also not recorded or referred to in any contemporaneous document.

66. I have no reason to think that (with the possible exception of Mr Leach when he retreated from what he had said to Mr Blue's solicitors) any of the witnesses were doing anything other than stating their honest belief based on their recollection of what was said in relevant conversations. But evidence based on recollection of what was said in undocumented conversations which occurred several years ago is problematic. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), at paras 16-20, I made some observations about the unreliability of human

memory which I take the liberty of repeating in view of their particular relevance in this case:

> "16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
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> 17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
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> 18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
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> 19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness

> statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.
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> 20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events."

67. In the light of these considerations, I expressed the opinion in the *Gestmin* case (at para 22) that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts.

68. A long list of cases was cited by counsel for Mr Blue showing that my observations in the *Gestmin* case about the unreliability of memory evidence have commended themselves to a number of other judges. In some of these cases they were also supported by the evidence of psychologists or psychiatrists who were expert witnesses: see e.g. *AB v Catholic Child Welfare Society* [2016] EWHC 3334 (QB), paras 23-24, and related cases. My observations have also been specifically endorsed by two academic psychologists in a published paper: see Howe and Knott, "*The fallibility of memory in judicial processes: Lessons from the past and their modern consequences*" (2015) Memory, 23, 633 at 651-3. In the introduction to that paper the authors also summarised succinctly the scientific reasons why memory does not provide a veridical representation of events as experienced. They explained:

> "… what gets *encoded* into memory is determined by what a person attends to, what they already have stored in memory, their expectations, needs and emotional state. This information is subsequently integrated (*consolidated*) with other

> information that has already been stored in a person's long-term, autobiographical memory. What gets *retrieved* later from that memory is determined by that same multitude of factors that contributed to encoding as well as what drives the recollection of the event. Specifically, what gets retold about an experience depends on whom one is talking to and what the purpose is of remembering that particular event (e.g., telling a friend, relaying an experience to a therapist, telling the police about an event). Moreover, what gets remembered is reconstructed from the remnants of what was originally stored; that is, what we remember is constructed from whatever remains in memory following any forgetting or interference from new experiences that may have occurred across the interval between storing and retrieving a particular experience. Because the contents of our memories for experiences involve the active manipulation (during encoding), integration with pre-existing information (during consolidation), and reconstruction (during retrieval) of that information, memory is, by definition, fallible at best and unreliable at worst."

69. In addition to the points that I noted in the *Gestmin* case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light.[2]

70. Mindful of the weaknesses of evidence based on recollection, I will make such findings as I can about what was said in the conversations on which Mr Blue relies and in particular in the crucial conversation on 24 January 2013 on which his claim is founded.

V. WHAT WAS SAID ON 24 JANUARY 2013?

71. Everyone present at the drinks in the Horse & Groom on 24 January 2013 recalls that there was some talk about the Sports Direct share price and how much Mr Ashley's shares would be worth if the share price reached various levels. I think it likely that this conversation was mostly between Mr Ashley, Mr McEvoy and Mr Clifton, as they and Mr Tracey all recall. That would have been natural both because the object of the drinks was for Mr Ashley to "bond" with Mr McEvoy and Mr Clifton and because, as traders, share prices are their bread and butter. It was probably Mr Clifton who introduced the question of how Mr Ashley was going to reward or incentivise Mr Blue on the basis of the share price, as Mr Clifton recalls himself doing. No doubt various different numbers were suggested and Mr Blue may well have proposed a target for himself of £7.20, as he says he did. All the participants (except for Mr Ashley, who remembers none of this part of the conversation) remember the group

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[2] For example, when US college students were asked to remember their high school grades and their memories were checked against records of their actual results, they were highly accurate for A grades (89% correct) but extremely inaccurate for D grades (29% correct). See Daniel Schacter, "*How the Mind Forgets and Remembers: The Seven Sins of Memory*" (2001) pp150-1.

settling on a target of £8 per share. It is inherently probable that they are right about this, as a target of £8 had an obvious logic to it, being approximately double the then current price of Sports Direct's shares.

72. I think it likely that in this conversation Mr Ashley did say something along the lines recalled by Mr Blue to the effect that, if Mr Blue could get the stock to £8 per share, why should he (Mr Ashley) care how much he paid Mr Blue, as he would have made so much money that it would not matter. No doubt others concurred with this sentiment. It is in keeping with what seems to have been the general tone of the conversation, including the comparison which Mr Clifton as well as Mr Blue recalled that, if the Sports Direct share price were to reach £8 per share, its market capitalisation would be the same as that of Marks & Spencer.

73. Recollections of particular numbers mentioned are much more problematic. It is apparent, however, that this conversation meant much more to Mr Blue, who was the subject of it, than it did to the others – or at any rate than it did to the ESIB representatives for whom it could have been no more than some amusement. I am prepared in the circumstances to accept as more likely than not to be correct Mr Blue's recollection of the discussion first settling on a figure of £10 million and of this figure then being increased to £15 million. Mr Blue's recollection that either Mr Clifton or Mr McEvoy, on returning from the toilets, suggested doubling the number in view of how much money Mr Ashley would make if Mr Blue could get the stock to £8 a share is supported by Mr Clifton's independent recollection of saying something exactly along these lines when he re-joined the group after a visit to the toilets. I note too that, although when his witness statement was prepared Mr Blue could not remember whether it was Mr Clifton or Mr McEvoy who came back from the toilets and suggested doubling the amount, an email sent by Mr Blue's solicitors in June 2015 shows that Mr Blue's recollection at that time was that it was Mr Clifton.

74. Mr Clifton thought that £10 million was the final number, arrived at by adopting his suggestion of doubling the amount, and did not recall Mr Ashley saying that he would split the difference. Mr McEvoy also thought that the final number was £10 million and Mr Tracey thought that it might have been £8 million. However, as I have indicated, I consider that they are less likely than Mr Blue to remember accurately how the conversation ended and what the final figure was. The fact that Mr McEvoy said in evidence that he recalled Mr Clifton suggesting that the amount should be doubled and Mr Ashley then splitting the difference provides some additional support for Mr Blue's recollection of the process by which the final figure was reached. No one has ever suggested that the final figure might have been £7.5 million and it is impossible using round numbers to arrive at £10 million by first doubling a figure and then splitting the difference.[3] I therefore think it most likely that the final number was £15 million, as Mr Blue recalls, and that the £10 million recalled by Mr Clifton was the number arrived at before it was increased after Mr Clifton's return from the toilets.

75. Mr McEvoy may well be right in recalling that, when the final number was settled by Mr Ashley, Mr Ashley and Mr Blue shook hands. I see no reason to doubt the evidence of Mr Tracey and Mr McEvoy that everyone was laughing during the

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[3] The starting figure would have to be £6,666,666, which is highly unlikely to have been a figure suggested.

conversation, nor the evidence of Mr Tracey that during the conversation Mr Blue had a big grin on his face and was looking "over the moon".

76. I am not, however, prepared to place reliance on Mr Blue's evidence that a period of three years in which to reach the share price target was specified. As with the final figure of £15 million, Mr Blue is the only person who recalls this. (As mentioned earlier, Mr Tracey recalled a period of 18 months or two years, while neither Mr Clifton nor Mr McEvoy recalled any period of time being discussed.) However, whereas the sum of £15 million is mentioned in the timeline that Mr Blue prepared in January 2015 and in the letter that he handed to Mr Ashley on 13 March 2015, there is no reference in either document to a three year timescale for achieving the £8 target and I think it likely that this is a later reconstruction on his part.

77. In accepting Mr Blue's evidence that the figure of £15 million was settled on, I have not overlooked the evidence of those witnesses who recalled Mr Blue mentioning different figures to them in subsequent conversations. Referring first to Mr Hellawell, none of the participants in the conversation on 24 January 2013 recalled a figure anywhere near as low as £1 million being discussed – which is the number that Mr Hellawell recalls Mr Blue mentioning in a conversation which he believes took place on 27 February 2014 (see paragraph 30 above). If a figure of one million was indeed mentioned to Mr Hellawell it is likely to have been the million shares that Mr Blue stood to receive if he joined the employee share scheme. Mr Leach remembered overhearing a conversation between Mr Ashley and Mr Blue at around the end of January 2014 in which Mr Ashley said that Mr Blue would be "on the million shares, same as the rest of them" – which Mr Leach took to be referring to what would happen if Mr Blue became the Finance Director – and Mr Blue might well have mentioned this to Mr Hellawell.

78. As for Mr Cowgill, the conversation that he recollects occurred on 12 May 2015, some two months after Mr Blue had written to Mr Ashley maintaining that there was an agreement to pay him £15 million and only around two weeks before this allegation was repeated and amplified by Mr Blue's solicitors in a formal letter of claim. Mr Cowgill gave evidence that Mr Blue told him that Mr Ashley should have paid him £8 million. But I am sure that Mr Blue would not have mentioned a different amount of money to Mr Cowgill from the amount that he was in fact already claiming. Indeed, I think it unlikely that Mr Blue would have mentioned a specific amount of money to Mr Cowgill at all. Mr Cowgill may well have confused a reference to the share price target of £8 per share.

79. I accordingly find that the substance of the "agreement" made between Mr Ashley and Mr Blue at the Horse & Groom on 24 January 2013 was that, if Mr Blue could get the Sports Direct share price to £8 per share (within an unspecified time), Mr Ashley would pay him £15 million.

VI. WAS A BINDING CONTRACT MADE?

80. The next question is whether what was said on 24 January 2013 gave rise to a binding contract. In answering this question, the key issue is whether, when Mr Ashley said that he would pay Mr Blue £15 million if he could get the Sports Direct share price to £8 per share, this would reasonably have been understood as a serious offer capable of

creating a legally binding contract. Having heard the evidence, I am quite sure that it would not. I have reached this conclusion for eight main reasons.

The setting

81. The first is the setting. As described by Mr Tracey, it was "five guys and a barman in a pub". A fair amount of alcohol had been consumed. Those circumstances by themselves do not prevent a contract from being made – any more than did the fact that in *MacInnes v Gross* [2017] EWHC 46 (QB) the relevant discussion took place over dinner in a smart restaurant. As Coulson J said in that case (at para 81), a contract can be made anywhere in any circumstances. But an evening of drinking in a pub with three investment bankers is an unlikely setting in which to negotiate a contractual bonus arrangement with a consultant who was meeting them on behalf of the company.

82. It was argued on behalf of Mr Blue that, while this might be true in the case of an ordinary businessman, Mr Ashley is not an ordinary businessman but is someone who adopts an "unorthodox approach to taking business decisions in informal settings while consuming substantial amounts of alcohol". In particular, Mr Blue relied on the fact that, at Sports Direct's weekly senior management meetings he had witnessed Mr Ashley (and others) drinking alcohol, sometimes allegedly in copious quantities. When Mr Blue was working at Sports Direct such meetings were held at the Lion Hotel in Worksop. Between 10 and 20 members of Sports Direct's senior management would typically attend and Mr Blue attended these meetings regularly. The meetings would begin by, at latest, 8pm with people first congegrating in the bar area. There is a conference facility at the hotel where the main part of the meeting would take place and where food would be served at around 9:30pm. The purpose of the meetings was for senior managers to update each other on the performance of the business and current developments. The meetings were divided into two parts, each around an hour long. One part would consist of a presentation from someone on a particular topic. Topics that featured regularly included: (i) retail operations, (ii) online strategy, (iii) IT and infrastructure, (iv) international expansion, (v) brand management, and (vi) property. The other part of the meeting consisted of going through a "management pack" of information and receiving a weekly update on each area of the business.

83. Mr Ashley agreed that at these meetings alcohol was frequently consumed and said that, at a typical meeting, he might drink four pints of beer followed by wine with the food or, if he stayed with beer, say six pints of beer during the evening. Mr Blue said that he thought Mr Ashley made alcohol freely available at these meetings as a deliberate strategy to encourage his senior managers to speak more openly than might otherwise be the case in a more formal meeting environment. He described this approach as typical of Mr Ashley's personality and business style. He may well be right about this but the evidence about these meetings does not seem to me to carry Mr Blue's case very far. The Sports Direct senior management meetings certainly show that Mr Ashley is happy to combine discussion of business matters with the consumption of alcohol. But there is no evidence to suggest that Mr Ashley has ever negotiated or concluded a contract at one of these meetings. The evening at the Horse & Groom was, in any event, a considerably less formal occasion than the senior management meetings, as there was no agenda or structure for the occasion and the

conversation was largely social or general chat, rather than being specifically directed to any business subject.

(ii) The purpose of the occasion

84. In addition to its setting, a second significant feature of the context in which the conversation on 24 January 2013 took place is the purpose of the occasion. Counsel for Mr Blue are plainly right in saying that the meeting with the ESIB traders was not merely social and that it had a business purpose. But that purpose was not to discuss Mr Blue's work for Sports Direct or terms for his remuneration. It was an outward-facing occasion in which Mr Ashley and Mr Blue were both representing Sports Direct in meeting the representatives of a prospective service provider. In particular, the aim was to enable the senior people on the trading side of ESIB to meet Mr Ashley in an informal setting in order to build a commercial relationship with Mr Ashley / Sports Direct. I accept Mr Blue's evidence that, given the demands on his time, Mr Ashley would not have agreed to attend the meeting, let alone have invested the time and energy in it that he did, had he not believed that securing the services and enthusiastic support of ESIB as the company's new corporate broker was important for Sports Direct. But that very fact is inconsistent with the notion that it was an occasion to agree with Mr Blue a personal incentive bonus plan. Not only is it inherently unlikely that a matter personal to Mr Blue would have been the subject of serious discussion in the presence of strangers, but such a discussion would have been completely extraneous to the serious purpose which the meeting had.

(iii) The nature and tone of the conversation

85. The third feature of the occasion which is inconsistent with an intention to make a serious contractual offer to Mr Blue is the nature and tone of the conversation. Before the topic of the Sports Direct share price came up, there had been talk about football in which Mr Ashley had been impressing and flattering the ESIB traders by talking about potential purchases of players in the transfer market and making them feel they were getting an inside track on Mr Ashley's role as the owner of a Premier League club. When the conversation turned to the Sports Direct share price, it was obviously jocular, with some joshing about just how wealthy Mr Ashley would be if the share price were to reach various levels. It was, as I have found, probably not Mr Ashley who introduced the idea of a payment to incentivise Mr Blue, but rather Mr Clifton who was (in his own description) "feeling a bit mischievous". Mr Ashley took up the idea but, apart from asking Mr Blue what he thought an appropriate share price target might be, carried on the conversation primarily with the ESIB traders, who made their own obviously facetious suggestions about how Mr Blue should be incentivised or rewarded. I have found, based partly on Mr Blue's own recollection, that the final figure was arrived at after Mr Clifton proposed doubling the number on his return from a visit to the gents. Mr Ashley then said that he would split the difference between the new number (of £20 million) and the previous figure (of £10 million) and Mr Blue said that he thought this sounded fair.

86. No skilled businessman in Mr Ashley's position would have fixed the amount of a contractual bonus payment for a consultant on the basis of numbers being bandied about by some City traders who had no knowledge of or particular interest in how much Mr Blue was paid – all the more so when it must have been obvious that Mr Clifton's proposal to double up was being made with tongue in cheek. The tone of

the discussion is also apparent from the evidence of the ESIB witnesses, which I accept, that everyone was laughing throughout. No one could reasonably have understood this to be a serious business discussion.

87. I do accept that "banter", as the ESIB witnesses all described it, can have a more serious underlying intent. Mr Tracey's perception was that Mr Ashley was using the discussion about how high the Sports Direct share price might go and how to incentivise Mr Blue as a way of conveying to the traders his faith in the company and the potential for its shares to increase in price. Mr Tracey also thought that Mr Ashley was trying to make Mr Clifton and Mr McEvoy view Mr Blue as important and assumed that he was doing this because he wanted Mr Blue rather than himself to be the main point of contact for ESIB. I see no reason to doubt Mr Tracey's reading of the situation. It reinforces the point that Mr Ashley was not interested in making a deal with Mr Blue but was focussed on cultivating the relationship with ESIB.

(iv) Lack of commercial sense

88. The fourth reason why no reasonable business person would have thought that a serious contractual offer was being made is that Mr Ashley had no commercial reason to offer to pay Mr Blue £15 million as an incentive to do work aimed at increasing the Sports Direct share price. I do not accept the submission made on Mr Blue's behalf that he was at that stage "a trusted and close business associate of Mr Ashley". He had only been working as a consultant for Sports Direct for around two months and Mr Ashley did not know Mr Blue particularly well. Their only period of close contact had been two weeks spent making "roadshow" presentations to investors during the Sports Direct IPO some six years earlier. Mr Blue's main point of contact when he did some work for Sports Direct in connection with the Debenhams bids had been Mr Mellors. It was Mr Forsey who had engaged Mr Blue's services as a consultant under the Management Services Agreement: Mr Ashley was not involved in the discussions. And in the two months since he had started work most of Mr Blue's dealings had been with Mr Forsey and Mr Mellors. There is no suggestion that Mr Blue had expressed any dissatisfaction with the remuneration that Sports Direct had agreed to pay for his services or had asked for any kind of bonus or incentive. Nor is there any evidence that Mr Ashley has ever offered anyone at Sports Direct – even those at the heart of the business – an incentive payment or bonus of anything like as much as £15 million.

89. Counsel for Mr Blue argued that promising to pay Mr Blue £15 million if he could get the share price above £8 made "obvious" or "perfect" commercial sense for Mr Ashley. Their argument was that, if Mr Blue managed to achieve the £8 share price target, Mr Ashley would personally be worth an additional £1.6 billion – or around a hundred times what he would have to pay Mr Blue. If, on the other hand, the share price did not reach £8 per share, Mr Ashley would still benefit from Mr Blue's efforts without them costing him anything at all.

90. It seems to me that there are two major flaws in this argument. The first is that, had Mr Ashley been having a serious business discussion about paying Mr Blue an incentive bonus, I am sure that he would not have approached it by remarking how enormously the value of his shares in Sports Direct would increase if the share price were to double to £8 per share. No entrepreneur who has built up a successful business decides whether or how much money to pay for something purely on the basis of what they might gain: they are also concerned not to incur an unnecessary

cost. My impression from the evidence accords with the submission of Mr Blue's counsel (made in the context of the £1 million payment) that Mr Ashley is "clearly a person who understands the value of money … He is simply not the kind of person to throw one million pounds at Mr Blue ..." The same applies with all the more force to a sum of £15 million. Had Mr Ashley thought that Mr Blue's efforts could make a significant difference to the share price and that it was desirable to offer Mr Blue a bonus to incentivise him, I am sure that he would have assessed how much he would need to offer in order to provide such an incentive. For that purpose he would have looked at how much Mr Blue was being paid by Sports Direct – which amounted to £250,000 per year if Mr Blue were to work a five day week. It would plainly have provided a massive incentive to Mr Blue to offer him a bonus of, say, £2.5 million (that is, ten times his annual earnings). A sum of £10 million or £15 million was on any view far more than Mr Ashley could possibly have thought it necessary or sensible to offer: it would simply have involved throwing money at Mr Blue. Nor in any serious business discussion would Mr Ashley, having arrived at a figure which itself would have far exceeded Mr Blue's wildest hopes or expectations, then have increased it by a further 50% through an arbitrary process of splitting the difference between the figure first arrived at and a figure which was double that amount.

91. In short, it is plain from the way in which big numbers were being tossed around that the conversation in the Horse & Groom was not a serious discussion about creating an incentive bonus arrangement for Mr Blue but was banter in which Mr Ashley was displaying his wealth and the scale of his ambitions.

92. A second flaw in the argument made by Mr Blue's counsel is that it assumes that Mr Blue's efforts had the potential to increase the Sports Direct share price by a substantial amount. I see no reason to make any such assumption, nor to suppose that Mr Ashley would have made such an assumption, having regard to Mr Blue's role at Sports Direct.

93. Plainly, there is room for many different opinions about the relative importance of different factors in influencing a company's share price. No expert evidence was adduced by Mr Blue to support his assertion that the kind of work that he did is likely to have had a significant impact on the share price of Sports Direct. In the absence of such evidence, I see no reason to suppose that it did. As discussed in section VII below, I do not doubt that Mr Blue did useful work in supporting the corporate brokers in their efforts to improve relations with investors and potential investors. But I see no *a priori* reason to assume that such steps would have a significant effect on the investment decisions made by experienced fund managers.

(v) Incongruity with Mr Blue's role

94. This point goes further than merely showing the absence of a good commercial reason to offer Mr Blue a £15 million incentive. Mr Blue's evidence – which I have accepted as probably accurate – is that Mr Ashley said he would pay the £15 million to Mr Blue if Mr Blue could "get" the Sports Direct share price above £8 per share. However, on even the most generous view of the value of Mr Blue's services, the idea that he could somehow, through his skills and contacts in corporate finance, "get" the share price to double its then level seems plainly fanciful. No one would seriously suppose that any human being has such powers, let alone someone performing a role which, as Mr Blue agreed, would typically command remuneration of no more than,

say, £300,000 to £400,000 per year (and was also a role of which Mr Blue had no previous direct experience). I think it would have been obvious to anyone with any experience of investment and financial markets that such an offer could not be meant seriously. That was certainly the perception of Mr McEvoy who said in evidence:

> "Being a trader, for me, for the share price to double based on Jeff's role I just thought that was – obviously it was a joke."

95. Mr Blue's response to this point was to suggest that Mr Ashley did not actually mean what he said and that what he must in fact have meant, or should reasonably be understood to have meant, is that he would pay Mr Blue £15 million if (a) Mr Blue did work with the aim of increasing Sports Direct's share price and (b) the share price in fact rose above £8 per share – without it being necessary to show any connection between the work done by Mr Blue and the increase in the share price. It seems to me that the fact that Mr Blue is seeking to re-cast Mr Ashley's "offer" in this way only serves to underline the point that it could not have been seriously meant.

96. Furthermore, if the offer made by Mr Ashley had been the version suggested by Mr Blue, it would no doubt have seemed less humorous to the City traders but would not have been any less absurd. To pay Mr Blue £15 million if the share price – for reasons which may have had nothing whatever to do with him – subsequently reached £8 on condition only that Mr Blue could show he had done some work (the nature and extent of which were left completely unspecified) with the aim in mind of increasing the share price, would be an utterly unbusinesslike arrangement. It is unrealistic to suppose that anyone with business experience – let alone someone with the business acumen of Mr Ashley – would seriously entertain it. Thus, the fifth reason for my conclusion that no reasonable person would have understood Mr Ashley to be making a serious offer is that a contract made on the terms discussed would have been inherently absurd.

(vi) Vagueness of the "offer"

97. This leads to the sixth reason why no reasonable person would have understood Mr Ashley to be making a contractual offer, which is that the "offer" was far too vague to have been seriously meant. Any serious discussion of a £15 million payment to incentivise Mr Blue would have required consideration of exactly what work Mr Blue was going to do to earn this bonanza and how the utility or effect of his work was going to be measured. It is not suggested by Mr Blue that such matters came into the conversation in the pub at all (or were ever mentioned afterwards). An essential element of any contract would also have been a specified period within which the share price target would have to be achieved. As indicated earlier, I am not satisfied that any timescale was agreed. Furthermore, if, as suggested by Mr Blue, the potential benefit to Mr Ashley would be the increased value of his shares (at least on paper), it would be reasonable to expect discussion of a period of time for which the share price would need to stay above the target price in order for the bonus payment to accrue. For the share price to peak above £8 for a day or an hour or a minute before falling precipitously would defeat the suggested object of the incentive. Precisely for that reason, when Mr Tracey realised that Mr Blue was taking Mr Ashley seriously, he suggested that Mr Blue should aim at trying to keep the share price above £8 for at least 30 days. But no such discussion ever took place with Mr

Ashley. That is yet another indication that no binding agreement between Mr Ashley and Mr Blue was ever seriously contemplated.

(vii) Perceptions of the ESIB witnesses

98. The seventh reason why I am confident that no reasonable person would have understood Mr Ashley to be making a contractual offer is that none of the three witnesses from ESIB who took part in the conversation thought that he was being serious.

99. I have noted that, although the test of whether an offer was made and intended to be legally binding is objective, in a case such as this where the relevant statements were oral, evidence of how they were understood by the parties themselves is admissible. That logic applies equally to the subjective understanding of other people who witnessed or took part in a conversation. It is therefore telling that all three of the ESIB representatives – Mr Tracey, Mr McEvoy and Mr Clifton – perceived the conversation about incentivising Mr Blue as no more than banter.

100. Counsel for Mr Blue did not suggest that the evidence given by these witnesses of their understanding was untruthful. But it was argued that what may have seemed like banter to them would not have seemed so if they had had the same prior knowledge as Mr Blue of Mr Ashley and his "unorthodox" business practices. This comes back to the contention that Mr Ashley was not an ordinary businessman but was, extraordinarily, the sort of person who would be willing to make a legally binding deal through what would seem to those who did not know him like banter in a pub. For reasons already given, the evidence relied on by Mr Blue does not bear out that contention.

101. It may be added that Mr Tracey did have a previous acquaintance with Mr Ashley, having been head of the team at Merrill Lynch that worked on the Sports Direct IPO. He was also a friend of Mr Blue and discussed with Mr Blue on several occasions in the following months what had been said by Mr Ashley in the Horse & Groom. An additional advantage enjoyed by Mr Tracey as an observer is that he was the only person present who was not drinking alcohol. It is clear – and Mr Blue did not dispute – that Mr Tracey's perception was that Mr Ashley was not being serious when he said that he would pay Mr Blue a bonus if Mr Blue got the share price to £8. Mr Tracey was in a much better position to take an objective view than Mr Blue, who had not only drunk two or three pints of lager on an empty stomach by the time the conversation took place, but whose judgment may have been impaired by the excitement of hearing his name mentioned in connection with very large sums of money.

(viii) Mr Blue's perception

102. My eighth and last main reason for concluding that, objectively, there was no intention to make a contract is that I am satisfied that Mr Blue himself did not understand there to be such an intention at the time when the conversation in the Horse & Groom took place or in the period immediately afterwards. That is indicated by Mr Tracey's evidence that he did not understand Mr Blue to be taking the conversation seriously when they first spoke about the evening (probably within the next day or so) but only gained this impression some months later at or around the

time of the barbecue at Mr Blue's house on 10 August 2013. This conclusion is also demonstrated by the objective facts. It is improbable that a person with as much business experience as Mr Blue, had he truly believed when the conversation in the Horse & Groom took place that Mr Ashley had agreed to pay him £15 million if he got the Sports Direct share price to £8 (or if the Sports Direct share price got to £8) would have thought it unnecessary to make any written record of what had been agreed. It is even more improbable – indeed, in my view, wholly incredible – that, if Mr Blue had believed there to be a binding oral agreement, he would have waited nearly a year – as on his own case he did – before ever mentioning what had been said in the Horse & Groom to Mr Ashley.

103. Mr Blue's explanation for why he did not mention the subject to Mr Ashley until, on his evidence, late December 2013 is that he saw no need to do so because their agreement was clear and he trusted Mr Ashley to honour it. But that explanation does not stand a moment's scrutiny. Even if Mr Blue had believed that Mr Ashley was being serious, the circumstances in which the conversation took place – an informal meeting with Sports Direct's new corporate brokers in a pub in which the drinks were flowing, people were laughing, and when Mr Blue (on his own admission) had been surprised when the idea of offering him an incentive had been discussed – would at the very least have signalled the need to get Mr Ashley's confirmation of the arrangement in the light of day. The ambiguity about what Mr Blue had to do in order to become entitled to the payment would also have cried out for some clarification. Moreover, if, as Mr Blue claims, he did work of various kinds on the strength of what Mr Ashley had said, I find it unbelievable that he would not have mentioned to Mr Ashley that he was embarking on such work.

104. Furthermore, it was not just a matter of clarity and trust. There was a need to make sure that Mr Ashley remembered what had been said and had the same recollection as Mr Blue. Even if Mr Blue is right that Mr Ashley was not at all drunk when the conversation took place, he must have learnt (from Mr Tracey, if not from Mr Ashley himself) that after he had left the pub at around 8.30pm the drinking session carried on late into the night. Given the well known fact that alcohol consumption impairs memory, I cannot believe that, if Mr Blue had thought at the time that he had made a contract with Mr Ashley under which he stood potentially to receive £15 million, he would have regarded it as unnecessary for months afterwards ever to check that Mr Ashley recalled what had been said.

105. All these points would have force enough if it had been expected on 24 January 2013 that the Sports Direct share price might double within the next few weeks or months. But, realistically, no one present in the Horse & Groom could have thought it likely that the share price would double within that sort of time frame. As mentioned, Mr Blue's evidence is that a period of three years was specified. I have not found this proved. But on any view, Mr Blue must have contemplated that it might be a matter of years rather than months before the £8 target was reached, if it was ever reached at all. However much Mr Blue trusted Mr Ashley, he could not sensibly count on Mr Ashley remembering what might be a year or more later an arrangement agreed in a conversation in a pub, if the arrangement had never been put in writing or ever mentioned again in the meantime. In my view, the irresistible inference from the fact that Mr Blue did not, on his own evidence, make any reference at all in any conversation with Mr Ashley to what had been said in the Horse & Groom (let alone

any written record of it) for the next 11 months is that Mr Blue did not believe at the time of that conversation that he and Mr Ashley had made an agreement.

106. I think it likely that Mr Blue started to attach more significance to the conversation and invested it with more weight in hindsight when the Sports Direct share price climbed rapidly in around June and July 2014. At that point, as mentioned earlier, the possibility of the share price reaching £8, which may have seemed remote in January, no doubt started to seem realistic. It was then that Mr Blue made it clear to Mr Tracey that he was taking what Mr Ashley had said seriously and began to dream of holidays in Barbados and buying the next door house.

107. Mr Tracey said that, when he realised that Mr Blue was taking Mr Ashley seriously, he advised Mr Blue to get their agreement put in writing. It was obvious advice to give and advice which I am sure that Mr Blue would himself have given if someone else in such a situation had spoken to him. Not only did Mr Blue not follow Mr Tracey's advice, he still even then did not raise the subject of the potential bonus payment in conversation with Mr Ashley. The reason why he did not, as it seems to me, must have been that, although he was by now convinced (or had convinced himself) that Mr Ashley had been serious when he had said that he would pay Mr Blue £15 million if he got the share price to £8 per share, Mr Blue still did not believe that Mr Ashley had intended to make a legally binding agreement. Rather, Mr Blue's silence only seems to me explicable on the basis that he was regarding what Mr Ashley had said as a statement of intention which he hoped that Mr Ashley would adhere to but which might at most have given rise to a moral obligation rather than a legally binding contract.

Work done by Mr Blue

108. Mr Blue has claimed that, although he did not mention the conversation in the Horse & Groom to Mr Ashley for the next eleven months, he was nevertheless doing a lot of work during that time in reliance on what Mr Ashley had said which was outside the scope of his consultancy agreement with Sports Direct. Mr Blue has said that such work fell into the following four categories:

    i) The appointment of corporate brokers;

    ii) Expanding the range and quality of equity research coverage;

    iii) Improving investor relations; and

    iv) Improving the liquidity of Sports Direct shares by arranging the sale of blocks of Mr Ashley's shares, thereby increasing the "free float".

109. More particularly, as regards the second and third of these categories, Mr Blue gave evidence that his work included meeting and arranging visits to the Sports Direct headquarters in Shirebrook for equity research analysts, attending over one hundred meetings with shareholders or potential investors, preparing and frequently updating a presentation to investors and financial model, launching a new corporate website and drafting announcements for Sports Direct and the company's interim and annual reports.

110. I agree that this work is outside the scope of the Management Services Agreement, as that agreement had been drafted, but I do not accept that Mr Blue did the work as a result of anything said by Mr Ashley in the Horse & Groom. I noted earlier that, although the services specified in the Management Services Agreement were services on "strategic development opportunities and related matters", from the moment he started working for Sports Direct Mr Blue became involved in other areas which could not fairly be described as related to strategic development opportunities, including work concerned with improving investor relations. Mr Blue was asked by Mr Forsey to do this work because, although Mr Blue had never done it before, he had general familiarity with such work through his experience in the City and, by taking it on, helped to reduce the heavy burden on Mr Forsey. This did not occur, however, as a result of anything said by Mr Ashley in the Horse & Groom. It occurred at the request of Mr Forsey and Mr Mellors, and Mr Blue was already engaged in such work by the time of the meeting with the ESIB brokers on 24 January 2013. Indeed, that meeting was part of it. As well as looking for a new corporate broker, other work in the field of investor relations on which Mr Blue had by that time already embarked included the preparation of the investor presentation and financial model, which he undertook at Mr Forsey's request.

111. Moreover, although the wording of the Management Services Agreement was not apt to cover investor relations work and some of the other work that Mr Blue did, it is clear that no one in practice paid any attention to that fact or saw any need to amend the agreement. The work was simply treated as part of Mr Blue's role as it evolved and was counted as part of the four days – and later five days – per week for which his firm, Aspiring Capital Partners, charged and was paid for his services by Sportsdirect.com Retail Limited. Thus, the monthly invoices which he submitted on behalf of Aspiring Capital Partners contained descriptions of work done which included frequent references to "corporate broking", "IR presentation", "IR materials", "investor meetings", "corporate website" and other matters which Mr Blue now says were not part of his role because they were not covered by the wording of the agreement. The itemised work even included work for MASH Holdings Limited, the company through which Mr Ashley owned his shares in Sports Direct. It is plain that all this work was treated, without distinction, as part and parcel of the services that Mr Blue (through Aspiring Capital Partners) was providing and being paid for under the Management Services Agreement.

112. Despite this, Mr Blue in his oral evidence denied that he had billed Sports Direct for items relating to corporate broking and investor relations, maintaining that he had included such references in the invoices that he submitted only so that "Mr Forsey had complete oversight in terms of the work I was doing". This piece of sophistry did Mr Blue no credit and showed the extent to which his evidence has been shaped by the claim he is making in these proceedings rather than the other way around.

Mr Blue's evidence of later conversations

113. In reaching a conclusion about whether Mr Ashley made a contractual offer, I have considered Mr Blue's evidence of conversations which he allegedly had with Mr Ashley from December 2013 onwards, in which he claims that Mr Ashley acknowledged an obligation to pay him a bonus arising from what had been said in the Horse & Groom. I have also taken account of the payment of £1 million made by Mr Ashley on 27 May 2014 which has been put at the forefront of Mr Blue's case. It

is important to note, however, the limited extent to which this evidence is relevant. Mr Blue has not advanced any case that, if what Mr Ashley said on 24 January 2013 did not give rise to a contract, a contract nevertheless arose from something that Mr Ashley said or did afterwards. The later conversations and the payment of £1 million are relevant and are relied on by Mr Blue only in so far as they shed any light on what the state of mind of Mr Ashley (and that of Mr Blue) was on 24 January 2013 at the moment when Mr Ashley said that he would pay Mr Blue £15 million if Mr Blue could get the Sports Direct share price to £8 per share. Their states of mind at that time are in turn relevant only in so far as they tend to show how a reasonable person would have understood what Mr Ashley was saying. There are, however, a number of difficulties in relying on the evidence of later events to reason backwards in this way.

114. One difficulty is that, as already mentioned, apart from the note that Mr Blue made in his Moleskine notebook on 25 February 2014 (quoted at paragraph 28 above), there is no written record or reference in any contemporaneous document to any of the later conversations on which Mr Blue relies. In addition, apart from a snippet of conversation which Mr Leach overheard at the Lion Hotel on 14 January 2014, there was no independent witness to any of these later conversations. Moreover, from having heard and seen him give evidence, I think it plain that Mr Ashley has no recollection of any of them. That is unsurprising given that any mention of a bonus for Mr Blue was a matter of far more significance to Mr Blue than it was to Mr Ashley. With very limited exceptions, therefore, the only evidence of the alleged conversations consists of Mr Blue's testimony based on his memory. I do not regard that without more as a reliable basis on which to make factual findings.

115. Second, the fact that by late 2013 Mr Blue had, as I have found, come to believe that Mr Ashley had been serious about paying him a bonus if the share price rose to £8 per share created ample scope for Mr Blue to over-interpret casual remarks in a way that reinforced his belief by reading much more into them than was warranted. The very brief exchange with Mr Ashley on 25 February 2014 which Mr Blue noted in his Moleskine notebook is a case in point. On Mr Blue's own account of this conversation, it involved no more than Mr Blue asking Mr Ashley whether Mr Ashley had seen that the share price had reached £8 and Mr Ashley replying that he had seen it. It is possible to conceive how Mr Blue could have interpreted a response which, from Mr Ashley's point of view, was no more than an acknowledgment that the share price had reached £8 as a sign that Mr Ashley recalled the conversation in the pub thirteen months earlier and was willing to pay Mr Blue a bonus on the strength of it. Such an interpretation, however, seems irrationally optimistic.

116. Mr Blue's earlier conversation with Mr Ashley in December 2013, assuming that there was such a conversation, could well have been along similar lines. I do not find it credible that Mr Blue, without ever having mentioned what was said in the Horse & Groom again to Mr Ashley in the meantime, had only to say "Mike, can I have a word? … I just want to make sure that we're still on with our agreement", in order for Mr Ashley immediately to recall – without any need for any further reminder – exactly what had been said on 24 January 2014 and to tell Mr Blue that he had "got it" and was "cool" with it. I am sure that, if Mr Blue made any allusion at around that time in any brief exchange with Mr Ashley to his hope of a bonus, it would have been expressed in different – although no doubt equally oblique – terms and that he would not have referred to "our agreement".

117. The question that Mr Blue recalls being asked on some unspecified occasion by Mr Forsey may also be an instance of over-interpretation by Mr Blue. According to Mr Blue, Mr Forsey unexpectedly asked him: "So what's your deal with Mike, then?" Mr Blue has not suggested that Mr Forsey told him that he (Mr Forsey) had been told by Mr Ashley of any deal with Mr Blue. The hypothesis that there had been such a prior conversation between Mr Ashley and Mr Forsey which prompted Mr Forsey's question is unfounded speculation on Mr Blue's part. If Mr Forsey did indeed ask Mr Blue such a question (an assertion first made in Mr Blue's witness statement), it seems to me most likely to have been prompted by something that Mr Blue had previously said – either to Mr Forsey or to someone else such as Mr Leach or Mr Hellawell who had spoken to Mr Forsey – to suggest that he might have some deal with Mr Ashley.

118. Counsel for Mr Blue submitted that the court ought to draw an adverse inference from the failure of Mr Ashley to call Mr Forsey as a witness to address this point in Mr Blue's evidence. Such an inference could only be appropriate, however, if Mr Blue's evidence about the question Mr Forsey allegedly asked would, if not rebutted, found the edifice that Mr Blue has sought to build on it regarding a putative prior discussion between Mr Ashley and Mr Forsey. In my view, it does not begin to do so.

119. In the same vein, counsel for Mr Blue submitted that the court should infer from the refusal of Sports Direct in June 2016 to conduct a voluntary search for potentially relevant documents, in circumstances where Sports Direct had previously given Mr Ashley's solicitors access to Mr Blue's archived emails, that such a search would have revealed evidence supporting Mr Blue's case. I do not accept this. An inference of that kind may be legitimate where, for example, a party who has a duty to disclose relevant documents is found to have deliberately destroyed or concealed such documents. However, it has not been argued on behalf of Mr Blue that Sports Direct had a duty to provide documents to Mr Ashley for the purpose of disclosure in these proceedings, nor that Mr Ashley had the power or duty to obtain and disclose documents in the custody of Sports Direct. If any such argument was to be made, it would need to have been made much earlier in the proceedings at a case management conference. In these circumstances, although the request made by Mr Ashley's solicitors to the in-house lawyer at Sports Direct for the company's agreement to search for documents may be described as, at best, perfunctory, I do not consider that any adverse inference of the kind suggested can properly be drawn from the response.

120. I attach somewhat greater weight to Mr Blue's evidence that the subject of a prospective bonus was mentioned at the Lion Hotel on 14 January 2013 (see paragraph 23 above). The conversation must again have been extremely brief because it is said to have occurred in whatever short time it took for Mr Ashley and Mr Blue to walk from the men's toilets to the bar. But Mr Blue's evidence that the rise in the Sports Direct share price was mentioned on that occasion is supported by the evidence of Mr Leach. The remark that Mr Leach remembers overhearing is consistent at least with Mr Blue having claimed credit for initiatives which he believed had helped to boost the Sports Direct share price and asking whether Mr Ashley was willing to pay him a bonus. I therefore think it possible that Mr Ashley did say something on that occasion which encouraged Mr Blue's hopes.

Change in Mr Blue's standing

121. A further relevant factor in evaluating Mr Blue's evidence about his conversations with Mr Ashley in 2014 is that there had, as I perceive, been a change in their relationship since the time of the meeting in the Horse & Groom. Although I have rejected the suggestion that Mr Blue was "a trusted and close business associate of Mr Ashley" in January 2013, I think this much nearer to the mark as a description of their relationship a year later. During that year Mr Blue had had regular contact with Mr Ashley and had gained his trust and confidence. This is apparent from, among other things, Mr Ashley's evidence that he asked Mr Blue to assist him with personal investments. It is also apparent from the fact that Mr Ashley wanted Mr Blue to become the Chief Financial Officer of Sports Direct in succession to Mr Mellors. Mr Blue and Mr Ashley both confirmed that this possibility was first discussed in late 2013. Another conversation which Mr Leach partly overheard indicates that it was being mentioned by Mr Ashley again at around the end of January 2014 (see paragraph 27 above). It is against that background that a conversation took place between Mr Ashley and Mr Blue in March 2014 in which Mr Blue says that the issue of Mr Ashley paying him a bonus was raised.

The conversation in March 2014

122. I think it inherently probable that there was such a conversation some time in March 2014. I very much doubt that Mr Ashley initiated the conversation, as Mr Blue has claimed. It is much more likely to have been Mr Blue who raised the subject of his being paid a bonus. But the likelihood that Mr Blue did indeed raise this subject with Mr Ashley is supported by the text messages exchanged with his wife on 25 February 2014, which show that Mr Blue hoped or expected – and had led his wife to expect – that he would be paid a bonus by Mr Ashley if the share price reached £8 per share. I see no reason to doubt Mr Blue's evidence that his wife afterwards pressed him to pursue the matter with Mr Ashley – which fits with her insistence already in one of the text messages sent on 25 February 2014 that Mr Ashley needed to send an email "to back this up".

123. I am not convinced that the conversation in which the subject was raised necessarily took place on 7 March 2014 at the Manicomio Café, as Mr Blue now believes. That is evidently a pure piece of reconstruction on his part, as in the timeline that he prepared in January 2015, and when he wrote the letter that he handed to Mr Ashley on 13 March 2015, he thought that the conversation had taken place on 27 March 2014. The latter date fits with the text messages that Mr Blue exchanged with Mr Tracey on 27 March 2015, telling Mr Tracey that he had news. It is unclear why Mr Blue would have waited 20 days before sending a text to Mr Tracey to tell him news which, from the tone of the message, Mr Blue had only just learnt. Be that as it may, it is apparent that, whenever the conversation did take place, it led Mr Blue to believe that the role of Finance Director would now be his.

124. I reject as improbable Mr Blue's evidence that Mr Ashley said that he was going to "re-negotiate their deal", although this is no doubt how Mr Blue now perceives the effect of their discussion. On the other hand, I find it plausible that, when Mr Blue raised the question of a bonus based on the share price exceeding £8, Mr Ashley brushed this aside by saying that it did not matter as Mr Ashley wanted Mr Blue to become Finance Director, which would result in him being handsomely rewarded

through the executive bonus share scheme. I do not doubt that Mr Ashley genuinely regarded Mr Blue at that time as the most suitable person to take on the role of Finance Director following the retirement of Mr Mellors. It makes sense that in these circumstances Mr Ashley would have wanted to keep Mr Blue happy by deflecting the discussion onto the benefits that he would receive as Finance Director rather than directly addressing his expectation or hope of a bonus on account of what had been said in January 2013 in the Horse & Groom.

125. It also makes sense that, as part of the discussion of Mr Blue becoming Finance Director, Mr Blue would – as he says he did – have pointed out that the annual salary for the job (of £150,000) would be less than his annual income under the Management Services Agreement (of £250,000) and that this would cause him some cash flow issues until he received shares under the executive share bonus scheme and was able to sell them. I accept as probably accurate Mr Blue's evidence that Mr Ashley responded to this point by indicating that he would personally be willing to advance £1.5 million on account of the bonus shares that he expected to receive.

The £1 million payment

126. I also accept Mr Blue's evidence that he had a further conversation with Mr Ashley in late May 2014, shortly before Mr Ashley paid him £1 million on 27 May 2014, in which Mr Blue expressed frustration that nothing had happened and mentioned that his wife was also very unhappy. The frustration that Mr Blue expressed, however, could not have been at Mr Ashley's failure to "honour their agreement" to pay him a £15 million bonus, as Mr Blue implied in his witness statement. Nor does it make sense that Mr Blue would have asked Mr Ashley for "a sign of his commitment" to their "agreement", nor that Mr Ashley would have agreed to pay £1 million to Mr Blue as a sign of such a commitment. That is because, on Mr Blue's own evidence, Mr Ashley had made it clear to him in their discussion in March that the only form of bonus that he could expect to receive would be by way of shares issued to him under the executive share bonus scheme which he would join on becoming Finance Director. Against that background, Mr Blue's frustration must have been that nothing had happened since March to implement the discussion of him becoming Finance Director and therefore joining the executive share bonus scheme for which approval was going to be sought from shareholders in the near future at a General Meeting. This finding is supported by Mr Blue's note of this conversation in the timeline that he prepared in January 2015.

127. Mr Ashley struggled in his evidence to explain why he agreed to pay Mr Blue £1 million and transferred this sum to Mr Blue's bank account. Having listened to Mr Ashley's evidence, I think the reality is that he has no real recollection now of his reasons for making the payment but has tried to think of things that would explain why he did so. Neither of the suggestions that he made, however, credibly accounts for the payment for reasons which were pointed out by Mr Blue's counsel. Mr Ashley's first suggestion was that he was rewarding Mr Blue for his work in getting Mr Ashley included in the employee share bonus scheme. However, as mentioned earlier, Mr Ashley believed strongly that he should not be part of the employee scheme but should have his own separate scheme with much more demanding performance targets. That objective had not been achieved. Nor at the end of May 2014 had Mr Ashley's inclusion in the employee scheme yet been approved by shareholders, even if such approval seemed assured. It does not make sense to

suppose that Mr Ashley would pay Mr Blue £1 million to reward him for his efforts in helping to secure Mr Ashley's inclusion in a scheme which had not yet been approved and which Mr Ashley did not want to be in (and in fact withdrew from just two weeks after it was approved by the shareholders).

128. Mr Ashley's second suggestion was that the payment was also referable to work done by Mr Blue in arranging an £8 million property investment for Mr Ashley and advising him on other investment proposals, which were rejected. It was clear that this suggestion was an afterthought which Mr Ashley came up with for the first time in the witness box. It was not convincing. Whilst such assistance with investments may well have contributed to the confidence with which Mr Ashley evidently reposed in Mr Blue at the time and to his desire to keep Mr Blue happy, some other factor is needed to explain why Mr Ashley paid him £1 million.

129. In my view, the best explanation of how the payment came about is provided by the timeline which Mr Blue prepared in January 2015. This contains the following entry for 23 May 2014:

> "MA insisted on a delay to JB's appointment as Group FD.
>
> JB frustrated by delay and requested that MA demonstrate commitment to previous arrangement.
>
> MA agrees to pay JB £1.0m."

Although Mr Blue did not accept this in his oral evidence, I think it reasonably clear – both from the document itself and for the reasons stated at paragraph 126 above – that the "previous arrangement" referred to in this note was the arrangement made in March 2014 when Mr Ashley had indicated that Mr Blue could expect to become the Group Finance Director and join the employee bonus share scheme. I have accepted Mr Blue's evidence that, as part of that discussion, Mr Ashley had agreed to advance Mr Blue £1.5 million. I think it likely that, as his note suggests, Mr Blue asked Mr Ashley to demonstrate his commitment to this arrangement by paying Mr Blue all or part of the £1.5 million that Mr Ashley had previously agreed to advance to Mr Blue on account of the proceeds that Mr Blue could expect to receive from his joining the employee bonus share scheme. This may also explain Mr Ashley's recollection that Mr Blue requested £1.5 million but that he (Mr Ashley) thought this too high and agreed to pay £1 million.

130. Whatever was or was not discussed between Mr Ashley and Mr Blue in late May 2014, however, and whatever Mr Ashley's reasons were for agreeing to pay Mr Blue the sum of £1 million, I am sure that Mr Ashley did not say anything at that time to suggest – and that Mr Blue did not understand – that in making the payment Mr Ashley was acknowledging an obligation arising from the conversation in the Horse & Groom in January 2013 to pay Mr Blue £15 million, of which the payment of £1 million was intended to be a first instalment. Had that been Mr Blue's understanding, I cannot conceive that he would have turned down Mr Ashley's offer – which he said that he specifically recalls – to have the arrangement recorded in writing. I also cannot conceive that, if that had been his understanding, Mr Blue would have sat on his hands in the following months without making any request for a further payment and without even asking Mr Ashley when he could expect to receive another payment.

Yet Mr Blue did not make any such request. After he received the payment of £1 million Mr Blue said nothing to Mr Ashley (or to anyone else) to suggest that Mr Ashley owed him any money until after he had resigned from Sports Direct, in the letter that he handed to Mr Ashley on 13 March 2015.

131. I infer that, after he had received the payment of £1 million, Mr Blue was not expecting to be paid any more money by Mr Ashley. What he was expecting was to be made Finance Director of Sports Direct, an expectation which Mr Ashley had encouraged. When he heard nothing further about this, Mr Blue became increasingly frustrated and disappointed. His frustration finally boiled over at the end of November 2014 when he raised the issue with Mr Ashley in a conversation of which he made a contemporaneous note (quoted in paragraph 39 above). It is telling that the only issue raised in that conversation was the issue of Mr Blue becoming Finance Director and that no suggestion was made by Mr Blue that Mr Ashley owed him any money. It is even more telling that no such suggestion was made in Mr Blue's resignation letter dated 24 December 2014, even though the letter was addressed to Mr Ashley personally. The complaints made in that letter referred to recent changes in Mr Blue's role and responsibilities and "a complete lack of clarity in regards to my position going forward". There was no suggestion that Mr Blue was discontented because Mr Ashley had promised to pay him a £15 million bonus of which only £1 million had been paid. It was only after Mr Blue had resigned that, as I interpret the sequence of events, he looked back and formed the belief that, in circumstances where he had not been given the Finance Director role which he had seen (with some encouragement from Mr Ashley) as replacing the bonus that he had expected, he had an entitlement to be paid more money by Mr Ashley.

Conclusion

132. I conclude that the events after the conversation in the Horse & Groom, including the payment of £1 million in May 2014, do not support the suggestion that Mr Ashley believed that he had promised to pay Mr Blue a bonus if the share price reached £8. Nor does the evidence of those events show that Mr Blue believed that he had a right to such a payment before he advanced such a claim after he resigned. Still less does the evidence of subsequent events provide grounds for inferring that, at the time when the conversation in the Horse & Groom took place, Mr Ashley or Mr Blue thought that the talk of a bonus for Mr Blue was a serious contractual offer. I am sure that neither of them had any such understanding at the time, any more than did Mr Tracey, Mr McEvoy or Mr Clifton. I am also satisfied, for the all reasons given earlier, that no reasonable person present on 24 January 2013 would have had such an understanding.

Was the arrangement sufficiently certain to be enforceable?

133. I mentioned earlier that it has also been argued on behalf of Mr Ashley that what he said in the Horse & Groom was too vague and incomplete to give rise to a legally binding agreement.

134. There is, as I have indicated already, substantial difficulty in giving the statement of what Mr Blue had to do in order to qualify for the £15 million bonus any sensible content. On the one hand, to interpret what was said literally as meaning that Mr Blue had to show that he had caused the share price to reach £8 per share would make the

payment condition in practice impossible to satisfy. On the other hand, it is difficult to interpret what was said as meaning that Mr Blue merely had to show that he had done work aimed at increasing the share price and that the share price had in fact risen to £8, since that is also an uncommercial intention to attribute to the parties, particularly when the work that Mr Blue had to do was left entirely undefined. Those are reasons (amongst others) for inferring that no contract was intended.

135. It does not follow, however, that if a clear intention had been shown to make a contract on terms that Mr Ashley promised to pay Mr Blue £15 million in the event that Mr Blue could get the Sports Direct share price to £8 a share, such an agreement would have been regarded as too vague to be enforceable. Suppose, for example, that a formal document had been signed by both parties recording an agreement in such terms. As indicated earlier, a court would in such circumstances do to its utmost to give a meaning to what had been agreed.

136. What, in my view, would defeat such an attempt, even if an intention to make a contract had been shown, is Mr Blue's failure to prove that a particular period was agreed within which the share price had to reach £8. That gap is not one which the court can fill. There are many situations in which an agreement is silent about the time within which something must be done and the court can give content to it by implying a term that the obligation will be performed within a reasonable time. But that is only possible when a court can apply some yardstick of what is reasonable. For example, in a contract for the carriage of goods when no date for delivery is specified, the court can assess what constitutes a reasonable period within which to expect delivery in the light of any past dealings and ordinary commercial usage, and imply a term on that basis. This does not seem to me, however, to be an approach which is available in the present case. There is no objective standard which the court can invoke to identify a period within which Mr Blue would need to get the share price to £8 in order to be paid £15 million. That is a matter which could only be decided by express agreement between the parties themselves. As Mr Blue has failed to prove that a specific period was agreed, I conclude that the "offer" made by Mr Ashley could not create a contract for the further reason that it lacked an essential term.

VII. WAS PAYMENT TRIGGERED?

137. I also referred earlier to Mr Ashley's alternative defence that, if there was a binding contract made, Mr Blue is not entitled to payment under it unless he can show that his actions caused the Sports Direct share price to reach £8 per share, which he cannot do. To decide whether this defence is well founded, it would first be necessary to decide whether the condition which had to be fulfilled in order to trigger payment can be given a sensible meaning and, if so, what that meaning is. In circumstances where I have concluded that there was no intention to create any contract, I do not consider this a fruitful exercise to attempt. I will, however, record my finding that Mr Blue has not proved that he caused the Sports Direct share price to increase to £8 per share.

138. I have referred (at paragraph 108 above) to the four categories of work which Mr Blue says he undertook in reliance on his "agreement" with Mr Ashley and have rejected his claim that he did this work as a result of anything said by Mr Ashley on 24 January 2013. Mr Blue also maintains that this work had a material, positive impact on the Sports Direct share price. Even if that is true, however, it is not the same as

saying, let alone showing, that Mr Blue's actions caused the share price to rise to the level of £8 per share reached on 25 February 2014. Generally speaking, in order to show for a legal purpose that a person's conduct has caused a particular outcome, it is necessary (though not sufficient) to prove that, but for the conduct concerned, the outcome would not have arisen. It cannot be said that the 'but for' test is satisfied in this case. No evidence has been adduced from which a court could possibly conclude that the Sports Direct share price would not have reached £8 but for Mr Blue's actions. The same is true even if the 'but for' test is not applied and it is treated as sufficient to show that Mr Blue's actions made a substantial contribution to the doubling of the share price. Again, no evidence has been adduced from which a court could properly draw that conclusion.

139. The first three categories of work identified by Mr Blue all fall into the general area of marketing the company to investors. Everyone agrees that two factors which affect share prices are a company's financial performance and the general economic climate. I would accept without the need for expert evidence that these are not the only relevant factors and that investor sentiment about a company which is not based solely on the company's results can have a positive or negative influence on its share price. The very fact that companies retain corporate brokers to provide advice and support with investor relations and seek to stimulate demand for the company's shares shows that such activities are perceived to be capable of having some impact. The same applies to the fact – which I am prepared to accept on the basis of Mr Blue's evidence – that companies the size of Sports Direct typically employ at least one person to deal with investor relations. But without expert evidence – which would, as it seems to me, need to include statistical analysis – it is impossible to gauge the potential or likely extent of such impact, either generally or in the specific case of the investor relations work that Mr Blue undertook as part of his role at Sports Direct. Indeed, it seems to me that the latter question may be intrinsically unanswerable as there is no means of running a counterfactual experiment to see what would have happened to the Sports Direct share price if Mr Blue had not been retained as a consultant during the relevant period.

140. Counsel for Mr Blue suggested that the court could form a view about the likely impact of Mr Blue's actions on the Sports Direct share price based on the "inherent probabilities" and "economic common sense". I cannot accept that those concepts provide a basis on which anyone, whatever their expertise in capital markets, can make a rational judgment on this question. They certainly do not enable a judge, who is a lawyer and not an economist or financial analyst, to do so without evidence. If required to express an untutored view about what the "inherent probabilities" and "economic common sense" suggest, however, mine would be that Mr Blue's actions are unlikely to have had more than a marginal effect on the market price of Sports Direct shares. At any rate there is no evidence that indicates otherwise.

141. The fourth category of work identified by Mr Blue is "improving trading liquidity". This refers to the fact that between January 2013 and February 2014 (when the share price reached £8) two large blocks of shares beneficially owned by Mr Ashley were sold. The transactions were: (i) the sale of 25 million shares on 25 February 2013 at a price of £4 a share; and (ii) the sale of 16 million shares on 23 October 2013 at a price of £6.625 a share. These sales significantly increased the "free float", i.e. the pool of shares not controlled by Mr Ashley, whose holding was reduced in consequence from

68.6% to 61.7% of the issued share capital. The point made by Mr Blue, which was endorsed by the ESIB witnesses and which I accept, is that increasing the liquidity of Sports Direct shares by this means is likely to have had a positive impact on the share price. In cross-examination, however, Mr Blue acknowledged that it was Mr Ashley's decision to sell these shares. Nor is it true that (as Mr Blue claimed in his witness statement) he "arranged, negotiated and executed" the trades. That was done by the placing brokers, Goldman Sachs. Mr Blue's role was a merely administrative one of liaising with the brokers. For Mr Blue to claim credit on the strength of this role for improving trading liquidity seems to me a piece of grandiosity on his part.

VIII. CONCLUSION

142. In the course of a jocular conversation with three investment bankers in a pub on the evening of 24 January 2013, Mr Ashley said that he would pay Mr Blue £15 million if Mr Blue could get the price of Sports Direct shares (then trading at around £4 per share) to £8. Mr Blue expressed his agreement to that proposal and everyone laughed. Thirteen months later the Sports Direct share price did reach £8. But no reasonable person present in the Horse & Groom on 24 January 2013 would have thought that the offer to pay Mr Blue £15 million was serious and was intended to create a contract, and no one who was actually present in the Horse & Groom that evening – including Mr Blue – did in fact think so at the time. They all thought it was a joke. The fact that Mr Blue has since convinced himself that the offer was a serious one, and that a legally binding agreement was made, shows only that the human capacity for wishful thinking knows few bounds.