

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 13th November 2007

Before :

HIS HONOUR JUDGE RICHARD SEYMOUR O.C.
(Sitting as a Judge of the High Court)

Between :

RENAULT UK LIMITED	<u>Claimant</u>
- and -	
(1) FLEETPRO TECHNICAL SERVICES LIMITED	
(2) RUSSELL THOMS	<u>Defendants</u>

Andrew Bruce (instructed by **Hiffes Booth Bennett**) for the **Claimant**
Laura John (instructed by **Healys**) for the **First Defendant**
The Second Defendant appeared in person

Hearing dates: 15, 16, 17, 18, 19 and 22 October 2007

JUDGMENT

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.:

Introduction

1. The claimant, Renault UK Ltd. (*“the Importer”*), imports into the United Kingdom the products of Renault S.A. (*“the Manufacturer”*), the well-known French manufacturer of motor vehicles. The Importer is a wholly-owned subsidiary of the Manufacturer. The Importer purchases from the Manufacturer at prices fixed by the Manufacturer the vehicles which are imported.
2. The Importer supplies the vehicles which it imports from the Manufacturer to a network of dealers across the United Kingdom. As I understood it, there are about 220 authorised Renault dealers in the country. It seems that the Importer determines the prices at which it supplies vehicles to dealers.
3. A company called REAGROUP UK Ltd. (*“the Distributor”*) operates a number of dealerships within the network supplied by the Importer. One of the dealerships operated by the Distributor is at premises situate at 305, Brighton Road, Coulsdon, Surrey and trades under the name Renault Croydon. In this judgment I shall refer to that particular dealership as *“the Dealer”*. The Distributor is a wholly-owned subsidiary of the Importer. The Dealer supplies vehicles to customers wishing to purchase them. Such customers may be members of the general public wishing to acquire vehicles for their own use, which, in this judgment, I shall describe as *“retail”* customers, or what are called *“fleet”* customers, that is to say companies or organisations which wish to acquire a fleet of vehicles to operate for the purposes of their activities.
4. At least in relation to vehicles manufactured by the Manufacturer and sold by retail by the Dealer, the operation is vertically-integrated. What is sold on the forecourt in Coulsdon is a vehicle originating with the Manufacturer, which has reached the forecourt in Coulsdon through a network effectively controlled by the Manufacturer, consisting of the subsidiary of the Manufacturer, the Importer, and the subsidiary of that subsidiary, the Distributor. That means, amongst other things, that the Manufacturer has the means, if it chooses to exercise it, to determine the effective sale price of the vehicle on the forecourt in Coulsdon. Manifestly the Manufacturer sets the price at which the Importer buys from it each vehicle which the Importer imports. Plainly the Importer sets the price at which a distributor in its dealership network acquires any vehicle which it wishes to resell to a customer. Through the ability to control by means of shareholdings the activities of both the Importer and the Distributor, the Manufacturer has the opportunity, if it chooses to take advantage of it, effectively to ensure what profit is made where in the vertical integration which I have described.
5. Motor manufacturers and their associated importers and distributors are in competition with other marques. The evidence put before me in the form of statistical information assembled by the Society of Motor Manufacturers and Traders Ltd. (*“SMMT”*) indicated that there were, in 2005 and 2006 some 45 major marques of cars available in the United Kingdom. No doubt not all of those marques offer all types of cars.

6. The particular statistics of SMMT which were put in evidence concerned "*Registrations of new cars in the United Kingdom – by marque*". Those statistics, which were not challenged as to their accuracy, demonstrated that cars manufactured by the Manufacturer declined as percentage of the total share of the market between 2004 and 2006. In 2004 the percentage of the market held by cars produced by the Manufacturer was 7.38. In 2005 the equivalent percentage was 7.16. However, in December 2005 the percentage was 5.27, down from 6.63 in December 2004, whilst in January 2006 the percentage was 5.44, down from 7.92 in January 2005.
7. At the root of this action lay what are apparently called in the motor industry "*affinity schemes*". An affinity scheme is a mechanism for supplying cars to retail customers at substantial discounts as compared with the list prices. Presumably the object of an affinity scheme is to boost the sales of the cars which are included within it. It appears to be an important part of an affinity scheme that its existence does not become widely known to retail distributors of cars of the marque within a particular scheme or to the general public. Because of the feature of an affinity scheme that substantial discounts, as compared with list prices, are offered, it is essential for any affinity scheme to work that the manufacturer of the marque concerned, or at least the importer, is involved and agrees to the operation of the scheme. It may be that there are various ways, in detail, in which an affinity scheme could be operated. The particular scheme with which this action was concerned related to members of the British Airline Pilots Association ("*BALPA*"), and members of the immediate families of such members. For ease of reference I shall describe all those intended to be included in the scheme simply as "*BALPA members*".
8. So far as the evidence went, none of the Manufacturer, the Importer, the Distributor or the Dealer had any connection whatever with BALPA before the establishment of the affinity scheme ("*the BALPA Scheme*") involving that organisation. What, so the witnesses called on behalf of the Importer, and in particular Miss Carolyn Sample, Regional Fleet Manager of the Importer for the South East of England, said was important about BALPA was that it could be treated as a closed group comprising BALPA members.
9. No suggestion was made that BALPA members were particularly deserving of the charity of the Manufacturer, the Importer, the Distributor or the Dealer. Indeed, to the contrary, one of the attractions of this particular group seemed to be that the members were likely to be affluent, and therefore to have money to spend on cars.
10. It is not material to the issues in this action to consider in any detail how the BALPA Scheme came to be established. It appears that the initiative in the first instance came from BALPA, sometime during 2004. BALPA has a subsidiary company, BALPA Financial Services Ltd. ("*BFS*"), which carries on business as a provider of financial and other services to BALPA members. The making of arrangements for the BALPA Scheme was entrusted, at the BALPA end, to BFS. BFS decided to engage an agent to manage the BALPA Scheme. In due course BFS entered into an agreement with the first defendant, FleetPro Technical Services Ltd. ("*FleetPro*"), under which it was to manage the scheme and pay BFS a commission on each vehicle supplied under it. The

agreement in question was in writing and was not actually executed until 4 November 2005. However, the BALPA Scheme in fact started operating as from 1 March 2005.

11. Mr. Russell Thoms, the second defendant, is, and was at all material times, the sole director and shareholder of FleetPro, and its only employee.
12. The BALPA Scheme was established by BALPA with the assistance of FleetPro. Included within it were marques other than that of the Manufacturer, but this action was not concerned with those other marques. There were, I think, seven other marques within the scheme.
13. At the stage at which the BALPA Scheme was being established, towards the end of 2004, Mr. Thoms made contact with Mr. Simon Arnold, at that time a corporate accounts manager employed by the Importer, to seek to establish whether the Importer would be interested in participating in the BALPA Scheme, and, if so, on what terms. The Importer had already, by the time of this contact, been approached by another of those seeking to obtain the business of managing the BALPA Scheme, Mr. Nicholas Gauntlett, a director of a company called The Car Company (UK) Ltd. (*"The Car Co."*).
14. Before coming to the way in which matters developed after Mr. Thoms made contact with Mr. Arnold, it is convenient to set out how the Importer dealt with affinity schemes.
15. The Importer, in common with, as I understood it, many importers of cars in the United Kingdom, sought to differentiate between retail customers for cars, who were expected to approach a member of the distribution network and negotiate to purchase a car through that member, and fleet customers. Fleet customers, certainly in some, perhaps many, instances were felt to merit the attention of the Importer itself and thus there were employees of the Importer, such as Miss Sample and Mr. Arnold, whose function was to deal with fleet customers. The system seems to have been that the basic commercial terms of supply of vehicles for fleet customers dealt with by the Importer were negotiated between the Importer and the fleet customer, but the actual delivery of vehicles was undertaken by a member or members of the distribution network. The negotiation between the Importer and the fleet customer was essentially about the discounts from list price which the Importer was prepared to allow in respect of the vehicles to be sold. Once a discount was agreed for each class of vehicle to be supplied, inevitably involving some discount from the list price of that class, the fleet customer would negotiate with a distributor or distributors making delivery to fix actual sales prices. This further negotiation to fix final prices took place because it was possible that, in return for an anticipated volume of business, the distributor or distributors might be prepared to grant a further discount in addition to that granted by the Importer. Once final prices for vehicles had been agreed, the distributor or distributors making delivery of the vehicles to be supplied would raise appropriate invoices, reflecting the terms agreed, so that the customer was only charged what had been agreed net of the discount allowed by the Importer plus any discount allowed by the distributor. However, as between the Importer and the delivering distributor, it seems that in the first instance the Importer would

charge for each vehicle supplied for onward supply to the fleet customer a price having some reference to the list price, namely the list price of the vehicle less the agreed margin for the particular distributor, and the distributor would, at least notionally, pay that price. However, it would then receive a rebate of the amount of the discount for the vehicle which the Importer had agreed with the fleet customer. As I understood it, the reasons for this rather cumbersome mechanism, as opposed to a straightforward reduction in the invoice price of the vehicle to the distributor, related to tax advantages. The rebates in respect of discount paid by the Importer are described as “*fleet support payments*”.

16. For administrative purposes any dealings with a fleet customer are identified within the Importer by what is called a “*Fleet Operator Number*” or “*FON*”. When an order is placed for a vehicle by a fleet customer the appropriate FON is noted on the order. The order details, with the appropriate FON, are put into a computer system used by the Importer and the members of the Importer’s distribution network, so that it is plain that the particular vehicle is subject to whatever is the discount which has been agreed with the particular fleet customer for the purchase of a vehicle of that type. The computer, as I understood it, is linked to the Manufacturer, and one of the functions which it performs is to notify the Manufacturer of the need to manufacture the vehicle ordered. In general, at least, the Manufacturer only produces vehicles to order, that is to say, in response to orders put into the system.
17. It appears that from the point at which an order is put into the computer system all functions are automatic, without the need for any human intervention. In particular, so far as is relevant to the issues in this action, the invoicing of dealers in respect of vehicles supplied and the allowance of fleet support payments are done automatically by the computer system, taking account, as appropriate, of any FON. Vehicles intended for sale to retail customers do not attract a FON.
18. As I understood it, it is not the case, at least generally, that a fleet customer would agree a flat rate of discount applicable to any Renault vehicle which it might purchase. Rather the situation is that agreement is reached as to a discount in respect of each type of vehicle currently manufactured by the Manufacturer and which the fleet customer might be interested in purchasing.
19. The Importer dealt with affinity schemes in a way similar to sales to fleet customers. Indeed on the evidence put before me, standard forms of documentation appropriate for sales to fleet customers were used in the cases of sales to members of affinity schemes, notwithstanding that they were not appropriate for that use.
20. In her oral evidence Miss Sample explained that her ordinary expectation was that the number of vehicles sold through an affinity scheme would be quite modest. She said that in 2005 the Importer participated in few affinity schemes – perhaps less than 20 altogether. Some of them produced no sales at all. Only two schemes had produced any significant number of sales. The most successful had been a scheme involving Civil Service Motoring Association, with some 250,000 members, under which about 200 vehicles a year were

sold. A scheme with Barclays Bank plc, applying to some 60,000 members, had also produced a significant number of sales, 86 in the first year of operation, but with the level of sales falling off thereafter. An affinity scheme with Microsoft had produced just five sales in three years.

21. The margin allowed to the Dealer by the Importer on sales of vehicles by the Importer to the Dealer in 2005 and 2006 was 7%. In order to understand why, in the context of the present case, the Dealer was ultimately prepared to give the benefit of the whole of that 7% to the BALPA Scheme it is necessary to understand that the source of profits for the Dealer did not depend solely upon the net benefit to it of the margin on the sale of each vehicle which it supplied. There were, in addition to the margin, bonuses and the like which depended on the number of vehicles supplied. Thus, at the appropriate level of numbers of sales, there could be a benefit to the Dealer in supplying a vehicle at a price at which, on its face, it was making no margin of profit.
22. Mr. Toby Johnstone was employed at all times material to this action by the Distributor as a fleet sales executive at the premises of the Dealer. It is material to this action to record that in paragraph 18 of his second witness statement, dated 21 September 2007, Mr. Johnstone explained the basis of his remuneration:-

“I am paid a basic monthly wage and bonus element on top. The bonus is linked to sales – at the relevant time, for the first X units sold in a month, (X being the target) I received £50 per unit; once X was reached, the unit bonus was increased slightly.”

The arrangements between the Importer and FleetPro in respect of the BALPA Scheme

23. At the time the participation of the Importer in the BALPA Scheme commenced there was little in the way of written material as to how it was envisaged that that participation would be undertaken. The only documents which had been produced were standard form “RENAULT 2005 FLEET SUPPORT TERMS” documents (to which type of document I shall refer in this judgment as “a Terms Document”) and standard form letters produced by the Importer for use in the case of fleet customers. A Terms Document completed in relation to the BALPA Scheme contained, most importantly, the list of the discounts for the different types of Renault car which the Importer was prepared to allow to those in the scheme. The standard form letters used in the case of fleet customers employed in relation to the BALPA Scheme contained nothing material to any issue in this action.
24. The first Terms Document produced, in fact by Mr. Arnold, in relation to possible participation in the BALPA Scheme was said to be valid from December 2004 to November 2005. It contained a range of discounts of between 10% for a Clio V6 to 22% for some Megane, Scenic and Laguna models. In respect of each type of model listed was a statement of the volume of sales anticipated. The total came to 38 for the year. Miss Sample explained that the stated figure of each type of vehicle could not be exceeded by actual

sales without a revision to the numbers recorded, because the computer system in use by the Importer would not permit discounts to be given for a number of vehicles in excess of that stated on the material Terms Document. The document produced by Mr. Arnold at this time recorded a FON for BALPA, 46172. In this judgment I shall refer to that number as "*the BALPA FON*". The document itself was addressed to Mr. Colin Sambrook, the Director of Resources and Services at BALPA at the time, care of the premises of The Car Co.

25. Once FleetPro had moved in in place of The Car Co. as the agent to manage the BALPA Scheme, Mr. Arnold sent Mr. Thoms under cover of a letter in the standard form relating to fleet customers dated 13 January 2005 a copy of the Terms Document which he had produced.
26. Mr. Thoms decided that it was appropriate for Renault vehicles to be supplied under the BALPA Scheme to be obtained from the Dealer. Mr. Thoms's evidence was that it was Mr. Arnold who had suggested using the services of the Dealer. It appears that that contention was not accepted on behalf of the Importer, but it was actually immaterial to any issue in this action who had suggested that FleetPro use the good offices of the Dealer, because it was not in dispute that that is what FleetPro in the event did.
27. The decision to obtain vehicles through the Dealer prompted Mr. Thoms to make contact with Mr. Johnstone. Mr. Thoms in the first instance was interested in negotiating with Mr. Johnstone an additional discount to purchasers under the BALPA Scheme from the Dealer. Mr. Johnstone was prepared in the first instance to agree an additional discount of 6.5%. At a meeting on 12 July 2005 Mr. Johnstone agreed to increase that level of discount to the full amount of the margin allowed to the Dealer by the Importer, 7%.
28. In an e-mail dated 24 February 2005 to Mr. Arnold Mr. Thoms told him that the BALPA Scheme was due to commence on 1 March 2005.
29. For the first three and a half months after the coming into operation of the BALPA Scheme no orders were placed ostensibly under it. The first order was placed on 14 June 2005. I shall return to the circumstances in which that order was placed. The order was placed by FleetPro itself in its own name, but it identified by name the intended end purchaser. What seems to have been contemplated was that FleetPro would acquire each Renault vehicle to be supplied under the BALPA Scheme by purchasing it from the Dealer and then reselling it to the end purchaser. In that way FleetPro was obviously in a position to add a margin to the resale price.
30. So far as arrangements between the Importer and FleetPro in relation to the participation of the Importer in the BALPA Scheme were concerned, much reliance was placed on behalf of the Importer on the terms of an e-mail dated 21 June 2005 written by Mr. Thoms to Mr. Johnstone, which he in turn forwarded to Miss Sample. It was accepted by Mr. Thoms that he had envisaged that the e-mail might be passed on in this manner, although equally Mr. Johnstone might have paraphrased it or summarised it or only copied parts

of it. Mr. Johnstone's evidence was that the terms of the e-mail reflected accurately what had been agreed between Mr. Thoms and Mr. Arnold at a meeting Mr. Johnstone had himself attended on 12 January 2005 concerning how the BALPA Scheme would operate. The e-mail was in these terms:-

"As discussed, here's some further information on the affinity plans that we're working on at the moment.

Just to summarise, we are introducing all-employee and member car purchase plans with a number of large employers and certain trade bodies.

These plans will cover employees in company cars who wish to opt-out and also employees who are not eligible for a company car, plus members of trade organisations with a sufficiently strong affinity relationship to facilitate the sale of big ticket items such as cars.

We operate a closed user group car purchase plan for each organisation, with a restricted range of manufacturers, usually 4 'volume' brands and 4 'prestige' brands so that the manufacturers involved can see an incremental sales opportunity.

Currently we have proposals at various stages with:

[It is unnecessary to list the organisations mentioned]

As you know, we have recently implemented a plan for the British Airline Pilots Association.

We also have discussions taking place with about 40 other large employers and trades bodies.

Organisation sizes range for 2,000 up to 65,000, with our market typically at 10,000+ employees/members.

In all cases we provide a password protected intranet site with user access restricted to eligible employees/members.

Participants are required to provide proof of employment/membership before a vehicle can be purchased.

Those eligible are employees/members and immediate family, though the car must always be registered in the employee/member name so that eligibility can be traced.

A set of plan rules is included on each web site covering issues such as restrictions on who can buy, registration, restrictions on purchasing (max 2 cars in total per annum) etc.

Vehicles must be registered in the end-user's name but c/o the appropriate employer/organisation at our address (so that the car can be fleet coded).

As part of our aftersales plan we provide free service/accident management for 36 months and, as part of this service, we arrange the tax disc renewal so that we retain the V5 form normally for the 3 years of the service plan.

Vehicles are normally promoted on finance plans (typically PCP through the Bank of Scotland). The on-line vehicle pricing system is designed to generate a finance quote for a car rather than a cash price, though we do of course comply with the consumer credit act which requires that we display a cash price and permit cash sales.

We believe that employer/trade body affinity sales will be a significant emerging opportunity in the fleet market and that our 'closed' plan operational practices for [sic] offer manufacturers a means of managing their participation in this market at low risk.

By way of feedback on these activities so far, it would be fair to say that the Renault pricing offered to BALPA has proved competitive in the Scenic/Grand Scenic sector, but in the Clio, Megane hatch/sport hatch and Laguna sectors the pricing has not been as competitive as other manufacturers' products, with the result that the sales focus you have seen recently has been focused on Scenic/Grand Scenic. Current enquiries suggest this will continue to be the case without additional support from Renault on these other products."

31. The particular features of the modus operandi described in the e-mail which were said to have been specifically agreed in relation to the participation of the Importer in the BALPA Scheme were having a password protected website with access restricted to BALPA members, having participants in the scheme provide proof of membership before being permitted to buy a car, limiting eligibility to BALPA members, and having the vehicles purchased registered care of the address of FleetPro. Mr. Thoms did not dispute that indeed those features of the participation of the Importer in the BALPA Scheme had been discussed and were those expected to be observed in the operation of the BALPA Scheme.

The claims of the Importer

32. The claims of the Importer in this action were founded upon alleged fraudulent misrepresentations. In the Re-Amended Particulars of Claim the way in which the case was put was pleaded as follows:-

“12. On or about 14th June 2005 the Defendants commenced placing orders for vehicles with Renault Croydon. On the occasion of each order:

12.1 the 2nd Defendant would prepare a pro-forma purchase order on the 1st Defendant’s headed note-paper which identified:

12.1.1 the model of vehicle to be purchased;

12.1.2 the “discounted price” of the vehicle, being the basic list price of the vehicle less (1) the value of the fleet support provided by the Claimant; and (2) the 7% dealer margin available to Renault Croydon; and

12.1.3 that the vehicle should be registered in the Purchaser’s name, c/o the 1st Defendant’s name and address. Only the name of the Purchaser for whom the 1st Defendant was acting as agent on the purchase was provided at the time of the order. The Purchaser’s address and contact details were provided by the 2nd Defendant at the time of Renault Croydon arranging delivery of the vehicle.

12.2 The aforesaid purchase order stated that the “Fleet Code” associated with the purchase was either BALPA or 46172 (being the Fleet Operator Number for BALPA).

12.3 The aforesaid purchase order was signed by the 2nd Defendant.

13. Pursuant to purchase orders placed by the Defendants:

13.1 Renault Croydon placed an order for the relevant vehicle by entering its details on the bespoke computer system maintained and operated by the Claimant and the Renault Dealer Network. Renault Croydon identified on its said order that the relevant Fleet Code was 46172;

13.2 Renault Croydon sold to the purchasers identified on the Defendants’ purchase orders new Renault vehicles; and

13.3 The Claimant paid to Renault Croydon the amount of the relevant fleet support due under Fleet Code 46172 immediately after the registration of the new vehicle with the Driver and Vehicle Licensing Agency [“the DVLA”].

Attached hereto marked “B” is a Schedule identifying the registration numbers of the vehicles purchased through the 1st Defendant, the models of the vehicles, the names & addresses of the purchasers, and the amounts of the fleet support paid by the Claimant.

14. *The Defendants well knew that:*

14.1 *the terms of the purchase orders (and in particular the relevant Fleet Code) would be passed on to the Claimant by Renault Croydon in order to induce the Claimant to make payments of fleet support to Renault Croydon; and*

14.2 *the Claimant would pay to Renault Croydon the amount of the relevant fleet support immediately after the registration of the new vehicle with the DVLA.*

15. *The Defendants' said knowledge is evidenced by the facts and matters pleaded in:*

15.1 *sub-paragraphs 4.1 – 4.5 and paragraph 5 above;*

15.2 *sub-paragraph 9.1 and the 1st sentence of paragraph 10 above;*

15.3 *sub-paragraphs 10.1 – 10.3 above;*

15.4 *and/or paragraph 11 above.*

16. *Further the Defendants intended that the terms of the purchase orders (and in particular the relevant Fleet Code) would be passed on to the Claimant by Renault Croydon because, if such terms were not passed on to the Claimant, Renault Croydon would not deduct, from its invoices, the fleet support payments due for the benefit of members or employees of BALPA such that the “discounted price” referred to in paragraph 12.1.2 above would not be the price payable to Renault Croydon and, in consequence, the 1st Defendant would be unable to realise a profit on its role as agent for the purchaser, as the sale would not proceed.*

17. *By the statements on the purchase orders referred to in sub-paragraph 12.1.2 and 12.2 above, the Defendants represented to Renault Croydon with the intent that such representations would be passed on to the Claimant that:*

17.1 *the purchaser of the vehicle was a member or employee of BALPA or a member of the immediate family or a member or employee of BALPA; and/or*

17.2 *the purchase was being made in accordance with the closed user group car purchase plan for BALPA described by the 2nd Defendant in his e-mail dated 21st June 2005 as pleaded in paragraph 6 above and/or as confirmed by the 2nd Defendant at his meeting with Carolyn Sample of the Claimant as pleaded in paragraph 8 above.*

18. The representation pleaded in sub-paragraph 17.1 above was false and made fraudulently in that the Defendants well knew that, with the exception of the vehicles sold to (1) David Reynolds (registration no.: LY55 JRU0; (2) John Moore (registration no.: LV55 ZJY); and (3) Peter James (registration no.: LX06 RXJ), none of the purchasers of vehicles sold pursuant to purchase orders placed by the Defendants were members or employees of BALPA or members of the immediate family of members or employees of BALPA. ”

33. There was no dispute as to the basic facts alleged in the passage from the Re-Amended Particulars of Claim which I have quoted. In particular it was not in dispute that FleetPro, through Mr. Thoms, had produced, between about 14 June 2005 and about 12 April 2006, some 217 orders for Renault vehicles to the Dealer and had marked on each order a “*FLEET CODE*” which was either “*BALPA*” or “*46172*”. Each of those orders was sent by Mr. Thoms as an attachment to an e-mail to Mr. Johnstone. Mr. Johnstone, on receipt of the particular e-mail, printed off the attachment and gave it to a lady called Fiona Burrows, who worked in the Administration Department of the Dealer. She put the details of the order, including the BALPA FON, into the computer system shared by the Importer and its distributors. That action had the effect of both ordering the relevant vehicle and recording it as the beneficiary of a fleet support payment at the appropriate level when the time came to make delivery. The order produced by Mr. Thoms was not itself copied and sent to the Importer. The misrepresentation alleged in the case of each relevant vehicle was, in effect, putting the BALPA name or the BALPA FON on the order produced by FleetPro, acting by Mr. Thoms, in circumstances in which it was envisaged that that information, rather than the document which contained it, would be put into the Importer’s computer system. It was also not in dispute that, save with regard to those identified in paragraph 18 of the Re-Amended Particulars of Claim, none of those in respect of whom orders were placed by FleetPro with the indication that the order in respect of him or her fell within the BALPA Scheme, was a BALPA member or an employee of that organisation. Each of these non-BALPA purchasers had in fact purchased his or her vehicle from an internet broker which had, in its turn, acquired the vehicle from an operation trading as “*Broker2Broker*”. Broker2Broker was in fact a trading style of FleetPro.
34. In this judgment I shall describe the process of applying to an order placed by FleetPro with the Dealer a Fleet Code of either BALPA or 46172, thereby representing that the particular order was destined for a BALPA member as end purchaser, when in fact the vehicle ordered was intended to be resold by FleetPro to an internet broker for onward sale to an end purchaser who was not a BALPA member, “*misuse of the BALPA FON*”.

The defences

35. A number of defences to the claims of the Importer were advanced on behalf of FleetPro and Mr. Thoms. The main matters raised arose out of the alleged fact that the suggestion that the Importer would not object to the selling vehicles to which the BALPA FON had been applied to persons who had no

connection with BALPA came from Mr. Johnstone. It was asserted that that indication on the part of Mr. Johnstone was in fact correct and that the Importer did not object to such practice. Alternatively, it was contended that Mr. Johnstone knew the true position in relation to misuse of the BALPA FON and was not misled by the references to BALPA or the BALPA FON on orders placed by FleetPro. The defendants' case was that Mr. Johnstone was the Importer's agent for the receipt of the orders and so the Importer could not say that it was deceived by the terms of them. Moreover, it was contended that any representation to the effect that a particular order placed by FleetPro with the Dealer was one which fell within the scope of the BALPA Scheme was made not to the Importer, but to the Dealer. Associated with that submission was an alternative submission that, if the Importer was deceived, it was deceived not by the orders produced by FleetPro, acting by Mr. Thoms, but by the representations which Mr. Johnstone caused Fiona Burrows to make by entering into the computer system the details of each order which she did, including the BALPA FON. It was asserted that in fact the Importer, by Miss Sample and Mr. Steven Wilson, Mr. Arnold's replacement, knew perfectly well that the orders about which complaint was made had not been placed in respect of persons with any connection with BALPA, and turned a blind eye to that knowledge. As an alternative to the analyses to which I have so far referred, the case for the defendants was that in the circumstances the Importer was estopped from relying upon the strict terms of the BALPA Scheme.

36. Mr. Thoms contended, by way of defence to the claim against him in his personal capacity, that he was not liable in that capacity because everything which he had done he had done in his capacity as a director of FleetPro, so, if there was any liability, it lay with FleetPro and not with him.
37. Quite apart from the issues of liability in this action, serious questions were raised on behalf of the defendants concerning the damages which were claimed on behalf of the Importer. The relief sought by the Importer in this action was pleaded in the Re-Amended Particulars of Claim in this way:-

“22. By reason of the Defendants' fraudulent misrepresentation and/or deceit, the Claimant has suffered loss and damage.

PARTICULARS

22.1 Had the Claimant not relied upon the Defendants' misrepresentations it would not have paid fleet support to Renault Croydon in respect of:

22.1.1 purchases of vehicles not made by members or employees of BALPA or members of the immediate family of members or employees of BALPA; and/or

22.1.2 purchases not made in accordance with the closed user group car purchase plan for BALPA.

Therefore the Claimant's loss is £695,655.80.

22.2 Alternatively, the Claimant's loss is quantified as the average retail sale price of each model of vehicle listed on Schedule "B" attached hereto (being the price which each of the purchasers for whom the Defendants acted as agents would have purchased Renault vehicles but for the Defendants' tortious [sic] acts) less the "discounted price" (as described in sub-paragraph 12.1.2 above) of each vehicle listed thereon. Full particulars of the said quantification of loss will be supplied in due course.

23. Further or alternatively, by reason of the aforesaid fraudulent misrepresentation and/or deceit (and the 1st Defendant's consequential unjust enrichment as referred to in paragraph 16 above) the Claimant is entitled to and seeks an account of the profits which the 1st Defendant has made on each vehicle sale described in Schedule "B" attached hereto and an order requiring the 1st Defendant to disgorge such profits by payment of the same to the Claimant."

38. The alternative claim for damages set out in paragraph 22.2 of the Particulars under paragraph 22 of the Re-Amended Particulars of Claim was not pursued. The contemplated schedule of loss was never provided.
39. It was contended on behalf of the defendants that the Importer had to prove its alleged loss, no doubt an uncontroversial proposition. However, it was sought to found upon that submission further submissions to the effect that the Importer had to demonstrate that it had not recovered its alleged loss from the Dealer, and that the discounts allowed would not have been allowed in any event. The conclusion for which Miss Laura John, who appeared on behalf of FleetPro, contended in her written skeleton argument was:-

"25. If it is found as a matter of fact that the Claimant would not have been able to sell each of the vehicles listed in Schedule B to the Particulars of Claim or that (some) discounts would in any event have been given, the claim against the First Defendant for damages must either fail or be reduced."

40. Another point which was relevant to damages and emerged during the course of the trial was that there came a time at which, even on the case of the Importer, it appreciated that FleetPro had placed orders apparently under the BALPA Scheme in respect of customers who did not qualify, yet, that notwithstanding, orders were met and fleet support payments made. It was submitted by Miss John that the cause of the making of those fleet support payments was not any misrepresentation, but the decision of the Importer to permit the vehicles in question to be supplied at the prices originally determined with FleetPro.
41. Miss John contended that an account of profits was not, as a matter of law, available in relation to a claim based on fraudulent misrepresentation.

Whose idea was it to use the discounts available under the BALPA Scheme for the benefit of non-BALPA members, who knew about it, and when?

42. Before considering the legal issues which arise in this action it is convenient to deal with the critical factual disputes between the parties.
43. At its most basic level the resolution of the difference between Mr. Thoms and Mr. Johnstone as to whether it was Mr. Johnstone who suggested to Mr. Thoms that FleetPro take advantage of the terms available under the BALPA Scheme for non-BALPA members depended upon whether I accepted the evidence of Mr. Thoms or that of Mr. Johnstone on the point. However, while the case of the defendants was that the suggestion was made orally and not, as such, recorded in writing, reliance was placed on some documents produced subsequent to the making of the suggestion as being consistent only with Mr. Johnstone being perfectly well aware of the fact that the terms available under the BALPA Scheme were being used for the sale of vehicles to non-BALPA members. Moreover, the evidence of Mr. Thoms was that in a telephone conversation with Mr. Johnstone on 28 June 2005 he told him in terms of the misuse of the BALPA FON.
44. Furthermore, so it was contended on behalf of the defendants, the action, or rather extended periods of inaction, on the part of the Importer, represented by Miss Sample and Mr. Wilson, after those individuals had good grounds for suspicion that discounts available under the BALPA Scheme were being misused by being claimed in respect of sales to non-BALPA members, showed that they knew, or at least strongly suspected, what was going on, but were not concerned. It was said on behalf of the defendants that that passive and relaxed attitude only altered in about April 2006 when it became apparent that there was a risk that the misuse of the BALPA FON might become more widely known. The case for the defendants was that the Importer was in fact indifferent to the misuse of the BALPA FON as long as it produced no complications for the Importer – after all, cars were being sold at prices acceptable to the Importer at the time the discounts for the BALPA Scheme were fixed. The only sensitivity of the Importer was that the allowance of discounts might become known to Renault dealers or the general public. If dealers found out about it, there would be likely to be complaints that the Importer was undercutting the prices which dealers were able to offer to retail customers, and thus reducing the number of sales the dealers could achieve. If the general public found out about it, there was likely to be a general downward pressure on retail prices so that the prices available to the few, the privileged members of affinity schemes, became available to everyone.
45. Again, whether the Importer was in truth indifferent to misuse of the BALPA FON was a matter which depended, at its most basic, on the assessment which I made of the evidence of Miss Sample and that of Mr. Wilson. However, once more certain contemporaneous documents were relied upon on behalf of the defendants in support of their cases on the point.
46. How Mr. Thoms in his witness statement dated 2 July 2007, at paragraph 17, described the contact with Mr. Johnstone which preceded the commencement

on the part of FleetPro of soliciting orders for Renault motor cars from internet brokers was this:-

“In the course of a telephone conversation with Mr. Johnstone in or about April 2005 Mr. Johnstone said that the Claimant had been having a difficult time selling cars so far in 2005. Mr. Johnstone said that, to try and stimulate car sales, the Claimant had been increasing other corporate customers’ discounts. Mr. Johnstone asked if the 1st Defendant had any potential customers for Renault cars at all as, without orders, the BALPA FON might not be continued into a second year. Mr. Johnstone said that Renault Croydon did a lot of work with other corporate accounts and car brokers and asked if the 1st Defendant had any customers at all who might purchase Renault vehicles if the right discount terms were available as he had access to other FONs with higher discounts than those offered to BALPA. Mr. Johnstone said that because of the drop in car sales the Claimant had been “turning a blind eye” to car sales at Renault Croydon through other FONs which were outside the FON terms as long as the cars did not immediately end up on the forecourts of independent dealers or car supermarkets and that the Claimant would probably do the same for the BALPA FON in order to obtain sales.”

47. In his second witness statement dated 8 October 2007 at paragraph 3 Mr. Thoms said:-

“I would like to make it clear that at the outset the First Defendant had no intention whatsoever of selling vehicles through the BALPA FON to anyone other than eligible members of BALPA. Indeed, for the first 3 months after the initial launch of the affinity scheme in March 2005 no sales took place at all under the BALPA FON as First Defendant adhered strictly to the principle of excluding anyone other than BALPA members and followed this absolutely until other suggestions were made by Mr. Toby Johnstone of Renault Croydon as referred to in my first witness statement on behalf of the First Defendant ...”

48. I do not, of course, overlook the fact that in misusing the BALPA FON Mr. Thoms was not acting altruistically out of a desire to assist the Importer to sell vehicles. He made plain in cross-examination that, on average, he made a gross profit of £300 on each of the 217 sales which he achieved. Overall, therefore, FleetPro made a gross profit of something in excess of £60,000 by these activities.

49. At the same time, as Mr. Johnstone made clear in paragraph 18 of his second witness statement, dated 21 September 2007:-

“The BALPA FON sales were a significant proportion of my monthly sales. They contributed towards my bonus and also, I

believe, that of Pamela Hillman my line manager. I am paid a basic monthly wage and bonus element on top. The bonus is linked to sales – at the relevant time, for the first X units sold in a month, (X being the target) I received £50 per unit, once X was reached, the unit bonus was increased slightly.”

Thus Mr. Johnstone made something over £10,000 as a result of the misuse of the BALPA FON by FleetPro to sell 217 vehicles.

50. It is also right to say that the Importer was obviously prepared for genuine BALPA members to purchase Renault vehicles at substantially discounted prices. The only obvious motivation for that was to sell more vehicles. Miss Sample told me in cross-examination that the vehicles sold under the terms of the BALPA Scheme were not sold at a loss. Thus in order to sell more vehicles the Importer was prepared to accept lower levels of profit than would have been achieved by sales at list prices. As matters turned out, the Importer did sell cars as a result of the availability of the terms of the BALPA Scheme. In that sense, at least, the participation of the Importer in the scheme achieved its aim.
51. The first vehicle supplied by the Dealer to FleetPro under the BALPA Scheme was delivered on about 15 July 2005.
52. The first document upon which reliance was placed on behalf of the defendants as being consistent with the suggestion of taking advantage of the terms available under the BALPA Scheme for sales to non-BALPA members being made by Mr. Johnstone was an e-mail dated 14 June 2005 sent by Mr. Thoms to Mr. Johnstone in respect of the first order which FleetPro placed with the Dealer. An order in the terms which I have described was sent as an attachment to the e-mail. The attachment was described on the face of the e-mail as “PO 050609-0003 – ecarservices – Renault Grand Scenic 2.0 VVTDynamique Pearl Black.doc”. The defendants’ case was that eCar Services Ltd. (“eCar”) was a well-known internet broker which supplied cars to the public at prices discounted from list prices, and that Mr. Johnstone must have noticed the reference to it in the description of the attachment to the e-mail dated 14 June 2005. The fact that Mr. Johnstone made no comment about the mention of eCar was only consistent, said the defendants, with Mr. Johnstone knowing perfectly well, because he had suggested it, that FleetPro was seeking customers to whom the terms of the BALPA Scheme would be offered from non-BALPA members. Mr. Johnstone gave oral evidence at the trial and was asked about the attachment to the e-mail of 14 June 2005. He said that he had not noticed the reference to eCar, and, if he had, it would not have meant anything to him. In the circumstances the point upon which the defendants sought to rely added nothing to the issue whether I accepted the evidence of Mr. Thoms in preference to that of Mr. Johnstone where that evidence was in conflict, because if I accepted the evidence of Mr. Johnstone in relation to the attachment to the e-mail dated 14 June 2005 there was nothing in the point taken on behalf of the defendants.
53. It may be material to notice that, according to the timings on the e-mails, Mr. Thoms sent his e-mail dated 14 June 2005 at 16.52 and Mr. Johnstone replied

at 16.58. Certainly on that occasion Mr. Johnstone read Mr. Thoms's e-mail very soon after it was despatched. In his reply Mr. Johnstone asked for details of the name and address of the intended registered keeper of the vehicle ordered. Mr. Thoms in his turn replied at 17.17, so far as is presently material:-

“Owner/Registration details are:

Michael John Downer

Registration address for all BALPA vehicles will be c/o us, as we will provide our 3 year aftersales service (service bookings, tax disc renewal, speeding/parking ticket management etc, etc) as part of the package.”

54. Mr. Andrew Bruce, who appeared on behalf of the Importer, relied on the terms of that response, which on its face was consistent with the supply of a vehicle to Mr. Downer being a legitimate supply pursuant to the BALPA Scheme, in support of the Importer's case that it was Mr. Thoms who was in fact deceiving everyone in relation to the persons entitled to benefit from the BALPA Scheme. Mr. Thoms was cross-examined about the passage I have set out. It was suggested to him that in fact the statement that FleetPro was to provide a three year after sales service was a lie, as the vehicle in question was to be supplied to an internet broker. Mr. Thoms did, indeed, accept that what he had written was untrue.
55. After the first order placed by FleetPro, orders started to come thick and fast. Four were placed on 15 June 2005, another on 17 June 2005, two more on 22 June 2005, a further one on 25 June 2005, and yet another on 27 June 2005. A point made on behalf of the defendants was that this rate of ordering, amounting to ten in less than a fortnight, was so different from what one would expect in terms of volume from an affinity scheme that it must have been obvious to Mr. Johnstone, were he not in fact the instigator of what was happening, that something was amiss, yet he said nothing, either to Mr. Thoms or to anyone at the Importer. That failure to raise any question, it was said, was evidence in support of the contention on the part of the defendants that it was Mr. Johnstone who had suggested that the Importer would turn a blind eye to sales on BALPA FON terms to non-BALPA members.
56. There does seem to me to be substance in this point. In his witness statement dated 12 June 2007 Mr. Johnstone said something about his experience of affinity schemes. What he said, at paragraph 43, was, so far as is presently material:-

“In my experience affinity schemes either take off, or flop and, on average, you probably only expect orders for in the region of 5 or 6 vehicles in the first month.”

However, when it was put to him in cross-examination that he must have noticed that the numbers of orders being placed by FleetPro were considerably in excess of what one would have expected, he said that he had not noticed

that. His answer on this question was the more striking because the volume of orders continued from 14 June 2005 until about 12 April 2006, when orders ceased, at a rate averaging some 20 vehicles per month, yet he contended that that level of orders never struck him as odd, never prompted him to enquire of Mr. Thoms how this was being achieved, and never caused him to mention the level of orders to anyone at the Importer, notwithstanding that, at least from the time Mr. Wilson was employed by the Importer in September 2005, he was in almost daily contact with him. It is also right to say that the sentence which I have quoted involved a degree of exaggeration on the part of Mr. Johnstone in any event. In cross-examination, and also in answer to me, he agreed that in fact he had only had experience of one other affinity scheme, that of Civil Service Motorists Association, of which he believed the membership numbered some 250,000, whilst he believed that the membership of BALPA numbered between 10,000 and 15,000. Mr. Johnstone also told me in cross-examination that the total number of sales to members of Civil Service Motorists Association had been about 100 in the first year, rising to 250 to 300 per annum thereafter. On those figures the apparent rate of sales under the BALPA Scheme, if limited to BALPA members, was quite spectacular.

57. On 28 June 2005 there occurred what the defendants asserted really amounted to a smoking gun being found in the hand of Mr. Johnstone. At 10.31 on that day Mr. Thoms sent to Mr. Johnstone an e-mail with an attachment which was said to relate to a further order. As it happened, the attachment on this occasion also contained a reference to eCar, but that was somewhat incidental to the point upon which the defendants seized. That was that what was sent was the wrong document. What was sent was in fact not an order, but a vehicle order confirmation. It was on the stationery of Broker2Broker and was addressed to eCar. It related to a Renault Grand Scenic 1.9 DCI 130 Privilege Manual Euro IV motor car in metallic ink blue. Mr. Johnstone accepted in cross-examination that he read the e-mail and opened the attachment almost as soon as he received it. He said that he gave no attention to the attachment, beyond noticing that it was not in the usual form of order placed by FleetPro. He therefore telephoned Mr. Thoms. Mr. Thoms, according to Mr. Johnstone, told him that the document sent as the attachment had been sent in error and asked him to return it. Mr. Johnstone then forwarded the original e-mail and attachment to Mr. Thoms at a timing noted on the forwarding e-mail as 10.29, but plainly after the timing of the original e-mail. The purpose of forwarding the original e-mail to Mr. Thoms was obscure, as it would remain as a received e-mail in the inbox of Mr. Johnstone's computer, but when I asked him why he had forwarded it what Mr. Johnstone told me was that he had done it because that was what Mr. Thoms had asked, possibly in order to identify what had been sent in error. At 10.42 Mr. Thoms sent a further e-mail, this time with an order for a Renault Grand Scenic Diesel Estate 1.9 dCI 130 Privilege [Euro 4] in metallic ink blue, that is to say the same specification and colour as the vehicle the subject of the vehicle order confirmation originally sent by accident by Mr. Thoms. The defendants relied heavily upon this incident as showing that Mr. Johnstone was totally aware of what was going on, as he raised no questions about it. I have to say that I found the evidence of

Mr. Johnstone on this point completely unsatisfactory. I am satisfied that the reliance placed on this incident by the defendants was well-founded.

58. So far as reliance on documents went, the next matter to which the attention of Mr. Johnstone was drawn in his cross-examination was an e-mail dated 16 August 2005 sent by Mr. Thoms in respect of four identical Renault Megane Hatchback Special 1.5 dCi 86 Oasis five door motor cars. It was suggested to Mr. Johnstone by Miss John that an order for four identical vehicles on the same day was highly suggestive of a company purchase. Indeed, insurance cover notes relating to these four vehicles, copies of which were put in evidence, indicated that that was indeed the case, the company concerned being RHA Telecom. Mr. Johnstone did not accept that there was any reason to suppose that orders for four identical vehicles on the same day was suggestive of a purchase by a company, and therefore not by a member or members of BALPA. However, I do not accept his evidence on this point. If, contrary to the assertion of Mr. Thoms, Mr. Johnstone had not understood perfectly well that orders were being placed under the BALPA Scheme for persons who were not members of BALPA, it would, in my judgment, have struck any person of reasonable intelligence that it was strange to have orders for four identically specified vehicles on the same day.
59. It was contended on behalf of the defendants that Mr. Johnstone would in any event, in due course, have seen copies of the insurance cover notes relating to the four vehicles, because those would have had to have been, and were, sent to the Dealer to enable the vehicles to be registered. In fact each of the cover notes was, on the face of facsimile transmission sheets under cover of which they were sent, directed to Fiona Burrows at the Dealer. She, Mr. Johnstone told me, was employed in the Administration Department to deal with matters like registration of new vehicles. However, she sat a matter of a few feet away from his desk, albeit separated from him by a partition. It was the case for the defendants that everyone, at least in the Fleet section of the Dealer, knew perfectly well that the terms intended to be confined to BALPA members were being taken advantage of in sales to non-members. Mr. Johnstone did not accept that, and he denied that he had ever told Mr. Thoms that everyone in the Fleet section of the Dealer was aware of the misuse of the BALPA FON. Mr. Johnstone contended that Fiona Burrows, and two other ladies, Jennie Tomlin and Lisa McSherry, to whom I shall come, performed mechanical tasks and did not need to know or consider whether particular sales fell properly within the terms of the BALPA Scheme or not. I have heard no evidence from any of the ladies concerned, but it would seem surprising if any of them took so little interest in her work as not at least to understand that there was a BALPA Scheme the benefit of which was supposed to be confined to BALPA members, that BALPA was an association of airline pilots, and that fairly obviously at least some of the purchasers being afforded BALPA terms were companies or otherwise not plainly entitled to the benefit of the BALPA terms.
60. Another copy of an insurance cover note put in evidence related to a company called SM MS Ltd., which had purchased a Renault Megane. There was also put in evidence a copy of an insurance cover note in the name of Advantage

Business Group Ltd. in respect of a Renault Scenic. Mr. Bruce suggested to Mr. Thoms in cross-examination, and he accepted, that it was not impossible that insurance in the name of companies related to members of families of BALPA members.

61. The role of Jennie Tomlin, according to Mr. Johnstone, was to produce status reports to show where within the Renault system, between manufacture and delivery, particular vehicles were at any particular time. An example of a “*FLEETPRO/BALPA STATUS REPORT*” produced on 5 December 2005 was put in evidence. The form of the document included the names of the customers concerned. On this particular document appeared in respect of one vehicle the name “*BALPA*”. Mr. Thoms gave evidence that Mr. Johnstone had told him that Jennie Tomlin had drawn Mr. Johnstone’s attention to that entry and commented that it was curious that the name of BALPA should actually appear in the list supposed to relate to the BALPA Scheme. Mr. Johnstone denied that Jennie Tomlin had ever made any such comment or that he had ever reported to Mr. Thoms that she had. I have to say that, in human terms, the tale has the ring of truth about it.
62. Another document relied upon on behalf of the defendants seemed to involve Lisa McSherry. It was an e-mail dated 14 November 2005 which she wrote to Mr. Thoms in which she said:-

“RE: Daphne Turner

Russell

Can you give her a call urgently – she does not want to sign the keeper/reg doc paperwork as it states c/o fleetpro and she has no idea who you are! Can you explain the situation with her ... thanks.”

63. Lisa McSherry’s tasks, according to Mr. Johnstone, were focused on delivery of vehicles to customers. On the face of the e-mail it seemed that Lisa McSherry understood that it was necessary for the vehicle to be supplied to Daphne Turner to be registered care of the address of FleetPro. It was suggested to Mr. Johnstone by Miss John that, if Daphne Turner had come to purchase her car as a result of visiting the website of BALPA and obtaining the details of the BALPA Scheme from there, she would have known who the manager of the scheme, FleetPro, was. That seems a fair point. It was then suggested to Mr. Johnstone that the fact that Daphne Turner said that she had no idea who FleetPro was made it plain, to Lisa McSherry, that Daphne Turner could not have been entitled legitimately to the benefits of the BALPA Scheme. Lisa McSherry, however, thought, clearly, that the way to deal with any problem was to get Mr. Thoms to sort it out, rather than to raise any concern with Mr. Johnstone, or anyone else at the Dealer. Mr. Johnstone’s answers to the cross-examination on this document seemed to me to be deliberately evasive. He told me that his interpretation of the e-mail was that the person Daphne Turner had no idea who he was was not FleetPro, but Mr. Thoms as an individual. That reaction, in my judgment, did not begin to grapple with the substance of the matters to which the e-mail gave rise.

64. Mr. Johnstone's superior at the Dealer was Mrs. Pamela Hillman. She sent an e-mail dated 31 October 2005 to Mr. Thoms concerning the registration of a vehicle ordered by a Mr. Largent to a company called Gas Transportation Co. Ltd. Omitting the details of the name and address of the company concerned, the e-mail was in these terms:-

"We've received communication from the customer today, asking for the registration document to be in the name of the company not the end user.

Could you amend your records accordingly."

65. The defendants relied on the terms of that e-mail as indicating that Mrs. Hillman was aware that vehicles ordered on the terms of the BALPA Scheme were being delivered to non-BALPA members. Mr. Johnstone accepted in cross-examination that Mrs. Hillman was aware of the existence of the BALPA Scheme. It was common ground that the only vehicles ever ordered by FleetPro from the Dealer were expressed to be covered by that scheme. Thus it was contended on behalf of the defendants that, as Mrs. Hillman plainly knew that Mr. Largent wished his vehicle to be registered in the name of a company, she must have appreciated that it was not being purchased by someone properly entitled to the benefit of the BALPA Scheme. It appears likely that that was so, but Mrs. Hillman was not called to give evidence and so she had no opportunity to give her account of the matter.
66. A point was made on behalf of the defendants that a number of vehicles supplied ostensibly under the terms of the BALPA Scheme were registered in the names of doctors, and one was registered in the name of a professor. It was suggested that those forms of registration indicated that the persons concerned were unlikely to be airline pilots. There is, perhaps, something in that, although Mr. Johnstone pointed out, correctly, that one could not assume that an airline pilot was not also a doctor of something, or a professor. It was accepted that the forms of names indicating "*doctor*" or "*professor*" did not appear on the order forms produced to Mr. Johnstone by Mr. Thoms. It seemed that those forms were derived from the forms of insurance documents produced in the context of registration of the vehicles concerned, and thus that they were seen by Fiona Burrows, and not by Mr. Johnstone. On that basis it is appropriate to treat the issue in the same way as indications on insurance documents which Fiona Burrows saw that the purchaser of a particular vehicle was a company. However, again, it is not impossible that an airline pilot was married to, the child of, or the parent of, a doctor or a professor.
67. The last documents which I should mention in the present context were a series of e-mail exchanges between Mr. Thoms and Mr. Johnstone concerning a vehicle supplied on the terms of the BALPA Scheme which proved to be defective. Arrangements were made for this vehicle to be collected from the premises of Elwell Sections Ltd. in West Bromwich and for a demonstration vehicle to be provided so that the customer could decide whether to accept a substitute vehicle in place of the defective one. The defendants contended that these exchanges showed that Mr. Johnstone knew, as he plainly did, that the vehicles were, respectively, to be collected from and delivered to, the premises

of a company. They went further and asserted that they also showed that Mr. Johnstone knew that the defective vehicle had been sold to someone not entitled to the benefit of the BALPA Scheme. Mr. Johnstone's answers to the points put to him about these documents in cross-examination seemed to me to be evasive. He said that his concern was on satisfying the customer, and he again rather avoided the substance of what was being put to him.

68. Mr. Bruce sought to persuade me to accept the evidence of Mr. Johnstone in preference to that of Mr. Thoms where the evidence of them differed. He relied heavily upon the fact that Mr. Thoms admitted in cross-examination telling lies in two contemporaneous documents. One was the e-mail dated 14 June 2005 to Mr. Johnstone, to which I have already referred. The other was in an e-mail dated 12 July 2005 to Miss Sample, to which I shall come. Mr. Bruce also drew to my attention that certain aspects of Mr. Thoms's and FleetPro's case were not made in solicitors' correspondence preceding the commencement of proceedings, and other aspects were not pleaded, but emerged only from Mr. Thoms's witness statements. In addition Mr. Bruce urged upon me that it had been demonstrated that Mr. Thoms's evidence as to Mr. Johnstone personally collecting vehicles from customers whose vehicles had been obtained from internet brokers supplied by FleetPro was false because Mr. Thoms had said that he understood that this had happened because the customers, respectively based in Reigate and Crawley, lived on Mr. Johnstone's route home from the Dealer, and he in fact lived in Selsdon. Mr. Bruce made the same point in relation to evidence of Mr. Thoms that he understood that Miss Sample missed attending a meeting on 13 March 2006 because she went to Birmingham to investigate a case concerning a Mr. Hughes, when she in fact missed that meeting and went to Birmingham to call on a customer, Chubb.
69. It seemed to me that the submission of Mr. Bruce that Mr. Thoms had admitted in cross-examination lies in contemporaneous documents was well-founded. However, I attach little significance to the points not taken in solicitors' correspondence or not pleaded. The focus of the allegations against FleetPro at the pre-litigation stage was breach of contract, not fraudulent misrepresentation, and no claims at that stage were suggested against Mr. Thoms personally. The alleged omissions from statements of case in the litigation seemed to me to be minor matters in respect of which the professional judgment of the pleader had a role, for they related to failure to plead details, such as the content of the telephone conversation between Mr. Thoms and Mr. Johnstone which took place on 28 June 2005. The so-called false evidence about collecting cars and the purpose which took Miss Sample to Birmingham struck me as equally explicable as misunderstandings on the part of Mr. Thoms as to what he had been told, or inaccurate information, as falsity. After all, Mr. Thoms did not contend that he had actually been present when the vehicles were collected, or at the meeting of Miss Sample in Birmingham.
70. A more grave and weighty issue as to credibility between Mr. Thoms and Mr. Johnstone upon which Mr. Bruce placed reliance concerned the events of the Dealer's Christmas party in December 2005. Mr. Johnstone attended. He

invited Mr. Thoms, who also attended. Another attendee was Mr. Keith Hayles. Mr. Hayles was, at the time, employed by the Distributor as a fleet sales executive at the premises of the Dealer. In his first witness statement, dated 2 July 2007, Mr. Thoms said, at paragraph 44:-

“On 20 December 2005 I attended a Christmas luncheon arranged by Renault Croydon for certain customers at the Sanderson Hotel, 50 Berners Street. London W1T 3NG. Towards the end of the event I sat with Mr. Johnstone and his colleague Mr. Keith Hayles and we discussed openly between us the sales under the BALPA FON and their source. Mr. Johnstone said that, even though the Claimant was aware of what was happening through the BALPA FON, it was unlikely that the Claimant would ever take action against the 1st Defendant because the Claimant needed the sales, the cars were delivered direct to the end customers and not to car supermarkets and the 1st Defendant retained the V5 registration documents. Mr. Hayles participated in the conversation and at this point expressed his agreement with Mr. Johnstone.”

71. Mr. Johnstone denied that there had been any such conversation at the Christmas luncheon. Mr. Hayles also denied it. Mr. Bruce submitted that Mr. Hayles, who left the employ of the Distributor early in January 2006, and has since had a somewhat chequered employment history, being currently employed by The First Group as an overseas property consultant, had no interest in telling anything other than the truth about the events at the Christmas luncheon.
72. While, for the reasons which I have explained, the force in some of the documents relied upon by the defendants and put to Mr. Johnstone was greater than others, in the light of his unsatisfactory answers to many of the points put, and my assessment of Mr. Johnstone as a gentleman who, by and large, was seeking to avoid answering questions frankly and to minimise his knowledge of what was going on and his involvement in events, I prefer the evidence of Mr. Thoms to that of Mr. Johnstone on all points upon which their evidence of fact differed. Although I have serious reservations concerning the general honesty of Mr. Thoms, as I shall explain later in this judgment, as between the evidence of Mr. Thoms and that of Mr. Johnstone, I am satisfied that the evidence of Mr. Thoms was reliable, whilst that of Mr. Johnstone was not. I was unimpressed by Mr. Hayles as a witness. Certainly I did not consider that I should prefer his evidence to that of Mr. Thoms as to what had been discussed at the Christmas luncheon in 2005. In any event, the evidence about that was rather peripheral to the issues which I have to decide. The main significance of Mr. Hayles's evidence was that, if I accepted his evidence in preference to that of Mr. Thoms, that might cast a longer shadow over the rest of Mr. Thoms's evidence. However, perhaps fortunately for Mr. Thoms and FleetPro, ultimately, as between them and the Importer, the issues did not seem to depend very much on whether I could accept his evidence, as I shall explain shortly.

73. I accept that Mr. Johnstone did indeed suggest to Mr. Thoms the possibility of taking advantage of the terms available under the BALPA Scheme to sell Renault cars to non-BALPA members. Mr. Thoms told me in cross-examination, and I accept, that he did not explain to Mr. Johnstone that FleetPro was in fact seeking to take advantage of the terms available under the BALPA Scheme to sell vehicles to internet brokers until after he had inadvertently sent to Mr. Johnstone as an attachment to the e-mail dated 28 June 2005 the Broker2Broker vehicle order confirmation addressed to eCar. However, in the telephone conversation which followed him sending that attachment he had made that clear. Consequently I find that as from 28 June 2005 Mr. Johnstone clearly knew what the true position was in relation to the misuse of the BALPA FON and was not deceived. In respect of the period between 14 June 2005 and 28 June 2005 I find that Mr. Johnstone had reason to suspect that the first order did not properly fall within the ambit of the BALPA Scheme, because of the conversation which I have found in which he suggested that the Importer would not object to the use of the BALPA FON for sales to non-BALPA members. I find that that suspicion must have matured into a certainty of knowledge with the increasing volume of orders, such that what he was told on 28 June 2005 was only confirmation of a conclusion which he himself had reached by that time.
74. The defendants' case was that not only Mr. Johnstone and others at the Dealer were aware that the benefit of the terms available under the BALPA Scheme was being offered by FleetPro to non-BALPA members, but also that the Importer, through Miss Sample and Mr. Wilson, were aware of that. The matters relied upon as against Miss Sample and Mr. Wilson were pleaded in paragraph 24A of the Amended Defence of the First Defendant in this way: _

“The Claimant’s actual knowledge: The First Defendant’s case is that the following individuals at the Claimant had actual knowledge (but turned a blind eye to the fact) that sales were being made outside the strict terms of the BALPA FON:

(a) Steven Wilson: In particular the First Defendant relies on:
(i) the conversation pleaded in paragraph 13 above, in which Mr. Thoms was informed [by Mr. Johnstone] that the Claimant would tolerate the BALPA FON being operated outside its terms; (ii) the general industry practice of turning a blind eye to affinity schemes being run outside their terms, including the fact that (at the same time as the BALPA scheme) the Claimant turned a blind eye in relation to other affinity schemes being operated outside their terms; (iii) the fact that the Claimant was more concerned with the appearance of the BALPA scheme than with its substance: including the registering of vehicles care of the First Defendant (to ensure that vehicles did not end up on rival dealer forecourts) and the “tick boxing” exercise in which Mr. Thoms was only asked particular questions about website security procedures; (iv) the failure of the Claimant to enforce identification requirements, until the fact that the BALPA scheme was being operated outside its

terms became known to another dealer, Renault Birmingham; (v) the fact that the Claimant did not in fact have “suspicions” in the relevant period, despite the high volume of sales (and the declining market for Renault); and (vi) the fact that throughout the relevant period Renault car sales were falling and the Claimant was more interested in selling cars (in a difficult market) as long as the operation of the BALPA scheme outside its terms did not cause difficulties for the Claimant in relation to its dealership network.

(b) Carolyn Sample: Sub-paragraph 24A (a) is repeated. In addition, the First Defendant relies on the conversation between Mr. Thoms and Mr. Johnstone pleaded in paragraph 21 above.”

75. The conversation pleaded in paragraph 21 of the Amended Defence of the First Defendant was said to have taken place on 12 July 2005 after a meeting between Mr. Thoms, Mr. Johnstone and Miss Sample at the premises of the Dealer. What was pleaded was:-

“After the meeting, Mr. Johnstone and the Second Defendant continued discussions about, amongst other things, the sale of vehicles through the BALPA FON. Mr. Johnstone stated that, as Ms Sample had referred to the overall sales volumes exceeding experience and expectations but had not directly challenged the sale of vehicles through the BALPA FON, she knew that the sales were outside the terms of the BALPA arrangement and that the Corporate Sales Department of the Claimant, and the Claimant in general, did not wish to lose the sales in question as the Claimant was experiencing difficulties in vehicle sales at the time. Mr. Johnstone and the Second Defendant also discussed the discount terms available from Renault Croydon and Mr. Johnstone agreed to increase the discount from the original 6.5% to 7% in recognition of the value to Renault Croydon of sales through the BALPA FON.”

76. The thrust of the case of the defendants that the Importer, through Miss Sample and Mr. Wilson, knew that the orders placed ostensibly pursuant to the terms of the BALPA Scheme were not placed on behalf of BALPA members thus depended essentially upon inference from the actions, or lack of action, of Miss Sample and Mr. Wilson. Both Miss Sample and Mr. Wilson, when cross-examined, maintained steadfastly that they were unaware of the misuse of the BALPA FON until they discovered on about 26 April 2006, at a meeting with Mr. Colin Sambrook of BALPA that there had been no sales to members of BALPA. Each of Miss Sample and Mr. Wilson accepted that she and he had suspected from the volume of sales that there was something wrong, but whenever the matter had been raised with Mr. Thoms he had assured them that all was well. Mr. Thoms countered that in fact the questions which Miss Sample and Mr. Wilson chose to ask were carefully phrased, and focused on the issue whether the security of the BALPA website, through which members could obtain access to information concerning the BALPA Scheme, could be

relied upon. Mr. Thoms contended that he always said, truthfully, that the security of the website was sound.

77. Mr. Arnold, the corporate accounts manager of the Importer with whom Mr. Thoms first dealt, left that employment in April 2005. He was not immediately replaced. His replacement, Mr. Wilson, took up his post in September 2005. In the interim the work which Mr. Arnold had previously undertaken, and which Mr. Wilson was to undertake, was covered by Miss Sample. Mr. Wilson joined the Importer from a tyre manufacturer. He had no previous experience of selling vehicles. He was thus dependent in the first instance upon Miss Sample to teach him about affinity schemes.
78. Miss Sample did not have any direct contact with Mr. Thoms until 12 July 2005. A meeting took place on that day at the premises of the Dealer between herself, Mr. Johnstone and Mr. Thoms. That meeting had been arranged following the forwarding to Miss Sample by Mr. Johnstone of Mr. Thoms's e-mail of 21 June 2005, to which I have already referred.
79. At the meeting of 12 July 2005 Miss Sample made contemporaneous notes on a Customer Visit Report form. She told me, and I accept, that she was interested in finding out about FleetPro. Her notes included:-

“Have a call centre in Cardigan, Wales. They provide all inbound call handling & initial sales. Started business developing web sites for companies offering PCP schemes to their company drivers. Now an off the shelf package which includes handling all back office functions & offer 3 year pay as you go maintenance package & accident management. Have schemes covering 750,000 employees. In addition have closed affinity schemes.

All cars are registered either c/o Fleetpro or client. Have access to funding via Bank of Scotland. They supply all the software for Ford @ Essex for staff supply schemes.

For outright purchase deals Fleetpro keep the V5s registered to themselves as they retax the vehicles etc.

Most of Balpa cars are outright purchase – so purchase decision based on purchase price rather than whole life costs.

...

Balpa

...

50 cars per month being ordered out of 10,000 members.

Renault took 15 orders last month.

30 were Rover/Vauxhall & balance went to premium models.

- *Zafira was popular due to high support on run out*
- *Corsa has high support so Clio not going well*
- *Vectra has FOC metallic paint + 33% discount incl. dealer”*

80. Some of the information recorded by Miss Sample was undoubtedly in fact incorrect. As at 12 July 2005 the only affinity scheme with which FleetPro was involved was the BALPA Scheme, with some 10,000 members. FleetPro was working on other possible schemes, but none had by then come to fruition. It is possible that the misapprehensions about the schemes which FleetPro were already operating came about as a result of a difference of perception between the provider of the information and the receiver of it. On Mr. Thoms’s account that was a bit of a theme in relation to what Miss Sample and Mr. Wilson recorded following meetings with him. I am prepared to accept that Miss Sample on this occasion may have misunderstood that what were in fact only aims and plans as to other schemes had already come into operation. However, I did form the clear impression that it was not unsatisfactory to Mr. Thoms in his dealings with Miss Sample and Mr. Wilson to have ambiguities and misunderstandings. He told me frankly that he answered questions put to him literally, and I think that he accepted that the approach which he adopted did create, or might have created, false perceptions. A particular example of that is that if Mr. Thoms were asked a question about the BALPA FON he answered it by reference to what was in fact happening in relation to the use of that FON, and said nothing about the fact that the FON was not being used in respect of sales to BALPA members. That was no doubt the reason for Miss Sample recording that, *“Most of Balpa cars are outright purchases ...”*. There were only ever three purchases by BALPA, and none had taken place by 12 July 2005. However, if one enquired about sales under the BALPA FON as at 12 July 2005, it was correct that in fact all were outright purchases – by internet car brokers.
81. Mr. Thoms accepted that the information about Vauxhall vehicles recorded by Miss Sample had been provided by him. He said that he was asked about the popularity of competitor vehicles to Renault and answered by reference to the level of enquiries received. However, by so doing he plainly created in the mind of Miss Sample the impression that he was talking about sales. Mr. Thoms told me that he did not tell Miss Sample that fifty cars per month were being ordered by BALPA members or that thirty of the fifty were Rover or Vauxhall vehicles, with the balance premium models. Any of such statements would have been untrue. Mr. Thoms suggested that the figure of fifteen Renault orders must have been based on what was on Renault’s system, rather than on his information, because in fact, he said, by the date of the meeting some 20 orders had been placed. However, it appears that the statement, *“Renault took 15 orders last month [that is, in June 2005, not over the last month]”* was literally correct. What Mr. Thoms was unable to explain was where the information about fifty cars per month being ordered and the numbers of Rover and Vauxhall vehicles involved came from, if not from him.
82. Light was shed on this difficulty, as it seemed to me, by Mr. Thoms’s acceptance that a statement in an e-mail which he sent to Miss Sample

following the meeting, but still on 12 July 2005, was a lie. The statement was in the sentence, *“Hopefully we can create a way forward which will help us consolidate across the range on the recent advances made on sales of Renault people carriers at BALPA”*. He accepted that the statement that there had been sales of Renault people carriers to BALPA was untrue. The explanation for that untruth which he offered seemed to me totally unworthy of credence. Having regard to the evidence on this point, and to Mr. Thoms’s attitude to answering questions put to him literally, and being content with ambiguity in his dealings with others, I formed the view that his evidence needed to be approached with great caution. He affected an open and frank manner. Much of what he told me in his evidence was supported by documents. Other evidence which he gave was inherently plausible. However, particularly in his dealings with Miss Sample and Mr. Wilson I came to the conclusion that Mr. Thoms was prepared to tell lies if it suited his purpose. Generally, I think, it was not necessary for him to tell a deliberate untruth, as opposed to create a false impression by adopting a pedantic approach to the meaning of a question or by adopting a rather vague description of aspirations or intentions which was likely to be interpreted as statements of factual achievements. However, I was satisfied as to his capacity to tell direct untruths if he considered it necessary.

83. It was not suggested at the meeting on 12 July 2005 by Miss Sample that she had any doubts as to the source of the orders placed by FleetPro with the Dealer being parties entitled to take advantage of the terms available under the BALPA Scheme. Mr. Thoms’s evidence, to which I have already referred, was that in the light of that, following the meeting, in a separate meeting with Mr. Johnstone, Mr. Johnstone indicated that Miss Sample must have known that the terms of the scheme were being misused, but was prepared to take no notice of that. I accept Mr. Thoms’s evidence that that is what Mr. Johnstone said. Miss Sample’s evidence was that she was not in fact suspicious at that point. Although the level of orders was higher than she had previously experienced with an affinity scheme, she had not previously had experience of a scheme in which the potential buyers were members of an organisation, rather than employees of a company.
84. One of the matters discussed at the meeting on 12 July 2005 with Miss Sample was improving the terms available under the BALPA Scheme, in particular by including metallic paint free of charge. Miss Sample sent an e-mail dated 15 July 2005 to Mr. Thoms setting out revised terms.
85. As I have said, it was a feature of the operation of the giving of fleet support terms by the Importer that the limits on numbers of vehicles specified in the Terms Document current for the time being must not be exceeded. During the period between June 2005 and April 2006 new Terms Documents were produced from time to time simply to increase the numbers of vehicles to which fleet support payments would apply. Miss Sample instigated or approved each increase. The first was produced on or about 9 September 2005 and increased the total number of vehicles to which the terms in the BALPA Scheme might apply to 124. Plainly by that stage Miss Sample contemplated that a figure of that order of magnitude might be sold under the BALPA FON

in the period to which the revised document related, August 2005 to July 2006.

86. After Mr. Wilson took up his post with the Importer Miss Sample arranged to visit Mr. Thoms with Mr. Wilson to introduce him. Mr. Wilson completed a Customer Visit Report following the meeting. He recorded these notes:-

“Discussed the Balpa contract (affinity scheme for Airline Pilots) which is going well. Slow down in Renault sales of late due to very cheap Citroen Picasso availability at £10,500 (£7.5k off list price) with 100 being sold in last 2 months. Vauxhall’s still selling well at 30% off list with free metallic (+3% dealer margin). Discussed the Chartered Surveyors Affinity scheme which he is launching, but is getting too big for fleet and is really retail scheme at 85,000 members. Suggested MBS terms level for it. The Lloyds TSB scheme for 50,000 members which is in Chris Durden’s area. Other potential schemes include Page & Moy, Capital One, Suffolk CC, Southern Water which should be discussed at the next meeting. Also discussed the need for product information on the Websites and requested Renault details from us. Request for Demo’s as below.”

87. The evidence of Miss Sample in her witness statement dated 28 June 2007 about the meeting on 28 September 2005 was this:-

“49. A large number of vehicles had been sold throughout the summer and the BALPA scheme had been going very well since its launch.

50. I do not recall specifically questioning Mr. Thoms on this occasion as to why the scheme was going so well; the purpose of the meeting was to introduce Steve to Mr. Thoms. Mr. Thoms explained to Steve how the BALPA Scheme operated through the BALPA website and intranet and the fact that he had a call centre in Wales to deal with enquiries and administration etc. He asked about the new Renault Clio (which was just about to be launched) and Steve said he would provide Mr. Thoms with some promotional literature as requested. Mr. Thoms also asked for some demo vehicles to be supplied and we were happy to accommodate this request as was usual Renault policy. Steve dealt with the follow up and took over the day-to-day account handling from then on.

51. Steve and I did discuss the number of cars being sold through the BALPA Scheme as it did seem high. We did the sums after the meeting and agreed that Steve should ask Russell Thoms about this and specifically whether there could have been any breach of security on the website. This seemed the only potential area for concern.

52. At this stage, it was not so much a case of alarm bells ringing but simply a gut feeling that there may be something not quite right and I wanted to be satisfied that it was all OK. Mr. Thoms was an experienced professional and we had been told by him throughout as to how the scheme would operate. He continually represented (for example, in his emails of 21 June ... 12 July ... in the initial meetings with us, when seeking to promote other schemes and in relation to BALPA specifically) that only eligible persons could purchase cars, proof of eligibility would be checked before he accepted and placed the order on behalf of BALPA and that the website was password protected and access restricted. Because of all the representations and assurances from Mr. Thoms I kept telling myself that I was probably worrying about nothing. I was also cautious about upsetting a customer if my gut feeling was unfounded.”

88. In cross-examination Miss Sample accepted that in fact the only occasions upon which Mr. Thoms made representations to her were in the e-mail to Mr. Johnstone dated 21 June 2005 forwarded to her, in his e-mail to her dated 12 July 2005 and in two proposals, respectively relating to Lloyds TSB and BAE Systems. The e-mail dated 12 July 2005 said nothing about how any scheme would, or did, work. The other documents contained an explanation as to the general modus operandi of FleetPro. None of the documents mentioned specifically how the BALPA Scheme operated or was intended to operate.
89. In an e-mail to Mr. Wilson dated 13 October 2005 Mr. Thoms enquired as to the number of a FleetPro FON. Mr. Wilson replied in an e-mail dated 17 October 2005:-

“the FleetPro FON is 47360, but at present there are no terms set up against this number, presumably because all the orders have been for Balpa and go through their FON.”

Mr. Bruce submitted, and I accept, that it is clear from the terms of that reply that at that time Mr. Wilson in fact believed that all of the orders placed by FleetPro up to that date had been orders which properly fell within the terms of the BALPA Scheme. However, it is necessary to emphasise that Mr. Wilson had only recently joined the Importer with no previous experience of the motor industry, so that his only knowledge about affinity schemes and how they could be expected to work, and with what results, had to come from Miss Sample.

90. Mr. Wilson met Mr. Thoms again on 27 October 2005. Once again Mr. Wilson completed a Customer Visit Report. This time he noted:-

“Met with Russell and discussed how the new Lloyds TSB Affinity Scheme is now live from 1/11/05. Terms at the same level as Balpa are being submitted. Also discussed the possibility of getting some general fleet terms for Russell to use like a Broker for smaller fleet business. Discussed at length the

security procedures he has in place to prevent the abuse of the Balpa and Lloyds Terms on the Smart Fleet (Fleet Pro) website. There is so much password protection that only a Balpa person can see the Balpa rates, the headline rates on the website are standard contract hire retail offers that he has added his own mark up to and trying to sell to retail customers with his service added. He keeps records of all Balpa registration documents in a file at home that he seemed happy enough to show us if we needed to see.”

91. Mr. Thoms emphasised, when cross-examined about this record, and I think that in the end it was not in dispute, that what he was asked about, and all he was asked about, in relation to use of the BALPA FON was the security of the website. To such questions, he contended, he answered truthfully. I accept that he did. However, it is plain from Mr. Wilson’s notes that by 27 October 2005, no doubt prompted by Miss Sample, he did have concerns about possible misuse of the BALPA FON.
92. The next development was that Mr. Wilson sent to Mr. Thoms an e-mail dated 3 November 2005. Mr. Wilson and Miss Sample told me that the e-mail was specifically directed at FleetPro and use of the BALPA FON, although it was dressed up to look like a general tightening up of procedures by the Importer. The sending of the e-mail was said to have been prompted by continuing unease at the volumes of vehicles being ordered by FleetPro under the terms of the BALPA Scheme. The e-mail was in these terms:-

“Many thanks for your time at our meeting last week, and I please [sic] that Lloyds TSB scheme is now up and running. The terms for this account have been raised and a copy will be with you shortly once it has gone through our standard sign off procedure. The terms as said previously are at the same level as Balpa.

In terms of some of the other things discussed, I could do with a little help from yourself.

As we touched on when you were explaining the security procedures that exist on your SmartFleet website there have always been concerns within the industry on either intentional or unintentional abuse of terms that are set up for affinity schemes. As we discussed, certain manufacturers will not even entertain such schemes due to the potential problems, and the grey area between fleet and retail business. Due to such fears, and actual incidents elsewhere, Renault are being forced to look at how we administer such schemes.

A procedure needs to be introduced that will feed Renault with some sort of proof that vehicles purchased on affinity schemes are being taken by the people that should be taking advantage of these excellent terms. This I expect should be no problem for yourself due to the stringent security measures that you already

have in place. We, at Renault, do need to get something at the time of order to show that, for example a Balpa affinity purchaser, is indeed a pilot.

If you could give this some thought and send me your feedback, we can move forward and meet the requirements of Renault. With Balpa I would suggest that the customer would simply present a copy of either his/her Balpa membership along with a pilot's licence to the dealership and we compile all this information centrally via yourself and the dealer.

Can I reiterate that this is not a reflection upon yourself and how you operate, and Carolyn and I are both extremely pleased with how the whole business is going. We are very keen to continue to move forward with you and hopefully increase the Renault sales through yourself, particularly in view of the Lloyds TSB scheme going live. This procedure will, as you will clearly understand, help to prevent any spurious affinity schemes from less professional operators being abuse [sic], and allow Renault to devote our time and resources with the more professional companies like FleetPro.

Many thanks, and I look forward to speaking to you soon."

93. It is, I think, plain on any view from the timing and terms of the e-mail dated 3 November 2005 that by that stage Miss Sample and Mr. Wilson were professing concern that there was misuse of the BALPA FON. Certainly they were, on the face of it, no longer prepared to rely simply on assurances from Mr. Thoms that the BALPA website was secure as entitling them to take no steps to do more to police the use of the terms of the BALPA Scheme. What prompted the sending of the e-mail was undoubtedly the continuing placing of large numbers of orders by FleetPro in respect of which discounts on the basis of the BALPA FON were claimed. That is what both Miss Sample and Mr. Wilson told me. However, the suggestion made on behalf of the defendants was that the e-mail of 3 November 2005 was not intended to be acted upon. Rather it was intended to provide evidence of suspicion on the part of the Importer in the event that misuse of the BALPA FON was discovered by outsiders, and thereby to protect Miss Sample and Mr. Wilson personally from criticism.
94. At one point Mr. Thoms described the situation in relation to the BALPA FON as "*the elephant in the room*". What I think he meant was that the circumstances were rather like the children's story of the king's new clothes. In the story everybody could in fact see that the king was naked, but everyone, bar a small child not party to the convention, asserted that the king was bedecked in the finest garments. As I understood Mr. Thoms's point, it was that he, Mr. Johnstone, Miss Sample and Mr. Wilson, as well as various employees at the Dealer, knew perfectly well that the BALPA FON was being misused by FleetPro, but everybody, by convention, proceeded on the basis that appropriate use was being made of the BALPA FON. I rather gathered that a part of what Mr. Thoms was suggesting was that those untrue statements

made, and false impressions created, by him as to how the BALPA Scheme was being operated, and with what results, were in a sense a game, known by the other participants to be such, but the object of which was to provide Miss Sample and Mr. Wilson with apparent justifications for not probing further into the use of the BALPA FON. I shall come to my conclusions in relation to the analysis for which Mr. Thoms appeared to be contending.

95. Mr. Thoms replied to the e-mail dated 3 November 2005 from Mr. Wilson the same day by e-mail. The material part of his e-mail was:-

“I’m meeting BALPA in about 10 days to discuss the plan operational processes for the 2006 year, as we have had different requests from the 8 different manufacturers for the verification processes and it’s getting a bit complicated, as we have to send out different versions of our quote forms requesting the info depending on the brand.

When we pitched for the job of administering the programme we did, though, give some undertakings to BALPA about the hoops through which members would have to jump to participate and one of the reasons we got the job was our approach to administration. Obviously they wanted things to be as simple and cohesive as possible, but we did explain to them the industry concerns and they accepted that some form of security would be necessary.

However, we’ve already had members balk at the requirement to register all cars c/o us, rather than at the members home address, and Volvo in particular has already caved in on this after uppity members threatened to cancel orders and buy other brands instead which had less stringent requirements.

Now Volvo lets members register cars at the home address, which we think they shouldn’t do (it undermines our authority as plan administrators when we tell members that a SAAB has to be registered c/o us, but not a Volvo, as it makes us sound as if we are not in control of the plan).

However, I think that the licence approach is a great idea which should be quite workable and, in fact, I will put it to BALPA as being the definitive route for all brands (I might even give you credit for it!).

The only people where I foresee a slight problem is flight engineers and BALPA’s own staff. I don’t think that flight engineers have any specific form of accreditation like a licence that they could produce, but I will ask BALPA and get back to you. Could staff be covered by a BALPA payroll ID number?”

96. Mr. Thoms did not get back to Mr. Wilson or anyone else at the Importer on the issue of verification, and no one at the Importer took any steps to pursue

the matter, until March 2006. That period of inactivity on the part of the Importer was relied on by the defendants heavily as indicating that the Importer, and in particular Miss Sample and Mr. Wilson, was not much interested in verification of the entitlement of purchasers claiming the terms of the BALPA Scheme to that benefit.

97. Moreover, it was pointed out on behalf of the defendants by Miss John that it was not as if there was no contact between Mr. Thoms and the Importer during the period 3 November 2005 to March 2006. Mr. Wilson continued to visit and new Terms Documents continued to be produced.
98. Mr. Wilson visited Mr. Thoms again on 12 December 2005. In his Customer Visit Report of that meeting Mr. Wilson noted:-

“Balpa sales slowed down at the end of the year. Renault share still quite good but diminished due to Citroen being very aggressive (42% on certain models). Need improved terms on new Clio, Laguna and need availability of Megane Dynamique which is the best seller but not available due to model change over.”

99. There was, it seems, no discussion of whether there had been any progress on the question of verification.
100. A new Terms Document was produced on about 3 January 2006 and sent to Mr. Thoms. It increased the permitted number of vehicles to be sold in the BALPA Scheme in the period August 2005 to July 2006 to 278.
101. Mr. Wilson visited Mr. Thoms on 7 February 2006. Again there was no discussion about progress or the lack of it on the issue of verification. All Mr. Wilson noted in his Customer Visit Report was:-

“Agreed to try to do a 2 month deal to promote Scenic, Campus and Laguna. Need to counter Citroens with FOC Sat Nav and Picasso at £12,999 with FOV Sunroof, Leather, Parking Sensors and 21 day delivery.”

102. In an e-mail dated 15 February 2006 to Mr. Thoms Mr. Wilson communicated improved terms of discount for Laguna, Scenic and Clio Campus vehicles.
103. On about 7 February 2006 a further Terms Document was produced, increasing the number of vehicles to be sold in the BALPA Scheme in the period February 2006 to April 2006 to 333.
104. In March 2003 Mr. Wilson and Miss Sample became more interested in the issue of verification of the entitlement of those claiming the benefit of the BALPA Scheme. What prompted this resurgence in interest neither of them really explained. The first manifestation of it was that Mr. Wilson arranged to meet Mr. Gilbert of BFS on 13 March 2006 and invited Mr. Thoms to attend as well. Mr. Wilson made his usual Customer Visit Report. His notes were brief:-

“Sales are 150 over 9 months but under pressure from Fiat as they want to drop one out of the 2 makes to allow another manufacturer to come on board due their 4x4 capabilities. Peter will not allow us to check the list of customers to see if they are Balpa members or not which we need to see for auditing purposes.”

105. The meeting was preceded by a meeting between Mr. Thoms and Mr. Gilbert in which, according to the evidence of Mr. Thoms, he filled Mr. Gilbert in as to the background of the meeting and the nature of the concerns which Mr. Wilson was likely to express.
106. Following the meeting Mr. Wilson sent an e-mail dated 22 March 2006 to both Mr. Gilbert and Mr. Thoms. He wrote:-

“many thanks for your time at the meeting last week. I hope you found it as useful as I did, and will give us the opportunity to continue the good relationship we have already developed.

The one major issue that we discussed that was causing difficulties was in relation to the authentication of users buying through the Balpa scheme. As I stated, Renault are going through the process of standardising the rules by which we deal with the many affinity schemes we successfully sell to throughout the UK. For reasons discussed we are now having to put systems in place where every vehicle ordered for an Affinity scheme must be accompanied by proof of membership of that scheme.

In the case of Balpa, the onus will be on the dealers (mainly REA Group Croydon) to obtain the membership details of each car purchaser when the order is placed. This audit trail is required in order that, if looked into, the Dealership can prove that the vehicle was supplied to a legitimate fleet customer. If this information is not given, then the dealer would not be paid the discount for that vehicle.

I hope this does not provide too many problems with the systems that are in place at present, or if you have any alternative suggestions I would be pleased to hear them. I have attached for your information, the spreadsheet we looked at in the meeting which lists all the Balpa members who have so far purchased through the scheme.”

107. The end came, in relation to the continued ordering by FleetPro of vehicles on the terms of the BALPA Scheme, as a result of a meeting between Mr. Wilson and Mr. Thoms on 12 April 2006. By this time the Importer had discovered the Broker2Broker website. It appears that the existence of that website was revealed to a Mr. Watkinson of the Renault Birmingham dealership by a broker, and he reported the discovery to Mr. Wilson and Miss Sample. The broker provided a name and password by which access could be obtained to

the Broker2Broker website, and both Miss Sample and Mr. Wilson viewed that website. Mr. Wilson's notes of his meeting with Mr. Thoms on 12 April 2006 read:-

“Agreed that due to potential leakage of renault's using Balpa terms on FleetPro's Broker2Broker website, all new orders must be accompanied with a copy of the Balpa membership and the Pilot's Licence. Existing outstanding orders must have the membership number given to RRG Croydon. Russell claims the website buys and sells renaults (and other makes) from Brokers and imports. Not very believable as the terms mirror the Balpa ones.”

108. In cross-examination Mr. Thoms accepted that the Renault vehicles advertised on the Broker2Broker website had all been obtained by misuse of the BALPA FON. He contended that Mr. Wilson had asked him generally where the cars on that website had come from and that that is why he had said that they came from brokers and imports. I did not find that a satisfactory answer. It is plain from Mr. Wilson's notes that he did not believe what he was told.
109. Only one or two further orders were placed by FleetPro with the Dealer after the meeting on 12 April 2006. However, orders which had already been placed continued to be met until at least June 2006. When Miss Sample was asked in cross-examination why the Importer had continued to supply vehicles to the Dealer to enable it to meet these orders and had continued to provide fleet support payments in respect of the vehicles concerned, she said that perhaps the orders should have been cancelled, but, in effect, the Importer did not wish to antagonise the retail customers of the vehicles.
110. Following the meeting on 12 April 2006 there were further exchanges between Mr. Thoms and Mr. Wilson about how exactly members of BALPA could prove their membership, but the detail of those exchanges is not material to any issue in this action. What is material is that Miss Sample and Mr. Wilson continued to investigate the use of the BALPA FON and in that context contact was made with Mr. Sambrook. A meeting took place between him, Miss Sample and Mr. Wilson on 26 April 2006. At that meeting Mr. Sambrook revealed that BALPA was supposed to receive a commission on each vehicle sold through the BALPA Scheme, but that it had received none. He agreed to investigate to see whether the sales under the BALPA Scheme had in fact been to BALPA members. As was not in dispute by the time of the trial, none of them had been, although three vehicles had been sold to BALPA itself.
111. Thereafter two meetings took place involving Mr. Thoms and representatives of the Importer. The first was on 15 May 2006 and was requested by Mr. Thoms because he had heard that various comments which he considered to be defamatory had been made about him or FleetPro by representatives of the Importer to representatives of BALPA. That meeting was attended by Mr. Simon Tippet, company secretary and legal adviser to the Importer, and Captain John Rhodes of BALPA, amongst others. Mr. Thoms told me that he considered that the presence of these individuals amounted to an ambush of

him and thus he said little at the meeting and refused to answer questions. A further meeting, not attended by Mr. Tippet or a representative of BALPA, took place on 23 May 2006 at which, it seems, Mr. Thoms hoped that he might be able to bring to a conclusion any claims which the Importer might be contemplating, but that was not how matters turned out.

112. As I understand it, about six outstanding orders placed by FleetPro were cancelled towards the end of June 2006.

113. I have already indicated a view as to the reliability of the evidence of Mr. Thoms. I formed the view that both Miss Sample and Mr. Wilson were essentially honest and straightforward in most of their evidence to me, but that the evidence of each had been "*firmed up*" on critical issues. In particular, as it seemed to me, Miss Sample, who had had some experience of affinity schemes before July 2005, sought to overplay her interest in ensuring that only BALPA members took advantage of the terms available under the BALPA Scheme and to underplay what she realised at the time the volumes of vehicles ordered by FleetPro under the terms of the BALPA Scheme actually meant, namely that vehicles were being sold to persons not entitled to the benefit of the scheme. In my judgment Miss Sample cannot have failed to have been struck as early as 12 July 2005 by how dramatically more successful than any other affinity scheme she had ever encountered the BALPA Scheme appeared to be. She told me in cross-examination that she was aware of the possibility of misuse of affinity schemes, and so it must, as it seems to me, have occurred to her that there was misuse in this case as early as 12 July 2005. Yet she asked no questions about it at the meeting on 12 July 2005 with Mr. Thoms. The focus of her attention seems to have been on developing business with FleetPro, not checking whether FleetPro was acting as it should. In her witness statement, in my view, she exaggerated the reassurances which she contended that Mr. Thoms had given. She increased the limits in the Terms Document produced on about 3 September 2005 to a level vastly in excess of her professed experience of the level of sales under affinity schemes, apparently without enquiry or comment. Mr. Wilson, new to the business of selling cars, must have taken his lead in relation to affinity schemes and what should be expected, as well as the attitude of the Importer to such schemes and possible misuse of them, from Miss Sample. He raised no issue relevant to possible misuse until his visit to Mr. Thoms on 27 October 2005. He followed that visit up by writing his e-mail dated 3 November 2005. The fact that he did write in the terms he did at that time demonstrates, as it seems to me, that Miss Sample, and, with the benefit of her assessment, Mr. Wilson, realised perfectly well, by about 27 October 2005, that the orders placed by FleetPro must at least have included substantial numbers of cars destined for persons not entitled to the benefit of the BALPA Scheme. No obvious purpose was served by writing the e-mail and not then following it up unless, as Mr. Thoms suggested to me, it was not intended as anything other than something which could be relied upon by Miss Sample and Mr. Wilson if their relaxed approach to what they strongly suspected was going on should thereafter be criticised. Miss Sample told me in cross-examination that she considered that a lapse of four and a half months between Mr. Wilson's e-mail of 3 November 2005 and it being followed up in March 2006 was a short period. I am afraid that I do

not accept that. It is not as if there was no contact between Mr. Wilson and Mr. Thoms in the intervening period. There were the meetings on 12 December 2005 and 7 February 2006. If the issue of verification of the entitlement of those seeking the benefit of the BALPA Scheme had been of any real interest to Mr. Wilson or Miss Sample at the time of those meetings what would have been more natural than at least to enquire what progress was being made, but there seems to have been no such enquiry. Also, it is difficult to reconcile any serious interest or concern with the increase in limits on the number of vehicles to which the BALPA Scheme applied on about 3 January 2006 and about 7 February 2006. Not increasing the limits would at least have contained the extent of any problem. The actions and inactions of Mr. Wilson and Miss Sample seem to me to be consistent only with a lack of any real interest in how the BALPA Scheme was operating so far as the Importer was concerned until about March 2006, when contact was made with Mr. Gilbert. However, even at that stage matters seemed relatively relaxed. From Mr. Wilson's e-mail to Mr. Gilbert and Mr. Thoms dated 22 March 2006 it is plain that attention was being focused on what was to happen in the future, not what might have happened in the past. Only after the discovery, from information provided by Mr. Watkinson which originated with a broker, of the existence of the Broker2Broker website and the offerings of Renault vehicles at discounted prices on that website, did there seem to be any urgency on the part of the Importer in dealing with the misuse of the BALPA FON. However, even at that stage the Importer continued to supply vehicles to the Dealer for onward supply to FleetPro for it to supply to internet brokers the cars desired by the customers of those brokers, and to supply them on the terms of the BALPA Scheme. As it seems to me, the only proper conclusion to draw from these circumstances is that Miss Sample and Mr. Wilson did indeed either understand perfectly well how the sales by FleetPro were being achieved, in the case of Miss Sample at least from about 12 July 2005 and in the case of Mr. Wilson from at least about 27 October 2005, or each closed his or her eyes to what, if they had thought about it for a moment, was blindingly obvious.

114. Mr. Thoms's analysis of "*the elephant in the room*", whilst rather colourful, is, I think, essentially correct.
115. So, against the background of my findings of fact that Mr. Johnstone knew, certainly by 28 June 2005, before the delivery of the first vehicle by the Dealer under the BALPA Scheme, that none of the vehicles was in fact being supplied to someone entitled to the benefit of the BALPA Scheme, that Miss Sample either knew, by 12 July 2005, that the benefit of the BALPA Scheme was being misused, or deliberately closed her eyes to that possibility, and that Mr. Wilson was in a similar state of knowledge or wilful ignorance by 27 October 2005, I turn to consider the law in relation to fraudulent misrepresentation.

Fraudulent misrepresentation – the law

116. In his written opening skeleton argument Mr. Bruce submitted, uncontroversially, at paragraph 8:-

“In order to establish liability for deceit/fraudulent misrepresentation, the Claimant must show:

(a) a misrepresentation of present fact or law;

(b) that the Defendants had no belief in the truth of the representation;

(c) that the Defendants intended the Claimant to act on the representation; and

(d) that the Claimant was influenced by the representation.

(see Clerk & Lindsell on Torts (19th ed.) at 18 – 04 to 18 – 35)

The Defendants will be liable even if the misrepresentation was made with no corrupt motive and with no expectation of profit, and even though the person defrauded has a full opportunity of discovering the fraud or had an agent who knew the truth (see Snell’s Equity (31st ed.) at 8 – 06).”

117. Mr. Bruce submitted that each of the four elements which he identified in paragraph 8 of his written opening skeleton argument was met in the circumstances of the present case.
118. There was, of course, no argument but that a misrepresentation was made by Mr. Thoms on behalf of FleetPro by completing the form of order in relation to each vehicle sought to be purchased under the terms of the BALPA Scheme so as to indicate a Fleet Code of “BALPA” or “46172”. It was accepted that Mr. Thoms knew that a representation in respect of each vehicle that the end purchaser of it was entitled to the benefit of the terms in the BALPA Scheme was untrue. However, the case for the defendants was that such misrepresentations were made not to the Importer, but to the Dealer, and specifically to Mr. Johnstone. Mr. Bruce submitted that the Dealer, and specifically Mr. Johnstone, was the agent of the Importer to receive the misrepresentations, and that was sufficient. He relied upon the passages set out in paragraphs 18-29 and 18-30 of *Clerk & Lindsell on Torts, 19th edition*:-

“A representation made to the claimant directly causes no problems. But a representation made to a third party with intent that it be passed on to the claimant to be acted on by him will equally suffice. Thus in Swift v. Winterbotham a plaintiff who gave credit on the basis of a fraudulent banker’s reference successfully sued in deceit even though the reference had been sent not to him but to his own bank. All that is required for these purposes is that the representation be intended, in one way or another, to reach the claimant in order to induce him to act on it. Nor is it even necessary that the defendant know precisely who the statement is intended for, provided he intends it to be relied on by someone in the claimant’s position: thus in another banker’s reference case a bank was held liable when it

sent a fraudulent reference to another bank for the benefit of a customer of whose identity it was entirely unaware. Indeed, in one case it was even held that an action for deceit could be based on a newspaper advertisement, provided the claimant showed that he was one of the class of persons at whom it was directed.

Nevertheless, it must be shown that there was an actual intention to deceive the claimant in question, whether individually or by reference to a class to which he belongs; it will not be enough merely to show that the misstatement is reasonably calculated to deceive him. Thus the House of Lords in Peek v. Gurney held that promoters of a company, who issued a fraudulent prospectus as a prospectus and as nothing more, were not liable for so doing to persons who, not being original allottees of the company's shares, purchased their shares in the market; the reason being that the promoters had no object in making the false statements except to get the shares taken up; they had no intent to influence market dealings. Again, in Gross v. Lewis Hillman Ltd. sellers of commercial property made certain representations to the buyers about it: the buyers agreed to purchase it, but then assigned the benefit of the contract to the plaintiffs. The plaintiffs' claim in deceit failed: even if the representations had been fraudulent (which they had not) they had been made to the buyers and the plaintiffs could not sue in respect of them."

119. In her written closing skeleton argument Miss John rather seized on a subparagraph in the written opening skeleton argument of Mr. Bruce, paragraph 5(c), where Mr. Bruce had written:-

"As a result of these representations, Renault Croydon sold cars to consumers purchasing through the Defendants at discounted prices and recovered the amount of the discount from the Claimant (through fleet support payments made directly to Renault Croydon);"

120. In the light of that comment Miss John submitted, at paragraphs 28 to 30:-

"28. On this explanation of the Claimant's case it appears that it was Renault Croydon who relied upon and/or was induced by the representations. If a claimant's loss results not from his own reliance, but from that of third parties (here Renault Croydon) a defendant is not liable in deceit (see Clerk & Lindsell On Torts 19th Ed, Sweet & Maxwell, paragraph 18-32).

29. Further or alternatively, it became clear in the course of the trial that the Claimant did not in fact rely on the representations made by the First Defendant but that

information contained in the representations were simply input into an automatic system.

30. In such circumstances, there was no reliance by the Claimant and the claim must fail as the wrong party has brought the action.”

121. The circumstances of the present case are novel. As I have already recorded, what happened when orders produced by Mr. Thoms and sent by e-mail as attachments to Mr. Johnstone were received was that he opened them, printed them off and gave them to Fiona Burrows to input into a computer system information including the BALPA FON. The evidence was that no human mind was brought to bear at the Importer’s end on the information put into the computer system by Fiona Burrows. No human being at the Importer consciously received or evaluated the specific piece of information in respect of each relevant order that it was said to fall within the terms of the BALPA Scheme. The explanation given by Mr. Bruce at paragraph 5(c) of his written skeleton opening was not some sort of error or misunderstanding, but reflected the fact that the last human brain in contact with the claim that a particular order fell within the terms of the BALPA Scheme was that of Fiona Burrows at the Dealer. The point of principle which thus arises is whether it is possible in law to find a person liable in deceit if the fraudulent misrepresentation alleged was made not to a human being, but to a machine.
122. I see no objection in principle to holding that a fraudulent misrepresentation can be made to a machine acting on behalf of the claimant, rather than to an individual, if the machine is set up to process certain information in a particular way in which it would not process information about the material transaction if the correct information were given. For the purposes of the present action, as it seems to me, a misrepresentation was made to the Importer when the Importer’s computer was told that it should process a particular transaction as one to which the discounts for which the BALPA Scheme provided applied, when that was not in fact correct.
123. However, that analysis of the present case gives rise to a further issue, namely one of causation. What caused the Importer’s computer to process each of the orders placed with the Dealer by FleetPro as it did was not in fact that the order stated that the Fleet Code was either “BALPA” or “46172”, but the decision of Mr. Johnstone to deliver the order with that information to Fiona Burrows for processing. It is thus necessary to consider whether the chain of causation was broken by the role of Mr. Johnstone. That in turn seems to depend, on the authorities, on whether it could be said that the Importer was not deceived by any misrepresentation because of information in the possession of its agent.
124. Mr. Bruce submitted that it was held by Scrutton J. in *Wells v. Smith* [1914] 3 KB 722, and had not since been doubted, that it was not a defence to a person who has committed deceit to say that the fraudulent misrepresentation concerned was made to an agent for the deceived, and the agent knew the truth. In fact it appeared that there were two grounds for the decision of Scrutton J. in the case. The first was that the agent did not acquire knowledge

in the course of his employment by the principal. The second ground Scrutton J. expressed in this way, at pages 725-726:-

“In the second place, I am not aware of any case, and counsel did not refer me to one, where, when a man has made a statement untrue to his knowledge to induce another, whom he does not believe to know its untruth, to act upon it, and that other has acted upon it in ignorance and to his damage, the maker of the false representation has been allowed to protect himself by proving that an agent of the other knew of the untruth. Mr. Smith has made a statement which he knew to be untrue, believing it might be shewn to Mrs. Wells and intending her to act upon it, while he did not believe she knew of its untruth. This is fraud, and I should be very slow to allow the effects of actual fraud to be nullified by constructive notice. The case of Bawden v. London, Edinburgh and Glasgow Assurance Co. would, I think, have been decided differently if the one-eyed assured had actually put on the proposal a statement that he had the sight of two eyes. Just as in Redgrave v. Hurd a man who told a lie as to his earnings was not allowed to protect himself by shewing that he had offered the books for inspection, which, if carefully inspected, would have shewn the untruth of his statement, so, I think, a man who tells a lie to another cannot protect himself by saying “Your agent should have warned you of my lie”.”

125. Miss John submitted that the decision of Scrutton J., as a decision at first instance, was not binding upon me. She further submitted that the decision on the second ground considered by the learned judge needed to be viewed nowadays in the light of the decision of Sir Nicolas Browne-Wilkinson V-C in *Strover v. Harrington* [1988] 1 Ch 390. That was a case of alleged innocent misrepresentation falling under *Misrepresentation Act 1967 s.2(1)*. It was contended that the truth as to the matter the subject of a misrepresentation made in the course of a conveyancing transaction had been communicated to the claimants’ solicitors, as was the fact, and that in those circumstances it was not open to the claimants to recover damages. The decision of Scrutton J. in *Wells v. Smith* was drawn to the attention of the Vice-Chancellor. He distinguished it, at page 408 of his judgment:-

“The crucial fact was that the plaintiff’s agent himself knew the fact to be untrue, and was himself a party to the defendant’s fraud. It is not surprising that the court held that the knowledge of the true facts by the fraudulent agent of the plaintiff could not be imputed to the plaintiff. The case seems to me a 100 miles away from the case we have here, since it is impossible to impute a fraudulent agent’s knowledge to his principal.”

126. Miss John urged me to adopt the approach of Sir Nicolas Browne-Wilkinson V-C in *Strover v. Harrington* and find that the knowledge of Mr. Johnstone as to the misuse of the BALPA FON by FleetPro should be attributed to the Importer. She submitted that, if it was to be the case for the Importer that Mr.

Johnstone or anyone at the Dealer had known of fraudulent misrepresentation on the part of FleetPro and not passed on that knowledge, that amounted to an allegation of a conspiracy to defraud and ought to have been pleaded. As it had not been pleaded, she contended, it was not open to the Importer to pursue any suggestion that the knowledge of Mr. Johnstone should not be attributed to the Importer.

127. The point really seemed to be a pleading point. Mr. Bruce countered that, while it had been pleaded at paragraph 13 of the Amended Defence of the First Defendant that:-

“In the course of a telephone conversation between Mr. Johnstone and the Second Defendant, Mr. Johnstone indicated that the Claimant was keen to make sales and that the lack of sales to date meant that the BALPA FON arrangement might not be continued into a second year and hinted that the widespread industry practice of ignoring the strict terms of such arrangements would be tolerated by the Claimant in order to increase sales (as to which see further paragraph 24 below).”

the Amended Defence of the First Defendant contained no reference to the allegation that Mr. Thoms had told Mr. Johnstone in terms on 28 June 2005 that the sales ostensibly under the terms of the BALPA Scheme had in fact been to internet brokers. There had been no necessity, he said, to plead that Mr. Johnstone had been a party to the fraud, if that, indeed, was what I found.

128. It does not seem to me that, in relation to matters of dishonesty and its consequences, it is appropriate for the Court to adopt any less exacting standards today than those applied by Scrutton J. nearly 100 years ago. Sir Nicolas Browne-Wilkinson V-C took the view less than 20 years ago that Scrutton J.’s approach was appropriate in a case of fraud, and I respectfully agree. I therefore find that, notwithstanding my findings of fact in the case of Mr. Johnstone, and notwithstanding any other knowledge of the misuse of the BALPA FON by FleetPro possessed by a representative of the Dealer, that knowledge was not to be attributed to the Importer.
129. What is material, if the case that the Importer did not rely upon the misrepresentations in the orders as to the applicable FON because it knew the truth was made out, was that an employee – in the circumstances of this case Miss Sample, Mr. Wilson, or both – had the requisite knowledge.
130. The question then arises what is the requisite knowledge. I think that in the end it was common ground that the claims of the Importer would be defeated if either Miss Sample or Mr. Wilson either knew for a fact, or had what is sometimes called *“blind-eye knowledge”* of, the truth as to the misuse which was being made by FleetPro of the BALPA FON. Miss John strongly urged me to find at least *“blind-eye knowledge”* on the part of both Miss Sample and Mr. Wilson, and from an early date. In her submissions she contended that the situation was a developing one, as the orders continued to be placed at an average rate of about 20 per month, and that, on the evidence, there were a

number of alternative dates which I could find was the date by which the “*blind-eye knowledge*” was established.

131. While Mr. Bruce referred me to some observations of Peter Gibson J. in *Baden v. Societe Generale pour favoriser le developpement du commerce et de l'industrie en France SA* [1993] 1WLR 509 concerning the categorisation of knowledge, Miss John relied on the passage at paragraph 116 of the speech of Lord Scott of Foscote in *Manifest Shipping Co. Ltd. v. Uni-Polaris Insurance Co. Ltd.* [2003] 1 AC 469 at page 517. The latter was to this effect:-

“In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity.”

132. Lord Steyn and Lord Hoffmann agreed with the speeches of Lord Clyde, Lord Hobhouse of Woodborough and Lord Scott in that case. Lord Clyde and Lord Hobhouse delivered speeches in which each indicated, on the “*blind-eye knowledge*” issue, views similar to that of Lord Scott. I accept the submission of Miss John that Lord Scott’s formulation is an appropriate one to adopt for the purposes of this judgment.
133. In the present case, as it seems to me, Miss Sample had firm grounds for suspecting misuse of the BALPA FON from the high level of orders, as compared with her experience of other affinity schemes, and the frequency of orders, placed from 14 June 2005 by the time of her meeting with Mr. Thoms on 12 July 2005. Yet, on my findings, she did not challenge Mr. Thoms then, or on the occasion of the later meeting which she attended on 28 September 2005, as to whether the BALPA FON was being misused. I accept that at the meeting on 12 July 2005 Mr. Thoms, falsely, spoke as if there were real sales to persons entitled to the benefit of the terms available under the BALPA Scheme. I accept also that on that occasion he explained how the members of BALPA could only gain access to the terms of the scheme through the BALPA website, which was protected by a password. However, the striking number of orders which started to come through as from 14 June 2005 must, in my view, have put it in the mind of Miss Sample that the BALPA FON was being misused. The picture was of no orders at all for the period 1 March 2005 to 14 June 2005, then, suddenly, something like 15 orders for Renault vehicles in a fortnight. Not only that, but, as Miss Sample recorded in her notes of the meeting on 12 July 2005, Mr. Thoms told her, and I accept that he did tell her,

that overall 50 vehicles had been sold under the BALPA Scheme. That information can, I think, only have enhanced her suspicions of misuse, if she were at all interested at that time in that possibility. I am thus satisfied that by no later than 12 July 2005 Miss Sample had firm grounds for supposing that the BALPA FON was being misused, based on the number and frequency of orders placed since 14 June 2005.

134. It is, perhaps, a philosophical question what degree of certainty of grounds for a belief amounts to knowledge of the truth of that which is believed. Miss Sample was at pains to emphasise to me during her cross-examination that she did not have concrete proof of misuse of the BALPA FON until she had the meeting with Mr. Sambrook on 26 April 2005. I do not accept that. But the fact that that was the position which Miss Sample adopted was, I felt, instructive. By the time she met Mr. Sambrook FleetPro had ordered 217 vehicles. Mr. Wilson had written his e-mail of 3 November 2005 at the prompting of Miss Sample because, plainly, by that stage it was obvious that the security of the BALPA website could not be relied upon. However, Mr. Thoms had not, for four and a half months, progressed in any way the introduction of procedures for BALPA members to prove their membership of that organisation when ordering vehicles. There had been the meeting with Mr. Gilbert on 13 March 2006 which had not resulted in any satisfactory proposals in relation to verification. By 26 April 2006 it was obvious to anyone who was not blindly refusing to see that the BALPA FON had been grievously misused. However, Miss Sample would have it that it was not until the meeting on 26 April 2006 that she considered that she had concrete proof. In my judgment that, if true, could only have been because she did not wish to draw the obvious conclusions from what she knew. In fact I do not accept her evidence on that point. I find that the probability is that she actually knew perfectly well from no later than 12 July 2005 that FleetPro was misusing the BALPA FON. If she did not actually know that perfectly well, it could only have been because she chose to shut that knowledge out of her mind, to turn a blind eye.
135. It follows that, in my judgment, on the evidence led before me, the Importer did not rely on any statement made by Mr. Thoms on behalf of FleetPro that a particular order placed on or after 12 July 2005 was one which fell within the terms of the BALPA FON because the Importer, by Miss Sample knew, or turned a blind eye to the possibility, that such number had been attributed to the order falsely. It was notable that at one point in her cross-examination Miss Sample expressed surprise that not a single one of the FleetPro orders had emanated from a BALPA member. That, in my judgment, is the only thing which genuinely surprised her throughout the whole affair.
136. As I accept that the Importer was misled by the statements in the orders placed by FleetPro with the Dealer in the period 14 June 2005 to 12 July 2005 that each order fell within the scope of the BALPA Scheme, it is necessary to consider what remedy, if any, it is appropriate to afford the Importer.

The liability of Mr. Thoms

137. Before coming to the question of remedies it is convenient to consider the issue of whether, in the light of my findings of fact, Mr. Thoms personally is liable to the Importer. I can deal with that matter shortly.
138. Mr. Thoms contended that, as he acted throughout on behalf of FleetPro, he could only be held personally liable if the circumstances were one in which it was appropriate to “*pierce the corporate veil*”, which he submitted it was not.
139. Understandably, as he has no legal qualifications, I think that Mr. Thoms had misunderstood the true issue. The true issue is whether an individual who has personally made a fraudulent misrepresentation, as Mr. Thoms did in completing each of the orders placed by FleetPro with the Dealer with the Fleet Code “*BALPA*” or “*46172*”, can escape liability on the grounds that he made the misrepresentation on behalf of a company. The answer is negative, for the reasons explained by Lord Hoffmann in *Standard Chartered Bank v. Pakistan National Shipping Corporation* [2003] 1AC 959 at pages 968-969:-

“20. My Lords, I come next to the question of whether Mr. Mehra was liable for his deceit. To put the question in this way may seem tendentious but I do not think that it is unfair. Mr. Mehra says, and the Court of Appeal accepted, that he committed no deceit because he made the representation on behalf of Oakprime and it was relied upon as a representation by Oakprime. That is true but seems to me irrelevant. Mr. Mehra made a fraudulent misrepresentation intending SCB to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representation and his knowledge. He was the only human being involved in making the representation to SCB (apart from administrative assistance like someone to type the letter and carry the papers round to the bank). It is true that SCB relied upon Mr. Mehra’s representation being attributable to Oakprime because it was the beneficiary under the credit. But they also relied upon it being Mr. Mehra’s representation, because otherwise there could have been no representation and no attribution.

21. The Court of Appeal appear to have based their conclusion upon the decision of your Lordships’ House in Williams v. Natural Life Health Foods Ltd. [1998] 1 WLR 830. That was an action for damages for negligent misrepresentation. My noble and learned friend, Lord Steyn, pointed out that in such a case liability depended upon an assumption of responsibility by the defendant. As Lord Devlin said in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465, 530, the basis of liability is analogous to contract. And just as an agent can contract on behalf of another without incurring personal

liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal liability.

22. This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying: "I wish to make clear that I am committing this fraud on behalf of someone else and I am not to be personally liable." Evans LJ [2000] 1 Lloyd's Rep 218, 230 framed the question as being "whether the director may be held liable for the company's tort". But Mr. Mehra was not being sued for the company's tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the way he did, Evans LJ answered it by saying that the fact that Mr. Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud."

140. In my judgment, therefore, Mr. Thoms personally is liable for the misrepresentations contained in the orders submitted by FleetPro to the Dealer.

Remedies

141. The measure of damages in a case of fraud is essentially that sum of money which is necessary to put the claimant, so far as money can, in the position in which he would have been if the misrepresentation had not been made to him, or, to put it another way, he is entitled to recover all of the loss suffered as a result of acting upon the fraudulent inducement to his detriment. Convenient formulations of the approach are to be found in the judgments of Lord Denning M.R. and Winn L.J. in *Doyle v. Olby (Ironmongers) Ltd.* [1969] 2 QB 158. At page 167 Lord Denning M.R. said:-

"in contract, the defendant has made a promise and broken it. The object of damages is to put the plaintiff in as good a position, as far as money can do it, as if the promise had been performed. In fraud, the defendant has been guilty of deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damages directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: 'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that

extra damages.’ All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case Mr. Doyle has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course, to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably have been expected to do.”

142. Winn L.J. at page 168 said:-

“It appears to me that in a case where there has been a breach of warranty of authority, and still more clearly where there has been a tortious wrong consisting of a fraudulent inducement, the proper starting point for any court called upon to consider what damages are recoverable by the defrauded person is to compare his position before the representation was made to him with his position after it, brought about by that representation, always bearing in mind that no element in the consequential position can be regarded as attributable loss and damage if it be too remote a consequence. ... The damage that he seeks to recover must have flowed directly from the fraud perpetrated upon him.”

143. As I have already noted, the claim of the Importer for damages in this action was for the total of the fleet support payments made to the Dealer in respect of the 217 vehicles supplied to which discounts had been applied under the BALPA Scheme but which should not have been. However, the evidence was that none of those vehicles was supplied by the Importer to the Dealer at less than the cost to the Importer of the vehicle concerned: the Importer made a profit of some sort on every vehicle. Moreover, it appeared that most, if not all, of the vehicles were manufactured to order by the Manufacturer. Thus, if the order for a particular vehicle had not been placed, that vehicle would never have been produced and sold at a profit by the Importer. Thus it appeared that, far from suffering a loss as a result of the misrepresentations complained of, the Importer was in fact better off. That consideration is one which, in my judgment, also falls to be taken into account in considering the “*blind-eye knowledge*” issue with which I have already dealt.

144. I think that, ultimately, Mr. Bruce accepted that, in order to succeed on its pleaded claim for loss, the Importer had to demonstrate that, but for the misrepresentations of Mr. Thoms and FleetPro, it would have been able, through a dealer, to sell the vehicles ordered by FleetPro to end purchasers at the appropriate list prices. Mr. Bruce submitted that I should conclude that that would have been the position in the light of the evidence of Miss Sample, at paragraph 73 of her witness statement, that:-

“Between 8th Sept 2006 and 12th Sept 2006 I contacted a sample batch of nine of these end purchasers [that is to say, the actual end purchasers of the vehicles sold to FleetPro]. A complete list of the end purchasers is attached to Renault UK’s particulars of claim dated 6 October 2006 marked schedule “A” and I reproduce this here at Exhibit CS1, pages 50 to 58. I asked each of the customers a series of questions about their respective purchases, in particular where they bought/ordered from (which website), whether they had any sort of affiliation with BALPA and what prompted them to buy a Renault vehicle? I refer to the notes I made following each conversation and which I adduce in evidence at Exhibit CS1, pages 59 to 68. None of the people contacted had any affiliation with BALPA whatsoever and they appeared to have bought the cars through a selection of websites ...”

145. The notes to which Miss Sample referred took the form of a written script through which she had gone with each person contacted, with prepared questions. She recorded in an appropriate box the answer to each question. One of the questions was, *“What prompted you to choose a Renault?”*.
146. Mr. Bruce submitted that the answers to the question, *“What prompted you to choose a Renault”* demonstrated that each of the nine persons contacted would have purchased the vehicle he or she in fact bought over the internet from a Renault dealer at list price but for the activities of FleetPro and Mr. Thoms. I do not accept that. The question asked was not appropriate to draw forth from the person questioned any worthwhile information as to what that person would have done if not able to purchase the car he or she did purchase over the internet, even assuming, which was not demonstrated on the evidence, that the only source of Renault vehicles available over the internet between June 2005 and April 2006 was FleetPro. The appropriate question was, *“What would you have done if you had not been able to purchase your new Renault car from an internet broker at the price you in fact paid?”*.
147. It seems to me appropriate to conclude that a person purchasing a vehicle over the internet was adopting that method of purchase because price was important. The vehicles purchased were all new. If the individual who wished to purchase was not able to find a Renault vehicle at a price he or she was willing to pay from an internet broker, there was a whole range of options open. One was not to purchase a vehicle at all. Another was to purchase one which was second hand. A further option was to purchase a vehicle with a cheaper list price than that which he or she in fact bought, and such vehicle did not have to be a Renault.
148. A further matter to take into account, as it seems to me, is the very small size of the sample of those contacted by Miss Sample. It does not seem to me that it would in any event be appropriate to extrapolate from the answers given by nine individuals that the 208 other purchasers would have reacted in the same way.

149. In the result, I am not merely not satisfied that the Importer suffered no loss as a result of any misrepresentation of Mr. Thoms or FleetPro, I am satisfied that the Importer made profits on sales of vehicles which would not otherwise have been manufactured and sold.
150. So far as may be relevant, if Miss Sample had not chosen to continue the Importer's relationship with FleetPro and Mr. Thoms following the meeting on 12 July 2005, but had jumped to the obvious conclusion, there would have been time to stop the delivery of any vehicle in respect of which a fleet support payment was made to the Dealer in the light of a representation that the BALPA FON was correctly applied to such vehicle. The first vehicles delivered to end purchasers were only registered at DVLA on 15 July 2005.
151. On no view, as it seems to me, could any claim be made in respect of fleet support payments made in respect of vehicles registered after, on its own case, the Importer knew the true position. As I have recorded, that date was contended to be 26 April 2006.
152. As an alternative to the claim for damages the Importer sought an account of the profits made by FleetPro from its selling of Renault vehicles to internet brokers. Miss John disputed the proposition that the remedy of an account was available in the case of a claim based on fraudulent misrepresentation. Certainly traditionally the remedy of an account has only been afforded in a case in which there was a fiduciary relationship between the claimant and the defendant from whom an account was sought. However, the issue of the availability of the remedy of an account in the case of a fraudulent misrepresentation had arisen in *Murad v. Al-Saraj* [2005] EWCA Civ 959.
153. In that case remedies were claimed against the defendants by the claimants both on the basis that the defendants owed fiduciary duties to the claimants and for fraudulent misrepresentation. The judge at first instance was Etherton J. At paragraph 347 of his judgment [2004] EWHC 1235 (Ch) he made an observation which, at first sight, appeared to involve him awarding the remedy of an account in respect of the claim based on fraudulent misrepresentation. The case went to the Court of Appeal. The leading judgment in the Court of Appeal was that of Arden L.J. At paragraph 46 of the judgment she said:-

“It would be tempting to jump to the conclusion from paragraph 347 of the judge’s judgment (set out in paragraph 14 above) that in this case the judge took the novel step of awarding the equitable remedy of account for the common law tort of deceit (cf Attorney General v. Blake [2001] 1 AC 268), but that is not in my judgment the true interpretation of the judge’s judgment. The judge gave a remedy of account because there was a fiduciary relationship. For wrongs in the context of such a relationship, an order for an account of profits is a conventional remedy. The Murads considered that that remedy would be more beneficial to them because, if they were awarded damages at common law, they would simply be entitled to recover the difference between the profit share to which they agreed and that which they would have negotiated if

the true position had been disclosed to them. The reference to deceit is, however, a reminder that the judge's finding was that Mr. Al-Saraj's failure to disclose the set off arrangement to the Murads was both deliberate and fraudulent, a point to which I shall have to return."

154. Jonathan Parker L.J., who was also a member of the court in that case, expressed, at paragraph 96, general agreement with the judgment of Arden L.J., but did not specifically comment on the issue of the availability of an account as a remedy for fraudulent misrepresentation. The third member of the court, Clarke L.J., did, however, comment at paragraph 164:-

"The second point is that I do not think that the approach to the equitable remedy of account for deceit or breach of fiduciary duty is any different on the facts of this case. Indeed, I do not understand the contrary to be argued."

155. Mr. Bruce submitted that the latter observations of Clarke L.J. established the principle that the remedy of an account was available for fraudulent misrepresentation. He contended that the correct interpretation of paragraph 47 of the judgment of Arden L.J. was not that she took a different view on that question, but rather that she interpreted the judgment of Etherton J. as not raising that issue.
156. Miss John, on the other hand, submitted that Arden L.J., if correctly understood, took the view that the remedy of an account for fraudulent misrepresentation was novel and not one which should be afforded, while Clarke L.J. did not positively take the contrary view, but merely intended to say that, if the remedy of an account was to be afforded for fraudulent misrepresentation, the approach to taking it would be the same as if it were to be taken as a remedy for breach of fiduciary duty.
157. I prefer Miss John's submission as to the correct interpretation of paragraph 47 of the judgment of Arden L.J. to that of Mr. Bruce. I confess to some doubt as to what Clarke L.J. was in fact intending to convey at paragraph 164 of his judgment, for his observations seem to me to be capable of being interpreted either as Miss John submitted or in the manner for which Mr. Bruce contended. However, what is clear, as it seems to me, is that it has not been established in a fashion binding upon me that the remedy of an account is available in a case of fraudulent misrepresentation.
158. The remedy of an account is, on any view, an equitable remedy. If, technically, it were available in this case, the question would arise whether, in the discretion of the court, that remedy should be afforded. The circumstances of the present case are singular. One does not normally find a willing victim of a fraudulent misrepresentation who has actually profited from being deceived. The extent to which the Importer benefited from being deceived did not emerge in the evidence, for, beyond explaining that the Importer had not supplied any of the relevant vehicles at less than the cost of the vehicle to it, the Importer did not lead any evidence as to the profits made. As, on the evidence, the Importer did benefit, by making profits on the sales of each of

the relevant vehicles, from the fraudulent misrepresentations of FleetPro and Mr. Thoms, and as it has wholly failed to demonstrate that it sustained any loss as a result of such misrepresentations, in my judgment it would not be appropriate, in the exercise of my discretion, to afford the remedy of an account to the Importer in this case, even if technically such remedy were available.

Conclusion

159. In the result, although, technically, the Importer has established that it did rely upon fraudulent misrepresentations made by FleetPro and Mr. Thoms between 14 June 2005 and 12 July 2005, it has not proved that it suffered any loss in consequence and it is not entitled to an account of profits. Consequently this action fails and is dismissed.