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Judgment: approved by the Court for handing down | *Delivered:* **2/2/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

2007 No. 67262

BETWEEN:

ODYSSEY CINEMAS LIMITED

Plaintiff;

-and-

VILLAGE THEATRES THREE LIMITED

Defendant;

-and-

SHERIDAN MILLENIUM LIMITED

Third Party.

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DEENY J

[1] The Odyssey Centre is a large entertainment complex at Queen's Island, Belfast. Its ownership is multi layered but for the purposes of these proceedings it is convenient to adopt the self-description by the Third Party that it is the landlord of the Centre.

[2] A large part of the first floor of the complex on the River Lagan side is given over to 12 cinemas with related spaces for the sale of tickets, confectionary and beverages. The third party herein, Sheridan Millenium Limited, on foot of the title enjoyed by it, agreed to lease the cinema area to the defendant for the period of 25 years from 14 May 2001 (although the actual lease was not executed until later). The defendant then operated the cinemas, in conjunction with or through a company in the Warner Group from shortly thereafter until 10 May 2006 when it entered into an agreement

with the plaintiff by which the plaintiff took an under lease of the cinema premises. The defendant is part of a group of companies in the leisure field based in Australia but active at that time in the United Kingdom.

[3] The plaintiff is a company formed for the purpose of this leasehold interest but controlled by Mr Patrick O'Sullivan who is a guarantor of the under lease of 10 May 2006. He operates the cinemas currently as Storm Cinemas, a trading name used by him for a chain of cinemas he controls in the Republic of Ireland.

[4] The plaintiff's claim against the defendant is that the defendant was guilty of misrepresentation which induced the plaintiff to enter into the under lease. While there was an initial period of non payment of rent the on going rent under the under lease is onerous. Some of that agreed rent is currently due by the plaintiff to the defendant but not yet paid because of these proceedings.

[5] Although the pleadings initially alleged fraudulent misrepresentation only against the defendant the plaintiff was ultimately given leave at a late stage to amend its pleadings to rely on an allegation of negligent misrepresentation against the defendant within the meaning of the Misrepresentation (Northern Ireland) Act 1967. At the conclusion of the plaintiff's case, in the face of an application from Mr Mark Orr QC on behalf of the defendant, Mr Kirk Reynolds QC for the plaintiff conceded, rightly in the face of the evidence he had called, that the allegation of fraudulent misrepresentation could only be read as meaning reckless rather than deliberately fraudulent misrepresentation, on foot of the decision of the court in Derry v. Peake [1889] LR 14 App Cases 337.

[6] Although a number of other matters were canvassed in the pleadings these were not pursued at trial. In particular, Mr Reynolds withdrew the allegation made with regard to the car park of the premises, when opening the action. The thrust of the case from the plaintiff was that the cinemas had been subjected to serious, persistent and longstanding noise problems giving rise to complaints and disputes from very soon after the time that they had opened. It was alleged that this was not disclosed to the plaintiff. It was alleged that the non disclosure amounted to recklessness, or if not, to negligence on the part of the defendant. The plaintiff made it clear that the remedy which the plaintiff earnestly sought was the rescission of the under lease because of this misrepresentation.

[7] The noise of which the Plaintiff complains emanates from licensed premises underneath Screens 1, 6 and 7 of the cinemas. One of these, Bar 7, is operated by Strike Four (Belfast) Limited. The court was informed that it is a subsidiary of Sheridan Entertainments Limited a company linked to the third party. Those premises opened in March 2002, after the opening of the

cinemas on 14 May 2001. The third party was given leave by the court on 18 March 2009 to join Strike Four as a fourth party and did so. Strike Four entered an appearance to that fourth party notice on 8 May 2009 but took no further part in the proceedings.

[8] The second of the premises which gave rise to difficulty here operated as a nightclub under various names since in or about November 2002. It seems to have traded in whole or in part, under the names Precious, Coyote and Refinery between then and the spring of 2006. The court was informed by the third party that it was then acquired by Utopian Leisure (Ireland) Limited who altered the internal layout of the premises in a way which may be relevant to these proceedings. The premises are now known as The Box Nightclub and are on two floors beneath the cinemas. The alterations would seem to have increased the amount of noise on the upper of the two internal floors and therefore more proximate to the cinemas immediately above. The third party was given leave on 18 March 2009 to join Utopian (Ireland) Limited as a fourth party but following a further application the said leave was amended by the court on 20 April 2009 to name Sheridan Nightclubs Limited as the fourth party. Again an appearance was entered on behalf of this second named fourth party on 22 May 2009 but it took no further party in the proceedings.

[9] A number of issues fall to be decided by the court.

(a) What was the extent of any noise problem between the opening of the licensed premises in 2002 and the under lease by the defendant to the plaintiff in May 2006?

(b) What representations were made on behalf of the defendant to the plaintiff relevant to noise prior to the under lease of 10 May 2006?

(c) Were there any misrepresentations, relevant to noise, inducing the plaintiff to enter into the contract?

(d) If so was any misrepresentation reckless or innocent or negligent?

(e) If it was a reckless misrepresentation the plaintiff is entitled to rescission of the contract but if the misrepresentation was negligent within the meaning of the statutory provisions, ought the court to exercise its discretion to award damages rather than rescission?

[10] In addressing the first of the issues above I resist the temptation to set out in extenso the very considerable oral and written evidence which I received

regarding the issue of noise before and after the plaintiff's occupation of the cinemas. To do so would make this an unduly lengthy and complex judgment. There were differences in the oral evidence but the court has had the benefit of considering the demeanour of the witnesses both in their examination in chief and in cross examination by skilful and experienced counsel. Furthermore I visited the premises in question with counsel and we were shown both the public parts of the relevant premises and some of the interior spaces from which noise may or may not have made its way to the cinema floor from the bar and nightclub beneath. I have carefully considered the relevant documentary evidence and the helpful submissions of counsel without necessarily referring to every element thereof.

[11] Nevertheless, it is necessary to set out some background to the findings of the court in relation to these issues. The defendant company had been engaged in a joint venture with the Warner Group in the United Kingdom in or about the time that it entered into possession of the premises. The cinemas were managed from May 2001 until 13 May 2003 by a joint venture company called Warner Village Cinemas Limited. The management of the cinemas was then taken over by Vue in a rather different form of joint venture. In effect Warner declined to acquire from but agreed to manage the cinemas for the defendant. The defendant by then had altered its corporate policy and wished to divest itself of its interests in the United Kingdom but at that stage was unable to find another party willing to take on the cinema lease at the Odyssey. Warner was only willing to conduct the management of the premises for a fee. The fact that the management was not being carried out by the defendant but by Vue on its behalf is relevant on the issue of representations subsequently.

[12] Issues with noise appear to have commenced as early as August 2002 emanating from Bar 7. Indeed on 13 August Jane Bond on behalf of Warner Village wrote to Sheridan Millenium Limited complaining about the noise from Bar 7 and saying that they were having to refund tickets on a regular basis. She had learnt of this from Kirk Edwards of the same company. The following day Mr Peter Holmes, Chief Executive of the Third Party, with commendable promptitude, wrote stating that a draconian sound limiter had been ordered. On 27 August Patrick Carr on behalf of the third party wrote saying that that was due to be installed and that furthermore the landlord had invited a leading acoustic consultancy in Northern Ireland, F R Mark and Associates, to monitor the situation. They reported on 28 August making recommendations with regard to the fitting of certain filters on the floor of the cinema and ceiling of the unit below. Further recommendations were made on 4 September. However, Warner Villages complained on 15 September that the limitation measures were not working as well as expected. There are further references in October to those noise problems. Due to continuing complaints of noise infiltration partly, it was alleged, because Bar 7 was being run as a club rather than as a bar, which it was designed to be, Warner Villages ultimately instructed their own noise advisers, Robert Mackenzie Partnership, in

December of 2002. An exchange of 20 December 2002 refers to further complaints but also to the manager of the bar co-operating in response of those complaints and turning the music down to remove the complaints.

[13] The report commissioned by Warner Village i.e. in effect on behalf of the defendant, came in on 23 December 2002 confirming that there was noise infiltration at times clearly in excess of the contractual limits. In leasing the premises the third party had set out "Acoustical Requirements for Lessees of Premises at Ground and Upper Ground Level of Odyssey Pavilion Area, Belfast" with regard to those areas i.e. including Bar 7 and the present Box nightclub. That level is described as and fixed at NR30 L_{10}. While the plaintiff's expert Dr Martin Lester had reservations about whether that was a sufficiently robust limit the fact of the matter is that it is one that was subsequently breached on a number of occasions by the fourth parties operating these premises below screens 1, 6 and 7 of the cinemas.

[14] In January 2003 Jane Bond of Warner Village was emailing Messrs Holmes and Carr warning them of a possible claim for disruption of business arising from the noise. Again on 12 January Karen Singleton, at that time assistant manager at the Belfast site, was informing Jane Bond of a significant problem where 300 tickets to readmit were issued to dissatisfied customers arising from sound coming from the nightclub then called Precious. There was further correspondence at that time. But the matter then subsides to some degree, no doubt for the reasons set out in Jane Bond's internal email of 3 April 2003 in which she reported that there had been extensive discussions with the third party. She acknowledged that improvements may have been made in the short term although the matter was not resolved. Indeed further complaints were made in May of 2003. In his reply of 19 May Mr Holmes says that he is unable to offer any other explanation than a door had been left open, pointing to this being a one-off experience. In late June there is a meeting, the minutes of which indicate that there had been little disruption in the last four weeks because measures had been put in place to limit the ability of the bar and nightclub to play loud music. On 19 July 2003 there were two customer complaints. However that seems to be an exception which confirms the view expressed by Peter Holmes to Jane Bond on 13 August 2003 recording a "period of successful living together" between the cinemas and the nightclub.

[15] There seemed to have been further complaints in October 2003 and December 2003; but then a gap to August 2004 when it was suggested that a fire escape door had been left open. I note that the management by now had changed to Vue but a lot of the personnel remained the same. Vue may have been aware of other complaints which were not passed on such as one on 26 April 2004. On 16 April an invoice was sent to the third party on behalf of the defendants seeking £150.80 due on foot of complementary tickets issued because of noise from the club. It is significant however that the apparent cessation of problems from December 2003 until April 2004 was now reinforced

with an apparent cessation (with one or two exceptions) of complaints completely from August 2004 until August 2005. It is further interesting to note that one of the complaints made by Karen Singleton in initially internal correspondence on behalf of the defendant was that an operations manager in the club had refused to turn the noise down i.e. this was operational non co-operation. As indicated above I will not set out in further details the exchanges between those involved at that time. I will just record that a variety of reasons were identified for these problems over the years. In one instance a disc jockey had actually used a screwdriver to interfere with a machine which was limiting the volume of sound which he could produce. He was subsequently prosecuted for criminal damage on foot of this. In other instances speakers were removed.

[16] My findings are that these noise problems were:-

(a) intermittent, and, to a degree, recurrent; they were not, prior at least to May 2006, constant.

(b) could not be described as recent as they had been raised as early as 2002;

(c) were operational in nature; if the club and bar were operated in accordance with the directions they had been given problems did not occur.

(d) the problems were limited to screens 1, 6 and 7 of the cinema;

(e) the problems only occurred when the bar and night-club were playing loud music i.e. after 9.00 pm, particularly on Wednesdays, Fridays and Saturdays;

(f) the problems were more likely to occur if there was a quiet movie being played in those screens at those times and as a result of this the management of the cinemas tended to programme films with louder sound tracks.

[17] How serious were the problems caused by the noise? I noted the evidence of several of those involved in the management of the cinemas to whom it was, they said, a serious problem. However, this must be put in context of the facts and of the findings which I have made above. I was and remain particularly struck by the fact that at no time did Warner Villages or Vue on behalf of the defendant apply to the court for an injunction restraining the club or the bar from operating in a way that breached the leasehold acoustic limit. Not only that but it does not appear that solicitors were ever

instructed to even consider that possibility. There was no letter from solicitors on behalf of the defendants or its managers to either the third party or the fourth parties operating the premises. It is significant that that failure to seek an injunction was replicated by the plaintiff when it took over the operation of the cinemas. It does not seem to me that I received any satisfactory explanation of that from the plaintiff save to say that the defendant had not done so either. It is a matter of public record that there has been litigation about this building and the operation of this building. It seems to me inconceivable that if the problem was either continuous or serious that nobody would have sought legal redress for such a nuisance.

[18] I quote from paragraph 24 of the affidavit of Kirk Edwards. He was involved in one way or the other with the management of the cinemas for six years, and sometimes actively concerned with the noise issue. It should be noted that he continues to be an area manager responsible for some 12 cinemas, employed by Vue Entertainment Limited.

> "I considered the noise issue to be an irritant. It was mostly managed at an operational level by moving quiet films to other screens or by speaking to the manager of the club and asking him to close the fire escapes or turn the music down . . . There had been noise problems with noise bleeds at some of the other sites operated by Vue. The noise issue was certainly not the most pressing problem at Belfast. It ranked well below the parking issue in terms of importance."

Events leading up to under lease to plaintiff by defendant

[19] As indicated above the plaintiff complains of alleged misrepresentations to it in the period leading up to the signing of the agreement of 10 May 2006 which the plaintiff company now seeks to rescind. The key figure on behalf of the defendant in connection with this transaction is Simon Thomas Phillipson. He has been General Counsel of Village Roadshow Limited, the parent company of the defendant, since 1998. He is a solicitor qualified in England as well as in Australia. His affidavit of 12 August 2008 was taken as his evidence in chief. He gave extensive oral evidence in addition. I make a few preliminary observations. This was a mature and careful witness. He answered questions with deliberation. He did not, so far as the allegation of recklessness against him and the defendant was concerned, give any such impression. He did not seem to be a person who was indifferent to what was being told to the plaintiff purchaser in this transaction.

[20] I bear in mind that throughout the relevant part of the transaction he was in Australia. He had instructed Messrs Carson and McDowell, solicitors,

of Belfast to act on behalf of the defendant in the transaction. That meant that his communication with Miss Rosemary Carson of that firm who was responsible for the conveyancing aspects consisted largely of e-mails. They had occasional phone calls when she would come in early in the morning and he would wait late on in his office so that their respective time cycles could meet. Whilst this is no doubt an aspect of the work of multi-national companies it does not seem to me something that can be ignored as a factor in the facts that evolved here. The matter was further complicated by the fact that the company of which he was the General Counsel was a very substantial company. They own a number of leisure parks of one or another kind in Australia. They are film producers having produced more than 56 feature films in the nine years leading up to the date of the affidavit including a number of very well known and successful films. They own no less than 533 cinema screens across 53 sites in Australia with a further 167 screens at 18 sites in three other jurisdictions. This context is very important with regard to the subsequent failure on the part of Mr Phillipson to recollect that he had been told in the past of some of the noise difficulties at this site to which the court has averted above. It was also right to note that it does not seem to have been disputed that the company of which he was the General Counsel was engaged in a number of transactions designed to centralise their operations on some particular themes which involved the disposal of cinemas, not only in the United Kingdom, but in New Zealand and Austria. He said that no litigation had arisen from those other sales nor indeed from a series of previous sales in 11 other countries across the world.

[21] I also consider it my duty to take into account the fact briefly averted to above that the cinema was actually being managed for the defendant by Vue Entertainment Limited of Chiswick, London. That company or a related company had acquired some cinemas from the defendant but as mentioned before had declined to acquire this cinema but agreed to manage it. A number of persons in that company were involved in this transaction in particular Mr Paul Tunney. Although they had local managers at Belfast they appear to be have been at a fairly junior level. It was therefore the situation that when the perfectly legitimate enquiries were being made by the plaintiff purchaser here they were being answered by a measure of co-operation between Australia, Belfast and London.

[22] While on the topic of Mr Phillipson's evidence in chief I noted his evidence that an inquiry just before this transaction as to why Belfast underperformed other sites identified four main factors none of which was a problem with noise. On the other hand noise was mentioned to a potential purchaser in 2004; but the problem diminished in scale between then and 2006.

[23] Various talks had taken place with Mr Patrick O'Sullivan over the years about buying one or more of the defendant's cinemas in the United

Kingdom. Mr O'Sullivan is a native of the Republic of Ireland where he had been directly involved in the cinema business since 1992. I considered him a largely forthcoming witness. He had built up a successful business which by December 2007 was the second largest cinema operator on the island of Ireland. In his affidavit, which was taken as his evidence in chief, he was at the beginning of 2006 interested in acquiring the Odyssey Cinema site, but also interested in the possibility of running a cinema site at what is now the Victoria Square Centre in Belfast which did not then exist but which was due to open in 2008. He had looked at the defendant's business and felt that he could significantly improve it over the two year period before any complex in the Victoria Square would open. He averred that the three matters he identified were a lack of basic marketing for some time, excessive car park charges and poor morale amongst staff. I find it interesting and relevant to note that he did not identify a noise problem in the course of his examination of the cinema site before he entered into this onerous lease. It is common case that he had a number of discussions and meetings with staff in the premises but as he said in oral evidence no one ever said there was a problem of noise to him. At that stage, of course, the staff in the cinemas were still working for the defendant and may not have wished to have raised difficulties. But I note further that Mr O'Sullivan went on to admit that he did not ask about noise. While not in any way determinative it seems to me that this evidence is consistent with the findings I have made and that this was not a particularly serious problem to the operation of the cinemas. Nor was it a topic which it was crucial for any sensible purchaser to investigate. Indeed, another witness at the trial said that some leakage of sound in these combined complexes was not uncommon.

[24] Mr O'Sullivan had talks with a Mr Kirk Senior whom he understood to be Chief Executive Officer of the overseas cinema division of the defendant. These talks made progress and I note that Mr Phillipson was involved in them and that on 20 February 2006 he provided instructions to Miss Carson in relation to a number of issues relating to the proposed transaction. The heads of an agreement were arrived at on a commercial basis giving Mr O'Sullivan 150% rebate of annual rent spread over three years and certain other commercial terms. His solicitors were Messrs Memery Crystal (Ireland) who continued to act for him in this litigation. The key person there was a partner in that firm, Miss Ruth Deehan. As I understand it neither she nor her firm had an office in Belfast. One of the points subsequently made by Miss Carson was that she had difficulty contacting Miss Deehan on occasions. Miss Carson in the course of her evidence in this action, which I considered conscientious and scrupulous, explained that often issues that arose in a large commercial conveyance of this kind were the subject of direct conversation between solicitors to facilitate resolution. This was impaired in this case because of Miss Deehan's absences from the office. This was partly because of her care for her mother who suffered a serious illness (from which she happily recovered). But in addition Miss Deehan had a scheduled holiday

over the key two months period as well as being absent from the office, quite legitimately, on a number of public holidays. Although Miss Deehan rejected this criticism in her evidence it seems to me that the facts bore out Miss Carson's observations. Although not crucial it was another element put into the equation which may have contributed to the confusion which ultimately arose, to which I will have to turn in a later passage. There was a very significant breakdown in communication between Memery Crystal and their own client at one point.

[25] Miss Deehan told Mr O'Sullivan that enquiries on the title and initial due diligence enquiries were issued in mid-March 2006. Nothing arises from any enquiries relating to the commercial aspects of the matter although these were important. It should, however, be noted that even the Commercial Property Standard Enquiries cover a wide area of which the issues of disputes and noise are only two aspects.

[26] As the solicitor for the vendor, in effect, much of the burden of the transaction fell on Miss Carson and she set out in detail the various searches which she provided to Mr Eugene O'Keefe of Memery Crystal and to Ruth Deehan. There was then some debate between the parties as to how much due diligence was required. Mr O'Sullivan himself seems to have conceded that some points were not essential but he was pursuing other matters.

[27] On 14 March 2006 Miss Deehan wrote to Miss Carson with her initial enquiries on the superior leases to which she looked forward to receiving replies. These were forwarded to Mr Phillipson with the observation that they were somewhat over the top. I do note that paragraph 9.5 of them included a request for the "General pre-contract enquiries for all commercial property transactions"(CPSE 1).

[28] Mr Phillipson then duly sought information to assist in answering these enquiries from his opposite number in Vue, Ms Anne Whalley (17 March 2006). I should observe at this point that there are at least three lever arch files of various e-mails and related documents going back and forward between the parties over this period, even after careful editing and preparation by the experienced solicitors acting on all sides here. Inevitably the court is summarising what passed. There is also the fact that both Mr O'Sullivan and Mr Phillipson appeared to have been keen to get on with the transaction and were encouraging and pressing their respective solicitors to do so. Nevertheless in early April 2006 Miss Carson was saying to Mr Phillipson that she did not have adequate information with which to reply to Miss Deehan at that point.

[29] I think it also right to point out an e-mail that passed from Anne Whalley to her colleague Paul Tunney in Vue on 17 March 2006 and which began as follows:

> "Village are (yet again) trying to sell their circuit and they have a party interested in Belfast."

She goes on to seek replies to him to various matters including "environmental, noise, disputes with landlords or utility companies". Although Vue wanted to bill Village separately for these various efforts one does get a picture of a little impatience on their part at having to address these issues, not for the first time. Indeed Mr Phillipson acknowledges to Anne Whalley on the same date that "due diligence can be a disruptive and time consuming exercise (and I know you have been on both ends before) and given that this is a relatively simple deal, for one cinema, I do not want to allow the purchaser to over complicate things." Miss Deehan for the purchaser met with Anita Hanna at Carson and McDowell's offices on 3 April it would appear. Although she said she was to go away from 6 April until 10 April and indeed seems to have been away from 10 to 20 April she did take part in a conference call on 7 April.

[30] Miss Carson had sent on the CPSE1 enquiries to Mr Phillipson on 5 April. He sent replies on 10 April but did say that some further information was required from Vue. He communicated at the same time with Vue asking them to answer what they could from their records and seek answers from local management if necessary. I note that on 19 April 2006 Mr O'Sullivan was saying to Mr Phillipson:

> "I think our respective lawyers need another push!"

On 21 April Mr Kirk Senior said they were equally frustrated and promised to "fire up our lawyers". On 25 April Miss Carson was chasing Mr Phillipson for an update on the CPSE1 enquiries and he in response was pursuing Miss Whalley at Vue. That is an Australian date because in fact Miss Carson then got enough back, in the context of the pressure which was being applied to her, to send the replies to CPSE1 to Miss Ruth Deehan on 25 April, also. One of the enquiries was No. 30 entitled 'Disputes' and it read as follows:

> "Except where details have already been given elsewhere in replies to these Enquiries, please give details of any disputes, claims, actions, demands or complaints which are currently outstanding, likely or have arisen in the past and which:
>
> (a) relate to the property or to any rights enjoyed with the property or to which the property is subject; or

(b) affect the property but relate to premises near the property or any rights enjoyed by such neighbouring premises or to which such neighbouring premises are subject."

The answer given was : "None to the best of the seller's knowledge".

[31] Miss Carson had drawn attention to this question by means of an asterisk in an earlier e-mail to Mr Phillipson but he had not, nevertheless, provided an answer to it. As indicated above at some stage in the past he had been told of or been copied into e-mails telling of issues about noise at this cinema. But I accept that he did not recollect those at the time when he was being asked by Miss Carson for an answer to this Enquiry. In the context averted to above of the many transactions with which he would have been involved this is not really surprising. I listened carefully to the cross-examination of Mr Phillipson by Mr Kirk Reynolds but it did not seem to me that I could safely or properly find that Mr Phillipson was turning a Nelsonian blind eye to matters of which he was in fact conscious.

[32] Miss Carson explains that she drafted the words "none to the best of seller's knowledge" because that was her interpretation of Mr Phillipson's silence on the point, he having neither provided information about any disputes nor indicated that he was still seeking information from Vue on this point. She was not aware that he had been continuing to ask Vue about this matter.

[33] It is not for this court to adjudicate between Miss Carson and Mr Phillipson on this aspect, save in the following respects. I do not consider that either was being reckless in what they were doing or showing indifference to the truth. I find, bearing in mind all the points adverted to above, that this was a case of understandable confusion. However, it does seem to me and I find that this was not a correct representation of the truth but was a negligent misrepresentation. There had been sufficient complaints from the operators of the cinema to the co-lessees or the third party to make it necessary to answer question 30 differently as it was seeking details of disputes and complaints. At the time, however, that the answer was sent Vue had given no details of any such complaints or disputes. Mr Phillipson did not apparently recollect any and Miss Carson would, of course, have been quite unaware of this previous history. She sought to argue that her wording was correct in that there were no disputes to the seller's knowledge. But I find that that is not justified. It might be said to be accurate if Mr Phillipson was personally the seller but the knowledge of the corporate defendant's agents must be attributed to them. Furthermore in the sale agreement itself the defendant warranted to make all reasonable enquiries. This answer to CPSE1 paragraph 30 was not accurate and full "to the best of the seller's knowledge, information and belief".

[34] The matter does not however end there. On 27 April Mr Paul Tunney of Vue sent to Miss Carson "replies to enquiries that I have co-ordinated and collated from various parties within Vue and outside". The defendant says that these are the basis of the true warranties that were being sent here and that in effect they supersede those previously sent by Miss Carson. The plaintiff does not accept that but in any event one has to look carefully at what was said in this further set of replies which were then sent on in an altered form to the plaintiff's solicitors. Mr Reynolds went through these replies in some detail and I take into account the points that he made. I also note the important letter of 2 May 2006 from Miss Carson to Miss Deehan. I note the letter of 10 May 2006 from Messrs Carson & McDowell, acknowledged by Memery Crystal LLP which, inter alia, at paragraph (b) notes that the following information shall be deemed disclosed and treated as generally disclosed:

> "(v) Any matters contained in correspondence between the seller or its advisors and the buyer or its advisors together with all enclosures to such correspondence and all matters contained in such enclosures;"

This clearly brings in the letter of 2 May.

That was headed "subject to contract" which was not inappropriate at that time. It does not mean that the letter was of no legal effect. See Bonner Properties Ltd v McGurran Construction Ltd [2008] NICh 16; [2009] NICA 49. The letter begins:

> "When I previously sent you replies to CPSE Enquiries there was some outstanding information which my client had to obtain from Vue. We have now heard from Vue and I can advise as follows:
>
> > '… 8.11 [Have any defects become apparent or claims been made by any third party that might give rise to a claim under any of the agreements, guarantees, warranties or insurance policies referred to above?]
> >
> > We are not aware of any defects other than the roof problems – see summary sheet attached'."

This is slightly different from what Mr Tunney had written to Miss Carson as he had written:

> "Not aware of any other than roof problems previously advised in 'other issues' with previous replies (copy attached again under Appendix B)."

Appendix B was attached to Miss Carson's letter, as 'summary sheet', and at paragraph 2 it read "Noise from adjacent bar units".

> "Intermittent problems have been experienced recently from Precious and Bar 7 – mainly on Friday and Saturday nights. Centre Management has spoken to both bar operators and a meeting is due to be held between the Centre Management, the sound consultants and representatives from Bar 7 and Precious and the cinema.
>
> There have been no problems for the last couple of weekends."

[35] The defendant said that this put the plaintiff fairly on notice of the noise issue. I find that that is not so. Firstly, I have set out above in square brackets the nature of the enquiry at 8.11 and it can be seen to be in a somewhat different context from that of disputes. Of more importance is the statement that the intermittent problems have been experienced recently. That is clearly misleading in the circumstances. Mr Tunney may not have been aware of or may have overlooked the earlier history of this matter but the making of all reasonable enquiries by the vendor would have disclosed a much more longstanding dispute. The inclusion of this paragraph, if the purchaser had read it, would certainly put them in notice of a potential noise problem but would not, I consider, have been a full and fair representation of the factual position. This is particularly so as noise was not mentioned in the letter itself.

[36] To return to Miss Carson's letter of 2 May it then proceeded to deal with certain other matters but it did not refer to Clause 30 relating to disputes. If one looks at Mr Tunney's e-mail to Miss Carson the disputes clause was still carrying the asterisk which Miss Carson herself had placed on it in sending it to Mr Phillipson. Mr Tunney wrote an answer to that as follows:

> "(a) and (b) not aware of any, other than those previously advised."

Miss Carson evidently concluded therefore that there was nothing fresh and she made no reference to Clause 30 in her letter to Miss Deehan, but of course Mr Tunney was adverting to the various issues in the summary sheet, his Appendix B, including parking, roof problems and noise. It seems to me that that cross-reference should have been made. Certainly given the earlier answer to Clause 30 it could not be said that these further replies rectified that. Again it is not for me to adjudicate between Mr Tunney and Miss Carson in this matter but clearly he did not provide her with a full and accurate picture.

[37] It appears that on the following day, 3 May at 9.00 a.m., a conference call took place between all the principal actors ie. Mr O'Sullivan, his solicitor Ruth Deehan, Simon Phillipson and Kirk Senior of the vendor and Miss Carson and her colleague Anita Hanna. At no point in this conference call, says Miss Carson, did the purchaser or his representatives raise any of the matters that had been disclosed in the summary sheet of ongoing issues and nor she avers did she receive a request for further due diligence material. But there is a surprising reason, at least in part, for that omission. Miss Deehan gave evidence that she directed her clerical assistant to forward these matters to Mr O'Sullivan. But it is now common case that although Miss Carson's letter was forwarded to him he was not given the summary sheet. The letter of course only referred to roof problems of which she was otherwise aware and which were not of any consequence. This was a most unfortunate omission. Miss Deehan's mother fell seriously ill, it would appear, on 4 May but this may have had nothing to do with the unfortunate clerical error. It may be that Miss Deehan's duty to her client required her to read the summary sheet as well as the letter and discuss its contents with her client. If she had done so she would have learnt that he had not seen the summary sheet. It appears however that no such conversation took place. So far as the issues in this action are concerned I consider that this unfortunate omission can reasonably be described as contributory negligence on the part of the purchaser by its solicitor vis a vis the defendant.

[38] The position therefore can be summarised as follows. The plaintiff, through Mr O'Sullivan, was induced to enter into the contract by the representations which were made. Although those covered a considerable number of matters I consider that he is entitled to complain that it was a misrepresentation to him to inform him that there were no disputes or complaints to the best of the seller's knowledge when in fact there had been. I consider that the paragraph in Mr Tunney's Appendix B which became Miss Carson's summary sheet did not fully and properly put the purchaser by its solicitor on notice of this issue but that it certainly gave some notice of it as an issue. Counsel for the plaintiff and the defendant chose not to ask Mr O'Sullivan what his attitude would have been if he had been told of the noise problem, no doubt for good reason. But in answer to questions from the court he said that if he had been told there was intermittent or persistent

noise issues he would have tried to find out if these were controllable. Having now seen Appendix B it indicated a non-structural problem (which the court concludes is a correct statement of fact). With management intervention on the part of the club it could be resolved and had been resolved on occasions by closing doors etc. But he had not been expecting that problem and if he had learnt that such measures had failed before he would not have touched the transaction with a 40 foot barge pole. Noise he considered more important for the running of cinemas than courtesy or cleanliness. I accept the sincerity of that evidence while reminding myself that he had made no express enquiry himself, although it was plainly obvious that three screens were above licensed premises. It is not inconsistent with the view which the court has formed that these problems are in fact remediable. It may be the remedy would be the issuing of injunctions against the operators of the club and bar to enforce the leasehold limits under which they operate. But few purchasers choose to buy litigation and I accept, on the balance of probabilities, that if Mr O'Sullivan had learnt of the intermittent but recurring nature of the noise problems here he would not have proceeded with the transaction, or, at the very least, would have negotiated some indemnity or other commercial adjustment. I am satisfied that if he had read Miss Carson's Summary Sheet of May 2 or his solicitor had drawn it to his attention that he would have, in the light of his own evidence, made further enquiries before committing himself. Those enquires would, on the balance of probabilities, have revealed the factual position I have outlined.

[39] I remind myself of the judgment of Lord Herschell in Derry v Peek [1889] 14 App Cas 337. The burden is on the plaintiff to prove the absence of an honest belief in the truth of what was stated. As Lord Herschell put it:

> "… Fraud is proved when it is shown that a false representation has been made:
>
> (1) Knowingly; or
>
> (2) Without belief in its truth; or
>
> (3) Recklessly, careless whether it be true or false."

The court is satisfied that there was negligent misrepresentation here but not fraudulent or reckless misrepresentation. I do not find that Mr Phillipson "shut his eyes to the facts, or purposely abstained from enquiring into them" per Lord Herschell, p.376. I am satisfied on the probabilities that that is not a proper description of the defendant's attitude here. Mr Phillipson was not saying: "Oh tell them anything". Nor was he failing to make enquiries. Nor was he choosing to make enquiries in the wrong place. He was enquiring of the right people at a properly senior level for the enquiries to be made. There is actually no evidence that he suspected that what was being said was

untruthful or inaccurate. The height of their case may be that he failed to read the Replies before approving them. He said that he paid other people to do this. But if he had done so it would not have lead him to change them as he was relying on others to provide (Vue) and to present (Miss Carson) the information to the Plaintiff and he swore that he had not remembered the history of complaints.

[40] It follows, therefore, that in the absence of any form of fraudulent misrepresentation the Plaintiff is not entitled to rescission as of right. The court must consider in the exercise of it's discretion according to law whether that is the appropriate remedy in all the circumstances.

Appropriate remedy for negligent misrepresentation

[41] For the avoidance of doubt it is clear on my findings that there was no fundamental breach of contract which would otherwise be called in aid by the plaintiff in search of such a remedy. There was a breach of warranty which might be regarded as a breach of contract but only entitling the plaintiff to damages.

[42] Although not pleaded by the plaintiff the starting point for any consideration of the plaintiff's rights at this point is the Misrepresentation Act (NI) 1967. (It is to like effect as the English Act of the same year):

> "Removal of certain bars to rescission for innocent misrepresentation.
>
> 1. Where a person has entered into a contract after a misrepresentation has been made to him, and -
>
> (a) the misrepresentation has become a term of the contract; or
> (b) the contract has been performed;
>
> or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b).
>
> *Damages for misrepresentation.*
>
> 2. - (1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the

misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

(2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.

(3) Damages may be awarded against a person under subsection (2) whether or not he is liable to damages under subsection (1), but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under subsection (1)."

[43] It can be seen from those provisions that where a party has entered into a contract after a misrepresentation has been made to him, but without fraud (i.e. innocently or negligently) the court has a discretion whether to declare the contract subsisting and award damages in lieu of rescission "if of opinion that it would be equitable to do so". The court must have regard to:

(a) the nature of the misrepresentation;
(b) the loss that would be caused by it if the contract were upheld; and
(c) the loss that rescission would cause to the other party."

[44] The leading authority on the interpretation of the equivalent English statutory provision is William Sindall Plc v Cambridgeshire County Council [1994] 1 WLR 1016. The Court of Appeal in England, Russell, Evans and

Hoffmann LJJ, concluded in that case that there had been no misrepresentation by the County Council with regard to the presence of a sewer, unknown to both parties, under the site which they were selling to the plaintiff for development. Therefore, strictly speaking, the remarks of the court with regard to the exercise of the court's discretion for misrepresentation under the 1967 Act to award damages in lieu of recession are obiter dicta. However, the matter was argued before their Lordships and Hoffman LJ expressly contemplated the possibility of the case going further before addressing this issue. Both he and Evans LJ addressed it at length and Russell LJ agreed with both of those judgments. It is also right to say that not only is the judgment quoted in the text books but it has been followed in a number of cases including Huiton SA v DIDEPA SA [2002] EWHC 2088 and UCB Corporate Services Limited v Thomason [2004] EWHC 1164; [2004] 2 All ER (Comm.) 774; ChD. The views expressed are not technically binding on me but fully accord with the preliminary views which I myself had formed. In dealing with the discretion at 1035, 1036 Hoffman LJ quoted from the 10th Report of the Law Reform Committee (1962) including this passage:

> "Unless the court's power to grant rescission is made more elastic than it is at present, the court will not be able to take account of the relative importance or unimportance of the facts which have been misrepresented. A car might be returned to the vendor because of a misrepresentation about the mileage done since the engine was last overhauled, or a transfer of shares rescinded on account of an incorrect statement about the right to receive the current dividend. In some cases the result could be as harsh on the representor as the absence of a right to rescind under the current law can be on the representee."

[45] Hoffman LJ went on to address the three matters to which the court must in particular have regard in foot of the sub-section. The first was the nature of the misrepresentation which in that case involved the cost of about £18,000 to put right the sewer in contrast to the sale of land at £5m and which he therefore inevitably viewed as "a matter of relatively minor importance". He then went on to discuss "the loss that would be caused by [the misrepresentation] if the contract were upheld." He concluded at page 1038B as follows. "I think that Section 2(2) was intended to give the court a power to eliminate this anomaly by upholding the contract and compensating the plaintiff for the loss he has suffered on account of the property not having been what it was represented to be. In other words, damages under Section 2(2) should never exceed the sum which would have been awarded if the representation had been a warranty. It is not necessary for present purposes to discuss the circumstances in which they may be less." The third matter

under the statute to be taken into account and addressed by the Lord Justice was the loss that rescission would cause to the other party. In that case again the difference was very stark as the property market had plunged reducing the value of the land by millions of pounds so far as the council was concerned if rescission had been ordered. "Having regard to these matters and in particular the gross disparity between the loss which would be caused to Sindall by the misrepresentation and the loss which would be caused to Cambridgeshire by rescission, I would have exercised my discretion to award damages in lieu of rescission. Sindall of course claimed to be entitled to damages under Section 2(1) on the grounds that all or some of the alleged misrepresentations were negligent. If Sindall were to succeed on this point it might be able to establish on the inquiry as to damages that it was entitled not merely to the difference between price and market value at the date of contract but to the subsequent drop on market value as well. In that case the award of damages will put Sindall in much the same position as if its rescission had taken effect. But I do not think that the possibility of this result should be anticipated by refusing to exercise the discretion under Section 2(2)." 1038F.

[46] In the instant case I directed, with the agreement of the parties, that the issue of damages would not be decided at this hearing as in the view of both parties, for different reasons, the court should not reach the issue of damages. I must be careful therefore not to tie the hands of the court considering the issue of damages in the future, without having this matter further argued before me. One must also bear in mind Section 2(3) of the Act which provides that damages may be awarded against a party in the position of the defendant here under sub-section (2) whether or not he is liable to damages under sub-section (1).

[47] The issue of rescission or damages was addressed by Evans LJ in his judgment at page 1042. At 1042H he says:

> "It has not been suggested that these three are the only factors which the court may take into account. The discretion is expressed in broad terms –
>
> > 'If of opinion that it would be equitable to do so.'
>
> The three factors, however, in all but exceptional cases are likely to be the ones to which most weight would be given, even if the sub-section were silent in this respect."

[48] Before turning to apply the Act and those dicta to the factual circumstances before me it is appropriate to address what happened after the

agreement for the under lease was entered into on 10 May 2006. Completion followed on 26 May and Mr O'Sullivan gave evidence that within a week of that he became aware that a significant amount of noise came through the floor into cinemas 1, 6 and 7 from the Precious nightclub and Bar 7. He arranged a meeting on 8 June with the third party where he "mentioned the noise intrusion into the cinema to Peter Holmes" (para 17 of O'Sullivan's affidavit). He was told of the prescribed limit of NR30 which had not been formally disclosed to him before. This reassured him to proceed with the refurbishment of his cinema and a marketing campaign to raise its profile. On 3 July there was a problem with a band playing at Bar 7. The club was closed over the summer for refurbishment as were some screens of Storm Cinemas but not 1, 6 and 7. It would appear therefore that consistently with the earlier findings of the court Bar 7 was not creating a problem. However a real problem did arise when the club reopened in November and this did give rise to significant complaints from Karen Singleton and others on behalf of the plaintiff to the third party principally. I bear in mind Mr Orr's able cross-examination of Mr O'Sullivan without setting out all the points which he made therein. But at least one of the points admitted by Mr O'Sullivan was that the issue of noise seemed to have amounted to "a tiny percentage of the total refunds" of the cinema after the club reopened. Even allowing for points that were made elsewhere in the evidence as to other possible categories which may have referred to noise Mr O'Sullivan did not dispute Mr Orr putting to him that the total numbers were "very very few." In reviewing the beginning of 2007 the principal witness for the plaintiff accepted that only £82 out of some £13,000 had been lost on the ground of noise. He admitted that there were no documents showing that he was unable to show films in screens 1, 6 and 7 before they were closed in the second half of the evenings. He admitted that no film had been rejected for distribution because of the noise issue but asserted that the time which he continued to show a film was sometimes truncated. After putting various statistics from early 2007 to Mr O'Sullivan he was forced to acknowledge that in the vast majority of days there was no complaint about noise at all. I take into account Mr O'Sullivan's affidavit which he did not expand on in his evidence in chief save in some brief respects not relevant to this issue. What emerges from paragraph 21 of the affidavit is that the closure of screen 1 and the closure of screens 6 and 7 which led on to the claim for rescission only took place after he had consulted his solicitors, Memery Crystal. He was asked whether he had not considered a remedy against the third party (related companies to whom operated both the bar and the club by this stage). He said 'no, his advice was that his first and only port of call was the defendant.' I find this puzzling given that there was no evidence of Mr Holmes and his colleagues in Sheridan refusing to co-operate with Mr O'Sullivan. I find Mr O'Sullivan's evidence in this respect unsatisfactory. I will say a word in a moment about the evidence of Mr Holmes. I bear in mind that the defendant did not control the nightclub now known as

Precious. I further bear in mind that it was significantly altered in the summer of 2006.

[49] In his affidavit and evidence in chief Mr O'Sullivan chose not to volunteer the fact that he had got a report from acoustic consultants by 5 March 2007. I find it quite remarkable and significant that he did not give this report to either the defendant or the third party until the middle of the following year, 2008. It is common case that there were exchanges between Mr Peter Holmes and Mr O'Sullivan and various other persons working for them in the period November 2006 to January 2007. But if the plaintiff company genuinely wanted to cure the problem of noise from the club it is inexplicable that they did not furnish their report, from A W M Consultants until, on the evidence of Mr Peter Holmes, June of 2008. They had sat on it for 14 months. (They had some criticism of the report but that is a separate matter; no attempt seems to have been made to properly revise and disclose the report.) One is left with the conclusion that rather than seeking to mitigate his loss by curing the problem of noise Mr O'Sullivan of the plaintiff had repented of his agreement with the defendant and was using the noise as a justification for claiming rescission. Why did he not seek a meeting with Mr Holmes in February or in March of 2007 before closing the screens? I can detect no explanation for that. Indeed he mentioned the issue of noise to Mr Holmes but not until October of 2007 some seven months after he had closed the screens. Mr Holmes had received no form of complaint between January 2007 and October 2007. He averred that he sought a meeting with Mr O'Sullivan in October 2007 to discuss any concerns he might have had "but he rejected same".

[50] It was put to him that it was significant that there was no press comment at all on any alleged noise problem at the Odyssey or Storm Cinemas. There was apparently one brief mention in a rival's radio advert to noise in other cinemas which might refer to these cinemas. That is a further pointer to noise being a small issue but Mr O'Sullivan did not feel able to offer any explanation for that. Indeed under pressure from Mr Orr and the figures which he was able to draw attention to he shifted his ground somewhat to saying that he was not opening the screens at night because of the risk of damage to his reputation. It was put to him that inconsistently with his case but consistently with Mr Holmes trying to make efforts to restrain the noise from the club, the number of complimentary tickets which had risen in November and December then fell back again. The percentage related to noise, it will be recalled was in any event "tiny".

[51] I now turn to the exercise of my discretion pursuant to Section 2 as to whether to grant the plaintiff the remedy he seeks in rescission. I have formed the clear opinion that it would be inequitable to grant him rescission but rather equitable to declare the contract subsisting and award damages in lieu of rescission in due course. The factual matters dealt with immediately

above satisfy me that a bona fide and reasonable effort was not made to remedy whatever noise problem there was in early 2007 before deciding to close these screens. The failure of the plaintiff to forward their acoustic consultant's report and ask the third party and the club (and bar, if appropriate) operators to respond to it condemns the plaintiff in itself, even without the plaintiff's failure to even write a letter threatening to seek an injunction to keep the operators to their leasehold limit. On the balance of probabilities I find that the plaintiff through Mr O'Sullivan had repented of its bargain and was using this issue as a justification for rescission of the contract. Such an approach on their part was also a failure to mitigate damages and it would be neither just nor equitable to grant rescission where such reasonable and bona fide efforts had not been made to remedy the problem which was the subject of the misrepresentation.

[52] To some degree that finding overlaps with the first of the three express factors to which the court must have regard ie. the nature of the misrepresentation. The nature of the misrepresentation here is that noise was of longer and greater significance than acknowledged in the summary sheet sent by Miss Carson to Miss Deehan on 2 May.

[53] The nature of the misrepresentation related to a problem which I find was operational in nature. It was not an inherent and irreparable defect in the premises themselves. It was of more significance than the £18,000 sewer in the William Sindall case but in my view, comparable to it in that the problem was one that could be remedied with effective action. Indeed the cost might have been negligible to the plaintiff inasmuch as the operators of the club and bar, if acting unlawfully in breach of the contractual noise limit, should have borne the costs of any proceedings which the plaintiff might have been forced to bring. The plaintiff had gone to the expense of getting an acoustic consultant's report and then, remarkably, failed to serve it either on the defendant or on the third party or on the operators of the club and bar.

[54] The defendant here is a mark for damages. Indeed it is in the position of being owed substantial sums of money by the plaintiff at the moment. Whatever loss is established by the plaintiff here at a damages action will be paid to the plaintiff.

[55] Against that if rescission were granted the defendant would be in the position of being forced to operate a single cinema in the United Kingdom against its will having lost the benefit of the bargain made with the plaintiff, an experienced cinema operator, in 2006. The disproportion is not of the same extent as William Sindall if a disproportion does exist. Without making any finding on what damages are applicable here under Section 1 or Section 2 of the Misrepresentation Act it is right to note the points set out above and in particular at paragraph 16 i.e. that the noise was intermittent rather than constant; was operational in nature and could and should have been avoided

by proper management; was limited to three of the 12 screens; was confined almost entirely to the time after 9 pm and to three days of the week and, finally, was usually only heard if there was a quiet film in those cinemas rather than one generating considerable volume. The problem seems to me, as I so found, to be one of minor importance rather than of major importance, which on the authorities, would again point against rescission. It can be seen therefore that it is clear in all the circumstances that the plaintiff is not entitled to rescission of this contract.

[56] A factor that puts the matter completely beyond peradventure is the issue of contributory negligence. Counsel for the plaintiff acknowledges that that is applicable in the area of negligent misrepresentation. And see s1(1) of the 1967 Act. It indisputably happened here. Miss Carson by her letter of 2 May did furnish the plaintiff's solicitors with an admission that there was a noise issue (albeit understated in that document). The solicitors for the plaintiff failed to pass on that two page document attached to her letter to Mr O'Sullivan who never saw it before signing the contract. Indeed one can see from Miss Deehan's letter of 15 February 2007 to Messrs Carson and McDowell that she seems uncertain as to whether or not they had been told of noise and was at that stage feeling her way cautiously. If the court granted rescission here the loss of the bargain would fall in its entirety on the defendant which cannot be equitable. But if, as I propose to do, the court awards damages in lieu of rescission then just and fair allowance can be made for the contributory negligence on the part of the plaintiff's solicitor. As previously pointed out the extent of such damages is to be assessed at a subsequent hearing. On the Plaintiff's submissions the deduction would be modest but that is to be assessed another day.

[57] The Plaintiff sought assistance from the judgment of Sir Donald Nicholls V.C. in Gran Gelato v Richcliff (Group) Ltd et al. [1992] Ch. 560. But the facts there were very different. The plaintiff's only contributory negligence there, if it was, was the solicitors for the purchaser not checking the head lease itself but relying on their opposite numbers while here the purchasers' solicitors ignored a positive though partial correction of the earlier misrepresentation by the vendors solicitors. It is very different from that case and the older authorities cited by the Vice Chancellor.

[58] In the circumstances I need not expressly rule on the defendant's contention that the Plaintiff affirmed the contract after learning of the noise, although it may be well made.

[59] Damages are also the appropriate remedy for the breach of warranty relied on in the alternative by the plaintiff. Here they have pleaded that there is a breach of Para. 11.2 of Schedule 3 of the Agreement by failing to make full and accurate replies to CPSE 1. I find that there was such a breach.

[60] "Quiet enjoyment" means the right to lawfully enjoy the demised premises rather than referring expressly to the issue of noise. See Howard v Maitland (1883) 11 QBD 695. But breach of such a covenant was neither pleaded nor argued by the Defendant.

[61] The court therefore finds against the defendant on negligent misrepresentation and breach of warranty.

Defendant's claim against third party

[62] It now falls to the court to consider the issues which arise between the defendant and the third party in the light of the findings which the court has made. I have had the benefit of written skeleton arguments from Mr Sharp for the third party and Mr Orr QC and Mr Coghlin for the defendant. I have also had the benefit of oral argument from Messrs Sharp and Orr. I take into account all the submissions and the authorities drawn to the court's attention even if they are not expressly mentioned herein.

[63] It seems to be that essentially what I have to consider is whether the third party may be liable to the defendant under one or more causes of action for loss and damage sustained by the plaintiff and recoverable by the plaintiff against the defendant arising from noise intrusion into the cinemas currently leased by the plaintiff, that is after 10 May 2006.

[64] The defendant relied on the provisions of Section 1 of the Civil Liability (Contributions) Act 1978. The third party gave no express indemnity to the defendant in relation to these matters and I am satisfied that its claim for an indemnity simpliciter cannot succeed. However it claims to recover to the full extent any damages which it is liable to pay to the plaintiff as outlined above and is yet to be assessed. Mr Sharp legitimately draws attention to Section 2(1) of the 1978 Act to the following effect:

> "Subject to sub-section (3) below, in any proceedings for contribution under Section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."

[65] The defendant claims against the third party in this regard under three independent but not inconsistent headings:

(a) Breach of covenant
(b) Nuisance
(c) Negligence.

It is right to say that in his submissions Mr Orr laid stress as his primary claim on the breach of covenant while not formally abandoning nuisance and negligence.

[66] In relation to the breach of the covenant for quiet enjoyment the defendant is able and does rely on two clauses in its contract with the third party.

Clause 5.1 reads:

> "That the tenant paying the rents and performing and observing the covenants and stipulations herein contained may peaceably hold and enjoy the property during the term without any interpretation by the landlord or any person lawfully claiming through under or in trust for the landlord."

The defendant here has continued to pay the rent, although the plaintiff is left out of pocket during these proceedings, but their sub-tenant has not been able to enjoy the covenant in favour of the defendant to peaceably enjoy the property because there has been a measure of noise intrusion. That noise intrusion or interruption to quiet enjoyment has been caused, I find, by the fourth parties who are in law persons "lawfully claiming through under or in trust for the landlord". Their claim to be present on the premises is from the landlord, the third party herein. They are not squatters with the third party trying to remove them. Indeed they have some kind of corporate connection with the third party.

[67] Mr Sharp for the third party sought to relieve his client of liability on foot of the decision of the House of Lord in Southwark London Borough Council v Mills and Others [1999] 4 All ER 449; [2001] 1 AC 1; [1999] UKHL 40. This is a case where two tenants complained of their local authority landlords' breach of the quiet enjoyment covenant because they could hear everything in adjoining flats owing to the nature of the structure. I have concluded that the decision of the House of Lords does not assist the third party. Lord Hoffman on the authority of Jenkins v Jackson (1886) 40 ChD at 74 confirmed the point made above that quiet enjoyment was not intended to have an express reference to noise. However, at 455B he said:

> "The covenant for quiet enjoyment is therefore a covenant that the tenant's lawful possession of the land will not be substantially interfered with by the acts of the lessor or those lawfully claiming under him. For present purposes, two points about the covenant should be noted. First there must be a substantial inference of the tenant's possession. This

> means his ability to use it in an ordinary lawful way … For my part, however, I do not see why in principle regular excessive noise cannot constitute a substantial interference with the ordinary enjoyment of the premises. The distinction between physical interference with the demised premises and mere interference with the comfort of persons using the demised premises recalls a similar distinction made by Lord Westbury LC for the purposes of the law of nuisance in St Helen's Smelting Company v Tipping (1865) 11 HL Cases 462. That distinction was no doubt justifiable in that context on pragmatic grounds but I see no reason why it should be introduced into the construction of the covenant for quiet enjoyment."

I will return to the judgment of Lord Millett with regard to nuisance in due course but I do not consider that his judgment assists the third party in regard to the breach of covenant; cf. p. 23D.

[68] The defendant also relies on Clause 5.7(b) which reads:

> "The landlord shall use all reasonable endeavours to procure that the tenant of any other units is obliged to take such steps as are reasonable in order to minimise the risk that any noise emanating therefrom is materially audible in the auditoria in the property."

Here we have an express clause dealing with noise. It is not disputed that the cinemas are auditoria in the property. The steps which the tenant of any other unit should take which are reasonable in the circumstances are clearly to comply with the contractual limit which they have agreed to for the creation of noise. On repeated occasions, although as I have found, not constantly, various such tenants have not abided by that standard. The issue therefore is whether the third party has taken "all reasonable endeavours" to procure that they ought to have done so. I consider that the third party, and Mr Peter Holmes in particular, has acted in good faith and made repeated and often successful efforts to tackle this problem. As pointed out earlier in this judgment there have been periods of peaceful living together between the users of the centre. However, I have to ask whether the landlord can be said to have used "all reasonable endeavours" with regard to the period after 10 May 2006. I find that they have not. It is not necessary for me I consider to go into this at length and I content myself with giving two illustrations. The report of FR Mark and Associates, of 28 August 2002, set down various clear steps which ought to have been taken to achieve compliance with the standard. They were not consistently followed over the years. It seems clear that when the nightclub known as The Box was refurbished in 2006

additional noise generation was put in the upstairs floor contrary to the advice of F R Mark. For the landlord to have taken "all reasonable endeavours" it seems to me that they ought to have ensured that the F R Mark report was observed in that refurbishment. That is particularly so, although not essentially so, where the legal entity controlling the nightclub is a related company to the third party. Furthermore when the noise did begin to trouble the plaintiff in November 2006 it was not immediately dealt with. Again Mr Holmes made efforts but it is sufficient to quote his own e-mail to Mr O'Sullivan of 22 January 2007. "Patrick I am sorry that this problem has continued. I had hoped that our earlier intervention would have helped but clearly not. I have written this morning to both parties (and I accept that we too are in the guilty camp) to suggest a meeting to test the equipment in use when the cinemas are not open …" And see the third party's own report from Simon Hetherington (23rd May 2008). I conclude that the third party did not fully discharge its duties under the covenant here but was in breach of the same.

[69] The court must, however, have considerable sympathy with the third party a little after this period when the plaintiff chose to close down certain cinema screens at certain times without informing the third party. Not only that but it chose to suppress, in effect, a report which it itself had received. It may be that the only loss which the plaintiff can recover against the defendant in which the defendant can pass on to the plaintiff will be the modest loss demonstrated, on the balance of probabilities, to have been caused in November 2006 to early February 2007. But this is a matter for the hearing on damages about which it is not necessary for me to say more now.

[70] The third party also sought to blame the fourth parties for the noise caused and in a factual sense that is right. But the defendant is entitled to choose which of several parties liable to it in damages it pursues and it is entirely logical and proper in this case for the defendant to have sued the party with whom it had a contractual leasehold relationship. As indicated above in any event these fourth parties are in the same group of companies as the third party.

Negligence

[71] The defendant has an alternative claim in negligence against the third party for failure to take reasonable care in their management of the centre. But the third party relies on the dictum of Pennycuick V-C in Smith v Scott [1972] 3 All ER 645, ChD to the effect "that it was not open to the court to reshape the law relating to the rights and liabilities of landowners by applying the principle of Donoghue v Stevenson [1932] AC 562 and thus saying that a landowner owed a duty of care to his neighbour when selecting his tenants.". Indeed more generally one might observe that it was contrary to the trend of the law thereafter and particularly after 1990. These parties

entered into a legal contract and I would be slow to add duties in tort going beyond that contract. I find in favour of the third party in negligence.

Nuisance

[72] The third party contends that it is not liable in nuisance. A succinct summary of the matter is found in the judgment of Lord Millett in Southwark LBC v Mills [1999] 4 All ER 449 at 465J:

> "Once the activities complained of have been found to constitute an actionable nuisance, more than one party may be held legally responsible. The person or persons directly responsible for the activities in question are liable; but so too is anyone who authorised them. The landlords have been held liable for nuisances committed by their tenants on this basis. It is not enough for them to be aware of the nuisance and take no steps to prevent it. They must either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property: see Malzy v Eicholz [1916] 2 KB 308. But they cannot be held liable in tort for having authorised the commission of an actionable nuisance unless what they have authorised is an actionable nuisance."

[73] In my view for so long as the fourth parties were producing noise in excess of the NR 30 limit in their leases at a time when persons were in the cinemas above which interfered at times with their enjoyment therein that constituted an actionable nuisance in law. It is clear that the third party did not authorise it as such but rather took steps to try and prevent it. These steps over a period of some years were not permanently effective but only intermittently effective. I therefore contemplated the possibility that the landlord might be said to have allowed this nuisance to the extent that it did occur. Counsel referred to a landlord being potentially liable in nuisance if he "allows troublemakers to occupy his land and to use it as a base for causing unlawful disturbance to his neighbours"; Clerk and Lindsell on Torts 19th Edition paragraph 20-62. While the court inspected The Box nightclub and was apprised in one way or the other with evidence of the change of use of the upstairs part of that nightclub proximate to the cinemas above the court had only limited information on the extent to which the third party was involved in that or required to authorise it. In all the circumstances I do not feel able to reach a final conclusion on this point. However, it may well be that in the light of my earlier findings no such conclusion is necessary. If the parties feel otherwise I will be willing to hear them. I find for the plaintiff on

breach of covenant with damages to be assessed after the hearing on damages between the Plaintiff and Defendant.