Neutral Citation Number: [2023] EWHC 1973 (Ch)

Case No: BL-2020-001819

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch D)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 July 2023

Before :

MR SIMON GLEESON
(Sitting as a Deputy High Court Judge)

- -

Between :

THE FINANCIAL CONDUCT AUTHORITY **(A Company Limited by Guarantee)**	**Claimant**
- and -	
(1) ROBIN SCOTT FORSTER **(2) FORTEM GLOBAL LIMITED** **(3) RICHARD PAUL TASKER**	**Defendants**

- -
- -

Mr Adam Temple & Mr Elliott Cook (instructed by **The Financial Conduct Authority**) for the **Claimant**
The First Defendant in person
The Second and Third Defendants did not appear and were not represented
Hearing dates: 2nd, 3rd 4th, 5th and 15th May 2023

- -

APPROVED JUDGMENT

Simon Gleeson:

1. This is a trial of a number of preliminary issues arising out of the activities of the first defendant, Mr Forster. In essence, the claimant, the Financial Conduct Authority (the "FCA") says that Mr Forster was responsible for the operation of an unauthorised collective investment scheme, that units in that scheme were sold to investors through deception, that Mr Forster was knowingly involved in that deception, and that he should therefore make restitution. The second and third Defendants did not appear. The second defendant is in liquidation, and the liquidators have confirmed that they do not intend to take part in the proceedings, having provided a witness statement to this effect.

2. The facts of the case raise a number of difficult points, both factual and legal. Mr. Forster appeared at the hearing as a litigant in person, and it has therefore been necessary for me to to some extent construct his case for him. However, I was assisted in this by the fact that Mr Forster was represented by solicitors and counsel until shortly before the hearing, and a defence drafted by leading counsel, Saima Hanif KC, was filed on his behalf. I confirmed with Mr Forster at the hearing that the reason that he appeared in person at the trial was not the result of any disagreement between him and his advisers as to the substance of his case, and I therefore took that defence as the basis of his position. More importantly Ms. Hanif, with Mr Forster's consent, was prepared to appear pro bono in order to make representations on one specific point, but the point which I felt to be the most difficult aspect of the case – the extent to which Mr Forster's position had a defence to allegations of knowing concern in illegal activity on the basis that he had received independent legal advice to the effect that the activity was not illegal. I would like to express very great gratitude to Ms Hanif

for the assistance which she provided to the court. I would also like to thank Mr Temple, who appeared for the FCA, for the way in which he sought to accommodate Mr Forster's position as a litigant in person, and to present the facts in as balanced a manner as possible – although I note that Mr. Forster disagrees with this assessment.

Dramatis Personae

3. Mr Robin Foster, was at the time when the events which gave rise to these proceedings occurred, no stranger to the business of doing business with other people's money. In September 2011 he had set up a company ("MBI") with an associate, Mr Gavin Woodhouse, which operated on what he described in his witness statement as "the lease model". I describe this below. Mr Forster was a director and shareholder of the MBI companies. When the relationship between Mr Forster and Mr Woodhouse broke down in 2016, the MBI business was essentially split between them into a care home business (Mr Forster) and a student accommodation and hotel business (Mr Woodhouse). The six MBI care homes were each owned by a single legal entity, and each of those legal entities seems to have been owned by or transferred to Mr Forster. Mr Forster also owned Qualia Care Limited ("QCL"), the service provider entity which operated the MBI care homes. Mr Forster also established first Qualia Care Developments Ltd ("QCD") and then Qualia Care Properties Ltd ("QCP") (together "the Investment Companies"). Both of these entities operated "the lease model". They raised money from the public to invest in the acquisition of further care homes which would subsequently be operated by QCL. Mr Forster subsequently established another Qualia entity, Qualia Care Holdings ("QCH")

which also makes an appearance. All of these entities presented themselves to the public and investors under the "Qualia" brand, and Mr Forster seems to have acted on behalf of all of them. I have therefore referred to actions being taken by "Qualia" unless a specific legal entity is named.

4. The second defendant, Fortem Global Limited ("FGL"), was the main sales agent for the investments offered by QCD and QCP. It is now in liquidation. It was owned by Mr Forster and Mr Tasker, the Third Defendant.

"The Lease Model"

5. The essence of this model was that capital was raised from private investors by selling them a leasehold interest in a room in a rented commercial property – care homes, student accommodation and hotels – at a very substantial overvalue. These offerings were presented as "buy-to-let" investments. The fact that these sales were at an overvalue was not concealed – the sales pitch seems to have been that the surplus funds over and above the cost of purchase of the asset would be used to renew and refurbish the property concerned, thereby improving its rental yield. The thing that made this offer attractive to investors was that MBI (and later Qualia) was prepared, in effect, to guarantee the returns. The typical offering indicated that investors would receive a guaranteed rental of 10% of their investment per annum for the first twenty-five years, and that at various points during that period the operator would be prepared to repurchase their room for at least 115% of their initial investment, regardless of the commercial performance of the actual business concerned, and regardless of whether the specific room leased by the investor was in fact let or not.

6. The legal structure was a standard opco/propco arrangement. The propcos (in this case QCD and QCP) took in money from investors and acquired assets (in this case the homes). The propcos then employed the opco (in this case QCL) to manage the assets. The opco collects the revenues from customers, pays its operating expenses, and shares the resulting profit in some manner with the propco for distribution amongst investors.

7. Part of the appeal of this "model" to investors was that it appeared to offer enhanced security. At least part of their payment would be applied in the acquisition of a long lease of a specific room, and that interest would be registered in their name with the Land Registry. The evidence of that registration, as provided to them, gave the appearance of securing at least part of their investment.

8. The Company and its auditors took the view that it was not required to recognise its obligations to investors under these guarantees as liabilities on its balance sheet. The argument seems to have been that these obligations might not arise - each room might have generated the necessary revenue, and the repurchase option might not be triggered - so the obligations were mere contingencies. A company with no capital was therefore able to raise funds from retail investors at high promised rates of return without recognising its liabilities under those promises to those investors on its balance sheet. If those liabilities had been recognised at any time, it would have been transparently clear that the company was hopelessly balance sheet insolvent. However, because this was not done, the "lease model" appeared to be a viable financial structure.

9. An important feature of this structure was that it did not require any investment at all from its originator. Because the sales were at an overvalue, each sale created an accounting profit which appeared to constitute capital of the company. Thus, once sufficient sales were made, the result was an apparently well-capitalised and solvent company. What was happening in reality, of course, was that investors were taking all of the risk of the commercial operation of the property concerned.

The Investments

10. In order to understand what it was that investors were actually sold, it is necessary to address three things – (a) what investors were told about what they were investing in ("The promotional materials"), (b) what they actually legally acquired, and (c) the economics of the arrangements in which they were invited to invest.

The Promotional Materials

11. The investments were marketed to investors in the UK by the Investment Companies, FGL and other sales agents (FGL being the main agent in terms of commission received). Potential investors were usually given Qualia's promotional materials, including brochures for individual care homes. A wide range of these brochures were before the Court.

12. The investments were also promoted using a report produced in June 2016 by Lupton Fawcett LLP – a firm of solicitors used by Qualia – entitled 'The Operations of Qualia Care and Qualia Care Developments' ("the Lupton Fawcett Report"). The fact that the Lupton Fawcett Report was used to promote

the scheme(s) does not appear to be controversial, though whether it was intended to be used for promotional purposes has been raised in witness evidence served by Mr Forster.

The legal arrangements

13. The investments were made up of various contractual documents between the relevant Investment Company and the individual investor, namely: a 'Sale Agreement', a 125-year 'Lease', a 25-year 'Sublease', a 'Developer Assured Buy Back Option Agreement', and a 'Developer Call Back Option Agreement'. By these agreements:

    i) The investor purchased a 125-year long lease of a specific room in a care home at a price usually between £50,000 and £75,000. The average price was about £67, 411.

    ii) The investor sub-let the room back to Qualia on a 25-year sublease. The investor was entitled to receive rental returns of 8-10% of the purchase price per annum for the period of the sublease.

    iii) The investor was also entitled to exercise an 'exit' option at certain specified intervals throughout the life of the sublease. This provided for the room to be repurchased at a specified price which was above the total value of the initial investment. Qualia had a 'buy-back' option in similar terms, again at a premium to the initial investment.

    iv) At the end of the sub-lease (or in certain other circumstances) the 'Management Provisions' of the lease took effect. This meant that the

room would be sub-let to a resident, with the profit to be split 50/50 between the investor and Qualia.

14. The Investment process was as follows. The investor would pay a deposit (of usually £500) and a standard suite of conveyancing documents would be provided to them. The investor would sign and return the contracts and pay the balance of the purchase price. The first annual interest payment was presented as "payable immediately", and was usually deducted from the purchase price or paid within 28 days of exchange. Subsequent returns would usually be paid annually, in arrears. Investors were encouraged to use Qualia's recommended solicitors – Gaddes Noble Property Lawyers – for the conveyancing process, with Qualia paying Gaddes Noble's fees.

15. It seems to have been a regular occurrence that rooms were sold in this way before the Investment Company had completed the acquisition of the relevant home. Mr Forster's evidence was that the marketing of rooms commenced when contracts had been exchanged for the purchase of a home, and the sale of a number of rooms prior to completion appears to have been necessary to raise the funds needed for completion.

16. Some investors therefore paid for their room and signed their contractual documents prior to the Investment Company owning the care home. This meant that, if the Investment Company's purchase of the care home did not complete (for instance, because the CQC refused approval) then the investors' room purchases also could not complete. It is a matter of dispute between the parties as to whether the investors understood this to be the case. In particular, as explained below, there were three specific homes - Alder Manor, Heather Hall,

and Poppy Grove (together, "the Unowned Care Homes") where CQC approval was refused after a number of rooms were sold. Thus completion of the purchase of the home never occurred, and these investors never acquired anything.

The Qualia Care Homes

17. A potentially confusing feature of this case is that each care home had at least two names: (i) a name under which the care home actually operated; and (ii) a 'promotional name' under which the investments were promoted. This was explained to investors on the basis that Qualia did not want investors to contact the homes directly.

18. In total, it appears that 793 rooms were sold or agreed to be sold to investors, with total investments of £53,457,000 across 16 care homes. Including Stanton Lodge, the FCA believe the total number of investments to be 858 rooms with a total sales value of £57,834,900. For the sake of clarity I have reproduced below the table created by the FCA which summarises the position as regards the different homes owned by Qualia entities.

Home Name	Promotional Name	Owned by	Rooms sold	Min price paid	Max price paid	Average price paid	Total invested	Investor Annual Returns[1]	Date of First Sale
Hillside	Addington Hall	QCD	109	£65,000	£70,000	£65,046	£7,090,000	8%-10%	11/05/2017
High Peak	Bilberry Gardens	QCD	39	£65,000	£70,000	£65,128	£2,540,000	8%-10%	12/10/2018
Daynes Pathway	Florence Hall	QCD	49	£50,000	£55,000	£54,796	£2,685,000	Usually 10%	23/03/2016
Millfield	Clarence Grove	QCD	91	£75,000	£75,000	£75,000	£6,825,000	8%-10%	18/08/2017
Duchess Gardens	Gramont House	QCD	85	£70,000	£75,000	£74,824	£6,360,000	8%-10%	05/09/2016[2]
St Marys	Newton Manor	QCD	77	£65,000	£65,500	£65,494	£5,043,000	8%-10%	19/05/2016[2]
Washington Lodge	Wagons Way	QCD	58	£54,500	£58,500	£58,431	£3,389,000	Usually 10%	19/05/2016
Walton Manor	Lavender Way	QCD	44	£70,000	£70,000	£70,000	£3,080,000	8%-10%	06/06/2018
St Marks	Tulip Park	QCD	35	£70,000	£70,000	£70,000	£2,450,000	Usually 10%	05/12/2018
Simonsfield	Rosemary Hill	QCD	37	£70,000	£70,000	£70,000	£2,590,000	8%-10%	23/07/2018
Woodlands/Forget Me Not Lodge	Emerald Court	QCD	33	£65,000	£65,000	£65,000	£2,145,000	Usually 10%	10/12/2019
Ascot	Heather Hall	Other	30	£65,000	£110,000	£66,500	£1,995,000	Usually 10%	15/08/2019
Loxley	Poppy Grove	Other	30	£65,000	£65,000	£65,000	£1,950,000	Usually 10%	31/10/2019
Stanton Lodge[3]	Opal Ridge	QCD							
QCP Clifton Meadows	Sapphire Court	QCP	41	£65,000	£70,000	£69,878	£2,865,000	Usually 10%	10/04/2019
QCP Airedale	Alder Manor	Other	35	£70,000	£70,000	£70,000	£2,450,000	Usually 10%	26/06/2019
TOTALS			**793**				**£53,457,000**		

1 '8%-10%' includes two situations: 1. Where some investors were promised 8% and others were offered 9%, 10% etc; and 2. Where investors were to receive 8% in Years 1-5; 9% in Years 6-10; and 10% in Years 11-25.

2 The data provided to the FCA included reference to a small number of sales in 2016. The FCA infers that these data were incorrect as they predate the incorporation of QCD.

3 Stanton Lodge ('Opal Ridge') was promoted on the FGL website, and a brochure was produced for it [Tab 7A]. The spreadsheet provided by the Investment Companies included a row for this care home (containing a typographical error, referring to it as Forget Me Not Lodge), but had no data about any rooms sold. The FCA was told that 'This information requires updating to reflect the acquisition and sale of rooms in "Forget-Me-Not" Lodge, a recent acquisition project…'

19. In addition to the Qualia homes, QCL also operated other homes. When Mr Woodhouse and Mr Forster separated, Mr Forster acquired six care homes owned by single-asset 'MBI' companies. These were Downshaw Lodge, Gilwood Lodge, Birchley Hall, Sandycroft, Ferndale and Oakesway (together, "the MBI care homes"). These had also been sold to investors on the same long lease model.

The Issues

20. This action is a trial of four preliminary issues. Deputy Master Nurse, by an order dated 4 October 2021, ordered that these issues should be determined at a first trial, with further hearings to be scheduled depending on the findings. Those four issues are as follows:-

i) Did the Investments constitute CISs as defined in s.235 of the Financial Services and Markets Act 2000 (the "FSMA")? In particular:

(a) did the 'arrangements' for each Investment include statements made in brochures and other promotional material used for the Investments?

(b) Was the purpose and effect of the arrangements to enable investors to receive profits or income from the acquisition, holding, management and disposal of property?

ii) If the Investments did constitute CISs, were they promoted using false and misleading statements or impressions in contravention of s.89 and 90 of the Financial Services Act 2012 (the "FSA 2012")? In particular:

(a) Were statements and/or impressions made by the Investment Companies to the effect that the relevant Investment Company owned the freehold of the Unowned Care Homes?

(b) Were impressions made by the Investment Companies to the effect that the care homes would be sustainable in their own right, without relying on investments of later investors to meet obligations due to earlier investors? If so, were such impressions false or misleading?

(c) Were any such statements and/or impressions made by the relevant Investment Companies knowing them to be false or misleading, or reckless as to the same?

(d) Were any such statements and/or impressions made by the relevant Investment Companies with the intention of inducing Investors to enter into Investments?

iii) Was the First Defendant knowingly concerned in any contraventions by the Investment Companies and/or by the Second Defendant? In particular, is it a defence to the allegation of knowing concern that the First Defendant relied on the matters set out at paragraph 79(5) of his Defence? This paragraph reads as follows:

> "At all material times, the Company Secretary to both Investment Companies, Mr Lindsay, who was also a qualified solicitor, never raised any concern as to the need for the Schemes to be authorised under s19 FSMA 2000.
>
> Written legal advice was specifically obtained from experienced independent Counsel on two separate occasions in 2016 and 2020 by the Qualia companies. On each occasion Counsel confirmed in writing that the Schemes did not constitute a CIS within section 235 of FSMA. For the avoidance of any doubt, for the purpose of these proceedings only, legal privilege in the two written opinions only is waived; save to this limited extent, Mr Foster does not waive legal privilege over any other material.
>
> It is averred that had Counsel expressed any material concern with respect to the lawfulness of the Schemes, Mr Forster would have taken due regard of the advice, and would have acted accordingly.
>
> As set out at paragraph 72 above, the FCA itself concluded in 2015 that the investment schemes operated by the MBI companies

(which the FCA alleges at paragraph 82.4 were 'similar investments') were not CISs.

Mr Forster reasonably relied on the foregoing in concluding that the Investment Companies were not contravening FSMA, and therefore that the activities of both companies were lawful."

iv) Has the First Defendant been personally enriched as a result of any contraventions as pleaded at paragraph 82(5) of the Particulars of Claim?

21. The question as to whether final restitution orders against the Defendants should be made under s. 382 FSMA (and if so, in what amounts) is not an issue for this hearing. However, the FCA has indicated that it is likely to seek an interim restitution order against Mr Forster if successful at this Trial.

22. The FCA's case in relation to the preliminary issues is that:

i) The Investment Companies, controlled by Mr Forster, contravened s. 19 and 21 of the FSMA by establishing, operating and promoting collective investment scheme(s) ("CISs") without authorisation. Many of the promotions were made by FGL and by the Third Defendant.

ii) In the promotion of the CISs, false and/or misleading statements/impressions were made to investors in breach of s. 89 and/or 90 of the FSA 2012, namely:

a) That the relevant Investment Company owned the freehold to the care homes marketed as Alder Manor, Heather Hall, and Poppy Grove (together, "the Unowned Care Homes"), and

b) that the care homes would be sustainable in their own right, without relying on investments of later investors to meet obligations to earlier investors. In essence, the investments amounted to a Ponzi scheme, and this was concealed from investors.

iii) Mr Forster was knowingly concerned in the contraventions of the Investment Companies and FGL such that a restitution order under s. 382 FSMA should, in due course, be made against him.

iv) Mr Forster has been personally enriched as a result of the contraventions above, by:

a) Receiving £1,230,054 from QCD, £325,000 from FGL and £11,000 from another company he wholly owned, Qualia Care Holdings Limited ("QCH").

b) Qualia Care Limited ("QCL"), a care provider owned by QCH, also received £2 million from the Investment Companies, of which £1.8 million was transferred to QCH.

23. Mr Forster's case with respect to the preliminary issues is as follows:

i) Investors were sold specific property – the individual rooms – and each room was separate. There was therefore no pooling of property. In addition, the returns paid to investors were specified as a fixed amount – conventionally, a percentage of the amount invested. There was therefore no "participation" in the profits of the enterprise, since the

amounts due to investors did not vary according to the profits of the enterprise.

ii) As regards the Unowned Care Homes Impressions,

a) the statements made in the promotional materials did not have the meaning alleged by the FCA, and in any event cannot have been relied upon by investors, since the solicitors acting for those investors as regards the registration of the leaseholds must have informed them that the property was not in fact owned,

iii) As regards the Sustainability Impressions

a) that it was entirely possible that the portfolio of care homes would improve its profitability so rapidly as to be able to meet all of the obligations due to investors, and

b) that he honestly believed this, and that he did not make the statements knowing or believing them to be misleading.

iv) He was entitled to rely on the legal and other communications which he had received, to the extent that, even if the FSMA was contravened, he cannot be said to have been knowingly concerned in any such contravention, and

v) Even if he has been enriched in the ways described, there is no element of injustice in that enrichment.

The Facts

24. The issues which arise in this case relate to the business operated by Mr Forster under the name "Qualia". However, the story begins before the establishment of Qualia, when Mr Forster and Mr Woodhouse operated MBI. As noted above, when Mr Forster and Mr Woodhouse separated, Mr Forster's company, QCL, continued to operate a number of MBI care homes.

25. Mr Forster established QCD in order to raise money to buy more care homes. However, at least some of the money raised was used to pay interest returns to investors in the MBI care homes. The terms on which these payments were made are mysterious – there seem to have been no signed contracts in place. These payments were not confined to investors in homes managed by QCL - two further MBI homes were not operated by QCL (because they were closed), but QCD made payments to the owners of those care homes nonetheless.

26. It is clear that from the very early days of Qualia, the contributions of investors in the Qualia care homes were used to finance the returns owed to investors in the MBI care homes. Mr Sowden, the FCA's expert witness, calculates that some £4.9m was advanced to MBI companies by QCD. Mr Forster himself accepted that there were significant amounts being paid out to MBI companies, and through them to their investors, in the first couple of years of Qualia.

27. It may be asked why Mr Forster felt the need to use new funds raised by his new vehicle to discharge the liabilities of his former vehicles. I think that there is a simple answer to this question. Mr Forster's new business was based on the same "lease model" as the MBI business and, as he said in evidence, involved many of the same investors. If an MBI home failed with substantial losses to

investors, his prospects of raising substantial new investment would be seriously harmed. Also, for as long as QCL continued to operate these homes, it was the recipient of the revenues derived from running them. He therefore clearly felt that it was worthwhile to use his existing investors' money to prop up the MBI businesses, since the failure of those businesses would reduce his ability to raise new money.

28. One of the key differences between the MBI model and the QCD model was that whereas MBI had had each home held by a separate legal entity, the Qualia model involved all homes being owned by a single legal entity, QCD. The reason for this was explicitly set out in para. 18(c) of Mr Forster's Second Witness Statement:

> "Where you have a number of properties within the same company at different stages in their turnaround, you have the ability to absorb losses when buying challenging homes which need time to turn around, as these could be covered by the profits generated by the better homes."

29. The reason that this is important is that it makes clear that Mr Forster did not regard investors as entitled only to the revenues arising only from their specific room, or even from the home in which their room was situated, but that returns to investors in the scheme as a whole were to be paid out of the revenues of the scheme as a whole. The revenues of the portfolio as a whole were to be used to pay investors as a whole.

30. It is clear on the facts that for some years the payment of returns to existing investors were funded entirely through the sale of rooms to new investors. The FCA says that this is evidence of malpractice. Mr Forster's defence is that it was simply cash flow management. Specifically, what he says is that when he

acquired a property, he commenced a substantial programme of updating and refurbishment, the outcome of which could reasonably have been expected to be an enhancement of the revenues received from that property so great as to cover all of the amounts due to investors and to leave a surplus.

31. In order to assess the credibility of Mr Forster's position, it is necessary to consider in some detail the course of the Qualia business during the years in which it was in existence.

2016-2017

32. QCD began acquiring care homes with alacrity. One of the first to be acquired was Duchess Gardens. QCD bought Duchess Gardens for £1.9m in December 2017 and sold 85 rooms for approximately £6.3m. This meant that it assumed buyback obligations in the region of £7.2m, and annual obligations to investors of approximately £575,000 per year.

33. It became necessary to establish the value of Duchess Gardens. A valuer (GVA) valued the property at £1.5m. However, Qualia seem to have asked for an enterprise valuation based on profitability, and provided some assumptions as to the future commercial success of the home. On that basis, GVA calculated the value of the enterprise would be £5.05m. Applying a further assumption of 3% annual increases in income, a further projection for a value in year 10 was reached of £6.57m. Mr Forster accepted in evidence that the assumptions provided by Qualia to GVA were unrealistically optimistic, and that this figure was unrealistic. However, the FCA notes that the value achieved through the

application of these assumptions was still less than the £7.2m which would be due to investors at that date.

34. GVA also pointed out in their valuation that in order to achieve these projected returns, a further £1.44m of capital expenditure would be required.

35. When cross-examined, Mr Forster did not produce any evidence of any sort of financial plan for Duchess Gardens. His explanation for his decision to make the acquisition was that he 'liked Duchess Gardens, [he]liked the area, [he] felt that it could work really well…'. The FCA suggests that if Qualia had performed financial modelling, or even followed the advice given to them by their own expert valuers, they must have (or should have) realised that there was no way in which investors in Duchess Gardens could be repaid without recourse to the profits of other homes.

36. The same scenario was repeated for Hillside, which was bought in August 2017 having been valued by CBRE in June 2017. QCD's total buyback obligations were in the region of £8m, yet CBRE's maximum valuation for the care home was only £5.06m.

37. When asked in cross-examination why he thought Qualia could do so much better than the previous owners, who had traded at significant losses, Mr Forster relied on his experience:

> "'Q… So where you have a professional valuer giving you their view of what is a sustainable, mature profit from a home, don't you think you should have used that as a guide for what you could expect from a successful turnaround?"
>
> A. Well, not through previous experience. And, you know, we've been in this position before where we get that type of estimated valuation and we've certainly far improved the level of profit

> compared to the valuation. So I do think that's very low in terms of what they deem would be realistic for that home.'

38. The problem with this answer is that at the time of the Hillside valuation in June 2017, Mr Forster had no such experience to draw on. At that stage, he had been in charge of the MBI homes, and some earlier Qualia homes (including the non-operational Daynes Pathway) but none of them could be said to have been turned around. There are no documents showing precisely how much money the care homes were losing in June 2017 but, as set out below, they were still losing money in November 2017 and March 2018.

39. This takes us to the financial position of QCD in June 2017. It had upcoming payments due to investors by the end of July 2017 of £454,000, and only £426,000 in its bank accounts. It was therefore only able to make these payments if it received further proceeds from the sale of new care home rooms to new investors, since it does not appear to have had any other source of revenue.

40. This position was made explicit in an email from Mr Howarth to Mr Forster on 7 July 2017, where (in the context of a discussion about lack of funds), Mr Howarth suggested that Qualia hold off making payments due to investors until further funds came in from the completion of sales of rooms in Hillside. It must have been clear, as accepted by Mr Forster, that the care homes were not supporting themselves at this point.

41. An email in November 2017 from Mr Whitaker to Mr Forster and Mr Howarth suggested that:

i) In total, the nine homes being operated were budgeted to show EBITDAR of £126k, but in fact were losing £4,400 per week. Daynes Pathway remained vacant, presumably with some costs attached, thus adding to the losses.

ii) Even the two care homes (Birchley Hall and Sandycroft) that had, by then, reached what Mr Whitaker describes as 'maturity', were not producing sufficient income to cover rental returns. Birchley Hall was said to be producing an EBITDAR of £37,000, whilst Sandycroft was losing £29,000.

2018

42. The lack of a successful turnaround for the homes (and the lack of profits to fund rental payments or buyback obligations) continued to be evident in 2018. It is clear from the January 2018 QCD Board Minutes (one of the very few internal Qualia documents available) that the care homes made a combined £150,000 loss in the month of November 2017 alone. This is against the 2017-2018 budgeted profit of £900,000. Accordingly, up until this point, all of the investors' returns had been financed from the contributions of other investors, since QCD had no resources of its own other than those contributed by investors.

43. These Board Minutes also break down the profits/losses by care home in November 2017. Birchley Hall had made a small profit (£2k), as had Duchess Gardens (£3k) and Washington Lodge (£5k). That was set against losses in all other care homes, including the MBI homes Downshaw Lodge (-£3k), Gilwood Lodge (-£23k) and Sandycroft (-£6k).

44. This is a significant point in the chronology. At this point, there was simply no ground for any reasonable board to have concluded that it would be possible to meet the periodic investment returns due to investors with regard to the homes which they currently owned. It must therefore have been clear to them that the options were (a) to agree a restructuring of the arrangements with the investors, whereby the promised returns were significantly reduced, (b) to put the company into administration and admit defeat (with a probably very significant loss for investors) or (c) to gamble for resurrection. This last would have involved deciding that they could acquire more homes with sufficient profit uplift potential that increased profit would wipe out the losses.

45. By May 2018, Mr Monnickendam (a qualified accountant and consultant to Qualia) provided the directors with provisional accounts to March 2018. These accounts showed that the care homes had collectively lost c. £986,000 before overheads (an approx. £1.8m shortfall from budget). That email set out the profits/losses by home for the year to March 2018, showing that only Washington Lodge (£52k) and Downshaw Lodge (£47k) made profits before central overheads, and only Downshaw Lodge made profits after central overheads (£5k). All other homes made losses. Including overheads, Sandycroft lost £124k, Gilwood Lodge lost £170k, and Birchley Hall lost £37k. It also confirmed that, two years since the start of QCD, its first care home (Daynes Pathway) was still non-operational and had not therefore been turned around.

46. In June 2018, the accounts for the then current financial year (FY18-19) showed that there had already been a shortfall to budget for QCL to the tune of £78,000.

47. The losses for Q1 2018 were confirmed in the August 2018 Board Report to be £95,000. Losses in the first five months of 2018 were again confirmed in the sum of £25,000 in the October 2018 Board Report. The Report does suggest that there might be profits in the latter half of FY2018/19, though these figures are before rent and do not come close to satisfying the investors' periodic investment returns.

48. Nowhere in these documents, even despite the significant losses, shortfalls to budget, and inability to pay investors from the profits generated by the care homes business, is there any evidence that anyone at Qualia – including Mr Forster – queried the sustainability of the Qualia investments or reflected on the business model. There is, for instance, a distinct lack of any such discussion in the Board Minutes of September 2018.

2019

49. By January 2019, it must have been clear that the 2018 gamble for resurrection had failed. It was therefore necessary to find an alternative source of repayments for investors. Mr Monnickendam therefore proposed that QCL should start paying rent to QCD at a rate of 70% of profits from profitable care homes with weekly payments on account in the sum of £25,000. Payments at this level were clearly unsustainable - QCL appears to have made a net profit before rent of £22,800 in the month of November 2018, whilst this proposal would have had it paying £84,100 of rent for that month.

50. The FCA says that there can be absolutely no doubt that Qualia – including Mr Forster – must have known that the model was unsustainable from at least April 2019 onwards. In that month, Mr Forster emailed Mr Monnickendam with a

plan to reduce investors' returns down to 6% (from 8-10%). The email from Mr Forster suggests that investors would be told that the need to reduce the rental returns was to 'protect property owners in future in what is a very challenging & regulated market'. Further that: 'Many of [FGL's] clients will have suffered with losses with other investments and huge drops in returns. Qualia's will still look attractive!!!!!...'. The email continues in capitals to suggest investors would be told that:

> "'Better to have a reliable 6%, with a stable and ever growing care provider… than a non proven developer with no operational experience…'; "

and

> "'By lowering your rental it helps protect Qualia for the long term and its staff & residents without the need to raise capital from outside the shareholders & bank funding.'"

51. It is hard to see why investors might have agreed with any such suggestion, unless it were put to them that the alterative was failure and insolvency. The FCA says that this e-mail demonstrates that at this point it was clear to Mr. Forster that a significant reduction in promised returns was necessary to avoid insolvency.

52. This e-mail was put to Mr Forster repeatedly in cross-examination. He was unable to explain its genesis or purpose, and in my view had nothing substantive to say about it.

53. QCP was used to replicate the activities of QCD. It is highly unclear why Mr Forster began to sue QCP for this purpose, since his expressed strategy to date was that economies could be maximised if all the homes were held by a single

legal entity. QCP raised funds from investors using the same "leasehold model" that MBI and QCD had used.

54. In August 2019 three new applications were made to the CQC for new approvals (the Unowned Care Homes). This was met by the CQC with a request for an independent business review to consider the financial stability of QCL. QCL was not prepared to engage in any such review. At this point it must therefore have become clear to Mr Forster and the management of Qualia that there could be no more room sales, which, in turn, would mean no new money.

55. Since QCP could not complete on its acquisition of the Unowned Care Homes, it had large uninvested cash balances. It is accepted that QCP would ultimately have been obliged to return these cash balances to investors. However, in the meantime a use was found for them.

    i) In July 2019, QCP made a loan of £250,000 that was passed on to QCL to fund its tax liabilities (that is, funds of non-operational care homes were used to fund liabilities of operational ones).

    ii) Also in July 2019, a further loan of £150,000 was made from QCP to QCD which was in part used to fund rental payments to the tune of c. £78,000 to QCD investors and £65,000 to MBI investors.

    iii) In September 2019, a sum of £90,000 was loaned from QCP to fund QCL's payroll liabilities in respect of an MBI care home (Downshaw Lodge).

    iv) In October 2019, a total sum of £300,000 was loaned to QCD and QCL and was used, in part, to fund rental payments to QCD investors and

QCL's payroll liabilities. The purpose of this loan to fund pre-existing leaseholder returns was made plain by the contemporaneous emails which sought (*inter alia*) Mr Forster's approval for those loans.

56. Mr Temple for the FCA put to Mr Forster that this last loan was a clear example of money from new investors being used to meet the obligations of old investors; a characteristic of a classical Ponzi scheme. Whilst denying that analysis, Mr Forster accepted 'it might look that way'.

57. In November 2019 Downshaw Lodge, a care home owned by MBI but managed by QCL, was placed in administration through a CVA. This is notable because Mr Forster in his evidence several times put forward Downshaw lodge as a successful turnaround of a home, showcasing QCL's management and turnaround abilities.

58. The effect of the CVA deserves a little consideration. There are broadly three possible values for a nursing home. Where the home is self-managed and generating an income, its value is the value of that income – the enterprise value of the business, floored at the bare building value. Where the management of the home is separate from the asset ownership, the asset owner can, on its own, realise only the bare building value – it is only if the asset owner and the manager co-operate that enterprise value can be realised. There is, however, a third situation. Where the building is encumbered with multiple long leases of individual rooms, its sale becomes effectively impossible unless a buyer can be found who is prepared to take it subject to those encumbrances – which means that, without the co-operation of the manager, the building is effectively valueless. In the Downshaw CVA, the only possible buyer was therefore another

Qualia entity. The home was therefore sold to Qualia Care Holdings, "QCH", which named its price as the bare building value - £1.125m. Investors received 23.66p in the pound.

59. Downshaw Lodge was one of a number of MBI entities which were placed in administration. Since QCD had in effect been keeping the investors in the MBI homes which it managed at bay by paying their returns out of QCD funds, at this point the various MBI entities owed £4.9m to QCD. These amounts were written off in full.

60. The point which Mr Temple makes – with some force - is that at the moment that they realised that this £4.9m was irrecoverable, the directing minds of Qualia must have realised that in order to have any hope of meeting their obligations to investors they would have needed to earn £4.9m on top of their existing obligations. In other words, this was the point in which any reasonable manager must have realised any prospect of the Qualia entities being able to meet their commitments to their investors had evaporated. The question of how Qualia should have dealt with their existing investors at that point is an open one. However, Mr Temple submits that it is crystal clear that they should not have continued selling rooms on the basis of promised returns which were now clearly undeliverable, and that the fact that they continued to do so is prima facie evidence of dishonesty.

61. In September 2019, Qualia – in particular Mr Forster – saw a witness statement of Mr Duffy from Duff & Phelps, which was filed in the MBI insolvency proceedings. On Mr Duffy's analysis, Qualia would have to make c. £5m in profit per annum simply to satisfy its obligations to investors which represented

a 300% growth in capital value over a 6 to 10 year period. At this point, QCD only had £58,000 in its bank account, whilst QCP had £1.9m (mostly in respect of the Unowned Care Homes). Mr Forster's evidence is that he did not sit down with Mr Duffy's analysis and reflect on its implications – presumably because he was already well aware of the true position. He did not, however, stop selling care home rooms on the basis of promised returns which he must have known to be unachievable.

2020

62. At the beginning of 2020, QCL was still trying to convince the CQC that is should approve the QCL takeover of the Unowned Care Homes without subjecting it to an independent business review. As part of that process, QCL submitted what they claimed to be QCD's FY19 draft accounts. This is an extraordinary document. It includes a revaluation of the Investment Property portfolio from £9.7m as at 1 April 2018 to £55.2m as at 31 March 2019. Mr Forster was unable to assist us in evidence as to the basis of this valuation, save to suggest that it had been based on the advice of "an independent third party valuer". Needless to say, no such valuation was produced in disclosure, and the figure bears no relation to any plausible valuation of QCD's assets on any basis. More importantly, what QCD actually owned was the reversion of the 125-year leases which had been granted over almost all of the properties, plus the value of its tenancy rights under the 25-year sublease at a significantly above-market rental. The value of the reversionary interests would be negligible, and it is hard to ascribe any substantial value to the sub-lease tenancy rights given the rental

commitments. The figure of £9.7m used in the prior year seems indefensible, and the £55.2m figure fantastic.

63. It was suggested to Mr Forster – and he accepted – that the likely reason for this presentation was that the CQC was required to ensure that licensed care home operators were financially sustainable, and had a revaluation not taken place, QCD would have appeared to be balance sheet insolvent and apparently unable to pay its debts as they fell due.

64. The inference which Mr Temple sought to draw from these facts was that these accounts were designed to deceive the CQC into believing that the funding model for QCD (which sat behind the provider, QCL) was sustainable and the companies were profitable.

65. As noted, the accounts delivered to the CQC were draft accounts. When full accounts were filed at Companies House, they showed a revaluation – based apparently on the QCD's director's own estimation - of c. £38m. This figure could not be explained by Mr Forster in cross-examination, and was double the valuation of c. £19m given in the spreadsheet created by Mr Monnickendam on 25 March 2020. Here again, Mr Temple suggested that this figure must have been included in the accounts of QCD to create the illusion (including to investors) that QCD was a substantial and stable company.

66. By March 2020, Qualia knew that a number of buyback dates were coming up including three in 2021 and forty-eight in 2022. The total buyback amount was in the sum of £2,948,225. It was put to Mr Forster that QCD could not possibly have had any prospect of meeting these obligations out of its own resources, and that therefore recourse to the monies held by QCP for investment in the as yet

unacquired care homes would be necessary. Mr Forster was unable to give an answer. Mysteriously, however, he was unwilling to concede that Qualia ought to have stopped selling rooms at this point.

67. One of the few items of management information which were available to the court were a set of management accounts prepared in March 2020. These made clear that the care homes in aggregate were expected to either break even or make a small loss. The idea that Mr Forster can at that stage have held any serious belief that the business would in fact make the £5m profit which it needed to meet investors' entitlements is not credible.

68. By August 2020, with the purchase of the Unowned Care Homes still uncompleted, the Investment Companies had access to about £3m of cash. However, QCP owed c. £6m to the investors in the Unowned Care Homes. On top of that, Qualia had rental obligations of c. £5 million over the same year. It therefore needed to find £11 million just to stay afloat, and its access to new funds from the sale of new rooms had been terminated.

69. It is therefore no surprise that on 11 September 2020 the Investment Companies were placed in administration. However, the previous day a very curious pair of documents had been created and signed between QCD or QCP on the one hand, and QCL on the other. What these documents provided for was a substantial reverse rent to have been due from QCD or QCP to QCL over previous years. In reality, QCL had been paying around £25,000 or £27,500 per week to QCD. However, when the reverse rent provided for in these agreements was taken into account, QCL was said to be owed c. £2m (QCL, it may be remembered, was at this point still solvent and wholly owned by Mr Forster). This money was

transferred immediately before the commencement of the Administration. The administrators regarded these documents as evidence that these amounts were legitimately due.

The Evidence

70. The FCA provided evidence from the lead FCA investigator, from a representative of the Care Quality Commission, and from a number of investors. None of this evidence was formally challenged as to its substance. Having regard to the fact that Mr Forster appears as a litigant in person, I do not regard this lack of challenge as an absolute bar to his introducing other evidence. However, in broad terms Mr Forster did not dispute the substance of this evidence at any point during his appearance before me, with one exception which I will come to. Mr Forster relied upon his own witness statement and a further statement provide by Mr Lindsay, Qualia's former solicitor, who was at the time a partner in Lupton Fawcett.

71. As part of the process of selling investments in the Qualia scheme, Lupton Fawcett produced a report in their own names (the "Lupton Fawcett Report") which appears to have been prepared for the purpose of being distributed to investors in order to promote the investment to them. The insolvency practitioner for QCD, QCP and QCL has now waived privilege over documents that show the drafting process, such that no issue with any ongoing privilege seems to arise.

72. Mr Forster has not filed any witness statements from investors.

73. Neither FGL nor Mr Tasker has filed any witness statements, other than that from FGL's liquidator confirming that they do not intend to take part in the proceedings.

74. The FCA has also filed and served a Hearsay Notice. The reason for this is that the way in which the FCA conducts an investigation of this kind is to send questionnaires to investors in the scheme asking for their responses to particular questions about the way in which they were dealt with. The responses to such questionnaires are necessarily hearsay evidence for the purpose of these proceedings. I did not see any reason why these responses should not be admitted in evidence in these proceedings.

75. The documents provided by Mr Forster are extremely limited. I am required to form a view as to whether the paucity of disclosure by Mr Forster is the result of a lack of information, or a deliberate attempt to conceal.

76. Some documentation was obtained from the insolvency practitioner of the various Qualia companies as to the preparation of the Lupton Fawcett report. These documents were obtained after the service of Mr Forster's witness statement. None of those documents were disclosed by Mr Forster, despite 8 of them (of 12 in total) being sent to/from a personal email address that he still uses. These contemporaneous emails contradicted Mr Forster's evidence as to the purpose of the Lupton Fawcett Report and the extent of his involvement in its creation. The FCA applied for consent under paragraph 12.5 of practice Direction 57AD for these documents to be admitted as evidence, and, applying the principles lucidly set out by Vos LJ in McTear v Engelhard [2016] EWCA Civ, there was no reason to withhold consent. Mr Forster did not oppose this.

Again, these e-mails contradicted Mr Forster's evidence that he was not involved in the creation and distribution of these documents

77. The essence of Mr Forster's case was that the business model of Qualia was viable at all times. Ordinarily, this should be evidenced by contemporaneous business plans, projections and cash-flow forecasts. In pre-trial correspondence, the FCA raised the fact that Mr Forster's disclosure lacked any such documents. Mr Forster was specifically invited to provide such further documents that fell within this category by the FCA's letter dated 22 July 2022 (at a time when he still retained solicitors to act for him). A few additional documents were provided but, otherwise, his solicitors' response was that (save for a very limited number of documents withheld for privilege) everything had been disclosed. During his cross-examination, Mr Forster repeatedly asserted the existence of documents that he said demonstrated financial modelling, analysis and similar, but no such documents were produced. Finally, when preparing his closing submissions and having had full sight of the FCAs case, Mr Forster was invited by the court to provide any further documents. No such documents were provided.

78. Mr Forster's status as a litigant in person is potentially relevant in this regard, since a litigant in person cannot be expected to understand the full niceties of the disclosure regime. However, the FCA points out that throughout the disclosure process Mr Forster was in fact represented by solicitors.

79. I therefore cannot follow Mr Forster to conclude that the absence of documentation supporting his evidence shows his non-involvement in the activities before me. Indeed, my conclusion is exactly the opposite – the fact

that the few documents that have been disclosed largely contradict his evidence suggests that other documents, if they had been disclosed would have disclosed the same.

Expert witness evidence

80. The parties were given permission to adduce oral expert evidence from one expert in the field of forensic accountancy to address issues relating to the sustainability of the investments, to be served sequentially. The FCA served the evidence of Mr David Sowden, who is a director in the forensic department of Grant Thornton UK LLP and a Fellow of the Institute of Chartered Accountants. His report was both comprehensive and helpful, and had clearly involved a very great deal of research into the financial position of the Investment Companies. None of the Defendants have adduced expert evidence.

The witnesses

81. In the event, only three witnesses attended for cross-examination: Ms Chambers and Ms Jupp on behalf of the FCA, and Mr Forster for himself. The FCA offered eight investor witnesses for cross-examination, of which Mr Forster was invited to pick three. This included Mr Wadham as well as Mr Cronin and Mr Woodward. It also offered its expert, Mr Snowden. Mr Forster decided not to cross-examine any of the FSA's investor witnesses, nor Mr Sowden.

82. Because Mr Forster presented his case as a litigant in person, it is probably wrong to apply the presumption that evidence which is not explicitly challenged in cross-examination is therefore treated as accepted. However, nothing in Mr Forster's presentation of his case called into question the contents of the investor

witnesses, and I accept their evidence as it stands. In particular, I accept Mr Cronin and Mr Woodward's evidence as to their belief as to ownership of the Unowned Care Homes.

Ms Chambers and Ms Jupp

83. The FCA produced two witnesses, Ms Chambers, the lead investigator from the FCA, and Ms Jupp from the CQC. Mr Forster cross-examined both of these witnesses, but the issues which he raised were not relevant to the issues before me. In particular, he did not seem to dispute the facts set out in either witness statement. As regards Ms Jupp, he sought to demonstrate that the CQC's decision to refuse consent to the transfer of the Unowned Care Homes was based only on the CQC's concerns about Qualia's business structure, and not on its record as a care provider. Ms Jupp accepted that this was the case. However her evidence was that one of the statutory obligations of the CQC is that, before they approve the registration of a care home to a new service provider, they must be satisfied that the service provider must be financially viable (Reg 13 (part 4) of the Care Quality Commission (Registration) Regulations 2009), they felt unable to do this.

84. On 16 August 2019, QCL made an application to add two additional care homes to their registration. These were Ascot Nursing Home and Loxley Chase Care Home. They also applied to add a further two homes, Airedale Care Home on 29 August 2019 and Forget Me Not Lodge on 7 April 2020. These applications were all formally refused on the 6 October 2020. Ms Jupp's explanation for this refusal was, in my view, illuminating. She said:

> "The financial model in QCL's case was unusual and complex… Having sought advice from CQC's Head of Market Oversight, he advised that we needed further expert analysis of the funding model and its financial stability in order to be satisfied the QCL could meet the requirements of Regulation 13 [financial stability].
>
> I therefore authorised for an Independent Financial Specialist to conduct an Independent Business Review ("IBR"), at the CQC's expense, to ensure we had as much relevant information as possible about the financial stability of QCL before a decision was made to grant or refuse the applications. This is not a common tool used by CQC to assess financial circumstances of a provider. It was the first and only time in my experience as Head of Registration that we had taken this action. Using the requirements of Regulation 13 and our powers to ask for further information we needed to ascertain the likelihood of sustained financial viability and this was the only way we believed assurances could be sought due to the complexity of the financial model.
>
> QCL would not agree to take part in the financial review. We could therefore not be satisfied that QCL had the financial resources needed to provide and continue to provide financial stability to any other new locations. It is our duty to refuse registration where CQC cannot be satisfied that there is the intention to comply with the regulations."

85. Both Ms Chambers and Ms Jupp were reliable witnesses who sought to answer (and confine their answers to) the questions asked of them.

Mr Forster

86. Mr Forster was a curious witness. He presented himself as having an almost Olympian detachment from the financial operations of Qualia, and his default position when asked about any particular aspect of Qualia's activities – be it a communication, a calculation or a projection – was that he did not get involved with that sort of thing at that level of detail, and left it to others. When presented with contemporaneous documents demonstrating his direct involvement in the creation of particular documents, he consistently responded that these were one-offs.

87. The correspondence between Mr Forster's evidence and his witness statement can best be described as approximate. When asked in cross-examination how long it would take to turn around a failing care home, his responses varied between the statement in his witness statement (no less than five years and often more) to two years. More significantly, he stated in his trial witness statement that he did not recall ever meeting a potential leaseholder to discuss investments, but withdrew this when presented with an email discussing exactly such a meeting.

88. Because the FCA's case largely revolves around allegations that misleading statements were made to investors, it is interesting to consider Mr Forster's evidence as to the inclusion of incorrect statements. For example, it was put to him that his letter to investors on 30 September 2020 to the effect that the FCA had instructed Qualia to stop making payments to investors was untrue, since this was not what the FCA had said. His response was that the letter may have been 'slightly misleading'. In other instances, misleading statements to investors were defended on the basis that the statements were 'not entirely factual', and 'the wording wasn't quite right'. When confronted with the email that demonstrated an intention to reduce investor returns to 6% (by stating or implying that Qualia was not sustainable without that reduction), he said 'I don't like the wording, obviously, that's been used there from myself' and 'I don't like my wording'.

89. I concluded that Mr Forster was mentally trying to put as much distance as he could between himself and the consequences of his actions. I think it is entirely possible that he is still trying to come to terms with the massive loss to investors

which he has undoubtedly caused, and is seeking – in his own mind – to excuse himself. However, the practical result of this is that I did not find his evidence to be reliable, or his account of his own lack of involvement in the activities of Qualia to be credible.

Mr Lindsay

90. Mr Forster put forward a witness statement from Mr Lindsay, the partner at Lupton Fawcett who had been responsible for advising QCD and MBI, obtaining the counsel's opinion regarding CIS status, and for preparing the Lupton Fawcett Report. Mr Lindsay was not available for cross-examination, and Mr Forster's evidence was that this was because he was seriously unwell. If he had attended for cross-examination, it would have been possible to throw some further light on the way in which the instructions to counsel were created, and as to his understanding as to the aims of the report.

91. Mr Forster described the business strategy behind his operations at some length in the witness box. However, it was succinctly summed up in the witness statement of Mr Lindsay as follows

> "…care services were much more profitable in the South of England, where there was a higher proportion of privately paying residents in care homes and that privately funded residents paid higher fees than those funded by their local authority. As a result, the properties in the North, which had a higher proportion of locally funded residents, were less profitable or loss making compared to many of those in the South. Accordingly, as I understood it, it made sense for the bigger care groups to build new, large care homes in the South, and to sell some of their care homes in the North and Midlands which were often home to the local authority funded residents, that were paying lower fees.

92. There are two ways of looking at this. One is Mr Forster's case, as advanced in his evidence, which is to the effect that he sincerely believed that these homes

were "diamonds in the rough", capable of being turned around to highly profitable businesses. The other is the FCA's suggestion, that since the cash inflow of the company involved the purchase of a care room, the optimisation of cash inflow involved the purchase of the cheapest possible rooms, and that a strategy of identifying and purchasing cheap rooms maximised inflows.

The Economic Structure of the Qualia Investments

93. In order to understand this case, it is essential to understand what Mr Forster was doing, and how he perceived it.

94. The basic business model was that investors were offered investments on terms that they would receive a (high) fixed rate of return for a 25-year period, and would then be offered a choice between selling the investment back to the company at a fixed price (at various fixed points, though Qualia's modelling in March 2020 was based on an assumed exit at 10 years) or electing to move to a basis where they would receive a return of 50% of the revenue generated by the investment property. There are two ways of analysing this arrangement. One is that it is a loan by the investor to the scheme with a fixed return and fixed maturity, subject to an ability to redeem at earlier dates, but with an option at maturity to elect to receive an interest in the future revenues of the investment property instead of cash repayment. I will call this the "Debt Model". The other is that it is an investment in the scheme property, with a specified return for an introductory period and a proportionate return thereafter, but with an option at various points of the introductory period to cash out at a specified price. I will call this the "Investment Model

95. It is entirely clear from Mr Forster's evidence that he thought about the arrangements exclusively in terms of the Investment Model. At a number of points during his cross-examination he expressed the view that the investors were "not creditors". More importantly, when pressed on the point that the revenues from the investment properties were never anything like sufficient to enable the redemption of the investments at the specified redemption price, he replied that this was not a prospect which was seriously considered – his expectation was that investors would simply remain as investors. This approach is confirmed by the accounts of the companies concerned, which did not take into account the obligations that would be owed to the investors if the redemption rights were exercised. This is consistent with the Investment Model but wholly inconsistent with the Debt Model.

96. This is also to some extent how the investments were presented to investors. The headlines in the various brochures provided to investors specified that this was a "buy-to-let" investment, with a number of different "exit strategies" available on request. Emphasis was placed on the element of fixed return in the brochures, but there is no doubt that what was being offered to investors was an income stream to be derived from a particular asset, backed by an undertaking to make up any shortfall with revenues from other assets.

97. It is therefore clear to me that the arrangements, in the minds of both Mr Forster and of the Investors, took the form of the Investment Model, not the Debt Model.

1. WAS QUALIA A COLLECTIVE INVESTMENT SCHEME?

98. The preliminary issue which falls to be decided is as to whether the arrangements with which we are concerned fall within the scope of the Financial Services and Markets Act 2000. This takes us to the question of whether they constituted a "collective investment scheme" (CIS) within the meaning of section s.235 of that Act.

99. CISs are defined by s. 235 FSMA, which provides:

> '(1) In this Part "collective investment scheme" means any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income.
>
> (2) The arrangements must be such that the persons who are to participate ("participants") do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions.
>
> (3) The arrangements must also have either or both of the following characteristics:
>
> (a) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled;
>
> (b) the property is managed as a whole by or on behalf of the operator of the scheme.'

100. The fact that the definition in s.235 may be a constitutive element of a criminal offence has created a certain amount of discussion about how the burden of proof should be applied in a case where the question of whether the facts satisfy s.235 is in question. As Arden LJ said in *FSA v Fradley*, cited with approval by Lord Carnwarth at [6] in *Asset Land*,

> "given that a contravention of the general prohibition in s.19 FSMA might result in the commission of a criminal offence, s.235 must not be interpreted 'so as to include matters which are not fairly within it."

101. This is, of course, clearly correct. However, it does raise the issue of what a "fair" approach might be in this context. There seem to be two intertwined issues of fairness here. One is as to what standard should be applied to the findings of fact – does the fact of the potential criminal consequences of the application of the section mean that the court should require some higher standard of proof before finding such facts? The other is as to the approach to construction of the words used – should construction strain against an interpretation which potentially gives rise to a criminal consequence?

102. I think that the answer to both questions is clearly no. As regards the facts, the position seems to me to be perfectly summed up by Baroness Hale in *Re B (Children) (Care Proceedings: Standard of Proof)* [2009] 1 A.C. 11; [2008] UKHL 35 at [70]:

> "'Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.'"

103. As Mr Temple correctly submitted, fairness here cuts both ways. Where there is a risk of a person suffering a criminal penalty, it might be argued that it is fair to adopt a more restrictive approach. However, where a statute has the express intention of protecting consumers, it might be argued that it is fair to adopt a broad, protective approach to its construction. I agree with both of these positions, and I think the necessary conclusion is that the section must simply

be interpreted in accordance with the ordinary, natural meaning of the words used.

104. Before coming to construe the section in detail, it is helpful to place it in context. Viewed from one perspective, it is simply a definition of investment funds, and many thousands of investment vehicles fall uncontroversially into its scope. However, viewed from another, it determines one of the most ineffable boundaries of the regulatory perimeter.

105. Financial services legislation must catch two different types of activities. One is dealings in investments qua investments -shares, bonds &c. These are relatively easy to define. The second is more tricky. These are dealings in non-investments where the mode of dealing brings the transaction within the scope of the legislation. These latter include, as well as collective investment schemes, futures, options, contracts for differences and deposits (money is not an investment – it is only when it is paid by way of deposit that the legislation applies). The common element of these categories is that they bring dealings involving non-investments within the scope of the financial regulatory perimeter.

106. The key to the applicability of s.235 is the distinction between the purchase of an asset, and the making of an investment in an asset whose economic substance derives from its common management. As Lord Sumption said in *FCA v Asset LI Inc (trading as Asset Land Investment Inc)* [2016] UKSC 17 at [99]

> "The fundamental distinction which underlies the whole of section 235 is between (i) cases where the investor retains entire control of the property and simply employs the services of an investment professional (who may or may not be the person from whom he acquired it) to enhance value; and (ii) cases where he

> and other investors surrender control over their property to the operator of a scheme so that it can be either pooled or managed in common, in return for a share of the profits generated by the collective fund."

107. This distinction between sales of things and sales of financial investments is an almost universal feature of financial regulatory law. In 1946 the US Supreme Court ruled, in respect of an arrangement where investors were invited to invest in orange groves, that the US securities laws should apply to any arrangement where there is "the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others" (*Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946)). This observation highlights the distinction which is at the core of s.235 – if the investor is being invited to participate in a common enterprise where both his contribution and his return will be monetary, the enterprise is very likely to be a CIS unless it falls within one of the existing exemptions (for example, because it is a company or an LLP).

108. Another important aspect of the question as to whether an arrangement is a CIS or not is that what is assessed is the "purpose or effect" of the arrangements made, not their legal structure. It is not possible to contract out of s.235 if the economic reality of the contracts concerned does not correspond to the legal terms of the contracts. As the US Supreme Court said in *Howey*, "The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae". I think this equally true under English law.

Property-based CISs

109. As noted above, a CIS arises where property is sold in a particular way. It is therefore very common for offerors of investments to seek to structure such

arrangements in such a way as to enable them to claim that they are merely selling property and not investments. Such schemes frequently involve the sale of parcels of land – as, for example, in *FCA v Capital Alternatives* [2015] EWCA Civ 284 (and indeed in *Howey* in the US), but can relate to any type of asset – wine, cryptoassets or, in one celebrated case, ostriches. Thus, *Capital Alternatives* involved a rice farm in Africa and various forestry projects, and *Asset Land* (and various other 'land-banking' cases) involved the sale of sub-plots in land in the UK.

110. The FCA's case is that the overall structure of the Qualia investments is broadly identical to that in *Asset Land*. In both cases, the investor purchases a smaller part of a larger whole which, in reality, the investor cannot exploit themselves. It is left to the scheme operator to make arrangements for the larger whole which are intended to generate profits. Although structured as a property purchase, both cases in practice involve the investor's participation in a business carried on by the scheme operator, with the real property replacing a share, or bond, which might otherwise be issued by the business. Any argument that the Qualia investments are not CISs therefore needs to distinguish the *Asset Land* case.

111. The distinction that was urged upon me in this case is that in this case investors were offered a fixed return. Whereas in a normal land banking scheme, an investor's entitlement to returns is limited to the profits of the scheme, in this case investors were promised a fixed return for a number of years after their investment.

112. I think there are two ways of putting this argument, but both fail. The first is that the fact that returns to investors were not expressed to fluctuate directly

with the performance of the underlying assets meant that the investors were not participating in a scheme in relation to those assets. I think that this is clearly wrong. The requirement of s.235 is that the overall effect of the arrangements must be a participation, not that an arrangement can only be a scheme if it is a pure pass-through. The overall effect of these arrangements was clearly that investors participated in the arrangements, simply because (a) all the property that the scheme had was the result of investor participation, and (b) the only possible outcome of the arrangements was that that property would be divided between those investors. The second way of putting the argument is based on the Debt Model – that what the investors were really doing was making a fixed-rate, fixed-term loan to the Investment Company. Now I think it is clearly correct that a lender does not necessarily become a participant in a scheme simply by making a loan to that scheme, even though his returns will be entirely derived from the scheme property. However, as I have held above, in this case the Debt Model was neither the intended purpose nor the intended effect of the arrangements. It is therefore inappropriate to seek to invoke it in these circumstances.

113. A payment of returns of this kind was considered in *Anderson v Sense Network* [2018] EWHC 2834 (Comm); and on appeal at [2019] EWCA Civ 1395. *Anderson* involved a deposit-taking scheme operated by ‘Midas’, whereby investors were told that their funds would be invested under special arrangements with the Royal Bank of Scotland, enabling high interest rates to be paid to investors.

114. The means by which RBS would provide returns was not entirely clear, with the decision at first instance at [171] noting various explanations given to depositors, some of which referred to high interest payments from RBS and some of which referred to RBS trading with the money. In truth, there were no special arrangements with RBS. However, at [173], Jacobs J summarised that investors were told that they would obtain the benefit of a relationship with RBS and therefore enhanced returns on their money.

115. Some of the investors claimed against Sense Network, the network of an IFA who had advised clients to enter the Midas scheme. In order to succeed against Sense Network, investors needed to show (i) that they had invested into a CIS; and (ii) that Sense Network was liable for advice to enter into the Scheme under s. 39 FSMA and/or at common law.

116. At both first instance and on appeal the investors lost on the second question, and therefore the question of whether the claimants had invested in a CIS was not critical to the result. Nevertheless, both judgments contain detailed obiter conclusions, finding that the deposit scheme did constitute a CIS (a point which was fully argued by the parties). At first instance, Jacobs J concluded at [177]:

> "'It is true, as Sense pointed out, that the scheme promised a fixed return. It was not therefore dependent on the actual performance of any investments or other assets which were acquired or trading using the money. However, there is nothing in s.235 which imposes a requirement to this effect, or requires an element of 'uncertainty' as to the returns of the scheme. I agree with the Claimants that a fixed return is compatible with a CIS as defined in s.235.'"

117. On appeal, David Richards LJ reached the same conclusion at [73]:

> "'Sense submits that section 235(1) was not satisfied, because the guaranteed return was not dependent on the performance or

> otherwise of the funds but was a fixed return payable irrespective of whether profits or income were received. The statements made about the special account with RBS were simply explanations as to how such high returns could be paid. I do not accept this analysis. As explained to investors, the whole point of the scheme was to enable them to have access to the supposedly high rates of return that Mr Greig could obtain from RBS. Payment of their contributions into the (non-existent) special account with RBS was of the essence of the scheme. The fact that Midas promised a fixed return, for which it was legally liable irrespective of the performance of the RBS special account, does not in my view prevent the scheme from falling within section 235(1). First, section 235 does not define or limit the form of an investor's participation. There is no reason why it should not take the form of a fixed return. Second, whatever the bare legal rights of investors against Midas, the nature of the arrangements was clear. If one asks the question: was the apparent purpose or effect of the scheme to enable the investors to receive income from the acquisition, holding and disposal of the rights constituted by the payment of their contributions into the RBS special deposit account, the answer is 'yes'.'"

118. It seems to me that the facts of this case fall clearly within the last sentence of David Richards LJ's observations above. Accordingly, a scheme will still be a CIS where its purpose or effect is to pay investors fixed contractual entitlements from the income generated by the management of the underlying property. Such returns clearly fall within the ordinary – and wide – meaning of the words used in s. 235 (whether characterised as 'profits', 'income', or as 'sums paid out' of profit or income).

The arrangements – section 235(1)

119. The relevant arrangements in this case consisted of: (a) the contractual and conveyancing documentation, and (b) the brochures and other promotional material used to advertise the investment to prospective investors. Whilst Mr Forster admits the former, he denies the latter on the basis that the contractual documentation contained an 'entire agreement clause'.

120. Mr Forster's position in this regard is untenable. In *Asset Land*, Lord Sumption JSC stated at [91] that:

> "Arrangements' is a broad and untechnical word. It comprises not only contractual or other legally binding arrangements, but any understanding shared between the parties to the transaction about how the scheme would operate, whether legally binding or not. It also includes consequences which necessarily follow from that understanding, or from the commercial context in which it was made. In these respects, the definition is concerned with substance and not with form. It is, however, important to emphasise that it is concerned with what the arrangements were, not with what was done thereafter. Of course, what was done thereafter may throw light on what was originally understood… but it must be possible to determine whether arrangements amount to a collective investment scheme as soon as those arrangements have been made. Whether a scheme is a collective investment scheme depends on what was objectively intended at that time, and not on what later happened, if different."

121. Lord Carnwath at [54] similarly held that no special weight should be given to contractual documents in assessing the arrangements in which investors participated.

122. Another point which Mr Forster raised in his closing submissions was that the investors cannot all have been involved in a single scheme, since different investors were dealt with on different terms. Again, I do not think that there is anything in this argument. In the first instance judgment in *Asset Land* [2013] EWHC 178 (Ch) at [158] (not the subject of an appeal), Andrew Smith J held that there can be a collective set of arrangements even if different investors had different understandings of how the scheme would work. With respect, I agree.

123. I therefore find that in identifying the arrangements for this purpose, I must look at all of the material presented to potential investors, and that includes the promotional material that was used to explain the investments to investors. This material clearly presented "Qualia Care" as the investee, and – as was clear from

Mr Forster's evidence – care had been taken to render this term non-specific to any individual legal entity. I therefore think that the "arrangement" here is a single arrangement encompassing all of the homes where rooms were sold to investors under the "Qualia" brand.

The property – section 235(1)

124. The arrangements must be in respect of 'property of any description, including money'. As such, the underlying property can take any form and can include the contributions made by the participants themselves (*Fradley* at [33], *Anderson v Sense Network* [2018] EWHC 2834 (Comm) at [175]), as well as any property managed in common with that of the investors (*Capital Alternatives* at [48]-[51]).

125. I therefore conclude that the scheme property included all of the homes in which rooms had been sold, the cash balances received from investors and not applied in the purchase of rooms, and any other property derived therefrom, apart from those amounts paid to investors pursuant to their income entitlements.

The purpose or effect – section 235(1)

126. The importance of the "purpose or effect" wording is that it actually creates two tests. One is as to what the purported purpose of the scheme was – put simply, the question of what investors thought that they were investing in. If an offeror offers investors an investment which is, as described, a CIS, he is offering a participation in a CIS, even if his true purpose is that once he has received the money he will simply abscond with it. The other is as to what the actual effect of the arrangements is. If the facts of the arrangement are that it satisfies the

definition in s.235, what is offered is a participation in a CIS, even if that is not the purpose of any of those involved.

127. The best evidence of the 'purpose' of an arrangement is likely to be that set out in the promotional material and contractual documentation in relation to it. The best evidence of the 'effect' of an arrangement is likely to be the evidence of how the scheme was actually operated.

"Purpose" – the marketing process

128. The question of the "purpose" of the arrangements takes us to the question of how the investments were in fact marketed. It is common ground that investors were led to believe that they were advancing money to an asset holding company which would own care homes, that those care homes would be operated by a separate entity (QCL), that the investor's entitlement to the promised returns would be a claim on that asset holding company, and that those returns would be financed through the proceeds of the operation of the care homes.

129. It is clear that this was indeed how the investments were marketed. A document entitled 'Introducing Qualia' sent by Qualia to sales agents (expressly to help promote the investments), stated:

> "The rental is serviced by [QCD], a property company, who in turn receive[s] 90% of all profits across from [QCL], the CQC-registered operator, as per the operator lease per home'; and 'Qualia always ensure there is sufficient profit or 'rent cover' in each facility. Both of these factors place comfort within each of our long leaseholders that there is sufficient profit across the business to protect the rental due to them each year. "

130. A 'Frequently Asked Questions' document, also provided to agents, stated:

> "'It is worth noting that Prop Co [i.e. QCD / QCP] owns the freehold to all facilities and are paid 90% of profits from all facilities and generates a level of development profit also thus creating a very strong asset-backed property company from which the rental and buy backs are serviced'; and 'Rental income is serviced by [QCD/QCP], which manages the lease to [QCL] and receives 90% of all operational profits from each facility.' "

131. A Qualia 'Agent Training Pack' for the Newton Manor care home stated:

> "QCD have an arrangement in place with the Operational Company ([QCL]) whereby they operate the facility and pay 90% of all operational profits to QCD."

132. The Lupton Fawcett Report seen by many investors also refers to QCD receiving 90% of QCL's profits.

133. When a client asked about the financial strength of QCD, he was told:

> "Owning the freehold and receiving 90% of profits from all facilities creates a very strong asset-backed property company from which the rental and buy backs are serviced to the investors."

134. What is important in this regard is that at no point were investors given any reason to believe that the source of the repayment due to them would be anything other than the profits made by QCL out of the operations of the homes collectively. I therefore do not believe that it can be argued that the offering to investors was made on any basis other than that their potential return on their investment was entirely conditional on the profitable operation of the Qualia portfolio of homes.

135. Finally, on "purpose", Mr Forster's position is that it cannot have been his purpose to offer investors participations in a CIS because he had received counsel's opinion to the effect that the arrangements were not a CIS. I will return in due course to the question of how much reliance Mr Forster is entitled to

place on this opinion. However, the point here is that the purpose of the scheme is different from the purpose of the promoter. The purpose of the scheme was to permit participants to participate in the revenues to be derived from the operation of the homes, and that remains true regardless of Mr Forster's state of mind.

Pooling

136. Mr Forster – quite properly - admits that the investors had no day-to-day control over the management of the property and that the property was managed as a whole by or on behalf of the operator(s). As such, the FCA does not need to show that the investors' contributions, and the profits or income out of which payments were to be made, were pooled.

137. However, the Defence prepared by Counsel for Mr Forster argued that where a participant both owns an asset of the scheme and is entitled to a fixed return, there is no "pooling", since the return due is payable regardless of the performance of the asset. I should therefore deal with the question of pooling here.

138. In *FCA v Capital Alternatives* [2014] EWHC 144 (Ch) at [159], Nicholas Strauss KC stated:

> "'In my opinion, [the term 'pooling'] bears its ordinary meaning. There is pooling where the profit from the investment property provides a fund to be used for the combined or common benefit of all investors.'"

139. Where – as I have held above – the fixed element of the amount payable to participants is in fact primarily performance dependent, the result is a single scheme, and the assets of the scheme are properly regarded as pooled. If the

economic effect of the arrangements taken as a whole is a pooling, the mere fact that the contractual terms specify otherwise does not save the arrangements from constituting a pooling.

140. It should also be noted in this regard that it was clear to investors that the returns due to them were to be paid to them regardless of whether their room(s) were occupied or not. Some investors were explicitly told that income and profit generated from the care homes would be pooled together within QCD, and that if a care home was not performing at a profitable level, returns to investors would be paid from the group and not tied to a specific care home (let alone the investor's care room). Given this background, I can see no argument that there was no pooling.

Indirect Offering

141. The fact that I have concluded that the investments were, as offered, participation in a CIS, means that the question of whether the effect of the triggering of the Management Provisions would have been to turn them into a different kind of CIS is not relevant. However, since I heard detailed argument on the point, I shall express my conclusions.

142. Investors in the scheme were told that they had – in effect – two options as regards their room. One was to sell it back to Qualia at a specified price, and the other was to allow it to be operated by Qualia on the basis that they would continue to receive a proportion of the rental received for that room. Opting for the latter arrangement was described as "triggering the Management Provisions".

143. I think that it is clear that the Management Provisions, once triggered, would have eliminated all of the grounds on which Mr Forster relied to support his argument that the arrangements were not a CIS. *Prima facie* there would have been no pooling, but there would necessarily have been "management as a whole" (since it would have been both physically impossible and illegal for the investor to manage the room directly himself), so the other requirements of CIS characterisation would have been satisfied.

144. The question which arises is therefore as to whether, even if the investments as initially offered were not participations in a CIS, the fact that they could be varied in such a way as to make them participations has the effect of making the offer of the initial investments an offering of a participation in a CIS.

145. As a preliminary point, Mr Forster argues that the Management Provisions are not in fact relevant, since they were never triggered for any investment. Mr Temple argues that the answer to that question must be 'no'. As observed by Lord Sumption in *Asset Land* (SC) at [91]:

> " 'It is, however, important to emphasise that [s.235] is concerned with what the arrangements were, not with what was done thereafter. Of course, what was done thereafter may throw light on what was originally understood… but it must be possible to determine whether arrangements amount to a collective investment scheme as soon as those arrangements have been made.' "

146. One way to approach this question is to ask who has the option to trigger the conversion. If there is no option – that is, if the instrument will automatically convert into a participation in a CIS at a specified point in time – then it seems to me that the offer of the instrument must be regarded as being an offer of a participation in a CIS. Equally, if the offeror of the instrument can unilaterally

convert that instrument into a participation in a CIS, then the offer of that instrument is an offer of a participation in a CIS. However, if the holder of the instrument has an option to convert the instrument into a participation in a CIS, but also an economically realistic option not to do so, then the offer of the instrument should not be regarded as an offer of a participation in a CIS.

147. In this case, the Management Provisions would necessarily take effect in due course. The effect of the contractual arrangements between the parties was therefore that investors would end up owning a participation in a CIS unless they sold the investment before the relevant date. It seems clear to me that an offering of an investment with these characteristics does constitute an offer of a participation in a CIS.

148. For all of these reasons I am of the view that the arrangements with respect to the businesses of QCP and QCD constituted a CIS, and that the investments that were offered to investors constituted participations in a CIS.

2. CONTRAVENTIONS OF FSMA

149. There are a number of things which follow from a finding that the arrangements constituted a CIS.

The General Prohibition

150. The establishment and operation of CISs in the UK constitutes a regulated activity under FSMA, as does the sale of units in a CIS to investors. Section 19 FSMA provides that no person may carry on a regulated activity in the United Kingdom unless they are authorised or exempt. None of the entities involved in the sale of the Qualia investments were authorised. It is therefore clear that the

Investment Companies, and any other person involved in the offering of units, would have been acting in breach of s.19 for the whole of their commercial lives.

151. Section 21 of the FSMA prohibits, in the course of business, the communication of invitations or inducements to engage in investment activity unless the person is authorised or the content of the communication is approved by an authorised person. Any unauthorised person contravenes s. 21 FSMA where, in the course of business, they communicate an inducement or invitation (and that communication has not been approved by an authorised person) to either:

   i) Enter (or offer to enter) into an agreement, the making or performance of which by either party involves buying or selling units in a CIS; or

   ii) Exercise rights conferred by units in a CIS to acquire, dispose of, underwrite or convert units in a CIS.

   It seems to me that all of the extensive marketing material presented to me in evidence satisfies this description.

152. There is no suggestion that any materials in this case were approved by an authorised person. Accordingly, any promotion of them by the Investment Companies or FGL breached s. 21 FSMA.

153. Both s.19 and s.21 operate on the traditional UK legislative model in this area, where a very broad prohibition is qualified by a very large number of exemptions. It is common ground that none of these exemptions apply in this case.

3. DID THE INVESTMENT COMPANIES MISLEAD INVESTORS?

154. Questions about the state of mind of a company are not always straightforward. In *FCA v Avacade* [2020] EWHC 1673 (Ch) at [398]-[402], Mr Johnson KC (sitting as a DHCJ) concluded that, where it is alleged that a corporate entity made false and misleading statements, it is necessary for the FCA to show that the entity's controlling mind and will (i.e. its directors) were aware of relevant statements, and knew them to be false, or made recklessly.

155. The first question that requires to be addressed is therefore the extent to which Mr Forster was in fact the controlling mind and will of both the Investment Companies.

156. There is no doubt that he was presented externally as such. He was variously described as the 'Chief Operating Officer' and the 'Chief Executive Officer' of the Investment Companies in promotional materials.

157. The Lupton Fawcett Report describes Mr Forster's role as being:

> "'… responsible for the operation, direction and growth of [QCD]. His intention is to grow QCD into a leading owner of care homes, predominately in the North of England, adopting a buy-to-let financial model… Robin aims to make Qualia a quality brand in the provision of dementia care, by delivering good returns to the property owners and high quality care to the residents.'"

It is clear that Mr Forster was represented externally as the 'moving light' behind the Qualia group.

158. The evidence that we have as to the internal administration of these entities shows that this was an entirely accurate picture. Mr Forster was not only

responsible for the overall direction and strategy of the companies, but was active in their management and operations.

159. Mr Forster had oversight of every aspect of the operation of the Qualia scheme and business. There were several points in Mr Forster's oral opening and cross-examination when he describes actions that were taken, and decisions that were made, in the first person ('I' or the collective 'we' or 'our'). Mr Forster also accepted that he had read and agreed with the description of his role in the Lupton Fawcett Report as being 'responsible for the operation, direction and growth of [QCD]'. He also accepted that he was the head of the Board for the Investment Companies and QCL. It is also clear that:

    i) He made the decisions, and lead the negotiations in respect of, transfers from MBI Walsden to Qualia owned care homes;

    ii) He was responsible for agreeing, and/or did agree as a matter of fact, commissions with sales agents, and approving payments of commissions. This is contrary to his evidence in his witness statement that he had little to do with agents;

    iii) He communicated with, called and both was willing to meet and did meet individual investors. Again, this is contrary to his evidence in his witness statement.

160. That other directors or staff members were also involved in various aspects of the business – from marketing to contract administration – is beside the point. He is a classic example of a 'moving light' behind a company – a hands on owner and director who led the strategy of the company and was involved in its

day-to-day operations. It is also clear from his own witness statement that he was the driving force behind the establishment of the Qualia companies and investments.

161. I am therefore entirely satisfied that Mr Forster was in practice the guiding mind of the Investment Companies. Thus the question of whether the Investment Companies made statements which they knew to be false or misleading is simply a question as to whether Mr Forster knew that those statements were false or misleading.

Misleading Statements and Impressions

162. Section 89 (misleading statements) of FSA 2012 provides, relevantly, as follows:

> (1) Subsection (2) applies to a person ("P") who –
>
> (a) makes a statement which P knows to be false or misleading in a material respect,
>
> (b) makes a statement which is false or misleading in a material respect, being reckless as to whether it is, or
>
> (c) dishonestly conceals any material facts whether in connection with a statement made by P or otherwise.
>
> (2) P commits an offence if P makes the statement… with the intention of inducing, or is reckless as to whether making it… may induce, another person (whether or not the person to whom the statement is made) –
>
> (a) to enter into or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement or
>
> (b) to exercise, or refrain from exercising, any rights conferred by a relevant investment.

163. Section 93(3) of FSA 2012 defines 'relevant agreement' as 'an agreement – (a) the entering into or performance of which by either party constitutes an activity

of a kind specified in an order… and (b) which relates to a relevant investment.' Section 93(5) defines 'relevant investment' as 'an investment of a kind specified by an order…'. In respect of which:

i) Art 2 of the Financial Services Act 2012 (Misleading Statements and Impressions Order) 2013 ("MSIO") specifies the activities for the purposes of s. 93(3)(a) as including, relevantly, Art 14 and 51ZE of RAO ('units in a CIS' and 'establishing and operating a CIS').

ii) Art 4 MSIO provides that 'relevant investments' are 'controlled investments' which are, in turn, defined by Art 1 as those investments listed in Part 2 of Schedule 1 to the FPO which, relevantly, includes paragraph 19 ('units in a CIS').

164. Section 90 (misleading impressions) of FSA 2012 provides as follows:

> '(1) A person ("P") who does any act or engages in any course of conduct which creates a false or misleading impression as to the market in or the price or value of any relevant investments commits an offence if –
>
> (a) P intends to create the impression, and
>
> (b) the case falls within subsection (2) or (3) (or both).
>
> (2) The case falls within this subsection if P intends, by creating the impression, to induce another person to acquire, dispose of, subscribe for or underwrite the investments or to refrain from doing so or to exercise or refrain from exercising any rights conferred by the investments.
>
> (3) The case falls within this subsection if –
>
> (a) P knows that the impression is false or misleading or is reckless as to whether it is, and
>
> (b) P intends by creating the impression to produce any of the results in subsection (4) or is aware that creating the

> impression is likely to produce any of the results in that subsection.
>
> (4) Those results are –
>
> (a) the making of a gain for P or another, or
>
> (b) the causing of loss to another person or the exposing of another person to the risk of loss.'

165. Subs (5) and (6) define the terms 'gain' and 'loss' for the purposes of subs (4).

166. The effect of these sections is as follows. S. 89 criminalises the making of any misleading statement where (a) the person making the statement knows that, or is reckless as to whether, the statement is false, and (b) the statement is made with the intention of inducing a person to (inter alia) purchase an investment.

167. Section 90 of the FSA2012 criminalises doing any act, or engaging in any course of conduct, which has the effect of creating a false or misleading impression as to the value of an investment. It applies where (a) the person responsible for the act or conduct intended to create the misleading impression, and either (b) the misleading impression was created for the purpose of inducing another person to deal in investments, or (c) the misleading impression was deliberately or recklessly created for the purpose of enabling the person making it to make a gain for himself or another.

168. In relation to s. 397(1) FSMA, the predecessor to s. 89 of FSA 2012, HHJ McCahill KC in *Capital Alternatives* at [368] held that knowledge includes wilful blindness and recklessness which should be construed consistently with *R v G* [2004] 1 AC 1034 at [41]:

> "'A person acts recklessly … with respect to—(i) a circumstance when he is aware of a risk that it exists or will exist; (ii) a result

> when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk.'"

169. Accordingly, the issues that need to be decided are:

    i) Which statements/impressions were in fact made.

    ii) Whether the conduct created a false or misleading impression as to the value of the care home rooms (for the purpose of s.90(1) FSA 2012 only).

    iii) Whether the Investment Company intended to make the impression (for the purpose of s.90(1)(a) FSA 2012 only).

    iv) Whether the Investment Companies knew that any such statement/impression was false or misleading or were reckless as to the same (for the purpose of s.89 and/or 90(3)(a) FSA 2012).

    v) Whether the statements were made with the intention of inducing, or reckless as to whether making it might induce, a person to enter into a relevant agreement or to exercise or to refrain from exercising any right conferred by a relevant investment (for the purpose of s.89 FSA 2012). For the purpose of s.90(2) FSA 2012, recklessness as to inducement will not suffice and intention to induce is needed.

    vi) Whether the Investment Company intended, or was aware, that creating the impression would lead to a gain for the Investment Company (or another person) or cause loss or the risk of loss to another person (for the purpose of s.90(3) and (4) only).

170. The FCA in effect identifies two ways in which it says that the promotional materials were misleading. The first applies to all of the materials, and is that they collectively gave the impression that the Qualia business model was viable and capable of repaying on the terms agreed the investments which it had raised (the "Sustainability Impression"). The second is specific to a number of sales of care homes (the "Unowned Care Homes"). In these cases, the FCA say that the Investment Companies made statements and/or gave the impression that they owned the rooms that they were selling, when in fact they did not (the "Unowned Care Homes Impressions")..

The Sustainability Impressions

171. The FCA's case is that investors were given the following impressions ("the Sustainability Impressions"):

i) That the care homes would produce sufficient profit to allow the Investment Companies to meet their obligations under the Subleases and the Option Agreements.

ii) That the Investment Companies (and Mr Forster) honestly believed that they would be able to meet their obligations under the Subleases and the Option Agreements.

iii) That the care homes would be sustainable in their own right, without relying on the investments of later investors to meet the obligations due to earlier investors.

172. It is clear that the Sustainability Impressions were in fact communicated – they occur regularly throughout the available documentation, and Mr Forster affirmed his belief in their truth on every possible occasion during his testimony.

173. The real issue in dispute is whether the Sustainability Impressions were false or misleading. If they were, it is worth highlighting that s.90 FSA 2012 can be satisfied without proof of knowledge/recklessness provided the Investment Company intended to make the impressions and to induce investors into investing by doing so. It is the FCA's case that:

    i) The Sustainability Impressions were, and always had been, false or misleading.

    ii) The Investment Companies knew from the beginning (alternatively, had come to know at various points in time) that the Sustainability Impressions were false or misleading, yet continued selling care rooms.

    iii) Alternatively, the Investment Companies were reckless as to the truth of the Sustainability Impressions from the very beginning (or, at the very least, at certain points in time) yet continued selling care rooms. That is, they turned a blind eye to the risk of the unsustainability of the investments.

174. As a preliminary point, I should note that the mere fact that an enterprise has failed is not evidence that it was always doomed to fail. The issue here is as to when it should have become apparent that failure was inevitable. In this regard, I should address Mr Forster's evidence as to his Micawberesque belief that something would turn up. The gravamen of his evidence in this regard was that

as long as he continued to grow the Qualia business by increasing the number of homes under management, a combination of ever-rising asset values, increased operating efficiencies and economies of scale would eventually have got the group to a place where it would have some reasonable prospect of meeting the obligations which it had taken on. He was, however, unable to demonstrate any grounds for these beliefs – it does not appear that any sort of analysis or financial projection was done within the group on these issues, and the evidence which he produced as to expected care home values confirmed nothing more than that if he had managed to turn the entire Qualia estate into efficient, well-run homes operating at around the industry average revenue model, he would have been most of the way towards that goal, but still short of it.

175. Consequently, as set out above, it must have been apparent to Mr Forster and others that taken as a whole the Qualia scheme was bound to fail sooner or later:

i) The failure of any one home to meet its obligations would mean that the other homes would not only need to meet their own obligations, but make up the shortfall in the others.

ii) It was known that Qualia's very first care home, Daynes Pathway, was completely non-operational. Indeed, it was left vacant for four years. Its investors were entitled to annual returns of c. £250,000 and had significant buyback obligations in 2022. In effect, it was left to the other care homes – many of which were not profitable and could not sustain their own obligations – to fund the investors in Daynes Pathway.

iii) A further weight around the neck of Qualia's sustainability was Mr Forster's decision to let various investors in another MBI care home (Walsden) transfer into Qualia care homes. This decision, in addition to other payments to MBI investors, increased the obligations of Qualia, without introducing any additional cash, and led to the writing off of a debt of c. £4.9 million.

176. The evidence strongly suggests that nobody in Qualia – including Mr Forster – actually took the time to create a proper business plan for Qualia. Nor did they undertake any financial modelling or work through the numbers/projections to ensure that the scheme was sustainable and would be able to (at any point in the future) generate sufficient profits to pay the investors their entitlements. Mr Forster accepted that, in 2016, no written business plan existed:

> "Q… I haven't seen any business plans dating from 2016 which demonstrate the sustainable model; do they exist?"
>
> A. In 2016, probably not on paper, no.
>
> Q. So they existed in your head; is that it?
>
> A. Not just mine, but you know, codirectors. Latterly we did obviously pull documents and spreadsheets and, you know, things like that together. But yes, I wouldn't say there was a business model there…"

177. If anybody at Qualia did in fact undertake any financial modelling in reasonable detail, it must have been clear to them that the investments were not sustainable. Mr Sowden provides a simple breakdown in his report of the amounts required, on average, to sustain a single care home room. Mr Forster was taken through this breakdown during the course of cross-examination. The upshot of the analysis is that:

i) The Investment Company would have approximately £18,000 per room of profit from the investor's contribution after certain costs (including commissions, care home freehold purchase, legal fees etc).

ii) That profit was sufficient to cover approximately 2.5 years of rental returns in respect of that room.

iii) After that 2.5-year period, each individual care room would have to generate £7,000 per annum or else the Investment Companies would run out of money and be unable to finance the investors' returns (ignoring all the central management costs that QCL's profits also needed to meet).

178. In fact, some (very basic) early modelling appears to have been prepared in respect of Daynes Pathway (by Alistair Barton, the then Sales Director) for the purposes of providing information to an investor. This was also put to Mr Forster during cross-examination. In that email, Mr Barton suggests that, after costs and the first year's rental payment, QCD would be left with only £8,333 of profit per room from the investor's contribution. That is sufficient to fund at most 3 years of rental returns for that room. By the end of that period, it would need to make a profit of £5,500 per room per annum to meet the returns (plus contribution to central costs).

179. Even on this basic analysis, it must have been (or should have been) obvious to Mr Forster or anybody at Qualia that the business would run out of money by the end of (at most) year three and could only be sustained thereafter if new investors were brought into the scheme or the care homes themselves started to produce significant profits.

180. In order to test whether it was, or should have been, obvious from these breakdowns that the investments were unsustainable, it is important to know how long Qualia thought it would take to turn around a particular care home. Here, again, the lack of contemporaneous documentation hampers the analysis and the evidence is inconsistent.

181. In slides for a webinar in September 2017, investors were informed:

> "The Qualia long lease model benefits from an initial 2-year rent-free window. This period gives Qualia the time to implement its staffing and care models and renovation programmes (CAPEX). This rental break is uncommon in the marketplace and affords Qualia the time to bring the home to full strength in order to deliver strong profits in line with its projections before rent becomes payable."

182. Mr Forster denied in evidence that his oral presentation to investors would have suggested that the care homes would have turned around in two years. This evidence is not credible, given that he provided FGL with some answers to provide to an investor who was asking questions, including:

> "Qualia create their operational estimates on their lowest expected projections and as such the minimum level of £674,800 EBITDA for the home would value the home at £5,060,000 within the first two years of trading… "

183. In response to this statement, Mr Forster stated in evidence that:

> "on that particular home there's no way, as I say, there were the odd home that could, but having got in with Hillside after, it was a big challenge that home… The reality was, as I said, that some will take the five years and the full five years, but others can be far quicker. "

184. This response, if true, suggests that Mr Forster was prompting FGL to lie to an investor about the business plan (in response to which Mr Forster agreed 'it's not entirely factual').

185. In his first witness statement, Mr Forster had suggested that it would take 'no less than five years and often more. This time frame however was and is built into the Qualia business model.' Nevertheless he also previously stated whilst giving evidence:

> "Our models always assume from day 1, after the Capex spend is done, that within the period around 18 months we would reach the level of profit after sustaining it. "

186. And also that:

> "we factored in really a four-year period in terms of turning around. At times we did it quicker, no doubt we did, but in answer to your question, yes, we had that timeline that we built in to be able to turn the home around."

187. The difficulty that Mr Forster faces is that:

   i) If the target turnaround time really was two years, as suggested to investors, then Mr Forster has no explanation for why various homes were not producing profits within two years, nor why Qualia continued to sell care home rooms after it became patently obvious that the care homes were not producing the necessary levels of profit within a two year period.

   ii) If the target turnaround time really was five years, then the breakdown of investment sums demonstrated that the companies would run out of money some considerable time before the care homes could be turned around.

Lack of formal arrangements

188. There also seem to have been no agreements in place between the Investment Companies and QCL as regards payments from QCL to QCD to reflect the fact that QCD was allowing QCL to operate properties owned by them.

189. The point here is that whereas QCD owned the rooms, the revenue generated from those rooms (i.e. the rental charges for the rooms) was collected entirely by QCL for its own account. For the owners of those rooms, the question of whether their asset was worth anything or nothing was a function of the amount which they were entitled to receive from QCL in respect of it. It is therefore somewhat bemusing that there does not appear to have been any common understanding (contractual or otherwise) as to what those rights might have been.

190. I think that the lack of such an understanding was extremely significant. There were only two possible routes by which QCD could pay investors their promised returns. One would be from monies received from new investors; the other would be from monies paid by QCL - there was no third possibility. The fact that the directors of QCD appear to have attached no significance at all to the absence of any claim on QCL seems to me to make clear that their present intention was that investors would have to be paid out of the proceeds of new investments, since there was no visible committed income stream that would enable them to be paid any other way.

191. The Lupton Fawcett Report, drafted in June 2016, expressly stated that there was an 'agreed operator lease'. However, despite this having been the subject of a specific question from Mr Lindsay to Mr Forster, this was untrue. There was no contract between QCL and QCD for the Qualia homes (until the eve of

administration). Given that one of the objectives of the Lupton Fawcett report was to provide reassurance to potential investors as to the legal structure of the arrangements, the fact that the report seems to have been deliberately misleading on this point is worthy of particular note.

192. The FCAs expert, Mr Sowden, summarises his conclusions in his report that the schemes were 'not sustainable' as follows:

> "'In order to continue, the shortfalls could only be funded from existing cash balances or from surplus funds generated from new investors… In summary, therefore, based on the available Qualia prepared information, on an annual basis it appears that QCL was unable to generate sufficient annual profits to sustain the Scheme and pay rent for the MBI homes.'"

193. Mr Sowden's report makes clear that from a relatively early stage in the development of the Qualia business, a competent financial analyst would have been able to identify that the financial structure was unsustainable, and that continuing to expand the business would simply have had the effect of increasing the losses of investors.

194. It seems to me that this is sufficiently clear on the facts that the only way that Mr Forster could not have been conscious of it would have been if he had deliberately closed his eyes to it.

195. For the reasons set out in paragraph [50] above, I am satisfied that from at least April 2019 it must have been clear to Mr Forster that the Qualia business was unsustainable, in that it would run out of cash long before there was any prospect of its generating significant revenue.

196. Prior to that point, however, there remains the issue of recklessness. At the time of the very first Qualia investment sale on 23 March 2016, there is no evidence

that Mr Forster had any reason to believe that the homes concerned would generate the amounts needed to pay the returns which he was promising to investors – indeed, his experience with MBI should have taught him that those returns were most unlikely. It is clear that Mr Forster, in his capacity as owner of FGL, was heavily incentivised to promise a level of returns which would maximise immediate sales and therefore commissions. Possibly more importantly, in order to keep the Qualia show on the road it was necessary to continue to generate cash inflows through new sales of rooms. The promised returns must therefore be at a level sufficient to keep that revenue stream flowing. It is entirely unclear how any responsible businessman – in particular one with the recent experience in the sector of Mr Forster – could have concluded that the returns promised to investors could be delivered on a sustainable basis. I am therefore of the view that the promises made to investors were recklessly made from the date of the very first sale of a room made by Qualia.

197. In summary, as regards the Sustainability Impressions, it is clear that:

i) The Investment Companies made the Sustainability Impressions and did so to induce would-be (and existing) investors to invest (or invest further).

ii) The Investment Companies intended to make those impressions.

iii) Those Sustainability Impressions were false or misleading right from the very beginning and, throughout the life of the investments, new investors were always needed to meet the obligations owed to earlier investors.

iv) The Investment Companies knew by at least April 2019, when Mr Forster proposed that investors' entitlements be cut to 6%, that the Sustainability Impressions were false or misleading.

v) The Investment Companies were reckless from the very beginning (and throughout 2016 to 2020) as to the truth of the Sustainability Impressions.

198. I am therefore satisfied that the Investment Companies were in breach of s.90 FSA 2012.

The Unowned Care Homes Impressions and Statements

199. The position as regards the Unowned Care Homes Impressions is the mirror image of that as regards the Sustainability Impressions. In this case, it is clear that the impressions or statements would have been false if they had been made, and the question is purely as to whether they were in fact made.

200. It is the FCA's case that QCP, the Investment Company:

i) Made false/misleading statements or gave impressions to the effect that it owned the freehold to the Unowned Care Home in question;

ii) Made false/misleading statements or gave impressions to the effect that investors had rights to an identifiable room within the Unowned Care Home;

iii) Dishonestly concealed from the investors the material fact that the Investment Company did not own the relevant Unowned Care Home.

The question of whether QCD had any involvement in the making of these statements, or the giving of these impressions is unclear. I will therefore confine these findings to the position of QCP.

201. It is accepted that the Investment Company never owned the Unowned Care Homes, and it is necessarily true that any statement or impression to the contrary would have been false or misleading. Mr Forster therefore argues that no such statement was ever made or impression given.

202. Mr Forster's primary case is that he had so little involvement with the marketing materials and process that he did not know what had been said to investors as regards ownership of the Unowned Care Homes. Hence his evidence was that he did not know whether the Unowned Care Homes Statements were made or not. However, his fallback argument was that even if such statements had been made, the solicitors acting for the purchasers must have told them what the true position was as regards ownership. Consequently no investor can have been misled.

203. We begin with Mr Forster's primary case, that the statements were not made. In this regard it is necessary to rely heavily upon the evidence led by the FCA from investors.

204. In this regard I note that Mr Forster did not choose to cross-examine any of the FCAs investor witnesses. Mr Temple therefore says that their evidence should stand as unchallenged. I do not propose to hold Mr Forster, as a litigant in

person, to the same standard in this regard as I would hold counsel. However, in practice there do not seem to be very many points of difference between them, since the investor witnesses describe the materials and the processes which were used to sell investments to them, whilst Mr Foster's case is that he was unaware of the details of this process. I am therefore inclined to take the FCA investor witness testimony as correct as regards what was communicated, since it is implicitly as well as explicitly unchallenged.

205. The marketing materials seem to me to exploit an ambiguity in the common understanding of property purchases. The marketing materials, in particular, are explicit that "upon receipt of your documents and balance of purchase funds, exchange and completion can take place", and this terminology was employed even in the case of brochures in respect of homes which Qualia did not own (see for example the brochure for Poppy Grove at F 639 and a sample report on title at D 1231). What this actually meant in practice was that (a) the money paid by the investor would pass immediately to Qualia, (b) the investor would acquire a lease if (and only if) Qualia completed the purchase, and (c) there was no guarantee of that happening. However, it is clear from the FCA's interviews with investors that this was not their understanding. They felt that they had been given to understand that Qualia already owned the room (otherwise how could it be selling it?), and that the term "completion" referred only to the transfer of the room to them.

206. The difficulty with this case is that it is necessary to infer from the limited evidence available what was actually said to investors. In considering this question, I am forced to rely only on the evidence from investors collected by

the FCA. I do not rely uncritically on this evidence – a disappointed investor is not an impartial witness, and allowance must be made for a subconscious desire to present facts in the best light, even where the witness is trying as hard as they can to be as accurate and dispassionate. However, my starting point must be their testimony. Of the FCA investor witnesses who invested in two of the Unowned Care Homes, their evidence was as follows:

207. Mr Cronin (Airedale) stated:

> "At paragraph 14: 'When I began the process of purchasing each of the rooms, I believed that I was buying them from Qualia as this was the name on the account into which I paid the initial deposit for the property. It was also the name on the reservation form and legal documents that I signed during the conveyancing process. I believed that Qualia were the legal owners of the properties at the time, and no one told me otherwise.'"
>
> "At paragraph 63: 'Upon receipt of the Welcome Pack [for Alder Manor], I believed that completion had taken place. The front cover and Welcome message thanked me for my purchase. I believed that I was now the legal owner of the property and was not told otherwise.'"
>
> "At paragraph 65: After being told by Gaddes Noble that the longstop date had passed and that, therefore, he could rescind the sales contract for Alder Manor if he wanted to, Mr Cronin's evidence is '… I was confused because I thought completion had taken place. After all I had received the Welcome Pack and was receiving quarterly payments.' Mr Cronin sent a contemporaneous e-mail to this effect to Gaddes Noble."
>
> "At paragraph 67: 'I had realised by then that the reason completion could not take place was because Qualia were not the legal owners of Airedale, yet none of my documents suggested anything other than the property was owned by Qualia when I believed that I had bought it.'"

208. Mr Woodward (Loxley Chase) states:

> "At paragraph 63(c): 'Nowhere in the documents did it state that the property was still owned by another operator and this was not discussed with me at any time by Joe Frost or anyone from Gaddes Noble. If I had known Qualia did not own the Poppy

> Grove care home, including the rooms my wife and I were investing in, then I would not have proceeded with the investment.'"
>
> "At paragraph 66: 'Leah Williams of Qualia later sent me and my wife an email attaching a Welcome Pack which referred to the care home as Loxley Chase. It specifically referred to it as a "Qualia Care Home". I therefore believed that it was owned by one of the Qualia companies and that it was open and being operated by another of the Qualia companies. Neither the Welcome Pack nor Ms Williams' welcome email gave any indication that Qualia did not yet own Loxley Chase.'"
>
> "At paragraph 71: 'On 26 September 2020 I received an email from Graham at Elite to tell me that completion had yet to take place on Qualia's purchase of Poppy Grove… According to the contract, I had a maximum of 90 days to proceed with the purchase or rescind the contract… This was the first time I was made aware that Qualia did not in fact own Poppy Grove and there was a problem with the purchase.'"

209. The position therefore seems to be that the difference between the completion of the sale contract, the completion of Qualia's purchase of the home and the completion of the grant of the lease to the investor was elided sufficiently during the sale process as to become invisible to investors. The statement made to investors was that, in effect, the Investment Company owned the Unowned Care Homes.

210. The point could be made on behalf of Mr Forster that it was the regular practice of Qualia to begin selling rooms in a home as soon as contracts were exchanged, and that all such sales carried a degree of risk that the purchase transaction might never complete. That is true. However, the fact that Qualia had in the past taken the risk of selling rooms which it did not yet own and got away with it does not demonstrate that that was in fact a reasonable thing to do.

211. The reasonableness of such sales rests entirely on the belief that completion is certain or almost certain. However, completion of the sale of any care home

requires the consent of the CQC, and the CQC's consent, as we have seen, turns on (inter alia) their assessment of the financial condition of the buyer. From Autumn 2019 it should have been entirely clear to Mr Forster that no such consent would be forthcoming.

212. I am satisfied that no attempt was made to communicate the true state of affairs to the investors. I think the investors were therefore entitled to proceed on the basis suggested by Mr Temple – that if a person purports to sell you an investment, it is a legitimate assumption that that person owns that thing or can deliver ownership of it. For at least some of the sales made of rooms in the Unowned Care Homes, it seems clear that at the time that the sales were made, there was no prospect of the sale being completed and the room transferred to the investor.

213. We therefore turn to Mr Forster's secondary case, that even if what was said to investors was reckless or untrue, since they would have received correct information from their solicitors, the effect of the untruth was negated.

214. On this point, the FCA's position is that in any case where the requirements of s.89 or 90 are satisfied, it is not a defence to argue that, even though the person concerned made misstatements or attempted to give a false impression, that person reasonably believed that any misimpression given would be corrected by a third party. I think that this must be correct. If I sell shares in a company on the basis of a representation that the company has a track record of profitable trading, when in fact it has not, it is no defence that the buyer could have discovered the truth for himself by consulting Companies House. I think that the position here is that if Mr Forster had in fact represented that the homes

concerned were owned by Qualia where in fact they were not, the only defence that might avail him would be to show that he had done everything possible to draw attention to and correct the relevant statements. He in fact did nothing of the kind.

215. In any event, Mr Forster's confidence that the solicitors would ensure that investors had the true facts does not seem to have been justified. He had examined what the solicitors were in fact telling those clients. In Paragraph 38(c) of his trial witness statement he says that he "has seen some of the reports on title which Gaddes & Noble prepared for leaseholders, possibly some I saw at the time…". It is in fact unsurprising that Mr Forster had seen these documents. Qualia directed potential investors to Gaddes Noble, whose services investors were encouraged to engage on the basis that Qualia would pay their legal fees. Gaddes Noble were, in the overwhelming majority of cases, engaged by investors. It was even put to Mr Forster that he was 'keeping an eye' on Gaddes Noble to which he replied that Paula Heslop (another Qualia director) was doing exactly that.

216. Gaddes Noble appear to have had a relatively standard "report on title" which they provided to investors. This said – perfectly correctly – that although the purchase price for the room was to be paid immediately, the lease in favour of the investor would only be granted after Qualia completed the purchase of the home. The report as regards Loxley Chase specified that completion might not happen, and that if it did not happen by a specified longstop date, the investor was entitled to rescind the contract of sale and ask for a refund of his money. It is true that an intelligent and engaged investor who had read such a report

carefully would have realised that his money was being put into a pot which was intended to be used at some point in the future for the purchase of the home, but that until then it was at the absolute disposal of the Investment Company (the report on title that I have seen is explicit that the money paid by the investor would be immediately and unrestrictedly available to the seller). However, I do not think that this comes anywhere close to providing a defence for Mr Forster if it can be shown that his communications to investors either said something different or created a different impression.

217. The way in which investors had been misled was as to the facts of the situation. The legal advice which they received could only have been meaningful to them if they had been aware of the true facts. I find that their misapprehensions as to the facts were directly attributable to what they had been told during the sales process, and that, given those misapprehensions, there was nothing in the report on title which they received from the solicitors which would have given them cause to realise that the position was not as it had been represented to them. More importantly, Mr Forster was aware of what the solicitors were telling the investors, and must have been aware that this was the case.

218. Mr Forster also argued that investors could have deduced that the investment was in a yet-to-be-acquired home because investors were told that their funds could be held either as agent or as stakeholder. The problem with this argument is that there is no evidence that investors were ever told any such thing. The idea was floated in a document entitled 'Qualia FAQ', but this document is not in a form suitable to be sent to investors, and there is evidence that it was simply sent to sales agents as part of Qualia's sales packs to agents. In this case, it is

clear that the text concerned was intended as a response to a query from an investor – in other words, how the sales agent should respond if the investor found out that the home was not yet owned. There is absolutely no indication that the possibility of funds being held as stakeholder pending completion of the acquisition of the home was ever raised pro-actively with investors. It should be noted there no evidence that any investors funds were ever held on a stakeholder basis. It is also notable that the standard Report on Title issued by Gaddes Noble expressly states that the deposit funds (which is the entire purchase price) will be held as agent by the Investment Company's solicitors and will be released upon exchange of contracts. There are no Reports on Title in the Trial Bundle that indicate any investor had their funds held as stakeholder or was given that option.

219. Standing back, this is unsurprising. The primary reason that Mr Forster was so keen to sell rooms in the Unowned Care Homes was to raise cash in order to meet the existing obligations of the Investment Companies as regards other homes. Sale proceeds held as stakeholder would have been useless for this purpose. It was therefore very heavily in Mr Forster's interest that investors' funds should be held as agent, and it is therefore unsurprising that other possibilities were not raised with them. This was presumably the basis of the statement in Mr Forster's first witness statement to the effect that "All of the contracts with investors stated that the investment was held as agent not stakeholder". Consequently, I do not accept that investors were ever told that their money could be held on a stakeholder basis pending completion of the purchase by Qualia of the home, and I therefore do not accept that they should, on this basis, have realised the true position.

220. I am therefore not required to decide (and do not decide) whether Mr Forster might have a defence if he could show that he knew that the misimpressions which he was giving would be corrected at a later stage by a third party. In fact, he could not have had any such belief. I am therefore clear that he deliberately set out to misrepresent to investors the position as regards ownership of the unowned care homes in order to increase his revenue from sales of rooms in those homes.

The statements or impressions were false / misleading

221. It was plainly false to suggest that Qualia owned the freehold of the Unowned Care Homes, or that investors had rights to receive rent under the Sublease.

222. Given that the impression related to the investors obtaining property rights, registered at the Land Registry, it is clear that the non-existence of those rights went to the value of the investments being made. As the whole purpose of the promotions was to sell rooms, which Mr Forster saw as generating a profit for the Investment Companies, it is clear that s. 90(3) and (4) are met as regards the Unowned Care Homes statements

223. I am therefore satisfied that, as regards the Unowned Care Homes Impressions:

i) The misleading statements which gave rise to the Impressions were made.

ii) The conduct of the Investment Company created a false or misleading impression as to the value of the care home rooms.

iii) The Investment Company intended to make the Impressions.

iv) The Investment Company knew that the Impressions were false or misleading, or was reckless as to the same.

v) The Impressions were given with the intention of inducing, or recklessly as to whether making them might induce, a person to enter into a relevant agreement.

vi) The Investment Company intended, or was aware, that creating the impression would lead to a gain for it (in the form of the profit on sale of rooms).

224. I am therefore satisfied that as regards the sale of rooms in the Unowned Care Homes, the Investment Company breached both s.89 and s.90 of the FSA 2012.

4. WAS MR FORSTER'S KNOWINGLY CONCERNED WITH THE INVESTMENT COMPANY'S BREACHES?

225. The FCA ultimately seeks restitution orders against the Defendants under s. 382 FSMA, which provides:

> "'(1) The court may, on the application of the appropriate regulator… make an order under subsection (2) if it is satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and –
>
> (a) that profits have accrued to him as a result of the contravention; or"
>
> (b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention…'

226. 'Relevant requirements' for these purposes include any requirement imposed under FSMA and s. 89 and 90 FSA 2012: s.382(9).

227. The questions before me are therefore:

   i) Whether Mr Forster was knowingly concerned in the contraventions of the Investment Companies and/or FGL; and

   ii) Whether Mr Forster has been personally enriched as a result of any such contraventions (for the purposes of s. 382(1)(a), (2)(a) and (2)(c)).

Knowing concern – summary of legal principles

228. Where intentional misconduct is alleged, cogent evidence is required to justify such a finding, since (it is said) intentional misconduct is exceptional, and therefore inherently improbable. Even here, however, there is a wide spectrum of probabilities as to the occurrence of reprehensible conduct (see *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408 at [47] per Vos C). Further, if a person's evidence is found to be dishonest, the inherent improbability of his having acted improperly elsewhere may be much diminished (see *Arkhangelsky* at [120] per Males J).

229. A useful summary of the requirements of knowing concern is set out by HHJ McCahill QC in *Capital Alternatives* [2018] 3 WLUK 623 at [797]-[810], which was later endorsed and adopted by Mr Johnson QC in *Avacade* [2020] EWHC 1673 (Ch) at [454]-[455]. In summary:

   i) The most obvious example of a person knowingly concerned in a contravention will be a person who is the 'moving light' behind a company which is carrying on investment business in an unlawful manner: see Sir Nicholas Browne-Wilkinson VC in *Securities and Investments Board v Pantell SA* (No 2) [1993] Ch 256 at 264D-E.

However, the question is not limited to those who are the 'moving lights' and each case must be considered on its own unique facts.

ii) Mere passive knowledge is not sufficient. The person must have actual involvement in the contravention to be knowingly concerned. That said, the concept of 'involvement' is a broad one, covering those who pull the strings at a directorial and/or managerial level and could, in an appropriate case, include those who are involved in a lower level, depending on their knowledge and participation in the contravention.

iii) The word 'concerned' has a broad meaning. It can cover a great many activities, including those that are behind the scenes. Therefore, it can capture both 'front office' and 'back office' functions performed with the necessary knowledge because, in a sales operation (for example) both parts of the business are required for sales to be effected.

iv) The relevant knowledge is knowledge of the facts on which the contravention depends. It is immaterial whether or not the individual knows that such facts constitute a relevant contravention. The individual is presumed to know what the law is and ignorance of the law is no defence: see *SIB v Scandex Capital Management A/S* [1998] 1 WLR 712 at 720F-H.

230. The Court of Appeal also considered the meaning of 'knowingly concerned' in *FCA v Ferreira* [2022] EWCA Civ 397. *Ferreira* involved a defendant who believed that a company's financial promotions had been approved by an authorised person, though they had not in fact been so approved. At first

instance, the judge held that it was unnecessary for the FCA to show that Ms Ferreira knew that the communication was not approved.

231. Both the trial judge and the Court of Appeal applied the same two-limb approach to the question of 'knowingly concerned': (i) the person must have been actually involved in the contravention, and (ii) that the person must have had knowledge of the facts on which the contravention depended (see [17]). The Court of Appeal noted at [18] to [19] that the second limb of this approach reflected the principles cited above in *Scandex*, and that the parties did not dispute the correctness of these initial steps in the trial judge's reasoning.

232. It is the FCA's case that Mr Forster was 'knowingly concerned' for the purposes of s.382 FSMA in the following contraventions:

i) The Investment Companies' contraventions of:

a) Section 19 FSMA by establishing and operating a CIS and selling units in a CIS.

b) Section 21 FSMA for promoting a CIS and thereby inviting investors to buy units in a CIS.

c) Sections 89 and/or 90 FSA 2012 by making the false or misleading statements/impressions, namely the impression that the relevant Investment Company owned the Unowned Care Homes, and the Sustainability Impressions.

ii) FGL's contravention of s.21 FSMA for promoting a CIS and thereby inviting investors to buy units in a CIS.

Mr Forster's knowing concern in the establishment and operation of the CIS and the promotion of the investments

233. For the reasons given above, I find that Mr Forster was the guiding mind of the Investment Companies and FGL, and was therefore fully involved in these activities as conducted by those companies. He was the force behind the establishment of the Qualia scheme, and participated fully in the marketing process, drafting and reviewing promotional materials, speaking at seminars, and engaging with individual investors. He was clearly knowingly concerned with these activities.

The activities of FGL

234. Mr Forster was the owner of FGL, which was engaged as agent in the promotion of investments in the scheme. In his evidence Mr Forster downplayed his involvement with FGL. However, he was undoubtedly an active owner of that company. In that regard, his attention seems to have been focussed on ensuring the continuing sales of rooms to new investors. In this regard:

   i) He approved commissions and commission payments to FGL sales agents, setting out the structure and amounts of commissions that FGL agents were to receive.

   ii) FGL personnel frequently e-mailed him to comment on or simply to be kept abreast of emails sent by FGL agents to investors.

   iii) Mr Forster directed an entire 'Summer incentive' marketing strategy to be employed by FGL and drafted the promotional email to be sent out,

directing it to be sent to FGL's entire database. Mr Forster also accepted in cross-examination that there would be a few examples of these.

235. Again, it is not inconsistent with 'knowing concern' that others – such as the FGL sales agents or even Mr Tasker – may have had more involvement in the day-to-day operations of FGL. What the evidence demonstrates is that Mr Forster both (i) had knowledge of the activities of FGL in the marketing of the Qualia investments and (ii) had actual involvement in those activities. Finally, it was because of Mr Forster that FGL was selling investments in the Qualia scheme in the first place.

Mr Forster's knowing concern in the false or misleading statement/impression in respect of the Unowned Care Homes

236. Although Mr Forster denied it in his evidence, it was clear from the e-mail record that we have that he was sent a draft of the brochure for one of the homes (Opal Ridge) for final approval before it was sent out. The FCA says that this is presented as being normal practice, so it seems likely that he saw, reviewed and approved the brochures for the Unowned Care Homes. These brochures (like the other brochures before it) were not only framed in terms of the investor 'purchasing' a care home room, but (as noted above) referred to the completion process taking approximately 28 days after reservation of the room.

237. Mr Forster also accepted that he would have seen (and contributed to some of) the Welcome Packs which thanked investors for their purchase and referred to the fact that 'completion had taken place'. Whilst his welcome message was not included in later Welcome Packs (including for Airedale and Loxley Chase),

it is clear that he was aware of and approved their contents, being materially similar to those that came previously. Further:

i) He was undoubtedly aware that any such statement or impression would be false for the vast majority of investors that executed their Sales Agreements prior to the freehold purchase of the care home completing.

ii) He accepted that the sale of the rooms in the Unowned Care Homes would not have gone ahead without his approval, and that none of the promotional materials (in particular, the Brochures) would have explained the delay between exchange and completion of the care room purchase.

238. Regardless of the detail of the content of the brochures, Mr Forster must have known from Autumn 2019 onwards that there would be no CQC registration and therefore no completion on these homes. He also knew very well what the brochures said, simply because they said what he knew the other brochures had said. The fact that he knew that the circumstances had changed whilst the brochures had not is itself strong proof that he knew that the position described in the brochures was now inaccurate.

Mr Forster's knowing concern in the Sustainability Impressions

239. For the reasons set out above, I am satisfied that Mr Forster knew (or deliberately closed his eyes to the fact that) the business model behind Qualia was unsustainable. He was entirely aware of the yawning gap between the revenues produced by the business and the liabilities owed to existing investors,

and approved inter-company loans for the specific purpose of using later investor contributions to finance obligations owed to earlier investors.

240. Most notably, it was Mr Forster who proposed in April 2019 to restructure the investors' obligations to reduce their rental returns to 6% (from 8-10%). At the very least from this date, he had both the knowledge of the business' financial position and the unsustainability of the scheme as sold to investors, and yet continued to be involved in the operation and promotion of the Qualia investments thereafter (which included selling rooms to investors using the Sustainability Impressions).

The Legal Advice – Knowing Concern

241. This takes me to the thorniest of the questions which arise from this case – to what extent, if at all, is the legal opinion received by Mr Forster a defence to the charge of knowing involvement?

242. The core of Mr Forster's case is that he was not knowingly concerned in the sale of investments, or in deceit as regards the sale of investments, because he had been advised by counsel that the transactions concerned did not involve investments.

243. The FCA says that the counsel's opinion obtained should be disregarded. They take their stand on the ancient common law position that ignorance of the law is no defence. There is significant authority for this position. The Court of Appeal in *Scandex* held that whether a person knows that the facts constitute a contravention (i.e. the legal conclusion as opposed to the facts themselves) is irrelevant. The issue was also considered in detail in *FSA v Fradley* [2004]

EWHC 3008, where the defendant argued that, if he were to be held liable, it must be shown that he knew that the scheme was a CIS and that to operate the scheme contravened FSMA: see [38]. John Martin QC rejected that submission at [39], stating that 'It seems to me clear that all is required is knowledge of the facts on which the contravention is concerned.'

244. The conclusion in Fradley relied on *Burton v Bevan* [1908] 2 Ch 240 which considered a similarly worded provision in the Companies Act 1900 that made directors personally liable if they 'knowingly contravened' the Act. Neville J held at 247:

> "'I think that 'knowingly' means with knowledge of the facts upon which the contravention depends. I think it is immaterial whether the director had knowledge of the law or not. I think he is bound to know what the law is, and the only question is, did he know the facts which made the act complained of a contravention of the statute?'"

245. Mr Johnston QC concluded in *Avacade* at [471] that legal advice is irrelevant to the question of knowing concern, though it might be relevant to the later inquiry as to the proper quantum of a restitution order.

246. This issue was the focus of Ms. Hanif's submissions. The basis of her case was the entirely uncontroversial assertion that, where a lay client seeks and obtains legal advice from an appropriately qualified professional, he cannot reasonably be expected to form a view on the correctness or otherwise of the legal advice which he has received. She therefore argued that Mr Forster, having obtained counsel's opinion, was entitled to rely on it thereafter.

247. This is, in principle, a good argument. To describe a person as "knowingly concerned" in a contravention of the law in circumstances where he has

obtained independent advice that the activity concerned is not in contravention of the law is to strain the meaning of the word "knowingly" beyond any reasonable compass. Clearly, a person who acts without giving any thought to the legality of his actions takes a risk, and in this context ignorance of the law is no defence. This is simply recklessness. A person who has carefully considered the legality of an action, obtained external advice from an appropriate professional, and then acts on that advice, simply cannot be described as reckless in this way – still less can he be described as having intended to break the law.

248. However, it is equally important to emphasise that an independent legal opinion is not a get-out-of-jail-free card. The term "a legal opinion" covers a bewildering array of different forms of advice: some absolute; some conditional; some tentative; and all based on a series of factual assumptions whose accuracy is generally outside the scope of knowledge of the legal advisor. There can be no hard rule as to the legal effect of "a legal opinion" – everything depends on the circumstances.

249. It is true that the lay client cannot be expected to interrogate the accuracy or otherwise of the legal analysis which forms the basis of the advice which he has received, and if he acts on the basis of defective legal analysis legitimately obtained, he is entitled to the forbearance of the court. However, he both can and must interrogate the factual assumptions on which the advice which he has received is based. If he is advised that he can deal with property in a particular way because its owner is dead, where in fact he knows that its owner is alive,

the advice which he has received will provide him with no defence at all to any consequent action.

250. Mr. Forster places some emphasis on the fact that the instructions to counsel were drafted by Lupton Fawcett, and not by him. It might reasonably be assumed that the instructions were drafted on the basis of information provided by Mr Forster to Lupton Fawcett, but I entirely accept that he drafting of the instructions would have been undertaken by Lupton Fawcett and not by him. However, I do not think that it is even remotely likely that (a) the instructions were not sent to him for review before being sent to counsel, or (b) counsel's advice was not sent to him once it had been obtained. As a result, he cannot claim that he was not aware of the contents of the instructions, or of the assumptions which underlay the opinion received.

251. The legal advice relied upon by Mr Forster is found in written Opinions of Prof. McGee dated 31 August 2016 and 19 August 2020.

252. As with all opinions, these documents were based on a number of assumptions as to facts. The basis of the initial advice is said to be the assumptions set out in the initial instructions. However, the opinion of 31 August 2016 summarises the assumptions on which it is based. In para 5, Prof McGee says

> "5. On those assumptions I accept that the participants do not share in the 'profits' of the managing of the property, since their return is fixed and is not dependent on the obtaining of profits. This seems to me a point of great importance, since any direct link between the profits and the return to investors is very likely to bring this part of s235(1) into operation. The question therefore is whether they receive 'income arising from that management or sums paid put of such profits or income'.."

253. Mr Forster must have known that this was not the way in which the scheme actually operated. In order for the participant's claims to be not dependent on the obtaining of profits from the scheme property, there would have to be some other source of revenues for them to be paid out of. Mr Forster knew perfectly well that there was not. There never was any investment in Qualia other than that raised from the investors. There never was any property other than that contributed by investors, and there never would be any return to investors other than that generated by their investments. If he had read the McGee opinion dispassionately, it should immediately have been clear to him that what it was in fact saying was that, in different circumstances, and against a different factual matrix, the contracts which had been put in place would not necessarily constitute participation in a scheme. This opinion is entirely correct. However, it does not help Mr Forster in this case.

254. Prof McGee delivered a further opinion on 19 August 2020. This opinion seems to have been sought in the light of the FCA's commencement of enforcement action on the basis that the arrangements were a CIS, and in the light of the then-recent decision in *Anderson*. The instructing solicitors sought to draw a distinction between the operating model in Anderson and that of Qualia as follows:

> "[in Anderson], Investors were informed that their funds would be pooled in this case. In other words, placed in a special account which would pay a higher interest rate to them. With Qualia, HNW's acquire a 125 Year Property Lease registered at Land Registry. They own that lease."

255. Prof McGee responded to this as follows:

> " This seems to me very important. As I recall from the time when this scheme was first being considered, it was clearly

> understood that the polling [sic] question was very important. The pooling of assets is forbidden because it creates a pooling of the risk. It is not too much to say that this pooling is what makes the scheme 'collective' and is a crucial part of the mischief to which s235 is directed."

256. Mr Forster knew perfectly well that the entire basis of the Qualia model was a pooling of income and liabilities, so that investors as a whole were paid out of revenues received as a whole. It was not and had never been the case that an investor received only the revenues attributable to his own room.

257. The key points here seem to me to be twofold. First, it is absurd to suggest that a lay client should not rely on the advice which he has received as regards the legal analysis which it contains. Provided that he has sought the advice of an appropriate professional, he cannot be criticised for relying on the advice which he has received. Second, however, is that all legal advice is necessarily based on assumed facts. Legal advice cannot take any other form than that "if the facts are X, the conclusion is Y". The lay client cannot be expected to hold any view as to the legal content of such an opinion. However, what he can be expected to do is to consider the statement of facts on which the opinion he has received is based. If that statement of facts does not correspond to the truth as he knows it to be, he cannot rely for any purpose on the advice which he has received, because he knows it to be based on false premises. Where he knows (or should know) that the factual matrix on which the advice given to him is based is incorrect, it is simply not open to him to say that he relied upon that advice.

258. In this sort of case, the benefit of the doubt should clearly be with the recipient of the opinion – if it is genuinely unclear as to whether the assumed facts of the opinion cover his particular situation, then he is entitled to proceed on the basis

that the opinion is correct. However, the mere fact that a legal opinion has been obtained does not, without more, provide a defence of any kind.

259. The test to be applied here seems to me to be that set out in *Group Seven v Notable Services* [2019] EWCA Civ 614. In that case the Court of Appeal set out the two conditions for wilful blindness or "blind-eye knowledge" as, first, the existence of a suspicion that certain facts may exist and, secondly, a conscious decision to refrain from taking any steps to confirm their existence [59]. Where a person has sought and obtained a legal opinion as to the legality of his activities based on a false or knowingly incomplete set of facts, that seems to me to be a clear confirmation both of the existence of a suspicion, and a desire for the true position not to be investigated.

260. Finally, and for the sake of completeness, I should say that exactly the same principle applies to the obtaining of confirmations from the FCA as to particular treatments. A person who goes through a process of providing the FCA with information which he knows or should have known to be incorrect in order to obtain a confirmation that his activities are unregulated seems to me to demonstrate both of the required characteristics for "blind-eye" knowledge.

261. This was demonstrated in the course of this case by Mr Forster's reference to the FCA letter to MBI confirming that, in the FCA's view, the MBI schemes were not CISs. This letter set out the assumptions which had been made in coming to that conclusion, one of which was that:

> "Profits/income from the investment in a room did not come from the pooling of income/profits from the property as a whole, but rather from the individual rents from each property. "

262. Since this was not the case, and that fact was clearly known by the recipients of the letter, the letter itself was of no relevance to the question of whether the operators of the scheme were knowingly involved in the contravention of the FSMA.

263. I think that the position of Mr Forster is as follows. He seeks to argue that, because he had received the opinions, he cannot have had the requisite knowledge that investments in Qualia were within the scope of the FSMA. He can therefore say one of two things. He can either say that he did not consider the contents of the opinions at all. In that case they cannot assist him as to his state of knowledge. Alternatively, he can say that he did read them. In that case, he must have known that the legal opinions which he had received were based on assumed facts which he knew to be untrue. In neither case can the existence of the opinion assist him as regards his knowledge of the legality of the transactions.

264. Finally, Ms Hanif, for Mr Forster, placed great store by the observations of Snowden LJ in *Ferreira*. In that case, Snowden LJ delivered the main judgment in an appeal by a director of a company which had been involved in illegal investment business against a first instance decision ordering her to pay £2,714,514 under s.382. Ms Ferreira's defence at first instance had been that she had sincerely but mistakenly believed that the promotions which had been provided to investors had been approved by an authorised person, where in fact they had not, and this was accepted by the judge (see [180]-[183] of the decision of Kelyn Bacon K.C. (now Mrs Justice Bacon) at [2020] EWHC 1097).

265. The Judge however made a restitution order against Ms Ferreira. Explaining this, she said:

> "As Browne-Wilkinson VC explained in *SIB v Pantell (No. 2)* at p. 264D–E, one of the purposes of introducing powers to make a restitution order against someone who was "knowingly concerned" in unlawful investment activity was to prevent directors from hiding behind the corporate veil of the infringing company. In particular:
>
> > "If as is often the case, the company is not worth powder and shot, it is obviously just to enable the court, as part of the statutory remedy of quasi-rescission, to order the individual who is running that company in an unlawful manner to recoup those who have paid money to the company under an unlawful transaction.""

266. Snowden LJ criticised this line of reasoning as follows:

> "[T]he Judge interpreted section 382 in a way that imputed to the legislature an intention to impose personal liability on directors (or others) simply on the basis that they knew of the actions that the company was taking in the course of its business. That would be a far-reaching step indeed. Business is normally conducted, and investment opportunities are routinely offered, by companies with limited liability. The interpretation adopted by the Judge would result in limited liability being disregarded irrespective of whether the company was in fact rendered insolvent by the contravention of FSMA, and in a much wider set of circumstances than those in which the courts have conventionally thought it appropriate to pierce the corporate veil. Such grounds conventionally require some finding that the directors or corporators have established the company as a sham or facade for the purposes of some fraud. The corporate veil has never been disregarded simply because the directors were aware of the actions that their company was taking in the course of its business. In my judgment, the intention to introduce such a radical departure from the principles of limited liability in the financial services field should not be attributed to the legislature in the absence of some very clear indication of which there is none."

267. I think that Snowden LJ's meaning here is clear - a director of a firm who has the ordinary knowledge of the firm's activities which a director is expected to have should not automatically be liable under s.382 on a breach by their firm of

a regulatory requirement. Directors of financial firms are entitled to the same company law protections as directors of any other type of company. I am not entirely convinced that that is what Judge Bacon meant by "hiding behind the corporate veil", but the proposition as articulated by Snowden LJ seems clearly correct. The ordinary rules of director's liability are not dispensed with simply because the firm concerned engages in unauthorised financial business. The FSMA does provide the FCA with the ability to pursue directors personally, but an essential threshold condition for such pursuit is, as Snowden LJ put it, "some fraud".

268. The conclusion from this is that in order for s.382 to apply, there must be some involvement by a director in the contravention of a regulatory rule by his company which goes some way beyond the normal involvement of a director in the affairs of the company.

269. It seems to me that that test is clearly satisfied here. Mr Forster was not simply aware of the position of the Investment Companies and FGM, he was the driving force behind their activities and their business. He also knew that they were raising money on the basis of promises which were first very unlikely to be, and later incapable of being, fulfilled. The reason that the companies were engaging in business in this way was in order to execute a plan which he had devised, and whose implementation he supervised. On the facts of the case before me, it seems clear that Snowden LJ's test for the piercing of the corporate veil by s.382 is clearly met.

5. WAS MR FORSTER PERSONALLY ENRICHED?

270. Given the lack of any cross-examination of Mr Sowden, Mr Forster does not seem to dispute that he received £1,230,054 from QCD, £11,000 from QCH and £325,000 from FGL.

271. The FCA pleaded that he also benefited from the £2,017,789 received by QCL from the Investment Companies in the days before they were put into administration, of which £1,838,500 was paid from QCL to QCH. There is a lack of information as to how far Mr Forster benefited from those sums, save that he admits he received two years' salary of £150,000 from QCL. In particular, to the extent that Mr Forster allowed QCL or QCH to pay his legal fees, he may have obtained further personal enrichments of such sums. Be that as it may, for present purposes the FCA accepts that the evidence does not demonstrate any enrichment beyond the £300,000 received by way of salary.

272. Factually, therefore, it seems plain that Mr Forster has received at least £1,866,054 from QCD, QCH, FGL and QCL. He would have received none of those sums but for the sale and promotion of the Qualia investments, and so the FCA submits that the sum represents his personal enrichment.

273. Although Mr Forster (unsurprisingly as a litigant in person) did not raise the point, Mr Temple points out that it would be open to him to argue that any such amount should be reduced to reflect tax paid on these sums. However, any such deduction would still leave a positive balance, so the answer to the question as to whether Mr Forster has in fact been enriched by his wrongdoing is a simple "yes".

274. My decisions on the preliminary issues are therefore as follows.

i) *Did the Investments constitute CISs as defined in s.235 FSMA? In particular:*

(a) did the 'arrangements' for each Investment include statements made in brochures and other promotional material used for the Investments?

(b) Was the purpose and effect of the arrangements to enable investors to receive profits or income from the acquisition, holding, management and disposal of property?

Yes to all issues.

ii) *If the Investments did constitute CISs, were they promoted using false and misleading statements or impressions in contravention of s.89 and 90 FSA 2012? In particular:*

(a) Were statements and/or impressions made by the Investment Companies to the effect that the relevant Investment Company owned the freehold of the Unowned Care Homes?

(b) Were impressions made by the Investment Companies to the effect that the care homes would be sustainable in their own right, without relying on investments of later investors to meet obligations due to earlier investors? If so, were such impressions false or misleading?

(c) Were any such statements and/or impressions made by the relevant Investment Companies knowing them to be false or misleading, or reckless as to the same?

(d) Were any such statements and/or impressions made by the relevant Investment Companies with the intention of inducing Investors to enter into Investments?

Yes to all issues.

iii) *Was the First Defendant knowingly concerned in any contraventions by the Investment Companies and/or by the Second Defendant?*

Yes. Mr Forster was knowingly concerned in all of the relevant contraventions, namely:

- The Investment Companies' contraventions of s19 and s21 FSMA.

- The Investment Companies' contraventions of s89 and s90 FSA 2012.

- FGL's contravention of s21 FSMA.

"In particular, is it a defence to the allegation of knowing concern that the First Defendant relied on the matters set out at paragraph 79(5) of his Defence? This paragraph reads as follows

"At all material times, the Company Secretary to both Investment Companies, Mr Lindsay, who was also a qualified solicitor, never raised any concern as to the need for the Schemes to be authorised under s19 FSMA 2000.

Written legal advice was specifically obtained from experienced independent Counsel on two separate occasions in 2016 and 2020 by the Qualia companies. On each occasion Counsel confirmed in writing that the Schemes did not constitute a CIS within section 235 of FSMA. For the avoidance of any doubt, for the purpose of these proceedings only, legal privilege in the two written opinions only is waived; save to this limited extent, Mr Foster does not waive legal privilege over any other material.

It is averred that had Counsel expressed any material concern with respect to the lawfulness of the Schemes, Mr Forster would have taken due regard of the advice, and would have acted accordingly.

As set out at paragraph 72 above, the FCA itself concluded in 2015 that the investment schemes operated by the MBI companies (which the FCA alleges at paragraph 82.4 were 'similar investments") were not CISs.

Mr Forster reasonably relied on the foregoing in concluding that the Investment Companies were not contravening FSMA, and therefore that the activities of both companies were lawful."

Mr Forster cannot rely on the counsel's opinions he received, because they were to his knowledge based on inaccurate assumptions as to the facts of the Qualia business. He cannot rely on the FCA's conclusion on MBI for the same reason – that the FCA's statement of the reasons for its conclusion disclosed on its face that it was based on inaccurate

assumptions as to the facts of the MBI business. He also has no defence arising from the fact that the issue was not raised with him by his lawyer.

iv) *Has the First Defendant been personally enriched as a result of any contraventions as pleaded at paragraph 82(5) of the Particulars of Claim?*

Yes