Neutral Citation Number: [2024] EWHC 2434 (Comm)

Case No: CL-2021-000051

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2024

Before :

MR JUSTICE FOXTON

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Between :

(1) 4VVV LTD and the (2) to (435) Claimants listed in Schedule 1 to the Claim Form	**Claimants**
– and –	
(1) NICHOLAS SPENCE and (2) DEREK KEWLEY AND (3) to (6) and (8) to (13) Defendants	**Defendants**

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Daniel Saoul KC and **Matthieu Grégoire** (instructed by **Trowers & Hamlins LLP**) for **the Claimants**
Matthew Collings KC, **Tim Calland** and **Rowena Page** (instructed by **Simon Burn Solicitors**) for **the First, Second, Sixth and Eighth to Eleventh Defendants**

Hearing dates: 15-18, 23-25, 29-30 April, 1 -2 May, 20-23 May and 6, 10-13 June 2024
Further submissions: 25 and 31 July 2024
Draft Judgment Circulated: 23 August 2024

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 27 September 2024 at 10:30am.

The Honourable Mr Justice Foxton:

A INTRODUCTION

A(1) The Claim in Outline

1. In 1863, Victorian entrepreneurs decided to capitalise on the success of Charles Kingsley's 1855 novel *Westward Ho*! by building a hotel and holiday villa near Northern Burrows on the North Devon coast. Their prospectus asserted:

> "The want of such accommodation has long been felt, and as no attempt to supply it has hitherto been made by individuals, it is deemed to be a legitimate project to be undertaken by a Company. The salubrity and beauty of the North of Devon have long been known and appreciated. Sir James Clark has placed it in the highest position for health-giving qualities; and the recent publication of Professor Kingsley's 'Westward Ho!' has excited increased public attention to the western part, more especially, of this romantic and beautiful coast. Nothing but a want of accommodation for visitors has hitherto prevented its being the resort of families seeking the advantages of sea bathing, combined with the invigorating breezes of the Atlantic...."

(The Northern Burrows Hotel Prospectus, Westward Ho! History Society, westwardhohistory.co.uk)

2. This case arises from investments made by the 435 claimants in holiday properties in Westward Ho! and Ilfracombe, and in student accommodation across the country, in reliance on what they allege were dishonest misrepresentations in investment prospectuses which were even more alluring than their 1863 predecessor. They seek:

    i) damages for deceit and unlawful means conspiracy against two individuals and a number of companies;

    ii) rescission of certain of the purchase contracts on the basis that they were induced by fraudulent misrepresentation;

    iii) a declaration that certain investments are unenforceable under s.26 of the Financial Services and Markets Act 2000 ("**FSMA**") on the basis that they constituted unauthorised collective investment schemes, and consequential relief in respect of those investments (including recovery of all amounts paid and compensation).

3. The action has proceeded by way of a phased trial, with this first phase determining a number of common issues, together with the claims of ten of the Claimants, referred to as "**the Lead Claimants"**.

4. The Defendants comprise:

    i) Mr Nicholas Spence, a director of the 8th to 11th Defendants and a former director of the 6th Defendant Green Parks Holdings Ltd which was the 7th Defendant until it entered administration and of and A1 Alpha (Leicester) Ltd (**A1 Alpha**), a key

company in the relevant events.

ii) Mr Derek Kewley, a director of the 8th to 11th Defendants and a former director of the 6th Defendant and A1 Alpha.

iii) The Sixth to Eleventh Defendants (referred to with A1 Alpha as **the Alpha Companies** and, together with Mr Spence and Mr Kewley, **the Alpha Defendants** and, with other companies in the same ultimate ownership, **the Alpha Group**) comprise companies which sold the investment properties, were also tenants of those properties under underleases and or managed many of the sites.

iv) The Twelfth and Thirteenth Defendants (**the Tuscola Entities**) who have been joined to the proceedings in their capacity as successors in title to the freehold title to certain properties, and whose position may be relevant to some of the claims for rescission advanced in the case. It was agreed at the PTR that any claims for rescission in respect of leaseholds of which the Tuscola Entities are freeholders would be addressed at a subsequent hearing after judgment in this trial, and the Tuscola Entities have not played an active part in this phase of the trial.

The Claimants have reached a settlement with the Third Defendant, Mr Andrew Crump, and the Fifth Defendant, and the Claimants have entered judgment in default against the Fourth Defendant.

The Witness Evidence

5. I heard evidence from or on behalf of all of the Lead Claimants (five of whom are investment companies):

i) Mr Andreas Alonefetis, the principal of AA Azure Yachting Limited (**"AA Azure"**) who invested in two Westbeach units, two rooms in the Q Studios student development in Stoke and a unit in the Ilfracombe development.

ii) Mr Alexander Longman, who invested in two Westbeach units.

iii) Mr Chukwuebuka Ofor who invested in a room in the Park Lane House development in Sunderland.

iv) Mr Hitesh Vyas who invested in a unit in the Ilfracombe development.

v) Dr Alice Hudson-Peacock, the principal of Hudson-Peacock Investments Ltd (**"HPIL"**) who invested in the Scholar's Court student development in Bradford.

vi) Mr Omar El-Quqa, the principal of Lotus Properties Real Estate Company Ltd (**"Lotus"**), who invested in ten properties: six units in the Norfolk Street student development in Sunderland, and four units in the Tudor Studios development in Leicester.

vii) Mr Paul Simpson, the principal of Magic Box Properties Two Limited (**"Magic Box"**), who invested in one unit in a student development at the Old Wesleyan

Chapel in Ambleside.

viii) Mr Oliver Whitefield, who invested in one unit in the Westbeach development.

ix) Mr and Mrs Whitton, who invested in one unit in The Box, one in Scholar's Village, one in Primrose Hill, by way of purchases from original investors rather than from the Alpha Group, two units in the Foundry and one unit in Ilfracombe.

x) Mr Adam Cayley of Wolfe Solutions Ltd (**"Wolfe"**) who invested in two units at Westbeach, one in Ambleside and two at Ilfracombe.

6. All of the Lead Claimant witnesses were honest (and it is right to record that there was no suggestion otherwise). Some of the witnesses clearly harboured strong feelings about what has proved to be a very unfortunate investment experience. Their evidence was tested in cross-examination which was sensitively conducted by Mr Collings KC and Ms Page in a manner which avoided adding insult to injury, making this one of the many occasions where courtesy and a good strategy aligned in commercial litigation. It is important to test their evidence of reliance objectively, with the benefit of any presumptions which arise in their favour. I return to this issue, and address their particular circumstances so far as relevant to that issue, below.

7. In the event, the principal witness called by the Alpha Defendants was Mr Derek Kewley, currently a director of the Eighth to Eleventh Defendants, and formerly a director of the Sixth and Seventh Defendants:

i) He became involved in providing student accommodation after suffering catastrophic injuries in a car crash. Having developed a portfolio of properties in Stockton-on-Tees, and raising funding for these ventures, he established himself as a mortgage-broker, setting up his own company called Tees Valley Finance. It was in that capacity that he and Mr Spence first came into contact in 2007, when Mr Spence was seeking to raise development finance for the Westbeach development.

ii) Mr Kewley was a clever and confident witness who was fully familiar with the trial documents – something which is no more a cause for criticism in a witness than it would be for the advocate cross-examining him. However, there were a number of occasions, when faced with difficult questions, he would take refuge in stock responses rather than give an answer, and he was generally unwilling to accept poor behaviour on his part when documents put to him unequivocally established this. His evidence was carefully tested by Mr Saoul KC over a number of days and by reference to a large volume of contemporary documents. It was clear to me that he was a financially savvy business operator, who was well-placed both from experience and instinct to understand the implications of the investor propositions which the Alpha Defendants were offering and to evaluate them. He did not strike me as in any way a dewy-eyed optimist.

iii) It is clear from the contemporaneous communications that there were numerous occasions when Mr Kewley was happy to mislead others to advance his own and Mr Spence's financial interests if he thought he could get away with it. When he did "come clean" on certain points, it was by necessity rather than inclination. For

that reason, I have approached his oral and statement evidence with caution. The particular issues which underpin this finding are set out in the chronological narrative below. It remains important, however, to recognise that a willingness to mislead in some contexts (something particularly apparent towards the end of this unhappy story, but present for most of it) does not of itself establish that a defendant has acted dishonestly in other contexts or at earlier points in time (cf. the well-known *Lucas* direction given in criminal trials).

iv) On 24 June 2024, Mr Kewley was sentenced to 5 months' imprisonment, suspended for two years, for his admitted contempt of court in breach of the freezing order imposed in this case. Mr Kewley admitted his deliberate breach of that order, which involved stark failures to provide truthful asset disclosure (some £5m of assets not disclosed) and dealing with assets in deliberate breach of that order (through selling assets which had not been disclosed without prior notice and consent). If any were needed, that behaviour provides a yet further reason to approach his evidence with caution.

v) In short, Mr Kewley showed no signs of having a moral compass, or at least not one capable of deflecting him from the path of his own self-interest. However, one thing which can and must be said for Mr Kewley is that he attended the trial throughout, and subjected himself to gruelling cross-examination over a number of days.

8. The same cannot be said for Mr Nicholas Spence, currently a director of the Eighth to Eleventh Defendants, and formerly a director of the Sixth and Seventh Defendants. At the PTR Mr Spence had sought permission to give evidence by video link from Florida where he now lives, but offered nothing of sufficient substance to justify such an order. The first eleven days of the trial proceeded on the basis that Mr Spence would be attending to give evidence in person. For example, there was a consensus that certain issues raised in the course of Mr Kewley's cross-examination would be better put to Mr Spence in his cross-examination, and reference was made at the end of Day 10 to the fact that Mr Spence had postponed his flight to address some disclosure issues which had unexpectedly emerged. However, at the end of Day 12, I was told that Mr Spence would not be attending the trial after all. While the Alpha Defendants' closing submits that "Mr Spence was unfortunately unable to attend in person to give evidence, although he could have attended remotely," no evidence was adduced to offer an explanation for his *volte face*, nor any application made at that point for Mr Spence's evidence to be taken remotely.

9. In *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [41] which, after a good run, has displaced *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 as a permanent feature of written closing arguments at witness trials, Lord Leggatt stated:

> "The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making

> overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

10. As to the position here:

i) Mr Spence is a central witness who was involved in all of the developments which feature in this case. While he played a particularly prominent role in the Westbeach and Ilfracombe developments, it is wholly inaccurate to submit, as the Alpha Defendants did in closing, that he "hardly featured in respect of the central issues to the claim". On the contrary, he is regularly copied into emails from Emerging Properties Ltd ("**EPL**") raising queries about the student as well as the holiday projects, had numerous exchanges with Mr Kewley about the projects generally, and was closely involved with the interactions with Mysing Properties Ltd (**"Mysing"**) with whom the Alpha Group entered into a joint venture arrangement, the freehold sale programme and the attempt to "cash out" and distance himself from the failing projects in 2018.

ii) In a deceit case, his own evidence as to his state of mind was of obviously central importance.

iii) As I explain below, the contemporary documents reveal numerous instances when Mr Spence was willing to mislead others to his own benefit, and at times he and Mr Kewley demonstrated a cynicism and indifference to the interests of others which is striking. These cannot be dismissed as "shoot from the hip" emails (if that is intended to signal that they did not reflect Mr Spence's real intention or mindset) when Mr Spence has offered no such explanation. Further, Mr Spence also breached the freezing order made against him in a number of respects.

iv) As I have stated, no explanation was offered for his failure to give evidence. He had been permitted to observe the trial on a remote basis, and would clearly have understood the number of difficult questions and documents he would be faced with.

v) In these circumstances, I am satisfied that it is appropriate to place positive significance on Mr Spence's absence when issues arise on which he had material evidence to give and where the state of the evidence which is before the court is such that there was genuine scope for evidence from Mr Spence to affect the

court's conclusion.

11. However, Mr Spence's absence raises the difficult issue of how to treat the drawing of inferences in circumstances in which Mr Kewley gave evidence, Mr Spence did not, and yet it is accepted (in the words of the Alpha Defendants' legal team) that "one can 'lump' the Defendants together and 'yoke' Mr Spence with Mr Kewley" (quoting from Bowen LJ in *Angus v Clifford* [1891] 2 Ch 449, 473). "Ordinary rationality" might suggest that the refusal, without good cause, of one alleged conspirator to give evidence provides positive support for the existence of the conspiracy, and does so as much against the co-conspirator who does give evidence as against the absent party. However, unless the court is able to conclude that the party who has attended was in a position to determine whether or not the absent party would give evidence, then this appears to me one of those occasions when considerations of ordinary rationality should yield to those of common fairness. A similar issue arises in criminal cases, when a failure by one defendant to offer an explanation or to give evidence is relied upon by the prosecution where, as noted in *Blackstone's Criminal Practice 2024*, [F20.26], "a direction may be called for where there is more than one accused. If A has failed to mention a relevant fact so as to attract a s.34 direction, it is desirable in the case of co-accused B whose case stands or falls with A's to give a direction not to draw any inference against B". I am satisfied that I can draw no adverse inference against Mr Kewley in respect of Mr Spence's absence.

12. One consequence of Mr Spence's failure to give evidence is that I did not have the opportunity to form an impression from his oral evidence of his business acumen and experience at the relevant time. However, I was taken to documentary evidence which traced Mr Spence's business career. This showed that Mr Spence became involved in supplying air-conditioning to new buildings, before moving into house building, starting on a small scale and expanding significantly. That business went through a substantial corporate insolvency, in the aftermath of which Mr Spence appears to have taken financially sophisticated measures with a view to shielding family assets from any future exposure. Those experiences can have left him in little doubt about the vagaries of the property market, and the ever-present risk of business failure. A considerable business sophistication on his part was also apparent in the contemporary documents. A good example of this was his response to an investor who had discovered that a receiver had been appointed over the company selling properties at Westbeach in May 2013, in which he offered a dishonest explanation of why the receiver was there in a manner which demonstrated real awareness of the legal framework. In sum, I am satisfied that Mr Spence was also astute, experienced and fully alive to the implications of the Alpha Defendants' investment offering.

13. Mr Peter Sullivan is a director of GP Ilfracombe Management Company Ltd, and a former director of a number of the other Alpha Group companies. He had a background as a service engineer, before becoming a buildings operations and facilities manager, coming into Mr Spence and Mr Kewley's orbit in that capacity. In and following November 2018, at a time when Mr Kewley and Mr Spence were seeking publicly to distance themselves from their rapidly disintegrating operation, Mr Sullivan replaced them as the de jure director of a number of the group companies. It was painfully obvious that Mr Kewley and Mr Spence had taken advantage of Mr Sullivan by putting him into the firing line, while they still manipulated matters from what they no doubt hoped was a

safe spot far behind the lines. However, Mr Sullivan was a willing front, not a patsy. Mr Sullivan showed a surprising, and misguided, sense of loyalty to Messrs Kewley and Spence. Occasionally in the contemporaneous documents, and in contrast to Messrs Kewley and Spence, his conscience spoke, but it never carried the day, and he was a voluntary (even if not, perhaps, always a willing) participant in some of their disreputable manoeuvres, not least as an active participant in hiding their ongoing management of the business. He sought to avoid damaging Mr Spence and Kewley in his oral evidence where possible, although when pressed, this was frequently the effect of his answers. Once again, I have found it necessary to approach his evidence with caution.

14. Mr Mark Ellis is a lifelong friend of Mr Kewley, is employed by him, and lives in a house registered in the name of Mr Kewley's wife. He was called to provide evidence as to the current income and expense of various investment units, which evidence had then been relied upon by the Alpha Defendants' property expert. However, it rapidly became apparent through Mr Grégoire's cross-examination that Mr Ellis was unable to support the schedules he had exhibited to his witness statement, and he accepted that the schedules were inaccurate or incomplete in a number of significant respects. His oral evidence was accordingly of very limited relevance.

15. Finally, so far as factual witnesses are concerned, I heard evidence from Mr Jackman, who is the caretaker of the Ambleside property. He was an honest witness who sought to assist the court, but his evidence was only of limited relevance to the issues I had to decide. It is unfortunate that he had to attend court, particularly as the journey to court proved unexpectedly protracted and came at a busy time for him personally.

16. The court also heard from two experts on the valuation of property: Mr Robert Robinson for the Claimants and Mr Richard Parkinson for the Alpha Defendants. Both were appropriately qualified and sought to assist the court. Each was able to identify issues with the other's approach, in what I accept was a challenging valuation exercise, at least when approached from the perspective of seeking to find comparable properties and given the lack of contemporaneous data. I am satisfied that there were errors in the Discounted Cash Flow (**"DCF"**) valuation performed by Mr Robinson which require correction. I am also satisfied that a number of the assumptions and inputs which Mr Parkinson had been asked to adopt were not made out on the factual evidence before the court, and I did not find many of the comparables used by Mr Parkinson particularly informative. As a result, as I explain below, it will be necessary for further calculations to be performed using inputs which arise from the findings in this judgment.

17. There is one important element of common ground between both experts which I should record at the outset. With the exception of three Scholar's Village Properties, where Mr Robinson but not Mr Parkinson projects sufficient earnings to cover the guaranteed earnings, and a number of properties where Mr Parkinson felt unable to calculate a realistic net return because of a lack of sufficient data points, they both conclude that none of the units purchased by the Lead Claimants were capable of generating the promised returns. I accept Mr Robinson's evidence (as the only evidence) in relation to the units where Mr Parkinson provided the court with no figures. This was not a case of "near misses": in each and every case, the realisable returns fell very substantially short of the promised returns.

18. Finally, the Claimants adduced forensic accountancy evidence from Ms Griffin. Her evidence was thorough, measured and fair, and very little of it was challenged. The Alpha Defendants did not adduce forensic accountancy evidence themselves. It was suggested on their behalf that this was the result of financial constraints. I do not feel able to place reliance on that explanation in the absence of satisfactory evidence as to the Alpha Defendants' means, particularly once regard is had to the very significant value that they were able to extract from the various schemes. I am satisfied that a more likely explanation is that the Alpha Defendants took the view that their interests at the trial would be better served by obscurity rather than clarity as to the underlying financial movements.

The Documentary Evidence

19. The Claimants mounted an extensive attack on the disclosure exercise undertaken by the Alpha Defendants. I accept that there have been a number of unanticipated waves of supplementary disclosure by the Alpha Defendants (there being eight tranches of disclosure in all), which continued during the trial. However, I am satisfied that the extended nature of the Alpha Defendants' *disclosure process* was principally the result of administrative or technical issues, or a re-visiting of the legal classification of documents, rather than any personal fault on the part of Mr Spence or Mr Kewley. That is not to underestimate the practical impacts which piecemeal disclosure has had on both legal teams, nor the unsatisfactory nature of a state of affairs in which a significant quantity of further material emerged for the first time at trial, and which it was not feasible to subject to the full range of agreed search terms.

20. The Claimants also pointed to the absence of a number of categories of documents.

21. First, the absence of "contemporaneous modelling of the viability of the schemes". To the extent that documents of this kind are absent from disclosure, I am satisfied that the principal reason for this is that no such modelling was done. While I will need to consider the significance of that when making findings of fact, it does not provide a basis for drawing adverse inferences against the Alpha Defendants.

22. Second, it is said that there were few direct written communications between Mr Spence and Mr Kewley. I was taken to a number of communications between these individuals by email, text and WhatsApp, many of which showed Mr Spence and Mr Kewley in an adverse light. While I accept that these are unlikely to represent the full range of such material – Mr Kewley and Mr Spence were working for lengthy periods of time in different parts of the country, and later in different countries – the presence of a number of unhelpful documents weighs against any suggestion of systematic pruning of material from disclosure. While I would have expected to see more direct communications in the early stages of Mr Spence and Mr Kewley's work together, given the passage of time and the fact that a number of adverse direct communications have been produced, I do not feel able to conclude that documents in this category have been deliberately suppressed. However, I am satisfied that the full set of communications of this type is not available at trial.

23. Third, it is said that there is no information on actual rental and running costs for the

many developments under the Alpha Defendants' control. I am satisfied that this criticism is fairly made. Given the importance of this data to the operation of the investments and the number of sites involved, I find it inconceivable that there would not be extensive records of rents and occupancy achieved, and running costs incurred or at least secondary evidence of the net profits being made, not least to work out how much needed to come into the underlessee to meet the guaranteed payments. It is clear from a number of contemporary communications summarised below that information of this kind was available. The paucity of the information disclosed was such that Mr Parkinson, the Alpha Defendants' property expert, had to make a general assumption as to the running costs of student investments, and his report also relied upon witness statements provided by the Defendants rather than contemporaneous documents. He made a number of comments to the effect that "overall I have limited information on the occupancy rates and very little information on the running costs". Mr Robertson also noted the "very limited information" he had received on rents. No satisfactory explanation has been offered for the very limited information produced on historic rents achieved, levels of occupancy, tenancy duration and running costs. I am satisfied that it is reasonable to infer that the absence of such material reflects the fact that it would have been unhelpful to the Alpha Defendants, showing that the rates, levels and periods of occupancy were significantly lower than those said to underpin the promised returns, and the running costs significantly higher. As well as being supported by the expert evidence at [17] above, as will become apparent from the factual account below, that inference is also strongly supported by the financial troubles the various developments soon ran into, and the snapshots which are available of the performance of particular developments at particular points in time.

24. The Claimants also pointed to significant gaps in the bank statements and accounting information available. I accept that these are incomplete, and that this has been a source of considerable difficulty for Ms Griffin. In combination with the poor quality of financial record-keeping within the Alpha Group, it has made forming an accurate picture of the financial performance of the business challenging. However, the Alpha Defendants did co-operate with the Claimants in an attempt to obtain replacement copies from the banks involved, without success. I accept that obtaining material of this kind will have been made considerably more difficult where the relevant Alpha Group company has gone into administration or liquidation, and I am not willing to draw an adverse inference in relation to this class of documents. However, I accept that the Alpha Defendants could have deployed some form of contemporary business record of amounts received and expended, had they thought it in their interests to do so.

25. So far as the accounting information is concerned, it is clear that the standard of record-keeping within companies in the Alpha Group was very poor. Ms Griffin described it as "seriously deficient". None of the accounts filed by the Alpha Group companies with Companies House were independently audited, the directors claiming the benefit of the exemptions afforded to small companies by the Companies Act 2006. It is clear that money was moved between group companies through informal and inadequately documented transactions, and transactions were re-characterised where necessary to achieve accounts in the desired form. The state of material before the court confirms the chaotic and "hand to mouth" manner in which the Alpha Group companies were run, and a very cavalier attitude to financial reporting. That, in itself, is revealing. I am also

satisfied that there must be some form of records of money received and spent which the Alpha Defendants could have deployed had they believed it to be in their interests to do so.

THE APPLICABLE LEGAL PRINCIPLES

Deceit

26. I can take the elements of the tort of deceit from the summary given by Henshaw J in *Ivy Technology Ltd v Martin & Bell* [2022] EWHC 1218 (Comm), [338]:

> "The basic ingredients of the tort of deceit are that:
>
> i) the defendant made a false representation to the claimant;
>
> ii) the defendant knew the representation to be false, or had no belief in its truth, or was reckless as to whether it was true or false;
>
> iii) the defendant intended the claimant to rely on the representations;
>
> iv) the claimant did rely on the representation; and
>
> v) as a result the claimant has suffered loss and damage."

The making of a misrepresentation

27. At [340] of *Ivy*, Henshaw J noted that "determining whether any, and if so what, representation was made by a statement requires (1) construing the statement in the context in which it was made, and (2) interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee."

28. Where a representation is said to be implicitly made, the court has "to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context": *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [50]. Where the implied representation is said to arise from things said orally or in a document, the court will construe the express words used and interpret them objectively according to the impact they might have on a reasonable person in the position of the representee (*Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2021] EWHC 484 (Comm), [215]).

29. A representation must be a matter of past or existing fact, not an opinion, although expressing an opinion will usually involve a representation that the maker of the statement does actually hold the opinion, and, dependent on context, that there are grounds (or sometimes reasonable grounds) for the opinion expressed (*Ivy Technology v Martin Ltd*, [345]-[346]). Similarly, statements as to the future will frequently convey implied representations as to the present or as to the present knowledge of the maker of the statement (*Spice Girls Ltd v Aprilia World Service BV* [2002] EMLW 27, [51]-[52]).

30. Some statements, particularly in a sales or a negotiating context, will not be treated as

representations because, objectively, they are not to be taken seriously or some degree of hyperbole is to be expected. These are referred to as "puffs" or "sales talks": *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147 (Comm), [420]. I was referred by Mr Collings KC to the following helpful passage in the judgment of Henry LJ in *Chartered Trust Plc v Davies* (1998) 76 P&CR 396, 403-404:

> "The judge found in that transparently fulsome description an implicit representation of the future letting policy of the landlords, and found his actual letting policy to be in breach of that representation, amounting to a representation. We live today surrounded by the blandishments of the advertising industry. We are used to them, and we take them with a pinch of salt. Read literally, this document praised the location and the design of the development, and expressed confidence in its success. It seems to me that even the most naive could not get any legal comfort from that document that they could not get from the lease. From the lease one gets a clear recognition by the landlords that the enjoyment of the benefit that the tenant took under the lease here depended in part on the actions of the landlords in letting and controlling the remaining units in and the common parts of this small retail development. I do not regard this as a case of misrepresentation: in my judgment the real issue is whether this is a derogation from grant."

Attribution of the representation to the defendant

31. Where the defendant itself makes the statement said to constitute the deceit, the position is straightforward. So, also, when the statement is made by one person, and other has vicarious liability for the act, or is made by an agent acting within its authority (actual or ostensible) on behalf of a principal (*Ivy Technology Ltd v Martin*, [507]-[510]). The situations referred to in the preceding sentence are frequently encountered when a company is held liable in deceit for statements made by its directors, officers or employees or an external agent employed by it to deal with prospective contractual counterparties. What, however, of the position where a claimant wishes to hold a director personally liable in deceit for a dishonest statement made on behalf of a company by someone other than the director? A director with a dishonest state of mind who directed, procured or authorised the making of a false statement by the company can be personally liable in deceit, just as the company may be liable in deceit of the basis of attribution of the director's knowledge: *C Evans & Son Ltd v Spriteband Ltd* [1985] 1 WLR 317, 425-330 and *MCA Records Inc v Charly Records Ltd* [2000] EMLR 743, [15]. In *Barclay-Watt v Alpha Panaretti* [2022] EWCA Civ 1169, [65], Males LJ approved the statement by Irwin J in *Contex Drouzhba v Wiseman* [2006] EWHC 2708 (QB), [96] that:

> "It cannot ever have been the policy of the law that a director of a company who commits acts amounting to deceit and at the same time procures acts amounting to deceit by the company of which he is a director, should be able to claim exemption from tortious action because of his status as director. On the contrary, the clear policy of the law must be – and must always have been – in favour of a remedy for fraud. It is in my view inconceivable, where fraud is proved, that the status of director could act as an effective shield from personal liability by a director."

32. Another scenario in which someone may be held liable in deceit for a false statement

made by someone else is where they authorise a third party to make a statement which they know to be false, even though the maker of the statement does not know that it is untrue (*Clerk & Lindsell on Torts* 24th, [17-30]). If both the maker of the statement and the person who authorises its making know that the statement is false, they will be liable as joint tortfeasors (ibid). Similarly, where the defendant makes or authorises the making of a statement known to be untrue to a third party, with the intention that the statement would be passed on by that third party to the claimant and acted on by them, the statement will be actionable against the defendant in deceit (*Libyan Investment Authority v King* [2020] EWHC 440 (Ch), [104]).

The representation must be false

33. This raises an issue of fact. In a pre-contractual context, it has been held that a statement will be treated as true where it is substantially true, and the respects in which it is untrue would not have been likely to induce a reasonable person to enter into a contract (*Avon Insurance v Swire* [2000] 1 All ER 573, [17]).

The defendant knows the statement is false, has no belief in its truth or is reckless as to its truth

34. The classic statement of the mental state required to establish the tort of deceit remains that set out in *Derry v Peek* (1889) 14 App Cas 337, 374: the statement must be made knowing it was untrue, without belief in its truth or recklessly. A statement is made recklessly where the person who makes or authorises the making of the statement makes it without caring if it is true or false (e.g. *Van Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm), [146]).

35. I accept the importance, righty stressed by Mr Collings KC, of not conflating lack of honest belief in a statement, whether through knowledge of its untruth or reckless indifference as to its truth, with carelessness, however gross, or even Panglossian optimism on an epic scale. Mr Collings KC's careful analysis of *Derry v Peek* (1899) 14 App Cas 337 underscored the carefully drawn boundaries of the tort of deceit, and the need to avoid blurring those boundaries.

Intending the statement to induce the representee to act on the statement

36. The claimant must establish that the representor intended the statement to induce him to act on the representation: *Ivy Technology Ltd v Martin*, [361]. If a statement is made with one of the *Derry v Peek* states of mind, there is a presumption of fact that the representor intended the representee to act in reliance upon it: *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep PN 189, [47].

The claimant must rely on the representation

37. The claimant must establish that it understood the representation in the sense which the court ascribes to it and has found it to be false. If the representation is material – in the sense that it would likely play a part in the decision of a reasonable representee when deciding whether to enter into a contract on particular terms – and is made dishonestly, there is an evidential presumption of reliance which it is "very difficult" to rebut

(*Hayward v Zurich Insurance Company plc* [2016] UKSC 48, [37]). However, this is a presumption of fact which can be rebutted, not a presumption of law (the legal burden remaining on the claimant to prove reliance): *NIVE v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [25]. It is sufficient for the claimant to have been materially influenced by the representation in the sense that it was "actively present in his mind" (ibid, [32]) and it is not necessary for the false representation to be the sole cause of the decision to contract, provided it plays a real and substantial part in the decision to contract (*SK Shipping Co Ltd v Capital VLCC 3 Corp* [2022] EWCA Civ 231, [61]).

38. In this case, all of the representations I have found were either made in the brochures approved by Mr Kewley and Mr Spence or were statements effectively repeating the key representations made in the brochures. In all cases, they were clearly and obviously material, and indeed reflected what Mr Kewley and Mr Spence recognised were key messages for any potential investors to give them confidence in the investment. To the extent that those representations were made dishonestly, it follows that the Alpha Defendants faced the "very difficult" task of rebutting the evidential presumption of reliance. That task was made even more difficult by the obvious credibility and sincerity of the Lead Claimant witnesses.

39. Finally, it is well-established that it is no answer to claim for deceit where the claimant has relied on a dishonest misrepresentation that the claimant might have discovered the falsehood (even where this might have been achieved through the exercise of ordinary care): *Clerk & Lindsell on Torts* 24th, [17-41].

The burden of proof

40. The burden of establishing the tort of deceit lies, of course, on the claimants. That is true of all of the elements of the tort (although, as noted above, there are circumstances in which a factual presumption of reliance can arise). The burden remains the balance of probabilities – there is no enhanced requirement of evidential cogency merely because the allegations involve dishonesty (*Bank of St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408, [44]-[47]).

41. In cases in which dishonesty is alleged, it has been suggested that "wherever the court is faced with a choice between two rival explanations of any particular incident, one innocent and the other not, unless it is dealing with known fraudsters, the court should start from a strong presumption that the innocent explanation is more likely to be correct" (*Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261, [40], Carnwath LJ). There will be cases where a significant factor in determining whether the burden of proof has been discharged is that the case involves someone of apparent probity acting dishonestly, when the events are explicable on an alternative basis. However, as Carnwath LJ recognised in his proviso for "known fraudsters", that factor will have limited weight where the evidence establishes a readiness on the defendant's part to act dishonestly to promote their own interests. The position may also be more nuanced when the court is faced with multiple allegations of the same dishonest scheme being practiced and repeated over a lengthy period of time, as is the case here. First, an assessment of the inherent probabilities will be informed by the full continuum of events. If repeatedly false representations as to the viability of similarly structured investment schemes are

made over a number of years, the court must consider the probability of this involving a succession of excessively optimistic but genuine estimates, or a business *modus operandi*. Second, if it is obvious that some of the investments were promoted dishonestly, it cannot be said to be improbable or inherently unlikely that other promotions of similarly structured investment schemes by the same individuals were also dishonest, although ultimately the court must look at all the evidence in deciding whether the burden of proof in relation to each allegation of deceit is satisfied.

42. Both sides recognised and relied upon the importance of contemporary documents and the inherent probabilities in deciding whether the burden of proof was satisfied. As Mr Collings KC noted, contemporary documents may not only expose a fraud, but contain materials which tell against it.

What Representations Were Made?

43. The Claimants pleaded a large number of representations said to have been made by the Alpha Defendants.

44. The first representation alleged is the so-called **Return Representation**: a representation that investors in the relevant scheme *would* receive the promised return for the promised period. I am not persuaded that, in isolation this was a representation of present fact – rather it was a description of the promises made by the contractual counterparty. The real vice of which the claimants complain is that those promises were known to be devoid of real substance. I have chosen to address that aspect of the Return Representation within the Substance Representation, to reflect the manner in which the case was presented in closing.

45. The second representation alleged (and which the Alpha Defendants realistically accept was made in the marketing material provided to potential investors) is the so-called **Substance Representation**. This has been formulated in various ways, but I am satisfied that it at least involved a representation that the promised benefits were believed to be realistically capable of delivery or achievable or viable by the promisor, as opposed to having a very high probability of failure, or being at best aspirational. The Alpha Defendants' legal team formulated the representation in characteristically fair terms in their written closing submissions, noting the Substance Representation "embraces various descriptions such as viable, achievable and deliverable, necessarily including the counterparty being an entity of substance." A representation in this sense was accepted by Mr Collings KC on behalf of the Alpha Defendants in respect of all of the projects and my use of the term Substance Representation is intended to refer to that meaning.

46. The third alleged representation made is that the companies involved in delivering the promised track record had a proven track record – **the Track Record Representation**. I accept that a number of the marketing materials referred to the developer as having lengthy experience and a track record of successful developments. In some, but not all, cases there were statements to the effect that those developments had produced or generated the amounts necessary to meet the net returns promised to investors. I am going to refer to statements of the latter kind (where the track record is of properties delivering the promised returns) as **the Modified Track Record Representation.**

47. The fourth alleged representation is **the Underwritten Representation** – that the promised returns were underwritten and therefore secure. I accept that a number of the marketing documents contained representations that the promised returns were underwritten by companies of substance or with assets or "asset-backed". That is capable of constituting an actionable representation to the extent that:

    i) The company promising the returns could not be said, from the asset perspective, to be companies of financial substance when the representation was made (it being no answer to the making of such a representation, as opposed to its falsity, that, had the representation been true when it was made, it might have ceased to be the case thereafter).

    ii) At the date when the representation was operative, there was a settled intention to dispose of the assets the company was described as having and to use the proceeds to meet outgoings.

    iii) The promise was said to be backed by identified assets when those assets would not be legally available to meet any claim for the returns.

48. I am going to refer to representations embracing these states of affairs as **the Asset-Backed Representation**. I am not persuaded that there was any different actionable sense of the Underwritten Representation, or at least one which adds meaningfully to the representations I have found.

49. The precise terms of the representations made in particular brochures are considered on a brochure-by-brochure basis below. However, statements that the level of returns were guaranteed ("high guaranteed income" and similar) were no more than a promise of a fixed return and did not of themselves amount to a promise that the contractual covenant of the promisor was secured, enhanced or collateralised in some way. Nor is the use of the word "underwritten" alone sufficient to amount to a representation of this type.

50. The fifth alleged representation is **the Effortless Representation** – that the promised returns would be paid without any effort or involvement on the part of the investors. I am not persuaded that this adds meaningfully to the Substance Representation. To the extent that the promised returns were delivered by the contractual counterparty, achieving the investment returns would indeed be effortless. What changed the position was the collapse of the Alpha Defendants' business structure. The vice of this alleged representation is really that there was no proper basis for suggesting with any level of confidence that the promised returns could be paid for the promised period, and that is addressed by the Substance Representation.

51. Finally, there were some representations alleged to have been made in particular brochures:

    i) A representation in some brochures were 100% occupied from Day 1 (**"the 100% Occupancy Representation"**). I accept that representations of fact to this effect were made in some of the brochures.

    ii) A representation that the investor had the right to require the developer/seller to

repurchase the investment after a defined period (**"the Buy-Back Representation"**). Once again, I am satisfied that this took effect as a representation as the contractual terms of the deal, and that it was made in some of the brochures.

52. The Claimants also argued for a number of implied representations. I am satisfied that those express representations I have found to have been made sufficiently capture the essence of the implied representations, which do not need to be considered independently.

Who were the representations made by?

53. I have dealt with the law at [31]-[32]. As I explain below, I am satisfied that Mr Kewley and Mr Spence authorised EPL to make the representations I have found in brochures and also in the Developer Prospectuses they were aware of (see [167]-[169] below). That material was either specifically approved by Mr Kewley and Mr Spence, or the making of the specific representations with which I am concerned in marketing statements by EPL was generally approved by Mr Kewley and Mr Spence. They intended EPL to market these investments on the basis that the returns were sustainable, backed by substantial assets and that the business model had been proved by the success of prior projects in delivering promised returns.

54. I have limited my findings to (a) representations contained in brochures and prospectuses; and (b) the repetition of those same representations (in substantially similar terms) in other EPL communications. Statements of the latter kind were also clearly authorised by Mr Kewley and Mr Spence who intended EPL to communicate statements to the intended effect to potential investors both through provision of the brochures, on EPL's website and in written and oral communications. I have not addressed individual communications (whether oral or in writing) by EPL to any other effect, as these were not really explored at trial and may raise more complex issues of attribution.

55. I am also satisfied that, in approving the relevant brochures and prospectuses, and other communications to the same effect, Mr Kewley and Mr Spence were authorising their use on behalf of the Alpha Group companies who would enter into transactions with an investor in order to implement the investor. That principally concerned the companies which entered into the purchase agreement, the superior lease and the underlease in respect of the unit sold and any management company which contracted with the investor as part of the same transaction. However, I am not persuaded that representations made to an investor for the purpose of persuading the investor to enter into a particular transaction can be attributed to Alpha Group companies who did not contract with the investor as part of the transaction.

Loss

56. A successful claimant in deceit is entitled to recover all losses directly flowing from the deceit, whether or not they are reasonably foreseeable, and including consequential losses: *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 per Lord Browne Wilkinson at 264H-265C.

57. At 266H-267D, Lord Browne-Wilkinson identified the following seven principles:

> "(1) The defendant is bound to make reparation for all the damage directly flowing from the transaction;
>
> (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction;
>
> (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction;
>
> (4) as a general rule, the benefits received by him include the market value of the property acquired at the date of the acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered;
>
> (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated, it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property;
>
> (6) in addition, the plaintiff is entitled to recover consequential losses caused by the transaction;
>
> (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."

58. A claimant who was deceived into making a purchase is in principle entitled to recover:

i) Any costs of acquisition that would not have otherwise been incurred: *4 Eng Ltd v Harper* [2008] EWHC 915 (Ch); [2009] Ch. 91, [21];

ii) Any costs incurred post-completion to support the acquisition: *East v Maurer* [1991] 1 WLR 461. This can include loss of management time: *National Building Society v Dunlop Haywards* [2009] EWHC 254 (Comm),[15]–[18].

iii) Lost profits on an alternative transaction that the claimant would have engaged in but for the deceit: *Smith New Court*, 282G (Lord Steyn describing that as a "classic consequential loss"); *East v Maurer* [1991] 1 WLR 461. Beldam LJ held in *East v Maurer*, 467 that it is not necessary to identify some particular purchase the claimant would have made in the counterfactual, rather the Court will do its best on the material available and, if necessary, discount so as to reflect relevant uncertainties. Such a loss must be pleaded and proved.

59. What of compound interest as damages where an actionable wrong has deprived the claimant of the use of funds to which it was entitled (whether funds which were

originally its own and which were paid away as a result of a legal wrong or funds to which the claimant had a legal right but which were withheld from the claimant in breach of its legal rights)? In *Equitas Ltd v Walsham Bros & Co Ltd* [2013] EWHC 3263 (Comm); a claim for compound interest as damages for breach of contract was brought against a reinsurer which had failed to pay sums due to insurance syndicates, causing the claimants to lose the opportunity to earn investment income on those sums. Males J stated that it was open to the court to infer a loss of compound income at the rate at which the syndicates could generally have borrowed money and to award that sum as damages for breach of contract. At [123], he held:

i) Unless there is some positive reason to do otherwise, the law will proceed on the basis, at any rate in the commercial context, that the claimant kept out of his money has suffered loss as a result. That represents commercial reality and everyday experience. Specific evidence to that effect is not required and, if adduced, may well be somewhat hypothetical and thus of little assistance.

ii) In the case before him, the general evidence of the importance attached in the insurance market to prompt remittance of funds was more than sufficient to justify the conclusion that the syndicates did suffer a loss by being kept out of their money.

iii) The question in such a case is not whether a loss has been suffered, but how best that loss should be measured.

iv) A solvent claimant who seeks to recover damages which exceed the cost of borrowing to replace the money of which it has been deprived is likely to be met with the defence that the claim is too remote or that it has failed to mitigate by borrowing in order to replace the money lost, in which case its recovery may be limited to that borrowing cost, which will include the need to pay compound interest, that being the only basis on which money can be borrowed commercially.

v) The position may be different if there is good reason why the claimant should not have gone into the market to borrow the missing money, for example if it did not know and should not reasonably have known that the money was missing.

vi) It is not necessary for the claimant to produce specific evidence of what it would have done with the money or what steps if any it took to borrow or otherwise to replace the money of which it was deprived.

vii) In commercial cases and unless there is some positive reason to do otherwise, the law will proceed on the basis that the measure of the claimant's loss is the cost of borrowing to replace the money of which the claimant has been deprived regardless of whether that is what the claimant actually did.

viii) A conventional rate will be used which represents the cost to commercial entities such as the claimant and is not necessarily the rate at which the claimant itself could have borrowed or did in fact borrow. If a conventional borrowing cost is to be adopted in this way, the question whether interest should be simple or compound answers itself: it is impossible to borrow commercially on simple

interest terms.

60. It might have been expected that the approach approved in the *Equitas* judgment would have led to claims for compound interest as damages being advanced on a routine basis in the Commercial Court, given that the vast majority of the claims in this court are brought by commercial entities in a commercial context. That does not appear to have been the case, although *Equitas* has been cited with approval in a number of first instance decisions in the Business and Property and associated courts:

    i) In *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2016] CAT 11, the Competition Appeals Tribunal applied *Equitas* to award compound interest as part of the damages caused by having to pay unlawful overcharges. The claim was pleaded and supported by extensive evidence as to how Sainsbury's business was financed.

    ii) In *Peacock v Imagine Property Developments Ltd* [2018] EWHC 1113 (TCC), Stuart-Smith J, the claimants agreed to enter into a property development venture with the defendant, a property development company, but wrongfully halted the development. The defendant counterclaimed and recovered its loss of profit on the development. The defendant also sought to recover the additional returns it would have earned from having the lost profits available for use in its business. The claim for the loss of specific business opportunities failed on the burden of proof, but the judge was satisfied the money would have been used in other developments and that these would probably have been reasonably profitable ([148]). The Judge was persuaded that an award of the cost of borrowing the money at the defendant's usual rate of borrowing (10%) should be made, compounded at three-monthly intervals.

    iii) In *Rowe v Ingenious Medial Holdings* [2020] EWHC 1731 (Ch), [36], Nugee J made an obiter observation in the course of a case management decision that "a claimant who shows he has been induced to pay out a capital sum as a result of a deceit (or other legal wrong) by a defendant and has not received it back is prima facie entitled to recover that sum as damages together with … interest as damages under the principle of *Sempra Metals Ltd v IRC* … on the simple basis that that is what he has lost" with "no onus on him to prove what else he has done with the money."

    iv) More recently, in *Royal Mail Group Ltd v DAF Trucks Ltd* [2023] CAT 6, the Competition Appeals Tribunal once again applied the *Equitas* decision when awarding compound interest as damages, noting at [762] that "some reason, lawyers and judges seem particularly averse to compound interest". The tribunal referred to Males J's decision in the *Equitas* case, and stated at [764] that "in the light of those comments it is perhaps surprising that compound interest is not ordered more often and the law still seems to be wedded to simple interest."

61. The tribunal in *Royal Mail* do not appear to have their attention drawn to one case which might be said to reflect the judicial caution about compound interest awards which they referred to, the decision of the Privy Council in *Sagicor Bank Jamaica Ltd v YP Seaton*

and others [2022] UKPC 48. In that case, a claim for loss in the form of compound interest consequential on the late payment of a debt failed because of the exiguous and wholly generalised terms in which it was advanced: see [28]. [30].

62. At [33], the Board agreed that in a typical commercial case, the normal and conventional measure of damages for breach of an obligation to remit funds consists of compound interest at a conventional rate, while noting that the evidence required from which a court can infer that a plaintiff has suffered financial loss in the form of the incurring of borrowing costs will depend upon the circumstances of the particular case. The Board noted that in the *Equitas* case the state of the insurance market at the relevant time and the evidence which was available of the importance in that market of prompt cash flow supported the inference that the claimant had suffered financial loss in the form of incurring borrowing costs to replace the withheld money.

63. However, the Board did not agree with Males J's conclusion that the common law has gone so far as to recognise that a claimant or plaintiff kept out of his or her money in a commercial context is as a norm entitled to claim and receive as damages for breach of contract interest on the withheld sums that is calculated by reference to the cost of borrowing such sums at a conventional rate without evidence from which such a loss can be inferred. At [37], the Board concluded:

> "In summary, interest, including compound interest, may be awarded as damages for breach of contract. A plaintiff seeking interest as damages where the defendant has withheld money in breach of contract must plead and prove its loss. If a plaintiff pleads that it has incurred loss by having to borrow replacement funds, what it must prove are facts and circumstances from which a court may properly infer on the balance of probability that it has borrowed funds to replace that which has been withheld from it. What evidence will suffice to enable such an inference to be made will depend upon the facts of the particular case. For example, if a business operated an overdraft to provide its working capital, it may be relatively straightforward to infer that the non-payment of money due to it will have increased its borrowing. If the claim for financial loss is the loss of an opportunity to make a profit or earn interest through an investment, it may be possible to infer from the way in which the plaintiff operates its business that it would have used the withheld funds profitably, for example if it could show that its practice was to deposit and earn interest on surplus cash. But if it claimed as loss an inability to pursue a particularly profitable project, the plaintiff could face a defence that it had failed to mitigate its loss by borrowing …. Where, as will often be the case, it is not possible to prove that the money would be used on a particularly profitable venture, the commercial return on a deposit of funds or on relatively short-term lending may be an appropriate approximation of the plaintiff's loss, provided it is properly pleaded and proved."

64. The present case involves claimants who say that they disbursed cash as a result of a legal wrong which would otherwise have been available to them. The Claimants are not commercial entities operating in a commercial market like the insurance market, but mostly retail investors (although some of the claimants are special purpose vehicles set up to hold those investments). None of the Lead Claimants have alleged, still less

established, that funds had to be borrowed as a result of the wrongs complained of. I am not persuaded in these circumstances that I can simply infer a loss in the form of the compound interest which would have been earned on the funds. For compound interest to be recovered as damages at common law, the relevant loss must be pleaded and the facts from which the loss can be inferred proved. I consider the position of each of the Lead Claimants in this regard in turn below.

65. The Lead Claimants argued that they are in a better position than most claimants seeking to recover compound interest as damages for two reasons.

66. First, it was said that if they established their claims in deceit, they would benefit from the "broad axe" in the calculation of damages. There are contexts in which a claimant who establishes it has been the victim of dishonest conduct will find itself better placed than other claimants – in the evidential presumption of reliance where there has been a dishonest misrepresentation, or in the absence of any rule of remoteness, for example. Similarly, the court is likely to favour the claimant when determining the amount of a loss which it is satisfied was suffered when assessing uncertainties which have been created by the defendant's wrongdoing (*Yam Seng*, supra). However, I am not persuaded that this can extend to the dispensing with the relatively limited requirements of pleading and proof which apply to a claim for the recovery of compound interest as damages. It ought to be possible for a claimant to provide some evidence of what it would have done with funds had they not been paid to the defendant by reason of the latter's fraud or of losses incurred due to the absence of such funds, and many of the Lead Claimants have been able to do so. I note that the requirement for loss to be pleaded and sufficiently proved was accepted and applied by Teare J in a dishonesty case in *JSC BTA Bank v Ablyazov* [2013] EWHC 367 (Comm).

67. Second, it was said that compound interest was not claimed simply as damages at common law, but in equity. No equitable claims are advanced in this case, save for rescission of the Ilfracombe transactions, but I accept that that, of itself, does not preclude the availability of the equitable jurisdiction to award compound interest. The equitable jurisdiction to award compound interest was subject to detailed review in *Granville Technology Group Ltd v LG Display Co Ltd* [2023] EWCA Civ 980. Like the deceit claims in this case, the claim in that case was an ordinary common law claim to recover damages in tort (breach of statutory duty: [25]). Males LJ summarised the law as follows:

    i) The purpose of the restitutionary equitable jurisdiction to award compound interest is to ensure that a fiduciary (or a fraudulent wrongdoer) does not benefit from his wrongdoing. Compound interest is intended to restore to the claimant not only the property which has been misapplied, but also the profits which have been, ought to have been, or can fairly be presumed to have been, earned from the wrongdoer's use of the claimant's property during the period in which it was taken from him. Compound interest is not awarded just because the defendant has behaved badly, or even fraudulently ([56]).

    ii) For compound interest to be recovered in equity in cases of fraud, the claim must be to "recover" the very money which had been "obtained by fraud and retained by

fraud". i.e. cases "where the fraud had resulted in the fraudster obtaining the claimant's money and retaining it for his own benefit" ([63]).

iii) The equitable jurisdiction to award compound interest does not apply to any case of fraudulent conduct. Compound interest is not awarded just because the defendant has behaved badly, or even fraudulently, and its purpose is not to deter other people from engaging in dishonest conduct. The jurisdiction does not apply, for example, to a straightforward action in tort for damages for deceit, but depends upon the defendant having in hand a fund obtained from the claimant which he has, or is deemed to have, made use of for his own benefit ([65]).

68. The Court of Appeal in *Granville* referred to the earlier decision in *Black v Davies* [2005] EWCA Civ 531, in which Mr Black deceived Mr Davies into entering into certain copper trades with third parties. The Court of Appeal dealt on an obiter basis, but in some detail, with the suggestion that there was jurisdiction to award compound interest under the court's equitable jurisdiction in fraud cases, in reliance on comments made by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington BC* [1996] AC 669, 701 and Lord Brandon in *President of India v LaPintada Compania Navigacion SA* [1985] AC 104, 116. At [87], the Court of Appeal stated:

> "When this passage from Lord Browne-Wilkinson's speech is read as a whole, in particular his quotations from Lord Brandon's speech in *LaPintada*, it is demonstrated that his two references to 'absence of fraud' cannot have been intended to go beyond the type of case referred to by Lord Brandon, that is to say a case where money has been obtained and retained by fraud; in other words, where the fraudster has had in hand a fund which he has, or is deemed to have, made use of for his own benefit. It follows that the correct view of the *Westdeutsche Landesbank* case is that three, not two, of their lordships were firmly of the view that the equitable jurisdiction to award compound interest was limited to the two categories of case identified by Lord Brandon. Like that case (where the claim was a common law claim for money had and received) the present case does not fall into either category. Mr Davies' fraudulent misrepresentation did not cause him to obtain and retain money belonging to the Black parties; it caused them to lose money by trading in the markets. In that state of affairs the present case is covered by the decision of the majority in the *Westdeutsche Landesbank* case. So far as this court is concerned, that is an end of the compound interest question. It cannot be reopened at this level of decision."

69. In this case, the claimants bring deceit claims against Mr Kewley, Mr Spence and the companies with whom they transacted. So far as Mr Kewley and Mr Spence are concerned, the claimants did not transfer funds to them, and there can be no question of the equitable jurisdiction to award compound interest being engaged to the claimants' benefit so far as they are concerned. To the extent that a claimant was induced by a corporate counterparty's deceit to pay money to that counterparty, I accept that there is a distinction from the fact-pattern in, for example, *Granville* (no transfers) and *Black* (payments to third parties). However, in cases where rescission is not sought and obtained of the relevant transaction, I do not think this changes the outcome. The corporate counterparties do not "retain" the claimants' funds in any meaningful sense,

nor are they being asked to "return" a fund. The payments were made on the basis of a condition (the receipt of the unit or obtaining the rights under the contract, whatever their eventual worth) which was satisfied. What is being sought is not the return of the claimants' funds, but damages representing the difference between the amount paid and the value received, together with damages for the loss of the opportunity to use those funds in some other profitable enterprise. I am satisfied that claims of this kind brought against a non-fiduciary do not attract the equitable jurisdiction to award compound interest.

70. I did not receive submissions on whether, where money is returned to the original payee consequent upon the rescission of the transaction, interest can be awarded on the amount returned on a compound basis and (if so) from what date. I note that the Law Commission's Report, *The Law of Contract: Report on Interest* (Law Com No 88) (1978) at paras. 10 and 21 understandably proceed on the basis that there is jurisdiction to award compound interest as ancillary relief in respect of equitable rescission and the proposition has the formidable support of Lord Brandon in *President of India v LaPintada Compania Navigacion SA* [1985] AC 104, 116 (which may in turn have drawn upon the Law Commission report). To the extent this issue is in dispute, I will address this at the consequential hearings.

FACTUAL FINDINGS

71. The investment properties comprise:

i) a new holiday development at Westbeach, Westward Ho!, Devon;

ii) various student accommodation across England and Wales; and

iii) an existing holiday resort in Ilfracombe, Devon which was identified as an object of refurbishment.

72. While each site has its own features, the business model was essentially the same for all properties: investors buying one or more units in a site managed as a whole, in return for the promise of fixed returns for a fixed period, with the actual operation of the site being undertaken by a company in the Alpha Group or retained by them. In order fairly to appraise Mr Spence and Mr Kewley's state of mind at any relevant point in time, it is necessary to have regard to the information they had acquired and the way they had conducted themselves across the full suite of investment offerings they had promoted at that point. For that reason, a broadly chronological factual enquiry is required, but with occasional deviations from that chronological account in an effort to ensure a more coherent narrative.

Westbeach

73. In 2007, Mr Spence met Mr John Fowler, the operator of a holiday park in Westward Ho!, and agreed to purchase that site (**Westbeach**) from Mr Fowler for £3,000,000 with a view to constructing a number of residential blocks on the site. When looking to raise financing to complete the acquisition, he came across Mr Kewley and, with his involvement, raised funding through a 2-year facility from Salt Commercial, as result of

which the acquisition was completed through a corporate vehicle in early 2008. The facility provided 100% of the purchase price, Mr Spence acquiring the property with his then business partner, Mr Horsnall. Planning permission for the development of the site was obtained in September 2008. However, that still left the problem of raising the finance to effect the development. With the advent of the financial crisis, that proved extremely difficult.

74. To assist in raising development finance, in 2008 Mr Spence commissioned a planning report from Planning Solutions Consulting Ltd. A draft report produced by Mr Mike Stickland dated 15 October 2008 was the result: **the PSL Report**. The PSL Report:

i) described the proposed development site in fulsome terms, and contained some high-level information about tourist projects for the South West region;

ii) referred to "enquiries with local holiday letting companies and national providers who report very good levels of bookings for self-catering holiday accommodation within the area", and referred to input from Blue Chip, a local letting agent, which is not available to the court but was apparently intended to take the form of an exhibit to the report;

iii) assumed a development of 160 apartments, consisting of 148 two-bedroom apartments and 12 three-bedroom apartments and associated facilities, none of which had been built (and which were, in the event, built in phases, to the extent that they were completed);

iv) provided estimated annual occupancy rates for two and three-bed units of 55% and 61.75% respectively and estimated gross income of £3,597,751, £3,154,778 net of commissions, payments and discounts;

v) assumed that operating costs would be met by operating revenue, it being assumed that non-residents would pay to use the facilities. In contrast to the Ilfracombe report, it contained no estimate of the costs of operating each unit (utilities, cleaning, service charges etc); and

vi) in a general disclaimer which apparently appears on the front of all their reports, stated that the projections it contained were "intended only to illustrate particular points of argument and do not constitute forecasts of actual performance."

75. As plans for the Westbeach site developed, the relationship between Mr Spence and Mr Kewley evolved from that of client and consultant into an informal joint venture. In late 2009 or early 2010, following interactions with a firm of estate agents called Barrasford & Bird, Mr Spence and Mr Kewley adopted a model of financing the development of the site by selling units to investors off-plan, with companies in the same corporate ownership as the site owners/developers sub-letting the units, renting them out to third parties and paying the unit owners a fixed return. The structure envisaged was broadly as follows:

i) An investor would purchase a long lease relating to one of the developments from one of the Alpha Companies (**the Superior Lease**).

ii) There was to be a guaranteed right of buy-back after 5 years at a guaranteed price.

iii) The investor would sub-let the property (the sublease being referred to as **the Underlease**) on a 5-year term, on the basis of a guaranteed percentage return on the purchase price.

76. On 19 March 2010, King Sturge LLP, a firm of valuers, produced a report for Salt Commercial "for loan security purposes" valuing the freehold interest of the Westbeach Site at £1.4m if planning permission were granted, £22.9m as a gross development value (with an assumed construction costs of £14.6m) and £750,000 assuming a distressed sale within 180 days. Various financial structures were in contemplation over the course of 2010, with the involvement of a financial advisory firm called RSM Tenon Limited ("**RSM Tenon"**). On 3 September 2010, RSM Tenon wrote to Salt Commercial stating that they had been asked by Mr Spence to confirm their "appointment as his accountant auditor and tax adviser in respect of" the Westbeach scheme. RSM Tenon suggested that the developer/freeholder would be a company called Green Parks (Westward Ho!) Ltd, who would finance the development by granting 125 year leases over 160 apartments, with the leases being repurchased by the developer after 5 years at 150% of the purchase price. RSM Tenon said that they had been told that PSL had prepared "detailed financial forecasts" of which they had had sight, but which they had not audited or verified, but expressed the view that, on the basis of those forecasts, the scheme appeared to be a viable proposition. Those forecasts addressed the first 18 months of the project (to completion of the build phase) and years one to three. The precise investment structure the report was considering is unclear, and the forecast envisaged a return to investors of 5%.

77. In the second half of 2010, Mr Spence and Mr Kewley also retained a firm of solicitors called Jacksons Law (**"Jacksons"**) to assist in the preparation of the scheme documentation. The scheme as outlined to Jacksons by Mr Kewley in an email of 25 August 2010 once again envisaged a 5% return for investors, and a 5-year buy-back for 150% of the purchase price (although in one exchange, Mr Kewley stated the developer was to have an option rather than an obligation to buy the apartments back). Jacksons produced legal documentation for the Westbeach scheme – draft contracts for the sale of individual apartments, the Superior Leases and the Underleases. An issue has arisen as to what comfort Mr Spence and Mr Kewley could properly and did take from their interactions with Jacksons in relation to the question of whether the scheme was a collective investment for regulatory purposes, which I return to at [604] below.

78. There was a dispute as to the extent of Mr Kewley's involvement in Westbeach in the early years of that project, it being Mr Kewley's evidence that he had very limited involvement until 2016. I accept that Westbeach was very much Mr Spence's "baby" (in Mr Kewley's phrase), and that Mr Kewley's "day to day" involvement in Westbeach may well have been limited in the early years of that project. However, I am satisfied that he came to work closely with Mr Spence in setting up the investment, and interacting with Jacksons and Barrasford & Bird, introducing and instructing sales agents and working to source bookings.

79. In or around August 2010, Green Parks (Westwood Ho!) Limited instructed Barrasford &

Bird to market units in Phase 1 (Block 1) of the Westbeach development, which contained 24 two-bed units. The marketing material shown to the court promised a 5% return over 3 years, with an offer to repurchase units at 150% of the purchase price at that point.

80. For reasons which are disputed, Mr Spence and Mr Kewley's relationship with Barrasford & Bird came to an end by Easter 2012, with only 11 units sold. Over the period in which Barrasford & Bird were involved, the ownership of Westbeach site was transferred to Green Parks (Westward Ho!) Limited in March 2011, when the loan from Salt Commercial was refinanced with the Nationwide Building Society ("**Nationwide"**). The Nationwide financing was itself restructured in February 2012, by which stage I am satisfied that the financial pressure on the project was becoming acute. Bridging finance had to be obtained, and a receiver was appointed by one of the lenders, Capital Bridging, in late 2012.

81. In or around September 2012, at a stage when Mr Spence and Mr Kewley were thinking of expanding into student accommodation, they came into contact with Mr Crump and his company EPL who had previously worked as a sub-agent for Barrasford & Bird. On 10 September 2012, Mr Kewley sent Mr Crump an email summarising the Westbeach investment proposition. By 25 October 2012, Mr Kewley was writing to Mr Crump stating that they were marketing 13 two-bed apartment blocks at Westbeach on the following basis:

    i) Investors would enter into a 5-year leaseback with a guaranteed return of 10% per annum.

    ii) One year's rent would be lodged with solicitors at completion "to guarantee the income".

    iii) There was a guaranteed buy back at the original purchase price after 5 years.

    Mr Crump was asked if he was interested in marketing the properties on that basis, with a subsequent plan to sell block 2 units "off plan" (i.e. prior to construction).

82. The letter attached a "revised sales brochure" entitled "West-Beach Brochure Oct 2012". At this stage, it was anticipated that the Hoseasons Group would manage the letting of the units. Mr Crump prepared a further brochure in similar terms, and also liaised with Mr Kewley to help him answer queries from direct investors. It is important to note the following:

    i) I am satisfied that EPL became involved because of dissatisfaction on the part of Mr Spence and Mr Kewley as to the rate of sales being achieved by Barrasford & Bird. Mr Spence and Mr Kewley took a particularly close interest in the way in which the units were marketed by EPL, as will become apparent.

    ii) That extended to a close interest of Mr Spence and Mr Kewley's part in the marketing material being used by EPL, with Mr Kewley providing an early example of a brochure which served as EPL's template, and reviewing and approving brochures on a regular basis.

iii) For his part, Mr Crump repeatedly passed questions received from potential investors back to Mr Kewley and passed on their responses – he clearly deferred to Mr Kewley and Mr Spence on the finances of the scheme.

iv) I am satisfied that EPL's marketing effort essentially remained broadly within parameters established and approved by Mr Kewley and Mr Spence.

v) Key broad themes of the marketing material, reflected in the Substance, Modified Track Record and Asset-Backed Representations, were approved by Mr Kewley and Mr Spence, who knew, understood and intended that they would be used.

vi) It is possible from the available documentation to see Mr Kewley and Mr Spence having regular sight of and approving the brochures EPL planned to circulate or were circulating on behalf of the Alpha Group companies involved in each project. Where there is no specific evidence that a particular brochure provided to a Lead Claimant was sent to and/or approved by Mr Kewley and Mr Spence, to the extent that it repeated the core messaging which I am satisfied Mr Kewley and Mr Spence did approve on a regular basis and did intend EPL to communicate to potential investors the representations in such brochures were authorised by Mr Kewley and Mr Spence.

83. The basis on which the "guaranteed" return had moved from 5% to 10% per annum was explored with Mr Kewley at trial, who said it was effectively Mr Spence's decision and he trusted him, and that it was believed that increases in rents over time would allow the 10% target to be met, with the one year's rent set aside providing a cushion for the early years. There are two issues to be considered:

i) what the basis was for the movement from 5% to 10%; and

ii) whether Mr Spence and Mr Kewley believed that there was any realistic basis for suggesting that 10% was a viable return.

84. Only Mr Kewley gave evidence on these issues. He said he had relied on the PSL Report, which he said he believed he had seen when the marketing of Westbeach began in 2012. However, that was a 2008 report prepared to support a contention that the income from the property would be sufficient to meet a development loan. It is not possible to determine what level of return this required. Mr Kewley also referred to the RSM Tenon report, but this was only considering a 5% return to investors: see [76].

85. I have seen no contemporaneous evidence that the PSL and RSM Tenon reports informed the adoption of a 10% guaranteed return in September 2012. However, in closing the Alpha Defendants sought to offer a justification for the view that the Westbeach units could pay their way which Mr Spence had not chosen to offer in evidence. This involved a lengthy excursus through various spreadsheets produced as part of the same exercise as the PSL Reports, and attempts to extrapolate from those 2008 spreadsheets to a position in 2012 and 2013. As to this:

i) The spreadsheets were last modified in March 2010, although it is not possible to tell what the modifications were. By the time the returns on Westbeach Phases 1

and 2 were being guaranteed at 10% a year for 10 years, Mr Spence had been operating the Westbeach Phase 1 site since Easter 2012, with greater experience of actual operation as units continued to be sold. He did not have to rely upon a set of 2008 assumptions projected forward at assumed rates to get to letting prices in 2012 and 2013. He had access to his own figures.

ii) However, there was no disclosure suggesting that the site was generating returns at the level predicted in Mr Stickland's spreadsheets or anything close to them, still less higher figures with the benefit of inflationary increases. I infer that this was because disclosure of actual income and expenses at Westbeach in 2012 would have shown that there was no basis for the promised returns.

iii) The expert opinion of both valuers is that the net returns of Westbeach were not sufficient to cover the promised returns from 2013, and there is no reason why the position would have been any different in 2012.

iv) In 2018 – by which time there ought to have been an appreciable increase in the nominal amount of rent on the basis of the same inflationary increases on which the Alpha Defendants relied upon so frequently – Mr Sullivan reported that 48 units at Westbeach phases 1 and 2 were making annual net returns of £1,211 each. While this was "lower than we would get as we are using a number of units for different uses", the figure is simply miles away from the projected return of £22,000 (as well as confirming that records were kept for the actual returns of units). That strongly suggests that the site never came close to generating the net earnings necessary to meet the promised returns.

v) As I have stated, I was shown no contemporaneous document linking the 10% promised return to the PSL Report, nor referring back to those 2008 projections as somehow significant in that context. Indeed there is no evidence the spreadsheets were even opened after March 2010. When the actual levels of return were clear, there was no internal discussion, still less exchanges with Mr Stickland, at the failure to achieve the levels in the PSL Report.

vi) Ms Griffin was unable to identify any letting income for Westbeach Phases 1 and 2 from the disclosed bank statements which she reviewed (although I accept that she did not have access to a full set). However, she did identify money being transferred into Green Parks Holdings from the start of her period of review on 7 August 2013 to meet returns: £40,000 in August 2013, £36,000 in September; a total of £80,000 before the end of 2013; £116,000 in the first six months of 2014; and £326,000 in total in 2014. There was clearly a huge cash deficit from the outset.

vii) Against that background, there were a number of very serious questions for Mr Spence to answer about the move from 5% to 10%, with evidence strongly suggesting this was driven by a desire to sell units more quickly in the face of financial pressures rather than any belief 10% was achievable. Mr Spence's failure to attend to answer those questions is itself highly significant when considering whether he had an honest belief in the viability or achievability of the

promised returns. Submissions by Ms Page by reference to the interstices of the 2008 spreadsheets, impressive as they were, cannot begin to remedy that gap. It is also right to record that in his witness statement, which was not adduced in evidence, Mr Spence did not found his asserted belief in the achievability of 10% on the analysis of the spreadsheets accompanying the PSL Report, nor did he do so in his witness statement seeking to set aside the freezing order on the basis that there was no good arguable case. Nor were those spreadsheets the subject of expert evidence.

viii) Finally, I do not feel able to place reliance on the email of 30 June 2015 which sent what appears to be an updated version of the PSL Report to Mysing with a view to getting Mysing to invest in the later Westbeach phases. Had Mr Kewley or Mr Spence sought to rely on this email in their evidence, they would inevitably have been intensively questioned about how the model attached to it in 2015 compared with the actual performance of Westbeach over the period 2012 to 2015. The fact that Mr Spence may have dusted off the PSL Report in 2015 for the purpose of trying to persuade Mysing to put some money into venture says nothing about Mr Spence's belief in the reliability of that version of the PSL spreadsheets in 2015, still less a different version of the spreadsheet some 3 years before. Mr Spence's failure to disclose actual performance during the period of Westbeach's operations to Mysing, and the decision instead to refresh a 2008 report produced before Westbeach had been built, is itself an obvious matter of concern.

86. I have concluded that Mr Spence lacked any honest belief that the Westbeach site was realistically capable of generating 10% annual returns over 5 years, and that the move to 10% reflected the financial pressures which the project was facing, and his assessment that this was what had to be promised to move units quickly enough to generate funds to continue the development.

87. As to any suggestion that Mr Spence honestly believed a 10% return to investors was a realistic or viable offering with the benefit of a one-year float:

i) If there ever was a plan to lodge a year's return with solicitors, I am satisfied that it was fleeting. While Mr Kewley referred repeatedly to money being "set aside", there are no bank statements available for the underlessee of Westbeach to enable the issue to be tested.

ii) In any event, I am satisfied that Mr Kewley and Mr Spence never "set aside" some form of sinking fund in Green Parks Holidays Ltd because this was simply not how they worked. I have already referred to the need for regular injections into Green Parks Holidays Ltd from at least the start of 2013.

iii) Nor am I persuaded that such a fund was "set aside" in the developer of the Westbeach site, Green Parks (Westward Ho!) Ltd, although investors would have had no claim on the assets of that company in the event of a default on the underlease in any event.

iv) I return to this issue at [120] below.

88. I should deal with one submission made by the Alpha Defendants in closing. It is not sufficient that Mr Spence may genuinely have intended to complete the construction of Westbeach, and bring the real property leases which the structure involved – superior lease and under lease –into being. To accelerate the sales to a level he was happy with, he caused the units to be marketed on a basis which he must have known had no realistic prospect of being delivered over the 10-year period of the promise. Nor is it an answer that, in the early years at least, Mr Spence may have been willing to transfer funds from other Alpha Group companies to "keep the show on the road" for a little longer. The unexplained increase in the promised returns and the complete absence of contemporary documents suggests that Mr Spence was willing to attract a quick influx of funds from investors by conveying a false impression that there was real substance behind the promised returns, when he realised that the returns were simply not sustainable for the promised term. That inference derives strong support from Mr Spence's failure to attend court and explain his state of mind or the basis upon which he honestly believed the investment offering was viable and capable of being delivered.

89. Indeed, there is a striking contrast between the care Mr Kewley and Mr Spence put into the construction side of their business, and the way in which they arrived at the rent guarantees. The former, by which they created units to sell, generating huge profits in the process, is carefully documented, there are numerous spreadsheets, the active involvement of appropriate professionals is clear. In the latter exercise, there is at best the odd email to provide EPL with some colourable basis for the promised return if challenged.

90. The position regarding Mr Kewley at this time is more complex. I accept that he was closely involved in a number of aspects of the Westbeach Phases 1 and 2 project, with authority to deal with Mr Crump and Jacksons, and to do so with considerable autonomy. While it is difficult to determine the point at which he moved from being Mr Spence's consultant to his partner, but this had clearly happened by 8 April 2013 when he became a 50% owner and joint director of A1 Alpha. Even before then, Mr Kewley clearly had considerable autonomy in relation to the sale of the Westbeach Phases 1 and 2 investment, given the extent of his ability to take important decisions on the companies' behalf without apparent reference to Mr Spence, and he introduced himself as Mr Spence's partner in November 2012, by which date he was already far more than a paid consultant. The fact that it may have taken until 2016 for Mr Kewley's de jure status as a director of the Westbeach companies to catch up with the de facto position does not change the position.

91. However, I accept that for the purposes of Westbeach Phases 1 and 2, it was Mr Spence who appears to have been the key figure so far as fixing the commercial terms were concerned:

    i) The Westbeach property was clearly Mr Spence's conception and the equity in it was Mr Spence's and not Mr Kewley's. It was Mr Spence, not Mr Kewley, who had raised the finance to acquire the property and faced the pressures of repaying it.

    ii) It was Mr Spence, and not Mr Kewley, who was dealing with Mr Stickland.

iii) In relation to Westbeach Phases 1 and 2, in contrast to the other projects, there was still a relationship of hierarchy between Mr Spence and Mr Kewley, with Mr Spence in charge, albeit this quickly evolved into a partnership of equals.

iv) There are no documents which show Mr Kewley contemplating the financial parameters of the Westbeach project, and what generating the required returns would involve.

v) There was no track record of failure in other developments to inform Mr Kewley's outlook.

vi) Mr Kewley's evidence in cross-examination was that exploration of the viability of the returns was a subject about which Mr Spence should be asked because "he came up with the numbers". I do not believe it would be fair to draw an adverse inference against Mr Kewley, as opposed to against Mr Spence, from Mr Spence's refusal to attend and answer those questions.

In these circumstances, I do not feel able to reject Mr Kewley's evidence that he left the determination of the investment offering and its viability to Mr Spence, and was happy to act on and accept Mr Spence's view that the 10% promise adopted in September 2012 was appropriate.

92. On 31 October 2012, Mr Kewley sent Mr Crump contractual documentation for Westbeach, including an underlease which was "the 10 year leaseback agreement which guarantees the buyers 10% … net pa – with the option for the developer to break in year 5 and exercise the buyback". The documents provided for Green Parks (Holdings) Ltd to guarantee the amounts due from the underlessee to the underlessor (and hence the guaranteed returns) –an arrangement which only applied to Westbeach Phases 1 and 2.

93. It will be apparent that between 25 October and 31 October 2012, there had been two significant changes in the commercial offer:

i) First, the promised return had moved from 10% for 5 years (but with a guaranteed buy-back by the developer) to 10% for 10 years (but with only the developer having a right to terminate the lease after 5 years). Once again, there is no material explaining the lengthening of the promised return period, although I accept that inflationary effects might have made the target less challenging over the back-end of the period. I remain of the view that Mr Spence can have had no honest belief in the viability of this promised return (which was no less exacting than its predecessor), and I remain unpersuaded that Mr Kewley had formed the view that the promised return was not viable, but was willing for the investment to be marketed on that basis nonetheless.

ii) Second, the buyback option had moved from a unilateral "put option" on the part of the investor, to its economic pole, a unilateral "call option" on the part of the developer. I am not persuaded that Mr Kewley was looking to hide this change from Mr Crump.

94. On 5 November 2012, Emerging EFZE Ltd (which was related to EPL) entered into a

marketing agreement with Green Parks Holidays Ltd in relation to Phase 2 of Westbeach. This provided for a non-exclusive, commission-based, marketing agreement. Subsequently, exclusive marketing agreements were entered into between the relevant Alpha Group developer companies and EPL to market specific developments to potential investors, although in some cases EPL undertook the marketing without signing such an agreement.

95. On 19 November 2012, Mr Crump sent Mr Kewley answers he had given to various potential investors, asking Mr Kewley to "check what I have written and add any details I have missed". This reflects what I am satisfied is a consistent feature of the manner in which Mr Crump worked, which continued throughout the period EPL was working with the Alpha Defendants: Mr Crump sought approval from Mr Kewley and/or Mr Spence of the information being communicated to potential investors. As to this particular communication:

i) Mr Kewley stated "the first 5 years are guaranteed at 10% net. Then there is a buy back. If that is not taken up, the rental guarantee will run for a further 5 years". That statement was potentially misleading, being capable of being read as suggesting the investor had a right to require the developer to buy the property back after 5 years when that was not the case.

ii) When asking who paid the guaranteed rental income, Mr Crump had identified Green Parks Ltd and suggested this was the company which owned the freehold, including undeveloped sites with planning permission, which was valued at £7.5m "in its current state, so this effectively underwrites your guaranteed income". That statement was defensible, both because the Westbeach site had been transferred from the developer, Green Parks (Westward Ho!) Ltd, to the operating company (Green Parks Holidays Ltd), in February 2012, although it was to be transferred to Green Parks (Holdings) Ltd on 2 August 2013, and because Green Parks (Holdings) Ltd had guaranteed Green Parks Holidays Limited's obligations under the underleases. While the message did not refer to the fact that the freehold was subject to a charge, in respect of a significant debt, I am not persuaded that Mr Kewley believed the statement was misleading on that basis, nor am I able to reject Mr Kewley's evidence that he believed there to be substantial equity in the Westbeach site at this time.

iii) On 19 November 2012, Mr Crump forwarded a question "who pays the guaranteed rental income, is it Hoseasons, if not, who is it?", Mr Kewley approved Mr Crump's suggested response, subject to the underlined passage:

> "Green Parks Ltd <u>its actually Green Parks Holidays Ltd</u>. This is the company that owns the freehold to the building and the whole site. The rest of the site has valid planning permission for further apartment blocks, swimming pool, restaurant, bar, reception and internal roads. The site is valued at £7.5m in its current state, so this effectively underwrites your guaranteed income".

iv) In response to the question, "if it is Hoseasons, what happens if they go bust?", Mr Kewley approved the response "It is not Hoseasons". Mr Kewley also stated that

instead of paying the first year's rent into escrow, "we are considering just paying the first 12 months rental payment at legal completion – similar to a cashback. This will provide buyers with instant cash and we save money on paying solicitors to sit on the escrow monies". In a further exchange on 22 November 2012, Mr Kewley approved Mr Crump's proposed response to a client that "Green Parks Holidays owns the freehold and land worth £7.5 million".

96. On 6 February 2013, Mr Kewley was circulating a revised brochure for block 2 at Westbeach:

i) This described the investment as "benefiting from guaranteed rental returns and an exit strategy option where the developer offers to buy the property back in 5 years" and "100% developer buyback guarantees" and "early exit option – buyback: £189,950".

ii) Those statements relating to the buy-back were incorrect, following the amendment of the proposed deal from one conferring a put option on the investor to one conferring a call option on the developer. I am satisfied that Mr Kewley must have known that the suggestion that the investment "benefited from …" "an exit strategy option" "where the developer offers" to buy the property was a thoroughly misleading description of a call option on the developer's part. The pattern of misdescription is simply too consistent and sustained to be accidental and unintended. I am also persuaded that Mr Spence must similarly have known this statement was to be made and was untrue – he was the moving spirit behind Westbeach, and would have taken a close interest in the buy-back offering of what was essentially his company. It is, in my view, highly likely that Mr Kewley would have discussed this language with Mr Spence, Mr Spence has, of course, chosen not to come to court to offer a contrary account.

iii) The brochure referred to "complete peace of mind" and an "established high-end developer" who had "completed a selection of high-end developments across the UK including a number of commercial developments and various other five star residential projects". It stated that "the combination of an established developer and the Hoseasons group creates a stunning partnership that guarantees delivery of your investment property and offers peace of mind through the build process and beyond."

iv) Mr Kewley said that the description "established high-end developer" and who had completed "a selection of high-end developments across the UK, including a number of commercial developments and various other five star residential properties" referred to Mr Spence's development at Kibworth, although he was unable to identify which other developments he had had in mind when describing the track record of the developer. There are elements of these statements which do not rise above the mere puff – the references to "high-end" and "five star". To the extent that they did not, I am not persuaded that Mr Kewley and (with rather greater hesitation) Mr Spence knew that these statements were substantially untrue in a respect which would influence the decision of a reasonable reader as to whether to contract.

97. The brochure also contained the statements which it is accepted amounted to the Substance Representation (indeed Mr Kewley confirmed that this was the impression which he and Mr Spence wanted to convey). For the reasons set out at [85] to [86] and [90] to [91] above, I am satisfied that Mr Spence had no honest belief in the Substance Representation but I am not willing to make the same finding about Mr Kewley at that point.

98. On 18 February 2013, Mr Crump contacted Mr Kewley again after a potential investor had asked for documentary evidence on various matters, including the ownership and valuation of Westbeach, the standing of the company, the basis of the guarantee and "evidence of the buy back". Mr Kewley replied with evidence of Green Parks (Holidays) Ltd's ownership of the site and an October 2012 valuation of £7.5m. Once again, I am not persuaded that Mr Kewley understood this last statement to be misleading because it did not refer to the level of debt secured on the site.

99. In 2013, the brochure circulated by EPL for Westbeach clearly reflected the language which Mr Kewley had included in his version of the brochure, and which Mr Spence was aware of. By this stage, and at all times hereafter, income guarantees were given for a 10-year period.

100. The brochure contained the following statements:

i) On the first page "Guaranteed Income for 10 Years" and "Guaranteed Buyback Years 5-20" and on a subsequent page, "offering generous annual net returns for 10 years combined with the peace of mind of a optional developer buyback offer in year 5,10, 15 and 20". Thus, the Buyback Representation was made.

ii) Mr Kewley accepted that the description of the buy-back was incorrect, but that "it would've have come out in the contract pack", saying "buyers weren't meant to buy purely on the strength of this, it was meant to put them into the legal process so they could do their own due diligence." I am satisfied that this misdescription of the buy-back position resulted from the misleading account which Mr Kewley had passed onto Mr Crump, and that both Mr Spence and Mr Kewley were happy for Mr Crump to convey that misleading impression to investors and expected him to do so.

iii) The "Financials – Summary" described the investment as "Secure, High Income" and "one of the most robust investments available today".

101. On 2 August 2013, the first underlease between a claimant and the underlease company, Green Parks Holidays Limited, began. By that date, the freehold of the Westbeach site had been transferred to Green Parks Holdings Limited, the developer company. As I have stated, over the period from 7 August 2013 to 28 March 2019, the developer company provided the underlease company with £3.7m in cash to allow the underlease company to pay the promised returns which could not be met from the operation of the site.

102. At this stage, I will complete the account of events relating to phases 1 and 2 of the Westbeach project up to end of March 2014, before reverting to the chronological sequence. By the end of 2013, the Westbeach project was already under severe financial

pressure. It is clear from an email from Mr Kewley to Mr Crump of EPL of 16 December 2013 that there was insufficient cash to pay EPL's invoices, and that VAT of £200,000 had been funded by another Alpha Group company. Mr Kewley explained that:

> "the simple fact is sales are the life blood of all our projects. If sales stall slow down or stop completely then our whole model starts to fall apart."

103. While Mr Kewley suggested that this email was addressing the need for sales to meet construction costs, I am satisfied that this reflected and was intended to refer to the business more generally. There is no evidence as to what the actual net returns from letting the properties at Phases 1 and 2 of Westbeach were in 2013, because no relevant material had been produced. However, the effect of Mr Robinson's and Mr Parkinson's evidence is that the net income cannot have been enough to meet the promised returns, on Mr Robinson's figures (which I prefer, not least when the Alpha Defendants have not produced the actual data) the units barely generating half of the required return.

104. However, by no later than October 2013, when the project had been operational for two summers, I am satisfied that Mr Kewley must have appreciated that 10% was not sustainable. By that date, he was very much Mr Spence's equal and partner, and privy to the realities of the Westbeach offering. He must also have appreciated that Green Park Holidays was in a precarious financial state, which exacerbated the complete lack of substance in the promises being made to investors.

105. I have reached these conclusions independently of a document produced in July 2014 and disclosed by the Alpha Defendants which was raised by the Claimants for the first time in post-trial submissions. Mr Kewley was not asked about the document, and for that reason I did not regard it as appropriate to rely upon it in reaching a conclusion as to his state of mind. However, as the present case involves only the Lead Claimants, and further trials may follow, I have included it in my chronological account:

i) On 14 July 2014, Mr Kewley emailed Mr Spence about Westbeach, suggesting that they seek to re-develop the rest of the site as a hotel. Mr Kewley explained "we know that trying to service investors at £19k pa from a two-bed apartment is never going to work" (i.e. the income generated from Phases 1 and 2 of Westbeach would never be sufficient to cover investor returns).

ii) Mr Spence did not challenge that assertion, but his response similarly evidences a view that the current structure was not viable:

> "I keep looking at different scenarios and keep coming back to should I just get phase 2 done and sell the rest of the site now to at least get a couple of £mill back and sell the remaining five to go towards the build cost for phase 2 and servicing investors for a couple of years …"

In this email, Mr Spence expressly acknowledged that the guaranteed returns were only likely to be paid for "a couple of years." That reflected his belief that the promised returns were simply not viable.

The move into student accommodation

106. Mr Spence and Mr Kewley became involved in student accommodation in 2012, using a A1 Alpha as the principal corporate vehicle. Mr Kewley became a director of A1 Alpha on 8 April 2013, and a 50% shareholder. There is no material evidencing any exploration of the market for student accommodation, even of the cursory kind described at [74] and [76] above in relation to the Westbeach site. It is clear that Mr Kewley and Mr Spence had equal standing in the student accommodation projects from the outset, with Mr Kewley taking the lead on the operational side.

Hylton Road

107. One of the first sites identified was Millfield House, 64-84 Hylton Road in Sunderland, a 25-bedroom purpose-built student accommodation with 9 commercial units at street level. I shall refer to Millfield House as "Hylton Road", although the Alpha Group had another site at 68 Hylton Road which is referred to in some of the documents by the same name.

108. In April 2013, Mr Kewley contacted solicitors at Sweeney Miller who had acted as the solicitors for some of the buyers for Westbeach, under an arrangement put in place by Mr Kewley. Sales of the Hylton Road property had already commenced by this point, even though the property had yet to be acquired. Mr Kewley asked Sweeney Miller if they wished to assume a similar role for Hylton Road as they had in relation to Westbeach. It is clear that it had already been determined that the units would be sold at 10% net returns for 10 years. I have seen no material underpinning this figure, and justifying its transposition from holiday lets to student accommodation. While Mr Kewley suggested he had conducted some form of market research, on the basis of the operation of those sites which featured more prominently in the evidence, and which I discuss below, there is no documentary support for this and I do not feel able to place reliance on Mr Kewley's uncorroborated evidence.

109. Mr Kewley suggested an arrangement "as happened with Devon" whereby the buyers would pay a fixed fee of £595 with the Alpha Group picking up any cost overrun (an arrangement fraught with the potential for conflict of interest). Two days later, Mr Kewley contacted Mr Miller of Sweeney Miller after learning from a potential buyer, Mr Parech, that Sweeney Miller had told him not to pay a reservation fee until they had seen the legal pack and in which Mr Kewley was described as an 'introducer'. Mr Kewley was not happy, stating "that is not particularly helpful and does not instil our buyers with a great deal of confidence. I would be grateful if you could perhaps refrain from making such comments to our buyers until you are formally instructed. We have a number of sites in the pipeline and due to the Surbhi excellent work with our buyers at Westward Ho! I was hoping we would be able to engage your services again to act for future buyers. However, actively discouraging potential buyers to place reservation fees is not a great start." That attempt to warn off solicitors, who were intended to provide independent advice from doing their duty to their clients, by reminding them who buttered their bread reflects poorly on Mr Kewley, but is consistent with his overall approach to doing business.

110. A1 Alpha obtained an option agreement to acquire Hylton Road on 10 April 2013 and completed the purchase on 1 August 2013 for £800,000.

111. By September 2013, the Hylton Road premises appear to have been fully occupied, but the rent obtained was not the £85 per week which had been assumed, but £75 per week. It would have been clear to Mr Kewley and Mr Spence by this point, if not before, that a considerable degree of uncertainty attached to the predicted rents.

112. In the event, A1 Alpha selected a firm of solicitors called Butterworths (and later Gordon Brown Law Firm, **"Gordon Brown"**) as the solicitors to be recommended to potential investors for Hylton Road. In September 2013, Mr Paul Crawley of Gordon Brown sent copies of the firm's searches on title to EPL before sending them to their clients, stating "can't see this causing any issues? Is this now good to go". It is clear that the plan was also to send the reports on title to EPL as well. Mr Crump forwarded them to Mr Kewley who replied "looks fine". This reflected the challenge posed by the financial structures put in place by A1 Alpha to the independence of the recommended solicitors. Mr Kewley clearly thought nothing of the fact that the independent solicitors acting for the buyers were running material by the seller's side first.

Norfolk Street

113. While none of the Claimants invested in Hylton Road, a number invested in another of the early student accommodation ventures, Norfolk Street in Sunderland which was to be converted into a 46-bedroom accommodation block. A1 Alpha took an option to buy the site in June 2013, and obtained planning permission to convert it into student accommodation in September 2013.

114. By 3 June 2013, Mr Kewley was in discussions with Mr Crump about the property at Norfolk Street in Sunderland which a local agent, Brendan Hackett, had brought to his attention. Mr Kewley set out assumptions for an investment proposal for Norfolk Street as follows:

    i) The calculations assumed that all the units could be rented out for £110 per week, a figure he said was obtained from a local agent (presumably Mr Hackett although he appears to have confirmed the rent for the first time on 4 October 2013), on which basis he calculated total income of £250,000. Mr Kewley said that Mr Hackett had told him that there was strong demand for purpose built student accommodation in Sunderland from Chinese students, and he was assuming 50 to 51 week tenancies.

    ii) £230,0000 would be needed each year to pay investors if none of the properties was sold at a discount.

    iii) He continued, "as with Hylton Road we will put aside 1 years rental cover (£230k) as a float to ensure rental payments are met over the 10 year period".

    iv) Assuming in the Alpha Defendants' favour that running costs were 18% (a figure which was used by Mr Kewley in emails of this kind, but which I am satisfied would have been known by Mr Kewley to be optimistic), 100% occupancy for 51 weeks, and the aspirational £110 per week, there would be a £25,000 shortfall in the first year. If that favourable combination of conditions could be maintained for all 10 years and rents rose by 3% year-on-year, there would be a marginal profit over 10 years.

115. On 6 June 2013, Mr Kewley chased Mr Crump for a response, stating "as with most agents I appreciate you want the rooms bigger, the prices reduced and your commission higher. However, if you genuinely think we will have a problem selling Norfolk Street to individual investors at the prices I have quoted – can you put together your preferred pricing list and we can discuss further?"

116. On 12 June 2013, Mr Kewley sent through a revised pricing to Mr Crump:

    i) He noted that if the price of the units was not discounted, annual income of £208,180 would be required (indicating a reduction in the unit price to be asked – perhaps as a result of Mr Crump's input).

    ii) He stated that the rental income assuming 100% occupancy for 52 weeks per year at £100-120 per week would be £255,620.

    iii) He then said "assuming running costs at a maximum of 18% = £46,011. Therefore we can demonstrate the development washes its face from Year 1". The word "demonstrate" suggests that Mr Kewley was anticipating a position in which it might be necessary to persuade a purchaser that the property could earn enough to meet the promised returns, and indeed Mr Kewley accepted "people wouldn't buy if the numbers were ridiculous and didn't make sense".

117. The fact that these calculations were produced for the purpose of being able to suggest to inquisitive investors that the numbers "made sense" provides the answer to the suggestion in the Alpha Defendants' contention that for the deceit case to be made good, "all of Mr Kewley's calculations would have to be concocted." These numbers were produced to support the marketing process. Nor is it necessary to speculate as to Mr Crump's knowledge. Proceedings were brought against EPL and settled. The court has sufficient to do to resolve the issues before it, without exploring the state of mind of Mr Crump.

118. This was, as both Mr Kewley and Mr Spence must have been aware, an optimistic set of figures: even if they all held good and rents benefited from 3% growth year-on-year, over a 10 year period the total profit was of the order of 1.7%. As experienced businessmen, Mr Spence and Mr Kewley must have realised that that was, even at its very best, a highly risky and at best marginal proposition. As to the inputs:

    i) I am willing to assume the figure of £100-£120 per week was sourced from Mr Hackett and honestly believed by Mr Kewley and Mr Spence to be achievable until July 2014, when students began to move in and it was clear that the property would only attract significantly lower rents.

    ii) The 100% occupancy figure year-on-year *for all 10 years* must have been regarded as optimistic by both of them. As Mr Jackson said when asked about the student accommodation which he ran for the Alpha Group when asked about voids, "that's just housing for you." Both Mr Kewley and Mr Spence knew that in 2013.

    iii) The figure for maintenance and expenses was not built up from estimates of those costs, but derived by calculating what would be left from the gross rent figure after

paying the promised returns. I reject Mr Kewley's evidence that the figure was taken from local research, of which there is no trace.

iv) There was an unresolved ambiguity in the Alpha Defendants' evidence as to what the expenses figure was to cover. The reality is that the 18% figure would need to cover not just the physical condition of the building (making good after student residence, annual surveys and inspections of fire and smoke alarms, gas and electricity units, door entry systems; window cleaning, blocked toilets and sinks etc), but the utilities and Wi-Fi (the rent was inclusive of bills), commissions being paid to Mr Hackett to source tenants, and someone to handle the paper work, conduct pre- and post-tenancy letting checks, hold deposits etc. The invoices submitted by Mr Hackett suggest that his costs alone were of the order of £20,000 plus VAT a year. Mr Kewley's suggestion that maintenance would be handled by sending workers engaged in construction elsewhere to do the job was hopeless – not only would they not do it for free (time is money in construction), but this was a 10 year commitment.

v) As I explain below, in internal documents the Alpha Defendants later budgeted for a 25% maintenance and expenses cost (which they did not achieve) at significantly larger properties which ought to have benefited from economies of scale, as Mr Kewley accepted.

vi) No money was "set aside" for the first year's returns as Mr Kewley accepted – if that was ever in contemplation, that contemplation was abandoned in July 2013: see [120] below.

119. In the course of marketing the properties, EPL was asked by one potential buyer what would happen if the developer went bust. Mr Kewley replied on 20 June 2013 that A1 Alpha would have the freeholds, making a similar statement on 26 June 2013. That reflected an awareness on Mr Kewley's part (and, as is clear from subsequent events, Mr Spence's as well) that potential investors would draw comfort from the suggestion that the company promising them the returns held the freehold of the site. It was that awareness which led them both to behave surreptitiously when selling the freeholds off, as I explain below.

120. Whatever plans there had been to set a year's rent aside had been abandoned by 2 July 2013, when Mr Spence told Mr Kewley he would not agree to this "because that will tie up £200k from the beginning which means we can't use the res[ervation] fees". I should, however, address Mr Kewley's evidence that something similar was done by setting aside what he referred to as a "mobilisation payment" of one year's rent as "buffer". Thus, he stated "we always *set aside* what we called a mobilisation payment initially. What was generally one year's rent which [we] could effectively top up if necessary" (emphasis added) or that "a certain sum usually equating to the first year or that year's Additional Rent due under the underlease would also be advanced to the Underleaseholder to provide it with a cushion and give it time to gain traction in the rental market." I am satisfied that there was no such arrangement and that this was simply an untruthful explanation cooked up after the event:

i) There is no contemporaneous evidence of any such arrangement, nor any contemporaneous references to the concept of a "mobilisation payment." I accept that there are some project spreadsheets which include a sum calculated at six month investor payments (on 28 October 2015 in the "spreadsheet across 3 projects" for Norfolk Street, Aberdeen and Park Lane House"). But this was not a retention (still less something retained), but a rather short-term forward view of cash requirements, and it appears to have been concerned with cases where properties became operational during the academic year, but letting on a significant scale could only begin at the start of the next academic year, rather than the risk net earnings would fall below the promised returns.

ii) So far as the student properties which did not form part of the joint venture with Mysing are concerned, it appears to be the case that no dividends were paid out save where remuneration was taken as dividends. However, A1 Alpha did lend £350,000 on an unsecured basis for the Aberdeen project (although this was repaid) and its funds were at all times fully committed in meeting its commitments (to the extent it was able to do so – it frequently could not). There was no amount of cash earmarked or even sitting in a bank account, as Mr Kewley had to accept.

iii) So far as the two holiday projects and the Mysing student properties are concerned, the development profits were made and held in different companies, from which profits were freely extracted. Indeed, I did not understand the Alpha Defendants to suggest that there was a "mobilisation payments" system in place for the two holiday projects.

iv) I accept Ms Griffin's evidence that there is no evidence of any provision being made to hold a sum equivalent to the first year's rent for any project. She reviewed the bank accounts of A1 Alpha and the Alpha Defendants' management company for the month end from July 2013 to September 2018, and found the cash held was only sufficient to meet 12 months of investor returns in 9 of 74 months. The suggestion that Mezzino Limited (**"Mezzino"**) – who managed some of the Mysing joint venture properties (see [155] and following below) – was sitting on a substantial cash float is wholly unsupported and I am unable to accept it. On 31 March 2016, when Mr Kewley contacted Mr Jamie Eustace of Mezzino to ask if they would process investor payments in relation Bradford and Loughborough investors, he stated that the necessary funds would be sent to them. There was no suggestion that Mezzino were sitting on funds. Funds were indeed sent by Mr Kewley (in some cases late) for the Foundry 1 and Bradford. There was no suggestion Mezzino was already sitting on the Alpha Group's cash.

121. On 4 July 2013, Mr Crump contacted Mr Kewley, with Mr Spence in copy, to pass on questions raised by a potential investor's lawyer:

> "His Malaysian lawyer has come back with some incorrect info which I would like to correct in a way that will reassure him. Lawyer has said along the lines of 'the management company providing the 10 year guaranteed income can be shut down at anytime and it would be near enough impossible to enforce'".

Mr Crump sought approval for confirmation to be given to the effect that the contract was not signed with the management company but with the developer company, which had assets, and that the NHBC would prevent the company from being shut down. This reflected what I am satisfied was Mr Crump's practice of "clearing" statements made with one of Mr Kewley and Mr Spence.

122. Mr Kewley replied authorising Mr Crump to communicate the fact that a 10 year guarantee was provided by freeholder (i.e. A1 Alpha) and that "unlike your average student or tenant, Alpha is a trading company with assets (freehold of Hylton Road and freehold of Norfolk Street) and is therefore [far] less likely to run away from its obligations." That reflected the emphasis which Mr Kewley placed, and wanted Mr Crump to place, on the freeholds as assets backing A1 Alpha's liabilities. It is also clear from the response that Mr Kewley was fully alive to when the freeholder provided the income guarantee, and when it did not.

123. In September 2013, the Alpha Defendants acquired a site in Aberdeen using another company, Alpha Homes (Leicester) Ltd, and committed to pay investors rent relating to that site from September 2014 (although the building was not in fact ready for letting and did not generate income until 2017). Alpha Homes (Leicester) Limited obtained a loan from A1 Alpha to meet those payments. Propping up the Aberdeen site was one of a number of financial pressures which A1 Alpha faced. On 19 September 2013, when A1 Alpha wanted to obtain a loan and was required to show proof of funds, Mr Kewley complained to Mr Scott of WPV Projects Ltd:

> "I don't have enough funds in Alpha to provide proof of funds (still waiting for last 3 sales to complete at Hylton Road) …. I feel like one of those guys in the circus spinning a number of plates at the same time".

Similar sentiments were expressed by Mr Spence in one of his many "Blimey" emails, commenting on 17 December 2015 that "it's real seat of the pants stuff again at the minute isn't it?". In the event, the proceeds of sales of other units which brought with them significant future liabilities arrived just in time to meet the immediately payable liabilities of properties already sold.

124. On 14 October 2013, Mr Crump contacted Mr Kewley to address a query which had been passed on by an investor in Norfolk Street who had received a marketing brochure in relation to another Alpha Group project, at Park Lane House, which I discuss at [135] below. The investor said that "as Norfolk Street buyers we are quite concern[ed] if we are given the same treatment and protection as the [Park Lane House]. Grateful if you can kindly advice on this. Likewise it says that the 1st year's income would be lodged in Escrow for addition[al] investor security for Norfolk Street. Will it apply to Park Lane House too?" Mr Kewley replied to Mr Crump confirming that there would be no escrow fund for either project. Keeping a year's promised returns in escrow would have been wholly incompatible with the precarious cashflow of the Alpha Group which I return to below. On 12 December 2013, after Mr Crump of EPL had chased for overdue commissions, Mr Kewley replied:

> "I've spent the afternoon going through the cashflow for Alpha for the next few

> weeks – we received £210k in from solicitors from exchanges yesterday. From this I have paid various outstanding invoices totalling £50k today which leaves approx. £160k in the pot. We are due the next valuation on Norfolk Street with the contractor next week and the scheduled payment is £128k (see attached), however contractor is currently 4 weeks ahead of schedule so I'm expecting this to be more. We also have the next quarterly payment to Hylton rd investors of £25k to pay on 1 January and we are spending money on Aberdeen getting building warrant in place and the site geared up to start in January…..so cashflow is a little tight at the moment. The main problem we have is that we have spent over £350k in cash to buy Aberdeen in, but so far have only received around £75k in reservation fees and Radoslavs payments. This combined with the outstanding £200k in VAT we have had to fund on Westbeach – has left the company coffers a little empty. All of which means I am going to struggle to pay your outstanding invoice on Norfolk street until we get some more funds in."

125. The clear implication is that Hylton Road was not paying its way.

126. On 14 February 2014, EPL informed Mr Kewley that it wanted to recruit someone to help with selling the Alpha Group units, and at the same time EPL chased outstanding commissions on Norfolk Street reservation fees (these were paid by investors before they had committed to buy a unit, there having been no Norfolk Street sales at that point). Mr Kewley replied the following day stating, "unfortunately moneys really tight until we get the next batch of exchanges through". He referred to a requirement to pay £200,000 to the contractor and bring EPL's balance up to date, continuing:

> "The odd reservation fees that are coming through are getting spent as soon as they come in on professional fees (architects, solicitors, building warrant etc on Aberdeen) and bits and pieces on Norfolk Street. Need to get 3 exchanges through on Norfolk St and completions on top floors and exchanges on Aberdeen and Westbeach."

The precarious state of the Alpha Group's finances, and the extent to which one project was exposed to the risks of another, are clear.

127. Marketing material for Norfolk Street was prepared by EPL and, I am satisfied that in accordance with EPL's general practice, its contents were approved by Mr Kewley and Mr Spence. Mr Kewley denied having seen a different document circulated by EPL – "4 Unique Points Why Our Investments Are the Best". It is not clear on the evidence that this document was approved by Mr Spence and Mr Kewley and I make no findings about it. However, Mr Kewley did not suggest he was unaware of the Norfolk Street brochure.

128. The brochure provided to one of the Claimants, Lotus, in February 2014 contained:

i) The statements which gave rise to the Substance Representation.

ii) Statements referring to the developer's track record who was said to be "responsible for many successful student accommodation and housing developments."

129. The statement regarding the developer's track record is troubling, but I do not feel able to conclude that Mr Kewley and Mr Spence believed it was untrue in a material respect. A student development had been built and was operational at Hylton Road, a project was underway in Aberdeen, and, in the context in which it appeared here, the word "successful" was too exiguous to provide a safe basis for a finding of deceit. Notably, the Modified Track Record Representation was not made.

130. What of the truth of the Substance Representation in the brochure? Lotus entered into its Purchase Agreement on 3 July 2014. I am satisfied that by this date, both Mr Kewley and Mr Spence had no honest belief in the viability of the promised returns:

i) I am told that Hylton Road had achieved 100% occupancy in its first year, albeit at a lower than assumed rent and, as I have stated, was clearly not paying its way in 2013-2014.

ii) Westbeach had been in operation for two summers without generating the promised returns, and having to be cross-subsidised from Green Parks (Holdings) Limited, and yet Mr Spence and Mr Kewley were content to plough on without adjusting their business model.

iii) By the start of July 2014, Mr Kewley and Mr Spence would have had a good sense about how year two at Hylton Road was shaping up, but no material has been produced evidencing the actual level of returns. While the rent figures had support from the "buoyant" Mr Hackett, the expenses figure looks highly optimistic even before the need to factor in ground rent, and neither Mr Kewley nor Mr Spence appear to be individuals pre-disposed to unwarranted optimism.

iv) The experts agree that Norfolk Street was not capable of generating sufficient income to meet the promised returns. Mr Kewley has stated that by September 2014, Norfolk Street was 100% occupied. Assuming that was so, it was at nothing like the rates assumed, and was only achieved by heavily discounting the rates asked, with rooms being let at £85 per week rather than the assumed £105-115 per week. That was apparent by at least July 2014, when students began to move into Norfolk Street, but only one paid the rent which Mr Kewley had assumed. The duration of the leases – and whether they achieved the 51-52 week annual occupancy assumed – is also unclear. The three variables of rent, occupancy and lease length were interrelated and frequently had to be traded off. That is an elementary truth of the letting business of which Mr Kewley and Mr Spence were aware at all times. However, the documents produced to suggest that the various projects could generate enough to meet the required returns invariably assumed that each of the three elements would be achieved in its most aspirational form.

v) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. A1 Alpha's accounts for the year-end February 2013 show a small loss, and while those for the following year show a small profit, I accept Ms Griffin's evidence that in reality the business was loss-making, and that numerous material matters were omitted from the accounts.

131. In considering their state of mind at this time, I have also found the exchange Mr Kewley and Mr Spence had on 3 June 2014 highly significant. After discussing the proposal of selling freeholds at the top of the market, Mr Kewley referred to the potential sale of the Westbeach freehold (as well as those at Hylton Road and Norfolk Street), stating that selling the Westbeach freehold "like the student stuff may be a great exit to sell the freehold and dump the rent guarantee at some stage in the future". The opinion is not offered in terms which suggest that this was some new revelation, or a response to an unexpected development, nor was it greeted with any surprise by Mr Spence. The message records an existing understanding to "dump the rent guarantee" for the student projects, and a suggestion that a similar approach could be adopted at Westbeach. I am satisfied that by June 2014, there was a well-established belief on the part of both Mr Kewley and Mr Spence that the rent guarantees on the student sites were not viable, and would have to be "dumped" at some point.

132. It is also striking that, neither at this point, nor as student projects continued to fail to deliver sufficient income to meet promised returns (as I explain below) is there any expression of surprise on Mr Kewley's and Mr Spence's part, no post-mortem, no anguished consideration of the viability of their business model and the need to adjust it. The abiding impression is that this what was they were expecting. While the failure of each new project to generate sufficient income to cover the promised returns makes Mr Kewley's evidence (and Mr Spence's case) that they nonetheless honestly believed the next project would buck the trend progressively more improbable, each new landmark in the trail of failure has implications for the past as well as the future. The overriding impression one is left with from the complete lack of any response to the unfolding disaster is that the inability of projects to come close to achieving the levels of income being used in the calculations which could be presented to investors to persuade them that these schemes were viable came as no surprise to Mr Kewley and Mr Spence, but was "business as usual".

133. It follows that I am satisfied that by June 2014 at the latest, both Mr Kewley and Mr Spence knew that Norfolk Street was being marketed on the basis of a Substance Representation which was untrue. While I have not relied on this document in view of the timing of its emergence, it is wholly consistent with the July 2014 exchanges quoted at [103] above.

134. Also in June 2014, Mr Kewley and Mr Spence had an exchange about a site in Glasgow which the Alpha Defendants have relied upon in closing as evidence of how "Mr Kewley and Mr Spence were selective about the sites they chose to pursue and only chose sites that they considered would be viable under their model". The submission quotes Mr Kewley's statement of the Glasgow site "I'm not too sure of it's going to be viable". In full, what Mr Kewley stated was:

> "Sid's been offered a site in Paisley near Glasgow which I have been looking at last night and while it's close to the Paisley campus of west of Scotland university – I'm not too sure if its going to be viable. Site is an acre, has lapse residential planning for apartments, but its in the hands of receivers and they are looking for cash offers of £500k so we couldn't do an option. Its also looks like Paisley is a pretty poor area with 1 bed flats going for £25k so I'm not sure how attractive its

going to be to investors paying £50k for a bedroom."

Mr Kewley was not, therefore, concerned about the viability of the returns to investors, but the viability of selling units to investors for £50,000 each.

Park Lane House

135. In November 2013, Mr Kewley and Mr Spence acquired some smaller units in Sunderland (four on 16 Roker Avenue, three on 24 Villette Road, six on 180 Hylton Road and three on 195 Hylton Road) in conjunction with a Mr Sydney Scott. These did not form part of the trial.

136. The Alpha Defendants also acquired an old garage and car wash site in Stockton Road, Sunderland, which became known as Park Lane House. A planning application was submitted to create a 100-unit purpose built student accommodation block.

137. Mr. Kewley sent Mr Crump an email on 29 August 2013 (with Mr Spence in copy) with pricing calculations for this site. Assuming 52 weeks occupancy on a 100% basis, this calculated rent of £572,000. The same 18% maintenance and expenses figure was used, without any supporting material, leaving £470,000, on which basis it was assumed the units could be sold for a total of £4.75m (with a 10% return per year of £475,000). Having set out the calculation, Mr Kewley said "so we can stand behind the 10% net guarantee in year one and then benefit from the increase in rents in subsequent years":

    i) The rent assumed was the same £110 per week used in Norfolk Street (rising to £115 per week the following year.) This close to the start of the academic year, I am satisfied that Mr Kewley and Mr Spence now had a good sense of the under-performance at Hylton Road.

    ii) Once again Mr Kewley assumed 100% occupancy for 10 years.

    iii) There was no support for the 18% figure for total expenses and there was no attempt to allow for ground rent when the freehold was sold.

    iv) Once again, both experts agreed that Park Lane House could not generate sufficient net income to meet the promised returns.

138. On 16 December 2013, Mr Crump contacted Mr Kewley raising the topic of unpaid EPL invoices. Mr Kewley replied stating "the simple fact is sales are the life blood of all our projects. If sales stall slow down or stop completely then our whole model starts to fall apart." A chase for fees on 14 February 2014 received a similar response. It was apparent from the same exchange that proceeds from sales at one site (Norfolk Street), which would bring in their wake 10 years of guaranteed net returns, were being used to meet investor payments on another site (Hylton Road). This obviously unsustainable state of affairs did not generate any contemporaneous expression of concern as to what would happen when the sales stopped, but the liabilities remained. That this was necessary so early in the life of Hylton Road also shows that there was no fund of one year's returns set aside for the early years of the projects.

139. In February 2014, Michelle Bezuidenhout of EPL had exchanges with Mr Kewley about the use of a new firm of solicitors to act for investors, and what the Alpha Group and EPL's requirements should be. EPL said that "from the start, we would want to be copied in on all correspondence to clients" and to get the report on title completed before the solicitors were introduced to any clients so it would not have any of the problems experienced to date, including errors, the report being late and "unnecessarily alarmist." Mr Kewley did not dissent from that view, which reflected a failure to acknowledge and respect the independent relationship which the solicitors were required to have with their clients.

140. On 29 March 2014, A1 Alpha purchased Park Lane House for £464,500. That month, EPL produced a brochure to market the property which was in circulation by June 2014 when it was provided to one of the lead claimants, Mr Ofor. I am satisfied that the contents of the brochure were approved by Mr Kewley and Mr Spence in accordance with the usual practice (and indeed Mr Kewley on 19 March 2014 was involved in providing images for the brochure). Further, a core element of the marketing which Mr Kewley always intended EPL to undertake, and authorised them to do so, was to convey that the figures were viable, realistic or achievable.

141. As to the brochure:

i) It contained the statements amounting to the Substance Representation.

ii) It described the developer as having "zero debt".

iii) It referred to "10% Net Guaranteed Income for 10 Years.

iv) It referred to "asset-backed contracts" and thereby made the Asset-Backed Representation.

142. A unit in Park Lane House was sold to Mr Ofor in December 2014. When that sale was entered into I am satisfied that Mr Kewley and Mr Spence knew that the Substance Representation was untrue:

i) The figures produced to suggest that Park Lane House could cover the net returns from its own earnings were highly optimistic. But on the basis of optimistic assumptions – rent of £95 per week at a time when Norfolk Street in the same city was only achieving £85 per week; 100% occupancy for 51 weeks a year for all ten years; 3.5% compounded rent increases annually and 25% running costs – the project would still run at a loss,

ii) By December 2014, Mr Kewley and Mr Spence knew that Hylton Road had not generated the necessary income to meet investor return in years 1 and 2.

iii) Mr Kewley and Mr Spence were already speaking in their internal communications of "dumping the rent guarantee".

iv) Westbeach had been operating for three summers without generating the promised returns, and having to be cross-subsidised from Green Parks (Holdings) Limited,

and yet Mr Spence and Mr Kewley were content to plough on without adjusting their business model.

v) By July 2014 they also knew that Norfolk Street was not achieving the assumed rents. By September 2014, at the start of the academic year, the failure of Norfolk Street to deliver as promised would have become all the more stark.

vi) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. I accept Ms Griffin's evidence that in reality the business was loss-making, and that numerous material matters were omitted from the accounts which showed a small profit of about £57,000. Its constant cash-flow crises are clear from the emails I have set out.

143. What of the suggestion the liabilities were "Asset Backed"?

i) As I explain at [148] and [149] below, by this date I am also satisfied that Mr Kewley and Mr Spence had decided to sell all of the freeholds as soon as they had sold the units, and that A1 Alpha had already sold the freehold of Norfolk Street and most of the freehold to Hylton Road.

ii) However, I am unable to form a clear view of A1 Alpha's asset base at this time.

iii) Accordingly, I am not able to find that Mr Kewley and Mr Spence knew that the Asset-Backed Representation was untrue at this time.

144. I am not at this time persuaded that any other statements in the brochure were known to be untrue. Beyond its net return promises, A1 Alpha does not appear to have had debt at this time (and certainly no project financing liability).

College Street

145. In July 2014, A1 Alpha became involved in a further project in College Street, Leicester, an existing 26-bed student site. There is no evidence of any material being used to underpin the promised returns on this site, although it did not feature to any significant extent in the evidence and I make no findings about it.

Freehold sales

146. Mr Kewley and Mr Spence's readiness to present the ownership of the freeholds as a factor which should give investors confidence is apparent in an exchange with Mr Crump on 23 May 2014. Mr Crump forwarded an email from a potential investor asking what would happen if A1 Alpha failed to pay the promised returns. Mr Kewley suggested a problem would only arise "if all the UK Universities suddenly decide to shut down completely" (something which was, of course, to happen in March 2020), continuing:

> "In the event that we breached the terms of the underlease buyers would be able to sue us for breach of contract – remember we are building up significant unencumbered assets in the freehold so are not going to let that happen."

147. However, on 3 June 2014 Mr Spence wrote to Mr Kewley referring to an anticipated worsening of market conditions, saying "I also think we should look seriously at disposing of the freeholds as we go and cash out on this value as we go while its at its peak so we have a good cash reserve each to put into deals as they come up". Mr Kewley replied saying that he had just spoken to a specialist ground rent broker about the price which would be obtained for the Norfolk Street, Hylton Road and Stockton Road freeholds, and also discussed what they would get for Westbeach once they sold the freehold following practical completion next year "on devon – if we manage to sell and build all 160 apartments the freehold would value to £3.2m."

148. I am satisfied that from early June 2014 at the latest, Mr Kewley and Mr Spence had decided to sell all of the freeholds as soon as they had sold the units (there being challenges to selling the freehold of a site before all the leases had been sold to investors – not least the need for the freeholder to be notified of the lease, and the information about the freehold sale which would become available to the solicitors for potential investors at the Land Registry). Indeed, when asked about this email, Mr Kewley accepted that "we were always going to sell them at some point to generate value".

149. On 7 November 2014, A1 Alpha sold the freehold of Norfolk Street and on 10 November 2014, most of the freehold at Hylton Road. These sales not only meant that some of the fixed assets used to present a picture of stability and security to potential investors were no longer owned by A1 Alpha, but that the operating rents of those sites now also included ground rent obligations to the new freeholders. The fact that this additional liability does not feature in Mr Kewley's and Mr Spence's discussions at all reflects the fact that they did not believe the promised returns could be met in any event.

150. There was a particularly revealing exchange on 5 June 2015. Mr Crump discovered the sale of the Hylton Road freehold when he saw Moore Investments had been registered as the owner. He sent a copy of the Land Registry entry to Mr Kewley, who forwarded it to Mr Spence with a one word comment: "bugger". Mr Spence replied:

> "Oh dear.. Lets have a think about that one over the weekend.. Maybe we could say that they are our land agent that hold our freehold titles for the management company structure in the event that we go bust and say that's how we set it out in the contracts but say we retain all of the common areas within the building to operate – see if your guy will go along with it first maybe before we say anything to Andrew..?"

151. Mr Spence's reaction, therefore, was to propose an elaborate lie. These exchanges show that a deliberate plan to hide the existence and extent of the freehold sales from Mr Crump, so as not to compromise their use as (dishonest) marketing tools. While Mr Kewley claims he phoned Mr Crump and told him the position, I am sure Mr Kewley gave a partial account, and did not tell Mr Crump that the freehold of Norfolk Street had also been sold.

152. On 27 September 2015, Mr Kewley was in contact with Mr Higgins and Mr Turner of Mysing (joint venture partners of the Alpha Group in some projects, as discussed at [155] below) discussing the proposed sale of the freehold of one of those joint venture projects,

the Foundry 1. It is clear Mr Kewley wanted to lease all of the units before the freehold was sold. I am satisfied this concern arose from their desire not to alert potential investors to the sale of the freehold. Mr Kewley stated in the course of these exchanges:

> "If we are left with 2-3 which are miles off completing – then we can grant the leases to ourselves and complete the freehold sale – but we will have problems subsequently selling these as it will be obvious we are no longer the freehold owners …"

This clearly recognised the importance of the perception that A1 Alpha owned the freeholds to the marketing effort.

153. On 6 October 2015, Mr Kewley and Mr Spence had a discussion in the course of which reference was made to the planned sale of the Stockton Road freehold. The following day, Mr Crump was in contact with both of them, asking "Have you sold any of the freehold titles? Butterworths have apparently just advised one of James' clients that a company called Moore Investments now own Norfolk Street freehold. We do need to know this because our marketing material states you currently own that. Or is this a mistake…." There is no record of any response. On 17 October 2015, Mr Crump raised this subject again, saying "I did ask a while back that we had found Noroflk [sic] Street freehold appears not to be owned by you guys anymore? Can you confirm. We are putting information out to clients on a daily basis that shows A1 owns the freehold to all your previous projects". Mr Kewley replied, copying Mr Spence, seeking to downplay the sale, "we have sold the basic freehold but have retained ownership of the valuable common parts such as the office and roof space (for solar installation). This doesn't effect any buyers as we still control and maintain the building". He did not reveal the other freehold sales underway.

154. I accept that some freeholds were sold by A1 Alpha, the underlessee for the student sites, and the proceeds of sale were paid to A1 Alpha – this was the position for College Street, Mandale Terrace, Park Lane House, Millfield House, Norfolk Street and the Wesleyan Chapel. The evidence before the court suggests total proceeds of sale for these freeholds of £2,275,000. However, those monies were used to meet deficits in investor payments or to acquire and develop new sites, bringing with them new liabilities to new investors. Indeed, such was the scale of the deficits being experienced on the student sites that the sales proceeds paid to A1 Alpha barely touched the sides. The suggestion that freeholds were still owned was intended to and did indicate the presence of stable assets of substance, with the business covering its outgoings without the need to consume its asset base in doing so. The revelation that freeholds had been sold and the proceeds immediately eaten up would have exposed the precarious status of the projects, and their inability to sustain themselves. It was for those reasons that Mr Kewley and Mr Spence worked so hard to conceal the true position.

The Mysing Joint Venture

155. In late 2014, Mr Kewley and Mr Spence met individuals looking for an investment opportunity on behalf of an investment company, Mysing. Through one of the Alpha Group companies, Mr Kewley and Mr Spence entered into a joint venture arrangement

with Mysing to develop more student sites, on terms whereby Mysing would provide the funding necessary to acquire the sites at 15% interest, the loan and interest to be repaid from any profits of sale, and the remaining profits would be split 50:50. The acquisitions were generally made by joint venture special purpose vehicles, in which each of Mysing and the Alpha Group had a 50% stake. However, the process of selling units in these projects was very much under the control of Mr Kewley and Mr Spence, who were de facto directors of the developer and the underlessee, whatever the formal position for any particular SPV.

Tudor Studios

156. The first joint venture project was Tudor Studios, an old shoe factory in Leicester with a grade 2 listing which was to be converted into 255 studios and associated communal space. The Mysing sites were acquired by Alpha Developments (Leicester) Ltd, owned 50% by Mysing and 50% by Alpha Homes (GB) Limited (itself a 50:50 joint venture between Mr Kewley and Mr Spence). The effect of this structure was that the freehold was not owned by A1 Alpha, and A1 Alpha had no legal right to access the investment value.

157. The introduction of Mysing did not lead to any more extensive modelling of returns, Mysing being apparently happy to buy into the existing business modus operandi, whatever they understood it to be. While Mr Kewley sought to suggest that Mysing had agreed to keep one year's rent within A1 Alpha, not only is there no documentary evidence to support this (the excel spreadsheets calculating profit share making no reference to it), but it is fundamentally inconsistent with the business structure, which was for Mysing to get its 15% "off the top". Had there been an arrangement of this kind with Mysing, it is inconceivable that reference would not have been made to it when issues blew up about the unauthorised retention by the Alpha Group of joint venture funds (see [218]-[223] below). But there was none.

158. On 27 October 2014, Mr Crump had contacted Mr Kewley and Mr Spence looking at what was being paid by way of rent for a comparable (but more attractive) unit in Liverpool, which he expected investors to compare Tudor Studios with ("this is one of our key competitors which our clients are highly likely to find") and was a more popular city. Mr Kewley reverted (with Mr Spence in copy) with his own comparable in Newcastle. Mr Crump replied saying "I would like to make sure they sell quickly *and that the rental stacks up"* – in effect, the substance of the net return promise (emphasis added). On 28 October 2014, Mr Crump explained "our concern … [is] the rental being achievable", with Tudor Studios being more expensive that two Liverpool projects in a cheaper unit "*so we just want to be able to show why it will rent for that much*" (emphasis added). This reflected a consistent theme of the exchanges between Mr Crump and Mr Kewley and Mr Spence – that it would be necessary from time-to-time as part of the marketing process to persuade investors that the guaranteed amount was robust, realistic and achievable. The principal purpose of these sets of assumptions was as tools of persuasion rather than as internal analyses of viability. Mr Crump also pointed out that other projects used 20% for management expenses (Mr Kewley having put forward a calculation assuming 17%), stating, "we can go lower for sure but would be great to have a breakdown". He asked for copies of any information Mr Kewley had received from

local Leicester agents to support the rent figure.

159. Nothing was forthcoming by way of a breakdown of management costs or information from local agents, because there was nothing to come. Instead, there was characteristic bluster – "[w]e are confident of the rents we can achieve – however why don't we keep the prices the same but offer the rent at 8% year one & two, 9% year three and four and then 10% from year five to ten?? This way you can easily demonstrate this is achievable with current comparables". There is no documentary evidence of any comparables being obtained, absent which I am unable to place any weight on Mr Kewley's evidence that this was done. In any event, Mr Crump's response on 28 October was that "10% would be better" because it would make the units easier to sell. Mr Kewley forwarded this email to Mr Spence, saying "Funny that – thought he might want to stay with 10%.....although if we get Loughborough I think we should stick with 8%", to which Mr Spence expressed his assent. Tudor Studios went to market on the basis of a 10% guarantee for ten years.

160. Mr Crump suggested reducing the management expenses figure below 17% if necessary, not on the basis that he thought it was too high in its own terms (of which there is no suggestion) but to make the figures look better for potential investors. On 27 October 2014, Mr Crump returned to his concern that if potential investors applied 17% for expenses to the rental prices on the internet, they would see that the income generated was too low. He explained the need "*to build a strong case* for rental prices at 150-165pw for 52 weeks or a lot of clients will simply rule it out" (emphasis added). He asked for additional information provided by agents, and suggested reducing operating costs to 9%. Mr Kewley's response was:

> "We normally base running costs for buildings at 15-18% of gross rental income and this has worked well for the smaller sites like Hylton Road and Norfolk Street. However due to economies of scale and additional income streams the running cost of larger schemes like Stockton rd [sic]and Tudor village [sic] will be less. At tudor rd [sic] for example we will have a laundry service with coin operated machines, we'll have vending machines, games machines (pool, airhockey, arcade games) and possibly a small café and shop all of which will add additional revenue to the scheme which means the scheme will cost less overall to run".

161. That response was utter flannel, as Mr Kewley well knew. The figures of 15-18% of (lower than assumed) income at Hylton Road and Norfolk Street was not sufficient to cover the full operating costs of those sites (which is no doubt why the actual figures have not been disclosed). The various items identified by Mr Kewley would provide marginal additional income.

162. It is clear from these exchanges alone that Mr Kewley and Mr Spence did not believe the promised returns could be achieved from the products. They had lowered their already unrealistic 18% expenses further to arrive at a figure to be used to persuade sceptical investors of the viability of the proposal. Neither of the current student properties – Hylton Road and Norfolk Street – had reached the assumed rents, or generated enough to cover the promised returns. The combination of the assumed rent of £165, the assumed tenancy length and the assumed occupancy figures was wholly unrealistic. Nor was the

ground rent (which would now be payable given that A1 Alpha did not own the freehold) factored in.

163. If the units were rented out at the top of Mr Kewley's range for £165, for 51 weeks per year, with 18% management costs, with full occupancy for 10 years, they would break even. If the 25% expenses figure the Alpha Defendants were planning for in the Mysing projects is used, then even with the optimistic assumptions of rent, occupancy and tenancy period all being achieved, the project would lose money. Both experts agreed that Tudor Studios could not generate sufficient income to meet the promised returns.

164. On 18 November 2014, Mr El-Quqa of Lotus was contacted by EPL about Tudor Studios and provided with a brochure prepared by EPL. Once again I am satisfied that the contents of the brochure were known to and authorised by Mr Kewley and Mr Spence:

    i) It contained the statements amounting to the Substance Representation.

    ii) It contained the Asset-Backed Representation, describing the contracts as "robust asset-backed contracts" with the developer providing "investors with a high standard of service throughout the investment, as well as "robust asset-backed contracts (with no third party shell company)".

    iii) There was a reference to this being the developer's "eighth student property with all previous developments having delivered the guaranteed yields on schedule", thereby making the Modified Track Record Representation.

165. I am satisfied that Mr Kewley and Mr Spence intended and had authorised EPL to make statements of this kind in marketing Tudor Studios and that when A1 Alpha sold the Tudor Studio units to Lotus in April 2015, they knew the Substance Representation was untrue:

    i) As I have stated, the assumptions prepared to justify the returns assumed the cumulative effect of what Mr Kewley and Mr Spence must have known to be an optimistic set of assumptions, and they had been willing to continue to market the units at 10% for ten years notwithstanding: [158]-[163].

    ii) By April 2015, it would have been known to Mr Kewley and Mr Spence that years 1 and 2 at Hylton Road, and year 1 at Norfolk Street, were not generating sufficient net income to meet the promised returns. However, that knowledge did not modify the terms of the marketing exercise or the offering in any discernible way.

    iii) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. This was manifest in the unauthorised "borrowing" of reservation fees on Mysing joint venture projects to meet investor payments (see [218]-[223] below) and the use of Norfolk Street sales proceeds to meet Hylton Road returns (see [124]). While A1 Alpha's accounts for the year-ending February 2015 showed a small profit of £66,000, I accept Ms Griffin's evidence that numerous material items were omitted, and that in reality the business was heavily loss-making.

iv) Mr Kewley and Mr Spence had already internally acknowledged the plan to "dump the rent guarantee" on the student properties in June 2014.

166. Similarly, the statement that "all previous developments having delivered the guaranteed returns on schedule" – which was clearly intended by Mr Kewley and Spence to suggest that earnings from the developments had met those returns – was false, as Mr Kewley and Mr Spence knew. It follows that the Modified Track Record Representation was untrue.

167. On 18 November 2014, EPL also sent Mr El-Quqa a more general document which has been described as "Alpha Homes Developer Prospectus" (**"the Developer Prospectus"**), and which in some iteration was certainly in circulation by July 2014. This referred to Alpha Homes as providing an opportunity to invest "directly into an asset-backed developer" offering an "asset-backed income guarantee." The Developer Prospectus:

i) referred to the fact that Alpha Homes "*currently* own a number of freehold properties", and emphasised the security which this brought when entering into a contract with the developer company for that reason;

ii) listed various freehold assets and their values, and the freeholds which Alpha Homes is expecting to acquire in the period up to April 2015 under currently planned projects: Park Lane House, two Hylton Road premises, Norfolk Road and Aberdeen;

iii) referred to "a wealth of assets underwriting your income guarantee and aligning the interests of the developer and investor", "a substantial and ever-expanding asset base" and stated "as income contracts are tied directly to the developer, investors benefit from an enhanced level of security";

iv) stated that "their developments have always been completed on time and have consistently delivered exceptional results";

v) referring to Westbeach, described Phases 1 and 2 as having "produced an average income of £24,000/unit in the first year – far exceeding its 11.9% guaranteed income level" (but glossing over the fact that the former figure was gross income, whereas the latter had to be paid from net receipts); and

vi) stated "they own several clean freehold assets completely debt free and operate their own management company. This presents investors with an asset-backed and secure investment".

168. Before considering what representations were made by the Developer Prospectus, it is first necessary to consider whether the distribution of the document in these terms was authorised by Mr Kewley and Mr Spence. I am satisfied it was:

i) Based on the material which I have seen, it is simply inconceivable that EPL and Mr Crump would have prepared and circulated a document whose purpose was to describe the Alpha Group and its business without seeking and obtaining the approval of Mr Kewley and Mr Spence for both the concept and its contents. Nor

would EPL have produced the level of detail the Developer Prospectus contained without sourcing and checking that detail with Mr Kewley and Mr Spence.

ii) Material available to the court shows a copy of the Developer Prospectus being sent by EPL to Mr Crump on 27 November 2014. There is no suggestion Mr Kewley would not have known of it before, nor any evidence of any response expressing previous ignorance, surprise or disapproval. Mr Kewley confirmed that he knew a document in this form was "doing the rounds."

iii) A further email of 18 October 2015 shows Mr Crump contacting Mr Spence seeking to update the Developer Prospectus to reflect the sale of part of the Norfolk Street freehold and the need to put a new value upon what remains, and asking which Alpha Group company now owned the freeholds. That is entirely consistent with Mr Crump looking to Mr Kewley and Mr Spence as the source of the information in the Developer Prospectus, and once again there is no evidence of any reaction on Mr Spence's part indicating prior ignorance or disapproval.

iv) The principal themes pushed in the Developer Prospectus – the security benefits to the investors which came from the freeholds owned by A1 Alpha – was one which Mr Kewley and Mr Spence were consistently keen to exploit, their awareness of the value of this marketing stratagem being clear from the efforts made to conceal their freehold disposal programme from Mr Crump.

169. The Developer Prospectus clearly made representations of fact that certain freeholds were currently owned by companies within the Alpha Group. While "Alpha Homes" is not the name of any company, the Developer Prospectus was clearly seeking to communicate that the contracting counterparty which assumed the return guarantee held or had a right to call on these assets. While that was not true of every property listed in this particular version, it was true of the developments where A1 Alpha promised the net returns, and I am not persuaded that Mr Kewley and Mr Spence believed it to be untrue in this respect at this time (when only the Aberdeen student project involved a freehold held in a different company). However, the Developer Prospectus impliedly represents that, at least, no wholesale programme of freehold sale is envisaged. To the extent that Mr Kewley and Mr Spence allowed the Developer Prospectus to be used once they had decided on such a programme, and still intended it to communicate the same overall message to investors, I am satisfied that they would have known it was misleading and, to this extent, the Asset-Backed Representation in the particular form made in the Developer Prospectus would be untrue.

170. By April 2015, when Lotus acquired its Tudor Studio units from A1 Alpha, I am satisfied that Mr Kewley and Mr Spence knew that the statement about Westbeach's returns was untrue. Far from the net returns from operating Westbeach Phases 1 and 2 exceeding the promised returns, they fell appreciably short of covering them, as reflected in the fact that transfers of cash from Green Parks Holdings Ltd had to be made from at least August 2013 to cover the outgoings. I am also satisfied that if Westbeach Phases 1 and 2 had generated a level of net returns sufficient to meet or even exceed the guaranteed investor payments, some contemporaneous documentation (bank statements, management accounts, or simply operating records) would have been produced to

demonstrate this. I infer that no such documents were produced because they would have shown that Westbeach Phases 1 and 2 were underwater from an early stage.

171. On 4 December 2015, another investor who had reserved two Tudor Studios units contacted Mr Kewley after he had checked local renting sites, and found prices of £73-85 a week when EPL were suggesting that Tudor Studios could generate the promised returns because rooms could be let for £115 per week. He asked the sensible question of how the promised returns could be met if these "high" rents could not be achieved. Mr Kewley initially tried to suggest the properties the investor had looked at were not comparable, but that suggestion was convincingly answered because the investor was comparing the rents achieved by the en suite rooms he had reserved, not the studios Mr Kewley had sought to use as the relevant comparator when suggesting Tudor Studios had a superior offering. Mr Kewley then responded on 8 December 2015, not by challenging the achievable rents, but stating, in effect, that the studios would subsidise the ensuites:

> "When we calculate the rent guarantees across any site we do so on the basis of the income for the entire site, not individual units. So the income for your units will simply form part of the income generated across the full site and predominantly generated from the much larger studios".

That response is of obvious significance to the issue of whether the Alpha Group was operating unauthorised collective investment schemes, to which I turn at [572] and following below. However, it also significant in showing that Mr Kewley held no serious belief that the £115 he used when seeking to justify the promised return was achievable. When the investor pointed out that this did not show that Tudor Studios could generate sufficient funds, Mr Kewley replied by stating that the promised returns could be met from other Alpha Group projects.

172. Further, the Asset-Backed Representations in the brochure and in the Developer's Prospectus were misleading given (i) the fact that the freehold of Tudor Studios was owned by a different company, not A1 Alpha which promised the returns under the underlease; and (ii) Mr Kewley and Mr Spence had embarked on a programme of selling the freeholds which A1 Alpha had, with negotiations for the sale of major parts of the Hylton Road and Norfolk Street freeholds well underway in October 2014, completing in November 2014.

173. Mr Kewley sought to suggest the asset-backing was "money set aside" (but I have rejected the suggestion that this was ever done and there is no trace of it) or the underleases themselves under which the asset-backed commitment arose (as to which, see [291(iv)] below). I am satisfied that Mr Kewley and Mr Spence were fully alive to the false statements in the brochure, but content to walk a line which involved authorising EPL to continue to hold out the suggestion that the contracts were backed by a large number of freeholds, while selling those freeholds off.

174. The Lead Claimants have also complained about the fact that the brochure stated that each room contained "high quality furnishings", while Mr Kewley contended that the furniture was not included in the contract. However, there was no exploration of the terms of the contract, nor am I am able to conclude that Mr Kewley and Mr Spence

intended to make a misleading statement about what was a relatively small element of the investment.

175. So far as the Developer Prospectus is concerned, on 21 November 2014, Mr Crump sought to check various parts of the Developer's Prospectus with Mr Kewley. Mr Kewley confirmed that A1 Alpha still owned substantial assets, mentioning freeholds of Hylton Road, Norfolk Street, Park Lane House and the so-called pre-tenanted properties. In fact the freehold for Hylton Road and for part of Norfolk Street had been sold earlier that month. I am satisfied Mr Kewley deliberately misled Mr Crump in this regard, his response when challenged about this in evidence being "with hindsight that was a mistake". When asked why he and Mr Spence had not told Mr Crump – who they knew was out there with their encouragement using the suggestion that A1 Alpha owned these freeholds to sell units on their companies' behalf – of the sales, he replied "when he asked, we told him". I am satisfied that the truthful answer to this question was that they were happy for Mr Crump and EPL to mislead investors to their benefit for as long as they could get away with it. The result was that, through the Developer Prospectus, Mr Kewley and Mr Spence authorised a form of the Asset-Backed Representation which was untrue and which they knew to be untrue.

176. On 17 December 2014, Mr Crump wrote to Mr Kewley and Mr Spence asking them to procure a statement from a lawyer or accountant for EPL to provide to an investor who was planning to buy two units "stipulating what your asset base is". Mr Crump had prepared figures for the freeholds of various properties which totalled £2.05m for A1 Alpha (including Hylton Road and Norfolk Street, which he clearly did not know had been sold) and the two Mysing properties, Tudor Studios and Foundry 1, which he had clearly been told were to be transferred to A1 Alpha. Mr Spence did not correct these errors, but replied (with Mr Kewley in copy) saying he would "chase Graham on the management accounts". I should say that I do not accept Mr Kewley and Mr Spence ever intended to transfer the freeholds in the two Mysing JV sites to A1 Alpha. They intended to sell them. On 30 December 2014, Mr Kewley sent Mr Spence an email which contemplated the freehold of the Foundry being sold for £900,000 with the overall profit being split between Mr Kewley and Mr Spence on the one hand, and the Mysing interests on the other. Both the Tudor Studios and Foundry 1 freeholds were already the subject of sale contracts by February 2015, when Mr Kewley produced a schedule recording the state of the freehold sale programme at that time.

177. On 28 January 2015, Mr Kewley provided a letter from PG Legal, a firm who acted for the Alpha Group, with Mr Phil Dean being the principal partner. The relationship between Mr Kewley and Mr Spence on one hand, and Mr Dean on the other appears to have been surprisingly close: Mr Kewley made a personal loan to Mr Dean of £330,000 in March 2018 and Mr Dean was one of the participants in an extravagant corporate hospitality trip organised by the Alpha Group to the Monaco Grand Prix in May 2018 at a cost of over £150,000. The letter from PG Legal provided to Mr Crump in January 2015 wrongly stated that Tudor Studios and the Foundry had been acquired by A1 Alpha from the Mysing joint venture vehicles, and referred to other sites acquired by A1 Alpha without recording that the freeholds had since been sold. Mr Crump replied setting out the terms of the letter he would prefer to receive "because it matches with the contract that people will receive". That involved stating that A1 Alpha owned freeholds of Hylton

Road and other properties to be listed and stating "Tudor Road Leicester is owned by Alpha Developments (Leicester) Ltd. My understanding is that after build completion of this site the freehold will be transferred to A1 Alpha …", with a similar statement for the Foundry. Mr Kewley came back stating he had spoken "with my solicitor and the letter he provided yesterday is about as good as we are going to get from him … it took me long enough to convince him to put in writing the anticipated sales and not just quote the figures from completed sales …" Mr Kewley did not state that the Mysing freeholds were not going to be transferred to A1 Alpha and that all the freeholds were being sold.

178. On 9 February 2016, Mr Crump wrote to Mr Kewley and Mr Spence, saying the potential buyer of a unit at the Foundry 1 "would like to know when certain freeholds will be transferring across to A1 Alpha", with Mr Crump asking "1, 2, 3 months?". Mr Kewley, with Mr Spence in copy, replied "we need to wait until the last lease is granted and formally registered at land registry – which could be a couple of months with the current back log". Mr Crump was determined to pin Mr Kewley down: "to be clear. With Foundry, you need to wait until that last lease is formally registered, then you can start proceedings to move the freehold to A1. How long would the actual move take once you have had the last lease formally registered?". Mr Kewley replied, "Just a couple of weeks." In fact, Mr Kewley and Spence had already exchanged contracts to sell the freeholds for the Foundry 1 and Tudor Studios, with the others appearing on a spreadsheet of freeholds being offered for sale. Mr Kewley and Mr Spence's response was, once again, wholly dishonest.

179. To similar effect, on 3 April 2015 Mr Kewley received an enquiry on behalf of a potential investor asking about the assets of A1 Alpha. Mr Kewley told him that "A1 Alpha … has built a large range of both commercial and residential property including both new build and refurbishment" and listed a number of properties. Three of those listed – Tudor Studios, Foundry 1 and Jubilee Court – were not built by A1 Alpha as developer. In response to a question about A1 Alpha's debt, Mr Kewley said that it was debt free and did not use bank funding, loans or overdraft. That could not be said of the three joint venture companies with their substantial debt to Mysing £5m at a 15% interest rate, Mr Kewley having included their developments but ignored their debt. When asked "in the future do you intend to sell the student sites together with your lease obligations to another developer?" Mr Kewley replied, "no – we are in this for the long-term and have no intention of selling". Mr Kewley accepted he intended to sell all the freeholds at this time, to the extent they had not already been sold. His evidence that he was referring to a "sale" of the underleases (a liability, not an asset) was false. Mr Kewley provided the investor with a dishonest response intended to provide false assurance, which ignored the difference between the various companies in the Alpha Group because it suited his interests to do so.

180. Mr Crump continued to pass on to potential investors Mr Spence's and Mr Kewley's dishonest assertion that the freeholds in the Mysing projects were to be transferred to the underlessee for those projects, A1 Alpha. One investor sought written confirmation of the position, and Mr Foden of EPL passed the request on to Mr Crump on 1 May 2015. This led to a request for a side letter from the relevant joint venture development company confirming its intention to transfer the freehold title on completion of unit sales. EPL suggested that, in addition to dealing with the request by this potential

purchaser of two units, "it may also be good practice to have such a side letter at hand for Tudor Studios and Jubilee (and any future projects purchased though SPVs) drafted too as it is something that comes up from time to time and could help". Mr Crump passed these requests onto Mr Spence and Mr Kewley, stating "if you are happy to make a side letter, obviously it's non-committal, it would be useful to show certain clients of the intention to transfer assets to A1. Just makes it look real". Mr Kewley sent a signed letter (dated January 2015 and clearly prepared to provide similar comfort to another investor) on 6 May 2015 stating "I can confirm that it is our intention on the granting of the final lease at the above property to transfer the remaining common parts and freehold …. to A1 Alpha". This was a lie. Mr Kewley accepted that, when the letter was produced, he and Mr Spence had already decided to sell the freeholds, not to transfer them to A1 Alpha.

181. On 19 October 2015, Mr Crump sent Mr Kewley and Mr Spence another version of the Developer Prospectus, asking them what value to attribute to that part of the Norfolk Street freehold which was still maintained:

i) The prospectus referred to an "asset-backed developer" and "asset-backed income guarantee", referred to "Alpha Homes … possess[ing] a substantial and ever expanding asset base" and giving a total value of assets currently held.

ii) I am satisfied that Mr Kewley and Mr Spence knew and intended that this document would be used to convey the impression to potential investors that the net return promises were contractually backed by a large asset-based on the part of the person making the promise (and thus authorised the Asset-Backed Representation as made in this document). While the prospectus did not state that no assets would be sold, the clear impression was that the promises enjoyed substantial backing in the form of fixed assets. Mr Kewley and Mr Spence knew that this was a false impression, in circumstances in which they had a fixed intention to sell all freeholds, and were well into a programme to carry that intention into effect.

iii) The prospectus said, "developments have always been completed on time and have consistently delivered exceptional results". That clearly sought (and was intended) to convey the suggestion that the developments were delivering good results in the context of the fixed returns promised, and hence made the Modified Track Record Representation. It was untrue, as none of the developments were generating sufficient income to meet promised returns, as Mr Kewley and Mr Spence well knew.

182. On 15 March 2016, Mr Kewley and Mr Spence discussed a potential deal with Mr Michael Gubbay, the principal behind the companies who acquired a number of freeholds. Mr Kewley had prepared a draft email which confirms their understanding of the importance which potential investors attached to A1 Alpha (or the equivalent underlessee) owning freeholds, and their plan to obscure the hollowing out of freehold value:

"We need to be seen to own the land for 2 main reasons – 1 to give our buyers

confidence & 2 there will be a 5% VAT Element on construction".

The draft suggested that Mr Gubbay's company Tuscola "could … take a charge on the freehold and a restriction on title would be easily explained away as a funding line during construction."

183. In April 2016, Mr Crump approached Mr Dean of PG Legal to ask if PG Legal could act for an investor seeking to sell a Foundry unit to someone else. Mr Kewley passed the message on to Mr Spence stating "FYI – might come up in the resale that the freehold at foundry has been sold …." (because freeholder consent would be required for the transfer of the lease). Mr Spence replied "Oh no". Mr Crump had not been told of the sale, and been permitted to carry on marketing properties on the basis of false statements about the freehold ownership.

184. The freehold of Tudor Studios was sold to Premier Ground Rents No 3 Limited and Premier Ground Rents No 4 Limited on 22 February 2017 for £2.6m.

The Foundry1

185. Foundry 1 is a 112 bedroom site in Loughborough which was already operating when it was acquired. It was already managed by Mezzino when it was acquired for the Mysing joint venture in December 2014. The acquisition vehicle was Alpha Developments (Loughborough) Limited which acquired the freehold, which was in turn owned 50% by Alpha Properties (Leicester Ltd) for Mysing and 50% by Alpha Homes (GB) Ltd for Mr Kewley and Mr Spence.

186. On 10 October 2014, Mr Kewley had told Mr Crump about the planned acquisition of the Foundry 1, and asked him to prepare a brochure.

187. Mr Kewley sent his pricing assumptions to Mr Crump on 29 October 2014, copied to Mr Spence. Once again, he assumed 100% occupancy for the entire year for all 10 years. A letter from Mezzino confirms that the Foundry had been 100% occupied from 2010-2011 to 2014-2015, save for 71% in 2012-2013.

188. Mr Kewley assumed an average rent of £95 per week across the building for the ensuites, and £145 per week for the smaller number of studios, stating that rents currently being achieved were £80-100 for ensuites and £140 to £150 for studios. The email makes no reference to costs such as ground rent, maintenance and management. Mr Kewley suggested 8% returns be offered for years 1 and 2, 9% for years 3 and 4, and 10% thereafter.

189. On 8 January 2015, Mr Crump raised a number of pertinent questions about these figures, including about occupancy levels since opening, and noted that EPL was likely to be asked about the fact that, on current rents, there was only £271.40 available for all costs for a year on each unit. Mr Kewley responded by stating that "my figures are worked on total income per building rather than individual returns on specific rooms", suggesting rents of £80-110 per week for the ensuites and £140-£150 per week for the studios. There was also an attempt to suggest that washing machines, broadband connection and vending machines would provide a source of significant income,

although Mr Kewley must have known this was not the case.

190. An email from Mr Foden of 21 January 2015 (not sent to Mr Kewley or Mr Spence) confirms the £80-100 per week figure was already being charged by Mezzino, albeit it does not give a figure for the studios.

191. The analysis does not discuss the expenses which, given the clear intention to sell the freehold, would involve ground rent over and above the expenses already being paid under Mezzino's management. Nor is the tenancy length obtained by Mezzino at the quoted rents clear.

192. It is not clear to me when sales of units at the Foundry 1 began – the Lead Claimants who purchased this property, the Whittons, did so by way of a resale by original investors in May 2018. However, the pricing discussions were continuing into January 2015 and I will therefore make findings as to the position at that time. The brochure for Foundry 1:

    i) contained the usual statements which give rise to the Substance Representation;

    ii) stated investors were "protected by robust asset-backed contracts" and referred to "robust asset-backed contract (with no third party shell company)" (the Asset Backed Representation); and

    iii) stated that "this is their ninth student property, with all previous developments having delivered the guaranteed yields on schedule" (the Modified Track Record Representation).

    I am satisfied that Mr Kewley and Mr Spence approved the content of the brochure in accordance with their usual practice.

193. As to the Substance Representation:

    i) Both experts accepted that the Foundry 1 could not generate sufficient net income to meet the promised investor returns.

    ii) Assuming 52 week tenancies, with full occupancy for every single unit for every week of the year for ten years, the rents adopted by Mr Kewley, 3% growth each year on a compound basis, and running costs of 18%: the ensuite units would be unprofitable, and the studios would make a small profit of £5,000 per unit over 10 years. Adding the shortfall of the ensuites and the modest profit for the studio units, meant that over 10 years, there would be a potential profit of £1,329 on the entire development, or an overall profit margin of 0.02%.

    iii) However, I am satisfied that the lowest expenses figure which can be used is the 25% which was the targeted figure for Mezzino-managed developments. Adopting that figure, even with the combination of otherwise optimal assumptions, the project was loss making, and more so once ground rent became payable.

    iv) In fact, Mezzino were operating above that 25% expenses figure. Email exchanges with Mr Spence suggest that Mezzino were operating to a budget of £207,000 a

year, and suggesting synergies if they were awarded two sites might reduce that to somewhere around £180,000 a year. Mr Kewley's 25% target required a reduction to £144,000 a year. The 18% allowed by Mr Kewley would have left £103,000. Had Mr Kewley and Mr Spence really believed that gap could be closed, against a background where they were obliged to pay Mezzino a minimum of £20,000 a year plus VAT, and an accommodation manager among other costs, then the expenses incurred at the Hylton Road and Norfolk Street sites would have been highly material. However, they have not been produced – I infer because they show that expenses were far higher than the input being used.

v) It is also significant that, despite having acquired a building which had functioned as purpose-built student accommodation since 2010, retaining the existing manager, and obtaining a letter from the manager to address historic occupancy, there is no evidence of the net returns produced by the building based on student lettings for 2010, 2011, 2012, 2013 and 2014, nor of historic material of this kind being factored into the promised returns. It is inconceivable that Mr Kewley and Mr Spence did not have access to this material. The obvious inference is that it did not support the promised returns.

vi) There was no ringfencing of one year's rent, as Mr Kewley suggested. Indeed, the only source of such money could have been sales proceeds, but with a Mysing joint venture such money did not belong to A1 Alpha the underleaseholder, but the developer company, and A1 Alpha had no entitlement to it.

vii) By January 2015, Mr Kewley and Mr Spence knew that Hylton Road in years 1 and 2, and Norfolk Street in year 1, were not covering the guaranteed returns. They had already formed the intention to "dump" the rent guarantees on the student properties by June 2014, and events since then had scarcely improved the outlook.

viii) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. While A1 Alpha's accounts for the year-ending February 2015 showed a small profit of £66,000, I accept Ms Griffin's evidence that numerous material items were omitted, and that in reality the business was heavily loss-making.

194. Further, the statement that previous developments had "delivered their guaranteed yields on schedule" was intended to communicate that those returns were delivered by the operations of the sites themselves, not that they might be underwater but to date had been bailed out. Mr Kewley and Mr Spence intended that EPL give this impression and make the Modified Track Record Representation and knew it was false.

195. Even before acquiring the Foundry, on 31 December 2014 Mr Kewley and Mr Spence had had an exchange in which they had referred to the intention to sell the freehold in the Foundry for £900,000, and a schedule produced by Mr Kewley in March 2015 showed that the freehold for the Foundry was already under contract by then. In any event, the freehold was not owned by A1 Alpha, the underlessee. Mr Kewley and Mr Spence knew that two freeholds owned by A1 Alpha had already been sold, and they were planning to

sell the rest as soon as they could. I am satisfied that Mr Kewley and Mr Spence knew that the Asset-Backed Representation was untrue.

196. I can deal briefly with one further point which featured briefly at the trial and which I have referred to at [174] above. The brochure stated that "each room includes Wi-Fi, high spec fixtures and fittings, high quality furnishings … quality white goods" and "each room will include quality furniture …". The development company later took the line that these items were not part of the sale, Mr Kewley stating "what we meant by that is we were going to have to fit it out with high quality furnishings to rent it out to students. We weren't conveying the furniture as part of the sales process.". However, there was no exploration of the terms of the contract, nor am I am able to conclude that Mr Kewley and Mr Spence intended to make a misleading statement about what was a relatively small element of the investment.

197. On 30 March 2016, the freehold of the Foundry 1 was sold to Moore Investments for £902,875.

198. A second Foundry site – Foundry 2 – was later purchased, also in Loughborough, also by Alpha Developments (Loughborough) Limited. This had 102 bedrooms. It did not feature in the evidence to any significant extent.

Jubilee Court and Mandale Terrace

199. The next Mysing joint venture project was Jubilee Court in Preston, a large site with planning permission for 240 bedrooms. The joint venture company used to acquire the site in 2015 and to develop the site was Alpha Developments (Preston) Ltd. This development did not feature to any significant extent in the course of the evidence.

200. However, on 13 November 2015, an investor in the site decided to visit it while he was driving past, and was surprised to find how undeveloped it was. He raised the matter with EPL who passed the query onto Mr Kewley. He received a rather general response, which he was not happy with, which led him to raise a number of detailed queries including proof of the identity of the developer owning the land. What he received back was information that the land was owned by a different company to the underlessee (i.e. Alpha Developments (Preston) Ltd not A1 Alpha). When the investor pursued this point, Mr Kewley told him on 19 November 2015 that "once the development is completed, the SPV [i.e. the developing company] is dissolved and the freehold and the onward management of the site reverts to our main trading company" A1 Alpha. That was a lie, the intention being to sell the freehold. Indeed, on the same day that Mr Kewley sent this reply to the curious investor, he wrote to a ground rent broker attaching a list of freeholds which a particular purchaser was "looking to acquire", including Jubilee Court. I do not accept that this was simply an attempt to assess value, as Mr Kewley dishonestly suggested in his evidence. By this stage, an ongoing programme of freehold disposal was well underway.

201. In 2015, the Alpha Group also acquired a site at Mandale Terrace in Stockton on Tees with planning permission for 28 rooms later, increased to 39 rooms, on this occasion without Mysing's involvement. It was very near a 380-bed site managed by Mezzino called Rialto and the plan was to use it as overflow facility. An email from Mr Spence to

Mr Crump on 15 June 2015 showed pricing on the basis of the weekly rent currently being charged at Rialto. Rialto benefited from a "nominating agreement" by which Durham University sent students its way. Mandale Terrace would not. Mr Crump responded by noting that a nearby and competitor site was offering 39 week leases, "which these numbers wouldn't work at". Mr Kewley did not provide an assumption for operating costs, but Mr Crump worked out that assuming 100% occupancy and 52 weeks a year this left 17% for operating expenses.

202. I am satisfied that Mr Kewley and Mr Spence knew that there was no prospect of the operating rents at this site covering the net rental promise. The rent was too high for a 52-week lease, any suggestion of consistent 100% occupancy was optimistic and the maintenance costs were simply the difference between what these optimistic assumptions generated and the net returns promised.

203. On 18 August 2015, Mr Spence and Mr Kewley had an exchange about another purpose built student accommodation block they had been offered in Durham. Mr Kewley suggested that "this market is getting seriously over-heated". Mr Spence thought the market was "about to top out", continuing:

> "It's funny given that we are a big part of the reason that the market has gone this way ... I reckon it could all start to slow down early next year when the rent guarantees stop being paid at the higher levels by other developers and it all settles down to 6% or 7% and then interest rates start to creep up".

204. However, that market view did not curtail Mr Spence and Mr Kewley's appetite for further projects.

205. On 30 October 2015, Mr Kewley and Mr Spence had an exchange by text. The principal purpose of the exchange was to discuss the ongoing programme of ground-rent sales, but reference was also made to the fact that the vendor's solicitor was not responding to Mr Dean, nor the person to whom the file had been passed. Mr Spence commented:

> "If this guy openly admits that he makes his money chasing people he'll have a field day when we sidestep 1500 rent guarantees next year."

Walking away from the rent guarantees was always in Mr Spence's and Mr Kewley's contemplation.

Scholar's Court

206. Scholar's Court was an existing purpose built student accommodation building in Haria House, Bradford with 217 rooms, of which 83 had been sold off by a previous developer. It was purchased by Alpha Developments (Bradford) Ltd – a Mysing joint venture company – for £3m in November 2015.

207. I have been shown a brochure for Scholar's Court prepared by EPL and provided to Dr Hudson-Peacock on 3 December 2015, HPIL purchasing the unit in February 2016. I am satisfied that the contents of this tried and tested marketing-document were known to and authorised by Mr Kewley and Mr Spence who on 23 November 2015 had asked to be

sent a copy of the brochure when it was prepared.

208. The brochure contained statements amounting to:

i) the Substance Representation;

ii) the Asset-Backed Representation;

iii) the Modified Track Record Representation; and

iv) the Occupancy Representation.

209. Mr Kewley contacted Mr Crump about Scholar's Court on 30 September 2015. He noted it was currently let for £85 per week for ensuites and £120 week for studios, with 43-week tenancies which he wanted to increase to 52 weeks (although Mr Kewley would have known that this would inevitably have impacted the weekly rent in a negative manner). He also noted that even on that more favourable tenancy length, the building was only 70% occupied in the most recent year, although higher levels of occupancy had been achieved before 2015-2016. A DTZ information pack for this site dated November 2014 showed it had generated £325,696 of net income (on the basis of a 39% expenses ratio before the management fee), whereas the Alpha Group financials would require net income of £547,680 in year one, then £616,140 when the promised return reached 9% and £684,000 when it reached 10%. It was simply not credible to have believed that the finances of the site could be improved to the extent necessary to make that an achievable outcome, and Mr Kewley and Mr Spence were far too savvy for such blind optimism. The DTZ figures also showed that the money to be made from extras such as laundry could never have the transformative financial effect which Mr Kewley used in justifying the figures in other projects (Mr Kewley accepting, when confronted with some hard data, that "it's not a shattering amount of money.")

210. On 21 November 2015, Mr Kewley informed Mr Crump that the units would be sold with the guaranteed return rising from 8% to 9% to 10% over the ten years.

211. It is apparent from an email from EPL to Dr Hudson-Peacock of 3 December 2015 that, even assuming 100% occupancy for 52 weeks a year at the assume rent, this left only 15% "to cover maintenance charges; ground rent; insurance; utility bills; all furnishings and decorations; sourcing and managing the students and money collection". However, a meeting on 20 January 2016 between Mr Kewley, Mr Spence and the Mysing representatives recorded that the expenses of running the various Mysing joint venture student properties was "higher than the original estimate of 25% and would be nearer 45%" (i.e. three times the figure which highly optimistic rent assumptions would leave for expenses at Scholars Court).

212. HPIL entered into a Purchase Agreement for Scholar's Court on 17 February 2016. By this date, I am satisfied that Mr Kewley and Mr Spence knew the promised income could not be paid from earnings on the property:

i) I accept Ms Griffin's calculation that there was always a high risk of this project being underwater.

ii) Both experts agreed that Scholar's Court could not generate the necessary net income to meet the investor returns.

iii) Even assuming 100% occupancy for 52 weeks a year, 18% expenses and 3% net growth every year, there would still be a 9% loss over 10 years. However, even that outcome was not remotely realistic as Mr Kewley and Mr Spence understood, not least from the prior operation of the site which had achieved nothing approaching that level of profit.

iv) In particular, the site achieved only 70% occupancy on the basis of 42 week tenancies in 2015/2016. Further, the DTZ document of November 2014 gave a total anticipated gross income for 2014/2015 (a time of 98.7% occupancy) of £729,370, with anticipated net income of £325,696, whereas the Alpha Defendants needed (at a minimum) £547,680 in net income to cover the investor returns of 8% for the first year (and then £616,140 00 when it reached 9% and £684,000 when it reached 10%). This was not a gap which could conceivably have been closed through "efficiencies", nor have the Alpha Defendants disclosed the material necessary to show what level of expenses they were incurring on other sites, which I infer were fundamentally incompatible with the dramatic turnaround required.

v) In December 2015, a spreadsheet prepared by Mr Higgins of Mysing showed the Leicester and Preston sites on 42 week tenancies; only 80% occupancy at Leicester and Bradford and 95% at another Preston site and Bradford; and all five sites on the spreadsheet running at a substantial deficit once allowance was made for investor returns.

vi) In January 2016, at the meeting with Mysing, Mr Kewley explained that the Foundry 1 was running at a shortfall of £248,000 against the amount of £460,00 required to meet investor payments and ground rent (see [223(v)] below).

vii) As at February 2016, Mr Kewley and Mr Spence knew that Hylton Road was not generating sufficient net returns to meet promised returns for the academic years starting in September 2013, September 2014 and September 2015; nor was Norfolk Street for the academic years start September 2014 and September 2015, nor Park Lane House or the Foundry in the academic year starting in September 2015. In February 2016, Mr Kewley and Mr Spence were projecting forward losses on existing projects of £5m from September 2016 to January 2018 (see [226] below). Further, the same note shows Mr Kewley telling Mr Spence that the deficit would *increase* if the Foundry 1 and Q Studios were taken into account to £6m.

viii) It is apparent from these communications that Mr Kewley and Mr Spence did monitor net incomings against outgoings, albeit they have not chosen to disclose the material relied upon for this purpose.

ix) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time, further exacerbated the lack of substance in the financial returns being promised. For the year-end February 2016, it had a very substantial negative asset value even without accounting for its liability for investor returns. While A1 Alpha's accounts for the year-ending February 2016 showed a small

profit of £51,352, I accept Ms Griffin's evidence that numerous material items were omitted, and that in reality the business was heavily loss-making.

x) Nothing had occurred to lead Mr Kewley and Mr Spence to change their June 2014 plan to "dump the rent guarantees" when it suited them.

213. It follows that Mr Kewley and Mr Spence knew the Substance and Modified Track Record Representations were false when HPIL entered into a Purchase Agreement on 17 February 2016.

214. The Asset-Backed Representation was also false and known by Mr Kewley and Mr Spence to be so on that date. The underlease was with A1 Alpha. It did not own the freeholds of any of the Mysing joint venture properties, including Scholar's Court, and the programme to sell all of the freeholds owned by A1 Alpha itself was well underway. Pursuant to that programme, the freehold in Scholar's Court was sold to Premier Ground Rents No 4 for £3,125,000 on 25 November 2016.

215. It is also clear that the Occupancy Representation was untrue and was known by Mr Kewley and Mr Spence to be untrue: see [223] to [226] below.

216. I accept that it is possible that Scholars Court suffered from an unanticipated reduction in the number of courses offered by one of the Bradford tertiary education institutions, on which there is equivocal and conflicting information. This might have made a bad situation worse, but it did not make a viable situation unviable –it was unviable from the outset.

The end of the Mysing joint venture

217. Tensions in the joint venture emerged at a relatively early stage, partly because of the casual attitude which Mr Spence and Mr Kewley adopted to the joint venture finances. Mr Higgins of Mysing had been promised bank reconciliations, but on 6 October 2015, Mr Kewley warned Mr Spence that these would show that A1 Alpha owed £1.35m to the joint venture companies because "we have basically been funding everything with reservations fees received on the other jobs." In what appears to have been a default response to any unwelcome news, Mr Spence replied "Blimey …." Mr Kewley and Mr Spence had had to raid joint venture funds to this extent because none of the projects were generating enough net income to meet the promised returns. It reflected the unsustainable nature of the business enterprise from the start: properties were sold off the back of unsustainable rent guarantees, which were paid using reservation fees and sale proceeds for further properties sold of the back of unsustainable rent guarantees, until the inevitable point when the plates stopped spinning.

218. Mr Higgins was still pressing for that reconciliation on 6 November 2015 (demanding it that evening), but the updating work Mr Kewley had done still showed A1 Alpha owing £1.3m to the three joint venture companies. Mr Kewley did not regard the unauthorised use of joint venture money as the problem, but the fact that Mysing now had access to the information to "work out that we have a lot [of] reservation fees missing from the development company accounts". The need to "plug the hole" was stressed. The issue had arisen because Mr Crump had been told by Mr Kewley and Mr Spence to pay

reservation fees received from joint venture project sales to A1 Alpha rather than to the development company.

219. On 14 December 2015, Mr Higgins wrote saying "there is currently over £1m of funds which is 'on loan' to Alpha GB from the JVs, and I think we had agreed some time ago that we would put all the money in correct accounts." Mr Kewley and Mr Spence jointly drafted a rather obfuscatory response which sought to put matters off until January, although it is not clear if it was sent.

220. Some sense of the financial pressure faced by the Alpha Group at this time can be seen from Mr Kewley's email to Mr Spence of 27 December 2015 which, appropriately enough, began with Mr Kewley telling Mr Spence "im [sic] now going to depress you". After listing the payments due to investors on 1 January 2016, he stated "we can scrap together around £250k at the moment which will pretty much clear out all our cash". Putting Aberdeen on one side, he continued, "we can make all the other payments except Loughborough by 1st Jan and then blame Loughborough on a banking error with the batch payments" (i.e. offer a dishonest explanation to hide the Alpha Group's financial difficulties). He referred to the fact that the £250,000 included £40,000 deposit money from the Mysing Bradford joint venture "which will need to [go] back to Mezzino in January – but we can worry about that in a few weeks".

221. On 4 January 2016, Mr Spence replied referring to the imminent completion of the sale of the freehold of Park Lane House, with the proceeds to be used to pay investors on student properties, Westbeach (which was clearly having to be propped by external funds) and a VAT liability. He referred to a lie about HSBC online business banking being down which was "keeping Andrew and the student investors at bay as to why loughborough investors havnt [sic] been paid."

222. On 18 January 2016, Mr Spence sent Mr Kewley a draft email he had prepared to go to Mysing following what had clearly been some tense email exchanges over the weekend. He acknowledged unease on Mysing's part, and promised to address outstanding issues on the Leicester and Preston projects. It is clear that Mysing was looking for more control over EPL (who received reservation fees) and Phil Dean of PG Legal (to whom investors paid the price on completion) so far as the amounts received were concerned, and Mr Spence was resistant.

223. A meeting took place between Mysing and Mr Spence and Mr Kewley on 20 January 2016:

    i) The unauthorised use of joint venture funds for non-joint venture business was acknowledged, and it was agreed that £900,000 of these amounts would be repaid in part when the Park Lane House freehold was sold. The remainder was to be repaid by one of two means. First the two joint venture participants "raising invoices for management services" to the Loughborough JV company – a book balancing exercise which would presumably have provided a means for the Mysing side to secure an equal benefit. The second was Mr Kewley and Mr Spence repaying the amounts.

    ii) Reference was made to the anticipated sale of the Westbeach freehold, the proceeds

of which would be used to pay down the Mysing debt,

iii) Mr Spence and Mr Kewley explained their financial difficulties had arisen from having only a 56% occupancy level at Park Lane House, on which a loss of £200,000 had already accumulated given the ongoing investor payments.

iv) Mr Kewley also explained running costs "of each projects once occupied was significantly higher than the original estimate of 25% and would be nearer 45%". This was on larger buildings where economies of scale would have been expected (as Mr Kewley accepted). It is clear that the figures of 15-18% used by Mr Kewley when trying to justify the viability of the various projects were unsupportable.

v) Mr Kewley explained that the Foundry 1 was running at a shortfall of £248,000 against the amount of £460,00 required to meet investor payments and ground rent.

vi) Mr Kewley and Mr Spence explained that by July 2016 there would be 1000 rooms under management and £1.5m shortfall in investor repayments, and that "if we were to take on any further projects this would compound the problem if the developments ran into another year and Alpha Holdings (GB) were not able to inform investors of a reduced return and align investor payment dates with rental incomes". This last sentence was an acknowledgement that the payment of promised returns off the back of net rent receipts was not sustainable, and at some point the former would have to be reduced to bring them in line with the latter.

vii) Reference was made to bringing projects currently outside the Mysing joint venture within its fold, so that profits from sales could be used to cover losses on investor payments up to January 2018.

viii) It was agreed to proceed with projects in Stoke and Luton, and to bring additional projects in Loughborough (Foundry 2), Preston (two projects) and Leicester into the joint venture.

224. On 22 January 2016, Mr Kewley wrote to Mr Higgins of Mysing by way of a follow-up, referring to a proposal to create a pot of 5% of profits to cover rental shortfalls across all the projects in the period to January 2018 (a proposal which is itself inconsistent with the suggestion that there was already an agreement to hold one year's investor payments within each development for this purpose). However, Mr Higgins had been spooked by the revelation at the meeting of a higher rental shortfall than previously disclosed. Mr Kewley sent Mr Spence a text on 22 January 2016 to tell him "the size of the rental shortfall has scared John off" and he wanted to part ways in September 2016 after the projects in Preston, Leicester and Bradford had been completed, with the Alpha Group buying Mysing's share in the Stoke project. Mr Kewley explained:

> "Basically he's happy for them to take less profit as we have the rent shortfall to carry forward …. He also happy to lend money in from Mysing so we can buy Ambleside on Friday… So looks like everything will work out as planned …."

225. The Mysing joint venture was terminated, with Alpha Properties (Leicester) Limited, which Mysing had used as its joint venture vehicle, being transferred into the ownership

of the Alpha Group. This appears to have involved a payment of £7.44m and the payment of accumulated interest on the Mysing finance of £1,855,000.

226. On 18 February 2016, Mr Kewley provided a further update to Mr Spence. He was projecting a £5m shortfall in the amounts necessary to meet investor returns over the period from September 2016 to January 2018, and including Stoke 1 and Loughborough 1, from September 2017 to January 2018 "we are looking at £6m shortfall … I think we need to think about this before crashing on with Stoke and Loughborough as it's a big risk with these sorts of numbers". That £6m deficit had been building up over 2 years. Mr Kewley attached a spreadsheet from which it is clear that occupancy at two student properties was at 80%, only one was at 100% and all were running at a loss as against investor returns. It is clear from this spreadsheet that data on occupation was kept, and the failure to achieve the levels of occupancy which formed the basis of Mr Kewley and Mr Spence's pricing assumptions would have been known to them at all times. The January 2018 time horizon is also significant, consistent with my view that Mr Kewley and Mr Spence were not worried about sustaining investor payments over the 10 years promised.

227. While the Alpha Defendants understandably made much of this brief moment of reflection, Mr Kewley and Mr Spence carried on without altering the terms of their offering, or doing anything more in the nature of due diligence or analysis to satisfy themselves that the propositions were viable. No consideration was given to how to address the £1.5m shortfall which had already arisen, and which was expected to reach £5m on existing projects by January 2018. Instead, in February 2016, A1 Alpha purchased Ambleside. After February 2016, A1 Alpha exchanged contracts on the Box; acquired the Ilfracombe site; purchased Scholar's Village; developed the Q Studios site; and purchased Primrose Hill. In short, they "crashed on". Understandably, there was no attempt in closings to suggest that any new sites were believed by Mr Kewley and Mr Spence to be so profitable that, in investor return terms, it was believed that not only would they wash their own faces but wash those of the existing, failing, sites as well.

Other student properties

Ambleside Wesleyan Chapel

228. The meeting between Mr Kewley, Mr Spence and Mysing on 20 January 2016 records Mr Kewley and Mr Spence stating:

> "DK/NS explained that by July 16 there will be c.1000 rooms under management that will result in a £1.5m shortfall in investor repayments … and that if we were to take on any further projects this would compound the problem if the developments ran into another year and Alpha Holdings (GB) were not able to inform the investors of a reduced return."

229. In February 2016, the Alpha Group acquired Wesleyan Chapel in Ambleside, using £1m of development finance from Mysing, but acquiring the property through A1 Alpha. The chapel had already been converted into 9 student accommodation units for 27 students, had been operational for 10 years and was currently occupied.

230. The Ambleside brochure was provided to Mr Kewley on 15 June 2015 and I am satisfied that it was seen and approved by Mr Kewley and Mr Spence (who between them must have been the source of the detail it contained). I was shown a brochure produced by EPL for Ambleside the contents of which, once again, I am satisfied were known to and approved by Mr Kewley and Mr Spence, which was provided to Magic Box, one of the Lead Claimants. Brochures for Ambleside were in circulation even before the property was purchased in February 2016. Magic Box purchased its Ambleside unit on 6 April 2016.

231. The brochure provided to Magic Box:

i) contained the usual statements amounting to the Substance Representation (and, in particularly explicit terms, suggested that "there is a healthy buffer between the fixed returns and actual projected NET rental income [which] provides enhanced security for both the buyers and developer");

ii) contained the Asset-Backed Representation;

iii) stated the rooms were let to students for 42 weeks per year at £102 per week, and to seasonal workers over the summer at £150 per week, and assumed a 17% operating and maintenance costs; and

iv) made the Modified Track Record Representation.

232. The figures in the brochure had first been sent by Mr Kewley to Mr Crump on 11 May 2015 who explained that a full-timer caretaker was employed at the site but said nothing about expenses (which would need to reflect this cost). Mr Crump contacted Mr Kewley and Mr Spence on 15 June 2015, suggesting "at first glance [the rent] seems to be steep unless someone is renting that all year for a decent price?", and noting "normally we add 17% to cover management, maintenance etc so all the figures you see attached can add up to quite steep average weekly rents". Mr Kewley reverted with an email repeating the summer letting possibilities, pointing out that assuming 100% occupancy for the 42-week student term, £150 for each room for 10 weeks over the summer, and 17% operating costs, produced £130,000 "which is what we are guaranteeing", and suggesting a possibility of higher income if students left early for a reduced rent reduction with the rooms being let to causal workers for a longer period. There was no attempt to work out why, if this was feasible, it was not already being done, nor how current operating costs compared with the 17% allowance. This was so even though, as purchasers of purpose built student accommodation which was already operating, Mr Kewley and Mr Spence would clearly have had access to the historic net returns achieved on the site.

233. On top of that, Mr Kewley made the frankly absurd suggestion that a converted 17th century Wesleyan Chapel by Lake Ambleside "cost peanuts to run", it being said that the building cost very little to heat due to high quality insultation. It is clear from the evidence of Mr Jackman, the caretaker at Ambleside who was called to give evidence on the Alpha Defendants' behalf, that the suggestion that this building was cheap to run was nonsense. Mr Kewley suggested the caretaker worked for free in return for the right to live in a caravan in the grounds, even though he intended to employ the caretaker on a wage which would consume 10% of the projected gross income on its own and let him

live in an apartment on the site.

234. When Magic Box purchased the site in April 2016, I am satisfied that Mr Spence and Mr Kewley knew that, like every other student property, there was no realistic prospect of the operation at Ambleside generating a sufficient net profit to meet the promised returns:

i) Both experts agree that the Wesleyan Chapel could not generate sufficient net revenue to meet the promised returns.

ii) Even adopting the most generous assumptions as to occupancy, rent and expenses, the project would generate a substantial loss. Using the weekly rents referred to in Mr Jackson's witness statement, and assuming 100% occupancy for 52 weeks a year, the gross rentals would not have covered the promised returns, still less the net returns after running costs. The statement about there being "a healthy buffer between the guaranteed net return" and actual projected NET rental income was wholly untrue, and Mr Kewley made no attempt to defend it. This was another financial disaster in the making.

iii) There has been no disclosure of the prior levels of net return, even though Mr Kewley and Mr Spence must have been aware of this when purchasing an operating purpose built student accommodation site.

iv) In January 2016, at the meeting with Mysing Mr Kewley explained that the Foundry 1 was running at a shortfall of £248,000 against the amount of £460,00 required to meet investor payments and ground rent (see [223] above).

v) As at February 2016, Mr Kewley and Mr Spence knew that Hylton Road was not generating sufficient net returns to meet promised returns for the academic years starting in September 2013, September 2014 and September 2015; nor was Norfolk Street for the academic years starting in September 2014 and September 2015, nor Park Lane House or the Foundry in the academic year starting in September 2015. In February 2016, Mr Kewley and Mr Spence were projecting forward losses on existing projects of £5m from September 2016 to January 2018, or £6m including the Foundry and Q Studios.

vi) The planned sale of the freehold would bring with it the requirement to pay ground rent.

vii) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. As of 29 February 2016, it had net current assets of barely £163,000 without accounting for investor returns. While A1 Alpha's accounts for the year-ending February 2016 showed a small profit of £51,532, I accept Ms Griffin's evidence that numerous material items were omitted, and that in reality the business was heavily loss-making.

viii) Nothing had occurred to lead Mr Kewley and Mr Spence to change their June 2014 plan to "dump the rent guarantees" when it suited them.

235. It follows that Mr Kewley and Mr Spence knew that the Substance Representation was untrue.

236. Mr Kewley and Mr Spence also knew:

i) The Modified Track Record Representation (which they intended the brochure to communicate, and which it did) was false.

ii) The Asset-Backed Representation was false. It is clear that Mr Kewley and Mr Spence intended from the outset to sell the freehold, as is apparent from an email from Mr Kewley to Mr Cottam of 4 January 2016. In due course, the freehold for the Wesleyan Chapel went the way of the other freeholds, being sold to Premier Ground Rents No 7 Ltd on 29 June 2018 for £220,000.

237. Mr Simpson of Magic Box was also provided with a version of the Developer Prospectus in February 2016:

i) This once again contained references to an "asset-backed developer", stating "Alpha Homes currently own a number of freehold property" and (under the heading "Income Guarantee") that "as the investment contract is signed directly with the developer … investors gain the added security of having their investment asset-backed."

ii) It said investors signed contracts "directly with the asset-rich … developer" backed "by the secured freeholds of 10 existing student developments and protected within an established umbrella company", the value of these assets currently standing at £3.16m and being set to increase to £7.2m once all current developments were guaranteed.

iii) It emphasised the contracts were "tied directly to a secure company".

iv) It listed a series of debt-free freehold asset including the Foundry 1, Tudor Studios, Hylton Road, Norfolk Street, Park Lane House, College Street, Jubilee Court and the Chapel Ambleside.

v) The Developer Prospectus made the Asset-Backed Representation.

238. I am satisfied that this document was fundamentally misleading –not least because the freeholds at Norfolk Street, Hylton Road, Park Lane House and College Street had already been sold, those at the Foundry, Tudor Studios and Jubilee Court never belonged to A1 Alpha, and the plan was to sell off all freeholds. I accept that Mr Kewley and Mr Spence knew that a document was being used by EPL to market the student sites which made false claims as to A1 Alpha's ownership of numerous freeholds, and that they were content for this to happen.

239. By 6 June 2017, only one apartment was left at Ambleside. Mr Kewley agreed to sell it to Mr Cayley at enhanced returns – 10% for 5 years and 12% for five years. There was no effort to assess the viability of these enhanced returns.

The Box

240. The Box was a former telephone exchange in Preston, converted into 44 rather basic units. It was acquired by A1 Alpha with a development loan from Mysing to undertake a complete refurbishment.

241. I have been shown a marketing report prepared by EPL and provided to the Whittons in May 2016, the contents of which I am satisfied were known to and authorised by Mr Spence and Mr Kewley. The brochure:

    i) contained the statements amounting to the Substance Representation;

    ii) contained the Asset-Backed Representation;

    iii) contained the Modified Track Record Representation.

242. On 2 February 2016, Mr Kewley contacted Mr Crump about The Box, proposing an investment offering with guaranteed returns of 8% for two years, 9% for two years and 10% for six years. Mezzino was to manage the building, which was to rent out at £75-80 per week. Even assuming 100% occupancy for 52 weeks a year, 18% expenses (massively below Messino's actual level) and 3% year-on-year increases on the rent put forward by Mr Kewley, the proposal was inevitably loss-making. Mr Kewley's reliance on the rent of four telephone masts on the roof as somehow making the difference was unavailing. Two of the four masts had been sold off on a long lease before the building was purchased, a third was terminated shortly after purchase and the last went with the inevitable freehold sale which also brought with it the requirement to pay ground rent.

243. The Whittons entered into a purchase agreement for a unit in The Box on 22 July 2016. As at that date I am satisfied that Mr Kewley and Mr Spence knew that the Substance Representation was untrue:

    i) Both experts agree that the Box could not generate sufficient income to support the promised returns.

    ii) Even adopting the most generous assumptions as to occupancy, rent and expenses, the project would generate a substantial loss: [242].

    iii) There has been no disclosure of the prior levels of net return, even though Mr Kewley and Mr Spence must have been aware of them when purchasing an operating purpose built student accommodation site.

    iv) As at February 2016, Mr Kewley and Mr Spence knew that Hylton Road was not generating sufficient net returns to meet promised returns for the academic years starting in September 2013, September 2014 and September 2015; nor was Norfolk Street for the academic years starting in September 2014 and September 2015, nor Park Lane House or the Foundry in the academic year starting in September 2015.

    v) In February 2016, Mr Kewley and Mr Spence were projecting forward losses on existing projects of £5m from September 2016 to January 2018, or £6m including

the Foundry and Q Studios.

vi) By 22 July 2016, the likelihood must be that the level of rent and occupancy for the academic year starting in September 2016 was clear, and it was similarly clear that it involved no turn-around in the failing fortunes of these sites.

vii) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. As at 29 February 2016, it had net current assets of barely £163,000 without accounting for investor returns. While A1 Alpha's accounts for the year-ending February 2016 showed a small profit of £51,532, I accept Ms Griffin's evidence that numerous material items were omitted, and that in reality the business was heavily loss-making.

viii) Nothing had occurred to lead Mr Kewley and Mr Spence to change their June 2014 plan to "dump the rent guarantees" when it suited them.

244. Mr Kewley and Mr Spence also knew in July 2016 that:

i) the Modified Track Record Representation (which they intended the brochure to communicate, and which it did) was false.

ii) the Asset-Backed Representation was false (and far from being ever-growing, the freehold sale programme meant the asset base was falling and would continue to fall). In due course, the freehold for the Box sold to Premier Ground Rents No 7 Ltd on 29 June 2018 for £980,000.

245. The Box was never rented out to students: no tenants could be found to occupy it at all, still less at 100% for 52 weeks a year at £75-80 per week.

Primrose Hill

246. Primrose Hill was another former chapel, in Huddersfield. It already had been converted into a 51-bedroom student property. The property was marketed by Fraser Morgan. On 2 February 2017, they sent Mr Kewley a marketing document stating that the average rent was £93 per week with tenancies ranging from 48 to 51 weeks, with a gross rent per flat of £4,550 and 22% expenses – a net receipt per flat of £3,549. The current level of occupancy was not stated. Mr Kewley emailed Mr Crump the following day, referring to the property as 100% occupied, and suggesting that units should be sold for £50,000-£55,000 each, with guaranteed returns of 8% for two years, 9% for two years and 10% for six years. That required net returns of £4,000-£4,400 in years one and two, £4,500 to £4,950 in years three and four and £5,000 to £5,500 thereafter.

247. Alpha Developments (Huddersfield) Ltd – a company jointly owned by Mr Kewley and Mr Spence – bought the property in March 2017.

248. On 12 April 2017, Mr Crump sent an email to Mr Kewley after a potential buyer of the property outright had asked for the "estimated gross amount the property will achieve over the 10 years". Mr Crump suggested the proposed net rental plus *20%* for

management and maintenance, and Mr Kewley agreed (which represents an inappropriately reverse-engineered answer to the question). Mr Kewley said that the rent was currently at £95 per week, but he was looking to increase it to £99 per week in September.

249. Applying the £99 per week rent which Mr Kewley had assumed in April 2017, the 20% expenses figure (not the 22% historically achieved) and the unduly favourable assumptions of 100% occupancy for 52 weeks a year for 10 years (when the property was currently achieving an average of £93 per week on 48-51 weeks), with rents increasing by 3% a year, the project would still be loss-making over 10 years.

250. I have been shown a copy of the marketing brochure for Primrose Hill produced by EPL and provided to Mr and Mrs Whitton in May 2017. Once again I am satisfied that the contents of the brochure were known to and approved by Mr Kewley and Mr Spence. The brochure:

i) contained the usual statements amounting to the Substance Representation; and

ii) stated that the developer had developed a robust business model in the student property sector which provided secure high yields and also referred to "proven delivery of sector high NET yields" and thereby made the Modified Track Record Representation.

251. Mr and Mrs Whitton purchased their Primrose Hill unit on 16 August 2017. As at that date I am satisfied that the Substance Representation was untrue and was known by Mr Kewley and Mr Spence to be untrue:

i) Both experts agreed that Primrose Hill could not generate sufficient net returns to meet the guaranteed payments.

ii) Mr Kewley "flipped" the incoming information on Primrose Hill overnight, arriving at promised returns which assumed a far higher net income than the property was currently achieving, but with no basis for doing so.

iii) Even making the unjustified assumptions made by Mr Kewley, the site would still be loss-making, and the more so once the freehold was sold and the ground rent factored in.

iv) As at August 2017, Mr Kewley and Mr Spence knew that Hylton Road, Norfolk Street, Park Lane House; the Foundry, Scholar's Court and the Wesleyan Chapel had not achieved the assumed net income in any year of operation, and would not do so in the academic year which was about to begin.

v) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. As at 27 February 2017, it had net current assets of barely £482,000 without accounting for investor returns, which far exceeded this figure. While A1 Alpha's accounts for the year-ending February 2015 showed a profit of £319,058, I accept Ms Griffin's evidence that numerous material items were

omitted, and that in reality the business was heavily loss-making.

vi) Nothing had occurred to lead Mr Kewley and Mr Spence to change their June 2014 plan to "dump the rent guarantees" when it suited them.

252. Mr Kewley and Mr Spence also knew Modified Track Record Representation was false.

Scholar's Village

253. Scholar's Village – Horton House – was an existing purpose built student accommodation facility in Bradford with 504 bedrooms. It was managed by CRM, until purchased by Alpha Developments (Bradford2) Ltd, owned by Mr Kewley and Mr Spence, on 2 November 2016 for £7,616,138. The acquisition was funded, as Ms Griffin has established, using funding from Mr Kewley and Mr Spence (£766,000), from sales made by other group companies in respect of other developments (£3,407,722) and from pre-sales of units for this development (£3,226.830).

254. I have been shown a marketing brochure for Scholar's Village prepared by EPL and provided to the Whittons in May 2016. Once again, I am satisfied that the contents of the brochure were known to and authorised by Mr Spence and Mr Kewley. The brochure:

i) contained the usual statements giving rise to the Substance Representation;

ii) stated "contracts underwritten by established company" and "all contracts are tied directly to the developer and asset backed" and, thereby, made the Asset-Backed Representation; and

iii) stated that the developer had developed a robust business model in the student property sector which provided secure high yields and also referred to "proven delivery of sector-high NET yields" and referred to the developer having "seven fully operational UK student properties – these have all provided 8-10% NET yields on schedule to our investors" (and thereby made the Modified Track Record Representation).

255. On 16 March 2016, Sophie Magee of Cushman & Wakefield contacted Mr Kewley with details of what was then Forster Hall. He forwarded the email to Mr Spence, who worked out the profit which could be made from selling units at £50,000 per room. On 23 March 2016, Ms Magee sent details of the existing operating costs of the building. These showed total annual income of £1,311,677 and spreadsheet showing expenditure of £777,330 including a £90,506 management fee. This produced a net income of £630,097. However, Mr Kewley and Mr Spence would require £2m net returns in the first two years, then £2.25m for years 3 and 4, and then £2.5m for five years. This was an unbridgeable gap, and the ritual references to "improving" rents and "efficiencies" could not disguise this fact.

256. However, Mr Kewley paid no regard to this information. On 20 April 2016, Mr Kewley sent Mr Crump proposed financials, copied to Mr Spence. Even assuming the proposed rents were achievable, and with 100% occupancy, and 3% year-on-year rent increases, and 18% expenses, this was a loss-making proposition on a "room-by-room" basis. The

18% was utterly inconsistent with the historical data Mr Kewley and Mr Spence had. Further, the plan was to use Mezzino to manage the property. As noted above, Mezzino's expenses *target* for other properties was 25%, and the actual performance was nearer 45%.

257. Mr and Mrs Whitton purchased their unit at Scholar's Village on 2 November 2016. As at that date, I am satisfied that Mr Kewley and Mr Spence knew that there was no realistic prospect of Scholars Village paying its way:

i) This was an operational purpose built student accommodation site running at a net income of £630,097. Mr Kewley and Mr Spence would require £2m net returns in the first two years, then £2.25m for years 3 and 4, and then £2.5m for five years. This was an unbridgeable gap, and the ritual references to "improving" rents and "efficiencies" cannot disguise this fact.

ii) Even assuming the proposed rents were achievable, and with 100% occupancy, and 3% year-on-year rent increases, and 18% expenses, this was a loss-making proposition on a "room-by-room" basis.

iii) The suggestion that Mr Kewley and Mr Spence thought that operating costs would fall dramatically under Mezzino is wholly incredible. Mezzino were achieving 43% on other properties, and the target Mezzino was aiming to get to was 25%.

iv) As at November 2016, Mr Kewley and Mr Spence knew that Hylton Road was not generating sufficient net returns to meet promised returns for the academic years starting in September 2013, September 2014, September 2015, and September 2016; nor was Norfolk Street for the academic years starting in September 2014, September 2015 and September 2016; nor Park Lane House in the academic years starting in September 2015 and September 2016; nor the Foundry, Scholar's Court, and the Wesleyan Chapel in the academic year starting in September 2016.

v) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. As at 29 February 2016, it had net current assets of barely £163,000 without accounting for investor returns and, as Ms Griffin's report demonstrates, it was operating at a significant loss.

vi) Nothing had occurred to lead Mr Kewley and Mr Spence to change their June 2014 plan to "dump the rent guarantees" when it suited them.

258. Mr Kewley and Mr Spence also knew:

i) the Modified Track Record Representation was false.

ii) The Asset-Backed Representation was false (and far from being ever-growing, the freehold sale programme meant it was destined to fall). In due course, the freehold for the Scholars Village was sold to Premier Ground Rents Ltd on 29 June 2018 for £500,000.

Q Studios

259. In 2015, a Mysing joint venture company, Alpha Developments (Stoke1) Limited, had acquired Q Studios in North Street, Stoke-on-Trent, the site being transferred to Alpha Developments (Stoke) Limited in December 2016 after the Mysing joint venture was terminated and the outstanding debt to Mysing repaid 2016 (see [299] above). Alpha Developments (Stoke) Limited was incorporated by Mr Kewley and Mr Spence on 1 December 2016.

260. This was a site with planning permission for 300 studios.

261. I have been shown the EPL Brochure for Q Studios provided to AA Azure, one of the Lead Claimants, on 29 November 2016. I am sure that the contents of this brochure were, in the usual way, known to and authorised by Mr Kewley and Mr Spence (there being by now a very well-established strategy for marketing these properties which were largely "all of a piece"). This brochure:

    i) contained the statements which amount to the Substance Representation;

    ii) contained the Modified Track Record Representation; and

    iii) stated that all contracts were "tied directly to our partner developer".

262. On 10 August 2015, prior to purchase, Mr Kewley informed Mr Crump that £139 a week for 51 weeks was more than achievable, suggesting this was supported by CRM and Mezzino. There is no documentary evidence of Mezzino's view. As to CRM:

    i) This was a reference to a September 2014 draft three-page budget prepared for someone called Eamonn Coleman based on architects' plans from Khoury Architects. The document appears to have been an appendix to a report, although the report is not available.

    ii) The basis for the £139 figure is not explained. The report assumed a void rate of 2% and projected net profit per bed of £5,696 after deducting VAT, on the basis that the site would go live in 2015.

    iii) Mr Crump asked for figures from Mezzino and CRM "today" and in 2017, but nothing was received.

    iv) A later email from Mr Kewley to Mysing dated 9 June 2016 suggests CRM was envisaging gross income on the building of £1.65m. How this reconciled with the gross income figure of over £2.11m in the three-page 2014 budget is not clear.

    v) Also on 9 June 2016, Sophie Magee of Cushman & Wakefield sent Mr Kewley a very negative appraisal of Q Studios, She referred to falling student numbers in the area, the fact that many students were local and did not require accommodation and the fact that students seeking accommodation in Stoke tended to have lower disposal incomes. Ms Magee used a £135 per week which she said was a *2016* rent, noting 300 units would be a lot for the market to absorb, and she also used 5%

voids and 26% for expenses. She also attributed a negative land value to site although I accept Mr Kewley's evidence that this may well have reflected the higher build cost Ms Magee was assuming. Ms Magee stated, "I've been fairly optimistic in terms of rent, void and yield and there are a number of potential inputs missing from the appraisal such as abnormals." The "fairly optimistic" assumptions were the rent of £135 per week and the 5% voids.

263. However, on 6 February 2017, Mr Kewley sent Mr Crump the three-page September 2014 budget. Although the budget assumed the building would become operational in 2015, Mr Kewley arrived at a rent of £160 per week rent in September 2016 by using four years' compound growth at 3.5% from September 2014. Had three years been applied, the rent would have been £155. Had Ms Magee's "fairly optimistic" £135 2016 figure been used, it would have been £145 per week. Mr Kewley assumed 100% occupancy (not the 98% in the CRM budget and the 95% assumed by Ms Magee). He also assumed 15% operation expenses (i.e. below the 19% expenses in the CRM September 2014 budget and the 26% in Ms Magee's figures).

264. AA Azure contracted to purchase a unit in Q Studios on 20 June 2017. At that date I am satisfied that Mr Kewley and Mr Spence knew that the Substance Representation was false:

i) Both experts agreed thar Q Studios could not generate sufficient net income to meet the promised returns.

ii) The figures of £160 per week and 100% occupancy assumed by Mr Kewley were significantly above figures Mr Kewley had been told were optimistic. The 15% expenses assumption used by Mr Kewley had no basis, and was completely inconsistent with the much higher levels of expenses the A1 Alpha student sites had experienced or the figures in the CRM budget and Ms Magee's appraisal.

iii) As at June 2017, Mr Kewley and Mr Spence knew that Hylton Road was not generating sufficient net income to meet promised returns for the academic years starting in September 2013, September 2014, September 2015; and September 2016; nor was Norfolk Street for the academic years starting September 2014, September 2015 and September 2016; nor Park Lane House in the academic years starting in September 2015 and September 2016; nor the Foundry, Scholar's Court and the Wesleyan Chapel in the academic year starting in September 2016. It would have been apparent by June 2017 that the following academic year would see no dramatic improvement.

iv) The financially precarious state of A1 Alpha, and indeed the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. As at 27 February 2017, it had net current assets of barely £482,000 without accounting for investor returns, which far exceeded this figure and, as Ms Griffin noted, the reality was that it was heavily loss-making.

v) I am unable to accept Mr Kewley's evidence that he had carried out further market research and ascertained reasons why there would be higher demand. Had this happened, I am sure Mr Kewley would have mentioned this to Mr Crump, rather

than relying on a budget produced by someone else on an unknown basis in September 2014.

vi) The planned sale of the freehold would bring the requirement to pay ground rent.

vii) Nothing had occurred to lead Mr Kewley and Mr Spence to change their June 2014 plan to "dump the rent guarantees" when it suited them.

265. The Modified Track Record Representation was also untrue, as Mr Kewley and Mr Spence would have known. None of the other student developments had generated operating profits sufficient to meet the promised net returns.

266. On 15 March 2019, the freehold of Q Studios was sold to Premier Ground Rents No 6 Ltd for £2,802,500.

The fall-out with Mezzino

267. At some point in 2016, Mr Spence and Mr Kewley decided to move Mezzino out of its role as the managing agent of a number of the projects:

i) The Foundry sites in Loughborough;

ii) Jubilee Court Preston;

iii) Scholars Court Bradford;

iv) The Box Preston;

v) Scholars Village Bradford;

vi) Mandale Terrace Stockton on Tees; and

vii) Tudor Studios, Leicester.

268. On 17 December 2016, Mr Kewley wrote to Mr Spence complaining about the costs of the Mezzino-managed sites, and the "£25,000 [monthly] management fee, saying, "can't wait to kick them out next year!!!" Mr Spence responded with his signature "Blimey yeah the sooner the better ..!!" That management fee of £300,000 per year does not appear to have been reflected in the assumed returns of any of the Mezzino managed properties.

269. In February 2017, Mr Spence moved to the U.S., where he has remained throughout the duration of this litigation. Beginning in March 2017, Mr Kewley and Mr Spence began withdrawing significant amounts from various development companies via Alpha Holdings (GB) Ltd, a total of £7.6m by May 2019. Dividends paid out in November 2017 from Alpha Developments (Preston) Ltd had been paid unlawfully, because of the cost incurred in buying out Mysing. When this problem was bought to Mr Kewley's attention by Mr Graham Barnes, who produced accounts for the Alpha Group companies, Mr Kewley told him to put the amount through as a loan instead (which it was not – it was money withdrawn by Mysing to reflect the cost of transferring its share to the Alpha

Group). This adjustment turned a large loss into a £209,119 paper profit. Mr Kewley responded: "yeah that looks better."

270. In 2017, the Alpha Group recruited Mr Peter Sullivan, with a view to him heading an Alpha Group management agency which would take over the management function (and associated revenue stream). This was done as part of an attempt to distance Mr Kewley and Mr Spence from the impending disaster, and put Mr Sullivan in the firing line. On 2 February 2017, Mr Kewley sent a message to Mr Spence saying "I was thinking on the way back today – do you think we should make Pete a formal director of Alpha Student Management? Not a shareholder but just a director …. If we make him a director then he's directly on the hook for compliance issues etc." Mr Simon Roopchand, a childhood friend of Mr Kewley's, was also recruited in early 2017.

271. Mr Kewley and Mr Spence also incorporated their own management company, Alpha Student Management Ltd (**"ASM"**). On 10 February 2017, they sought legal advice from Mr Fletcher of PG Legal as to how they could terminate Mezzino's involvement and take over the management of the sites currently managed by Mezzino. They were advised that the termination plan was "not watertight, appears to be possible only by mutual consent and not by unilateral notice". Mr Spence suggested moving assets to leave Mezzino with contracts with A1 Alpha which:

> "has no assets to speak of and is of no use to us as a trading company after this year so they would potentially be chasing a dispute with an empty company if they took issue with it, would we have any issue down the lime with that ..? … We could put the company into administration or liquidation next year to block any legal challenge if it cam [sic] to it".

272. A1 Alpha, it will be recalled, was the company with the "substantial asset base" which featured so prominently in the marketing material. The statement that A1 Alpha "is of no use as a trading company after this year" and could be liquidated is fundamentally inconsistent with any intention on Mr Kewley and Mr Spence's part that A1 Alpha should honour the numerous 10-year guaranteed return commitments it had made.

273. On 12 March 2017, Mr Sullivan emailed Mr Roopchand to discuss the plan to get rid of Mezzino, suggesting Mezzino should be allowed "to fill F2 [Foundry 2] to reduce the risk on rental income, limit the contract period as we said and also get as many ideas we can out of him while I do the breach work". Mr Roopchand responded, "although Mezzino are not rolling over they are falling in line and they now understand that every decision they make needs to be completely justified …. This actually has a negative effect on our strategy of terminating Mezzino as they could potentially correct a number of breaches to contract they have now". Mr Roopchand had started keeping a record of alleged breaches, explaining:

> "The plan is to ask them (via email) once follow up in a months time with a reminder and then send an official letter in September to state the breaches and to rectify within 14 days as per contract (if we believe it is the right way forward) …."

274. On 5 April 2017, Mr Sullivan emailed Mr Roopchand with a cost comparison on the Foundry 1, showing that at 90% occupancy there were major losses, using both

Mezzino's own cost figures and comparator figures obtained from the Student Loan Company.

275. On 6-8 April 2017, an investor payment was missed on Scholar's Court. When an investor contacted Mezzino, who were managing the property, he was told that yields were dropping, the site was not popular and Bradford University were reducing the number of courses. This was passed on to Mr Kewley, who replied that the client "will receive guaranteed rent from us for next 10 years regardless of rents or occupancy – so doesn't have any of these worries", a reassurance which he must have known was wholly false.

276. On 16 April 2017, Mr Roopchand and Mr Kewley had an exchange about reducing maintenance and management costs for the Foundry, noting that if there was no management fee and an accommodation manager and administrator, expenses would be below 15%. Mr Kewley replied "get all schemes costing us just 15% and our business model might just work!!", no doubt a humorous comment, but one which reflected a long acknowledged truth that the business model was unsustainable. Mr Spence chipped in, "Hmm that would seem to be the case wouldn't it". Mr Roopchand did a calculation suggesting that if the Alpha Group cut out the agent, shared an accommodation manager for the two Foundry sites, *and* reduced utilities and maintenance by 20%, then it would be possible to achieve 20% direct running costs. That of itself shows how wholly unrealistic the 15-18% figures regularly used were. The exercise also assumed that it would be possible to terminate Mezzino's contract. It also assumed that the Alpha Group management entity which would take over administration and management would do the exercise for free – something which was not going to happen. A spreadsheet prepared by Mr Roopchand in February 2018 showed ASM intending to charge significant management fees. In the same email, Mr Roopchand referred to an exercise he was doing "to calculate what we need to do for the coming years until the 10 guarantees expire". In closing, the Alpha Defendants suggested that this evidenced that Mr Roopchand, Mr Kewley and Mr Spence "fully intended to honour the entirety of the 10-year underleases". That was clearly not Mr Kewley and Mr Spence's intention – see for example [271]-[272] above – but in any event it is clear that the work being done by Mr Roopchand in advance of the 5 May meeting was with a view to working out what level of (reduced) guaranteed return could properly be offered, not to work out how to honour the promises already made: see [278] below.

277. On 20 April 2017, Mr Kewley and Mr Spence had an exchange about another company, Pinnacle, which was said to be running into difficulties. Mr Kewley described Pinnacle as using sales money to keep the student rent guarantee going – something which Mr Kewley and Mr Spence had been doing from the outset. Mr Spence replied, "more than likely, yep … naughty bad boys ….!" This last comment clearly reflected Mr Spence's acknowledgement that this was what he and Mr Kewley were also doing, and that it was improper.

278. Mr Roopchand was also working on a 10-year financial model. He sent Mr Kewley his first effort on 14 May 2017, with a view to calculating the extent to which the various projects were losing money for the purposes of approaching investors to reduce their guaranteed returns:

> "Hopefully following this full exercise you and Nick can decide what we say to the investors (in terms of % reduction if required within the ten year contracts)".

Mr Kewley added in the figures he had been asked for, together with the ground rent payments required following the sale of freeholds. However, true to his own approach to the business from the outset, he continued:

> "However don't waste too much time on spreadsheets as its all fairly meaningless numbers with too many variables … Either at the end of the underlease or before if we decide we will just offer the investors 100 per cent rental income less service charge and ground rent".

That last sentence reflected Mr Kewley's awareness that the sites could never be run in a way which would generate sufficient profit to meet the investor returns, and that ultimately the net return promises would be "dumped".

279. Mr Roopchand replied saying "I think we do have to seriously go for it with an October to January take over of Mezzino buildings".

280. On 10 September 2017, Mr Spence told Mr Kewley "that feeling I had a few months back about this all coming to a grinding halt soon is playing up again." He debated whether it might be cheaper to seek a consensual exit with Mezzino, noting "Simon would also like to get them fully out of the picture well before we write to the investors". Mr Kewley claimed (I am satisfied untruthfully) that he could not remember what they were planning to write to the investors about, but it is obvious it was to be a letter announcing that returns would no longer be paid in the guaranteed amounts.

281. On 2 January 2018, A1 Alpha terminated all management agreements with Mezzino based on various alleged breaches.

282. A court case was commenced by the Alpha Group in which a large number of breaches were alleged, but not the allegations of fraud which Mr Kewley suggested in the course of his evidence lay behind the decision to terminate. On 17 September 2017, Mr Kewley and Mr Spence discussed what they described as "THE Letter" to go to investors announcing the cessation of the guaranteed payments, in which they would refer to their litigation against Mezzino relating to "several million pounds in unlawful and excessive charges" and a further £500,000 on which Mezzino were sitting.

283. The litigation was settled in October 2018 on the basis that £500,000 rent received by Mezzino from students and since paid into court would be split 50:50.

Return to Westbeach

284. At this point, it is necessary to break away once again from a chronological account to consider the marketing of Phases 3 to 6 of the Westbeach development.

285. In February 2014, Mr Kewley approved a brochure for Phase 3 of Westbeach – as Mr Kewley accepted, another example of how EPL and Mr Kewley and Mr Spence worked: "this is generally the way we used to do the brochures, and he's sent one over, we'd say,

yes, it looks good or no there's this problem with it". I remain satisfied that Mr Kewley was acting as a de facto director of Green Parks (Holdings) Limited and Green Parks Holidays Limited at this time.

286. As well as the various statements about the promised returns which engaged the Substantiality Representation, the brochure referred to "Guaranteed Buyback Year 5" on the front page with references on other pages to "Guaranteed … Exit", "Guaranteed Buy-Back End of Year 5" and to "Profit from Buy-Back". The text made the Buy-Back Representation, stating:

> "In year 5 the developer will purchase the apartments back from each Investor. This is a contractual obligation on the developer's part and the Investor must sell the apartment back. It is, therefore, a fixed 5 year investment term."

That was, once again, a thoroughly misleading explanation of a contractual arrangement which gave the developer the right to buy the unit, but no obligation to do so. Mr Kewley must have known it was untrue. His evidence when asked about this was to the following effect:

> "I mean these brochures they're always sort of very high level you know? Lots of bullet points, lots of pretty pictures. We never for one moment thought that a buyer would read a brochure and sign a legal document without any subsequent legal representation. They were literally just a gateway to get potential buyers potentially interested in the site and they would go into the legal procedure and say – say ambiguities in the brochure would be highlighted to them by the solicitors, by the contract reports, the leases, the underleases etc."

287. I am satisfied that Mr Kewley (and Mr Spence) were clearly willing to market the scheme in terms which they knew to be untrue, to draw people in, and did not care whether investors ascertained the true position before contracting.

288. On 6 January 2016, Green Parks (Holdings) Limited sold a 250-year development lease on the site of Phases 1 and 2 of Westbeach to Tuscola FC101 (BVI) (as an alternative to selling the freehold, albeit the effect was to hollow out the value of the retained freehold). That proposal must have been in contemplation for some period. On 4 April 2016, Green Parks (Holdings) Limited sold a 999-year lease on the remainder of the site to Landinvest Ltd (BVI), taking a 12 year lease back to complete the development and further sales.

289. Even after this sale, these properties continued to be marketed on the basis that the investment was "asset-backed" or similar language. When Mr Kewley was asked about this in cross-examination, he made the point that the freehold was not owned by the underlessee anyway. That is correct, but merely reflected the fact that the investments could not fairly be described as "asset-backed" even *before* the granting of the development lease. As that evidence demonstrated, Mr Kewley was throughout alive to the legal significance of the asset being held in a different company to the company which undertook to pay the promised returns, and I am satisfied that he would have appreciated this at the time he authorised the marketing materials containing the asset-backed representations to be put into circulation.

290. It was precisely for this reason that Mr Spence and Mr Kewley did not tell Mr Crump of EPL about the development leases. On 5 January 2016, Mr Kewley informed Mr Spence that if the 250-year development lease transaction completed on 7 January, "its going to be interesting taking calls from Phil or Richard about freehold sales while we are sat opposite Andrew!!!" Mr Spence replied, "it certainly will." It was also clear from Mr Spence's reply that he was planning an effective sale of the freehold of the rest of the Westbeach site, in addition to the 250-year lease which was about to complete.

291. A further version of the Phase 3 brochure was provided to Mr Cayley of Wolfe on or before 19 February 2016. Once again I am satisfied its contents were known to and approved by Mr Kewley and Mr Spence. This promised returns of 10% for five years and 12% for five years:

i) Once again I am satisfied that there was no basis for these figures, for the reasons given in [85]-[86]; [104]-[105] above. Further, by February 2016, there had been a prolonged period of operations at Westbeach in which it had failed to generate sufficient net returns to meet less demanding investment returns. Mr Kewley was unable to offer any coherent support for the suggestion that he and Mr Spence believed these figures were realistic or achievable. As a result the Substance Representation was untrue and was known to be untrue.

ii) The financially precarious state of Green Parks Holidays Limited, and the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. Green Parks Holidays Limited had a substantial negative net current assets figure in its year-end accounts for each year from 31 October 2013 to 31 October 2015.

iii) The brochure stated, "contract underwritten by asset rich developer" and referred to "yields from properties purchased off-plan are underpinned by the developer's large asset base". These statements clearly represented that there were contractual rights against an asset-rich entity (the words "contract underwritten" can be interpreted in no other way). I am satisfied that this is precisely the impression which Mr Kewley and Mr Spence wanted to give. This was a consistent theme of the marketing effort, and Mr Kewley's and Mr Spence's handling of the freehold issue (see, for example, [146]-[154] above) shows their sensitivity to and willingness to exploit this issue. I am unable to accept that these words were in the brochure by accident or as an unintended legacy from earlier versions. The evidence clearly establishes Mr Kewley's and Mr Spence's willingness to continue using wording which they thought would help sell the properties even though it had ceased to be true, until a change was compelled when they were found out.

iv) This representation – essentially the Asset-Backed Representation - was untrue. The Westbeach underlessee had no assets (and was not the developer). Mr Kewley's suggestion that the assets in question were the underleases was an obvious falsehood – these were the very contracts under which the liabilities were owed, and contracts cannot be underwritten or "asset-backed" by themselves. Unlike Westbeach Phases 1 and 2, there was no cross-company guarantee from the developer (although Green Parks Holdings Limited was itself hollowing out its

assets through the development leases being granted in January and April 2016). When I asked how it could be said that "contracts are underwritten by the developer's large asset base" when there was no contractual right on the investor's part to claim against the developer's assets (whatever they might be), Mr Kewley replied, "it couldn't. It wasn't meant to do that."

v) The brochure stated, "the developer has 15 years experience and a strong track record of delivering high quality developments to clients". I am not persuaded that statement objectively refers to the commercial performance of the properties (so it did not, therefore, constitute the Modified Track Record Representation), as opposed to the quality of the building, and in that later sense. I am not persuaded it was untrue or believed by Mr Kewley and Mr Spence to be untrue.

292. The Westbeach property continued to subsist on a "hand to mouth" basis. In June 2018, Mr Spence and Mr Crump had an exchange in which Mr Spence complained about the poor sales of Westbeach units, with £2-3m of sales left to be achieved if construction was not to stop. Mr Spence referred to a slow-down in ordering supplies as a result of the cash squeeze, with knock-on delays on completion.

293. On 20 July 2018, Mr Kewley informed Mr Spence that he had been through the cashflow for Westbeach, that they would be "a little short of cash" until Westbeach Phase 3 was finished, and further sale contracts reached the point of exchange. Mr Kewley stated:

> "It looks like we can now get all the remaining units signed off by simply moving the temporary electric and water supply to each successive block of 16 finished units and therefore we don't need to pay the outstanding amounts for Water/Electric connection for the time being."

294. This reflected a tactic which Mr Spence and Mr Kewley operated on the Westbeach project, of procuring a certificate of completion for units (and triggering a right to payment) even though the units remained without power and water, and were unlettable. It was utterly disgraceful.

295. The marketing of Phases 3 and 4 appears to have been principally conducted in 2016, that for Phase 5 in 2016 and 2017, and for Block 8 in 2018:

i) An undated Phase 3 brochure contains the Buy-Back Representation, statements amounting to the Substance Representation, the Asset-Backed Representation.

ii) A Phase 3 brochure provided to Mr Cayley contained the statements amounting to the Substance Representation; "proven income generation" on Phase 1 where there were "high tenancy levels" which "resulted in gross annual rental income" of £20,000-24,000 per apartment and which had even exceeded the 11.9% net yield projection; the contracts being "underwritten by an asset-rich developer" and the "developer's large asset base" with "no third party shell companies"; referred to the developer having the freehold of the development; that the 13 student properties in which the developer had worked had all delivered "high fixed yields on schedule" and been 100% occupied from day 1, delivering all returns on schedule as promised. The returns promised in this brochure were 10% for years 1 to 5 and

12% for years 6-10, which Mr Kewley suggested had resulted from the fact that with enhanced facilities, it would be possible to extend the duration of stays and raise the price. The brochure therefore made the Modified Track Record and Asset-Backed Representations.

iii) An undated Phases 3 and 4 brochure contains statements amounting to the Substance Representation, a reference to "proven income generation" on Phases 1 and 2, and to the contract "being underwritten by an established company" and by "an asset rich developer"; that "the first two phases … have been fully operation since 2013 and 2015 respectively, again producing double-digit NET yields" (and hence the Modified Track-Record and Asset-Backed Representations). It also referred to the Foundry (Phase 1), Westbeach (Phases 1 and 2), Park Lane House, Norfolk Street, the Chapel and College Street Village, being 100% occupied since opening.

iv) An undated brochure for Phase 5 also contained the statements communicating the Substance Representation, a statement that there was "proven income generation" from Phases I and II; that the contract was "underwritten by established company"; that "the developer … as the freeholder of the development is heavily incentivised to ensure high occupancy levels"; that the fixed income contracts were "tied directly to the developer" (and also "all contracts tied directly to the developer. There are no third party shell companies"). Reference was made to 16 fully operational properties which "have all provided 8-10% NET yields on schedule to our buyers", as had Phases 1 and 2 of Westbeach, and various properties (The Box, College Street, Norfolk Street, Durham House). Once again, the brochure contained the Asset-Backed and Modified Track Record Representations.

v) An undated brochure for the Westbeach Final Phase contains statements amounting to the Substance Representation, referred to "proven income" from Phases I and II, to "contracts underwritten by established company", described the developer as "the freeholder of the development" being heavily incentivised to ensure high occupancy levels, and "all contracts tied directly to the developer" with "no third party shall companies" Once again, the brochure contained the Asset-Backed and Modified Track Record Representations.

296. I am satisfied that Mr Kewley and Mr Spence approved the making of all of those representations, either specifically or because they authorised EPL to make marketing statements in those terms, and were fully aware that EPL was doing so.

297. As to these representations:

i) The Substance Representations were all untrue and known by Mr Kewley and Mr Spence to be untrue. The net rental income on the units sold in Phases 1 and 2 of Westbeach had not come near to covering the net returns promised, with payments being made from monies paid by Green Parks (Holdings) Ltd, to which there was no legal claim.

ii) Mr Kewley and Mr Spence knew that the returns originally promised could not be met without ongoing sales which themselves would require further net return

promises which could not be met save from further sales, and so on.

iii) The financially precarious state of Green Parks Holidays Limited, and the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised. Green Parks Holidays Limited had a substantial negative net current assets figure in its year-end accounts for each year from 31 October 2013 to 31 October 2017.

iv) The Buy-Back Representation was untrue and Mr Kewley and Mr Spence knew it was untrue, but were happy to use it to lure investors in.

v) The Asset-Backed Representation was untrue and, after 4 January 2016, must have been known by Mr Kewley and Mr Spence to be untrue (Green Parks Holdings Ltd having alienated the value in the freehold). The statement about the developer owning the freehold was intended to convey that it held an asset of value, and was expected to continue to do so. By January 2016, this was known by Mr Kewley and Mr Spencer to be untrue. The suggestions that the returns were underwritten by an Asset Rich Developer was untrue, and must have been known by Mr Kewley and Mr Spence, to be untrue because the developer (Green Parks (Holdings) Limited) was not on the hook for the returns promised by Green Parks Holidays Limited, and Green Parks (Holdings) Limited was not asset-rich in any event.

vi) For the same reason, the statements about the contracts being tied directly to the developer were also untrue, and known to be untrue. This was part of a repeated effort on Mr Kewley and Mr Spence's part to use marketing material they had approved to suggest that investors could look to the developer as well as the underlessee for payment of the promised returns, even when they knew that was not true (as was the case with the Mysing and holiday sites). Mr Kewley accepted that Green Parks Holidays Limited had no assets except the underleases (which were really a liability because the promised returns substantially exceeded any realistic yield from the underleases) and that the brochures were "just wrong" in this respect.

vii) The repeated statements about proven income generation in Phases 1 and 2, a particular form of the Modified Track Record Representation, which were clearly intended by Mr Spence and Mr Kewley to suggest that the properties generated sufficient net rent to cover the promises returns, were untrue and must have been known to be untrue. Mr Robinson's evidence, which I accept, was the net returns would not have come close to covering the promised returns. Mr Kewley and Mr Spence have not produced the actual figures. Westbeach Phases 1 and 2 had needed substantial cash subsidies from the outset to meet the promised returns.

viii) The repeated references to other properties developed by the developer delivering "high fixed yields on schedule" was clearly intended to suggest that the net income derived from operating those properties had been sufficient to service the net returns and was, therefore, the Modified Track Record Representation. This representation was untrue and must have been known to be untrue by Mr Spence and Mr Kewley: none of those other developments had generated sufficient net

> income to pay the promised returns. Mr Kewley accepted that by 2016, every single property was failing to cover the promised returns from its earnings, stating "we were aware that the rents weren't where we thought they were going to be when we launched individual schemes and we knew later on that we had higher voids that what we were initially led to believe."

Ilfracombe

298. Mr Spence first appears to have become interested in acquiring a 9-acre holiday park in Ilfracombe in 2008. The park comprised 275 units (a combination of studios, apartments and chalets), and a central facilities building with a function room, two swimming pools, shops, a bar etc. The site, owned by a Mr John Fowler, was in poor condition. Some valuations or reports were obtained, but they are too distant in time from the Alpha Group's acquisition of the site for those materials to be of any relevance.

299. By 2015, Ilfracombe had been identified as a potential Mysing joint venture project, and contracts had been exchanged on the site.

300. The Alpha Group retained Mr Dean of PG Legal as its solicitor for the proposed transaction. He produced a report on title of 15 July 2015 for a transaction which it was envisaged would be a 50:50 joint venture with Mysing. Mr Dean stated the reality was that this was a loss-making business and that it was only "the developer's experience and knowledge that makes it worthwhile". Mr Kewley and Mr Spence found this statement amusing, but did not suggest that it was untrue. The Alpha Defendants added documents from their disclosure to the trial bundles after the end of the trial which are said to show the site was profitable on an EBITDA basis for Mr Fowler in 2012, 2013 and 2014. These were not explored in the evidence. The extent to which there was net positive cash flow after interest and tax is unclear, nor how far the profits deprived from the central facilities functions (in particular the bar and the function rooms), rather than hiring out the units.

301. Mr Spence originally approached Mr Stickland of PSL for a report on Ilfracombe in May 2015, and he was sent a fee proposal on 15 May 2015. Mr Spence cavilled at the quoted fee, and the matter was not progressed at that time. Instead, Mr Spence used the spreadsheet template prepared by PSL for Westbeach in 2008 to produce his own Ilfracombe spreadsheet which he then sent to Mysing, whom he was hoping to involve in the Ilfracombe project at the stage. There was no evidence before the court as to the use of Mr Spence's spreadsheet or how he arrived at the inputs.

302. On 30 July 2015, Mr Kewley asked Mr Crump to begin marketing the units, on the basis of a guaranteed 8% net return for 10 years. Mr Crump did not think this would be a particularly appealing prospect, and he also said he needed "detailed historical performance records (ideally accounts, occupancy rates, room rates etc), unit schedule, contracts" and "those independent rental valuations (good or bad news) will help us a lot to pitch it right or if they are good news we can use them as validation." Mr Kewley immediately revised the terms to 8% for five years and 10% for five years, with a developer buy-back option at 110% of the purchase price after five years. He attached a 2008 *gross* rental valuation, and promised the 2016 tariffs would be provided. Mr Crump

pushed again on 7 August 2015 for the historical rental figures, stating that "because it's operating, many clients will consider it normal to have details of past rental achievements" and "probably full accounts (released only in certain circumstances). To not have these would be a problem for some clients." Mr Spence replied stating, "the problem has always been with John Fowler Holidays that they only produce group accounts but we have engaged Planning Solutions Ltd to prepare a detailed report showing an analysis of the park's current trading performance and an assessment of what can be achieved with our proposed improvements. We should have this in a couple of weeks so will be available for anyone that asks to see it. Planning Solutions Ltd are a specialist leisure consultant and have a very good standing in the industry."

303. I do not accept that past rental information was not available to Mr Spence – Mr Fowler's company must have kept such records. On 3 August 2015, Mr Spence contacted PSL again, sending Mr Stickland the model Mr Spence had produced which he described as reflecting an assumed tariff and an expansion programme to replace all of the single storey chalets on the upper site, with the lower site over the road being either developed as a residential site or sold off. Mr Spence said the intention was only to trade the new-ish 3 storey units, of which there were 124, to build a further 150 new units, and to refurbish 25 units within the existing core area. He explained, "the existing new-ish 3 story [sic] units are the 'Gold' standard units and these are the only units we intend to trade when we take over in March. We then hope to raise investment to build out a further 150 units on the footprint of the old chalets and fully refurbish 25 units within the central core area and give this building an external face lift. The report needs to assess the current trading 124 units and then give an indication as to what income would be achievable with the proposed upgrades and expansion to the park up to 300 units."

304. Mr Spence, who clearly felt under pressure to move sales quickly, contacted Mr Crump on 5 August 2015 setting a sales target of 20 sales a month. Mr Crump responded, stating that 4-8 units a month was more realistic, and pointing to the fact that the 2008 documents had Mr Spence's name on them "so people will want to know that story too". By 10 August 2015, marketing material had already been prepared.

305. On 23 August 2015, Mr Stickland agreed to undertake the work referred to in Mr Spence's 3 August email for £4,500, stating PSL's report would "give weight to the selling operation and a foundation for the site business plan."

306. On 14 September 2015, Mr Spence chased Mr Stickland for the report, saying he wanted to release Ilfracombe to market on 17 September, and he wanted to finalise the brochure by then. Mr Stickland replied, stating that the report should be ready in time, and noting that on the 2015 tariff, the current projected income per unit was £8,500 for a standard unit, £9,000 for a mid-range and £14,500 for a three-bedroom top grade unit based on 70% occupancy and 12% average discounts. It was noted that the newly refurbished units would command higher tariffs and "slightly higher" occupancy. It was said that the three-bed room apartments, once refurbished, could command £16,250 net per year, or £18,000 if the site opened over Christmas as well. Mr Spence replied, asking if these were net figures), stating that Mr Spence needed to be able to demonstrate that rentals of £8,800 were achievable now, and would be surpassed with refurbishment. Mr Stickland replied stating that the figures were net of VAT, and that the mid-range units should

achieve 8% yield "and refurbished units probably achieve this at 6% occupancy". It is not clear whether this was intended to refer to 60% occupancy – that figure does not appear in the draft report when it emerged.

307. On 21 September 2015, the full report was still being assembled by PSL, but Mr Stickland sent Mr Spence a set of spreadsheets. Mr Stickland indicated that he had assumed a higher tariff and marginally higher occupancy for refurbished units, producing £17,000 of income net of VAT, and a yield of below 8% after expenses "unless you add back the VAT".

308. There was clearly some pushback from Mr Spence on these figures, because on 23 September, Mr Stickland sent a further email saying he had now pulled out the low grade accommodation and substituted a refurbished unit, assuming that only refurbished units would be sold. With those adjustments, the return on investment would achieve 8% and gradually rise to 10%. He concluded, "I trust this will meet with our requirements and we will proceed to assemble the remainder of the report around these numbers so that you have a full package to provide to investors." It follows that Mr Stickland was only offering projections on a venture in which all units had been refurbished.

309. Mr Spence was still not happy, although he told Mr Kewley that the report was not a "total disaster", and that he had asked Mr Stickland to remove the VAT element in the calculation, adding it back at the end when "hopefully we can just ignore that bit." In fact, it is clear Mr Spence had asked Mr Stickland to include VAT within the figures. On 25 September 2015, Mr Stickland sent a further spreadsheet through "with VAT included". He noted the figures now looked robust for the 2 and 3-bedroom refurbished units, stating "I have shown the results on the 5-year spreadsheet inclusive of VAT as requested", and sought Mr Spence's approval to proceed with producing the rest of the report. Mr Spence's request to include VAT for calculations intended to show the profit-earning capacity of the site for investors was inappropriate, as he must have known.

310. Mr Spence forwarded the email to Mr Kewley, saying "phew". Mr Kewley replied "that looks really good – although not sure how achievable 85% occupancy is". Mr Spence said "yeah but let's not worry about that". The 85% was average occupancy when the site was open – rather than over the year including closed periods. However, even on that basis, Mr Crump thought it high, and these communications suggest that Mr Spence and Mr Kewley thought likewise.

311. The draft of that report (**"the 2015 PSL Report"**) was finally sent through on 2 October 2015 with an updated version of 5 October – but as with Westbeach, no final version – although it was dated September 2015. The suggestion that the 2015 PSL Report provided the reassurance for Mr Spence and Mr Kewley as to the viability of the proposed returns is undermined by the extent to which Mr Spence was pressurising Mr Crump to begin marketing units before it had been released, including the preparation of the brochure.

312. The 2015 PSL Report was the subject of detailed consideration at trial – rather more attention, I am sure, than it received from anyone at the time. The following points are to be noted:

i) The report only addresses refurbished two- and three-bedroom units on the assumption that "the holiday village environment and the landscape will be re-developed to an excellent standard alongside the fully furnished and equipped letting accommodation which will, on completion, consist of a mix of 150, two bedroom and three bedroom units."

ii) The report assumed that all operating costs (save for local authority rates) for the leisure and amenities and the entertainment venue, (swimming pool, retail and catering) would be met by operating revenues.

iii) The report does not use the actual operating costs for the park and the apartments, even though it was accepted that Mr Fowler had provided this data to Mr Spence and Mr Kewley. It would appear that the actual data for 2012 to 2015 was not shared with Mr Stickland.

iv) The occupancy rate assumed by Mr Stickland requires some explanation. The summer season ran from March to October, with the possibility of expanding that to include February half-term and the Christmas period. The figures presented assumed 72% occupancy in "high season", 85% when the park was open (whether "high" or "low" reason) and 50-55% on an annualised basis.

v) The five-year projection showed receipts inclusive of VAT, as Mr Spence had requested.

313. EPL prepared the Ilfracombe brochure which Mr Crump sent to Mr Kewley for approval on 21 October 2015, saying "please have a read through and check you are happy … in particular page 5 numbers and any other detail to be honest!" Once again, that reflected Mr Crump's practice of seeking approval from Mr Spence and Mr Kewley for significant messaging. It was duly approved. The brochure offered fixed income returns of 8% for five years and 10% for five years, with two-bed apartments at £110,000 and three-bed apartments at £125,000. I accept it is not clear if any of these sales opportunities were converted to reservation fees before the project went into a quietus at the end of 2015.

314. There were exchanges between Mr Crump, Mr Stickland and Mr Spence in October and November 2015 from which it was absolutely clear that the PSL 2015 Report could only be said to support the 10% returns if the VAT was treated as income to the owner, which obviously it could not. It was also clear that EPL was already offering Ilfracombe to investors and fielding queries from them. Another thing which emerges very clearly from those exchanges is Mr Stickland's insistence that his report is assuming the high grade refurbishment of the two- and three-bed units.

315. There appears to be no further contact with Mr Stickland until April 2016, when he as approached to manage the park. His response does not suggest that he regarded the outputs of the exercise he had been asked to conduct as particularly reliable. Mr Stickland said, in effect, "thanks, but no thanks", explaining:

> "The real issue for you is 2017 onwards is the difficulty with any single park operation. The marketing and sales of the site which can be extremely expensive on a one off basis and losing the 'John Fowler' brand may cause a significant

> downturn in bookings. It only takes 10 to 15% downturn in occupancy to practically wipe out the sites profit".

316. On 27 September 2016, Green Parks (Holdings) Ltd acquired the site for £8.24m, granting three 999-year leases on the same day to Tuscola (FC104) Ltd for the three planned phases of the development, and 250-year leases to Green Parks (Holdings) Ilfracombe Ltd. Funding for the acquisition was provided by Mysing, the sale of the long leases being used to provide part of the repayment of that funding. On 4 April 2016, Green Parks (Holdings) Ltd entered into a 999-year leasehold interest for the remainder of the site to Landinvest Ltd, another BVI company. The effect of these sales was that Green Parks (Holdings) Limited divested itself of its main valuable fixed asset.

317. On 29 September 2016, Mr Kewley told Mr Spence that Mr Dean of PS Legal, the Alpha Group's legal advisers, wanted to buy an Ilfracombe unit. This merited another "blimey" from Mr Spence, who continued, "ok if he's sure. We'll have to tell him how it is on the rental figures etc just so he's aware from the beginning". This reflected Mr Kewley and Mr Spence's knowledge that the actual rents on the property were far short of those necessary to provide investor returns – something which they were willing to draw to the attention of their close associate, but not the investors.

318. On 8 November 2016, Mr Kewley was contacted by a Mr Bowyer who had been instructed by Mr Gubbay to value ground rents at Ilfracombe. When forwarding the email on to arrange access, Mr Kewley told Mr Spence he had "cut the bit out below about ground rent valuation": this was consistent with their practice from the very beginning of concealing the steps taken to monetarise freeholds. Mr Spence responded, "it'll be interesting to see how he's going to value ground rents on that site .. I can't imagine it's going to come to much with the state of some of the units". This was a realistic appraisal of the condition of many of the units, albeit one which Mr Kewley and Mr Spence did not choose to share with potential investors or to condition the promised returns.

319. In February 2017, Mr Spence wrote to Mr Kewley informing him that he was going to suggest dropping the price to £99,000, and increasing the promised returns to 10% for five years and 12% for five years. This was done by way of text exchanges between Mr Spence and Mr Kewley. I do not accept that there was any discussion or analysis of these figures before the terms were re-set, still less any review of the 2015 PSL Report and accompanying spreadsheets.

320. There appears to have been a relaunch of Ilfracombe in this revised form in the first half of 2017. By the time PG Legal prepared a contract pack in June 2017, 25 reservation fees had already been paid. On 6 June 2017, Mr Crump asked whether the obligation to refurbish the units being sold should be included in the contract, to be told by Mr Spence (wholly dishonestly) that this was not necessary because the refurbishment only took 28 days and work would start as soon as the reservation fee was received.

321. On 27 June 2017, Mr Kewley and Mr Spence referred to the fact that one investor had expressed concern over whether the lease could be forfeited. Mr Kewley noted that an amount became payable from Mr Gubbay's company once a quantity surveyor had

certified that £945,000 of work had been done (the company then having 5 days to make a payment or forfeit its development lease). Mr Spence suggested fabricating documents to suggest that the relevant work had already been done, with a view to serving the five-day notice and triggering forfeiture. The plan was not put into effect, but it reveals the inherent dishonesty which was the default modus operandi or Mr Kewley and Mr Spence.

322. On 24 September 2017, a list of supplier payments for work at Ilfracombe was sent to Mr Sullivan. It is clear that there was a struggle to meet these costs even before investor payments began accruing, with £40,000 being transferred from the account of the Ilfracombe Holdings company, leaving it with £13,000 cash, and £1,000 in the underlessee which "should be enough to cover Fridays wage run". Mr Kewley transferred money in from ASM, which was part of the student business.

323. The Alpha Group produced their own Ilfracombe projections, prepared by Mr Simon Roopchand (who did not give evidence) and which he shared with Mr Kewley on 30 September 2017. Mr Roopchand described this document as a "guestimation on what we need to do with the investors." On the basis of 136 units, Mr Roopchand calculated significant trading loss on the 10% investor return model – an annual deficit of £524,000. The exercise is criticised by the Alpha Defendants in closing because it does not reflect 302 units. However, the PSL 2015 Report on which so much reliance was placed assumed only 150 refurbished units being operated, and many of the units at Ilfracombe were in very poor condition.

324. In November 2017, Mr Roopchand produced a further schedule showing Ilfracombe accrued losses for the calendar year to date of £776,369 *before* payment of investor returns, with occupancy consistently below 50%.

325. I have already referred to the centrality to the PSL 2015 Report of the high-end refurbishment which they assumed would be carried out. However, within the Alpha Group, there was no calculation of the cost or timing of the overhaul, where the money was to come from to pay for it, nor the impact on letting as a whole or the need to take a block of accommodation out of use at a time where refurbishment was required. Mr Kewley acknowledged the additional risks imposed by the refurbishing programme in his evidence, saying "we had no hard and fast time scales on refurbishment because we were juggling an active park with refurbishments on sales". The refurbishment programme represented a cost drain as well as impacting the operation of the park as a whole. There was no committed cash for this. Mr Kewley said that the plan was for the development company (Green Parks (Holdings) Ilfracombe Ltd) to make what he described as "soft loans" to the underlessee (Green Parks (Holidays) Ilfracombe Ltd) to meet the cost. This was a reference to the practice of making a loan which was never intended to be re-paid. "Soft loans" apart, which the underlessee had no legal right to, the underlessee had to meet the refurbishment cost from park operations, which posed an ever greater risk to its ability to meet the promised returns. In an insolvency scenario, the "soft loans" would become hard loans, and the prognosis would be even more dire. The reality is that Mr Spence and Mr Kewley must have known that the ability to fund the refurbishment and whether it would ever be completed were highly precarious.

326. On 4 December 2017, Mr Crump chased Mr Kewley for an update on the progress of the Ilfracombe refurbishment. Mr Sullivan sent Mr Kewley the current plan which showed that refurbishment of the first 124 units would stretch out to February 2019, with the caveat "this is dependent on the finances of course". Mr Kewley sent Mr Sullivan's plan to Mr Spence, where it merited another "blimey .. I thought he was gearing up to get them all done together while it's shut, that looks like they're being done two at a time with a small team .. Andrew'll freak out if he sees that .. have they started any yet?" They decided not to send the report onto Mr Crump. Mr Spence suggested trying to accelerate the work, if necessary transferring funds from the Westbeach account or from monies extracted from other companies by way of directors' loans which would then be lent to Ilfracombe for the refurbishments. Mr Kewley was not keen, replying:

> "I'd prefer to take funds out of Westward Ho personally to use up the directors loan and then just use an intercompany loan if more funds are needed, rather than us putting our own tax free income into it ..."

327. On 18 January 2018, Mr Sullivan was made a director of the two holiday park underlessee companies – Westbeach and Ilfracombe.

328. A number of the Lead Claimants were sent Ilfracombe brochures or links to them. AA Azure (a link on 1 May 2018), the Whittons (in May 2018), Mr Vyas (in June 2018) and Wolfe (in June 2017). I am satisfied that Mr Kewley and Mr Spence knew of and approved the contents of these brochures or their essential messaging (indeed, as I have recorded, they approved of the first Ilfracombe brochure in October 2015). As to these brochures:

    i) They all contained the statements which amount to the Substance Representation, providing "immediate income from day 1."

    ii) They referred to "fully operational serviced apartments" and "ongoing refurbishment".

    iii) They described Ilfracombe as a "proven and improving development".

    iv) The brochure provided to Wolfe stated that all reconditioning work would be completed by the end of June 2017, that provided to the Whittons, March 2018; that for Mr Vyas stating "majority of renovation work already complete".

    v) They stated that the site was developed by an award-winning developer who had "provided thousands of clients with effortless high NET yields" with "a proven track record." This amounted to the Modified Track Record Representation.

329. All of the brochures, therefore, contained the Substance and Modified Track Record Representations. As to the dates of purchase:

    i) AA Azure purchased Unit 112 on 31 July 2018.

    ii) Mr Vyas purchased Unit 52 on 28 June 2018.

iii) Wolfe purchased Unit 21T on 25 April 2018.

iv) The Whittons purchased Unit 51 on 26 June 2018.

330. Taking the position as at 25 April 2018, I am satisfied that both Mr Kewley and Mr Spence knew that the Substance Representation was untrue:

i) Both experts agreed that the Ilfracombe units could not generate sufficient income to cover the promised returns.

ii) To the extent that reliance was placed on the 2015 PSL Report, that was addressing a fundamentally different proposition of a park of 150 units refurbished to a high standard and with "the holiday village environment and the landscape … re-developed to an excellent standard alongside the fully furnished and equipped letting accommodation which will, on completion, consist of a mix of 150, two bedroom and three bedroom units." Even then, it had been possible only to present returns which matched those to be presented to investors by wrongly including VAT as though it was part of the investor's return.

iii) The reality of the site was very different. Its poor condition was noted in November 2016 when the ground rent valuations were discussed. The cash flow pressures left insufficient money to pay for the refurbishment. Refurbishment of the first 124 units was to take until February 2019, even if the money was somehow available. By November 2018, 6 months later, only 56 units had been refurbished.

iv) I am in any event concerned at the extent to which Mr Spence was able to influence the contents of the 2015 PSL Report for his and Mr Kewley's own purposes. Mr Spence and Mr Kewley placed no great faith in the report, as evidenced by their response to the 85% occupation rate for the periods when the park was open.

v) I am satisfied that Mr Kewley's and Mr Spence's understanding of the amounts which the Ilfracombe units could earn is best reflected in their 29 September 2016 exchange expressing concern that Mr Dean, a friend and close adviser, might buy one and that "we'll have to tell him how it is on the rental figures etc just so he's aware from the beginning".

vi) I am also unable to accept that Mr Kewley and Mr Spence could have honestly placed reliance on figures produced in 2015 with inflation assumptions when re-launching Ilfracombe in 2017 and selling units in 2018, when the site had operated throughout that period, and from 2016 in the Alpha Group's ownership. For that reason, Ms Page's impressive submissions by reference to the detail of the spreadsheets were unavailing on this occasion as well. It is clear that the actual performance at Ilfracombe was very significantly worse than the PSL 2015 Report presented. Mr Roopchand's projections in September and November 2017 showed that the site was running at a very substantial deficit, and there is an adverse inference to be drawn from the failure to disclose the source material available to Mr Roopchand.

vii) The financially precarious state of Green Parks Holidays (Ilfracombe) Limited

which had net current assets without accounting for investor returns of negative £500,000 by 31 July 2017, and over negative £2.6 million by 31 July 2018, and the Alpha Group generally, at this time further exacerbated the lack of substance in the financial returns being promised.

331. I am also satisfied that the Modified Track Record representation was false and known by Mr Kewley and Mr Spence to be false. None of the projects were generating sufficient net revenue to meet investor returns, including Ilfracombe itself and Westbeach.

332. On 19 July 2018, Mr Kewley signed a letter on Alpha Homes note paper addressed to an Ilfracombe investor confirming that all of units would be refurbished and that this was due to be completed by the end of 2018. Mr Kewley did not believe that this schedule would be met. In 2019, when confronted with a letter of this kind by the administrator of Green Parks Holidays (Ilfracombe) Limited, Mr Kewley challenged the authenticity of the letter and denied signing it. However, there are contemporary documents which confirm that Mr Kewley did approve letters of this kind (e.g. an exchange of 17 July 2018 with Mr Crump). Mr Kewley's later denial was simply another lie.

Things Fall Apart

333. Over the course of 2018, events began to accelerate towards the long inevitable demise.

334. On 1 February 2018, Mr Roopchand prepared another spreadsheet, showing that, with the exception of the Foundry 2 and Ambleside, occupancy levels were far below 100%, with properties running at substantial deficits when investor returns were brought into account, and some not even covering their operating costs. Total cash available across the student properties was £474,000, reflecting a £6m shortfall against the investor payments promised of £6.4m. Expenses were running at between 38% and 70% of income.

335. In exchanges in May 2018, Mr Kewley and Mr Spence referred (implicitly) to plans to "dump" the rent guarantee from some time after the end of June when noting that Mr Crump would "definitely" not be speaking to them at that time (I reject Mr Kewley's evidence in cross-examination he did not know what this was a reference to). However, they continued to push Mr Crump to sell, referring on 11 June 2018 to the need to effect £2-3m of Westbeach sales "which are all critical to the development of the property and without these sales to the build will stop".

336. On 3 July 2018, Mr Sullivan told Mr Kewley that A1 Alpha could not cover next month's bills (Mr Kewley confirmed "I'm aware"). On 4 July 2018, Mr Kewley and Mr Spence took another £2m out of Alpha Holding Limited, Mr Kewley coming close to accepting in evidence that the money was taken out at that time because "we knew there were issues in the business".

337. In August 2018, Mr Kewley and Mr Spence set up a company called Complete FM Solutions Ltd, which was to take over the maintenance of the various Alpha Group sites and move it "in-house". Mr Kewley and Mr Spence were shareholders, but said that they could not be directors (reflecting their ongoing attempts to distance themselves from the operations of the Alpha Group business). Complete FM Solutions Ltd entered into a

Facility Management Service Agreement with ASM.

338. On 5 September 2018, Mr Kewley told Mr Spence that he had discussed the outstanding Westbeach units with Mr Roopchand and told him to "just do the bare minimum (including water supply) to get all units signed off by Christmas – then we can have a look at what monies left next year and decide what to do …"

339. On 24 September 2018, Mr Kewley informed Mr Dean of PG Legal that the underlessee companies were going to offer investors the "opportunity" to break the underleases, engage ASM and take over the management of their properties.

340. For whatever reason, that plan was not implemented immediately. Instead, on 2 October 2018, ASM wrote to investors stating, "we propose to make a smaller rent payment at the end of October and then to make good this shortfall over the next twelve months", but would miss the 1 October instalment. I am satisfied Mr Spence and Mr Kewley approved the terms of that letter, which was characteristically dishonest in its suggestion that there was any prospect of full payment resuming. On 3 October 2018, Mr Crump wrote to investors reporting that "A1 Alpha have informed us that all future payments will be made on time as usual for the duration of your 10-year underlease agreement". Mr Spence forwarded this to Mr Kewley stating "Looks like Andrew is onboard with everything. I think if he managed it well he may even keep on selling". The reassurances ASM offered through Mr Crump were entirely false, as Mr Kewley and Mr Spence well knew, and the attempt to continue sales off the back of these false assurances thoroughly reprehensible.

341. On 12 October 2018, Mr Crump asked Mr Sullivan when the missing payments would be made. Mr Sullivan dissembled. When Mr Crump pushed for something concrete to pass on to investors, Mr Sullivan prepared a draft stating that investors would be paid £111.60 in October and receive a further update in November. When Mr Crump pushed again, Mr Sullivan forwarded the enquiries to Mr Kewley and Mr Spence, who remained his boss and the real directors of the company. Mr Sullivan's stated, "I think it's too soon to reveal the grand plan as it would look like we had it up our sleeves all along." Mr Kewley effectively accepted (and to the extent he did not, I am satisfied he knew) that the "grand plan" was to ditch the underleases. Mr Sullivan clearly knew this too, although he was evasive in his evidence. On 22 October 2018, Mr Sullivan was once again raising the issue of telling investors of the plan to simply hand net returns to investors, saying "I think we need to think about when this comes out as otherwise it will appear to be 'death by a thousand cuts' and we will lose all credibility in their eyes."

342. On 13 November 2018, Mr Kewley had an exchange which Mr Barnes, who produced the Alpha companies' unaudited accounts. The accounts showed a major loss at A1 Alpha (Properties) Leicester Ltd from which significant dividends had been extracted, which rendered those dividends unlawful. Mr Kewley instructed Mr Barnes to make some adjustments to the accounts, following which the accounts showed a profit of £209,119.

343. On 30 November 2018, Mr Kewley and Mr Spence resigned from their directorships of the Westbeach and Ilfracombe holding companies and the two Green Parks Holidays Ltd

companies, with Mr Sullivan being appointed as a director of those companies that he was not already a director of on the same day. The shuffling of the paper directorships did not change how the companies were run, with Mr Kewley and Mr Spence remaining very much in charge. When confronted with documentary evidence of this, Mr Kewley accepted "Nick and I were trying behind the scenes to … make this work going forward for everybody." Mr Sullivan confirmed that there was no change to his salary and no hand-over process. I am satisfied that Mr Kewley and Mr Spence remained de facto directors of those companies, their resignations notwithstanding.

344. On 3 December 2018, Mr Kewley told Mr Dean and Mr Fletcher of PG Legal that the various underlessees were not going to pay rent on 1 January 2018, but wanted advice on how to deal with rental receipts to avoid being "viewed as an unregulated collective investment … I would appreciate your views." Mr Fletcher of PG Legal identified difficulties in this regard with both of the approaches Mr Kewley had identified, because each involved pooling of rents. Mr Spence told Mr Kewley, "that's what I was a bit worried about. I think we should consider paying the rent out based on individual account/service charge statements as if we were operating a management agreement and that way if a room has rented out it'll receive a reasonable amount of rent but for the ones that haven't they'll owe us money".

345. On 8 December 2018, Mr Kewley and Mr Spence arranged a call with Mr Sullivan, Mr Kewley explaining "we need to be careful about me & Nick still seeming to be actively involved in the businesses we are no longer directors of and giving instruction to employees". The plan was to brief Mr Sullivan, and let him "front" conversations with the employees.

346. On 22 December 2018, ASM informed investors in student properties that they would henceforth be operating on a costs plus basis, and would not be making the January investor payments. The letter was drafted by Mr Kewley and Mr Spence, but sent in Mr Sullivan's name, reflecting the realities of corporate control within the Alpha Group and the desire to mislead third parties as to the nature of Mr Kewley's and Mr Spence's involvement. Mr Sullivan accepted in evidence that he could "see how it can be construed as dishonest." EPL was not told of the letter in advance.

347. On 23 December 2018, Mr Crump emailed Mr Kewley and Mr Spence about Ilfracombe and Westbeach, but Mr Spence and Mr Kewley decided to ignore him.

348. On 28 December 2018, EPL sent an email to investors in student properties, referring to ASM's communication to investors in those properties of 22 December 2018, and stating that EPL would be looking into matters with its lawyers. Against the background of (i) the missed October 2018 payments; (ii) the 22 December 2018 saying henceforth only actual earnings net of costs would be paid; (iii) the Alpha Defendants' decision to send that communication without consulting EPL and (iv) Mr Kewley's and Mr Spence's decision to ignore Mr Crump's emails, it cannot credibly be said that this was not an entirely natural and predictable response to the Alpha Defendants' own conduct.

349. On 1 January 2019, the payment due to Westbeach investors was not made. This failure to pay was in no sense a consequence of EPL's email of 28 December 2018 email

regarding the student properties, but the fact that the inherent flaws of the Westbeach scheme meant that there was no money in Green Parks Holidays Ltd to make the payment.

350. On 3 January 2019, Mr Sullivan met a representative of one of the investors in Scholar's Village, Mr Gamany of CSI Prop Sdn Bhd, and told him (falsely) that "the original directors Nick Spence and Derek Kewley are no longer directors nor are they involved". He reported that there was no service budget, occupancy levels were low and the property was operating at a loss. Mr Sullivan forwarded the note of the meeting he had been sent and his draft response to Mr Kewley and Mr Spence for their approval, stating "bearing in mind we are about to launch an Exocet shall I sit on this response?"

351. On 4/5 January 2019, EPL terminated all contracts with the Alpha Group.

352. Press reports about the Alpha Group fiasco began to emerge. On 6 January 2019, Mr Kewley emailed Mr Spence referring to such reports, and advising:

> "We shouldn't really pay ourselves more from A1 Properties at the minute given that its A1 that has the liabilities ... it's one of the first thing as directors (I know we're not now but probably still applies) is to stop taking remuneration ... the fee structure and debt creation is there to take it through ASM now anyway but A1 shouldn't really do it cause it'll get picked up in insolvency".

It is clear that Mr Kewley and Mr Spene saw ASM as a means to continue profiting at the investors' expense – a later communication suggested it would bring in "circa £400,000 revenue with decent margins". Mr Kewley also suggested getting Mr Dean to approach Gordon Brown Solicitors (who acted for many of the investors in their purchases), pretending to be ignorant of the ongoing correspondence and looking to persuade them to support a restructuring proposal.

353. On 9 January 2019, EPL informed student investors that they were terminating all contracts with Mr Spence and Mr Kewley's companies, and were in contact with insolvency practitioners and solicitors, whose help investors would need. The termination of EPL's contracts with Alpha Group companies was effected on 10 January 2019. On 16 January 2019, EPL informed investors that it was building a legal case against the Alpha Group and urged investors to act together to this end.

354. Notwithstanding this dire situation, Mr Kewley and Mr Spence were still looking to complete sales at Westbeach. On 10 January 2019, Mr Sullivan expressed concerns at doing this "as we have no intention of paying the rent on phase 5 or catching up on phase 3 rent this would be a deliberately misleading communication". However, Mr Sullivan soon overcame any scruples, and Jacksons were given instructions to serve completion notices on buyers. Mr Sullivan said he was told by Mr Kewley to do this, and he was under "absolutely horrific" pressure. The instruction was sent to Jacksons requiring notice to complete to be served that day.

355. On 21 January 2019, Mr Sullivan sent a draft letter for investors to Mr Kewley and Mr Roopchand, and he cleared another email with Mr Kewley and Mr Spence on 6 February 2019. On 16 February 2019, Mr Sullivan sent letters prepared by Mr Kewley and Mr

Spence to investors in the student schemes, and Mr Kewley continued to draft Mr Sullivan's correspondence or tell him what points to make throughout 2019.

356. In January 2019, investors in Westbeach and Ilfracombe received letters referring to financial difficulties across the investment schemes. The January payments to these investors were not made.

357. On 6 February 2019, Mr Sullivan sent Mr Kewley and Mr Spence an analysis of net earnings *before investor returns* at Westbeach, which amounted to £1,211.86 per unit in 2018.

358. On 21 February 2019, A1 Alpha went into administration and Quantuma were appointed as administrators.

359. In February 2019, Mr Spence and Mr Sullivan did work to try and ascertain what level of return could be paid to investors. A calculation assuming 95% occupancy (and at this point many properties had 30% voids) suggested 3%.

360. Solicitors for one investor sent a letter to Jacksons on 25 March 2019 protesting at the service of a completion notice when its unit was unhabitable, with no final decoration, walkways and the main stairs unfinished and no lift installed. On 1 May 2019, Jacksons informed Mr Kewley that they were ceasing to act for the Alpha Group, citing a conflict of interest, as issues had been raised about the "legitimacy" of the documentation they had been supplied with. This did not provoke even a "blimey" from Mr Spence, merely an "interesting".

361. On 9 May 2019, Mr Sullivan had a meeting with one of the lead Claimants, Mr Vyas, at which Mr Sullivan stated that "the business itself never generated any income to pay investors, and all investors returns were to be paid for by sale of new units." I am satisfied that Mr Vyas' note was accurate, and that Mr Sullivan was confirming how the Alpha Group's business had always operated.

362. On 28 May 2019, Mr Kewley and Mr Spence withdrew a further £600,000 from Alpha Holdings GB Limited.

363. On 31 May 2019, Green Parks Holidays (Ilfracombe) Limited, the Ilfracombe underlessee, entered administration. Quantuma were appointed liquidators.

364. On 3 June 2019, Mr Kewley and Mr Spence co-ordinated the rendering of ground rent invoices to the Ilfracombe investors, the failure to pay investor returns notwithstanding,

365. Exchanges between Quantuma and Green Parks (Holdings) Limited on 24 June 2019 showed Mr Kewley taking the position that the company was under no obligation to complete the refurbishment of the Ilfracombe units, and Mr Kewley falsely denied he had written letters confirming the intention to complete the refurbishment.

366. On 27 June 2019, Green Parks (Holdings) Limited went into administration, RMT Accountants and Business Advisors Ltd (**"RMT"**) being appointed as administrators. Green Parks Holidays Limited, the Westbeach underlessee, entered into administration

on 1 July 2019.

367. In November 2019, Mr Kewley, Mr Sullivan and Mr Roopchand implemented a plan they described as "operation shutdown" to switch off the internet at various student sites (the students in residence notwithstanding) to put pressure on the administrators.

368. On 5 May 2020, Mr Kewley and Mr Spence procured the appointment of Mr Gubbay to the Green Parks Ilfracombe management company. Mr Kewley and Mr Spence were looking to Mr Gubbay to support them in their dispute with Ilfracombe investors, and decided not to tell the receivers brought in by the investors that £900,000 had yet to be paid by Mr Gubbay's company under the development lease (which could be forfeit as a result) because that "would go against Gubbay" and "we need Gubbay to sort out Ilfracombe first anyway". For the same reason on 20 May 2020, Mr Spence and Mr Kewley decided not to support the officeholder's attempts to get electricity connected at Ilfracombe in case this undermined the attempts by Mr Gubbay's company to recover ground rent. Mr Kewley was in touch with Mr Gubbay about Mr Gubbay's plan to use private security contractors to take over control of the park's shared facilities.

369. On 27 May 2020, some investors in student accommodation entered into a settlement agreement involving A1 Alpha and Quantuma. A legal issue arises as to the effect of this settlement agreement which I address below.

370. On 8 July 2020, Green Parks Holidays Ltd entered voluntary liquidation, Quantuma being appointed as liquidators.

371. On 30 September 2020, Green Parks Holdings (Ilfracombe) Ltd offered to assign the development leases for Ilfracombe Phases 1 and 2 to Tuscola (106) Limited, after it had defaulted on its obligation to pay rent under the development lease. On 29 December 2013, Tuscola (106) Limited accepted the offer, with the development lease being assigned to Tuscola (106) Limited and Tuscola (107) Limited on 16 June 2023.

372. The ongoing disputes between investors and Mr Gubbay's companies culminated in proceedings commenced before the First Tier Tribunal in Autumn 2021 which have yet to reach a final resolution.

THE LEAD CLAIMANTS' CLAIMS FOR DECEIT

373. The tort of deceit is ultimately dependent on showing that a material representation was made to a particular claimant (e.g. that they received and read the document said to contain it and understood the representation in the relevant sense); that the representation made to that claimant was untrue; that the representation was made dishonestly; and that the particular claimant relied upon the representation; and suffered loss by doing so.

374. In this section:

i) I first consider the issue of representations made, truth, Mr Kewley and Mr Spence's belief and reliance on a Lead Claimant by Lead Claimant basis.

ii) I then consider the issues of valuation which raise issues common to all Lead

Claimants.

iii) I then consider any further issues of loss which arise in relation to each of the Lead Claimants.

AA Azure

375. AA Azure is a private limited company incorporated in Cyprus in 2010 by Mr Andreas Aloneftis and his wife, Mrs Natale Aloneftis. I heard evidence from Mr Aloneftis, who was a credible witness.

376. AA Azure purchased:

i) unit 2316 in Westbeach in March 2014;

ii) unit 3321 in Westbeach in November 2016;

iii) rooms 363 and 364 Q Studios on 20 June 2017; and

iv) unit 112 in Ilfracombe on 31 July 2018.

Unit 2316 Westbeach

377. I accept that AA Azure was provided with a Westbeach brochure in November 2013 and this contained:

i) The Substance Representation.

ii) The Buy-Back Representation.

378. I am not persuaded that the other representations pleaded by AA Azure as set out in sections 22-23 of its Individual Points of Claim were made as actionable representations. Nor do I feel able on the evidence to have regard to communications with Mr Aloneftis in the form of emails or telephone communications from EPL beyond those substantially repeating the brochure representations, which raise more complex issues of attribution which were not fully explored at trial.

379. I am satisfied that the Substance Representation was untrue and known at all material times by Mr Spence to be untrue: see [97]. So far as Mr Kewley is concerned, I am satisfied that he was aware that the Substance Representation was untrue when the purchase agreement was concluded with Green Parks (Holdings) Limited on 31 March 2014: [104]-[105]. By this date, Westbeach had been operating for two summers, and I am satisfied that it did so without generating anything like the necessary returns to service the promised returns.

380. I am satisfied that the Buy-Back Representation was untrue and was known by both Mr Kewley and Mr Spence to be untrue: see [96(ii)] and [100(ii)]. It is suggested by the Alpha Defendants that "it did not matter because buyback was nevertheless provided." This appears to be a reference to the fact that if AA Azure had, like Mr Longman's solicitors, spotted that there was no right of buyback, a side letter would have been

agreed. However, even assuming that was the case, it provides no answer to the complaint that AA Azure was falsely told it would have a legal right of buy-back when this was known not to be the case. Nor do I accept that an investor like AA Azure who did not spot the absence of a legal right to buy-back at the time of transacting, but requested a buyback later on, would necessarily have been provided with it. The position which Mr Kewley and Mr Spence, and thus the relevant Alpha Group company, would have taken in the event of such a request would depend on the circumstances at the time.

381. I accept Mr Aloneftis' evidence that AA Azure relied upon both of these representations in entering into each of the Purchase Agreement, the lease agreement and the underlease. There was no real challenge to Mr Aloneftis' evidence regarding the Substance Representation (nor, realistically, could there have been). There was a challenge to his evidence as to AA Azure's reliance on the Buy-Back Representation. As to this:

i) It is the case that the Buy-Back Representation did not originally feature in AA Azure's original Particulars of Claim. However, it was later clarified that it had in fact been included in the Schedule of Claimants' Information.

ii) In any event, I accept Mr Aloneftis' evidence that he read and understood the value of the Buy-Back option. That is inherently credible evidence, and receives considerable corroboration from the fact that Mr Aloneftis did later correspond with EPL seeking to exercise that option.

iii) I do not regard Mr Aloneftis' failure to check for the presence of this right (which was displayed in such prominent terms in the brochure) in the more complex contractual documentation as significant. Those were legal documents, not readily digestible by a lay person, and Mr Aloneftis (and through him, AA Azure) was entitled to proceed on the basis that the contracts would do what it had been represented they would do.

Unit 3221 Westbeach

382. I accept that Mr Aloneftis on behalf of AA Azure accessed the EPL webpage which contained marketing material for Westbeach in June/July 2016. I am satisfied that the material on the website would have been broadly consistent with the brochures for Phase 3 at Westbeach produced between February and July 2016 as summarised at [291] and [295] above and contained statements which Mr Kewley and Mr Spence had authorised EPL to make. These comprised:

i) The Substance Representation.

ii) The Asset-Backed Representation.

iii) A statement that the developer had a strong track record of delivering high quality developments to clients, but not the Modified Track Record Representation.

383. I am not persuaded that other actionable representations in the terms pleaded in paragraphs 25 to 26 of the AA Azure Individual Particulars of Claim were made, and I have not found it necessary to consider the status and effect of any other statements made

by Mr Phillips of EPL in telephone calls, or those made in the brochure previously provided to AA Azure in late 2013.

384. I am satisfied that the Substance and Asset-Backed Representations were untrue and were known by Mr Kewley and Mr Spence to be untrue for the reasons given at [297] above. It is not sufficiently clear that the statement that the developer had a strong track record of delivering high quality developments to clients was untrue, as it appears to refer to build-quality rather than rental performance. Nor am I persuaded that Mr Kewley and Mr Spence intended the statement to be understood in a sense in which they knew it was untrue.

385. I accept Mr Aloneftis' evidence that AA Azure relied upon both of these representations in entering into the purchase agreement with Green Parks (Holdings) Limited on 22 November 2016; the lease agreement with Green Parks (Holdings) Limited on 24 September 2018 and the underlease with Green Parks (Holidays) Limited on the same date. In relation to this and the other investments, it was suggested that AA Azure had relied on the success of its existing investments. I accept that AA Azure would not have purchased the later investments if the deficiencies in the earlier investments had already become apparent. However, that provides no basis for rejecting Mr Aloneftis' evidence that he relied on the further representations made, just as he had relied on those originally made.

Rooms 363 and 364 Q Studios Stoke

386. I accept that Mr Alonefetis' evidence that on 29 November 2016, he was provided by an email from EPL with a link to through a webpage for Q Studios and that he accessed and read the online marketing brochure. I am satisfied that this brochure made:

i) the Substance Representation; and

ii) the Modified Track Record Representation.

387. I am not persuaded that other actionable representations were made in the terms pleaded in AA Azure's Individual Particulars of Claim.

388. I am satisfied that both of those statements were untrue, and were known by Mr Kewley and Mr Spence to be untrue, for the reasons set out at [264] to [265] above.

389. I am satisfied that AA Azure relied upon the two representations in entering into the Purchase Agreement with Alpha Developments Stoke Ltd on 20 June 2017, and into the lease agreement with Alpha Developments Stoke Ltd and the underlease agreement with A1 Alpha on 21 December 2018 and the underlease agreement with A1 Alpha on 1 September 2018.

Unit 112 Ilfracombe

390. I am satisfied that AA Azure received a link to an online brochure from EPL on 1 May 2018 and that Mr Aloneftis accessed and read the brochure. I am satisfied that that brochure contained:

i) The Substance Representation.

ii) The Modified Track Record Representation.

391. I am not persuaded that other actionable representations were made in the terms pleaded in AA Azure's Individual Particulars of Claim.

392. I am satisfied that both of those statements were untrue, and were known by Mr Kewley and Mr Spence to be untrue, for the reasons set out at [330] and [331] above.

393. I am satisfied that AA Azure relied upon the two representations in entering into the Purchase Agreement with Green Parks (Holdings) Limited on 31 July 2018; the superior lease agreement with Green Parks (Holdings) Ltd on the same date; and an underlease with Green Parks Holidays (Ilfracombe) Limited, also on the same date.

Alexander Longman

394. Mr Longman, who had a career in financial services and worked as a managing director at Credit Suisse Singapore Ltd, invested in two Westbeach properties:

i) unit 1104; and

ii) unit 1317.

395. I accept that Mr Longman received and read a brochure for Phases 1 and 2 of Westbeach and that it contained the following representations:

i) the Substance Representation; and

ii) the Buy-Back Representation.

396. I am not persuaded that other actionable representations were made in the terms pleaded in Mr Longman's Individual Particulars of Claim.

397. I am satisfied that the Substance Representation was untrue and known at all material times by Mr Spence to be untrue: see [85]-[86]. So far as Mr Kewley is concerned, I am not satisfied that he was aware that the Substance Representation was untrue when Mr Longman entered into the Purchase Agreement with Green Parks (Holdings) Limited on 26 June 2013: see [90]-[91].

398. As to the Buy-Back Representation, the position is more complex:

i) On or shortly after 13 June 2013, Mr Longman was sent a Report on Title by Sweeney Miller Solicitors. This included a section on "the Company's Break Clause" which identified that the option was "in favour of the Seller / Landlord only" and clearly explained that this was an option which the Seller was not bound or obliged to exercise, and that "there no *guarantees* that the Seller will indeed exercise the break option to buy-back the property. There is no right for you to break the lease … [Y]ou cannot compel the Seller to take the property back" (emphasis in original).

ii) I accept Mr Longman's evidence that this did not reflect his understanding. However, there appears to have been some form of follow-up between Sweeney Miller and the seller's solicitors because a further version of the report on title was produced on 19 June 2013. It had an addendum in which Sweeney Miller stated:

> "Since preparing the Report, the following changes have been agreed:
>
> 1. The Seller will exercise the buyback option on the fifth anniversary of completion. This is, of course, subject to the proviso that a company is only as good as its assets. If they do not keep up with this obligation, then you can take them to court but if the company has no assets, then you may not be able to enforce against them".

iii) I think it likely that this issue was raised by Mr Longman with Sweeney Miller, who obtained the change referred to on Mr Longman's instructions.

iv) The Superior Leases contained an obligation on the Seller's part to serve a break notice on Mr Longman after 5 years.

v) In these circumstances, I am unable to accept that the Buy-Back Representation was continuing to operate on Mr Longman from 19 June 2013. There was no suggestion that there was no binding obligation on the Seller's part to re-acquire the property. In this respect, the Purchase Agreement he signed was what he had been led to believe it would be.

vi) No claim was brought for breach of the buy-back obligation.

399. I accept Mr Longman's evidence that he relied on the Substance Representation when he entered into:

i) the Purchase Agreement with Green Parks (Holdings) Limited on 26 June 2013, the lease agreement with Green Parks Holidays Limited on 2 August 2013 and the underlease on the same date in relation to Unit 1104; and

ii) the Purchase Agreement with Green Parks (Holdings) Limited on 26 June 2013, the lease agreement with Green Parks Holidays Limited on 2 August 2013 and the underlease on the same date in relation to Unit 1317.

That evidence was not seriously challenged and is inherently credible.

Mr Chukwuebuka Ofor

400. Mr Ofor is an electronic engineer who lived in Kenya at the time of making his investments. He brings this claim in relation to Room 2D1 of Park Lane House.

401. I accept Mr Ofor's evidence that he was provided with a brochure relating to Park Lane House by Mr Foden of EPL by email on 16 June 2014 and also with a copy of the Developer Prospectus on 25 July 2014 which documents made:

i) The Substance Representation.

ii) The Asset-Backed Representation.

402. As at 4 December 2014, when Mr Ofor entered into the Purchase Agreement for Room 2D1, I am satisfied that the Substance Representation was untrue and known by Mr Kewley and Mr Spence to be untrue for the reasons set out at [142] above.

403. I am not satisfied that Mr Kewley and Mr Spence believed the Asset-Backed Representation to be untrue at that date: see [143]-[144]. I am conscious that the representations would ordinarily continue until the relevant contracts had been concluded, and that the lease agreement with A1 Alpha and the underlease were concluded on 23 September 2015. However, that raises the potentially complex and unexplored issues of how realistic it would have been for Mr Ofor not to enter into other contracts once he had entered into the Purchase Agreement and what the effect on his loss would have been.

404. The brochure did not make the Modified Track Record Representation. The Developer Prospectus described the previous developments as having "consistently delivered exceptional results" and also referred to high-performing investment opportunities including guaranteed 10% returns on student properties. While the issue is marginal, I do not feel able on the evidence to conclude that through these two statements Mr Kewley and Mr Spence were intending to or did communicate that the properties had themselves delivered sufficient profit to meet the 10% returns. It follows that I am not persuaded that the Developer's Prospectus contained the Modified Track Record Representation.

405. I am not persuaded that other actionable representations were made in the terms pleaded in Mr Ofor's Individual Particulars of Claim.

406. I accept Mr Ofor's evidence that he relied on the Substance Representation in entering into the contract with A1 Alpha to purchase Room 2D1 on 4 December 2014, and the lease agreement with A1 Alpha and the underlease on 23 September 2015.

Mr Hitesh Vyas

407. Mr Vyas is a qualified accountant. He invested in Unit 52 in Ilfracombe.

408. I accept Mr Vyas was provided with and read a brochure provided to him by EPL on 31 May 2018, and that he was also sent the Developer's Prospectus on 1 June.

409. I am satisfied that these documents made:

i) The Substance Representation.

ii) The Modified Track Record Representation (the brochure stating, "together we have carefully handpicked investments in sought-after UK locations and provided thousands of clients with effortless high NET yields" and the Developer's Prospectus referring to "high occupancy" producing "the reliable delivery of these yields").

410. I am also satisfied that these representations were untrue and were known to be untrue by

Mr Kewley and Mr Spence: see [330] and [331] above.

411. I am not persuaded that other actionable representations were made in the terms pleaded in Mr Vyas' Individual Particulars of Claim.

412. I accept Mr Vyas' evidence that he relied on the Substance Representation in entering into the contract with Green Parks (Ilfracombe) Holdings Ltd on 28 June 2018, a superior lease with Green Parks Holdings (Ilfracombe) Ltd on 1 January 2015 and an underlease with Green Parks Holidays (Ilfracombe) Ltd on the same date. The evidence does not establish reliance on the Modified Track Record Representation.

HPIL

413. HPIL is a company established by Dr Alice Hudson-Peacock and Dr Mark John Hudson-Peacock. HPIL invested in Unit 67, Scholar's Court.

414. I accept that Dr Hudson-Peacock on behalf of HPIL was sent a brochure for Scholar's Court on 27 November 2015 which she read and which contained:

i) the Substance Representation;

ii) the Asset-Backed Representation;

iii) the Modified Track Record Representation ("all previous developments having delivered the guaranteed yields on schedule"; and

iv) the Occupancy Representation so far as Scholar's Court was concerned.

415. I am also satisfied that first three of these representations (but not the fourth) were untrue and were known to be untrue by Mr Kewley and Mr Spence when HPIL entered into the Purchase Agreement: see [212] to [214].

416. I am not persuaded that other actionable representations were made in the terms pleaded in HPIL's Individual Particulars of Claim.

417. I accept Dr Hudson-Peacock's evidence that HPIL, through her, relied on these three actionable representations in entering into the Purchase Agreement with Alpha Developments (Bradford) Ltd on 17 February 2016, and in entering into the long lease with Alpha Developments (Bradford) Ltd and the underlease with A1 Alpha on the same date. As to the challenges made to this evidence:

i) While I accept some representations were more important to Dr Hudson-Peacock than others, that does not prevent the other representations being material and relied upon, and in any event the subject-matter of the representations was such that they essentially operated together to cumulative effect.

ii) Nor does the due diligence which I accept Dr Hudson-Peacock prudently undertook persuade me that she was not relying (for HPIL) on the representations made in the brochure.

iii) Dr Hudson-Peacock clearly foresaw a risk of the investment not performing as promised, and, when considering whether to purchase a second unit, very sensibly gave consideration to the possibility that this might involve an accumulation of risk. However, awareness of a risk things might turn out worse than anticipated is very far from knowledge that failure is baked in from the start.

iv) Dr Hudson-Peacock's enquiry as to whether the obligations were insured, which did not receive an affirmative response, would have been an answer to any representation that the returns were underwritten by some other entity, but I have held that no such representation was made. It does not otherwise undermine HPIL's reliance case.

v) Dr Hudson-Peacock was shown the report on title which recorded that the developer and the underlessee were different companies. I accept Dr Hudson-Peacock's evidence that she did not understand from this that the developer's assets were not available to meet the liabilities under the underlease (and there are a number of legal mechanisms by which that might have been the case), still less was she aware of the ongoing programme of freehold sales which A1 Alpha was in the course of undertaking.

Lotus

418. Lotus is a company incorporated in Kuwait created as a special purpose vehicle by Mr Omar El-Quqa. Lotus invested in ten Alpha Group properties and two schemes. The units at issue in this action comprise:

i) Units A1 to A6 in Norfolk Street.

ii) Studios 211, 213, 215 and 219 in Tudor Studios.

419. I accept that Mr El-Quqa was sent a copy of the brochure for Norfolk Street by EPL on 17 February 2014 and that he read the brochure. I accept that the brochure contained the Substance Representation. It did not contain the Modified Track Record representation and I am not persuaded that the words "the developer for this property has over 10 years experience and a strong track record" constitutes an actionable misrepresentation. I do not feel able, on the evidence and argument at trial, to find that Mr Kewley and Mr Spence were aware of and approved any representations made by EPL in phone calls or the "4 Unique Points" document. Nor am I persuaded that other actionable representations were made in the terms pleaded in Lotus' Individual Particulars of Claim.

420. I am satisfied that the Substance Representation was untrue and that by the time Lotus entered into the Purchase on 3 July 2014, Mr Kewley and Mr Spence knew that it was untrue but were content for the Norfolk Street to be marketed on a false basis, with a view to "dumping" the rent guarantee prior to its expiry: see [130]-[133] above.

421. I accept Mr El-Quqa's evidence that Lotus, through him, relied on the Substance Representation in entering into the Purchase Agreements, leases and underleases for the six Norfolk Street units with A1 Alpha on 3 July 2014. That evidence was entirely credible and was not shaken in cross-examination.

422. I also accept that Mr El-Quqa was sent a copy of the brochure for Tudor Studios by EPL on 18 November 2014 and that he read the brochure which contained the following representations:

    i) the Substance representation;

    ii) the Modified Track Record representation ("all previous developments having delivered the guaranteed yields on schedule"; "our eight student properties constantly achieving 10% net for 10 years")); and

    iii) the Asset-Backed Representation ("protected by robust asset-backed contracts"; "all guaranteed-income contracts are asset backed").

423. I am satisfied that the Substance and Modified Track Record representations were untrue and known by Mr Kewley and Mr Spence to be untrue: see [165], [166] and [170] above. I am also satisfied that by November 2014, Mr Kewley and Mr Spence were committed to the sale of all A1 Alpha freeholds, and had already embarked on doing so, and that, for this reason, the Asset-Backed Representation was misleading and they knew that it was misleading: see [172] above.

424. I am not persuaded that other actionable representations were made in the terms pleaded in Lotus' Individual Particulars of Claim.

425. I accept Mr El-Quqa's evidence that Lotus, through him, relied on these three representations in entering into the Purchase Agreements for the Tudor Studios units on 17 April 2015 with A1 Alpha, and the lease and underlease contracts with A1 Alpha on 1 September 2016.

Magic Box

426. Magic Box was incorporated by Mr Paul Simpson, and he and his two sons are shareholders. Magic Box invested in Unit 6, the Old Wesleyan Chapel, Ambleside.

427. I accept Mr Simpson, on behalf of Magic Box, was sent a copy of the Ambleside brochure by EPL on 17 February 2016 and that Mr Simpson read the brochure. The brochure contained the following representations:

    i) the Substance Representation;

    ii) the Asset-Backed Representation (which was also made by the Developer Prospectus); and

    iii) the Modified Track Record Representation.

428. I am satisfied that each those representations were untrue and were known by Mr Kewley and Mr Spence to be untrue: see [234], [236] and [238].

429. I am not persuaded that other actionable representations were made in the terms pleaded in Magic Box's Individual Particulars of Claim.

430. I am satisfied that Mr Simpson on behalf of Magic Box relied upon the Substance and Asset-Backed Representations in entering into the Purchase Agreement, Superior Lease and Underlease with A1 Alpha on 7 April 2016. He is less clear as to the Modified Track Record Representation, referring to the developer's "experience in developing student accommodation" without referring specifically to the success of previous developments in delivering the guaranteed returns. In those circumstances, I do not feel able to find that Mr Simpson relied on the Modified Track Record Representation.

Oliver Whitefield

431. Mr Whitefield worked in construction, latterly as a health and safety consultant, until his retirement in 2016. He purchased Flat 5005 in Phases 3 and 5 of Westbeach.

432. I accept that EPL sent Mr Whitefield brochures for Phases 3 and 5 of Westbeach in November and December 2017 and that Mr Whitefield read the brochure which made the following representations:

i) the Substance Representation;

ii) the Modified Track Record representation in full and Westbeach-specific form ("16 fully operation UK student properties … have all provided 8-10% NET yields on schedule to buyers"; "proven income from operational phases").

433. I am satisfied that both of these representations were untrue and known by Mr Kewley and Mr Spence to be untrue: see [330] to [331] above.

434. I am not persuaded that the brochures contained the Asset-Backed Representation. The words "contract underwritten by established company" says nothing about the asset-base of that company. I am not persuaded that other actionable representations were made in the terms pleaded in Mr Whitefield's Individual Particulars of Claim.

435. I accept Mr Whitefield's evidence that he relied upon the Substance and Modified Track Record Representations in entering into the Purchase Agreement with Green Parks (Holdings) Limited on 25 May 2018, into the 125-year lease with the same company of 10 January 2019 and the underlease with Green Parks Holidays Limited on the same date.

Mr and Mrs Whitton

436. Mr Shaun Whitton and Mrs Tina Whitton are both retired. They invested in six Alpha Group units:

i) unit 203 in The Box;

ii) unit E7D in Scholar's Village;

iii) unit 16, Primrose Hill;

iv) units 8B and 21E in the Foundry 1 (purchased from investors who had themselves purchased the units from Alpha Group companies); and

v) unit 51 in Phase II of Ilfracombe.

437. I accept that the Whittons received The Box brochure from EPL on 5 May 2016, and that Mr Whitton read the brochure. The brochure made the following representations:

i) the Substance Representation;

ii) the Asset-Backed Representation (e.g. "contracts underwritten by Asset-Rich Developer"; "contracts underwritten by the developer's large and ever-growing asset base");

iii) the Modified Track Record Representation ("15 student properties, with all previous developments having delivered buyers their fixed returns on schedule"; "each operational property has been 100% occupied from day 1, delivering all returns on schedule and as promised").

438. Each of those representations were untrue and known by Mr Kewley and Mr Spence to be untrue: see [243]-[244] above.

439. I am not persuaded that other actionable representations were made in the terms pleaded in the Whittons' Individual Particulars of Claim.

440. I accept Mr Whitton's evidence that he and (through him) Mrs Whitton relied upon the three misrepresentations in entering into the Purchase Agreement with Alpha Developments (Preston) Ltd on 22 July 2016, the 250-year lease with the same company on 5 September 2016 and the underlease with A1 Alpha on the same date.

441. I accept that the Whittons were sent a copy of a brochure for Scholar's Village by EPL on 24 May 2016, and that Mr Whitton read the brochure which contained:

i) the Substance Representation;

ii) the Asset-Backed Representation ("Contracts underwritten by established company"; "all contracts are tired directly to the developer and asset-backed, There are no third party shell companies"); and

iii) the Modified Track Record Representation ("seven fully operational UK student properties – these have provided 8-10% NET yields on schedule to our investors").

442. I am satisfied that those representations were untrue and known to Mr Kewley and Mr Spence to be untrue: see [257]-[258] above.

443. I am not persuaded that other actionable representations were made in the terms pleaded in the Whittons' Individual Particulars of Claim.

444. I accept Mr Whitton's evidence that he relied on these misrepresentations in entering into a Purchase Agreement with Alpha Properties (Bradford) Ltd on 2 November 2016, when he became party to the Superior Lease with the same company on the same date and entered into the underlease with A1 Alpha on the same date.

445. I accept that the Whittons were sent a brochure for Primrose Hill on 10 May 2017 and that Mr Whitton read the brochure which made the Substance Representation, and I am satisfied that this representation was untrue and known by Mr Kewley and Mr Spence to be untrue: see [251] above. I am not persuaded that the Modified Track Record Representation were made. The words "proven income generation" did not represent any particular level of income generation and the reference to "award winning partner developer" was true, or to the extent it was not, mere puff. I am not persuaded that other actionable representations were made in the terms pleaded in the Whittons' Individual Particulars of Claim.

446. I accept Mr Whitton's evidence that he relied on this misrepresentation in entering into a Purchase Agreement and the lease agreement with Alpha Properties (Huddersfield)) Ltd and the underlease with A1 Alpha on 16 August 2017.

447. The position of the Foundry 1 raises more complex issues because the Whittons did not purchase their units from an Alpha Group company, but from existing investors by way of a resale. As to this:

i) The Whittons were introduced to the Foundry by EPL on 14 March 2018, who made statements to the same effect as:

a) the Substance Representation;

b) the Asset-Backed Representation ;

c) the Modified Track Record Representation.

ii) The Whittons were also provided with the original brochure – it is not clear by whom but I will assume it was not an Alpha Group company – which made:

a) the Substance Representation;

b) the Asset-Backed Representation ("Asset-Backed Contracts"; "all income period contracts are asset-backed");

c) the Modified Track Record Representation ("their ninth student property with all previous developments having delivered yields on schedule").

(I am not persuaded that other actionable misrepresentations were made in this brochure).

iii) That brochure, in common with most or all of the others, had a page headed "Ready Made Exit Strategy" stating that the guaranteed income would enhance the resale value of the property, making it easier to sell. It was expressly noted that investors could "provide improved guaranteed yields at resale" and that the remaining guarantee period would be passed onto the purchaser".

iv) So far as the statements by EPL are concerned, they would naturally be understood in this context as acting for the existing investor selling the units and not for the

Alpha Group Defendants. However, I am satisfied that the situation can be analysed as one in which representations originally made by the relevant Alpha entities and authorised by Mr Kewley and Mr Spence to the original purchaser are passed on by that purchaser to the new purchaser (through EPL, on this occasion acting for the original purchaser).

v) For liability to arise in that context, the maker of the original representation must know that its statement is likely to be communicated to the new representee, and it must be part of the statement's known purpose that it should be communicated to and relied upon by the new representee: see *Banca Nazionale del Lavoro SpA v Playboy Club London Limited and others* [2018] UKSC 43, [11] and *Chitty on Contracts* 35th (2023), [10-038] where the editors observe "where a person makes a false statement in a document (such as a bill of lading) which he knows is going to be passed on to other people and relied on by them, any person who does in fact rely on the document will be a representee."

vi) I am satisfied that this approach fixes Alpha Developments (Loughborough) Ltd, A1 Alpha, Mr Kewley and Mr Spence with responsibility for the representations made in the brochure and to the same effect as those in the brochure at the time those statements were repeated to an on-purchaser who was being offered the unit with the benefit of the income guarantee. It was clearly contemplated in the brochure that the rent guarantee would be used by investors to promote the resale of the property, and I accept that one of the known purposes of the brochure was to assist in such resales by allowing the investor to show it to potential purchasers who would benefit from guaranteed income for the purposes of explaining what they were getting and why they should attach credence to what was being said. Mr Kewley accepted that he assumed that brochures were being used in this way.

vii) A separate issue arises as to the meaning of the representations, given that the brochure is being provided and the representations repeated to the Whittons some period after the guaranteed return period began and after the original sale date (being the date which ordinarily would be the date at which the truth of the representations would fall to be tested). I can see, for example, that if the brochure described the asset position in 2016 when it was provided to the original purchaser, and it was later provided or its contents repeated to a on-purchaser in 2018, it could not realistically be said to be making representations as to the asset position in 2018.

viii) It is sufficient for present purposes to proceed on the basis that the only representations made, and which Mr Kewley, Mr Spence and A1 Alpha authorised to be made, to the Whittons as purchasers from a original investor related to the state of affairs *at the date of the original purchase*. That is similar to the representation made by the shipowner in a bill of lading as to the apparent good order and condition of the cargo on shipment, which is made to those who take up the bill by indorsement, but which so far as subsequent holders are concerned still involves a representation *as to the position at the time of shipment*, not at the date they take up the bill.

ix) On that basis, each the representations were untrue, and were known by Mr Kewley and Mr Spence to be untrue: see [193]-[195] above.

448. I am satisfied that the Whittons relied upon these representations when entering into the Purchase Agreement for Unit 8B on 17 May 2018, in taking the assignment of the lease from Alpha Developments (Loughborough) Limited and of the underlease with A1 Alpha.

449. Finally, I accept that on 25 May 2018, EPL sent the Whittons a copy of the brochure for Phase II of the Ilfracombe development. I accept that Mr Whitton read the brochure, which made:

i) the Substance Representation; and

ii) the Modified Track Record Representation (through the words "we have carefully picked ideal investments in sought after UK locations and provided thousands of clients with effortless high NET yields"; and "proven delivery of sector-high yields").

450. Those representations were false and known by Mr Kewley and Mr Spence to be false: see [330]-[331].

451. I am not persuaded that other actionable representations were made in the terms pleaded in the Whittons' Individual Particulars of Claim.

452. I accept Mr Whitton's evidence that he relied on these misrepresentations in entering into a Purchase Agreement and Superior Lease Agreement with Green Parks Holdings Limited on 26 June 2018, and an underlease with Green Parks Holidays (Ilfracombe) Limited on the same date.

Wolfe

453. Wolfe was established by Mr Adam Cayley and his wife and business partner. Wolfe invested in four Alpha Group properties:

i) Unit 3327 in Westbeach;

ii) Flat 4 in the Wesleyan Chapel;

iii) Units 21T and 140 in Ilfracombe.

454. I accept that Mr Cayley on behalf of Wolfe was sent a copy of the Westbeach brochure by EPL on or before 19 February 2016 and that he read the brochure. The brochure contained the following representations:

i) the Substance Representation;

ii) the Asset-Backed Representation ("contracts are underwritten by the developer's large asset base"; "contracts underwritten by the developer's assets"; "contracts underwritten by asset rich developer");

iii) the Modified Track Record Representation ("they have now worked on 13 student properties alongside numerous other commercial and residential projects. All have delivered high fixed yields on schedule") and the statement that Phase 1 apartments had "performed beyond the 119% NET yield projection in Year 1" which, read in conjunction with "Proven Income Generation from Phase 1" and "high tenancy levels … has resulted in an annual ross rental income of 20k-24k per apartment" which represented that Westbeach was generating sufficient returns to meet investor returns.

455. I am satisfied that each of these representations was untrue and known by Mr Kewley and Mr Spence to be untrue: see [291] and [295]-[296].

456. I am not persuaded that other actionable representations were made in the terms pleaded in Wolfe's Individual Particulars of Claim.

457. I accept Mr Cayley's evidence that on behalf of Wolfe he relied on these representations when entering into the Purchase Agreement with Green Parks (Holdings) Limited on 11 October 2016, a lease agreement with the same company on 24 September 2018 and the underlease with Green Parks Holidays Limited on the same date.

458. I accept that Mr Cayley on behalf of Wolfe was sent a copy of a brochure for the Chapel, Ambleside by EPL in June 2017 and that he read the brochure. The brochure contained the following representations:

i) the Substance Representation;

ii) the Asset-Backed Representation ("robust asset-backed contracts"; "all guaranteed income contracts are asset-backed");

iii) the Modified Track Record Representation ("their eleventh student property, with all previous developments having delivered the guaranteed yields on schedule"); and

iv) the Occupancy Representation ("the property has been operating for over 10 years and has experienced 100% tenancy during this time").

459. I am satisfied that each of the Substance, Asset-Backed and Modified Track Record Representations were untrue and known by Mr Kewley and Mr Spence to be untrue: see [234], [235], [236]and [239] above. As to the Occupancy Representation, I have not been able to find where this issue was explored with Mr Kewley in cross-examination. As he was the individual most closely involved in the student projects, I do not feel able to reach any findings as to either Mr Kewley or Mr Spence's state of mind in relation to this representation.

460. I am not persuaded that other actionable representations were made in the terms pleaded in Wolfe's Individual Particulars of Claim.

461. I accept Mr Cayley's evidence that he relied on behalf of Wolfe on the Substance and Asset-Backed Representations in entering into the Purchase Agreement with A1

Properties (Sunderland) Ltd on 13 October 2017, and when he became bound by the Superior Lease with the same company on that date and entered into the underlease with A1 Alpha. Mr Cayley did not give evidence that he relied upon the Modified Track Record Representation.

462. I accept that Mr Cayley on behalf of Wolfe was provided with a brochure for Ilfracombe by EPL in or around June 2017. The brochure contained the following representations:

i) the Substance Representation;

ii) the Modified Track Record Representation ("together we have carefully handpicked ideal investments in sought after UK locations and provided thousands of clients with effortless high returns").

463. I am satisfied that the Substance and Modified Track Record Representations were untrue and known by Mr Kewley and Mr Spence to be untrue: see [330]-[331]. I am not persuaded that other actionable representations were made in the terms pleaded in Wolfe's Individual Particulars of Claim.

464. I accept Mr Cayley's evidence that he relied on behalf of Wolfe on the Substance Representation in entering into the Purchase Agreement and Superior Lease with Green Parks (Holdings) Limited on 25 April 2018 and the underlease with Green Parks Holidays (Ilfracombe) Ltd on the same date in respect of Unit 21T. I also accept that he relied on the same representation in paying the reservation fee of £5,000 in respect of Unit 140 (which did not progress) on 27 April 2018. Mr Cayley did not give evidence that he relied upon the Modified Track Record Representation.

REMEDIES FOR DECEIT

Valuation of the units

The date of valuation

465. Each expert valued the Lead Claimants' properties on three valuation dates:

i) The date of purchase.

ii) The date proceedings were commenced.

iii) The date of the report.

466. In the case of the Lead Claimants, each sought damages on the basis of the valuation at the purchase date. I am satisfied that this is the appropriate starting point for valuation of the benefits received by the claimant in this context and there was no challenge by the Alpha Defendants to the use of that date.

467. The only exception is where the property has in fact subsequently been sold by the relevant Lead Claimant. This is an issue which arises in relation to the Whittons and I address it in that context below.

The remaining valuation issues

468. In their written closing submissions, the Alpha Defendants put forward a helpful "suggested approach to deciding the valuation issues" which I have adopted (and indeed I should record that I was very much assisted by Mr Calland, who conducted the cross-examination and closing submissions on this part of the case for the Alpha Defendants, and whose expertise in this area was obvious at all times, but never over-played).

469. This requires me to determine the following:

i) Methodology: DCF or traditional method?

ii) Should the properties be valued subject to underleases?

iii) The holiday properties:

a) Use of comparables for capital values at Westbeach and Ilfracombe.

b) Yields.

c) Income.

d) Costs.

iv) The student properties:

a) Yields.

b) Income.

c) Costs.

Methodology: DCF or traditional valuation?

470. Mr Robinson employed a DCF valuation, but applied a yield-derived multiplier as a cross-check – that latter approach being referred to in this case as the "traditional investment method". Mr Parkinson used the "traditional investment method" for the student properties and most holiday properties, but for some holiday properties he has only relied upon capital value comparables. I accept that with adequate data , the DCF and traditional investment approaches should, if properly calculated, deliver the same answer. The Alpha Defendants confirm that they are content for the final value calculations to be performed using the DCF approach.

471. Given that, it is probably not necessary to get into the arguments about the competing merits of the two approaches which featured in cross-examination and closing submissions. I am satisfied that the DCF approach can be appropriately applied here. The RICS Guidance on Discounted Cashflow Valuation published in November 2023 (**"the RICS Guidance"**) indicates a preference for DCF valuations where comparative price information is not readily available ([1.6]). RICS Guidance, [1.7] makes it clear that the DCF valuation methodology can be applied to all investment valuations regardless of

size, scope or purpose. The RICS Guidance would suggest that, although the end results of different methodologies should be the same, there may be circumstances in which one starting point is seen as offering advantages over another. There are no suggested comparables for the student properties, which constitute a particularly opaque market. Indeed, it was far from clear to me whether the concept of selling single student rooms in a block would ever have taken place outside of the guaranteed return scheme of the kind promoted in this case, and which failed so spectacularly.

472. What of the holiday properties, where Mr Parkinson suggested that comparable transactions were available? I accept that the market for apartments in Westbeach (in particular) and holiday chalets in Ilfracombe (to a lesser extent) bears stronger similarities with conventional property transactions than the student properties. My principal difficulty with Mr Parkinson's reliance on comparable transactions was that he was forced to use a very small number of very different transactions. While I accept Mr Parkinson sought to make adjustments for this, there comes a time when the extent of the adjustments required is so substantial that by the end of the exercise, the connection with the starting point becomes wholly tenuous, rather as when a series of adjustments are made to the diet of a flea in attempt to work out what to feed an elephant. The comparables relied upon were essentially residential properties which could be sold as full-time residences or second homes, as well as used as holiday lets, they could be purchased with mortgage finance and had unlimited annual use. In many cases, there were no associated facilities. Westbeach and Ilfracombe were subject to restrictions prohibiting permanent residential occupation and were not mortgageable.

473. It follows that I accept Mr Robinson's use of the DCF methodology. However, I accept that he has made the following errors in the implementation of that approach as follows:

i) First, Mr Robinson has calculated his DCF valuations by basing his estimated exit value or EV on his year 0 income, and not the income in the year in which the sale of the property is assumed to take place: year 9. It is necessary to work out the resale value at the date of assumed resale, and then discount that value back. Mr Robinson does that, but uses the year 0 income, rather than the year 9 income, in calculating the resale value in year 9 which is then to be discounted back to year 0. I am satisfied that is an error: it involves postulating a purchaser in year 9 who uses income which is 10 years out of date when determining what to pay for the property. The use of the future, rather than date of initial acquisition, income to calculate the future sale value is supported by the RICS Guidance to which I have already referred ("the exit value is commonly based on an assessment of the expected rental value of the asset at the end of the discounting period": [4.52]). It was indicated in closing submissions that Mr Robinson would want to revise his yields in that scenario, and increase them by 2-3% depending on the site. I understand that this is controversial, and the Alpha Defendants would wish to challenge such an adjustment in cross-examination. I accept that this issue developed somewhat unexpectedly because of the fact the two experts adopted different methodologies. Further, there is support in the RICS Guideline (at [4.60]) for reflecting the greater uncertainty of the EV in this discount rate. In these circumstances I have decided to adopt the following course:

a) I am provisionally minded to increase the yields applicable to the year 9 value by 1%, which gives some allowance for the considerations in the RICS Guideline at [4.60], but adopts a conservative figure given the stage at which the point emerged.

b) If either party wishes to argue for a different figure, I will give directions for further evidence and submissions. However, if a party pushes for such a hearing, and fails to obtain a more favourable outcome, the costs of this further exercise are likely to be visited upon them.

ii) Second, Mr Robinson uses negative EVs in his discount calculations where work remains to be completed. These reflect the assumed capital value of the completed property less the cost to complete, in cases in which it will cost more to complete the work than the property would be worth as a result. Mr Robinson accepted in cross-examination that the correct EV in this scenario is zero, as did the Claimants in closing.

iii) Third, Mr Robinson deducted the cost of finishing unfinished apartments twice – both when net income is calculated from year 0 as a negative to reflect the cost of completing the work, only turning positive when the cost of the work is covered, and in calculating the year 9 EV. I accept that this involves an error and that the costs of completion should only feature once. I understand addressing this issue will, in practice, resolve the negative EV issue as well.

474. Reference was made to a fourth alleged error, in relation to the components in Mr Robinson's discount rate, but as this is not said to have affected the overall calculation, I do not need to address i

What assumptions are to be made about the underleases?

475. A key difference in the valuation approach of the two experts was that Mr Parkinson was instructed to value the units on the basis that there was an effective underlease with the guaranteed return promise in place, whereas Mr Robinson was asked to conduct his valuation on the basis that no effective underleases were in place. Helpfully, Mr Parkinson provided alternative valuations on the assumption that no effective underlease was in place.

476. I am satisfied that the valuations should be conducted on the basis that no effective underleases were in place:

i) That appears to me to be more consistent with the approach supported by the authorities as to the assessment of damages in deceit cases, in which the court is often called upon to make "reasonable assumptions which err if anything on the side of generosity to the claimant where it is the defendant's wrongdoing which has created those uncertainties" (*Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [188]). Damages must also compensate for any losses arising from "the risk of misfortunes directly caused by his fraud" (*Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, 280).

ii) The approach adopted of giving full value for the promised returns would be wrong in principle, as it would give the Alpha Defendants the benefit of an enhanced value resulting from misleading and dishonest statements. In this regard, I was referred to the following statement by Lord Coleridge CJ in *Twycross v Grant* (1877) 2 C.P.D 469, 489-490:

> "It was indeed contended that 700l. could not be right, as the defendants were at all events entitled to be credited with the market-price of the shares when the plaintiff bought them; and reference was made, in support of the defendants' contention on this point, to *Sedgwick on Damages*, p. 556, and to Lord Campbell's observations in *Davidson v. Tulloch*. No doubt, if the shares were really worth anything when bought, the defendants ought to have credit for what they were really worth. But the fact that they were quoted at a premium on the Stock Exchange is only evidence of value, not proof of it; and, if the jury thought (as they well might, and probably did,) that the quotation on the Stock Exchange did not shew a real, but only a delusive value caused by the fraudulent nature of the prospectus and the mode in which the shares were manipulated by the defendants and others in concert with them, the jury were not only justified in disregarding, but were bound to disregard, such delusive and factitious value; although, of course, if the plaintiff had sold his shares, he must have credited the defendants with whatever he might have realized by the sale. There is no evidence whatever that the shares ever had any value except that which resulted from the wrongful acts of the defendants; and it would be contrary to all principle to allow them to take advantage of their own wrong, and claim credit for the market-price of the shares, when but for their own concealment of the contracts in question there is no reason to suppose that the shares would have had any market value at all."

iii) For the reasons I have set out, there was no realistic prospect of the promised returns being made from the properties themselves, nor was the strength of the covenant of any real value because of the limited asset-base and heavy liabilities of the underlessee and the utterly chaotic and unprincipled manner in which it was run. To the extent that funds did come in from other companies, with the exception of Green Parks (Holdings) Limited on Phases 1 and 2 of Westbeach, this was wholly voluntary.

iv) To the extent that guaranteed returns were paid, the lead Claimants are giving credit for them. The amounts actually paid, and for which credit is being given, represent in my assessment the best evidence of the value of the promises of fixed returns made as part of the sale, and, credit being given for these, it would involve double-counting to include some element representing the value of a promise to pay them which was unlikely to be fully performed when valuing the properties. I understood that the need to avoid such a double-count was accepted.

What assumptions are to be made about the completion of Westbeach and Ilfracombe?

477. Some of the Westbeach and Ilfracombe properties were sold at a stage when either the

units themselves or the surrounding facilities, or both, had not been built and have never been built. In these circumstances, the issue arises as to whether the court should value the transactions at the date of sale with an element of "hope" value based on the expectation at that point that the entirety of the complex would be built.

478. As to this, I should first deal with the Alpha Defendants' suggestion that the reason that the Westbeach and Ilfracombe sites were not "built out" was the fact that from October 2018, Mr Crump of EPL encouraged investors in those sites who had yet to complete their purchases not to do so. Any conduct of this kind would have been a perfectly understandable response to the underlessees' defaults in paying returns on the student sites, and the fundamental flaw in the Alpha Defendants' business model which this left exposed in plain sight. Taken at face value, this argument accepts that the only means of building out the property was by completing sales off the back of unrealistic (and, as I have found, fraudulent) misrepresentations of the viability of the promised net returns. In any event, the lack of viability of the Westbeach and Ilfracombe investments and the very real risk that they would not be completed was clear long before October 2018. Mr Kewley and Mr Spence were anticipating the collapse of both projects when they resigned their directorships of the Green Parks companies in November 2018.

479. The reality is the completion of construction of those phases of Westbeach and Ilfracombe which were not built was dependent on the ongoing sale of units on a dishonest basis, and would in any event run into the ground once those sales stopped, for whatever reason. Consistent with the legal principles outlined at [476] above, I am not persuaded that any "hope" value for future construction should be built into the valuations on the purchase date. An informed investor at the date of purchase would not have been willing to accord substantial value to the hope of future construction, because the high risk of non-completion carried with it not simply the loss of expectation or "unrealised hope", but the reality of an investor being left with a unit carrying ongoing liabilities in the form of service charges, council tax, utilities and ground rent, at the same time as a very real risk the property would not be delivered in a lettable state. This was a case in which the "disappointment value" at least matched the "hope value".

480. Finally, I should note that if I have not reached that conclusion, then I would have been persuaded that the purchase date was not the appropriate date to assess the value of the property received under various investment contracts affected by the failure to complete the site, but rather the date when construction on the Westbeach and Ilfracombe sites was abandoned by the Alpha Group in 2019. I am not persuaded that investors in the holiday properties could realistically have established they had been defrauded until, at the very earliest, the payments ceased in January 2019, by which time they were well and truly locked into sites which were never going to be built.

The holiday properties

481. The first issue which arises is whether the court can safely adopt the comparables used by Mr Parkinson when arriving at capital values at Westbeach and Ilfracombe:

    i) I have already noted that I did not find the suggested comparables for Westbeach and Ilfracombe particularly informative. In this regard, Mr Parkinson decided to

seek comparables because his investment value based on net income was notably lower than the price paid for the property, but in a transaction induced by deceit because the benefits of the investment property were deliberately oversold, I regard that starting point as unreliable.

ii) The mere fact that (for example) a Westbeach property could be *used* as a part-time holiday home (in the sense that an owner could decide, in effect, to stay there themselves) does not provide a sufficient basis for treating properties which could be sold as first or second homes as comparable transactions.

iii) It follows that I do not feel able to adopt Mr Parkinson's valuations for the Westbeach and Ilfracombe sites.

482. I should record at this point that each side was able to point to certain anomalies in the other side's expert's valuation of particular properties:

i) Mr Robinson was criticised for the contrast in his valuations of Westbeach block 3 unit 3327 (£19,200 at purchase) and Unit 3221 (one floor below, and accorded a lesser rating) was accorded no value. In response, it was pointed out that Unit 3327 was a "gold unit" with a higher rent, and in a market operating at all times at far less than 100% occupancy, might well be earning income when unit 3221 was earning none. I accept, nonetheless, that the difference is incongruous.

ii) Mr Robinson was also criticised for his assumption that properties which were not capable of producing income had no value, although I can well understand that properties which would cost more to put in a lettable condition than the discounted revenue they would earn would have a zero value, and Mr Parkinson ascribed a zero value to certain Ilfracombe units.

iii) For their part, the Claimants pointed to the fact that Mr Parkinson valued unfinished uninhabitable properties in Westbeach Units 3 and 5 at broadly the same price as completed and habitable properties in Phases 1 and 2, and much higher than a comparable transaction put forward by Mr Parkinson which took place at a much later time when there had been a 55% increase in market values over the relevant period (such that the "comparable" ought to have had a much higher value). Once again, I accept that this also seems incongruous.

iv) They also pointed to the fact that Mr Parkinson ascribed a positive value to properties which could not be rented out at Ilfracombe, when he had been willing to adopt an investment value approach for unfinished properties in Westbeach.

483. The reality is that there were rough edges to both experts' valuations which, when seeking to adopt an approach across a large number of properties, were capable of throwing up idiosyncratic results on particular units. However, that reflects the difficulties of the task, and the paucity of the data available. In circumstances in which I am satisfied that Mr Robinson's overall methodology, with the three adjustments I have referred to, is sound, I am not persuaded that I can discard it simply because there may be some "outlier" outcomes, nor that it would be principled for me to make ad hoc adjustments to particular outputs off my own bat.

484. The second issue which arises is the yields for the holiday properties. The selection of a yield is essentially a judgmental exercise, which will be informed by yields on other kinds of investment property in the same locality, and the implied yields which can be derived from actual transactions.

485. In that context, the Alpha Defendants relied heavily upon the fact that in a 2020 report, Mr Robinson had produced a report with yields in which were much lower than those he used in his 2024 report:

Property	**Mr Parkinson**	**Mr Robinson 2024**	**Mr Robinson 2020**
Westbeach	11%	17%	12%
Ilfracombe	12%	20%	12%

486. As to this:

i) I accept that Mr Robinson's October 2020 report was prepared under considerable pressure of time (in seven weeks) for the purpose of an application for freezing order relief. That report had to consider several hundred properties, not simply those acquired by the Lead Claimants and which are in issue in this trial. It would not have been possible within the time available to him for Mr Robinson to produce a DCF for each property even though his report had to offer an assessment of loss which embraced all of them,

ii) His trial report, although concerned with many fewer properties, was prepared over a much longer period with much more in-depth consideration of each property.

iii) In addition, Mr Robinson had the benefit of more data when preparing his 2024 report, including disclosure and information arising from three units which have been re-sold (Unit 16 at Primrose Hill, sold on 28 February 2024 for £4,765.20; Unit 8B at the Foundry sold for £27,280.06 on 29 June 2023; and Unit 21E at the Foundry sold for £27,370.18 on 29 June 2023).

487. In the present context, what matters is not the fact of Mr Robinson changing his mind, but whether there are good reasons for it. The sentiment that, when the facts change, an opinion can legitimately change with them, has a long pedigree. So what of the substance of the position?

488. As to Westbeach:

i) Mr Parkinson's figures involved an upwards adjustment of yields of 9.72% and 7.04% to 11% to reflect the increased risk in Westbeach. Mr Robinson's 2020 figures involved an adjustment (overall downwards) of three yields of 8%, 20%

and 25%. The 8% figure was from a property called Lighthouse View which was one of the yields which contributed to Mr Parkinson's yield.

ii) It will be apparent that, for all the similarity of the end-point of Mr Parkinson's and Mr Robinson's 2020 figures, with the exception of the use of Lighthouse View, they were reached with different inputs. Mr Robinson's 2024 report reflects diminished reliance on Lighthouse View, and much grater reliance on the other two yields.

iii) Mr Robinson points to two completed Westbeach transactions after his 2020 report – one in 2021 at an implied yield 18% and one in 2023 at an implied yield of 15.7%, together with a number of unsuccessful attempts to sell Westbeach properties at auction which failed, which I accept are indicative of negative market sentiment towards these units.

iv) I accept that those further transactions or attempted transactions are matters which are capable of justifying a change in Mr Robinson's 2020 yield. His reliance on those transactions was criticised because (a) these were sales by administrators, who (it is to be inferred) would not hold out for or be able to secure the best price and (b) the sales took place at a stage when any purchaser would have had no expectations of the project being built out, in contrast to the purchase date. As to (a), while there is something in this, Mr Parkinson was also willing to rely on one of the liquidator sales. I have dealt with (b) at [477]-[480] above.

v) However, I have concluded that the information now available, having regard to the types of transactions, justifies a lower yield than the 17% used in Mr Robinson's 2024 report for Westbeach at date of purchase. I am satisfied that a yield of 15% is an appropriate yield to use as a component of the discount rate.

489. Turning to Ilfracombe:

i) Mr Parkinson's figure of 12% involved upwards adjustments from yields from a hairdressers in Barnstaple (7.4%) and a retail property in Barnstaple, currently let as a coffee shop (5.75%).

ii) The basis for Mr Robinson's 2020 yield of 12% is unclear. His report noted the dearth of similar units being sold. He referred to a three-bedroom unit up for sale at £37,500 which was attracting little interest; a two-bedroom apartment for sale with an indicated yield based on the asking price of 15% which he thought too high and a one bedroom flat in a Grade II Georgian building in the town centre.

iii) Mr Robinson's 20% yield in his 2024 report relied mainly on transactions from the Green Bay Holiday Park – there were 14 transactions with yields from 12% to 25%, and with a mean yield of 18.78% and a median yield of 19%. Those were all short lease transactions which I accept would have had a downwards effect on value and influence the yields achieved. Against that, Golden Bay was clearly a more established operation than Ilfracombe, and an informed purchaser would have regarded it as a significantly better medium term bet than an Ilfracombe project which was in a poor state when acquired; where no funds had been set aside for

refurbishment; which depended on ongoing sales; and where the ongoing refurbishment programme was not the subject of any detailed timeline (see [330]).

iv) I accept that the 20% figure used by Mr Robinson is too high, both because it is higher than the Golden Bay transactions, and because it fails appropriately to reflect the short-term leases in those transactions.

v) In the time-honoured phrase, doing the best I can on the material available, I am satisfied that a yield of 16% is appropriate as a component of the discount rate.

490. The third issue is the income and costs at the holiday properties.

491. Taking Westbeach first:

i) For the reasons I have set out in at [23] above, I am satisfied that it is reasonable to infer that the absence of such material reflects the fact that it would have been unhelpful to the Alpha Defendants, in showing that the rents and levels of occupancy were significantly lower than those said to underpin the promised returns, and the running costs significantly higher. That assessment is amply corroborated by contemporaneous documents which I have summarised above, which show on a regular basis higher than assumed returns, and occupancy levels frequently below 100%.

ii) The inputs used by Mr Parkinson for his Westbeach calculation came from evidence to be given by Mr Mark Ellis as to income and expenses in 2022, from which Mr Parkinson made adjustments to arrive at figures at an earlier point in time. For reasons which were not in any way the fault of Mr Parkinson, it became apparent that Mr Ellis could offer no support for those figures, the documents provided to support them did not do so and that the figures for expenses failed to take account of relevant information: see [14] above. Those figures, and therefore any valuation produced using them, were wholly unreliable, with the result that Mr Parkinson was not able to present the court with Westbeach calculations which could be used. To the extent that Mr Parkinson relied on an exercise carried out *ex post* by one of *the claimants* to test the viability of the Westbeach site on various assumptions, that was grounded neither in factual evidence nor relevant expertise, and Mr Parkinson made a number of adjustments to that unsupported starting point for reasons which I was unable to discern.

iii) For unit 3327, Mr Robinson's net income figure exceeds Mr Parkinson's. As both figures are affected by the absence of evidence which would have been available to the Alpha Defendants but which they did not produce, I have decided to adopt the medium point between these two figures.

iv) For units 2316, 3221 and 5005, the difference between the experts' figures reflects different rent figures based on the categorisation of apartments by reference to gold, silver or bronze levels by ACE Holiday Lettings Ltd which manages a number of Westbeach apartments. The rates charged by ACE for apartments they manage involves different rates for the three different categories of apartment. I do not feel able to second-guess that assessment that different types of property will

command different levels of rent in the holiday market, particularly when the Alpha Defendants could have avoided the need to try and reconstruct actual net income by producing the records of what was received and spent.

v) On that basis, I make the following findings as to the net income of the Westbeach properties at the purchase date:

Unit 1104 £10,018.

Unit 1317 £11,763.

Unit 2316 £5,746.

Unit 3221 £6,173.

Unit 3327 £12,900.

Unit 5005 £6,394.

492. So far as Ilfracombe is concerned:

i) Here, Mr Parkinson arrives at a net income of £4,000 per unit. Mr Robinson reaches the conclusion that there was no net income.

ii) Both experts say that they have not been provided with adequate trading information. However, the parties do not fall to be treated in the same way so far as this evidential void is concerned, because I am satisfied that the Alpha Defendants could have produced trading information but have not done so. Further I feel unable to place any reliance on the trading information used by Mr Parkinson, which was provided by Mr Ellis.

iii) The principal reason why the Alpha Defendants ask me to accept Mr Parkinson's account is that the park is operational, it being suggested that the park would not be trading if the units could not be let. However, owning the units will generate certain fixed costs, which will be incurred whether they are let or not, and it is not difficult to see why it would make sense to let them once acquired, even if the letting proposition as a whole did not generate a net profit.

iv) In these circumstances, I accept Mr Robinson's conclusion.

The student properties

493. Mr Robinson's yields are based on room transactions he identified which took place in 2023, which I accept followed a period of market decline. Reference is also made to the sale of whole buildings, rather than rooms, over the period 2015 to 2023. I accept some downwards adjustment from Mr Robinson's figures room transactions is justified to reflect:

i) the market deterioration in 2023;

ii) his use of figures in 2023 which were higher (in some cases only marginally so) than the 2023 transactions; and

iii) (to a marginal extent) the fact that the buildings were older in 2023 than at date of purchase.

494. Both experts, faced with a dearth of evidence, have relied to some extent on the prices achieved in whole building sales. However, those are very different transactions, and the downwards adjustment from the whole room price to the individual room price must reflect that fact. I accept that building sale prices are a helpful broad indicator of the relative attractiveness of student accommodation different locations, but I found the more granular attempt by the Alpha Defendants to derive and apply a 2-4% additional room risk to be applied to the building risk unpersuasive and likely to understate the risks of an individual room transaction. Occupation of a room has a binary quality which occupation of a building does not, nor is it susceptible to alternative uses in the way a building is. The significance of the attractiveness of a particular location is likely to manifest itself in a greater level of risk at the room level than the building level.

495. The end result is as follows:

i) I accept that the building yields are of some use in fixing the relative value of rooms in different locations, but reject the suggestion that they yield a mathematical formula which can safely be used to determine room transaction yields. Nonetheless, I accept that in some instances the building figures suggest that some of Mr Robinson's yields are too high.

ii) I accept that the 2023 room transactions are of use, provided account is taken of the deteriorating market, and they reinforce my view that the "adjusted building yield" exercise Mr Parkinson has performed understates the appropriate yields. In some instances, they suggest they provide a basis for some uplift over Mr Robinson's 2020 figures, albeit not in all cases.

496. Once again, doing the best I can, my findings as to the appropriate yields (as components of the discount rate) are as follows:

Q Studios

363 14%

364 14%

Scholar's Court

67 17%

Park Lane House

2D1 16%

The Box

203 17%

Scholar's Village

E7D 17%

Primrose Hill

16 17%

The Foundry

8B 12%

21E 12%

Norfolk Street

A1 16%

A2 16%

A3 16%

A4 16%

A5 16%

A6 16%

Tudor Studios

211 10%

213 10%

215 10%

219 10%

Wesleyan Chapel

Flat 4 17%

Flat 6 17%

497. Turning next to income and costs:

i) The same observation about the significance of the Alpha Defendants' failure to produce the actual data applies.

ii) There are a number of units where the experts' figures are close or where Mr Robinson's figure is higher than Mr Parkinson's. Given the judgmental nature of the exercise in the absence of hard data, I am going to adopt the mid-point of those estimates as follows:

a) Q Studios 363 and 364: net income of £3,500 .

b) Scholar's Court 67: net income of £3,400.

c) The Foundry unit 8B: net income of £3,250.

d) The Foundry unit 21E: £2,950.

e) Ambleside Flat 4: £22,845

f) Ambleside Flat 6: £5,000.

498. There are some general points arising in relation to the other valuations:

i) Mr Parkinson has generally chosen a longer letting period of 50 weeks, whereas Mr Robinson has generally chosen a 44 week lease term (with 42 weeks at Tudor Studios). Shorter terms attract higher rents and visa-versa. It is possible to find students sites offering a variety of lease terms. This is a good example of an issue on which evidence of the actual letting periods would have been particularly informative. Taking that factor into account, I am satisfied that the periods by Mr Robinson are broadly appropriate, but that some slight upward adjustment is required to his rents by reason of the use of the shorter letting period.

ii) Mr Parkinson has assumed costs of 25%, adjusted downwards to 20% for newer properties and up to 30% for older properties. Mr Robinson has used actual costs data for a 3-year period supplied to him by the claimants. I am satisfied that Mr Robinson's figures are the ones to use. Not only is it appropriate to do so when evidence of actual costs has not been disclosed by the Alpha Defendants, but the contemporaneous documents suggests that Mr Parkinson's broadbrush figures are simply too low.

iii) Making those adjustments, I have concluded that the following net income figures should be used:

Park Lane House 2D1:	£2,350.
The Box 203:	£500.
Scholar's Village E7D:	£1,500.
Primrose Hill 16:	£1,000.
Norfolk Street A1 to A6:	£1,700.
Tudor Studios 211, 213, 216, 219:	£2,900.

Conclusion

499. I am going to ask the experts to produce agreed calculations of the value of the various units on the basis of these findings. I will refer to the outcome of that process as **"the Determined Value".**

Rescission

500. Where a party is induced to enter into a contract by deceit which is attributable to its counterparty, it is in principle permitted to rescind the contract. A number of the Lead Claimants seek rescission of the Purchase Contracts and their superior leases with the underlessees: A.A. Azure Ltd; Wolfe Solutions Ltd; Mr Hitesh Vyas; the Whittons.

501. As is well-known, there are a number of potential obstacles or bars to rescission, a number of which are relied upon by the Alpha Defendants here:

    i) where counter-restitution is impossible (or, as it is sometimes put, *restitutio in integrum* is not possible);

    ii) where the contract has been affirmed; and

    iii) (possibly) where the right to rescind is lost through the effluction of time.

502. Counter-restitution requires the party seeking to rescind the contract to return any benefits received under the contract. In this case, I can see no bar to counter-restitution being given by way of payment of the monetary benefits received under the underlease and return of the property acquired under the sale contract.

503. Affirmation requires the party seeking rescission to elect to affirm the contract with knowledge of the right of rescission, election requiring an unequivocal communication of the decision to maintain the contract or the doing of act which is inconsistent with the intention to rescind: *Chitty on Contracts*, [10-144]-[10-145]. Lapse of time may be evidence of affirmation but affirmation will not normally be possible by a party who has no knowledge of its right to rescind (*Chitty on Contracts*, [10-148]). Further, mere silence or inactivity will generally lack the necessary unequivocality for affirmation.

504. In this case, all that is said in support of the affirmation plea is the time which has elapsed. I am not persuaded that there has been any affirmation in this case. This is a case in which the right to rescind turned largely on the states of mind of Mr Spence and Mr Kewley. Ascertaining the fact and extent of their fraud has been a huge forensic exercise. At no point prior to the service of the claim could anyone in the position of Mr Spence, Mr Kewley and the companies they controlled have formed the view that the relevant claimants had decided to live with their investments, the dishonest representations notwithstanding.

505. A further issue arises in relation to attempts to rescind certain investments in Ilfracombe, where rescission potentially engages the interests of the Tuscola Entities. I understand the issue which may arise here is the possibility that the superior leases have been forfeited for non-payment of ground rent and service charges. I will address those issues

at the consequential hearing following handing down this judgment when the two Tuscola Entities will be represented.

506. However, I can deal with an aspect of the Alpha Defendants' argument. At paragraph 63A of the Re-Amended Defence, it is suggested that Mr Gubbay's companies (including the two Tuscola defendants) have taken possession of the rescinding claimants' properties "and have generated revenue from them, to which the Claimants are entitled as mesne profits. The Claimants have thereby failed to mitigate their loss and/or are obliged to give credit in respect of the same."

507. In fact:

i) There is no evidence before me that any mesne profits have been earned over any particular property, still less in what amount. Each Lead Claimant has their own claim, and the Alpha Defendants would need to plead and prove which Lead Claimant had failed to mitigate their loss and in what amount.

ii) In any event, this would provide no answer to the rescission case. To the extent that any claimant is entitled to rescission, the relevant right (if there is one) will revert (or have reverted) to the Alpha Group selling company.

iii) Finally, I do not accept that the comparatively limited obligation of a victim to mitigate the effects of a fraud extends to bringing litigation against Mr Gubbay's companies. The effect of Mr Kewley's evidence is that Mr Gubbay is a hard-headed businessman, and it is amply clear from the events which were the subject of evidence of this case that any litigation against his vehicles would be hard-fought.

An indemnity

508. The Claimants also seek an indemnity or indemnities in respect of any obligations under the Superior Leases (e.g. ground rent) and in respect of future losses consequent upon the deceit. This raises the issue of whether, and if so to what extent, the risk of the relevant liabilities against which an indemnity is sought is already reflected in the valuations and yields adopted. This point was dealt with rather speedily on the last day of the hearing. In my view, it is better considered at the consequentials hearing with the benefit of my final damages assessments, and when the terms of the indemnities sought have been set out in detail.

Credits

509. The Claimants are required to give credit for amounts paid under the underleases as part of the calculation of their loss.

510. I do not accept that credit must be given for furniture packs:

i) The description of the units in the brochures tended to suggest that they included "a furniture pack" or "high quality furnishings". Whether formally conveyed or not, I am satisfied that property in these units was intended to pass to the purchasers of

unit.

ii) In any event, I am not persuaded on the evidence that this had any impact on the value of the units acquired, and indeed find it improbable that it did.

iii) Nor was any effort made to value this furniture, which I suspect it would have cost the Alpha Defendants more to take possession of than could have been realised from its sale.

Tracing

511. Those Claimants whose claims for rescission are upheld seek directions for such further accounts and enquiries as may be just and appropriate in order to vindicate any proprietary claims that may result from the Court's findings (*El Ajou v Dollar Land Holdings Plc* [1993] 3 All ER 717, 734b-e, per Millett J; *Kazakhstan Kagazy v Baglan* [2021] EWHC 3462 (Comm), [107].

512. I will deal with this issue at the consequentials hearing.

Mitigation

513. With the exception of the suggestion that some claimants were required to give credit for rent allegedly collected by companies owned by Mr Gubbay (see [506]-[507] above), I did not understand the Alpha Defendants to pursue a case that any of the Lead Claimants had failed to mitigate their loss in closing. The burden of pleading and proving such a case, and establishing the amount by which the loss should have been reduced, rested on the Alpha Defendants (*Thai Airway International Public Co Ltd v KI Holdings Co Ltd* [2015] EWHC 1250 (Comm), [33]).

514. I would have rejected any suggestion that any of the Lead Claimants acted unreasonably in not entering into any of the restructuring proposals put forward by the very individuals and companies who had deceived them. The difficulties faced by a disparate and geographically dispersed group of individuals who had been mis-sold "hands off" investments when confronted with the unfolding disaster are readily imagined, and it is easy to see understand why the appointment of office-holders was seen as the best way forward. As it is, it is only with the formation of a committed action group, and considerable tenacity, that the scale of the Alpha Defendants' deceit has been laid bare.

Costs incurred in litigation

515. In closing submissions, Mr Saoul KC accepted that if costs had been incurred in pursuing adversarial litigation (as opposed, for example, to placing companies into administration or liquidation), they should be treated as costs rather than damages. The particular costs which might engage that particular issue are not clear to me but my findings in the following section are subject to that concession.

THE RELIEF SOUGHT BY THE LEAD CLAIMANTS

AA Azure

516. Subject to any issues raised by the Tuscola Entities, I am satisfied that AA Azure is entitled to rescission of the Purchase Agreement and leases for Unit 112 Ilfracombe together with return of the payment price, provided it returns the unit by way of counter-restitution.

517. Further or alternatively, I am satisfied that AA Azure is permitted to recover damages representing the difference between the purchase price and the Determined Value of each of the other units acquired at the date of purchase.

518. I am also satisfied AA Azure is entitled to damages in the amounts pleaded in paragraphs 53.3 to 53.12 of Closing Annex A. There was a challenge to amounts contributed to legal action for Ilfracombe and to take the developer into administration. I am satisfied that the latter amount represents a reasonable response to the position the Alpha Defendants had placed AA Azure in. I did not understand the former to be claimed as damages in the light of Mr Saoul KC's observation in closing (see [513] above).

519. AA Azure must give credit for amounts paid under the various underleases.

520. AA Azure also claims consequential losses on the basis that, if it had not made this investment, it would have made an alternative investment marketed by Aspen Wolfe, for which returns of 7-9% would have been received. That evidence was not seriously challenged, and I therefore accept that this is the alternative investment which AA Azure would have made but for the deception which led to the investments made with the Alpha Group. However, the burden being on AA Azure to calculate its loss, I have concluded that the consequential loss established on the evidence should be calculated at a 7% return, being the lower end of the indicated range.

521. On the basis of that finding, it is not necessary to consider the claim for compound interest as damages at common law for AA Azure.

Mr Longman

522. I am satisfied that Mr Longman is permitted to recover damages representing the difference between the purchase price and the Determined Value of each of the units acquired at the date of purchase.

523. I am also satisfied Mr Longman is entitled to damages in the amounts pleaded in Closing Annex B paragraphs 22.2 to 22.712.

524. Mr Longman must give credit for amounts paid under the various underleases.

525. Mr Longman also claims consequential losses on the basis that, if he had not made this investment, he would have invested elsewhere, either in the financial markets or in the wine market or in a hedge fund, or a mixture. I do not feel able on the evidence to find that there was an alternative investment which Mr Longman would have made, but did not make, because he acquired these units. There are no contemporaneous documents showing active consideration of other investments at this time. The question of what Mr Longman would have done is essentially speculative, and even after making the purchase, he still had cash available for investment. Nor am I persuaded I can assume

that Mr Longman has suffered an investment loss equivalent to that calculated in one of Ms Griffin's scenarios. Mr Longman had to plead and establish on the balance of probabilities the alternative investment which would have been made. No such loss has been established. Warnings are consistently given that investments can go up as well as down, and the court cannot presume, even in favour of the victim of deceit, that every investment made in the counterfactual world would have been profitable. That is one of the reasons why it is important for there to be a more than exiguous case as to what the alternative investment would have been.

526. So far as the claim for compound interest as damages at common law is concerned, in his individual Particulars of Claim, Mr Longman pleads the alternative investments he says he would have made, but no basis for a claim that he either borrowed money at a compound rate, or lost the opportunity to earn such a rate by way of deposit. Accordingly I am not persuaded that this claim is open to him.

Mr Ofor

527. I am satisfied that Mr Ofor is permitted to recover damages representing the difference between the purchase price and the Determined Value of the unit acquired at the date of purchase.

528. I am also satisfied Mr Ofor is entitled to damages in the amounts pleaded in Closing Annex C paragraphs 26.2 to 26.4.

529. Mr Ofor must give credit for amounts paid under the various underleases.

530. Mr Ofor also claims consequential losses on the basis that, if he had not made this investment, he would have invested in a rental property in Nairobi which would have achieved rental of £5,145 a year. However, this appeared in his statement of case, not his witness statement. The assertion is, in any event, devoid of any detail and there are no documents showing an interest in investment in Kenya. The assertion appears to be inconsistent with Mr Ofor's evidence that he wanted to invest "in countries that were linked to strong economies and backed by strong currencies." Nor am I persuaded I can assume that Mr Ofor as suffered an investment loss equivalent to that calculated in one of Ms Griffin's scenarios. Mr Ofor had to plead and establish on the balance of probabilities the alternative investment which would have been made. No such loss has been established.

531. So far as the claim for compound interest as damages at common law is concerned, in his individual Particulars of Claim, Mr Ofor pleads the alternative investments he says he would have made, but no basis for a claim that he either borrowed money at a compound rate, or lost the opportunity to earn such a rate by way of deposit. Accordingly I am not persuaded this claim is open to him.

Mr Vyas

532. Subject to any issues raised by the Tuscola Entities, I am satisfied that Mr Vyas is entitled to rescission of the purchase agreement and leases for Unit 52 Ilfracombe together with the return of the payment price, provided he returns the unit by way of

counter-restitution.

533. Alternatively, I am satisfied that Mr Vyas is permitted to recover damages representing the difference between the purchase price and the Determined Value of Unit 52 at the date of purchase.

534. I am also satisfied Mr Vyas is entitled to damages in the amounts pleaded in Closing Annex D paragraphs 24.2.2 to 24.2.3.

535. Mr Vyas must give credit for amounts paid under the various underleases.

536. Mr Vyas also claims consequential losses on the basis that, if he had not made this investment, he would have invested in an alternative rental property in Leicester with his parents. He was able to provide considerable detail as to the purchase price of the property and the profits which his share would have made, I accept that Mr Vyas has established the consequential loss set out at paragraph 24.2.4 of Closing Annex D, save for the compounding of rent.

537. Having established his alternative investment claim, it is not necessary to consider any claim for compound interest as damages at common law.

HPIL

538. I am satisfied that HPIL is permitted to recover damages representing the difference between the purchase price and the Determined Value of Unit 67 at the date of purchase.

539. I am also satisfied that HPIL is entitled to damages in the amounts pleaded in Closing Annex E paragraphs 26.2 to 26.5.

540. HPIL must give credit for amounts paid under the various underleases.

541. HPIL also claims consequential losses on the basis that, if it had not made this investment, it would have invested in another identified property in Folkestone for which a finalised investment statement was produced identifying the specific property, and its investment outcome. There are documents confirming HPIL's links with the developer of that investment, Roma Capital. Dr Hudson-Peacock's evidence was that HPIL was "thinking about" the Folkestone investment at the same time as the investment made with the Alpha Group. The principal point taken against HPIL's consequential loss claim was that it had the money to make the Folkestone investment as well. However, I do not think HPIL's failure to invest in the Folkestone project *after* it had invested in Unit 67 (even though it had funds to do so) undermines Dr Hudson-Peacock's evidence that it would have invested in the Folkestone property if it had not purchased Unit 67. In this regard, it is significant that HPIL decided to leave cash in the bank, rather than invest in a second Alpha Group proposal. Accordingly, HPIL' claim for loss of profit at paragraph 26.6 of Closing Annex E succeeds.

542. Having established its alternative investment claim, it is not necessary to consider any claim for compound interest as damages at common law.

Lotus

543. I am satisfied that Lotus is permitted to recover damages representing the difference between the purchase price and the Determined Value of the various units it acquired.

544. It is no answer to that claim that it was Mr El-Quqa who, on Lotus' behalf, paid the purchase price. That would have given rise to a liability from Lotus to him, or represented a capital contribution by a shareholder to the company.

545. I am also satisfied that Lotus is entitled to damages in the amounts pleaded in Closing Annex F paragraphs 46.2 to 46.5.

546. Lotus must give credit for amounts paid under the various underleases.

547. Lotus also claims consequential losses on the basis that, if it had not made this investment, Mr El-Quqa himself would have invested the purchase price in various shares on his own account. I am unable to accept this claim for two reasons. First, I accept Ms Page's submission that this would not represent a loss to Lotus. Establishing special purpose vehicles brings both advantages and disadvantages. I do not accept that the separate personality of Lotus can be ignored for the purpose of recovering a loss which, on the evidence, it did not suffer (cf. *Palmali Shipping SA v Litasco SA* [2020] EWHC 2581 (Comm)). Second, I found the evidence as to the shares into which it was said that the purchase price would have been invested on a counterfactual analysis vague and essentially speculative. There is no contemporaneous evidence of Mr El-Quqa considering investing in what have proved to be very profitable shares. This evidence is too exiguous to establish a consequential claim.

548. Nor am I persuaded I can assume that Lotus has suffered an investment loss equivalent to that calculated in one of Ms Griffin's scenarios. Lotus had to plead and establish on the balance of probabilities the alternative investment which would have been made. No such loss has been established.

549. So far as the claim for compound interest as damages at common law is concerned, in its individual Particulars of Claim, Lotus pleads the alternative investment it says it would have made, but no basis for a claim that it either borrowed money at a compound rate, or lost the opportunity to earn such a rate by way of deposit. Accordingly, I am not persuaded this claim is open to it.

Magic Box

550. I am satisfied that Magic Box is entitled to recover damages representing the difference between the purchase price and the Determined Value of Unit 6, Ambleside at the date of purchase.

551. I am also satisfied Magic Box is entitled to damages in the amounts pleaded in Closing Annex G paragraphs 20.2 to 20.4 save for the legal fees, which would have been incurred in purchasing the alternative property which I accept that Magic Box would have purchased if it had not been fraudulently induced into purchasing Unit 6, and the contribution to a fund to explore a private prosecution, which was not concerned with the

enforcement or protection of the private law rights at issue in these proceedings.

552. Magic Box must give credit for amounts paid under the various underleases.

553. Magic Box also claims consequential losses on the basis that, if it had not made this investment, it would have invested in an alternative rental property in York, in a third unit to go with two it already had. Mr Simpson's evidence was detailed and compelling, as Mr Collings KC very fairly acknowledged. However, as the burden of proof lies on Magic Box, I am satisfied that the 27% profit made on one of those existing units, Cherry House, is the best measure of the profit which would have been made on the alternative investment.

554. Having established its alternative investment claim, it is not necessary to consider any claim for compound interest as damages at common law.

Mr Whitefield

555. I am satisfied that Mr Whitefield is entitled to recover damages representing the difference between the purchase price and the Determined Value of Flat 5005, Westbeach at the date of purchase.

556. I am also satisfied Mr Whitefield is entitled to damages in the amounts pleaded in Closing Annex H paragraphs 22.2 to 22.6 and 22.8.

557. Mr Whitefield must give credit for any payments received under the underlease.

558. Mr Whitefield also claims consequential losses on the basis that, if he had not made this investment, he would have invested in an alternative rental property in Devon. Mr Whitefield had already acquired rental properties in North Devon, and was able to quantify his claims by reference to the returns on his existing portfolio. His interest in property in that area is established not merely by these alternative investments, but by this investment. I am satisfied that this claim has been made out on the evidence in the amount claimed at paragraph 14 of his witness statement. It is not, therefore, necessary to consider any alternative claim for compound interest as damages.

The Whittons

559. Subject to any issues raised by the Tuscola Entities, I am satisfied that the Whittons are entitled to rescission of the purchase agreement and leases for Unit 51 Ilfracombe together with return of the payment price, provided they return the unit by way of counter-restitution.

560. I am satisfied that the Whittons are entitled to recover damages representing the difference between the purchase prices and the Determined Values of the following units at the dates of purchase as follows (the claim for this head of damages in relation to Unit 51 being in the alternative to rescission):

    i) Unit 203 in The Box;

ii) Unit E7D in Scholars Village;

iii) Unit 51 in Phase II of Ilfracombe.

561. There are three units which the Whittons have since sold:

i) On 29 June 2023, the Whittons sold Unit 8B of the Foundry for a sale price of £27,5000.00 via a private sale to a developer and Unit 21E of the Foundry for £27,500.00 on the same basis.

ii) On 28 February 2024, the Whittons sold Unit 16 Primrose Hill for £4,765.20 (including legal fees via an auction).

iii) I am satisfied that these resale prices should be used to measure the Whittons' loss. There was no suggestion that they had acted unreasonably in selling the properties nor in the price realised for them. I would have rejected that argument in any event – the Whittons were clearly looking to do their best in a difficult situation, and continued ownership of the properties was an ongoing source of worry and of financial liability for them.

iv) The use of a resale price for the purpose of quantifying damages in a scenario such as this is supported by the decision of the House of Lords in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254, 265-268. It is the difference between the purchase price and that resale price which best represents the loss the Whittons have suffered by reason of having been deceived into entering into these transactions.

v) I am unable to accept the Whittons' further argument that I should adopt the same approach in relation to Unit E7D in Scholars Village, which was put into an auction in May 2024 but failed to reach its reserve price, and in respect of which it is said that I should adopt the highest bid as its value. The resale of property acquired under a transaction induced by an actionable misrepresentation crystallises the claimant's loss, with the claimant no longer being affected by movements in value upwards or downwards. The failure to sell a property at auction has neither of these effects. While I accept that the events at the auction provide some evidence of the value of the property at a particular date, and might also inform the court's assessment when asked to make findings as to its value at a different date, that evidence falls to be assessed as part of all of the available evidence on the topic. Unlike a completed sale at a reasonable time and price, it does not become a data input into the loss calculation in its own right.

562. I am also satisfied the Whittons are entitled to damages in the amounts pleaded in Closing Annex I paragraphs 55.3 to 55.7 (those relating to Unit 51 of Ilfracombe being amounts to be addressed pursuant to the indemnity on rescission if rescission is effective).

563. The Whittons also claims consequential losses on the basis that, if they had not made these investments, they would have invested in rental property in Southampton or Portsmouth in the case of the Box and Scholars Village, and elsewhere in respect of other

investments. The evidence as to the location or type of the alternative properties is vague and there is no information as to how the profit should be calculated. While Mr Whitton states he would have considered an alternative investment in Southampton or Portsmouth, he says no more about what might have been acquired and to what effect. That appears to be the limit of the evidence.

564. I have not been able to find on the balance of probabilities that such alternative investments would have been made or what profits would have been made.

565. Nor am I persuaded that I can assume that the Whittons have suffered an investment loss equivalent to that calculated in one of Ms Griffin's scenarios. The Whittons had to plead and establish on the balance of probabilities the alternative investment which would have been made. No such loss has been established.

566. So far as the claim for compound interest as damages at common law is concerned, in their individual Particulars of Claim, the Whittons plead the alternative investment they say they would have made, but no basis for a claim that they either borrowed money at a compound rate, or lost the opportunity to earn such a rate by way of deposit. Accordingly I am not persuaded this claim is open to them.

Wolfe

567. Subject to any issues raised by the Tuscola Entities, I am also satisfied that Wolfe is entitled to rescission of the contracts it entered into in respect of Unit 21T at Ilfracombe, and consequential relief, but must give counter-restitution by returning the property.

568. I am satisfied that in respect of Unit 3327 at Westbeach, Wolfe is entitled to damages in the amount of the difference between the purchase price and the Determined Value on the date of purchase.

569. I also accept that Wolfe is entitled to damages in the amounts claimed paragraphs 24.4.1 to 24.4.8 of Closing Annex J.

570. Wolfe claims two further losses:

i) Loss suffered in having to withdraw from another rental property investment it had made. This evidence was supported by detail and not challenged, and I accept Wolfe has suffered the loss claimed in paragraph 24.4.9 of Closing Annex J.

ii) Profits which he would have made in an alternative investment in "properties, shares or pension investments". There was no detail as to what the alternative investment would have been and I am not persuaded on the evidence that Wolfe would have made a particular alternative investment which would have generated a quantifiable return. The evidence is simply too exiguous.

iii) Nor am I persuaded that I can assume that Wolfe had suffered an investment loss equivalent to that calculated in one of Ms Griffin's scenarios. Wolfe had to plead and establish on the balance of probabilities the alternative investment which would have been made. No such loss has been established.

571. So far as the claim for compound interest as damages at common law is concerned, in its individual Particulars of Claim, Wolfe pleads the alternative investment it says it would have made, but no basis for a claim that it either borrowed money at a compound rate, or lost the opportunity to earn such a rate by way of deposit. Accordingly I am not persuaded this claim is open to it.

THE COLLECTIVE INVESTMENT SCHEME ALLEGATIONS

Introduction

572. Section 235 of the Financial Services and Markets Act 2000 (**FSMA**) defines a collective investment scheme as follows:

> "(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."

573. With exceptions which are not engaged in this case, collective investment schemes are regulated activities for the purposes of FSMA 2006, and can only be carried on by authorised persons. It is common ground that none of the Alpha Defendants were so authorised. However, the issue of whether the various Alpha Group investment schemes were collective investment schemes is very much in issue, as is the issue of what consequences should follow if they are.

574. In considering the issues which arise as to the application of s.235 of FSMA 2000, it is helpful to identify why schemes with the characteristics of collective investment schemes have been given a particular regulatory status. As Mr Simon Gleeson pointed out in his impressive judgment in *FCA v Forster* [2023] EWHC 1973 (Ch), a "distinction between sales of things and sales of financial investments is an almost universal feature of financial regulatory law", referring in this context to the decision of the US Supreme Court in *Securities and Exchange Commission v WJ Howey Co* 328 US 293 (1946). In

that case, the issue was whether an offering of units of a citrus grove development with a contract for cultivating, marketing and remitting the net proceeds to the investor was an "investment contract", which fell within the regulatory perimeter of the Securities Act 1933, Murphy J stating at 299, 301:

> "The transactions in this case clearly involve investment contracts, as so defined. The respondent companies are offering something more than fee simple interests in land, something different from a farm or orchard coupled with management services. They are offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents.
>
> …
>
> We reject the suggestion of the Circuit Court of Appeals, 151 F.2d at 717, that an investment contract is necessarily missing where the enterprise is not speculative or promotional in character and where the tangible interest which is sold has intrinsic value independent of the success of the enterprise as a whole. The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test be satisfied, it is immaterial whether the enterprise is speculative or nonspeculative, or whether there is a sale of property with or without intrinsic value".

575. Reverting to the United Kingdom context, Lord Sumption explained the manner in which the regulatory perimeter of FSMA 2000 had been drawn in this particular context in *Asset Land Investment Plc and another v The Financial Services Authority* [2016] UKSC 17, where he noted that during the consultation process which preceded Professor Gower's *Review of Investor Protection* (1984) (Cmnd 9215), Pt 1, the issue arose as to whether the regulatory scheme should extend to alternative investments in physical assets such as land etc, as well as unit trusts or futures. Professor Gower expressed the view that where the investor acquired exclusive control of the physical asset rather than really buying rights to share in the income or capital appreciation under an arrangement whereby someone else controlled and managed the physical assets, the regulatory protection scheme should not apply ([4.03], [4.29(a)]). While Professor Gower's recommendations were not directly enacted, the distinction he drew is reflected in s.235 of FSMA 2000. As Lord Sumption noted at [86]:

> "In keeping with the policy objectives identified by Professor Gower, there is an important difference, which runs through the whole of the Act between financial instruments and physical assets. With very limited exceptions, regulated activities must relate to assets … [which] are … financial instruments of one kind or another. Regulated activities as defined do not relate to physical or other non-specified assets. Collective investment schemes are the one exception to this. They may comprise arrangements with respect to 'property of any description'. … The Financial Services and Markets Act 2000 regulates only the indirect sale or holding through collective investment schemes of non-specified assets. It has no application to the direct acquisition, management or disposal of non-specified assets such as land. A huckster may engage in all manner of sharp practice in selling land to consumers, in which case he is likely to fall foul of the common law rules

> concerning misrepresentations and may well infringe consumer protection legislation … But he will not be carrying on an activity regulated by the Financial Services and Markets Act 2000, and will not in general fall under the regulatory powers of the Financial Conduct Authority."

576. Finally, so far as the "collective" nature of the investment is concerned, in *Financial Conduct Authority v Capital Alternatives* [2015] EWCA Civ 284, [24], Christopher Clarke LJ noted:

> "The purpose of the section is to provide protection for an investor in a collective investment where there is pooling of (a) contributions and income/profits and/or (b) collective management. In such circumstances the operator is not, or may not be, dealing with the characteristics and needs of each individual investor, or his appetite for risk, or his need for income or capital, but with the operation of the scheme, and the assets forming part of it, as a whole. The investor's individual interests may thus be subordinated to the interests of the scheme as a whole."

577. Against that background, I turn to consider the specific elements of s.235, and whether they are satisfied in this case.

Section 235(1): an arrangement with respect to property.

578. It is established that "arrangements" is a broad and untechnical word, which must be applied in that spirit. In *Asset Land*, [91], Lord Sumption stated:

> "'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 and not with what was done thereafter. Of course, what was done thereafter may throw light on what was originally understood. It may for example serve to show that some record of the understanding was a sham. It may found an argument that the arrangements originally made were later modified. But it must be possible to determine whether arrangements amount to a collective investment scheme as soon as those arrangements have been made."

579. For the purpose of identifying whether there is an "arrangement with respect to property", the court is not confined to considering the legal effects of the formal contractual documentation, but it should also have regard to the manner in which the scheme was promoted (*FCA v Forster*, [119]-[120], [127]; *Asset Land*, [54]).

580. The term "property" is broadly defined ("of any description"). There was no dispute that the Alpha schemes as promoted in the brochures were "arrangements with respect to property." However, it may be helpful for the purposes of the further issues which arise to define what the "property" is for s.235(1) purposes. In *FCA v Forster*, [125], a case in which individual rooms in care homes were sold to investors, Mr Simon Gleeson held

that the "property" was not limited to the asset acquired by an individual purchaser, but comprised the care home in which individual rooms were sold, the amounts paid by investors to the extent not applied and any other property derived from renting out the rooms save for those amounts paid to investors pursuant to their individual income entitlements. I agree with that broad characterisation, those being the assets of the enterprise which was to generate the profits or income in which the investors were intended to participate. That included communal facilities in any of the scheme properties (*FCA v Capital Alternatives Ltd* [2015] EWCA Civ 284, [48]).

"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 from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income"

581. It has been noted that this element of s.235(1) embraces both the manner in which the scheme is presented ("the purpose") and the consequences of the way in which it is operated ("the effect") (*Forster*, [127]). In this case, I am satisfied from the promotional material authorised by the Alpha Defendants that the purpose of the Alpha Group investment schemes as presented was for the investors to participate in the profits or income generated through the management of the various *sites* by the letting out the individual units, and ancillary income streams. As is clear from the findings set out above, the essence of the scheme being sold was the notion that each site could generate enough income to pay the promised returns, and the importance of that aspect of the investments is reflected in the Substance Representation which it is conceded was made. That reflected the fact that it was a participation in the relevant site which was being offered and invested in, the guaranteed net return notwithstanding. For so long as payments were made (as they initially were), that was also the broad effect of the scheme (payments being made from the profits of renting and retained amounts received from investors under the Purchase Agreement). Clearly an aspect of the scheme was that, if occupation was less than 100%, any investors' flats left empty would still benefit from the operation of the site as a whole.

582. It is clear that it can be the purpose or effect of a scheme that the investor should "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" (emphasis added) even if the scheme promises a fixed return, payable whatever the yield of the property. That is clear from the use of "participate in" as an alternative to "receive" and the fact that it is enough the investor is to participate in or receive "sums *paid out of* such profits or income." This interpretation has been confirmed by case law:

    i) *Anderson v Sense Network* [2018] EWHC 2834 (Comm), [177] in which Jacobs J observed "[i]t 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.'

ii) That determination was upheld by the Court of Appeal, [2019] EWCA Civ 1395, [73]-[74]. At [73], David Richards LJ noted:

> "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'."

iii) In *Forster*, [112], Mr Gleeson noted that "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."

iv) Mr Gleeson continued at [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)."

583. Those conclusions, with which I respectfully agree, answer any suggestion that the fixed nature of the promise returns prevented the Alpha Group's investment offering from being a collective investment scheme.

Are the Alpha Schemes ones in which the investors do not have day to day management of the property (whether or not they have the right to be consulted or to give directions)?

584. In answering this question, the court's focus is on the activities of management which are to be the source of the profits in which the investor is to participate, (or to share in sums paid out of such profit or income): *Asset Land*, [33]-[34]. *Re Sky Land Consultants Plc* [2010] EWHC 399 (Ch), [76], [79]; *Financial Conduct Authority v Capital Alternatives Ltd* [2015], [85], [120]. In this case, that is the management of the property (sourcing tenants, preparing the properties for letting, handling the contracts and administrative arrangements with incoming and outgoing tenants, maintaining the properties so that they could be let, collecting rent and enforcing the terms of letting, managing any ancillary income streams). I will refer to these collectively as the "letting activities".

585. It cannot be seriously argued that the investors had day-to-day control of the letting activities. This was carried on by the managing agents appointed under the Superior Leases. There was a faint suggestion that the provision in the Superior Leases by which the investors agreed to become members of the management companies if requested to do so was sufficient to give them day to day control of the letting activities. However, the investor had no right to membership without a request, and the Alpha schemes as promoted in the brochures made it clear that this was to be a passive, "hassle free", investment in which the investors could and would want to leave management to others. This was the "reality" of how the Alpha Schemes were to operate (*Asset Land*, [59]). One of the selling points of the various projects consistently stated in the brochures was that the sites would be centrally managed by an experienced management company and that investors would have no involvement in the management of the sites. None of the Lead Claimants were members of the management companies prior to the collapse of the schemes.

586. In any event, such control as an investor might acquire by becoming members of the management company could not be said to amount to "day to day" control. It would be akin to the position of a shareholder, able to give directions in conjunction with other shareholders through the exercise of the voting rights at general meeting, but not in day-to-day management of the company's operations.

Were the contributions of the participants and the profits or income out of which they were to be made pooled?

587. In *FCA v Capital Alternatives* [2014] EWHC 144 (Ch), [159], Nicholas Strauss KC observed that "there appears to be no authority on the meaning of pooling of profits or income … In my opinion, it 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." It is not only profits or income which must be pooled, but contributions as well.

588. In this case, the investors in the various Alpha schemes contributed their individual units for collective management, and thereby pooled them. I note that it was common ground in *FCA v Capital Alternatives* [2015], [25] that there had been pooling of contributions when the scheme involved owners of individual plots of land placing them under common management as part of the scheme.

589. Were the profits or income "out of which" the investors were to be paid pooled? Once again, the answer in my judgment is clearly yes. The words "out of which" naturally extend to a position in which the economic activity of letting the units is expected to generate profits which will be the source of the payments to investors, nonetheless so because there is a fixed payment obligation which applies regardless of how unsuccessful (or successful) that economic activity is. In this case, the payments made to investors were not in any way limited to the net profit derived from renting out their unit (even in cases where the full amount due to all investors could not be paid). For the reasons set out earlier in this judgment, the brochures consistently suggested that it was the operation of the site as a whole which would generate the amounts which would pay the fixed returns. At each site, the rents received were paid into a single account, and any net

returns paid from that same account for the purpose of paying investors. The purchase prices paid by investors were used to defray common construction costs and investor returns generally. Indeed, as I have noted at [171] above, Mr Kewley told an investor on 8 December 2015 that "when we calculate the rent guarantees across any site we do so on the basis of the entire site, not the individual units. So the income for your units will simply form part of the income generated across the full site ….". No clear confirmation of pooling could be required.

Was the property managed as a whole by or on behalf of the operator of the Alpha Schemes?

590. Given my conclusion on s.235(3)(b), this issue does not strictly arise, but in any event this requirement is also satisfied.

591. "The property" for this purpose is that identified in s.235(1), not the lease obtained by the individual investor (*FCA v Capital Alternatives Ltd* [2015], [48]). In that case, at [72]. Christopher Clarke LJ held that determining whether that property is managed as a whole "requires an overall assessment and evaluation of the relevant facts", identifying what is "the property", and what is the management thereof which is directed towards achieving the contemplated income or profit. He stated that "it is not necessary that there should be no individual management activity — only that the nature of the scheme is that, in essence, the property is managed as a whole, to which question the amount of individual management of the property will plainly be relevant."

592. In *Forster*, Mr Gleeson found that property was "managed as a whole" when investors invested in leasehold rooms in a care home, and their entitlement was not limited to revenues arising from their specific room, but rather the revenues of the portfolio as a whole were used to pay the community of investors as a whole ([29]). That was also the position here. Indeed Mr Sullivan confirmed that, in the student properties, rent was paid by students into ASM's rent account, and investors were paid out of that account, topped up by monies originating in the operation of other companies within the Alpha Group.

The consequences of my finding that the investment schemes in issue were Collective Investment Schemes

Was the general prohibition in s.19(1) breached?

593. Section 19(1) of FSMA 2000 provides that no person may carry on a regulated activity in the United Kingdom (or purport to do so) unless he is an authorised person or an exempt person. Establishing and operating collective investment schemes is a "regulated activity" (Article 51ZE of the Financial Services and Markets Act 2000 (Regulated Activities) Order (2001/544) (**RAO**). In *Various Angelgate and Baltic House Claimants v Key Manchester Ltd* [2020] EWHC 3643 (Ch), the court held that "establishing" a collective investment scheme meant setting one up, and operating an investment scheme meant "running or managing" one ([27], [31]). Selling units in a collective investment scheme is also a regulated activity (Article 14 of the RAO).

594. There can be no doubt that the companies which sold units to investors, the companies which entered into the underleases and the management companies designated in the

original contractual documentation were engaged in establishing and operating collective investment schemes. As none of them were authorised to do so, it follows that they all breached the general prohibition in s.19(1) of FSMA 2000.

The effect on the enforceability of the agreements constituting the collective investment scheme

595. Section 26 of FSMA 2000 provides:

> "(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.
>
> (2) The other party is entitled to recover–
>
> (a) any money or other property paid or transferred by him under the agreement; and
>
> (b) compensation for any loss sustained by him as a result of having parted with it.
>
> (3) *'Agreement'* means an agreement–
>
> (a) made after this section comes into force; and
>
> (b) the making or performance of which constitutes, or is part of, the regulated activity in question.
>
> (4) This section does not apply if the regulated activity is accepting deposits."

596. The result is that the investors may at their election enforce the agreements, or claim their entitlement under s.26(2): *Re Whiteley Insurance Consultants (a firm)* [2009] Bus L.R 418, [25]. An investor who elects to recover monies paid or property transferred under an agreement entered into in contravention of s.19(1) of FSMA 2000 must repay any money paid or property transferred to them: s.28(7) which provides:

> "If the person against whom the agreement is unenforceable–
>
> (a) elects not to perform the agreement, or
>
> (b) as a result of this section, recovers money paid or other property transferred by him under the agreement,
>
> he must repay any money and return any other property received by him under the agreement."

Section 21 of FSMA 2000

597. Section 21 of FSMA 2000 provides that "a person … must not in the course of business, communicate an invitation or inducement to … engage in investment activity.":

i) "Communicate" for this purpose includes causing a communication to be made: s.21(13).

ii) "Engage in investment activity" is defined as "entering or offering to enter into an agreement the making or performance of which by either party constitutes a controlled activity": s.21(8).

598. In this case, the relevant controlled activity is selling units in a collective investment scheme (the combined effect of paragraphs 3 and 25 of Schedule 1 to the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005).

599. Whether someone has communicated an invitation or inducement to engage in investment activity is to be determined objectively, the question being whether a reasonable observer, taking account of all relevant circumstances, would (i) consider that the communicator intended the communication to persuade or incite the recipient to engage in investment activity or its purpose; and (ii) regard the communication as seeking to persuade or incite the recipient to engage in investment activity: *FCA v 24Hr Trading Academy Ltd* [2021] EWHC 648 (Ch), [71].

600. I have found that Mr Kewley and Mr Spence authorised and approved the contents of the EPL marketing brochures on behalf of the Alpha Group companies who entered into the relevant transactions with the investors. Those companies thereby caused EPL to communicate an invitation or inducement to potential investors to participate in an investment activity. Section 25 of FSMA 2000 provides:

> "Contravention of section 21.
>
> (1) A person who contravenes section 21(1) is guilty of an offence and liable–
>
> (a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both;
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.
>
> (2) In proceedings for an offence under this section it is a defence for the accused to show–
>
> (a) that he believed on reasonable grounds that the content of the communication was prepared, or approved for the purposes of section 21 in accordance with subsection (2A) of that section, by an authorised person; or
>
> (b) that he took all reasonable precautions and exercised all due diligence to avoid committing the offence."

601. The Alpha Defendants have raised the application of s.25(2)(b) on their pleadings, but Mr Collings KC confirmed in closing that that sub-section (setting out a defence to an offence created by FSMA 2000) was not relevant to the issues I had to decide. The Alpha

Defendants do, however, rely on the steps said to have been taken to ensure that this was not an unauthorised collective investment scheme as a reason why the court should order the enforcement of the various agreements, relying in this regard on the following sub-sections of s.28:

> "(3) If the court is satisfied that it is just and equitable in the circumstances of the case, it may allow–
>
> (a) the agreement to be enforced; or
>
> (b) money and property paid or transferred under the agreement to be retained.
>
> (4) In considering whether to allow the agreement to be enforced or (as the case may be) the money or property paid or transferred under the agreement to be retained the court must–
>
> (a) if the case arises as a result of section 26, have regard to the issue mentioned in subsection (5); or
>
> (b) if the case arises as a result of section 27, have regard to the issue mentioned in subsection (6).
>
> (5) The issue is whether the person carrying on the regulated activity concerned reasonably believed that he was not contravening the general prohibition by making the agreement.
>
> (6) The issue is whether the provider knew that the third party was (in carrying on the regulated activity) contravening the general prohibition."

602. For the purposes of s.28(3) to (6):

i) The court's focus is on the circumstances of the individual case, those in which the agreement was made and subsequently performed: In *re Whiteley.*

ii) Section 28(5) involved both a subjective test as to what a person believed, and an objective test as to whether that belief was reasonable: *Jackson v Ayles* [2021] EWHC 995 (Ch), [53].

iii) Legal advice received can be a relevant factor: *Helden v Strathmore Ltd* [2010] EWHC 2012 (Ch), [97(i)].

603. At the forefront of the Alpha Defendants' submissions on the issues raised by sections 21 and 28 of FSMA 2000 was that "numerous unrelated legal advisers verified the so-called Investment Schemes as being compliant".

604. My factual findings on this issue are as follows:

i) Mr Kewley and Mr Spence, and through them the relevant Alpha Group companies, were aware from an early stage of the need to consider whether their

business proposal was a collective investment scheme. This issue was discussed at a meeting in June 2010 with Daniel Stokes of Barrasford & Bird when discussing a (different) fractional ownership model.

ii) It was conceded that Mr Kewley was independently aware of the risks of development structures being construed as unregulated collective investment schemes from his background in financial services.

iii) Notwithstanding this, Mr Spence assisted by Mr Kewley had already begun selling units in Westbeach Phases 1 and 2 before any approach was made to Jacksons to draft contractual documentation, and reservation fees for the whole of the top floor. That is telling, because it shows the readiness of Mr Kewley and Mr Spence to run the risk of selling unauthorised collective investment schemes before receiving any legal advice.

iv) It is clear that Mr Kewley's evidence seriously overstated the position when he claimed that "we made very specific instructions to the solicitors when the initial contract documents were set up to ensure that they weren't" a collective investment scheme. No request for advice on this issue features in the documented exchanges between Mr Kewley and Jane Armitage of Jacksons on 25 and 26 August 2010 when Jackson gave a quotation for preparing the contract documents for the buyer's package of £5,000-£7,500 plus £200 and disbursements for each individual unit.

v) The highlight of the Alpha Defendants' case is a four line email of 27 August 2010 from Mr Kewley to Ms Armitage, in advance of a scheduled meeting, saying that it "might be a good idea to have the benefit of a full IFA at the meeting just to make sure we don't build anything into the product structure that might be construed as an FSA regulated investment or unregulated collective investment scheme", with a suggestion that Martin Walker, of Argentum Lex, attend the meeting with Jacksons.

vi) However, there is no evidence of any such discussion taking place at the meeting, still less one in the course of which Jacksons provided advice. There is a detailed file note taken by Jacksons of a meeting of 1 September 2010 attended by Jane Armitage and Erica Doe of Jacksons, Mr Kewley, Mr Spence and Mr Walker. There is no reference to FSMA 2000 or collective investment schemes in that note, Mr Wentworth attended to discuss the partnership and trust implications of fractional ownership, but no regulatory issues were discussed. There is only one email available from Mr Wentworth, and that only addresses issues arising from the use of limited liability partnerships.

vii) Nor is there any mention of the provision of advice on this issue in Jacksons' engagement letter of 8 September 2010 which set out the "objective and scope of services" of the Jacksons' engagement.

viii) A further detailed note of a meeting of 16 November 2010 attended by Ms Armitage and Ms Doe of Jacksons, Mr Kewley, Mr Spence, Mr Walker and Alison Goncalves also contains no reference to FSMA 2000 or collective investment

schemes.

605. I am not persuaded, therefore, that Jacksons were asked to or did advise on this issue. Nor am I persuaded that I can infer from the fact that Jacksons drafted the documents which were used that this involved some form of implicit confirmation on their part that the collective investment scheme issues has been addressed. Advising on the collective investment schemes implications of what was proposed would have been a task of obvious significance, requiring careful consideration of the nature of the scheme, how it would operate in practice and the legal regime. Giving a positive opinion on this issue would have involved a significant assumption of responsibility on a law firm's part, with the potential for significant downside if a positive opinion was offered which turned out to be wrong. Before any opinion was given, significant work would have been required (which would have been charged for), and the eventual view made subject to appropriate caveats. There is no evidence that any of this took place, and if it did, it would have undoubtedly left a significant set of documentary footprints. This does not require me to treat the few documents relied upon by the Alpha Defendants in this context as the laying of a false trail. The reality is that having floated the point, Mr Spence and Mr Kewley chose not to press this issue, perhaps because Jacksons made it clear it was a difficult, complex and costly question, perhaps because they formed a sense that they might not like the advice they would get.

606. The proposal at the time of the Jacksons' meeting was, in any event, difference to that which was later rolled out across the many investment schemes at issue in this trial. For the Alpha Defendants to have reasonably relied on legal advice had it been given – contrary to my view that it was not – they would have had to provide the legal advisers were an accurate description of how the schemes would operate, including the handling and treatment of cash in common accounts.

607. Nor am I persuaded that the issue was considered by the law firms subsequently retained by the Alpha Defendants who used the documentary precedents prepared by Jacksons – Richard Reed and PG Legal. Indeed this suggestion was not pressed.

608. So far as later communications are concerned:

i) On 4 August 2015, the Financial Conduct Authority raised the collective investment scheme issue with Mr Crump who passed the query onto Mr Kewley. Mr Kewley said "we looked into this extensively with solicitors several years ago and it's not a collective investment … None of our schemes are collective investments as buyers do not pool their funds." Both the statements that the matter had been looked at extensively with solicitors previously, and that none of the Alpha Group schemes involved pooling of funds, were false, as Mr Kewley must have known. As I have noted, he was saying the very opposite to an investor who questioned the viability of one scheme in December 2015.

ii) On 29 June 2017, Mr Dean of PG Legal raised the topic with Mr Kewley after the collective investment scheme issue had been raised by another solicitor in relation to a different scheme. Mr Kewley replied that they had "already been through all this – the FCA (or FSA as it was then) even launched an investigation into

Emerging Property several years ago and we were given the all clear. The problem with Mark's scheme is he is pooling money together to cover rent in the early years – we don't do that." Once again, Mr Kewley was not telling the truth when he stated that the issue had been gone through, and while the FCA had not pursued the matter, it did not approve the schemes. Further, the Alpha schemes did pool money, just like the scheme Mr Kewley referred to (through the mixture of funds within A1 Alpha, Green Parks Holidays Limited and Green Parks Holidays (Ilfracombe) Limited and the "soft loans" from other group companies from sales proceeds received).

iii) On 3 December 2018, Mr Kewley wrote to PG Legal discussing the consequences of the fact that the promised rent payments would no longer be made, and raising the issue of how making payments from the net income of the properties should be approached having regard to the collective investment scheme issue. The query did not refer to any earlier advice, but I accept that it provides support for the suggestion that Mr Kewley thought that the fact that guaranteed returns were no longer to be paid could be a material factor. Mr Fletcher of PG Legal responded by stating that the approach the firm had adopted on other schemes was that the rent "earned" by a landlord was related to the property they owned. He expressed a concern as to the position if payments were made from pooled earnings from a number of units (as had always been the case under the Alpha Group schemes). Mr Kewley wrote to Mr Spence saying he had been worrying about the same thing, and that payments should be linked to whether a particular investor's unit was let out. That email evidenced a sophisticated awareness on Mr Kewley's part as to the features which gave rise to a collective investment scheme and the obvious hazard which a pooling model entailed, it being well-known to Mr Spence and Mr Kewley that the Alpha Group projects involved pooling of receipts and expenses.

609. Against this background, I am satisfied that at all material times Mr Kewley and Mr Spence's state of mind was as follows:

i) They were aware of a risk that their business model might constitute an unauthorised collective investment scheme.

ii) They did not seek legal advice on this issue, content to avoid directly confronting the question.

iii) They were aware that there was an argument that the fixed returns might take the schemes outside of the scope of the FSMA 2000 regulatory net, but received no advice on the merits of that argument.

iv) They were content to operate on the basis of a known and appreciable risk that the schemes might constitute an unauthorised collective investment scheme.

610. In these circumstances, I am not persuaded that Mr Kewley and Mr Spence, and thus the companies for whom they were acting, reasonably believed that they were not contravening the general prohibition through the various investment schemes. It follows that I am not persuaded that it would be just and equitable in the circumstances of the case to allow any of the agreements constituting the unauthorised collective investment

schemes to be enforced, nor the money and property paid or transferred under the agreements to the various Alpha Group companies to be retained.

Compensation claims under s.26(2)(b) of FSMA 2000

611. Finally, an issue arises as to the scope of the obligation to pay compensation under s.26(2)(b) of FSMA 2000.

612. First, it is not disputed before me that the obligation is owed by the contractual counterparties and not (for example) Mr Kewley and Mr Spence as de jure and de facto directors of those companies: see by analogy *SIB v Pantell (No 2)* [1993] Ch 256; [270] and *Brown v InnovatorOne Plc* [2012] EWHC 1321 (Comm), [1231]-[1239]. I would note that a separate issue might arise as to whether there could be liability under FSMA 2000 on a joint enterprise basis, which Walker J left open in *Bull v Gain Capital Holdings Inc* [2014] EWHC 539 (Comm), [198]-[210]. There was no argument to the effect that the statutory scheme itself precluded reliance on a breach of FSMA 2000 as the unlawful means in an unlawful means conspiracy.

613. Second, there is the measure of compensation. Section 26(2)(b) allows recovery for money or property transferred under the unenforceable agreement, and in addition compensation for any loss sustained by the investor as a result of having parted with it (i.e. having parted with the money or property transferred).

614. There is an oddity about s.26(2)(b). As a provision which applies to offer restitutionary and compensatory relief where a transaction is held to be unenforceable, it might have been drafted to achieve something similar to *restitutio in integrum* of the kind which follows rescission of a contract. That would include an indemnity for losses or liabilities incurred by the purchaser in making or following the sale (e.g. in this case legal fees, service charges and council tax) but not consequential damages (e.g. loss of the opportunity to conclude an alternative profitable transaction). However, the language of s.26(2)(b) and its focus on loss caused by the making of *the transfer* would appear to preclude compensation of the former kind.

615. Does s.26(2)(b) permit recovery of loss of the latter kind? In *In re Whiteley Insurance Consultants* [2008] EWHC 1782 (Ch) [27]-[28], David Richards J held:

> "All policyholders from the earlier period who claim a return of the premiums paid by them are also entitled to claim compensation under section 26(2)(b) for any loss sustained by them as a result of parting with the premiums. As Scott LJ observed in *Securities and Investments Board v Pantell (No 2)* [1993] Ch 256, 270 on section 5 of the Financial Services Act 1986, it combines a restitutionary remedy and a compensatory remedy. Compensation for the interest which could have been earned on the premiums would certainly be within section 26(2)(b), but it may be that if a party could establish that he had paid the premium out of borrowed money he could recover the actual costs of borrowing incurred by him. The precise scope of the remedy provided by section 26(2)(b) raises difficult issues. Would it for example extend to profits which would have been earned on an alternative use of the money which the claimant can establish he would have pursued, or do the words 'as a result of having parted with it' confine the remedy to more direct losses

> such as interest or, in the case of other property such as shares transferred by the investor under an agreement, dividends and other benefits which the investor would have received on the shares if he had retained them? By providing a substantive remedy for the loss of the use of money, section 26(2)(b) foreshadows the developments in the common law established by the House of Lords in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2008] 1 AC 561 and assistance by way of analogy may be obtained from the speeches in that case. It should be noted that the remedy actually established by the claimant in that case was for unjust enrichment, i.e. a disgorgement of the benefit obtained by the defendant, rather than as here a remedy to compensate the claimant for his loss, but compensatory remedies are extensively discussed in the speeches.
>
> This is not the case in which to explore the extent of the remedy under section 26(2)(b). The individual sums at stake in this case are small."

616. In circumstances in which s.26(2)(b) is addressing the consequence of an agreement being unenforceable, rather than providing a remedy for a private law wrong, still less one necessarily involving dishonesty where the "alternative transaction" loss is perhaps most commonly encountered, it can be argued that the words "as a result of having parted with it" are concerned with the *direct* consequences of the payment or transfer, and are not wide enough to embrace alternative use compensation of the *East v Maurer* kind. However, I can also see a strong argument that if interest which would have been earned on the amount transferred is recoverable, or the fruits of a transferred asset such as dividends on transferred shares, then the "fruits" of the transferred amount in other forms such as in an alternative investment which would have been made with the transferred asset should also be recoverable. Fortunately, it is not necessary to decide this issue, because in those cases where consequential loss of this kind is made good on the facts, the loss is recoverable in deceit.

617. That leaves the issue of whether s.26(2)(b) compensation extends to liabilities incurred to third parties, such as service charges and council tax and, indeed, sums paid to third parties for the purpose of entering into the unenforceable transaction (legal fees). This would only appear to matter in this case of Wolfe, who has not sought rescission of the purchase agreement for its Ambleside unit where these losses could be the subject of an indemnity, and, even in that case, Wolfe has its claim for damages for deceit. Had it been necessary to decide this issue, then I would have had difficulty in construing s.26(2)(b) as extending to losses caused not by the transfer itself, but by entering into the transaction which the court has held to be unenforceable – whether those losses comprised pre-transaction costs such as legal fees, or liabilities to third parties which arose in respect of what the investor received in return for the transfer. Had s.26(2)(b) been intended to award compensation for loss resulting from the entry into the unenforceable transaction, it would have been very easy to say so.

618. I accept that it would be possible to advance a claim for compound interest under s.26(2)(b), and inconsistent with the views of David Richards J in *In Re Whitely*. However, such a claim would have to be pleaded and proved, just as when compensation for a loss of this kind is sought by way of damages for a breach of contract or tort: see [59]-[69] above.

The FSMA 2000 remedies sought by the Lead Claimants

619. On the basis of the Lead Claimants' closing submissions, the following Lead Claimants seek relief under s.26 of FSMA 2000 in respect of Ilfracombe units in the alternative to claims for rescission in equity:

i) AA Azure.

ii) Mr Vyas.

iii) The Whittons.

iv) Wolfe (who also seek s.26 relief in respect of Unit 4 Ambleside).

620. In each case, I am satisfied that the relevant investor is entitled to:

i) a declaration that the agreements entered into with Alpha Group companies in respect of the investment in the Ilfracombe unit is unenforceable within s.26(1) of FSMA 2000; and

ii) recovery of the purchase price under s.26(5)(a) of FSMA 2000.

621. The requirements for allowing the agreements to be enforced under s.28(3) of FSMA 2000 are not met.

622. These investors must return the units to the sellers under s.28(7) of FSMA 2000.

623. I have not found it necessary to determine whether AA Azure and Mr Vyas can recover the losses suffered in respect of the alternative investment under s.26(5)(b) of FSMA 2000 (the alternative investment claims of the other Lead Claimants seeking s.26 relief having failed on the facts) because those amounts are recoverable as damages for deceit in any event.

624. None of the Lead Claimants (including, for the avoidance of doubt, AA Azure and Mr Vyas) can recover compound interest under s.26(5)(b), such claims not having been pleaded and proved.

THE UNLAWFUL MEANS CONSPIRACY CASE

The ingredients of the tort

625. The ingredients of a claim for unlawful means conspiracy are set out in *Kuwait Oil Tanker Co SAK v. Al Bader* [2000] 2 All ER (Comm) 271 (CA), [108]:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

626. *Combination*: In *Ivy Technology v Martin & Bell* [2022] EWHC 1218 (Comm), [582]-[583], Henshaw J summarised the legal requirements as follows:

> "i) The combination must be to the effect that at least one of the conspirators will use unlawful means …
>
> ii) It is unnecessary, in order for a combination to exist, that it be contractual in nature or that it be an express or formal agreement …
>
> iii) It is enough for liability to arise that a defendant be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. However, the conspirators do not need to have exactly the same aim in mind ...
>
> iv) Direct evidence of the combination is not essential. It is also unnecessary for the claimant to pinpoint precisely when or where it was formed …
>
> v) Participation in a conspiracy is infinitely variable and may be active or passive. The courts recognise that it will be rare for there to be evidence of the agreement itself ...
>
> It is necessary to look at all the particular facts of the case to establish whether there was a combination and whether someone participated, actively or passively, in the conspiracy. Being aware that someone was committing a potentially unlawful act, but (simply) not taking steps to stop it, may not suffice to demonstrate a combination, but it all depends on the circumstances, and in particular the position of the individual concerned …"

627. A director can conspire with a company of which he is a director: *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2010] EWHC 774 (Ch), per Morgan J at Annex I [77]. This is a stronger case than a conspiracy between a director and a one-man company – the companies had separate roles in the overall scheme to promote these investments, concluding separate transactions, but with the roles of each ultimately controlled by Mr Spence and Mr Kewley.

628. *Intention*: In an unlawful means conspiracy, the required intention was summarised by Bryan J in *Lakatamia Shipping Co Ltd v Su* [2021] EWHC 1907 (Comm), [91] as follows:

> "The intention to injure element will be satisfied simply where the 'gain to the conspirators is necessarily at the expense of loss to the victim'- see *Palmer* at [219], and at [220]-[222] per Judge Russen QC. It is 'no defence for [a defendant] to show that their primary purpose was to further or protect their own interests …' - see *Lonrho Plc v. Al-Fayed (No.1)* [1992] 1 A.C. 448 , 466A per Lord Bridge. Whether a defendant had the requisite intention to injure 'and therefore had joined the combination turns on whether they knew about the alleged conspiracy. Knowledge includes "blind eye" or "Nelsonian" knowledge as well as actual knowledge': see *Manek v. Wirecard AG* [2020] EWHC 1904 (Comm), at [45] per

Sir Ross Cranston."

629. *Knowledge*: On the current state of the authorities below the Supreme Court, it is clear that it is not necessary for the conspirators to know that the means to be employed are unlawful, provided they have knowledge of all the facts which make the means unlawful: *Racing Partnership v Done Bros* [2020] EWCA Civ 1300, [133], [139] and [171] following *Belmont Finance v Williams Furniture* [1980] 1 All ER 393. Lewison LJ dissented, preferring observations in *British Industrial Plastics v Ferguson* [1938] 4 All ER 504 and *Meretz Investments v ACP* [2008] Ch 244 to the effect that there might be a defence based on a belief that the defendant's acts were lawful. However, I would note that, even in this context, *Meretz* contemplates a positive belief in a legal right to act in a particular way, which is not made out on the facts here. As Mr Saoul KC noted, while concerned with accessory liability for a strict liability tort, the Supreme Court in *Lifestyle Equities CV v Ahmed* [2024] UKSC 17, [135] holds that the knowledge required for accessory liability in that context is knowing the essential facts which make the primary wrongdoer's acts tortious, not knowledge of the fact that the acts constitute a tort.

630. As is usually the case, "blind eye" knowledge is sufficient, namely "a suspicion that certain facts may exist, and a conscious decision to refrain from taking any step to confirm their existence" (*Ivy Technology Limited v Martin*, [589]).

631. *Unlawful means*: the concept of "unlawful" means extends to "all acts a defendant is not permitted to do, whether by the civil law or criminal law" (*OBG v Allan* [2007] UKHL 21, [162]). It was not disputed before me that both the tort of deceit (ibid, [49]) and acts which are contrary to FSMA 2000 (*Trafalgar v Hadley & Others* [2023] EWHC 1184 (Ch), [312]) can constitute unlawful means for this purpose.

632. *Loss*: Damages for conspiracy are at large (see e.g. *Capital for Enterprise Fund a LP v Bibby Financial Services Ltd* [2015] EWHC 2593 (Ch), [14]).

Unlawful means conspiracy: deceit

633. I am satisfied that Mr Spence was party to an unlawful means conspiracy in relation to the sale of units in Westbeach Phases 1 and 2, together with Green Parks (Holdings) Ltd, Green Parks Holidays Ltd and the Alpha Group management company designated in the contracts entered into by investors when acquiring their unit(s), to cause loss to investors in Westbeach Phases 1 and 2 by inducing them through the making of dishonest statements to enter into disadvantageous contracts. The knowledge of Mr Spence is attributable to the corporate participants in the investment scheme, who were essentially acting under his direction. The unlawful means – the deceit – were the means by which the loss was inflicted, as they induced the investors to enter into the loss-making contracts.

634. In relation to all of the other schemes, and sales of Westbeach from October 2013 onwards, I am satisfied that Mr Spence and Mr Kewley were parties to a series of unlawful means conspiracies to cause loss to investors in those schemes by inducing them through the making dishonest statements to enter into disadvantageous contracts to acquire units in those investments:

i) For each investment, there was a single unlawful means conspiracy between Mr Spence, Mr Kewley, the company which sold units to the investor, the underlessee and any management company designated in the contractual documentation by which the investors purchased their unit. In circumstances in which the management company, to whom Mr Spence and Mr Kewley's knowledge was attributable, as an intended participant in the structure to which the investor was signed up, I am satisfied it is appropriately treated as a party to the conspiracy, Mr Spence and Mr Kewley co-ordinating the activities of a number of corporations they controlled, each with its own part to play in the wider scheme.

ii) The knowledge of Mr Spence and Mr Kewley is attributable to the corporate participants in the investment scheme, who were essentially acting under their direction.

iii) The unlawful means – the deceit – were the means by which the loss was inflicted.

635. Mr Spence and Mr Kewley were clearly working together to enrich themselves through the investment schemes, and using the Alpha Group companies within their control as part of the scheme. The Alpha Defendants have submitted that "the credibility of the conspiracy claim suffered from it being initially alleged to have been a conspiracy including Mr Crump to Mr Crump now effectively being a victim" and "from Mysing not being alleged to be co-conspirators". As to this:

i) In *Hotel Portfolio II Limited v Ruhan and Stevens* [2022] EWHC 383 (Comm), [202]-[203] I noted:

> "It is frequently argued by defendants in dishonesty cases that if the fraud alleged took place, various other persons not before the court must have been complicit in it. This can be a very effective means of bringing out the inherent improbability of a claim (see for example the comments of Mr Justice Tomlinson in *Three Rivers DC v Bank of England* [2006] EWHC 816 (Comm), [6]-[7]. I also accept that there are cases in which the success of the claimant's case necessarily involves a finding of dishonesty against a third party, and that, in such circumstances, the court may well take a view that it is appropriate to give that third party notice of the allegations being made and an opportunity to answer them …
>
> However, it is necessary to approach arguments of this kind with some care, particularly in cases where the claimants makes no direct allegation of dishonesty by the third party, and in which the claimant's case does not necessarily entail any such dishonesty. To do otherwise would involve the risk of already complicated litigation being expanded beyond manageable bounds, with judges asked to make findings about the conduct of a broad range of individuals in litigation in which only the parties will have given disclosure and adduced witness evidence. In very many cases, a claimant is entitled to be agnostic as to the position of a non-party who the defendant says would be implicated by the allegations of fraud advanced. That is likely to be the case when upholding the case advanced against the defendant(s)

would not necessarily entail any dishonest activity on the part of someone not participating in the case (not least because the full evidential position in relation to that person will not be before the court). Thus, in *Boreh v Djibouti* [2017] EWCA Civ 56, [44], an allegation that the substance of the judge's findings as to the conduct of a solicitor in a case applied 'by parity of reasoning' to a barrister against whom no such findings were made was rejected by the Court of Appeal because:

> 'The judge was perfectly entitled to reach the conclusion that [the solicitor] had behaved dishonestly, and that, as a result, the freezing order should be set aside, irrespective of any need to make any findings to similar, or different, effect in relation to [counsel], whose knowledge and state of mind had not been investigated. The judge was entitled to conclude that the latter's state of mind had not necessarily been the same as the former's'".

ii) The Claimants did allege that Mr Crump and EPL turned a blind-eye to the false representations that they made with Mr Kewley and Mr Spence's approval. They satisfied a judge that there was a "good arguable case" of Mr Crump's and EPL's dishonesty when obtaining freezing order relief. I am told that EPL's insurers declined cover on the basis that EPL had received legal advice at one point that the marketing material it was using was misleading. However, EPL clearly deferred to Mr Kewley and Mr Spence on the key marketing messages, and regularly passed investor queries onto them. It is also clear that some parts of the Alpha Group's modus operandi – freehold sales, the plan to "dump" the leases – were withheld from them. It has not been necessary to investigate whether they knew or suspected enough to be culpable in the marketing exercise in which they were engaged, and if so, in what manner and to what extent.

iii) It is apparent from the events of late 2015 and early 2016 that Mysing did not have anything like full visibility of what was occurring inside the Alpha Group, and indeed that information was deliberately withheld from them. When they became more aware of what was happening, the joint venture was brought to attend. I have not heard evidence or submissions as to what Mysing knew or believed about the viability of the guaranteed returns Mr Kewley and Mr Spence's companies were offering, and it is not necessary to make any observations as to whether there are grounds for criticism of Mysing or not.

iv) In neither respect, therefore, is this a case in which the claims the court has heard – allegations of dishonesty against Mr Spence, Mr Kewley and the relevant Alpha Group companies – cannot fairly be decided without the court reaching a view on the state of mind and conduct of absent parties.

636. In relation to these unlawful means conspiracies, the intent to injure is manifest in the intention to cause the investors to enter into economically disadvantageous contracts which in each case involved the investor paying more for property than it was worth, and becoming exposed to future liabilities.

Unlawful means conspiracy – establishing, operating and soliciting investments in unauthorised investment schemes

637. I am also satisfied that in respect of all the properties, including Westbeach Phases 1 and 2, Mr Spence and Mr Kewley were parties to an unlawful means conspiracy to cause the investors loss by inducing investors to participate in unregulated collective investment schemes established and operated by the relevant corporate defendants in contravention of s.19 of FSMA 2000 through communications which contravened s.21 of FSMA 2000. This merits some further analysis.

638. First, as noted at [608] to [609] above, I am satisfied that both Mr Kewley and Mr Spence knew of the facts which made their investments an unauthorised collective investment scheme, and (furthermore) were aware of a significant risk that these were investment schemes, in which case they knew that they required authorisation and did not have it. That is also sufficient to answer the suggestion that it would be a defence to the claim for unlawful means conspiracy based on the FSMA 2000 breaches that the Alpha Defendants believed that they had a lawful right to act as they did.

639. Second, I have not found that Mr Kewley knew that the Substance Representation in relation to Westbeach Phases 1 and 2 was untrue in respect of sales prior to October 2013 and in these circumstances, I cannot find that Mr Kewley intended to cause the investors in that project to enter into a loss-making transactions prior to that date. However:

i) In *Hotel Portfolio II UK Ltd v Ruhan* [2022] EWHC 383 (Comm), [246]-[248], I offered support for the view that the requisite intention for the tort of unlawful means conspiracy was established where "the purpose of the agreement or combination between the Defendants was to use unlawful means for the purposes of avoiding a potential obstacle" to the transaction including the loss of the opportunity to negotiate better terms, such that the object of the conspiracy was "was to interfere with HPII's rights in and relation to the Hyde Park Hotels".

ii) In *VP Fund Solutions (Luxembourg) Ltd v GI Global Investment Limited and Others* [2022] EWHC 1872 (Comm), Mr Nicholas Vineall KC stated at [57]:

> "In a similar way, in the instant case it seems to me to be highly unattractive to contend that the relevant intent to injure is lacking when someone who wishes to enjoy the benefit of an investment from the claimant uses unlawful means to keep the investor in ignorance of some fact about his adviser which might very well be expected, if the investor knew of it, either to put the investor off the package altogether, or at least to cause the investor to seek better terms (including perhaps a rebate of the monies circling back to the adviser)."

iii) In this case, the purpose of requiring authorisation of collective investment schemes is to protect potential investors from the significant risks that investments in that form are regarded by legislation as presenting, and to ensure that the process of soliciting investment in schemes of this kind is done by individuals authorised and regulated for the purposes of protecting the interests of potential investors, with investors benefiting from the Financial Services Compensation Scheme. A party

who enters into a conspiracy which has the object of soliciting investment in investments which have been unlawfully established, operated and marketed, and thereby deprives potential investors of the protections which the statutory scheme requires when the decision to invest is taken, does, in my assessment, intend to injure the investors for the purposes of the tort of unlawful means conspiracy, even if it is not intended that the investment will be loss-making.

640. Third, an issue arises as to whether the unlawful means were the means by which the defendant intended to harm the claimant. Mr Collings KC referred to the decision of the Supreme Court in *JSC BTA Bank v Khrapunov* [2018] UKSC 19. Before considering that case, it is helpful to consider the history of one of the common law's more improbable hypotheticals, the pizza delivery business:

i) The hypothetical appears to have emerged in *OBG Ltd v Allan* [2008] 1 AC 1 when the House of Lords were addressing the tort of causing loss by unlawful means. At [160], Lord Nicholls stated:

> "Similarly with the oft-quoted instance of a courier service gaining an unfair and illicit advantage over its rival by offering a speedier service because its motorcyclists frequently exceed speed limits and ignore traffic lights. The unlawful interference tort would not apply in such a case. The couriers' criminal conduct is not an offence committed against the rival company in any realistic sense of that expression."

ii) At [266], Lord Walker stated:

> "On the economic torts, the most important difference is in the identification of the control mechanism needed in order to stop the notion of unlawful means getting out of hand-for example, a pizza delivery business which obtains more business, to the detriment of its competitors, because its drivers regularly exceed the speed limit and jump red lights. Lord Hoffmann sees the rationale of the unlawful means tort as encapsulated in Lord Lindley's reference (in *Quinn v Leatham* [1901] AC 495, 534) to interference with 'a person's liberty or right to deal with others.' In his view acts against a third party count as unlawful means only if they are (or would be if they caused loss) actionable at the suit of the third party."

iii) The example was picked up in the context of unlawful means conspiracy by Lord Mance in *Total Network SL v Commissioners of Customs and Excise* [2008] AC 1174, [119]:

> "Caution is nonetheless necessary about the scope of the tort of conspiracy by unlawful means. Not every criminal act committed in order to injure can or should give rise to tortious liability to the person injured, even where the element of conspiracy is present. The pizza delivery business which obtains more custom, to the detriment of its competitors, because it instructs its drivers to ignore speed limits and jump red lights (Lord Walker in *OBG Ltd v Allan* ..) should not be liable, even if the claim be put as a claim in conspiracy involving its drivers and directors. And—as in relation to the tort of causing

> loss by unlawful means inflicted on a third party—there is a legitimate objection to making liability 'depend upon whether the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant': per Lord Hoffmann in *OBG Ltd v Allan*, at para 59."

iv) The vice of the pizza-delivery example in this context is not wholly clear from *Total Network* itself, but was the subject of consideration in *Khrapunov*. At [13]-[14], the Supreme Court referred to the distinction drawn by the House of Lords in *Total Network SL v Commissioners of Customs and Excise* [2008] AC 1174 between cases where there is a predominant intention to injure, even when no unlawful means are used, and cases where unlawful means are used and it is known the claimant is likely to be injured. They continued:

> "These two varieties of intention were to be contrasted with a situation in which the harm to the claimant was purely incidental because the unlawful means were not the means by which the defendant intended the harm to the claimant … As an example of the latter situation, Lord Walker cited *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173. The defendants in that case were alleged to have acted in breach of the statutory order imposing sanctions on Southern Rhodesia, but the order 'was not the instrument for the intentional infliction of harm': para 95. Lord Mance in *Total Network* (p 1259, para 119) was, we think, making the same point, by reference to the example of a pizza delivery business which obtains more custom, to the detriment of its competitors, by instructing its drivers to ignore speed limits and jump red lights. Addressing the character of the unlawfulness required, Lord Walker derived from the authorities the proposition that:
>
> > 'unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts (whether or not they include conduct lower on the scale of blameworthiness) provided that they are indeed the means by which harm is intentionally inflicted on the claimant (rather than being merely incidental to it)': para 93, and cf para 95."
>
> He concluded:
>
> > '94. From these and other authorities I derive a general assumption, too obvious to need discussion, that criminal conduct engaged in by conspirators as a means of inflicting harm on the claimant is actionable as the tort of conspiracy, whether or not that conduct, on the part of a single individual, would be actionable as some other tort …
> >
> > 95. In my opinion your Lordships should clarify the law by holding that criminal conduct (at common law or by statute) can constitute unlawful means, provided that it is indeed the means (what Lord Nicholls of Birkenhead in *OBG Ltd v Allen [2008]*

> *AC 1*, para 159 called 'instrumentality') of intentionally inflicting harm.'
>
> Lord Hope arrived at the same conclusion, at p 1235, paras 43 and 44, where addressing the facts of the case before him, he observed that although there was no predominant intention to injure the commissioners, the means used by the conspirators were directed at the claimants themselves':
>
> > 'a conspiracy is tortious if an intention of the conspirators was to harm the claimant by using unlawful means to persuade him to act to his own detriment, even if those means were not in themselves tortious.'"

641. The pizza-delivery example most recently surfaced in *Racing Partnership*, in which one of the unlawful means relied upon was the breach of a third party's terms and conditions for use of a particular services. Arnold LJ stated that he could not see why the speeding offences were not the instrumentality of the rival pizza businesses loss in the example ([152]). At [154] he stated:

> "It seems to me that the discussions of instrumentality in the case law tend to conflate two different questions. The first concerns the defendant's intention. As noted above, it is now well established that, in unlawful means conspiracy, the defendant must intend to injure the claimant, although that need not be the defendant's predominant intention and it is sufficient that the defendant intends to advance their economic interests at the expense of the claimant's. To that extent, the defendant's intention must be directed at the claimant. The second question is one of causation. The unlawful means must have caused loss to the claimant, rather than merely being the occasion of such loss being sustained. As I see it, this is the best explanation of the courier service/pizza delivery example: in that example the claimant's loss is caused by customers (who may be presumed not to appreciate that the defendant is systematically breaking the law and some of whom may prefer the defendant's service for other reasons) choosing to place their orders with the defendant, and so the unlawfulness is the occasion for the loss rather than the direct cause of it."

642. At [156] he stated:

> "It remains necessary to consider, however, whether SIS's breaches of the Exchanges' terms and conditions caused TRP loss, or were merely the occasion for that loss. In other words, can the present case be distinguished from the pizza delivery example? With some hesitation, I have concluded that it can. This case is all about obtaining and supplying information. SIS obtained information in order to supply that information to its customers. SIS obtained some of the information from the Tote in breach of an obligation of confidence to Arena/TRP and some of the information from the Exchanges in breach of their contractual terms and conditions. In both cases TRP suffered loss because it was competing to supply the same information to the same customers. The judge accepted that the breach of confidence satisfied the test of instrumentality. As counsel for TRP submitted, however, there is no relevant distinction between the two means. Accordingly, I

consider that in both cases the use of the unlawful means caused loss to TRP."

643. Phillips LJ agreed, holding at [172]:

> "I also agree with Arnold LJ that the unlawful obtaining of information from the Exchanges was instrumental in SIS causing injury to TRP, being the very means by which SIS was able to and intended to compete with TRP. I see a clear distinction between the present case and the 'pizza delivery' example, where the cause of the claimant's loss results from the competitiveness of the defendant's business due to its offer of speedier deliveries. The defendant's breach of traffic laws is an incident of fulfilling the promise of speedier deliveries, not the cause of the claimant's loss."

644. At [214], Lewison LJ stated:

> "The so-called economic torts have been considered by the House of Lords and the Supreme Court on a number of occasions in recent years; but it cannot be said with confidence that the law is clear. As has been said (in slightly different terms) in many cases, the quest is for a control mechanism to stop these torts from getting out of hand. In *OBG Ltd v Allan* … Lord Hoffmann proposed a test of actionability. But in *Revenue and Customs Cmrs v Total Networks SL* .. the House of Lords disagreed. Another proposed control mechanism is "instrumentality" but as Arnold LJ rightly points out at para 149 it is hard to see how the courier company or the pizza delivery business would escape liability on that account. Arnold LJ's explanation at para 151 may be the best that one can do, but it does not seem to me to be intellectually satisfying."

645. Finally, in *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm), Calver J rejected a suggestion that it was necessary to show that a defendant intended loss to be caused through the instrumentality of a particular unlawful means before it could be liable for the conspiracy, provided that the unlawful means "'were indeed the means' which caused the loss" ([547]).

646. The Alpha Defendants relied on the "instrumentality" discussion in these cases to contend that the unlawfulness of the unauthorised collective investment schemes was not the means by which loss was caused to the Claimants. Mr Collings KC submitted:

> "However unlawful UCIS was, it wasn't actually the means, the means was the underlying matter and not that unlawfulness on the top of it."

647. The instrumentality requirement has caused most difficulty in cases, or hypotheses, in which the defendant has been able to enter into business transactions with one or more third parties which has deprived the claimant of business (whether the opportunity to enter into that transaction itself, or to derive profit from the alternative arrangements which would have operated but for the defendant's contracts), and used unlawful means in doing so:

    i) In some instances, all that can be said is that the defendant would not have entered into the transaction with the third party if it had not acted unlawfully. *Lonrho* was such a case (the unlawful act being the supply of oil in breach of sanctions to the

UDI regime in Southern Rhodesia, prolonging the period when the appellant's pipeline was not in use). It is clear that this is not sufficient. This would also be the case if a pizza-delivery business used its premises in breach of a restrictive covenant, but derived no competitive advantage from the particular premises used. Arnold LJ described this as a case in which the unlawful means is, at best, the opportunity for the claimant's loss.

ii) There can be cases where the unlawful means enhances the competitiveness of the defendant's offering vis-à-vis the claimants. That appears to be the case with the pizza delivery business example, to the extent that custom was lost to the claimant because customers preferred speedier delivery. However, the pizza delivery example has always been postulated as an instance where the requisite instrumentality is not present. It has been suggested that this may because the unlawful means causes loss to the claimant in too indirect a way (pre-supposing that, had the third party not contracted with the defendant, it would have contracted with the claimant), or (a rather different point which does not really address the hypothetical, save perhaps on the basis of an argument that we should not lightly formulate bases of liability at private law which are inherently difficult to prove) because proving the effect of the unlawful means on the behaviour of third party will be difficult. At all events, a clear formulation of the reason why the requirement of instrumentality is not met has proved elusive.

iii) In *Racing Partnership*, the defendant's business was the supply of information obtained by unlawful means, which damaged the claimant whose very business was the supply of the same information obtained lawfully. This was not a case where the complaint was about the means by which the defendant conducted its business in competition with the claimant, but a complaint that the defendant's business activity was itself the exploitation of information obtained unlawfully, when it was the claimant who had the legal right to exploit that same information. In effect, it was suggested that the defendant was using unlawful means to sell pizza which the claimant had the legal right to sell.

648. Identifying where to draw the line in those contexts has presented formidable difficulties. Fortunately, the present case presents nothing like so nuanced a fact pattern. In the part of the case presently under consideration, the unlawful means involved entering into a transaction of a particular kind without complying with statutory requirements intended to protect putative counterparties to transactions of that very kind from the risk of loss which investments of that kind were deemed to present. The claims now brought are by individuals of the very class the statutory regime was intended to protect; for loss of the very kind the statutory regime was intended to protect the members of the class against. In those circumstances, any requisite test that the unlawful means be the instrumentality of the loss is amply satisfied.

REMEDIES FOR UNLAWFUL MEANS CONSPIRACY

649. The claims for damages for unlawful means conspiracy involve the same legal and factual analysis as the claims for damages for deceit, and I refer to my determinations in that context above.

OTHER ISSUES

The Alleged Settlement Defence

650. Finally, the Alpha Defendants contend that some of the Lead Claimants are precluded from advancing their claims because they are bound by the Quantuma Settlement Agreement dated 27 May 2020, having either voted in favour of that Settlement Agreement or taken up shares in the management company regarding their development pursuant to the Settlement Agreement.

651. Clause 2.2 of the Settlement Agreement provided that investors in A1 Alpha properties who voted in support of the settlement at the scheduled creditors' vote would be deemed to have agreed to its terms.

652. Clause 8.8 requires specified management companies to issue shares to all leasehold creditors who did not presently have them.

653. The particular issue which arises is whether the releases effected by the Settlement Agreement in respect of investors who voted in favour of the Settlement Agreement are limited to claims relating to specific developments.

654. Clauses 18 and 19 of the Settlement Agreement provide:

> "18.1 This Agreement will be in full and final settlement and subject to the release and discharge of any actions, claims, rights, demands and/or set offs in relation to the Dispute, whether in law or in equity (the Released Claims), against ASM, the Management Companies, the Development Companies and/or Mr Kewley and Mr Spence and Mr Sullivan by the Joint Administrators of A1A (in their capacity as Joint Administrators and Joint Liquidators) and, separately, each Leaseholder Creditor who approves the terms of this Agreement in the Creditors' Vote or who subsequently takes up membership pursuant to clause 8.8.
>
> 18.2 The Joint Administrators confirm that they are not aware of any other potential claims in relation to the Developments other than the Dispute 1.
>
> 19.1 Each party agrees not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against the other party any action, suit or other proceeding concerning the Released Claims, in this jurisdiction or any other.
>
> 19.2 A1A and the Joint Administrators shall not disclose any information or documents to the Leaseholder Creditors which may be relevant to the Dispute, without the prior written consent of Derek Kewley and Nick Spence, save where it is necessary for the Joint Administrators to provide such information to creditors for the purposes of complying with their statutory obligations as administrators and liquidators of A1A.
>
> 19.3 Clauses 18 and clause 19.1 shall not apply to, and the Released Claims shall

not include, any claims in respect of any breach of this Agreement."

655. As to this:

i) The Settlement Agreement was entered into in respect of certain identified developments, involving the management and development companies for those developments. The defined term "the Developments" was used in the main body of the agreement to refer to the particular developments listed in Schedule 1.

ii) "The Dispute" – the key term defining what was settled or released – is defined as involving allegations of a wide kind "in relation to the Developments" (i.e. the developments identified in Schedule 1).

iii) I am satisfied that there is nothing in the Settlement Agreement which releases claims in relation to other developments.

656. Further, the mere fact that shares in a management company are issued to a particular claimant is not of itself sufficient to make that claimant a party to the management agreement if the claimant did not take those shares up (as clause 18.1 requires) or vote in favour of the Settlement Agreement. Clause 2.2 of the Settlement Agreement provides "if a Leaseholder Creditor votes in support of this agreement in the Creditors Vote it will be deemed to have agreed to the terms of this Agreement". That having been stipulated in the Settlement Agreement as the necessary means of acceding to it, only investors who voted in favour of the Settlement Agreement are parties to it.

Points not pursued

657. In the Statement of Defence:

i) the Alpha Defendants relied upon a statement described as "the Disclaimer" which appeared in most of the brochures by which the various units were purchase and a "non-reliance" clause which appeared in the purchase agreements; and

ii) pleaded that the Lead Claimants' misrepresentation claims were misrepresentations as to the creditworthiness of a third party, with the result that they were not actionable unless made in writing and signed by Mr Kewley and Mr Spence (by virtue of s.6 of the Statute of Frauds Amendment Act 1828).

658. In written opening, the Disclaimer and non-reliance clauses were identified as reasons why reasonable readers would have taken the contents of the brochure "with a pinch of salt" but they were not otherwise relied upon, and the Statute of Frauds Amendment Act 1928 was not relied upon at all. The Alpha Defendants did not challenge the Lead Claimants' statement in opening that the points were not now being advanced. None of the points were advanced in closing. In these circumstances, it is not necessary to say any more about them.

CONCLUSION

659. For those reasons, I am satisfied that the Lead Claimants have made good their claims against the Alpha Defendants to the extent and in the respects set out in this judgment.

660. I would like to conclude by thanking both legal teams and all counsel for their exemplary presentation of a complex case. All counsel made significant contributions to the oral as well as the written advocacy. Despite the considerable distress which Mr Kewley's and Mr Spence's deceptive business practices have caused to the investors, the case was conducted throughout in a co-operative and professional matter, something which is very much to the credit of all of the lawyers involved.