



Neutral Citation Number: [2020] EWHC 1097 (Ch)

Claim No: BL-2018-000837

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

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

Date: 06/05/2020

**Before :**

**Kelyn Bacon QC**  
**(sitting as a Deputy Judge of the High Court)**

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**Between :**

**THE FINANCIAL CONDUCT AUTHORITY**  
**(a company limited by guarantee)**

**Claimant**

**- and -**

**(1) MR LEE ANTHONY SKINNER**  
**(2) MS KAREN FERREIRA**  
**(3) MILLER & OSBOURNE ASSOCIATES**  
**LIMITED (dissolved on 6 August 2019)**  
**(4) VENOR ASSOCIATES LIMITED**  
**(5) MR CLIVE HARRIS MONGELARD**  
**(6) MR TYRONE MILLER**

**Defendants**

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**James Purchas and Daniel Khoo for the Claimant**  
The **First and Second Defendants** appeared in person  
The **Fifth and Sixth Defendants** appeared in person on their own behalf and on behalf of the  
Fourth Defendant

Hearing dates: 2–6 and 10–11 March 2020  
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## **Approved Judgment**

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

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KELYN BACON QC

*Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 6 May 2020, 10.30 a.m.*

**Kelyn Bacon QC (sitting as a Deputy Judge of the High Court):**

**Introduction**

1. The Claimant is the Financial Conduct Authority (“the FCA”), which is the regulator of the UK financial services industry pursuant to various provisions of the Financial Services and Markets Act 2000 (“FSMA”) and the Financial Services Act 2012 (“FSA”). Its claim against the Defendants arises from their promotion of shares in the company Our Price Records Limited (“OPR”), a company whose directors were the first and second Defendants, Mr Skinner and Ms Ferreira. A total of £3.6 million was raised from 259 investors over the course of two share offerings in 2014 and 2015. The share offerings were promoted by 32 marketing agents. The two marketing agents that introduced the majority of the investors were Miller & Osbourne (“M&O”, the third defendant) and Venor Associates (“Venor”, the fourth defendant). Both companies were operated as a joint business trading under the name of “Gemini”, and were jointly managed by the fifth and sixth Defendants, Mr Mongelard and Mr Miller. OPR did not ever trade in any material way and is now in administration. M&O was dissolved after these proceedings commenced.
2. The FCA alleges that OPR, M&O and Venor contravened s. 21 FSMA and s. 89 FSA by communicating, to potential investors, materials promoting investments in OPR that had not been approved by an authorised person; that (in OPR’s case) the investment materials contained false or misleading statements and/or dishonestly concealed material facts; and that (in the case of M&O and Venor) the companies promoted the shares to potential investors by making false or misleading statements. In addition, the FCA alleges that M&O and Venor contravened s. 19 FSMA by carrying out regulated activities (of making arrangements for investors to acquire shares in OPR, and advising those investors on the merits of acquiring those shares) without authorisation.
3. Regarding the individual Defendants, the FCA says that Mr Skinner and Ms Ferreira were knowingly concerned in OPR’s breaches of s. 21 FSMA, Mr Skinner was additionally knowingly concerned in OPR’s breaches of s. 89 FSA, Mr Miller and Mr Mongelard were knowingly concerned in M&O/Venor’s breaches of ss. 19 and 21 FSMA, and that Mr Mongelard was additionally knowingly concerned in M&O/Venor’s breaches of s. 89 FSA.
4. On that basis the FCA seeks restitution orders under s. 382 FSMA, which once recovered are for distribution among the investors. The FCA also seeks declarations regarding the contraventions, and orders restraining the Defendants from committing further contraventions.
5. The first and second Defendants contest the claim, saying (essentially) that they understood the various materials to have been approved by their accountants, Leigh Carr, and therefore did not know that there were breaches of s. 21 FSMA; that the investment materials were not false or misleading; that in any event Mr Skinner relied upon his professional advisers in preparing those materials; and that in the circumstances, even if there were

contraventions they should not be required to make restitution of the investors' losses.

6. The fourth to sixth Defendants admit the contraventions of the FSMA and FSA by M&O and Venor, and admit that Mr Mongelard and Mr Miller were knowingly concerned in those contraventions. They say, however, that they believed that Leigh Carr was authorised to approve the investment materials; that the scripts for communicating with potential investors were prepared on the basis of the information provided by Mr Skinner; and that in the circumstances they should (likewise) not be required to make restitution.
7. The FCA was represented at trial by Mr Purchas and Mr Khoo. The Defendants represented themselves, with the main submissions being made by Mr Skinner and Mr Miller, and only brief further submissions from Ms Ferreira and Mr Mongelard.

### **Witnesses**

8. A key element in the FCA's case is its allegation that the individual Defendants were aware of the contraventions of the FSMA and FSA by OPR, M&O and Venor, and in particular were aware of the lack of approval of the investment materials and the lack of authorisation of M&O and Venor, and were also aware that statements in the investment materials and promotional communications made by marketing agents were false and/or misleading. All of this is, on the facts, vehemently disputed by the relevant Defendants in their evidence. It is therefore appropriate, at the outset, to make some general comments about the various witnesses.
9. The FCA relied on the evidence of 13 witnesses, 10 of which were investors who had acquired shares in OPR (with the sums invested by them ranging from £3000 to £30,000). They gave evidence as to the circumstances in which they had come to invest in OPR, including the statements made to them by either Mr Skinner or the marketing agents who had contacted them. Eight of the 10 investors had been recruited by M&O/Venor. Hearsay notices were served in respect of the evidence of three of those witnesses, who for various different reasons were unable to attend the trial to give evidence. No objections to these were made by the Defendants. While the other seven investors attended the trial to give evidence, their evidence was not challenged by any of the Defendants, and the only question put to them by Mr Skinner asked for confirmation that they had received various Information Memoranda (which was evident from the witness statements in any event).
10. The FCA's remaining witnesses were Ms Bianca Daley-Gage, Mr Roy O'Gorman and Mr Jagdish Natt. Ms Daley-Gage is an investigator in the Unauthorised Business Department of the Enforcement and Market Oversight Division of the FCA and was an appointed investigator in relation to the activities of the Defendants. Her evidence essentially presented the material obtained by the FCA in the course of its investigation, on which it relied in these proceedings, including information obtained in interviews with the Defendants and with Mr O'Gorman and Mr Natt. While Mr Skinner asked her

a number of questions, he did not challenge her evidence in any substantial respect.

11. Mr O’Gorman is the senior partner at Leigh Carr and OPR was, formally, his client. He attended the initial meetings with Mr Skinner and Ms Ferreira, before handing over to others in his firm (principally Mr Natt) for the work that OPR required. His evidence addressed, in particular, the extent to which Mr Skinner and Ms Ferreira had been told by Leigh Carr that it was not authorised to assist with investor fundraising. His account was robustly challenged in cross-examination by Mr Skinner, and Mr O’Gorman’s evidence in response was very defensive. For the reasons set out further below I consider that his account of events was not reliable.
12. Mr Natt is a junior partner at Leigh Carr who, in practice, was responsible for the advice and approvals on which the Defendants rely. Again, his account of his involvement with OPR was robustly challenged in cross-examination by Mr Skinner. In certain respects I consider that Mr Natt’s account was not reliable, and I have therefore treated the remainder of his evidence with some caution. Mr Natt’s explanation of the circumstances in which he came to write the two key “approval” letters relied on by the Defendants was however clear, detailed and consistent with the contemporaneous evidence. On this particular point, therefore, I consider that his evidence was credible, and I prefer it to Mr Skinner’s version of events.
13. In addition, the FCA served a hearsay notice in relation to (i) statements made by investors relevant to their dealings with OPR and marketing agents, contained within the FCA’s consumer questionnaires; (ii) similar statements made by investors in records of calls between the FCA and those investors; and (iii) the statements made on calls between M&O/Venor marketing agents and investors, as recorded in extracts from M&O/Venor’s call records management system. No objection was made to the admission of any of this evidence.
14. All four individual Defendants served witness statements, and all except Mr Mongelard were cross-examined by Mr Purchas for the FCA. Mr Miller also put some supplemental questions to Mr Skinner.
15. Mr Skinner was described by Mr Purchas in his closing submissions as displaying “a confidence and appeal that reflected his ability to secure investment in OPR”. I agree with that assessment. Mr Skinner maintained in unequivocal terms, throughout his evidence (and indeed his submissions), that everything was the fault of his professional advisers, and that he bore absolutely no responsibility for any contraventions of the FSMA and FSA, or indeed for the losses of the investors’ funds. On closer scrutiny, however, it was rapidly apparent that large parts of his evidence were incoherent or implausible, and were contradicted by the contemporaneous documents as well as the evidence that he gave in interview with the FCA. It was also clear that during the relevant events in 2014 and 2015 Mr Skinner repeatedly misrepresented the truth to investors, his advisers and others with whom he was dealing. With certain exceptions, which I set out below, I do not regard Mr Skinner as a reliable witness.

16. The thrust of Ms Ferreira’s evidence was that she had relied completely on Mr Skinner to manage the OPR fundraising. Although she was a director of OPR and the sole director of two further companies, Ted Lucy and The Loving Memory Tree (“TLMT”) which, as I will explain below, were used to channel funds from OPR to Mr Skinner, Mr Skinner had arranged all of the relevant transactions, which extended to controlling the bank accounts of all three companies. While that account was credible and was endorsed by Mr Skinner, I do not consider that Ms Ferreira can avoid all responsibility (as she sought to do) by reference to her reliance on Mr Skinner, given her central role in OPR, Ted Lucy and TLMT.
17. Mr Miller said in his evidence that he was responsible for the financial and administrative side of the M&O/Venor business, while Mr Mongelard ran the sales side of the business. Mr Miller therefore said that he had very little involvement in the training of sales staff and the marketing scripts that they were given, and that he relied upon what he was told by Mr Skinner regarding regulatory compliance. While Mr Miller’s general description of his role was credible and was not disputed by Mr Mongelard, I consider that Mr Miller (in common with the other Defendants) was too willing to place the blame on others rather than taking responsibility for the activities of the M&O/Venor business.
18. Mr Mongelard served a witness statement and was due to be cross-examined on his evidence. On the morning of the fourth day of the trial, however, he sent the Court a letter stating that he no longer wished to be cross-examined. Following further submissions in private by Mr Mongelard and Mr Purchas, I directed that Mr Mongelard should be entitled to continue to rely on his witness statement, but that the Claimant should be permitted to comment on the weight to be given to that evidence in circumstances. In his closing submissions Mr Purchas duly submitted that limited weight should be placed on Mr Mongelard’s evidence. I agree, but note that in any event Mr Mongelard’s witness statement was very brief, and the main relevant facts are not disputed.

### **The regulatory framework**

19. The FCA has brought this case on the basis of alleged contraventions of three provisions: s. 19 FSMA, s. 21 FSMA and s. 89 FSA.
20. Section 19 FSMA provides:
  - “(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –
    - (a) an authorised person; or
    - (b) an exempt person.
  - (2) The prohibition is referred to in this Act as the general prohibition.”

21. Section 21 FSMA as in force at the time of the events giving rise to this claim, provided, so far as material:

“(1) A person (‘A’) must not, in the course of business, communicate an invitation or inducement to engage in investment activity.

(2) But subsection (1) does not apply if –

- (a) A is an authorised person; or
- (b) the content of the communication is approved for the purposes of this section by an authorised person.

...

(5) The Treasury may by order specify circumstances (which may include compliance with financial promotion rules) in which subsection (1) does not apply.”

22. The Financial Services and Markets Act 2000 (Financial Promotion) Order 2005 (‘FPO’) was adopted pursuant to s. 21(5) FSMA. It sets out various circumstances in which the ‘financial promotion restriction’ (defined in FPO Article 5 as the restriction in s. 21(1) FSMA) does not apply.

23. For present purposes two exemptions are relevant. The first is an exemption for certified high net worth individuals, set out in Article 48 FPO. The second is an exemption for sophisticated investors, set out in Article 50A FPO. Both exemptions are subject to strict conditions, which include in both cases a requirement that the relevant promotional communication should be accompanied by a warning that the content has not been approved by an authorised person within the meaning of the FSMA, and that reliance on the promotion for the purposes of engaging in investment activity may expose an individual to a significant risk of losing all of the property or other assets involved.

24. Section 89 FSA (which is in Part 7 of the FSA) provides, in so far as material:

“(1) Subsection (2) applies to a person (‘P’) who –

- (a) makes a statement which P knows to be false or misleading in a material respect,
- (b) makes a statement which is false or misleading in a material respect, being reckless as to whether it is, or
- (c) dishonestly conceals any material facts whether in connection with a statement made by P or otherwise.

(2) P commits an offence if P makes the statement or conceals the facts with the intention of inducing, or is reckless as to whether making it or concealing them may induce, another person (whether or not the person to whom the statement is made) –

(a) to enter into or offer to enter into, or to refrain from entering or offering to enter into, a relevant agreement ...”

25. S. 93(3) FSA defines a “relevant agreement” as being one the entering into or performance of which by either party constitutes an activity of a kind specified in an order made by the Treasury and which relates to a relevant investment. S. 93(6) FSA then provides that a relevant investment is an investment of a kind that is (likewise) specified by the Treasury. The Financial Service Act 2012 (Misleading Statements and Impressions) Order 2013 then defines a specified activity to include an activity falling within Part I of Schedule 1 to the FPO, and a specified investment to include an investment falling within Part II of Schedule 1. In particular:

- i) Part I includes the following activities: subscribing for securities (Article 3), making arrangements for another person to subscribe for securities or making arrangements with a view to another person subscribing for securities (Article 4), and advising on investments (Article 7);
- ii) Part II sets out various controlled investments, which include shares in the share capital of any body corporate (Article 14(1)(a)).

26. The activities of OPR and M&O/Venor in promoting subscriptions for shares in OPR therefore fell within the scope of s. 89(2)(a) FSA.

27. The FCA’s powers to seek relief against the Defendants in respect of contraventions in these provisions are set out in ss. 380 and 382 FSMA. S. 380(1) provides:

“If, on the application of the appropriate regulator ... the court is satisfied ...

(b) that any person has contravened a relevant requirement and that there is a reasonable likelihood that the contravention will continue or be repeated,

the court may make an order restraining ... the contravention.”

28. S. 382 provides, in relevant part:

“(1) The court may, on the application of the appropriate regulator ... make an order under subsection (2) if it is satisfied that a person has contravened a relevant requirement, or been knowingly concerned in the contravention of such a requirement, and –

(a) that profits have accrued to him as a result of the contravention; or



(b) that one or more persons have suffered loss or been otherwise adversely affected as a result of the contravention.

(2) The court may order the person concerned to pay to the regulator concerned such sum as appears to the court to be just having regard –

(a) in a case within paragraph (a) of subsection (1), to the profits appearing to the court to have accrued;

(b) in a case within (b) of that subsection, to the extent of the loss or other adverse effect;

(c) in a case within both of those paragraphs, to the profits appearing to the court to have accrued and to the extent of the loss or other adverse effect.”

29. In the case of both provisions, a “relevant requirement” includes a requirement imposed under the FSMA or a requirement imposed by Part 7 of the FSA whose contravention constitutes an offence under that Part. It is not, therefore, disputed that the remedies set out in ss. 380 and 382 are in principle available in respect of all three of the contraventions alleged by the FCA in this case.

### **Factual background**

30. It is necessary to set out in some detail the way in which OPR was relaunched and the manner in which the fundraising was conducted. This narrative includes my findings on a number of relevant factual points that were disputed by the Defendants.

#### *The original Our Price business*

31. Our Price was originally a chain of record stores in the UK. At the peak of its success in the 1980s, when it traded under the name of “Our Price Records”, it was the UK’s second largest retailer of records and tapes. In 1986 the business was acquired by WH Smith, which sold it on to the Virgin Group in 1998. During this time (during which the chain was rebranded as simply “Our Price”) the majority of the stores were closed, and in 2001–2002 the remaining stores were acquired by the Brazin group (an Australian retailer), which operated the Sanity chain. Mr Skinner then came onto the scene in September 2003, buying all 118 Sanity stores in the UK, including the remnants of the Our Price chain, through an investment company, Primemist.
32. OPR had been incorporated on 9 June 2003, and Mr Skinner was appointed as a director on 14 October 2003. Mr Skinner’s position is that the trademarks owned by Our Price were all transferred to OPR by an assignment agreement on 19 September 2003, very shortly after the Primemist acquisition of the Sanity stores.
33. Primemist rapidly ran into financial difficulties and entered into administration in late 2003, resulting in the closure of the last remaining Our Price stores in early 2004. Mr Skinner resigned as its director in 2006, and in 2012 Ms

Ferreira was appointed as the director of OPR. Mr Skinner says that OPR was dormant between 2004–2014. It appears, however, that by May 2009 Mr Skinner had registered a series of “ourprice” domain names including [www.ourprice.co.uk](http://www.ourprice.co.uk), [www.ourpricerecords.co.uk](http://www.ourpricerecords.co.uk) and [www.ourpricerecords.com](http://www.ourpricerecords.com), and was using (at least) the [www.ourprice.co.uk](http://www.ourprice.co.uk) website to offer items to be used in charity auctions.

34. In September 2009, HMV purchased the Our Price trademarks from the liquidators of the Primemist and Our Price businesses, believing that those trademarks were (at the time) still owned by Our Price. The trademarks were then sold on to Palm Green Capital in 2013 following the insolvency of HMV. Palm Green’s claim to the Our Price trademarks is relevant for the reasons discussed below.

#### *The revival of OPR in 2014*

35. In 2014 Mr Skinner decided to revive OPR as an affiliate marketing business, using the website [www.ourprice.co.uk](http://www.ourprice.co.uk) and the Our Price brand. The business idea was to use the website to offer discounts on products from designer brands and other major retail brands, receiving a commission from the relevant companies for purchases via the Our Price website.
36. In order to launch the new business Mr Skinner explored various ways of raising funds, including both approaching high net worth individuals and/or sophisticated investors, who (as set out above) would be exempted from the requirements of s. 21 FSMA, and raising funds from less sophisticated investors through a broker that was authorised under s. 21(2)(a) FSMA or using promotional materials that were approved under s. 21(2)(b) FSMA. Although Mr Skinner may not have had a detailed understanding of the regulatory framework, it is clear from his evidence that he knew that the requirements of s. 21 would apply unless he was dealing with particular kinds of investors such as sophisticated investors. He also knew that for the purposes of s. 21 he would either need to raise funds through a broker authorised by the FCA, or would need to have his promotional materials approved by someone who was authorised by the FCA.
37. In May 2014, Mr Skinner approached Mr O’Gorman at Leigh Carr, and on 7 May Mr O’Gorman met Mr Skinner and Ms Ferreira briefly at Leigh Carr’s offices, before continuing their discussion over dinner. It is common ground that during the course of their discussion Mr O’Gorman agreed to help Mr Skinner to find a suitable bank for OPR, and was also willing to assist with OPR’s tax affairs generally and the preparation of cashflow forecasts and financial projections for the purposes of the fundraising. It is also undisputed that Leigh Carr was not and is not, as a matter of fact, authorised by the FCA. There is, however, a dispute as to whether Mr O’Gorman told Mr Skinner this at any point.
38. Mr O’Gorman’s evidence was that on 7 May, notwithstanding his agreement to assist with certain aspects of the OPR fundraising, he told Mr Skinner that Leigh Carr could “not assist with the proposed fundraising from investors because the firm was not, and is not, authorised and regulated by the [FCA] in

that regard”. Mr Skinner and Ms Ferreira both denied that Mr O’Gorman said any such thing.

39. On this point I prefer the evidence of Mr Skinner and Ms Ferreira to that of Mr O’Gorman. Mr O’Gorman is not a financial services specialist and admitted in his witness statement that he did not have “any technical knowledge of the regulatory requirements for a share issue”. He also said that he was not at that time aware of the specific requirements of s. 21 FSMA. If that was indeed the case, it seems inherently improbable that he would have been at pains to draw Mr Skinner’s attention to the specific limitations of Leigh Carr’s FCA regulatory status on that occasion.
40. After that meeting there was some correspondence between another partner at Leigh Carr (John Prior) and Mr Skinner regarding the registration of OPR with HMRC for the purposes of the Enterprise Investment Scheme and the Seed Enterprise Investment Scheme. Mr Skinner also emailed Mr O’Gorman with updates as to his progress in concluding agreements with brokers for the purpose of his share offering in OPR. These included, in particular, negotiations with Variable Pitch Partners (“VPP”), who were an appointed representative of Larpent Newton & Co Limited, which was authorised by the FCA.<sup>1</sup> Following discussions between Mr Skinner and VPP as to the fee structure for their services, on 13 June 2014 VPP proposed a “compromise solution”: “no up front fee despite due diligence and input on marketing material needing to be done by us, and a success fee of 6% commission and 15% warrants”. Mr Skinner forwarded this proposal to Mr O’Gorman, together with further emails between him and VPP discussing the detail of this proposal. In a further exchange of emails on 19 June, which Mr Skinner also forwarded to Mr O’Gorman, Mr Skinner arranged a meeting with VPP and accepted VPP’s fee proposal.
41. The next meeting with Mr O’Gorman took place on 24 June 2014, when Mr Skinner and Ms Ferreira went to Leigh Carr’s offices to meet both Mr O’Gorman and Mr Natt. That was the meeting at which Mr O’Gorman introduced Mr Skinner and Ms Ferreira to Mr Natt. Mr Natt took a manuscript note of the meeting, from which it appears that there was some discussion of the projected revenues of OPR as well as the estimated costs, including the costs of advertising, website development, salaries (including those of Mr Skinner and Ms Ferreira) and professional costs. Mr Natt also noted in relation to the cost of raising finance “Broker fees – 6% of amount raised” and “15% warrants”, which must have been a reference to the agreement on fees reached with VPP/Beaufort.
42. Mr O’Gorman and Mr Natt both said in their witness statements, and repeated in cross-examination, that at the 24 June meeting they gave Mr Skinner and Ms Ferreira an engagement letter, which Ms Ferreira signed on behalf of OPR. That engagement letter purportedly set out (among other things) the fact that

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<sup>1</sup> VPP were introduced to Mr Skinner by an FCA authorised broker, Beaufort Securities. While the ensuring negotiations and discussions were typically conducted with, and copied to, both VPP and Beaufort, VPP was the broker ultimately engaged by OPR. For convenience, therefore, this judgment refers simply to VPP.

Leigh Carr was not authorised by the FCA and could not provide advice on investments. Mr Skinner and Ms Ferreira, however, both denied receiving or signing any engagement letter, whether at that meeting or on any other occasion.

43. Again, I prefer the account of Mr Skinner and Ms Ferreira in this regard. Two facts in particular indicate that no such letter was provided or signed on that occasion. The first is that Leigh Carr has been unable to find a copy of any signed engagement letter on its files. Mr O’Gorman said that he gave the letter to an employee called George Colgate, whose responsibilities included opening new client files; but it is common ground that Mr Colgate did not ever open a formal client file for OPR at that point, and the file was instead opened in January 2015 by Mr Prior. That suggests that Mr Colgate was *not* given the engagement letter, since otherwise one would have expected him to open the client file in June 2014. (Mr Colgate has since died, and no further light is shed on the matter from the papers and files that he left behind.)
44. The second fact is that the only electronic version of the engagement letter that has been located on Leigh Carr’s computer servers is a version with metadata showing that it was first created on 3 September 2015. No earlier version has been located by anyone in Leigh Carr.
45. Mr Natt’s suggested explanation for this was that on 2 September 2015 he wrote to Mr Skinner to request copies of the identification material required in respect of new clients for the purposes of the Anti-Money Laundering Regulations, which had not been obtained previously from Mr Skinner or Ms Ferreira. That omission had come to light as a result of an internal review of the firm’s compliance arrangements. Mr Natt suggested that he may at the same time have opened the original engagement letter and saved it as a new document under a different name.
46. That is a very unlikely explanation, given that on that hypothesis the earlier electronic version would have remained; but no such earlier version has ever been found. Nor is there any evidence of a computer problem within Leigh Carr that caused any earlier data to be lost (such as a server failure). The more likely explanation is that in the course of the internal compliance review Mr Natt noted that Leigh Carr had not obtained from OPR *either* the identification required for the Anti-Money Laundering Regulations *or* a signed client engagement letter. That was why Mr Natt requested the identification material from Mr Skinner on 2 September 2015; and that would also explain why Mr Natt drew up a client engagement letter on 3 September, anticipating that Mr Skinner and Ms Ferreira would sign it at some point.
47. Taking these matters together, I find that the engagement letter was most likely not produced or signed in June 2014, but was created on 3 September 2015 as the metadata indicate, and was not (in the event) ever given to Mr Skinner and Ms Ferreira to sign.
48. I also do not accept Mr O’Gorman’s and Mr Natt’s account that at the 24 June 2014 meeting they told Mr Skinner that since the firm was not authorised by the FCA they could not assist him with fundraising or a public share offer. At

the time, as Mr Natt's manuscript notes made clear, Mr Skinner had told Mr O'Gorman and Mr Natt that he would be working with VPP, who were FCA regulated brokers, and Mr O'Gorman was aware (from the email correspondence forwarded to him) that it was envisaged that VPP would be doing the necessary due diligence for the share offering. It was not contemplated that Leigh Carr would be assisting with the fundraising in any way other than assisting Mr Skinner to put together his financial projections and cashflow forecasts. It is therefore improbable that Mr O'Gorman or Mr Natt would have seen a need to tell Mr Skinner that they could not provide a service that he was – at the time – not seeking from them.

*Appointment of VPP and initial share offering to high net worth/sophisticated investors*

49. VPP produced a draft engagement letter on 30 June 2014 which provided, among other things, that VPP would assist OPR with preparing an information memorandum to be provided to investors, and “any other Communication, as required, such as a short two page ‘teaser’ and presentation material for investors”. VPP's commission was (as Mr Skinner had agreed) 6% of the funds raised by VPP, plus warrants representing 15% of the shares placed by VPP.

50. Mr Skinner sought advice on the draft agreement from his solicitor, Ray Smyth of Duane Morris. Mr Smyth observed that VPP's commission of 6% was “at the higher end of the current range but not outrageous”. He also commented, among other things, that:

“It is important here to appreciate that any ‘Communication’... and any presentation or teaser material are likely to be ‘financial promotions’ within the meaning of the Financial Services & Market Act. Financial promotions are strictly regulated and it is a criminal offence to publish or communicate a financial promotion unless it is either approved by an authorised person or comes within an exemption. Accordingly, the provision that I have added at clause [1.2(j)] of the engagement letter is designed to give you comfort and assurance that communications will only be made with prospective investors where either the communication has been approved by an authorised person or is made in circumstances where an exemption clearly applies.”

51. Reflecting that comment, Mr Smyth's amendments to the engagement letter (underlined) included the following services to be provided by VPP:

“assisting the Company with regard to and facilitating compliance with the FSMA (Financial Service Markets Act) and the applicable FCA (Financial Conduct Authority) regulations. The foregoing shall include us approving, or (as appropriate) securing the approval of any financial promotion(s) to be issued in connection with the Transaction or otherwise ensuring that any such financial promotion is or the

intended recipient(s) thereof are subject to an exemption from the need to obtain such approval.”

52. In the final version of VPP’s engagement letter (dated 18 July) that amendment was only accepted in qualified form:

“Where the relevant Communication shall be made by us, the foregoing shall include us approving, or (as appropriate) securing the approval of any financial promotion(s) to be issued in connection with the Transaction or otherwise ensuring that any such financial promotion is or the intended recipient(s) thereof are subject to an exemption from the need to obtain such approval in all other circumstances, the foregoing shall be limited to providing assistance if/as required.”

53. The engagement letter was signed by both Ms Ferreira and Mr Skinner, as Mr Skinner had been reappointed as a director of OPR on 8 July. Meanwhile, Mr Skinner had been working together with VPP, Mr Smyth and Mr Natt to prepare an information memorandum (“IM”) to promote the OPR share offering to prospective investors. Mr Skinner also engaged a designer, Steve Cole at Argento. Mr Natt’s role at this stage was limited to providing, in an appropriate accounting format, the financial projections and cashflow forecasts that would be included in the IM. That was consistent with the discussion at the meeting of 24 June, as recorded in Mr Natt’s manuscript notes. Mr Skinner was the source of the figures that Mr Natt put together, and Mr Natt was not asked to carry out any due diligence on the assumptions and projections that were provided by Mr Skinner. That was explicitly recorded in a disclaimer drafted by Mr Natt, set out on the second page of a set of projections sent by Mr Natt to Mr Skinner on 4 July, which read as follows:

“These projections have been prepared by Leigh Carr, Chartered Accountants, on the basis of information provided by the directors of Our Price Records Limited trading as earning ‘Affiliate Marketing Commission’ and with advice from Leigh Carr.

These financial projections include certain estimates and projections with respect to the anticipated future performance of the Company and as to the market for the Company’s products. Such estimates and projections reflect various assumptions made by the Directors and by the senior management concerning anticipated results, which may or may not prove to be correct, but are in their opinion a fair reflection of their expectations.

Leigh Carr have not been asked to express an opinion on the information contained herein, nor have they done so. Leigh Carr have not carried out any ‘due diligence’ work on the information contained herein.”

54. During the subsequent discussions between Mr Skinner and VPP it emerged that VPP was likewise not going to approve any of Mr Skinner’s promotional materials. Instead, VPP proposed to rely instead exclusively on the exemptions for high net worth and sophisticated investors. Accordingly, on 9 July VPP sent Mr Skinner the text of a disclaimer to be included in the IM for investors, which included a prominent warning at the head of the document, stating that the content of the IM had not been approved by an authorised person within the meaning of the FSMA. That text corresponded to the disclaimer required by the exemptions in Articles 48 and 50A FPO. On 31 July VPP informed Mr Skinner that the two-page summary, or “teaser”, would also require a disclaimer in the same terms, in a box and in bold at the top of the document.
55. Duane Morris’ engagement letter to Mr Skinner and Ms Ferreira, dated 28 July, similarly set out Mr Smyth’s understanding that “it is not intended that the information memorandum will be approved by a person authorised by the Financial Conduct Authority as a financial promotion”.
56. Once the IM and teaser document were finalised, VPP promoted these to its client base.

*Decision to offer shares to general retail investors*

57. By early September 2014 no potential investors had come forward through VPP. Mr Skinner became increasingly frustrated at this, and on 10 September he asked for a meeting with VPP. The meeting took place on 12 September and was attended by VPP, Mr Skinner and Ms Ferreira. According to Mr Skinner’s memo of the meeting sent to VPP in the evening of 12 September, it was agreed that:

“[VPP] will focus in on the investor base again informing them that:

1. The website is now operational (mobile version completed Monday evening)
2. It is now revenue generating
3. As of the 1<sup>st</sup> October the Shares will be offered to the public but the company will have a much higher valuation (in excess of 12 Million)

Hopefully these 3 key points will push the investor base to react more positively !!”

58. On 14 September VPP sent an email to a PR agent reporting on the meeting with Mr Skinner and Ms Ferreira that “Post the 30<sup>th</sup> September the focus of any residual fund raising will switch from purely a ‘professional/ High Net Worth’ audience to a general ‘Retail’ audience under a regulated sign-off from their Auditors [sic]”.

59. Two comments need to be made about those notes of the meeting. The first is that the claim by Mr Skinner that the OPR website was “revenue generating” was at best an exaggeration. By the date of the meeting there had been (on 3 September) a single credit from the website in the amount of £20.03 from a single affiliate company. No further revenue was received by OPR until January 2015.
60. The second point is that the emails from Mr Skinner and VPP both reveal that by the time of the meeting Mr Skinner had decided that from 1 October 2014 he would no longer seek to attract high net worth or sophisticated investors, but would promote OPR to a general retail investor base, which would – as VPP’s email recorded – require approval from an FCA regulated entity. It is also clear that VPP, despite being a regulated entity, was not offering to provide that approval itself. Rather, Mr Skinner had told VPP that approval would be provided by OPR’s “auditors”, which must have been a reference to Leigh Carr.

*The 3 October 2014 Leigh Carr letter*

61. At some time either shortly before or after the 12 September 2014 meeting, Mr Skinner approached Mr Natt with the object of getting Mr Natt to provide a s. 21 approval for the IM, in order for the IM to be circulated to general retail investors (i.e. not limited to high net worth or sophisticated investors who were exempt under Articles 48 or 50A FPO), which is what had told VPP he would do from 1 October. It is undisputed that on 3 October Mr Natt provided a letter that was expressed to be an “approval” of the IM for the purposes of s. 21 FSMA. What is hotly disputed is the way in which that letter was obtained, and in particular what Mr Natt knew about the intended purpose of his letter. I record below the competing versions of the events, before setting out my findings of facts on the disputed points.
62. Mr Natt said that Mr Skinner contacted him on or about 11 September with a request that he provide “assurance and comfort” in relation to the financial projections that Mr Natt had helped Mr Skinner to prepare for the IM. Mr Natt said that his initial response was to explain that he could not do that, because he could not verify the directors’ forecasts and projections. His evidence (repeated at length in cross-examination) was that Mr Skinner was persistent and claimed that the brokers just wanted assurance that Mr Natt had reviewed the cash flow and financial projections. At no point did Mr Skinner inform Mr Natt that he was intending to prepare a new IM for general retail investors, recording Leigh Carr as having approved it under s. 21 FSMA.
63. Mr Skinner denied that there was ever a conversation between him and Mr Natt on or around 11 September, and claimed that the first time he raised the issue with Mr Natt was on 18 September. On 17 September, however, the email record shows that Mr Skinner sent Mr Natt a copy of the IM, stating “Please find attached the document as discussed”. The version of the IM attached to the email on 17 September was the version prepared for VPP, which contained (as described above) the prominent disclaimer at the start of the document stating that the content of the IM had not been approved by an authorised person within the meaning of the FSMA. There was no indication



in Mr Skinner's email that this disclaimer was going to be removed or that any of the figures in the document were going to be changed.

64. On 18 September it is common ground that Mr Skinner met Mr Natt at the offices of Leigh Carr. Ms Ferreira said that she also attended that meeting. Mr Natt said that at the meeting Mr Skinner persisted in asking Mr Natt to give an assurance that the cash flow projections had been reviewed by him and were properly compiled, for the purposes of showing his brokers. Eventually Mr Natt agreed to produce some sort of letter explaining how he had compiled the projections. Mr Natt said that Mr Skinner collected a hard copy draft of that letter on or around 22 September.
65. Mr Skinner's account was that he made clear at the meeting that he wanted a s. 21 approval for the purposes of the new retail IM; that the whole purpose of the meeting was to discuss the retail IM; and that Mr Natt was willing to provide the s. 21 approval that Mr Skinner sought. He categorically denied ever receiving a draft of Mr Natt's letter. Ms Ferreira's account of the meeting was somewhat vague. She said that she "never really got involved in [figures]" and was unable to recall the details of the conversation between Mr Skinner and Mr Natt. She was, however, adamant that there had been a discussion about retail investors and that s. 21 FSMA had been mentioned.
66. On 1 October, in preparation for marketing OPR's shares to general retail investors, Mr Cole sent a revised version of the IM to Mr Skinner, noting that "it has been changed significantly". One of the changes was to remove, in its entirety, the prominent disclaimer that had been inserted in the VPP version of the IM, at the behest of VPP, notifying investors that the IM had not been approved by an FCA authorised entity. The 1 October version did not state that the document had been approved by anyone at all. In a further version sent by Mr Cole on 2 October, however, the second page of the document contained a statement (the wording of which had been provided by Mr Smyth on 30 September) that:

"This document has been approved by Leigh Carr (Chartered Accountants) for the purpose of Section 21 of the Financial Services and Markets Act 2000 (FSMA) and the FCA's financial promotion rules."
67. The projection and cashflow figures in the 2 October version also differed significantly from the figures in the VPP version. In cross-examination, Mr Skinner variously said that he had hand-delivered the new version to Mr Natt on or around 2 October, and that he might have emailed it to Mr Natt on 3 October. There is, however, no record of Mr Skinner ever doing either of these things, and Mr Natt denied receiving the October IM in any form.
68. It is, however, common ground that on 3 October Mr Skinner telephoned Mr Natt. In his witness statement, Mr Natt explained that during that call Mr Skinner had told Mr Natt that his brokers required a sentence referencing s. 21 FSMA. Mr Natt asked Mr Skinner to provide the exact wording that the brokers had asked for. In cross-examination Mr Natt described the conversation in further detail as follows:

“On 3 October, which was a Friday, you badgered me, you said you had to go to the printers and I was holding up the entire project and you needed this letter to show to the brokers, otherwise the print ... whoever was doing the print, was not able to print over that weekend. ... You said the brokers had said that they wanted that sentence in. And the impression I got was that you were dealing with a regulated broker who knew [what] he was doing and if that was what he required, that might be okay. ... You were assuring me, constantly assuring me, that this letter was not going to go anywhere, and I didn't address it to the brokers, I only addressed it to you as director and you said all you were going to do is show it to the broker. You constantly reassured me on that.”

69. Mr Skinner denied that account of the conversation. That call was, however, followed by an email which read:

“Hi Jag,

As discussed please can you send an up to date Section 21 approval letter to the Directors of Our Price Records Ltd to me by email.

Please can it start with:

We have reviewed the Information Memorandum and have approved it for the purpose of Section 21 of the Financial Services and Markets Act 2000 (FSMA)

To complete the rest of your letter:

The Information Memorandum is dated the 1<sup>st</sup> October 2014

The Assumptions are on Page 20

The Business Risks are on Page 24 and have been renamed Risk Factors

I hope this covers all you need to complete your letter but if I have missed anything please let me know.

Kind regards

Lee”

70. Later that day, Mr Natt sent Mr Skinner an email saying “Please find attached a draft of revised report. I trust this is to your satisfaction.” The report read as follows:

“Dear Sirs

We have reviewed the Information Memorandum and have approved it for the purposes of Section 21 of the Financial Services and Markets Act 2000 (FSMA).

We have reviewed the accounting policies and calculations used in the preparation of the Information Memorandum of Our Price Records Ltd for three years dated 1<sup>st</sup> October 2014 ('the Prospectus').

The Information Memorandum, for which the directors of the Company are solely responsible, are [sic] based upon assumptions made by the directors which cannot be confirmed and verified in the same way as historical results. The principal assumptions are summarised on Page 20 of the Prospectus.

It should be appreciated that the projections have been prepared for the purposes of illustration and do not constitute a forecast. Because the projections cover a period of trading based on agreements which are not yet in place, the assumptions are necessarily more subjective than would be appropriate for a forecast. Events and circumstances frequently do not occur as expected and the actual results may therefore differ materially from those projected.

We draw your attention, in particular, to the section headed 'Risk Factors' set out on page 24 of the Prospectus, which describes the directors' views of the principal risks associated with a business to which the projections relate. For these reasons, we do not express any opinion either on the validity of the assumptions or the possibility of the projected results being achieved.

In our opinion, the Information Memorandum, so far as the accounting policies and calculations are concerned, have [sic] been properly compiled on the basis of the directors' assumptions and are presented on a basis consistent with the accounting policies normally adopted by companies under Generally Accepted Accounting Practice in the UK (UK GAAP).

Yours faithfully,

Leigh Carr"

71. Mr Skinner replied saying that the letter looked fine, and asking for a copy on the Leigh Carr letter heading "so I can show it to the brokers". Mr Natt provided that later on the same day.
72. Regarding the disputed points of the narrative above, my findings are as follows:

- i) I accept Mr Natt's evidence that Mr Skinner contacted him on or about 11 September. That is entirely consistent with the fact that on 10 September Mr Skinner had sought a meeting with VPP, which took place on 12 September; and as set out above Mr Skinner told VPP at the meeting that on 1 October he would be switching to a general retail share offering with sign-off from his auditors. Given that discussion and Mr Skinner's haste to get things moving at that point, it is very probable that Mr Skinner sought to take that forward with Mr Natt around the same time, and by contrast highly unlikely that Mr Skinner would have waited until (on his account) 18 September before trying to obtain Mr Natt's approval.
- ii) I also accept Mr Natt's evidence that Mr Skinner contacted him again on 17 September, which is when Mr Natt asked for a copy of the latest IM. Mr Skinner's email ("as discussed") makes clear that a discussion had taken place between them, and that he was sending the IM as a result of that discussion. There would, moreover, have been no reason for Mr Natt to ask for a copy of the IM out of the blue. The only reason why Mr Natt would have asked for that document would have been if Mr Skinner was asking him to do further work relating to the IM.
- iii) I accept Ms Ferreira's statement that she was at the meeting of 18 September. There is no reason to disbelieve her account of that, nor did Mr Natt specifically dispute it; he merely said that he could not recall whether she was there or not.
- iv) I accept Mr Natt's evidence that after the 18 September meeting he produced a draft letter that was identical to the final version save in the four respects identified in Mr Skinner's email of 3 October, namely (i) it did not contain the s. 21 sentence at the start; (ii) it did not refer to the date of the IM (since Mr Natt had not seen any IM dated 1 October); (iii) the page number for the assumptions was not page 20, but referred to the pagination of the VPP version that Mr Natt had seen; (iv) the draft letter referred to Business Risks rather than Risk Factors, and again referred to the pagination of the VPP version that Mr Natt had seen. While Mr Skinner denies receiving that draft letter, there is no other plausible explanation for the terms of Mr Skinner's own email of 3 October, which only makes sense if it is understood to be referring to a draft in the terms that I have described. Mr Natt's subsequent email referring to his "revised report" also implies that there was a previous version.
- v) I accept Mr Natt's account that Mr Skinner told him that the letter was required in order to show to the brokers. Mr Skinner's email of 3 October specifically asked for the letter to be put on headed paper "so I can show it to the brokers". Mr Natt says (and I accept) that this gave the impression that Mr Skinner was continuing to use FCA regulated brokers, as had been the plan when Mr Natt had first met Mr Skinner and Ms Ferreira. (As set out further below, Mr Skinner's request for a further version of that letter in March 2015 was also put on the basis that it was requested by his brokers.)

- vi) I am also satisfied that Mr Natt did not know that his letter was going to be used for the purposes of a general retail IM, and certainly did not know that a new IM would be issued stating that it had been approved by Leigh Carr. There is no record of the October version of the IM having been provided to Mr Natt either in electronic or hard copy. The only version of the IM that Mr Natt had seen by 3 October – as far as the contemporaneous documentary record shows – was the VPP version which contained the prominent disclaimer referred to above. The only evidence that Mr Natt was ever told that his approval was required for a new retail IM is, therefore, the evidence of Mr Skinner and Ms Ferreira. Given the vague nature of Ms Ferreira’s evidence in relation to the 18 September meeting I do not place any weight on her account. As for Mr Skinner’s contentions, I have comprehensively rejected his version of the events leading up to the 3 October letter, and I therefore consider his evidence to be entirely unreliable in this regard.
- vii) I do not need to decide when, precisely, Mr Skinner first said that he needed Mr Natt’s letter to refer to s. 21 FSMA. I do, however, accept Mr Natt’s account that he only provided the s. 21 wording following pressure from Mr Skinner. Mr Skinner had already (as far back as 12 September) informed VPP that he was going to proceed to market OPR to general retail investors on the basis of sign-off from his “auditors”. He had also informed Mr Smyth that Leigh Carr was going to oblige, which led Mr Smyth to supply the approval wording that was incorporated into the 2 October version of the IM. It was also clear that Mr Skinner was very frustrated at the lack of uptake following the VPP promotion and wished to implement the new fundraising strategy as quickly as possible. Mr Skinner accepted, in his evidence, that he knew that he had to have the IM approved for the purposes of s. 21 if he was going to approach general retail investors. I have also found that the draft letter did not contain a s. 21 approval statement, such that Mr Skinner had to provide the wording that he wanted Mr Natt to insert in that regard. That is all entirely consistent with Mr Natt’s account of the discussion on 3 October.
73. These conclusions are further supported by two specific subsequent events, namely the “whiting out” of the approval statement on a later version of the IM that was sent to Mr Natt, and Mr Natt’s immediate response when Mr Skinner forwarded him, on 16 October 2015, the letter from the FCA. I discuss both of those below.

#### *The share offering to general retail investors*

74. VPP did not ultimately manage to secure any investment in OPR. Mr Skinner therefore terminated the exclusive agreement with VPP on 30 September 2014 and pursued his plan of attracting general retail investors. To that end the October version of the IM (containing the Leigh Carr approval statement) was sent out to various marketing agents. The closing date was specified as 31 December 2014, and the minimum subscription amount was given as £6000, with lower investments possible “subject to the Directors’ discretion”. The IM was accompanied by a two-page summary which stated on each of its pages

“For your opportunity to invest PLEASE REQUEST THE FULL INFORMATION MEMORANDUM. This document has been APPROVED for the purpose of Section 21 of the Financial Services and Markets Act 2000 (FSMA)”. It is common ground that, whatever the position in relation to the IM itself, Mr Natt had not seen or approved the summary document.

75. The relaunched share offering to general retail investors was successful, with a total of £863,100 raised from 92 investors during the course of October to December 2014.
76. A further version of the IM was prepared in January 2015, amending the closing date to 4 April 2015 and reducing the minimum subscription amount from £6000 to £3000. This contained the same Leigh Carr approval statement as the October IM, although it is undisputed that this version was neither sent to nor approved by Leigh Carr. The January IM was provided to investors through further marketing agents including M&O and Venor, who were engaged on 25 January 2015 and 2 March 2015 respectively.
77. A further amended version of the IM was prepared during February and early March 2015. This extended the closing date to 30 September 2015, increased the share price, and materially amended the cashflow forecast by comparison with the previous versions. On 4 March 2015 Mr Skinner sent that IM to Mr Natt, along with Mr Natt’s 3 October 2014 letter, requesting “Please can we have the same letter except dated March 2015 and paragraph 2 dated [M]arch 2015”. Notably, however, the version of the IM sent to Mr Natt concealed the s. 21 approval wording, by means of turning the text of that wording white (against a white background), such that the approval wording was not visible on the pdf that Mr Natt received. Two days later, on 6 March, Mr Natt had not provided the letter, so Mr Skinner sent a chaser email saying “Sorry to be a nuisance as I know you’re busy but I am being pressed by the brokers for the Section 21 approval letter. Is it possible to get it over to me today?” Mr Skinner accepted in cross-examination that he was not, in fact, being pressed by any brokers, but had invented this story in order to try to get Mr Natt to provide his letter quickly.
78. Mr Skinner’s chaser email had the desired effect: Mr Natt duly provided an updated approval letter later that day in the terms requested. On 9 March Mr Skinner sent Mr Natt a further version of the IM explaining that the content was the same but the colour of the cover had been changed. In that version, again, the approval wording had been whited out such that it was not visible by Mr Natt.
79. Mr Skinner accepted that he had asked his designer, Mr Cole, to remove the s. 21 approval wording on the two versions of the IM sent to Mr Natt on 4 and 9 March. His explanation was that he thought it inappropriate to send Mr Natt an IM containing a s. 21 approval statement before Mr Natt had actually approved it. That explanation is, in my view, implausible. On Mr Skinner’s account, Mr Natt had already approved the October version of the IM, and by 6 March he had also approved the March version. That being the case, there was no reason why, at least for the version sent on 9 March, Mr Natt could not have seen the statement that had been inserted on the basis of the approval

letter he had provided. As Mr Skinner expressly stated, nothing had changed in that version save for the colour of the cover. The fact that Mr Skinner nevertheless went to the trouble of asking Mr Cole to produce a version of that with the s. 21 text removed indicates clearly that Mr Skinner wanted to conceal from Mr Natt the fact that this letter was being used as the basis of a s. 21 approval statement in the IM.

80. In late September 2015 a further version of the IM was prepared and sent to various agents including Mr Mongelard. That version did not contain the s. 21 approval statement by Leigh Carr, and changed the banking details for OPR to a different account. The closing date was extended to 31 March 2016. The financial projections and cashflow forecast remained the same as on the March 2015 version.
81. In total, 32 marketing agents were used to raise funds for OPR between October 2014 and November 2015. Of the 259 investors introduced by those marketing agents, 176 were introduced by M&O and Venor. Neither M&O, nor Venor, nor indeed any of the other 30 marketing agents were authorised by the FCA to carry on investment activities for the purposes of s. 19 or s. 21 FSMA.
82. The fees of the marketing agents were, moreover, far higher than the fees that had been proposed by VPP. By 20 September 2014 Mr Skinner had agreed to pay one agent, John Mayhew, a commission of 50% on the gross amount raised on any direct sales of shares by him, and also proposed that Mr Mayhew should get further commissions on the sales by third party agents introduced by him on a deal by deal basis, with the maximum total commission to be 50%, “and the objective to be 40% to the third party and 10% to you”. The contracts between OPR and the other marketing agents indicate commission levels of between 20–50%, and in cross-examination Mr Skinner suggested that the commissions ranged between 30–65%. The FCA’s calculations show that around 50% of all investor monies received was in fact paid from the various OPR accounts to bank accounts held in the names of the 32 marketing agents.
83. These levels of commission were well outside of the ordinary range for a share offering of this nature, and Mr Skinner knew this: on 6 October 2014 Mr Smyth sent him comments on one of the agency agreements, providing for a 50% commission level, noting that “As I have commented, this commission level is the steepest (by a long way) that I have ever seen!”

#### *Agreements with Ted Lucy and TLMT*

84. Once the marketing agent fees were accounted for, a large part of the remaining funds invested by shareholders made its way to Mr Skinner through a curious set of agreements between OPR and two companies of which Ms Ferreira was the sole shareholder and sole director: Ted Lucy and TLMT. In October 2015, OPR’s lawyers described these as dormant companies. The companies were, however, actively being used by Mr Skinner and Ms Ferreira from October 2014 through to December 2015.

85. The first of the agreements was entered into on 26 September 2014, between OPR and Ted Lucy, and purported to be a services agreement, by which Ted Lucy would provide a range of administrative services (including book keeping, marketing advice, advertising advice, website advice, and the provision of management and personnel) for OPR, in return for which OPR would pay Ted Lucy 20% of “all monies received” by OPR, which according to Mr Skinner included shareholder subscriptions. The agreement was signed by Mr Skinner on behalf of OPR, and by Ms Ferreira on behalf of Ted Lucy.
86. A week later, on 3 October 2014, Ted Lucy entered into what was essentially a mirror agreement with TLMT, providing for the same services to be carried out as in the Ted Lucy/OPR agreement. The consideration was specified to be £50,000 per month. That agreement was signed by Ms Ferreira on behalf of both Ted Lucy and TLMT.
87. A further week later, on 10 October 2014, TLMT entered into a loan agreement with Mr Skinner, providing for an advance to Mr Skinner of up to £1 million, at an interest rate of 10% after an initial 18-month interest free period. Repayments would be in “irregular instalments” and the loan would be secured against Mr Skinner’s shares in OPR.
88. During the course of 2014 and 2015 over £720,000 was transferred from OPR’s accounts to Ted Lucy (equating to around 20% of the investor monies received). Over £650,000 of that was transferred to TLMT, almost all of which was then transferred to Mr Skinner’s personal account. The FCA’s investigation showed that most of the money transferred to Mr Skinner was spent on gambling websites. Some of the remaining funds in the Ted Lucy and TLMT accounts were also spent by on gambling websites. Around £21,000 of the investor funds were used to pay rent and utility bills for Ms Ferreira’s property, from which OPR was operated by Ms Ferreira and Mr Skinner.
89. It is undisputed that Mr Skinner proposed the Ted Lucy/TLMT agreement structure to Ms Ferreira, and that he controlled all of the bank accounts for OPR, Ted Lucy and TLMT despite the fact that he was not at any time a director of the latter two companies.
90. Mr Purchas submitted that these transactions were so extraordinary that they represented nothing more than a mechanism for the extraction of funds from OPR for the personal benefit of Mr Skinner. I agree with that submission. Ultimately neither Mr Skinner nor Ms Ferreira denied that the mirror contracts were structured so as to enable the payments to Ted Lucy for “administration services” to flow through to Mr Skinner. Their justification for the arrangement was that whatever Mr Skinner did with the money, the transfer of funds to him was legitimate since the amount fell within the terms of the financial projections for administration expenses for OPR during its first two years of operation. I reject that submission for the reasons set out further below.

*The trademark litigation*



91. Meanwhile, during the course of 2014 a trademark dispute with Palm Green was brewing. In July 2014 Mr Skinner engaged Withers & Rogers LLP (“Withers”) to deal with the registration of trademarks for Our Price and Our Price records, but on 12 August 2014 Withers informed Mr Skinner by email that Palm Green had registered earlier trademarks for Our Price, noting that “We have already discussed these registrations”. On 20 October 2014 Mr Skinner was informed by Withers that there was a notice of threatened opposition by Palm Green, and on or around 17 November 2014 Mr Skinner told Withers that he would be transferring responsibility for the trademark issue from them to Keltie LLP. Formal opposition was then filed by Palm Green on 20 November 2014.
92. The trademark dispute continued into 2015. On 15 April 2015 Palm Green’s solicitors wrote to Keltie maintaining their entitlement to the Our Price trademarks and objecting that OPR’s use of the trademarks in their IMs raised “potentially serious issues under sections 89 and 90 of the Financial Services Act 2012”. The letter noted in particular that:
- “As your clients are aware, Palm Green asserts that they, and not your clients, are the true owners of the trade mark in question, and are contesting your clients’ claim to ownership rights in the current opposition proceedings. Palm Green will continue to do so in all relevant forums. Nevertheless, by asserting their ownership in investor materials, without reference even to the existence of a rival claimant, your clients have made a strong signal to the market that they hold verified, uncontested ownership of the brand name, which they have made the key feature of their business proposition.”
93. On 1 July 2015 Palm Green filed a witness statement in the trademark litigation. That statement exhibited a copy of an OPR IM and summary, and made similar points to those in the 15 April letter:
- “[OPR] is current promoting its proposed use of the OUR PRICE brand and seeking investment from third parties, in which context it has published a flyer which is attached as Exhibit F and an Information Memorandum which is attached as Exhibit G. Neither of these documents contain any mention of or reference to Palm Green’s registered rights relating to the OUR PRICE brand. Potential investors are entitled to believe from the applicant’s Memorandum that its claim to the brand name is valid and watertight.”
94. During the course of August 2015 there were negotiations between the parties with a view to settling the dispute. It appears that those negotiations continued during September and October, but in November 2015 Mr Skinner decided (on the advice of Mr Smyth) not to close an agreement with Palm Green while the FCA enquiry (which I discuss below) was still pending.

*The FCA’s investigation*

95. On 16 October 2015 the FCA wrote to OPR expressing concerns that OPR had contravened s. 21 FSMA and had been knowingly concerned in brokers breaching s. 19 FSMA. In particular, the FCA noted that the IMs stated that they had been approved by Leigh Carr, but that Leigh Carr did not have the appropriate permission to approve financial promotions. The FCA also noted that the OPR share sale had been marketed by agents that were likewise not authorised by the FCA for that purpose.
96. Mr Skinner initially forwarded the letter to Mr Smyth asking for his help. Mr Smyth replied saying that he was away from the UK, and that Mr Skinner should show the letter to Leigh Carr as soon as possible. Mr Skinner therefore sent the letter to Mr Natt asking for his comments. Mr Natt's response, just over three hours later, was as follows:

“Our Section 21 FSMA letter was addressed and issued solely to The Directors to enable them to present the information memorandum to the FCA regulated introducing brokers who would then in turn offer it to their High Net Worth clients who were covered under exemptions from section 21.

Our understanding was that the document was not for issue at any time to any member of the public directly but only to FCA regulated investment professionals or FCA licenced brokers.

We trust and have assumed that as per the original agreement only FCA authorised brokers were going to be used. The FCA letter indicates that this may not have been the case and unauthorised share sales may have been enacted. Please confirm that this is not the case and all share sales have been made by FCA duly authorised entities.”

97. Mr Skinner replied thanking Mr Natt for his response, and saying that he would discuss this with Mr Smyth on his return to the UK the following week. The outcome of that discussion is reflected in a letter of response sent by Mr Smyth to the FCA on 27 October 2015, in which he relied on the 3 October 2014 letter from Mr Natt, claiming that OPR had understood that Leigh Carr had the requisite expertise and authority to issue the s. 21 approval, saying that the directors of OPR were “shocked and concerned” to learn that Leigh Carr may not have been appropriately authorised, and saying that OPR did not understand Mr Natt's response of 16 October 2015.
98. It is, however, notable that Mr Skinner did not, at that time, challenge Mr Natt as to the contents of his response. Quite the contrary, it appears that in a subsequent telephone conversation Mr Skinner sought to reassure Mr Natt that the matter was being sorted and the issue had arisen due to a “rogue broker”. That is reflected in Mr Natt's manuscript notes of the call on a printout of his email to Mr Skinner, as follows:

“Telecon :- Lee Skinner – matter sorted. Letter sent to FCA with explanations.

Rogue broker was not authorised by Our Price :- Global Capital Wealth – FCA blacklisted.”

99. In cross-examination Mr Skinner was unable to explain how those notes came to be written in circumstances where, as he accepted, the matter was certainly not “sorted”. The explanation is, however, fairly obvious: despite writing to the FCA in terms that sought to place the blame squarely on Leigh Carr, Mr Skinner was seeking to reassure Mr Natt by fabricating a story concerning a rogue broker that had not been authorised by OPR. Mr Skinner knew, however, that the FCA’s concern had nothing to do with a rogue broker; his conversation with Mr Natt could therefore have had no purpose other than to continue to conceal from Mr Natt the fact that Mr Natt’s letters had been used for the purposes of OPR’s general retail share offering.
100. It is also notable that, notwithstanding the FCA’s letter, OPR continued its share offering, with the last share sales being made on 18 November 2015. On 19 November Mr Smyth sent Mr Skinner an email noting that he had received documentation relating to further allotments of shares, and commenting that “You are aware of my views and advice that, pending the outcome of the FCA enquiry, no further shares should be issued but I understand your approach on that”. This indicates that Mr Smyth had at some earlier date advised Mr Skinner to cease issuing shares, but that Mr Skinner had rejected that advice.
101. On 11 December 2015 the FCA wrote to Mr Smyth maintaining its objections to the activities of OPR, and expressing deep concern that the company had continued to sell shares to the public despite the terms of the FCA’s previous letter. The FCA requested OPR to cease carrying on regulated activities with immediate effect.
102. During the course of its subsequent investigation, the FCA obtained information pursuant to information requests from OPR and all of the Defendants save for Ms Ferreira, as well as Mr Natt and VPP. The FCA also compelled all of the individual Defendants, as well as Mr Mayhew, Mr Natt, Mr O’Gorman and Mr Tobin of VPP to attend interviews with the FCA, which took place on various dates between February and August 2016.
103. In addition, the FCA contacted a number of investors who had subscribed for shares in OPR, and sent a questionnaire to 245 investors for whom the FCA had contact details. 106 (43%) of those returned the completed questionnaire. Following that exercise the FCA spoke further to various of the investors. The FCA relies, in these proceedings, on the statements made in those questionnaires and in the telephone calls with specific investors, as well as the more detailed evidence given by the 10 investor witnesses.
104. OPR entered administration on 25 April 2017 without ever having traded in any material way. As at April 2017 just over £483,000 remained of the £3.6 million that it received from investors. M&O was dissolved on 6 August 2019.

**The issues**

105. The FCA has brought different claims against the various Defendants. These give rise to essentially five issues:
- i) Whether Mr Skinner and Ms Ferreira were knowingly concerned in the (admitted) contravention by OPR of s. 21 FSMA.
  - ii) Whether OPR contravened s. 89 FSA by making false or misleading statements or dishonestly concealing relevant facts, and if so whether Mr Skinner was knowingly concerned in that contravention.
  - iii) If Mr Skinner and Ms Ferreira are found to have been knowingly concerned in any contravention, whether they should be ordered to make restitution under s. 382 FSMA, and if so of what sum.
  - iv) Whether Venor, Mr Mongelard and Mr Miller should be ordered to make restitution under s. 382 FSMA following their admissions that M&O and Venor contravened ss. 19 and 21 FSMA and s. 89 FSA, their further admissions that Mr Mongelard and Mr Miller were knowingly concerned in the contraventions of ss. 19 and 21 FSMA, Mr Mongelard's admission that he was also knowingly concerned in the contraventions of s. 89 FSA.
  - v) Whether the FCA should also obtain declarations and orders restraining the Defendants from committing further contraventions.
106. I consider each of these issues in turn below. Before doing so, however, I should address one procedural issue raised by Mr Mongelard and Mr Miller, concerning the admissions pleaded in the composite defence filed on 6 May 2018 on behalf of the third to sixth Defendants. That defence was drafted by solicitors, with the involvement of counsel, and (as indicated above) essentially admitted the FCA's case against those Defendants, but sought to avoid restitution on the basis of various factual claims. At some point thereafter those Defendants decided to represent themselves, and in an application dated 9 January 2019 they sought to withdraw the admissions made in their defence on the grounds that they had not understood what they were admitting.
107. That application was dismissed by Chief Master Marsh on 18 January 2019: *FCA v Skinner and others* [2019] EWHC 392 (Ch). The Chief Master rejected the submission that there was any misunderstanding by the third to sixth Defendants, given the involvement of solicitors and counsel and the detailed way in which the defence was drafted. He also considered that the defence would have no real prospect of success in any event. Mr Mongelard and Mr Miller were advised that they could appeal this, but decided not to do so, apparently on grounds of cost. They have, however, asked me to take into account (in some way) their submissions that their defence was drafted on what they say was an incorrect basis.
108. As I indicated during the hearing, there is no basis on which the defence of the third to sixth Defendants can be repleaded now, given the unsuccessful attempt to do so earlier in the course of these proceedings. The defence

therefore stands unamended; that is the basis on which the FCA has prepared its case; and it would be entirely inappropriate for me to consider the question of restitution on the basis of an alternative case now. I do, however, consider and address below the substance of Mr Mongelard and Mr Miller's submissions in this regard, namely their claim that they reasonably believed that Leigh Carr had approved the IMs for the purposes of s. 21 FSMA. That is something that may, in principle, be relevant to the question of restitution notwithstanding the admissions otherwise made by those Defendants.

### **The s. 21 claims against Mr Skinner and Ms Ferreira**

109. It is admitted that OPR contravened s. 21 FSMA by communicating, in the course of business, a series of invitations and/or inducements to subscribe for shares in OPR (in the form of the IMs and two-page summary documents) in circumstances where those communications were not approved by an authorised person, and no other exemption applied. The question is whether Mr Skinner and Ms Ferreira were knowingly concerned in that contravention within the meaning of s. 382 FSMA.
110. Mr Skinner and Ms Ferreira say that they were not knowingly concerned, on the basis that they believed that the IMs had been approved by Leigh Carr.
111. The FCA's primary case is that as a matter of law, for the purposes of s. 21 read together with s. 382, the requisite knowledge extends only to knowledge of the acts that constitute the offence under s. 21(1), namely the communication of an invitation or inducement to engage in investment activity; it is not (the FCA says) necessary to go further and show that the Defendants knew that the various potential exemptions (or any of them) were not engaged.
112. In the alternative, the FCA contends that as a matter of fact Mr Skinner did know that Leigh Carr had not approved the IMs or any of the two-page summaries for the purposes of s. 21 FSMA, or was at least wilfully blind in that regard, and that Ms Ferreira was wilfully blind as to the fact that no approval had in fact been given.

### *The legal test for knowing concern in a breach of s. 21*

113. Under s. 382 a restitution order may be made against a person who has been "knowingly concerned" in a contravention of a relevant requirement by the primary contravener (which in this case was OPR). The concept of "knowing concern" contains two discrete elements:
  - i) The first is that the person must have been *actually involved* in the contravention. Most obviously, this includes a person who is, as Browne-Wilkinson VC put it in *SIB v Pantell (No. 2)* [1993] Ch 256, 264D–E, the "moving light" behind a company carrying on investment business in an unlawful manner. More broadly, however, it will extend to those who "pull the strings at a directorial and/or managerial level": *FCA v Capital Alternatives* [2018] 3 WLUK 523, §801.

- ii) The second requirement is *knowledge of the facts on which the contravention depends*. It is immaterial whether or not the person knows that those facts constitute a contravention, since ignorance of the law is not a defence: *SIB v Scandex Capital Management* [1990] 1 WLR 712, 720F–H, and *FCA v Capital Alternatives*, §802.
114. In the present case it is not in dispute that both Ms Skinner and Ms Ferreira were “concerned” in OPR’s breaches of s. 21 FSMA, in the sense of being actually involved in the contravention. Mr Skinner was most certainly the “moving light” behind OPR; and Ms Ferreira was his co-director, who signed off on the key decisions and attended important meetings with Leigh Carr and others such as VPP.
115. The defences advanced by Ms Skinner and Ms Ferreira rather focus on their belief that OPR’s communications had been properly approved by Leigh Carr. That raises a key threshold legal question that was debated at some length in Mr Purchas’ written and oral submissions at the trial, namely the extent to which the facts on which the contravention depends include, in a s. 21 case, the fact that the relevant communications were *not* approved by an authorised person. Unsurprisingly, none of the Defendants made legal submissions on this point. Mr Purchas did, however, very conscientiously identify the arguments that the Defendants might advance and the case-law on which they might rely, in order to enable the issue to be properly explored at the hearing.
116. The essence of the FCA’s primary case is that the constitutive elements of a s. 21 contravention are the elements set out in s. 21(1) – namely that (i) there was a communication of an invitation or inducement to engage in investment activity, and (ii) the communication was made in the course of business. S. 21(2) does not set out an element of the contravention, Mr Purchas submitted, but rather merely sets out a situation in which the prohibition in s. 21(1) does not apply at all. If (as in this case) it is clear that the prohibition *does* apply, because none of the relevant exemptions are satisfied, then the “knowledge” in question can only concern the knowledge of the elements set out in s. 21(1).
117. That submission is of somewhat deceptive simplicity, for this is not, in my view, a straightforward issue. The effect of the FCA’s submission is that in almost every case where a person is “concerned” in a breach of s. 21 FSMA they are likely to have the requisite degree of knowledge, since all that is required is knowledge that a communication has been made which invites or induces investment activity or claims management activity, and knowledge that this is in the course of business. Only in a rather limited set of circumstances might a good case be made of lack of knowledge, such as a situation where the communication has been made by a rogue employee, entirely unbeknown to the company’s directors.
118. Mr Purchas acknowledged that the existing case-law in relation to knowing concern in contraventions of s. 21 FSMA has not grappled with this issue, presumably because none of the defendants in the previous cases relied on a belief that the relevant communications had been approved for the purposes of s. 21(2). The one case in which this issue is touched upon – which Mr Purchas very properly drew to my attention – is *SIB v Scandex*, where it was said at p.

717 D–E in relation to knowing concern in a contravention of s. 3 of the Financial Services Act 1986 (the predecessor to s. 19 FSMA) that:

“The contravention consists of (i) the carrying on of an investment business (ii) in the United Kingdom (iii) by a person who is not an authorised person under Chapter III of the Act of 1986. Before the second defendant can be made liable under section 6(2), therefore, he must appear to have possessed the requisite knowledge of all three ingredients of the contravention. It is not disputed that the second defendant was knowingly concerned in the carrying on by Scandex of an investment business in the United Kingdom. The sole question is whether he has an arguable case for claiming that he did not know that it was not an authorised person.”

119. For the purposes of knowing concern in a contravention of s. 3 of the 1986 Act, therefore, there is no doubt that it was necessary to show knowledge that the investment business was not being carried on by an authorised person. It might, therefore, be argued that the same should be true of s. 21 FSMA.
120. As Mr Purchas pointed out, however, the discussion of knowledge in *SIB v Scandex* follows inevitably from the way in which s. 3 of the 1986 Act was drafted (and similarly the way in which s. 19 FSMA is also drafted). Under both s. 3 of the 1986 Act and s. 19 FSMA the prohibition was and is defined as being engaged *unless* the relevant person is an authorised person. An essential ingredient of the prohibition on carrying on an investment business is therefore that the person carrying on the business is not authorised.
121. By contrast, s. 21(1) FSMA sets out an absolute prohibition on communicating an invitation or inducement to engage in investment or claims management activity, which does not in itself carve out the situation in which that communication is authorised. Instead, separate provisions disapply s. 21(1) FSMA if certain conditions are satisfied – which include (under s. 21(2)) the fact that the communication is made by an authorised person or has been approved by an authorised person. The FCA should not, Mr Purchas submitted, have to prove knowledge in relation to the requirements of a disapplication provision that is not applicable on the facts of a particular case.
122. I consider that Mr Purchas was right to place emphasis on the structure of the prohibition in s. 21 FSMA. The prohibition could have been drafted in similar terms to s. 19 FSMA, so as to provide for a prohibition on communicating an invitation or inducement to engage in investment activity, unless the communication is made by or its contents have been approved by an authorised person. Indeed s. 57 of the 1986 Act, which was the predecessor to s. 21 FSMA, did identify the prohibition in essentially that way. S. 21, however, was drafted in conspicuously different terms, as Mr Purchas described.
123. It is also notable that s. 21(2) is not the only situation in which the prohibition in s. 21(1) is disapplied; in addition, as described above, various exemptions are specified in the FPO, including the exemptions for certified high net worth

individuals and sophisticated investors. If as a matter of construction the elements of the contravention incorporated the fact that no exemption or disapplication provision applied in a particular case, the result would be that proof of knowing concern under s. 382 would require an enquiry into the defendant's knowledge or belief of the facts relating to every exemption that might potentially, but on the facts did not, apply to the case in question. That would substantially undermine the effectiveness of s. 382.

124. Mr Purchas also referred to the policy reasons that, in his submission, supported the FCA's construction of the concept of "knowing concern". As Browne-Wilkinson VC explained in *SIB v Pantell (No. 2)* at p. 264D–E, one of the purposes of introducing powers to make a restitution order against someone who was "knowingly concerned" in unlawful investment activity was to prevent directors from hiding behind the corporate veil of the infringing company. In particular:

"If as is often the case, the company is not worth powder and shot, it is obviously just to enable the court, as part of the statutory remedy of quasi-rescission, to order the individual who is running that company in an unlawful manner to recoup those who have paid money to the company under an unlawful transaction."

125. As Mr Purchas pointed out, if a company has contravened s. 21 FSMA it is no defence for it to assert that it believed (reasonably or otherwise) that the relevant communications to investors were authorised. It would, therefore, be illogical if a director who is the controlling mind of the company could avoid a finding of knowing concern in the contravention by reference to such a belief, particularly in light of the rationale for orders against those "knowingly concerned" as described above.
126. "Knowledge" of a contravention of s. 21 therefore requires knowledge of the facts giving rise to the contravention as set out in s. 21(1). It is not necessary to go further and establish that the defendant knew that the primary contravener was not authorised, or that the relevant communication was not approved by an authorised person; nor is it necessary to establish any knowledge or belief as to the applicability of any other exemptions, such as the exemptions for high net worth individuals or sophisticated investors.
127. I therefore reject Mr Skinner and Ms Ferreira's defences to the s. 21 claims. Whether or not they believed the contents of the various investment communications to have been approved by Leigh Carr is irrelevant to the establishment of knowing concern under s. 382. All that is required is that they knew the facts set out in s. 21(1); and in that regard it is undisputed that both Mr Skinner and Ms Ferreira did indeed know that OPR was, in the course of business, communicating invitations and/or inducements to engage in investment activity.
128. It is therefore not strictly necessary for me to address the FCA's secondary case concerning Mr Skinner and Ms Ferreira's knowledge that OPR's communications had not been approved for the purposes of s. 21. I will,



however, set out my findings on that because it was fully argued before me, and in case the matter goes further.

*Mr Skinner's knowledge*

129. Mr Skinner protested throughout his submissions and his evidence that he did not understand the requirements of s. 21 FSMA. I reject that claim: I have already found that Mr Skinner knew from the outset that he would require approval under s. 21 unless he was dealing only with high net worth or sophisticated investors (as was originally sought through VPP) or was using a broker authorised by the FCA. His evidence was that he had been told this by Richard Mayhew in April 2014. Mr Smyth also made a similar point in his comments on VPP's draft engagement letter (extracted above), which Mr Skinner accepted was "in line" with what he had been told by Mr Mayhew.
130. Mr Skinner also signed the minutes of a meeting of the board of directors on 25 July 2014 to approve the arrangements for the offer of shares by VPP, with the minutes recording explicitly that:
- i) The IM and the "Teaser" summary that VPP intended to circulate to investors would (or would be likely to) constitute a "financial promotion" within the meaning of s. 21.
  - ii) Both documents would therefore need to be approved by a person authorised in such regard by the FCA, unless the document was issued and distributed in exempt circumstances.
  - iii) Since neither the IM nor the "Teaser" would be approved by an authorised person, it would only be lawful for those to be directed at and provided to persons falling within one of the relevant exempt categories, which were then listed.
131. While Mr Skinner suggested that he may not have understood this, that is not credible given the fact that this merely confirmed what he had been told repeatedly by various of his advisers by that point. The fact that Mr Skinner sent the s. 21 wording to Mr Natt for inclusion in the 3 October 2014 letter, and was insistent that Mr Natt should provide approval in terms that referred to s. 21, also demonstrates that Mr Skinner was very well aware that he needed a s. 21 approval for his share offering to general retail investors to be lawful.
132. It is, however, undisputed that none of the two-page summaries sent out with the various versions of the IM had been approved by Mr Natt or anyone else at Leigh Carr. Nor did Leigh Carr approve either the January 2015 or the late September 2015 versions of the IMs (and indeed, as recorded above, the September 2015 version did not even purport to have been approved by Leigh Carr). Mr Skinner's protestations that he did not think that he needed Leigh Carr to approve those documents are not credible. In relation to the summaries, he had been told explicitly that the VPP versions of the summaries would have to be approved by an authorised person, unless distributed in exempt circumstances, and there is no plausible reason for him to have thought that the subsequent summaries prepared for the general retail market

would be subject to different rules. As for the two IMs that Leigh Carr did not approve, in both cases Mr Skinner knew that the content of the IMs had changed by comparison with previous versions, so again there is no plausible reason for him to have thought that the new versions did not require approval. Quite the contrary, Mr Skinner's own evidence was that he sent Mr Natt a further version of the March IM because the colour of the cover had been changed.

133. That leaves the question of whether Mr Skinner knew that the two letters provided by Mr Natt on 3 October 2014 and 6 March 2015 were not, in fact, approvals of the content of the IMs for the purposes of s. 21. I have set out in detail, above, my findings as to the circumstances in which those letters were provided to Mr Skinner, in which I have accepted the account of Mr Natt and rejected Mr Skinner's version of events. In particular, I have found that Mr Skinner did not at any point tell Mr Natt that his letter would be used for the purposes of a general retail IM, but instead told him (both in October 2014 and March 2015) that the letter was required to show to Mr Skinner's brokers. There were, however, no brokers asking to see a letter from Mr Natt at either point – the broker story was therefore a complete fabrication.
134. I consider that the only reason that Mr Skinner would have invented such a story was to conceal from Mr Natt the true purpose of his request. That conclusion is fortified by the “whiting out” of the s. 21 approval statement from the two versions of the IM sent to Mr Natt in March 2015. As I have set out above, the only plausible explanation for this was that Mr Skinner was seeking to conceal from Mr Natt the fact that his letters had been (and would continue to be) used as the basis of s. 21 approval statements in the various IMs.
135. This in my view demonstrates that Mr Skinner was very well aware that Mr Natt's letters were not genuine approvals of the content of the relevant IMs for the purposes of s. 21. Rather, Mr Skinner knew that he had obtained the letters upon a pretext and had then proceeded to use them for a purpose not intended by Mr Natt. Had he genuinely believed Mr Natt to have been issuing a s. 21 approval for the IMs there would have been no reason whatsoever to have relied on a (repeated) fiction of requiring the letters to show brokers, or to have concealed the s. 21 statements in the IMs sent to Mr Natt.
136. Mr Natt's response when informed of the FCA investigation, and Mr Skinner's reaction to that, are also telling. Mr Natt's prompt explanation on 16 October 2015 of his understanding of the purpose of his letters is consistent with all of the other contemporaneous evidence as well as Mr Natt's witness evidence in this hearing. Mr Skinner's response, by contrast, was thoroughly duplicitous – instead of challenging Mr Natt as to his explanation (which he surely would have done if that explanation differed from his understanding of events) he came up with another entirely fabricated story about a rogue broker, and a false assurance that the matter was “sorted”. Again, as I have found, the only purpose of this can have been to conceal from Mr Natt the true state of affairs. That in turn supports the conclusion that Mr Skinner knew all along that Mr Natt's letters were never intended to be approvals of the IMs for the purposes of s. 21.

137. Even if, therefore, it had been necessary for the purposes of knowing concern to demonstrate that Mr Skinner was aware that OPR’s investment communications (in the form of the IMs and summaries) were not approved under s. 21, I would have no hesitation in finding that he did in any event have the requisite degree of knowledge.

*Ms Ferreira’s knowledge*

138. The position of Ms Ferreira is different. Her account was that although she was a director of OPR (and the sole director and shareholder of Ted Lucy and TLMT) she had no real understanding or involvement in the legal and financial side of the business, but relied entirely on what she was being told by Mr Skinner. Mr Skinner was the person who communicated with the various sets of lawyers; the majority of the communications with Leigh Carr were also through Mr Skinner and did not involve her, although she did attend the initial meeting with Mr O’Gorman and Mr Natt on 24 June 2014 and the subsequent meeting with Mr Natt on 18 September. Ms Ferreira also said that she did not fully understand the requirements of s. 21 FSMA, nor did she fully understand (for example) the board minute of 25 July 2014.
139. None of that account was seriously disputed by the FCA. It is also consistent with the picture that emerged from the documentary record, which showed clearly that Mr Skinner was the driving force and controlling mind of OPR throughout 2014 and 2015. Given that Ms Ferreira trusted Mr Skinner to the extent that she handed over the bank details and passwords for the Ted Lucy and TLMT accounts, and gave him free rein to operate those accounts and move money between the companies of which she was the sole director and shareholder, and did not even (she said) check the bank accounts for those companies for herself, it seems very likely that she also trusted him to organise the share offering in a way that complied with the relevant legal requirements.
140. In those circumstances Mr Purchas unsurprisingly did not suggest that Ms Ferreira had actual knowledge that no s. 21 approval had been given. Rather his submission was that she was wilfully blind to that effect, such that knowledge of the relevant facts could be imputed to her. He relied in that regard on the comments of the Court of Appeal in *Group Seven v Notable Services* [2019] EWCA Civ 614, [2019] 3 WLR 1011. In that case the court set out the two conditions for wilful blindness or “blind-eye knowledge” as, first, the existence of a suspicion that certain facts may exist and, secondly, a conscious decision to refrain from taking any steps to confirm their existence (§59).
141. The court in that case continued by commenting that the existence of the suspicion must be judged subjectively by reference to the beliefs of the relevant person, and that the decision to avoid obtaining confirmation must be deliberate. At §60 it cited with approval the speech of Lord Scott in *Manifest Shipping v Uni-Polaris Insurance (The Star Sea)* [2003] 1 AC 469, at §116, that:

“In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific

facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. To allow blind-eye knowledge to be constituted by a decision not to enquire into an untargeted or speculative suspicion would be to allow negligence, albeit gross, to be the basis of a finding of privity.”

142. The requirement that there must be (judged subjectively) suspicion that is “firmly grounded and targeted on specific facts” means that it is not enough that the relevant person *should* have been on notice that a particular state of affairs might or might not exist. Rather, it must be established, on the facts, that they *did* suspect the facts but deliberately decided not to inquire further.
143. In the present case the extent to which Ms Ferreira relied upon Mr Skinner may be surprising. It may also – as Mr Purchas put to her in cross-examination – call into question whether she was properly exercising the independent judgment due of a director of OPR. But it does not show that Ms Ferreira did in fact suspect that anything was amiss. Quite the opposite – her unwavering trust in Mr Skinner’s capabilities explains why she most likely did *not* suspect that there was any non-compliance with the relevant legal requirements.
144. I therefore reject the FCA’s secondary case in relation to Ms Ferreira. Had it been necessary to show that she was aware that OPR’s investment communications (in the form of the IMs and summaries) were not approved under s. 21, I do not consider that Ms Ferreira had either actual knowledge or imputed knowledge on the basis of wilful blindness.

### **The s. 89 claims against Mr Skinner**

145. The FCA says that Mr Skinner was knowingly concerned in contraventions by OPR of s. 89 FSA in that (i) OPR knowingly or recklessly made false or misleading statements in relation to its financial projections (or dishonestly concealed relevant facts), since those projections did not take account of the broker fees of up to 50% and the 20% paid to Ted Lucy; and (ii) OPR knowingly or recklessly made false or misleading statements in relation to an absence of litigation, when it was known that there were ongoing trademark proceedings against OPR.
146. Mr Skinner denies both the contraventions by OPR and his own liability, on the basis that the financial projections were accurate, and that he (and OPR) relied at all times on his professional advisers.
147. I will address the alleged contraventions separately, since they turn on quite different facts.

### *The statements in the financial projections*

148. Each of the IMs from October 2014 onwards contained a set of summary financial projections setting out projected profit and loss figures for the first three years of trading, as well as a projected cash flow for each of those years. While the IMs themselves only gave headline figures for the cost of sales,

which in the first year were projected to be £1,012,000 spent on “Advertising and Marketing” and £486,096 on “Administration”, a hard copy spreadsheet containing a detailed breakdown underlying the headline figures was given to the FCA by Mr Skinner in his first interview on 9 February 2016, describing it as “the detail behind the summary”.

149. In that spreadsheet:
- i) There was an assumption of a total payment of £150,000 to brokers, and £192,000 of administration salaries (made up of payments of £16,000 per month for twelve months) during the first year of trading. Together with other costs such as accountancy and legal fees, those figures contributed to a total of £486,096 administration costs during the first year, which was the headline figure given (unchanged) in each of the IMs from October 2014 onwards.
  - ii) Marketing costs were itemised as being made up of television, radio and press advertising, among other forms of advertising, and a substantial figure for marketing salaries (£20,000 per month throughout the first year). Together with other marketing costs, the total marketing figure was given as £1,012,000, which was likewise the headline figure given (unchanged) in each of the IMs from October 2014 onwards.
150. In his interview with the FCA, Mr Skinner admitted that the figures in the IMs did not reflect the broker fees that turned out, on average, to be around 50%, but were instead based on an assumption of fees of only 10%. Mr Skinner’s explanation for the discrepancy was that he had created the spreadsheet with the detailed figures before he knew what the broker costs would be. He claimed that once the true scale of the broker fees was known, the figures were updated in later versions of the IM.
151. As is apparent from the IMs, however, the total figure for the projected administration costs did not change, but remained constant for all versions of the IM that were distributed to the general retail investors. Moreover, it is also the case that Mr Skinner knew by 20 September 2014 at the latest that the broker fees for the general retail share offering were likely to be far higher than those of VPP, given that he had already agreed to pay Mr Mayhew a commission of 50% (with the stated “objective” of a total of 50% commission to be paid to Mr Mayhew and any third party marketing agents introduced by him). Mr Skinner had also accepted that he had told Mr Smyth on or before 29 September 2014 that broker commissions would be around 50%.
152. Mr Skinner therefore clearly knew by the time that the October IM was finalised that the broker fees that were built into his administration cost projections grossly understated the fees that he knew would have to be paid to secure the investments that he sought.
153. In his evidence at trial Mr Skinner changed his story, saying that the spreadsheet he had provided to the FCA in interview was not in fact the basis for the figures in the IM, but was a “working document” that was never ultimately used for the purposes of the IM projections. The broker fees were

not, he said, included in the administration costs figures given in the IMs, but were instead included in the figures projected for advertising and marketing. When asked where, in that case, his initial projections for marketing spend on (for example) television advertisements and marketing salaries would have been accounted for, he said that those would not have been incurred, since the intention was not to launch until all the funds had been raised.

154. Mr Skinner's claim was therefore that the figures set out in the IMs as representing advertising and marketing incorporated commissions to brokers amounting to 50% of the gross amounts of the shareholder investments; and that the IM projections therefore did not mislead investors. He asserted (for the first time in his closing submissions at trial) that there had been another spreadsheet which contained the detailed figures underlying the IM projections, but that he had been unable to locate it.
155. That explanation is utterly implausible. In the first place, there is no reference in any of the contemporaneous documentation (or indeed any of the other evidence before the court) to an alternative spreadsheet or other detailed set of figures that produces the headline figures in the IMs while building in an assumption of 50% broker commissions. Moreover, even if Mr Skinner *had* constructed an alternative set of workings on the basis of his claims in oral evidence, that set of figures would inevitably have looked completely different to the figures in the IM projections, because apart from anything else those figures could not have included projected sales of over £1.9 million in the first year (since on Mr Skinner's case there would have been little or no advertising in that first year to generate those sales).
156. It is, therefore, quite clear that the figures in the IM were not based on a missing alternative set of workings, but were indeed based on either the spreadsheet that Mr Skinner produced in his FCA interview, or something very similar to that; and those detailed underlying figures assumed broker commissions of 10% rather than 50%.
157. The IM projections did not, therefore, reflect what was by October 2014 known to be the likely broker commissions, and they were therefore false or (at the very least) misleading. Mr Skinner (and therefore OPR) must have known this, since he was well aware that the projected broker commissions had changed dramatically.
158. The financial projections likewise did not take account of the Ted Lucy services agreement that had been entered into on 26 September 2014, providing for the transfer to Ted Lucy of 20% of all investor monies received, supposedly for the provision of administrative services. As I have set out above, that led to the transfer to Ted Lucy of over £720,000 during the course of 2014 and 2015, over £650,000 of which was then transferred to TLMT, and from there to Mr Skinner. None of this was accounted for in the financial projections.
159. Mr Skinner in his opening submissions attempted to justify this on the basis that the Ted Lucy/TLMT agreements were a realistic salary arrangement, which was reflected in the costs shown in the financial projections in the IMs.

I reject that explanation. There is no evidence of any of the transfers to Ted Lucy/TLMT being used to meet salary costs for either Mr Skinner or Ms Ferreira (which would of course then have required National Insurance contributions). Rather, the majority of the funds flowed directly to Mr Skinner by way of what purported to be a loan arrangement.

160. Nor can it plausibly be said that the Ted Lucy/TLMT transfers were reflected in the administration costs projected in the financial summaries, in any event. Those summaries estimated administration costs of £486,096 in the first year of trading and £318,096 in the second year of trading. As Mr Skinner's detailed spreadsheet showed, those estimates included not only the cost of administration salaries and expenses such as rent and utilities bills, but also accountancy and legal fees; and as indicated above the IM projections were predicated on OPR starting to trade and generating substantial revenue from the first year onwards. By 10 December 2015, however, just over 14 months after the general retail share offering had commenced and before OPR had even launched, Ted Lucy had extracted almost the entire allowance for administrative expenses for two full years of trading.
161. The IM projections did not, therefore, take account of the large sums that Mr Skinner intended to extract from OPR through the Ted Lucy and TLMT agreements, and the projections were therefore false or misleading in that further respect. Again, Mr Skinner (and therefore OPR) must have been aware of this, since it is common ground that he set up the Ted Lucy and TLMT contracts.
162. For completeness, while Mr Skinner faintly suggested that he had informed Leigh Carr about the higher broker commissions and the 20% transfers for "administrative services", there is no evidence whatsoever that he did so, nor any evidence that he discussed those aspects of the financial projections with Mr Natt at any time after they were prepared for the purposes of the initial VPP share offering.
163. Given my findings as to the false or misleading nature of the financial projections in the IMs, it is not necessary for me to determine the FCA's alternative case that Mr Skinner dishonestly concealed material facts in connection with those projections.
164. As regards the other requirements of s. 89, there is no doubt that the figures in the financial projections were (for the purposes of s. 89(2)) provided with the intention of inducing investors to subscribe to shares in OPR; nor is there any doubt that the scale of the broker commissions and the payments to Ted Lucy were (for the purposes of s. 89(1)) material matters that should have been reflected in those financial projections. The combined effect of the broker commissions and Ted Lucy payments was that 70% of the shareholder investments were being extracted upfront and were being used to pay brokers and to fund Mr Skinner, before OPR had even started trading. Unsurprisingly, most of the investor witnesses said in their witness statements that they would not have invested, or would likely not have invested, if they had known that these sums were being taken upfront from their investments.

165. I therefore find that the financial statements in the IMs contravened s. 89 FSA and that Mr Skinner was knowingly concerned in those contraventions.

*The trademark litigation*

166. The FCA's second s. 89 claim concerns the statements in the various IMs that OPR "currently has no outstanding litigation". These statements appeared on page 25 of the October 2014 IM and the same page of the January, March and September 2015 IMs. As with the other information in the IM, it is clear that these statements were made with the intention of inducing investors to subscribe to shares in OPR.
167. Those statements were manifestly false, and Mr Skinner (and therefore OPR) knew that they were false. From 20 October 2014 Mr Skinner knew that Palm Green was threatening to oppose the trademarks registered by OPR, and the dispute between OPR and Palm Green continued (as Mr Skinner knew) throughout the period of the OPR share offering. No mention of this dispute, however, was made in any of the versions of the IM that were provided to potential investors during 2014 and 2015.
168. Mr Skinner said that he believed that OPR was entitled to use the brand, by reason of the September 2003 assignment agreement. I accept that he did believe this; and I also accept that he intended to resolve the dispute with Palm Green through the settlement that was being negotiated in 2015. That does not, however, change the fact that the dispute with Palm Green was ongoing throughout the period of the share offering, from 20 October 2014, and was not in fact ultimately ever resolved by Mr Skinner. That meant that the IM statements regarding the absence of litigation were false.
169. The materiality of that false information cannot seriously be doubted. Every version of the IM contained repeated statements throughout the document referring to OPR's "well-known and recognisable brand". As Palm Green's solicitors said in their letter to Keltie on 15 April 2015, by asserting ownership to the brand in OPR's investor materials, without any reference to the existence of a challenge to that entitlement, OPR was representing that it had uncontested ownership of the brand name, which was a "key feature" of OPR's business proposition.
170. Mr Skinner's ultimate response at trial was to blame his professional advisers for not telling him that he needed to refer to the trademark litigation in the IM, saying that he relied upon his lawyers and should therefore not be held responsible.
171. I do not accept that submission. In the first place, there is no evidence that Mr Skinner ever asked any of his solicitors whether the relevant statement in the IM should be amended in light of the dispute with Palm Green. More importantly, however, this submission is at most a suggestion that Mr Skinner did not know that the falsity of the statements amounted to a contravention of s. 89 FSA. However, as is well-established and set out above, it is immaterial whether or not the person who is knowingly concerned knows that the facts constitute a contravention.



172. I therefore find that the statements in the IM regarding the absence of litigation also contravened s. 89 FSA, as alleged by the FCA, and that Mr Skinner was knowingly concerned in that contravention.

### **Restitution by Mr Skinner and Ms Ferreira**

173. Section 382 FSMA gives the court a very wide discretion to require a person knowingly concerned in a contravention of a relevant requirement to pay “such sum as appears to the court to be just”, having regard to any profits accrued to that person, and the loss or adverse effects arising as a result of the contravention. In *FCA v Capital Alternatives* HHJ McCahill QC considered the discussion of restitution orders in *SIB v Pantell (No. 2)*, *FSA v Shepherd* [2009] Lloyd’s Rep FC 631, and *FSA v Anderson* [2010] EWHC 1547, and summarised the principles to be drawn from those cases at §1327 as follows:

“(1) In considering the justness of the Order, the statutory purpose behind the powers of the Court must be taken into account. The statutory purpose behind section 382 includes the protection of the investing public, consistent with the regulatory objective of the protection of consumers: *Shepherd* at [36];

(2) The quantum of any restitution order must be ‘just’ having regard to the matters expressed in section 382(2). This involves the Court undertaking (*Shepherd* at [36]):

‘a balancing of the interests of the investors against the culpability of the contravener. There may be cases in which the contravention of the FSMA was technical or inadvertent and this may temper the judgment of the Court as to what it would otherwise be minded to order. It is incumbent upon the Court to consider all the circumstances that bear upon the fairness of the order it makes.’

(3) A defendant’s lack of means is not a reason for an Order under s. 382 not to be made: *Shepherd* at [39–40];

(4) In *Shepherd*, the Court observed that the defendant’s conduct might not have been as bad as it could have been, but it was nevertheless sufficiently bad to encourage the Court to make an award reflecting the entire loss suffered by the investors: *Shepherd* at [43]:

‘Gradations of wrongdoing are not easy to reflect in differing awards where compensation for loss is concerned. Generally speaking the loss is either compensated in full or not at all. Such differing gradations of serious conduct might be reflected in some other way, possibly in relation to the extent to

which the order should reflect the disgorgement of profits in addition to the compensation for losses.’

This suggests that the default position should be that restitution orders will usually extend to the losses sustained by investors.

(5) Orders against those knowingly concerned do not depend upon them personally having received money (although that can be taken into account by the Court): *Pantell* at 278B–C, by analogy.”

174. The judge also considered, in *FCA v Capital Alternatives*, that a reasonable belief in the legality of the acts found to constitute a contravention may be a relevant factor, but must be considered alongside the other circumstances of the case. In particular, where an agreement is onerous, based on misleading statements, or entered into with unsophisticated parties on disadvantageous terms, then the defendant’s belief in the legality of their conduct may carry less weight in the balancing exercise (§1334–1335).
175. A reasonable belief in the legality of the conduct in question is not, therefore decisive, but must be weighed in the round against any other factors that might be relevant to the assessment of the “just” sum to be paid under s. 382 FSMA.
176. Applying those principles to the present case, and starting with Mr Skinner, the FCA seeks an order for repayment of the full sum of the investor losses. I consider that such an order is amply justified. This is a case falling within ss. 382(2)(c) where Mr Skinner has profited personally from the contraventions, and the investors in OPR will have lost (when OPR is eventually wound up) all or almost all of their investments. The restitution order should therefore have regard to both the profit to Mr Skinner and the investor losses.
177. In the circumstances set out above, I consider that it is right to order Mr Skinner to compensate the investors in full for their losses. Mr Skinner was, as I have set out, the controlling mind and driving force behind OPR throughout 2014 and 2015. It is not disputed that, as between Mr Skinner and Ms Ferreira, Mr Skinner was primarily responsible for the legal and financial side of the business during that period. It was, therefore, Mr Skinner who led the discussions with Leigh Carr and the various solicitors engaged by OPR; Mr Skinner was also the source of the financial projections in the IMs; and he was involved throughout the drafting process for the various versions of the IM. I have found that Mr Skinner knew that OPR’s investment communications were not approved under s. 21 FSMA, and knew that the IMs contained false or misleading statements contrary to s. 89 FSA. I have also found that Mr Skinner obtained the two Leigh Carr letters, which he used to insert s. 21 approval statements in the IMs, through a deliberate and sustained deception of Mr Natt at Leigh Carr.
178. Mr Skinner also personally received the majority of the sums transferred from OPR to Ted Lucy, as well as receiving other sums directly from the OPR bank accounts, all of which he controlled. He ultimately received around £700,000 from the fundraising exercise, the majority of which (he did not deny) was

spent on gambling. Although Mr Skinner now says that he is entirely impecunious and unable to find employment, both *FCA v Shepherd* and *FCA v Capital Alternatives* make clear, as set out above, that a defendant's lack of means is not a reason for an order under s. 382 not to be made.

179. In these circumstances I do not consider that there are any mitigating factors that would indicate any reduction in the extent of the restitution ordered to be made by Mr Skinner.
180. The same does not, however, necessarily apply to Ms Ferreira. At the hearing Ms Ferreira relied on Mr Skinner's submissions in relation to the issue of restitution, and declined an express invitation to put forward her own case on this point. Ms Ferreira did not, therefore, contend that (if found liable) the court should distinguish between her position and that of Mr Skinner in respect of any order of restitution pursuant to s. 382 FSMA. Nevertheless, Ms Ferreira did repeatedly submit (in her submissions and in her evidence) that she relied on Mr Skinner's advice at all times and for all areas of the business. Given that submission, and my findings set out above, it is appropriate for me to consider whether the differences in the position of Ms Ferreira and Mr Skinner should be reflected in the restitution order made against her.
181. In that regard, the first point to note is that the FCA's claim against Ms Ferreira is limited to a claim of knowing concern in OPR's contravention of s. 21 FSMA. It is not said that she is also liable for the breaches of s. 89 FSA. It also follows from my conclusions in relation to the s. 21 claim that Ms Ferreira's involvement in that contravention turns on the fact that she was aware of the communication of an invitation or inducement to engage in investment activity. As I have found, Ms Ferreira (unlike Mr Skinner) did not know that the communications were not approved under s. 21, and she had no involvement in the email and telephone communications between Mr Skinner and Mr Natt that led to the production of the 3 October 2014 letter and the similar letter sent on 6 March 2015. There is, in particular, no evidence that she was aware of the fact that Mr Natt's letters were procured on the basis of a deception by Mr Skinner as to the purpose for which those letters were going to be used.
182. Set against all of this is the fact that Ms Ferreira was, undoubtedly, closely involved from the outset in the relaunch of the OPR business. Indeed Ms Ferreira was the sole director of OPR when she and Mr Skinner initially spoke to Leigh Carr in May 2014, and until 8 July 2014 when Mr Skinner was reappointed as a director. As a director of OPR, Ms Ferreira had independent duties of diligence, which it is quite clear that she failed to discharge, relying instead entirely on Mr Skinner and not exercising any independent judgment as to whether the share offerings were compliant with the relevant regulatory rules. Consistent with the comments in *FCA v Capital Alternatives*, it should also be borne in mind that the share offerings were made to unsophisticated investors who, between them, invested very large sums of money on the basis of the misleading statements made in the IMs.
183. A further relevant consideration is the fact that, although Ms Ferreira did not personally profit from the investments to the same extent as Mr Skinner (apart

from the payment of rent and bills for her house, and the use of a car bought by OPR, Ms Ferreira appears to have received only £12,250, which came from Mr Skinner rather than directly from OPR) she allowed herself to be the conduit through which Mr Skinner extracted funds from the business, by entering into the Ted Lucy and TLMT agreements and effectively handing over control of those companies to Mr Skinner.

184. It is, as Jules Sher QC (sitting as a deputy judge) observed in *FSA v Shepherd*, at §43, difficult to reflect gradations of wrongdoing in differing awards. Nevertheless, he acknowledged (rightly, in my view) that the exercise of the court in determining the amount of the sum that is “just” must involve consideration of the culpability of the contravener, including any finding that the contravention was inadvertent. In the present case, while Ms Ferreira played a central role in the relaunch of the OPR business and the successive share offerings in 2014 and 2015, she is less culpable than Mr Skinner for the reasons set out above. It is in my view just that this should be taken into account in some way. Taking all of the matters set out above in the round, I consider that it is appropriate to order Ms Ferreira to make restitution of 75% of the investor losses.

### **The claims against Venor, Mr Mongelard and Mr Miller**

185. In relation to Venor, Mr Mongelard and Mr Miller, it is admitted that M&O and Venor contravened (i) s. 19 FSMA, by carrying out regulated activities – namely making arrangements for investors to subscribe for shares in OPR, and advising on the merits of subscribing for shares in OPR – without authorisation; (ii) s. 21 FSMA, by providing the IMs to prospective investors and inviting and/or inducing those investors to subscribe for shares in OPR, in circumstances where the communications had not been approved by an authorised person; and (iii) s. 89 FSA, by making false and misleading statements in calls to consumers. It is also admitted that Mr Mongelard and Mr Miller were knowingly concerned in the contraventions of s. 19 and 21 FSMA, and that Mr Mongelard was knowingly concerned in the contraventions of s. 89 FSA. The issue as regards these Defendants is whether they should be required to make restitution pursuant to s. 382 FSMA, and if so what is the “just” sum. The three Defendants say that they should not have to make restitution, on the grounds that they reasonably believed that the communications had been authorised by Leigh Carr for the purposes of s. 21 FSMA, and that Mr Skinner was the source of the false or misleading information used in the call scripts to potential investors.
186. I note at the outset that neither Mr Mongelard nor Mr Miller suggested that they believed that their companies, M&O and Venor, were authorised for the purposes of s. 19 FSMA. Nor did they obtain any proper legal advice as to the legality of any aspect of their involvement in the OPR share offering. Mr Miller confirmed in cross-examination that he had in fact not obtained any paid legal advice at all. Instead, he suggested that he had informally approached a few solicitors about the legal position in respect of s. 21 FSMA alone. In his interview with the FCA, Mr Miller said:

“I’d had a bit of research of it, I’d spoken to a few solicitors about it and you know, a lot of them seemed to think it was fine one said it wasn’t so we wasn’t too sure about where we sort of stood with it ...”

187. It is clear, therefore, that Mr Mongelard and Mr Miller embarked upon this venture without getting any formal advice as to the legality of what they were doing, and in the knowledge (as least on Mr Miller’s part) that at least one solicitor had questioned the legal position. As to the basis on which they nevertheless decided to proceed to offer shares in OPR, using the IMs and summaries produced from time to time, Mr Miller said in his FCA interview that he and Mr Mongelard believed that Leigh Carr had “signed it off”, and that Mr Skinner gave them assurances to that effect.
188. Mr Skinner accepted in cross-examination that he had indeed told Mr Miller and Mr Mongelard that he had obtained professional advice to the effect that since he had approval for the purposes of s. 21 FSMA, the marketing agents were all “protected under that”. Mr Miller admitted in his FCA interview, however, that he had not seen any document confirming that Leigh Carr had approved the share offering, and in cross-examination he could not recall whether he had even asked Mr Skinner for proof of Leigh Carr’s approval. Furthermore, while Mr Miller claimed in his interview that he had spoken to Leigh Carr and they had confirmed that they had signed off the share offering, Mr Miller asked both Mr O’Gorman and Mr Natt in cross-examination whether they had had any conversations or correspondence with him or Mr Mongelard, and both Mr O’Gorman and Mr Natt confirmed that they had not. I therefore consider it most likely that Mr Miller and Mr Mongelard simply relied on what they were told by Mr Skinner, without making any independent enquiries or taking professional advice themselves. That did not provide any reasonable basis for them to believe that the requirements of s. 21 FSMA were met (still less s. 19 FSMA, which does not ever appear to have been mentioned by Mr Skinner).
189. As for the contraventions of s. 89 FSA, the FCA relies on a number of false and misleading statements in the call scripts of M&O and Venor, namely that:
- i) OPR was a very fast-growing company, already generating large cash revenue.
  - ii) The band Madness had agreed to appear for free in an advert for OPR’s website.
  - iii) Mr Skinner was a personal friend of Richard Branson and had business dealings with him.
  - iv) Following one advert in the Sun newspaper, the OPR website had received 16,000 hits within hours and thousands of transactions had been made.
  - v) OPR had been told that it might be considered for a buy-out or listing on the main market of the LSE.

- vi) JP Morgan had sought to represent OPR on its share offering.
190. There is no dispute that these statements were made by M&O and Venor; that they were false or misleading in contravention of s. 89; and that Mr Mongelard was knowingly concerned in those contraventions. (The FCA does not say that Mr Miller was knowingly concerned in the s. 89 contraventions.) Mr Mongelard declined to give evidence as I have explained above; he did, however, submit in his closing submissions that he believed that the statements in the call scripts were accurate, and that the source of those statements was either the IMs themselves or the information given to them by Mr Skinner.
191. The suggestion that the statements came from the IMs can be immediately discounted – none of the IMs contained any of the disputed statements. As for Mr Skinner’s involvement, Mr Skinner refused to comment on whether he was the source of the statements in the call scripts. It is, however, apparent from the evidence that he is likely to have been the source of at least some of the statements made to investors. Given my findings as to Mr Skinner’s willingness to fabricate facts in his dealings with Leigh Carr and others, I consider it entirely plausible (and indeed likely) that he embellished the success and prospects of OPR in his discussions with Mr Miller and Mr Mongelard.
192. That does not, however, absolve Mr Mongelard for all responsibility for the statements that were being made by M&O and Venor. Whatever he was told by Mr Skinner, Mr Mongelard appears to have taken no steps at all to satisfy himself as to the truth of the statements that were being made to potential investors. Nor was there any other basis for him to believe the statements above to be true. Rather, Mr Mongelard appears to have been willing to allow and indeed encourage the call operators he employed to make entirely unverified statements, with the sole aim of encouraging investors to subscribe to shares in OPR.
193. Mr Miller and Mr Mongelard also both benefited significantly from their involvement in OPR. The FCA has calculated that the total net sum received by M&O and Venor from OPR amounted to £513,320. Of that, the FCA estimates that Mr Mongelard personally received over £142,000 and that Mr Miller personally received over £132,000. Neither Mr Mongelard nor Mr Miller disputed those figures, which were set out in the witness statement of Ms Daley-Gage. Mr Mongelard did say in his closing submissions that he was in financial difficulties and had been subsisting on state benefits. As with Mr Skinner, however, that is not a reason not to make an order under s. 382 FSMA.
194. Mr Miller also objected, in repeated and emphatic terms, to the fact that the FCA had brought these proceedings against him and Mr Mongelard (and their respective companies) but not against all of the other agents involved in the marketing of OPR’s shares. That is not a relevant consideration in this regard; the FCA does not have to justify its decision to bring proceedings against some but not all of the marketing agents. In any event, however, I have already observed, M&O and Venor between them introduced 176 (almost

68%) of the 259 investors in OPR, which amply explains the inclusion of the third to sixth Defendants in these proceedings.

195. As a final matter, neither Mr Miller nor Mr Mongelard submitted that there should be any difference between them as to their liability. That is not surprising. While M&O was Mr Miller's company, and Venor was Mr Mongelard's company, both Mr Miller and Mr Mongelard confirmed in their FCA interviews that they ran the companies as a single enterprise under the trading name of "Gemini", operating from the same address and engaging staff to work jointly for the two companies. The companies were jointly managed by Mr Miller and Mr Mongelard, and the profits of the companies were shared between Mr Miller and Mr Mongelard. Although the FCA's claim of knowing concern in a contravention of s. 89 is made against Mr Mongelard only and not Mr Miller, that simply reflects the different roles that Mr Mongelard and Mr Miller played in the joint enterprise, and specifically the fact that Mr Mongelard's role was to train and monitor staff, and to make and oversee calls to prospective investors, whereas Mr Miller role focused on the administration, payroll and finance side of the business. Both Mr Miller and Mr Mongelard were actively running the business together, and there is no suggestion that one or the other of them played a more passive role than the other in the decision-making. In these circumstances I do not consider that it is appropriate to make a distinction between Mr Miller and Mr Mongelard, or indeed between those individuals and Venor.
196. In all the circumstances set out above, I find that it is appropriate to order Venor, Mr Mongelard and Mr Miller to repay the full sum of the investor losses caused by M&O and Venor, with liability to be joint and several as between those three Defendants.

### **The claims for declarations and injunctions**

197. In addition to the restitution orders, the FCA seeks declarations that each of the Defendants has contravened or has been knowingly concerned in contraventions. The FCA also seeks orders restraining Mr Skinner, Ms Ferreira, Mr Miller, Mr Mongelard and Venor from acting in contravention or being knowingly concerned in contraventions of the relevant provisions.
198. Regarding the declarations sought, there is no doubt that the FCA has established the factual basis for these. The question is whether the declarations ought to be granted, as a matter of discretion. In this regard Mr Purchas relied upon the comments of Neuberger J in *FSA v Rourke* [2001] EWHC 714 (Ch), a case concerning a bookkeeper who started an unauthorised deposit-taking business contrary to ss. 3 and 35 of the Banking Act 1987. In that case, the judge considered that declarations regarding the contraventions might be useful to clarifying what could be publicised by the FCA, would emphasise to depositors the seriousness of the breaches, and might help to make the general public more aware in general of the risk of placing deposits with unauthorised entities.
199. I consider that analogous considerations apply with equal force in the present case. The declarations will provide a short and clear summary of the

contraventions found (and in some cases admitted) in the present case, which may well assist the FCA in publicising the findings that I have made. They may also emphasise to investors the seriousness of the contraventions by the relevant Defendants, and may help to make the general public more aware in general of the risk of placing investments through unauthorised marketing agents. I also note that none of the Defendants put forward any serious objection to the grant of the declarations sought. I therefore consider that it is appropriate to grant declarations in this case.

200. As for the injunctions, these are sought in the first instance under s. 380(1) FSMA. That provision only applies, however, to a person who has contravened a relevant requirement, where there is a reasonable likelihood that the contravention will continue or be repeated. That can, therefore, only apply to the primary contraveners – i.e. Venor in this case. In relation to the remaining Defendants who were knowingly concerned in contraventions, the FCA has to fall back on the court's powers under s. 37 of the Senior Courts Act 1981. In that case, as Mr Purchas acknowledged, it must be shown that there is a real risk of the relevant conduct being repeated.
201. In that regard the Defendants have, in general terms, submitted that they have no intention of being concerned in further contraventions of the FSMA or FSA. Mr Skinner and Ms Ferreira have gone further and have said explicitly that they would be willing to provide undertakings in this regard. If undertakings are provided by all of the Defendants in the terms of the orders otherwise sought by the FCA, I do not consider that it will be necessary to grant injunctive relief.

### **Conclusion**

202. For the reasons set out in detail above, I will order the Defendants to pay to the FCA, pursuant to s. 382 FSMA, the following sums:
- i) In the case of Mr Skinner, the sum of £3,619,352, representing the total of the investor losses.
  - ii) In the case of Ms Ferreira, the sum of £2,714,514, representing 75% of the investor losses.
  - iii) In the case of Venor, Mr Mongelard and Mr Miller, the sum of £1,207,050 on a joint and several basis, representing the investor losses attributable to M&O and Venor.
203. I will also make declarations in the terms sought by the FCA. I do not, however, consider that it is necessary to make the injunctive orders sought if the Defendants provide undertakings to the court in equivalent terms.