



Neutral Citation Number: [2020] EWHC 2175 (Ch)

Case No: HC-2017-002628

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 07/08/2020

Before:

Mr Stephen Houseman QC
(sitting as a Deputy Judge of the High Court)

Between :

THE FINANCIAL CONDUCT AUTHORITY
(A Company Limited by Guarantee)

Claimant

- and -

(1) AVACADE LIMITED (In Liquidation)
(trading as Avacade Investment Options)
(2) ALEXANDRA ASSOCIATES (U.K.) LIMITED
(trading as Avacade Future Solutions)
(2) CRAIG STANLEY LUMMIS
(3) LEE EDWARD LUMMIS
(4) RAYMOND GEORGE FOX

Defendants

Mr Adam Temple for the Claimant
Mr Steven McGarry (instructed by **Zakery Khub Solicitors**) for the Second to Fourth
Defendants

Hearing date: 31 July 2020
Draft Judgment provided on 5 August 2020

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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Stephen Houseman QC (sitting as a Deputy Judge of the High Court):

INTRODUCTION

1. This judgment deals with two of the matters before the court at a hearing conducted remotely on Friday 31 July 2020. The remaining matters were dealt with in separate oral rulings at the conclusion of the hearing on the basis that there would subsequently be a single composite order made on all matters consequent upon issuance of this reserved judgment.
2. The hearing itself was, in effect, an adjourned consequential hearing relating to a substantial (118 page) written judgment issued by Mr Adam Johnson QC (sitting as a Deputy Judge of the High Court) on 30 June 2020 with neutral citation number [2020] EWHC 1673 (Ch) (“**30 June Judgment**”). That judgment followed a nine day trial in January-February of all but one of the issues in dispute in these proceedings as identified in a List of Issues agreed by the parties and with the court at the Pre-Trial Review in December 2019 (“**LOI**”). The order for a split trial had been made by Master Clark at the Case Management Conference in August 2018. The precise terms of the split between so-called ‘First Trial’ and ‘Second Trial’ featured in the parties’ submissions at the present hearing, as explained further below.
3. At a post-judgment hearing on 14 July 2020, pursuant to directions made on 8 July, the trial judge recused himself from further involvement in these proceedings - save for the orders made by him on that occasion, which included a series of final declarations consequent upon the 30 June Judgment (“**14 July Declarations**”) and refusal of permission to appeal. The trial judge gave his reasons for recusal in an *ex tempore* judgment during the hearing on 14 July 2020.
4. Through correspondence and draft orders provided on 17 June 2020, i.e. in response to receipt of the draft version of what became the 30 June Judgment and in anticipation of the consequential hearing, the Claimant (“**FCA**”) sought amongst other things (1) substantial interim restitution orders as against all five defendants and (2) final injunctions as against the Second to Fifth Defendants. But for the recusal of the trial judge, those matters would have been dealt with at the original consequential hearing on 14 July 2020. In the event, they were adjourned to the present hearing together with questions of costs.
5. As regards the five defendants: the Second to Fourth Defendants (“**AA**”, “**CL**” and “**LL**”, respectively; together, “**Represented Defendants**”) were represented through solicitors and counsel before me; neither the First Defendant (“**Avacade**”) (now in liquidation) nor the Fifth Defendant (“**Mr Fox**”) were represented or provided any substantive response to the relief sought by FCA. Mr Fox indicated that he had no comment on either of the draft orders provided at the time by FCA. Avacade, CL and Mr Fox were not represented and did not appear at or in the First Trial.
6. Despite the absence of any direction or permission to such effect, the Represented Defendants served additional evidence after the 14 July hearing in the form of a tenth witness statement of LL dated 24 July 2020 (“**Lummis 10**”) and Exhibit LEL 10. Comprised within Exhibit LEL 10 is an affidavit of an employee of HMRC, Parmjit Cheema, dated 29 November 2019 which relates to separate proceedings involving

CL and LL arising out of the tax treatment of an Employer Financed Retirement Benefit Scheme (“EFRBS”) formerly operated by or through Avacade. The Represented Defendants relied upon this exhibited affidavit to undermine FCA’s application for an interim restitution order based upon or referable to “*profits appearing to the court to have accrued*” to CL or LL within the meaning of section 382 of the Financial Services and Markets Act 2000 (“FSMA”). They relied upon Lummis 10 to demonstrate that the making of a substantial interim restitution order would be prejudicial to them in terms of insolvency/bankruptcy and stifling their ability to defend these proceedings any further, including pursuit of any (application for permission to) appeal in respect of the 30 June Judgment and 14 July Declarations.

7. FCA did not object to this late and unsolicited evidence. Nor did FCA object to the late filing of the Represented Defendants’ skeleton argument for the present hearing in breach of the direction made at the 14 July hearing. The court accepted an apology and explanation for the late skeleton argument provided by counsel for the Represented Defendants. FCA filed a short supplemental skeleton to deal with points raised, including by reference to new evidence, in the Represented Defendants’ late skeleton argument.
8. Through their skeleton argument, if not before, the Represented Defendants also sought a stay of execution of any interim restitution order and costs orders made by the court at the present hearing. The basis for seeking a stay of execution was two-fold: first, that an appeal had good prospects of success despite the trial judge’s refusal of permission on 14 July 2020; secondly, that compliance with or enforcement of such order(s) in the meantime would stifle their ability to (seek permission to) pursue an appeal. (I refer to such application and any contingent appeal for convenience as the “**Proposed Appeal**”). In making my determination as to costs of the proceedings at the conclusion of the present hearing, I refused a stay of execution of the costs orders made against the Represented Defendants. I do not repeat the reasons for that refusal. I address below the separate question of stay of execution of any interim restitution orders by reference to the Proposed Appeal.
9. Finally, as regards the form and basis of relief sought, FCA clarified its position during the course of the hearing in two main ways. As regards the interim restitution order, a series of alternative cases were articulated through variants shown in a revised draft order provided at the request of the court during the hearing, to which objection was taken at the hearing and in a subsequent letter to me dated 5 August 2020 from the Represented Defendants’ solicitors. As regards the final injunction, it was clarified that the jurisdictional basis for an injunction against CL, LL or Mr Fox would (have to) be s.37 of the Senior Courts Act 1981 (“SCA”), rather than s.380 FSMA - which would apply only to AA - as explained further below. FCA also offered an undertaking relevant to the application for a stay of execution pending the Proposed Appeal.

RELEVANT BACKGROUND

10. There is a great deal of background which potentially impinges upon the two matters I have to decide. This is hardly surprising in circumstances where the proceedings have progressed through a substantial trial culminating in a detailed written judgment running to 118 pages concerning multiple contraventions of FSMA as well as the Financial Services Act 2012 (“FSA”).

11. As set out in the 30 June Judgment, and summarising as briefly as possible for present purposes, the two corporate defendants (Avacade and AA) were found to have contravened a number of statutory provisions through promotion of investment products held in self-invested personal pensions (known as ‘SIPPs’) which were targeted at retired individuals with existing pension plans; whilst the three individual defendants, who were (save for Mr Fox in respect of AA) directors of both companies at all material times, were found to have been knowingly concerned in the respective contraventions.
12. By way of further detail and using paragraph numbers in the 30 June Judgment where appropriate for cross-referencing:
 - (i) During the period between sometime in 2010 and about August 2013, Avacade (a) made investment-related arrangements and advised on investments in contravention of s.19 FSMA, (b) made financial promotions - through its website and by calling investors - in contravention of s.21 FSMA, and (c) made false or misleading positive statements - including as to the relative or absolute risk profile of investments - in contravention of s.397 FSMA and (since 1 April 2013) s.89 FSA, as recorded in paragraph 1 of the 14 July Declarations.
 - (ii) Avacade’s activities led to 1,943 investors transferring a total of about £87m of pension funds into SIPPs of which £68m was placed into investment products from which Avacade received commissions and/or fees (paragraphs 5 & 473(i)). Avacade received commissions/fees ranging between 6.3% and 20.3% (paragraph 166) and amounting in total to £10.621m (paragraphs 167-168).
 - (iii) During the period between about August 2013 and June 2016, AA (a) made investment-related arrangements and advised on investments in contravention of s.19 FSMA, (b) made financial promotions - through its website, an investment handbook and by calling investors - in contravention of s.21 FSMA, and (c) made false or misleading positive statements - including as to the relative risk profile of investments - in contravention of s.89 FSA, as recorded in paragraph 2 of the 14 July Declarations.
 - (iv) AA’s activities led to at least 59 investors transferring a total of about £4.8m of pension funds into SIPPs of which around £950,000 was placed into a single product known as the Paraiba Bond which was promoted by AA and from which AA received commission (paragraphs 7 & 473(ii)). AA received commission of 25% on investments in the Paraiba Bond (paragraph 135) plus commissions/fees on other products including Ethical Forestry (see below) and amounting in total to £715,000 (paragraphs 167-168).
 - (v) By far the largest investment product/scheme was Ethical Forestry (£42,600,452) concerning tree plantations in Costa Rica. The English companies concerned in this venture have been placed into liquidation and criminal investigations have been commenced (paragraph 169). Significant damage to the plantations was caused by Hurricane Otto in late 2016. The Financial Services Compensation Scheme (“FSCS”) has made payments to UK investors on the basis that the underlying investment has nil value,

according to evidence before the court, although this is not addressed in the 30 June Judgment.

- (vi) CL and LL were each knowingly concerned in Avacade's and AA's statutory contraventions at all material times, as recorded in paragraphs 3 and 4 (respectively) of the 14 July Declarations. Mr Fox was knowingly concerned in Avacade's statutory contraventions at all material times, as recorded in paragraph 5 of the 14 July Declarations.
 - (vii) These three individuals constituted the core senior management of the business operation and "*worked together as a closely knit group*" (paragraph 463) at any rate until CL and LL fell out with Mr Fox by early 2015 (paragraph 7). They constituted the collective "*directing mind and will*" of Avacade (including Mr Fox) and AA (excluding Mr Fox), respectively (paragraph 403). CL and LL are father and son, but LL's juniority - he was aged 25/26 when this business activity commenced at some point during 2010 - did not alter the fact that he was "*an integral part of the structure of both Avacade and AA, and was involved in not only their operation but also their development*" (paragraph 472).
 - (viii) As regards sums received by each of the three individual defendants through commissions/fees accruing to Avacade and/or AA (as the case may be): CL received £2,550,019, LL received £2,553,360 and Mr Fox received £1,714,226 (paragraphs 464-466). (In each case, the individual total is qualified by the phrase "*in the region of*" in paragraph 466.) As noted above, Mr Fox was a director of Avacade, but not AA; whereas CL and LL were directors of both companies at all material times.
 - (ix) Save for some misleading statements in the period 1 April 2013 to 1 April 2014, each of the contraventions constituted "*relevant requirements*" for the purposes of s.380 and s.382 FSMA (paragraphs 449-452).
 - (x) The false or misleading positive statements made by or on behalf of Avacade and AA, referred to in (i) & (iii) above, were made at least recklessly in each case (paragraphs 379 to 447).
13. There is a dispute between the parties as to whether any of the figures referred to in paragraph 12(ii), (iv) or (viii) above can be said to represent "*profits*" which (may appear to) have "*accrued*" to the entity/individual in question for the purposes of s.382 FSMA. The trial judge alluded to this issue in a parenthetical aside towards the end of the 30 June Judgment (paragraph 473(i)(c)). I return to it below.
14. Despite the trial judge's refusal of permission to appeal, I was informed at this hearing that the Represented Defendants intended to file an Appellants' Notice before expiration of the relevant time period (i.e. by Tuesday 4 August) seeking permission to appeal. I was shown a detailed set of (Draft) Grounds of Appeal. Before circulating this judgment to the parties' legal teams in draft on Wednesday 5 August, I was informed that an Appellants' Notice was filed within time and a copy was provided to me (in copy to FCA's counsel) at my request. The Proposed Appeal is, therefore, now pending or extant.

15. When considering the scope of potentially relevant evidence, it is important to keep in mind the nature of the power involved in respect of each of the two separate remedies under consideration.
16. The power to make a (i.e. final) restitution order is found in s.382 FSMA. As examined below, that power itself involves evaluative elements and an avowedly wide remedial discretion framed in terms of what “*appears to the court to be just*”. The court’s power to order an interim payment in respect of such a future/final restitution order (aka interim restitution order or ‘IRO’ for short) is found in CPR 25.7. That general procedural power is engaged where the court is suitably satisfied as to the prospect of a monetary remedy being subsequently awarded against a defendant in the relevant proceedings. When these two powers (interim and final) are added together, as they must be, the evaluative and discretionary nature of the current exercise is underscored.
17. The power to grant a (final) injunction under s.37 SCA depends upon the court being satisfied that it is “*just and convenient*” to do so. The specific injunctive power in s.380 FSMA depends upon there being “*a reasonable likelihood*” of a future or continued or repeated contravention of a “*relevant requirement*” under the statute. It was common ground before me that irrespective of the statutory basis for injunctive relief, the court needs to be satisfied as to a real risk of repetition of what I will for convenience call ‘prohibited behaviour’ on the part of each enjoined defendant, by analogy to *FCA v Da Vinci Invest Ltd* [2015] EWHC 2401. The position of the three individual defendants (CL, LL & Mr Fox) is distinct from that of the sole relevant corporate defendant (AA) for these purposes, as noted above and addressed further below.
18. In light of these considerations, it makes sense to look primarily at the findings made in the 30 June Judgment, as reflected in the 14 July Declarations, rather than delving into the evidential hinterland. This is especially so in circumstances where the trial judge is not available to consider the discrete matters arising consequent upon his own detailed and thorough judgment.
19. The Represented Defendants point to examples of evidence in order to show that it is impossible to ascertain with any confidence the so-called ‘irreducible minimum’ of any future/final restitution order against any of them, so as to preclude any IRO at this stage. The court has to adopt a pragmatic approach, bearing in mind that the absence of a complete financial account - for example, showing “*profits*” that may have “*accrued*” to each defendant - is something within the control of the defendants not FCA.
20. This observation leads into a discussion of the precise ‘split’ of issues in these proceedings and the proper ambit of the 30 June Judgment. The Order of Master Clark dated 16 August 2018 (“**CMC Order**”) states as follows:

“There shall be a split trial as follows:

(a) The First Trial will determine whether the Defendants have acted in contravention of and/or have been knowingly concerned in contraventions of [FSMA] or [FSA] and whether any relief, including any interim restitution order, is appropriate pending the resolution of the Second Trial.

(b) The Second Trial, if necessary, will determine the appropriate final relief (if any) against the Defendants, including all questions of quantification of any losses sustained by individuals insofar as that is relevant to the Court's discretion under section 382 of [FSMA]."

21. Three things should be noted from the CMC Order, adopting the terminology of 'First Trial' and 'Second Trial' for convenience. First, the potential for an IRO was expressly contemplated as a consequential matter arising from judgment at/after the First Trial. Secondly, the only matters reserved for a Second Trial were "*appropriate final relief*" and "*quantification of any losses sustained by individuals*" in so far as relevant to any final restitution order under s.382. Thirdly, there is no mention of 'profits' or 'gains' made by any of the defendants either within the scope of the First Trial or the Second Trial - notwithstanding the fact (as noted above and discussed further below) that s.382(2) mandates a restitution order by reference to either or both of "*the profits appearing to the court to have accrued*" to the defendant(s) and/or "*the loss or other adverse effect*" to/upon qualifying person(s) in any given case.
22. The LOI runs to 43 paragraphs. Issues 1 to 42 fell within the scope of the First Trial, including (Issue 42) the question of what relief (if any) it is appropriate to order under ss.380 and/or 382 FSMA pending "*identification of the value of the investors' investments into the Investment Products*" in accordance with Issue 43. ("*Investment Products*" are defined upfront in the LOI.) For its part, Issue 43 falls under a heading in square brackets which reads: "*ISSUES FOR DETERMINATION AT A SECOND TRIAL*". It concerns ascertaining the current value of the investments made by UK investors into the Investment Products as a result of contact with Avacade or AA. That sole issue appears to correspond to "*quantification of any losses sustained by individuals*" in sub-paragraph (b) of the CMC Order (quoted above).
23. Consistent with Issues 23 & 24 (Avacade; CL, LL & Mr Fox) and Issues 39 & 40 (AA; CL & LL) the trial judge inquired into and made relevant findings of fact as to the levels of "*commissions and/or fees ... received by*" the two corporate defendants as well as the amounts "*paid to*" each of the three individual defendants, as appearing in the 30 June Judgment and summarised in sub-paragraphs (ii), (iv) and (viii) of paragraph 12 above. Such findings were made by reference to substantial detailed evidence served by FCA in the form of the witness statement of Matthew Richards including various appendices comprising financial analysis, none of which was challenged by cross-examination (30 June Judgment, paragraph 14(i)). FCA's oral and written submissions stressed that it would seek IROs following judgment at the First Trial. To this end, the 30 June Judgment contained a section dealing specifically with s.382 (Section IX, paragraphs 448-472).
24. I was referred to sections of LL's cross-examination during which the purpose of certain lines of questioning concerning the use of an Employee Benefit Trust ("**EBT**") and/or EFRBS was challenged by the defendants' counsel (Day 7, pp.144-152). These exchanges involving the trial judge demonstrate or presuppose that investigation into economic gains made by the individual defendants was within the ambit of the First Trial, as expressly contemplated by Issues 24 & 40 in the LOI. This included inquiries and findings that might ground an application by FCA for IROs prior to the Second Trial in accordance with sub-paragraph (a) of the CMC Order.

25. It is notable that neither the CMC Order nor LOI contains any reference to “*profits*” as distinct from amounts paid or received. FCA’s skeleton argument for the CMC nevertheless made it clear that the First Trial should include appropriate inquiries into and findings about the individual defendants’ “*financial enrichment*” from the relevant corporate/investment activities and specifically forecasted that any IROs obtained after the First Trial on the basis of “*their personal profit from the contraventions*” might mean that a Second Trial (including any final restitution order based on “*calculation of investor losses*”) may become unnecessary in practice, e.g. due to default or bankruptcy.
26. In light of this bespoke procedural context, any suggestions on behalf of the Represented Defendants to the effect that inquiries into or findings about their “*financial enrichment*” or “*personal profit*” through involvement in the relevant corporate/investment activities did not form part of the First Trial or should not have featured in the 30 June Judgment or could not form the basis for making any IROs at this stage are wholly without merit. All participants in the First Trial must be taken to have contemplated that an application might be made by FCA for IROs against some or all defendants in light of any findings made in this first stage of the proceedings, including as regards the “*financial enrichment*” or “*personal profit*” of any of them. Conversely, none of the participants in these proceedings could reasonably have contemplated that there would be scope for further inquiries or more refined (still less, inconsistent) findings in the Second Trial as regards such matters, as reflected in the clear language of both the CMC Order and LOI as well as the absence of challenge to FCA’s evidence on such matters at the First Trial.
27. Further, and taking the pragmatic approach outlined above, any attempt by the Represented Defendants to seek to undermine or marginalise such findings in the 30 June Judgment by reference to additional evidence or by pointing out that specific evidence (i.e. within their control, e.g. personal bank statements or tax information) was not available to the trial judge should be viewed with a degree of scepticism. Likewise any technical points about ascertainment of “*profits*” as distinct from sums received by a corporate or individual defendant, not least where the court is not equipped to or ultimately interested in ascertaining actual profits under s.382 FSMA (cf. “*appearing to the court*”, as discussed below).
28. Finally, it should be noted by way of background that no point was taken on behalf of the Represented Defendants as to the availability at this stage of final injunctive relief, notwithstanding the terms of the CMC Order. Their resistance to grant of injunctive relief was on the basis that it was not appropriate in the factual circumstances. Nor was any point taken about the wording of LOI Issue 42 which refers only to injunctive relief under s.380 FSMA and not s.37 SCA. In my view, the Represented Defendants were right not to take such points.

LEGAL FRAMEWORK

29. The relevant legal test for each head of relief was largely if not entirely common ground between the parties. I have summarised the position in relation to final injunctions in this specific context in paragraph 17 above. I deal here with IROs, starting first with the statutory jurisdiction to make such orders on a final basis before moving to the court’s procedural power to order an interim payment pursuant to CPR 25.7.

Restitution Orders (s.382 FSMA)

30. Section 382 FSMA states, so far as material, as follows:

(1) The court may, on the application of the appropriate regulator or the Secretary of State, 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 paragraph (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.

(3) Any amount paid to the regulator concerned in pursuance of an order under subsection (2) must be paid by it to such qualifying person or distributed by it among such qualifying persons as the court may direct.

(4) On an application under subsection (1) the court may require the person concerned to supply it with such accounts or other information as it may require for any one or more of the following purposes—

(a) establishing whether any and, if so, what profits have accrued to him as mentioned in paragraph (a) of that subsection;

[...]

(8) “Qualifying person” means a person appearing to the court to be someone—

(a) to whom the profits mentioned in subsection (1)(a) are attributable; or

(b) who has suffered the loss or adverse effect mentioned in subsection (1)(b).”

31. Section 382(2) confers a wide remedial discretion upon the court to make an order for such sum “*as appears to the court to be just*” having regard to the matters identified in sub-paragraphs (a)-(c). In order to engage this remedial discretion, it is necessary first to satisfy the threshold or gateway in sub-section (1) including its disjunctive sub-paragraphs (a) and (b); although the amount of any restitution order is not fixed

directly by reference to any specific quantification of what might loosely be called ‘profit’ or ‘loss’. The court is empowered to order a “*just*” sum.

32. As observed during the hearing, there is a conspicuous asymmetry on the face of this section between ‘profit’ and ‘loss’. Whilst it appears to be necessary to show some actual “*profits*” accruing to a defendant in order to satisfy s.382(1)(a) (as reinforced by s.382(4)(a), also quoted above), s.382(2)(a) and (c) both speak of “*profits appearing to the court to have accrued*” which is softer-edged language. In contrast, s.382(2)(b) and (c) both speak of “*loss or other adverse effect*” which reflects the corresponding gateway in s.382(1)(b) (“*suffered loss or been otherwise adversely affected*”). This linguistic asymmetry may reflect the fact that ‘profit’ can be a subjective and even slippery concept depending on how it is calculated and the incidence of taxation, etc. Whilst ‘apparent profit’ may be a better label in this specific legal context, I refer to it as ‘profit’ for ease of reference and as an unambiguous counterpoint to ‘loss’ for the purposes of my analysis in this judgment.
33. It is clear that s.382(2) is not intended to replicate the common law regime for quantification of damages. It is much broader and looser in operation.
34. Both sides cited extensively from the substantial judgment of HHJ McCahill QC in *FCA v Capital Alternatives* [2018] 2 WLUK 623 at [1326]-[1329]. It is clear from those passages that the court exercising the broad remedial jurisdiction under s.382(2) may take account of the degree of participation and culpability of each defendant when dealing with multiple defendants in one (set of) contravention(s). Consistent with the purpose behind restitution orders and the specific provision made for subsequent distribution under the court’s auspices (s.382(3)) the default position is that restitution orders should usually extend to the losses sustained by investors: *ibid.* [1327](4).
35. Ultimately, the court must look at all the circumstances of the case - although a defendant’s lack of means is not a reason for refusing a restitution order: see *FSA v Shepherd* [2009] Lloyd’s Rep FC 631.
36. In the *Capital Alternatives* case as well as *FCA v Skinner* [2020] EWHC 1097 (Ch), by way of illustration, different restitution orders were made as against different defendants before the court depending on the circumstances applicable to them. The latter case involved a proportionate order (75%) as against one of the defendants (Ms Ferreira); whilst the former case included time-limited loss-based orders against two of the individuals (Mr Gibbs and Mr Meadowcroft) who had been knowingly concerned in the relevant contraventions.
37. On the specific question of ‘profit’ in the case of a personal defendant who pays income tax, I was referred to *FSA v Anderson* [2010] EWHC 1547 (Ch) in which Vos J (as he then was) deducted 40% as notional income tax from the sums received by Mr Anderson (*ibid.* [70]). The context for such approach was an aspect of the restitution order referable to the “*profits appearing to the court to have accrued*” under s.382(2). The deduction for notional income tax appears to have been uncontroversial in that case.

Interim Payments (CPR 25.7)

38. There was no dispute between the parties as regards the court's procedural power to make an interim payment under CPR 25.7. The general practice relating to interim payments is summarised in 2020 White Book, Volume 2, Section 15E at 15-099 to 15-119. FCA bears the burden of proof. The normal civil standard of proof applies both as to gateway and quantum. An application for an interim payment is ordinarily required to be made in accordance with the procedure set out in CPR 25.6; however, in light of the CMC Order and conduct of the First Trial, no objection was taken in this regard.
39. The court must first be satisfied that a relevant gateway is met, in this case CPR 25.7(1)(c): if the claim went to trial the claimant will obtain a substantial award of money (other than costs) as against the defendant. (CPR 25.7(1)(b) does not apply here, because the 30 June Judgment is not a judgment for damages or a sum of money to be assessed despite containing findings designed to support FCA's application for IROs.) It is often noted that CPR 25.7(1)(c) says "*would*" rather than "*may*" or "*is likely to*" and this is taken to mean "*will*" when rendered in non-conditional language.
40. As regards quantum the court may not award an interim payment more than a "*reasonable proportion of the likely amount of the final judgment*": CPR 25.7(4). Although the parties spoke of the 'irreducible minimum' for any interim payment in the present context, I took that to be a colloquialism for or epitomisation of the discretionary exercise capped by CPR 25.7(4). I interpret the reference in *FSA v Martin* [2004] EWHC 3255 at [80](6) to a "*minimum interim order*" in the same sense. The authorities treat the quantum assessment of an interim payment as a matter of discretion to be exercised by reference to all the circumstances and evidence before the court. It is sometimes described as involving a 'rough estimate' invoking judicial intuition if not clairvoyance.
41. Some guidance in relation to IROs can be gleaned from the Court of Appeal decision in *FCA v Asset LI Inc* [2014] Bus LR 993 at [100]-[112] where it is referred to as an 'IPO' by way of shorthand for an interim payment order under CPR 25.7(1)(c). The judgment of Aikens LJ in *Test Claimants in the FII Group Litigation v Revenue and Customers Comrs (No 2)* [2012] 1 WLR 2375 at [36] was cited as offering guidance in this context (see [107]):
- "... Considering the wording without reference to any authority, it seems to me that the first thing the judge considering the interim payment application under [CPR 25.7(1)(c)] has to do is put himself in the hypothetical position of being the trial judge and then pose the question: would I be satisfied (to the civil standard) on the material before me that this claimant would obtain judgment for a substantial amount of money from this defendant?"*
42. The Court of Appeal upheld the decision of Andrew Smith J granting an IRO in that case, noting that the judge had taken into account the risk of stifling the defendants' pursuit of an appeal or further participation in the quantum stage of the proceedings in the context of a split trial (see [109]). It appears that the judge considered evidence from the FCA as to the current market value of the relevant investment assets (plots of land) when making his evaluation (see [111]). The judge's determination was found to be well within the ambit of discretion conferred by CPR 25.7.

43. A claimant is entitled to make more than one application for an interim payment: CPR 25.6(2). Any interim payment order may be made with conditions attached (CPR 3.1(3)) in furtherance of the interests of justice (e.g. avoiding stifling). These procedural features may have significance in the present case, as explained below.

INTERIM RESTITUTION ORDER

44. FCA sought IROs against all five defendants on a series of primary and alternative bases, in each case applying the same basis to all five defendants. The reference in this context to ‘basis’ involves jumping ahead to any final restitution order, since the present application is only for an interim payment pursuant to CPR 25.7, as noted above.
45. I pause here to make two further observations about the ‘basis’ of estimation in this procedural/remedial context.
46. First, it is clear from the face of s.382 FSMA itself that this remedial jurisdiction is intended to operate flexibly and not as a facsimile of common law principles governing damages calculated by reference to loss or profit. Section 382(2) mandates an award of “*such sum as appears to the court to be just having regard*” to the matters identified in sub-paragraphs (a) to (c), as addressed above. The quantum of any restitution order is a matter of discretion, albeit one structured by the two alternative or cumulative scenarios which I have labelled as ‘profit’ and ‘loss’ for present purposes.
47. Secondly, there is no reason why the same ‘basis’ should apply to each defendant in a case, like the present, where some defendants have “*contravened a relevant requirement*” whereas others have been “*knowingly concerned*” in such contraventions within the meaning of s.382(1). It must be open to the court to make an IRO against each defendant on - i.e. by reference to - whichever ‘basis’ it feels may be more suitable or applicable in respect of any future restitution order against that particular defendant. Indeed, a defendant-by-defendant contextual approach accords with the s.382 jurisprudence, as noted in paragraph 36 above.
48. This position is *a fortiori* in the context of an interim payment under CPR 25.7. The court is required to look ahead to be satisfied as to a notional minimum quantum (“*reasonable proportion*”) for any final s.382 order against each defendant at/after the Second Trial.
49. FCA advanced its claim for IROs against the five defendants as follows:
- (i) **Assumed Loss.** FCA’s primary case was based on losses estimated to have been suffered by investors in three of the investment products as a result of contact with/by Avacade - namely, Mosaic Caribe (£555,479 invested), Sustainable AgroEnergy (£1,244,500 invested) and Ethical Forestry (£42,600,452 invested) - on the conservative assumption (so it is said) that 50% of the total value of such investments had been lost, i.e. £22,200,216 being half of £44,400,431. This figure was rounded down to £22,200,000. Further:

- a) Since this loss estimation process applies only to Avacade, it necessitates a separate basis of estimation for AA. FCA suggests using the figure of £715,000 for any IRO against AA, reflecting the total amount of commissions/fees found to have been received by it in relation to relevant investment activities (see paragraph 12(iv) above).
- b) Accordingly, the amounts sought as against each defendant on this primary basis are as follows: Avacade (£22,200,000), AA (£715,000), CL (£22,915,000), LL (£22,915,000) & Mr Fox (£22,200,000) reflecting the fact that Mr Fox was not knowingly concerned in any of the contraventions on the part of AA.
- c) Such orders are subject to the proviso that, pending any Second Trial, FCA may not recover any sum greater than £22,915,000.

(Although not strictly accurate in light of the position of AA, I refer to this basis of claim for convenience as the “**Assumed Loss**” basis.)

- (ii) **Gain-Loss Proxy.** FCA’s first alternative case was based on gains made by each of the defendants as a proxy for losses suffered by investors, i.e. on the twin assumptions that (a) any commissions/fees paid to Avacade or AA, from which CL or LL or Mr Fox derived their own personal economic benefit, must ultimately have come from investors’ money and (b) but for the proven contraventions no such money would have been transferred (i.e. lost) by those investors. Further:

- a) As regards the position of Avacade (and, therefore, all three individual defendants) the sum of £10,000,000 was sought, this being a rounding down from the total amount of commissions/fees (£10.621m) found to have been paid to Avacade (see paragraph 12(ii) above).
- b) The position of AA remains the same as on the Assumed Loss basis (see (i) above) being based on commissions/fees received by AA in the sum of £715,000. The use of this figure for AA, even in (i) above, is as a proxy for investor loss.
- c) Accordingly, the amounts sought as against each defendant on this first alternative basis are as follows: Avacade (£10,000,000), AA (£715,000), CL (£10,715,000), LL (£10,715,000) & Mr Fox (£10,000,000), reflecting the fact that Mr Fox was not knowingly concerned in the contraventions on the part of AA.
- d) Such orders are subject to the proviso that, pending any Second Trial, FCA may not recover any sum greater than £10,715,000.

(I refer to this basis of claim for convenience as the “**Gain-Loss Proxy**” basis.)

- (iii) **Gross Profit.** FCA’s second alternative case was based on gains made by the defendants treated as “*profits appearing to the court to have accrued*” to each of them within the meaning of s.382(2). This alternative to (ii) above was

proffered by FCA without prejudice to it seeking a loss-based restitution order at/after the Second Trial, recognising that a profit-based order is not provable in any insolvency until all other creditors have been paid in full. Accordingly:

- a) The amounts sought against each defendant on this second alternative basis are as follows: Avacade (£10,000,000), AA (£715,000), CL (£2,550,019), LL (£2,553,360) & Mr Fox (£1,714,226) (see paragraph 12(viii) above).
- b) Such orders are subject to the proviso that, pending any Second Trial, FCA may not recover any sum greater than £10,000,000.

(I refer to this basis of claim for convenience, acknowledging the dispute as to the concept of 'profit' in this context, as the "**Gross Profit**" basis.)

- (iv) **Net Profit.** FCA's third and final alternative case was a variant on (iii) above, deducting 40% notional tax from the figures for each of the three individual defendants as in *Anderson* (above). This brings their respective amounts down as follows: £1,530,011 (CL), £1,532,016 (LL) and £1,028,535 (Mr Fox). The same proviso and reservation applies as in (iii) above. I refer to this basis of claim for convenience, with the same acknowledgement, as the "**Net Profit**" basis.

50. Unlike Avacade and Mr Fox, the Represented Defendants resisted any IRO. Their resistance was root and branch in the sense that they objected as a matter of principle and made no counter-suggestions as to any appropriate amount(s) for an IRO. Their resistance was based primarily on two central contentions. First, the court exercising its s.382 jurisdiction at/after the Second Trial would have to take into account the fact that the defendants acted merely as introducers and did not provide investment products or handle client monies (referred to during the hearing as the "**characterisation**" issue). Secondly, it was impossible for the court at this stage to form any reliable conclusions as to quantum sufficient to justify making an IRO pursuant to CPR 25.7 (to which I refer for convenience as the "**quantification**" issue).
51. I can deal with the characterisation issue briefly, because it was - sensibly, in my view - not maintained with vigour during the hearing. The Represented Defendants readily acknowledged that the nature of their involvement in the proven contraventions would be a factor in the court's ultimate exercise of this broad statutory remedial discretion, rather than an answer or bar to the making of a restitution order against each of them at the end of the day. This is inherent in the flexible language of s.382, which must in turn impact upon this court's approach under CPR 25.7.
52. FCA directed me to examples in the decided cases where orders under s.382 are tailored to each defendant depending on its or his/her role in the relevant contraventions, in some cases through a proportional (i.e. percentage) adjustment and in other cases an order prescribed by periods of time, including those referred to in paragraph 36 above. These are all matters for the court exercising the s.382 jurisdiction at/after the Second Trial.
53. FCA reminded me in this context of the gravity of the findings made against Avacade and AA as primary contravenors and the three individual defendants as knowingly

concerned in such contraventions through their corporate roles and personal benefit schemes. Such contraventions included making (at least) recklessly false or misleading statements about prospective investments, including through direct unsolicited calls to individual investors, as summarised in paragraph 12(i), (iii) & (x) above. FCA suggested that final restitution orders would be pursued against all five defendants without exculpatory adjustments or discounts, so far as may be appropriate.

54. In the event, I am not persuaded that the characterisation issue makes any real difference to the exercise that this court has to conduct pursuant to CPR 25.7. It appears that the three individual defendants were the moving force behind the business concept or model that involved a series of serious statutory contraventions on the part of the two corporate defendants. All three individual defendants received, by one route or another, substantial seven-figure sums by way of profit-sharing arrangement, ultimately derived from and at the expense of the victims of this prohibited behaviour. Without pre-judging the court's attitude at a future stage, it seems unlikely to me that any of the defendants would succeed in obtaining a significant discount to any notional gross s.382 order at the end of the day based on their specific role and responsibility in the underlying events leading to these proceedings; and certainly not in so far as based upon or by reference to their own personal economic gain through such impropriety. Nothing in Lummis 10 alters this conclusion.
55. Moving on to the quantification issue, this sub-divides between 'loss' and 'profit' using those rather blunt labels as forensic shorthand. Before addressing each in turn, I deal with a threshold point advanced by the Represented Defendants as to why it was inappropriate for the court to order any interim payment by reference to the split trial regime in these proceedings.
56. It was suggested that no interim payment could or should be made because the Second Trial would be the proper opportunity for the court to investigate and make findings as to both 'profit' and 'loss' referable to the contraventions established as against the various defendants at the First Trial. As to this contention:
 - (i) As discussed in paragraph 26 above, I reject this submission as regards 'profit' for the simple reason that the trial judge was asked to investigate and did make findings in relation to such matters, at any rate in terms of amounts paid to or received by each of the defendants as summarised in paragraphs 12(ii), (iv) & (viii) above. These findings accord with the CMC Order and LOI. Such findings of fact provide more than sufficient basis or guidance to enable the court at this stage to exercise its power under CPR 25.7, as addressed below, notwithstanding the trial judge's observation summarised in paragraph 13 above.
 - (ii) The position as regards 'loss' is different. The purpose of the split trial in these proceedings was to defer the quantification exercise - more specifically, the ascertainment of the residual value of the relevant investments as defined in LOI Issue 43 - for consideration at a Second Trial, should the proceedings get that far. The 30 June Judgment does not, therefore, supply the kind of factual foundation in terms of 'loss' as it does for 'profit'. The court is nevertheless able to form a view by reference to the available evidence for the

purposes of making an interim payment of some amount under CPR 25.7, as addressed below.

57. I address these separate bases in reverse order below, bearing in mind the observations made in paragraphs 44 to 48 above.
58. I am satisfied as to the threshold or gateway requirement in CPR 25.7(1)(c), i.e. that, if this claim proceeds to a Second Trial, FCA would obtain a restitution order for a substantial amount of money (other than costs) against each of the five defendants whether referable to 'profit' (s.382(2)(a)) or 'loss' (s.382(2)(b)) or an amalgam of the two (s.382(2)(c)).
 - (i) **IRO referable to 'loss'**
 59. The Represented Defendants do not contend that this court cannot be satisfied that the threshold or gateway requirement in s.382(1)(b) will be met in relation to each of them. I am satisfied, so far as required to be for present purposes, that one or more persons have suffered some loss or been adversely affected as a result of one or more of the proven contraventions in respect of which the three individual defendants were knowingly concerned at all material times. On this basis and given the substantial sums involved, I am likewise satisfied as to CPR 25.7(1)(c) as already noted.
 60. As regards 'loss' it is said by the Represented Defendants that this court cannot be sufficiently satisfied as to the "*likely amount*" of a final restitution order at/after the Second Trial such as to order (less than) a "*reasonable proportion*" pursuant to CPR 25.7(4). I have some sympathy with this contention: the whole purpose of the Second Trial is to ascertain quantum of loss, by reference to the current value of the relevant investments; and there are, accordingly, no findings in the 30 June Judgment dealing with such matters. Issues of causation or attribution may also arise in this context by reference to the language of s.382 ("*as a result of*") and there may be arguments as to why (for example) loss caused to investors by hurricane damage to tree plantations is not wholly attributable to the proven contraventions (see paragraph 12(v) above).
 61. It is for this reason that the Assumed Loss basis advanced by FCA as its primary case (see paragraph 49(i) above) necessarily involves looking beyond the 30 June Judgment for evidence showing an absence of any meaningful residual value in the three identified investments and the proffered assumption that such investments are now worth only 50% of their original cost to investors. I do not feel comfortable making assumptions about the residual value of any of the investment products/assets in the present case given that the sole purpose and focus of the Second Trial concerns that specific inquiry, as reflected in paragraph (b) of the CMC Order and LOI Issue 43. Such quantification exercise, if it goes ahead, will involve potentially complex analysis with the assistance of multiple expert witnesses.
 62. The Represented Defendants raised an additional point by reference to payments made by FSCS to investors. FCA says that such compensation is not relevant to the ascertainment of a "*just*" sum under s.382(2) because any subsequent distribution of sums received by FCA in accordance with s.382(3) would include FSCS as analogous to a subrogated insurer/indemnifier or, at any rate, the court could ignore such parallel

statutory compensation when ascertaining ‘loss’ under s.382(2). It is not clear whether or how this might work in practice, given the reference in s.382(3) to “*qualifying person(s)*” and the definition of “*qualifying person*” in s.382(8). Whilst in some circumstances, parallel statutory compensation through FSCS has been held not to have diminished the underlying loss to investors (see *FSCS v Abbey National Treasury Services* [2008] EWHC 1897 (Ch); [2009] Bus LR 465) the position in relation to s.382 appears to be untested and is not, in my view, free from doubt. This adds another dimension to the uncertainty surrounding proper quantification of ‘loss’.

63. In the circumstances, I decline to make an IRO on the Assumed Loss basis advanced by FCA as its primary case. I am not in a position to be satisfied as to the “*likely amount*” that a court will order on this basis at/after the Second Trial. I cannot, therefore, be satisfied as to the amount of an interim payment which is no more than a “*reasonable proportion*” of such amount for the purposes of CPR 25.7(4).
64. The Gain-Loss Proxy basis of estimation advanced by FCA as its first alternative case involves treating gains made by each of the defendants as losses suffered by investors on the twin assumptions summarised in paragraph 49(ii) above. Those assumptions are demonstrably reasonable, in my view. The ultimate source of money paid to Avacade and AA as commissions/fees is presumed to be investors’ original capital and it is reasonable to suppose that but for the proven contraventions such investment capital would not have been diminished, at the very least to the extent of such commissions/fees. There is no dispute that the personal gains made by CL, LL and Mr Fox derive from those commissions/fees paid to Avacade and AA, as the case may be. In so far as it is suggested that this court is not in a position to make such assumptions at the present stage, I disagree.
65. However, whilst I am satisfied that the figures for Avacade (£10,000,000) and AA (£715,000) represent a reasonable proportion of the likely amount that a court would order under s.382(2) at/after the Second Trial on the ‘loss’ basis, I am not so satisfied as to the equivalent amounts sought in respect of the individual defendants. The respective amounts of personal gain found in the 30 June Judgment provide a safer and fairer proxy for investor losses on these applicable assumptions, i.e. £2,550,019 (CL), £2,553,360 (LL) and £1,714,226 (Mr Fox). This also gives effect to the defendant-by-defendant ethos behind a s.382 order at the end of the day.
66. The fact that paragraph 466 of the 30 June Judgment qualifies such findings with the words “*in the region of*” does not introduce material uncertainty that disables or deters me from reaching this conclusion under CPR 25.7. This quantitative qualification cuts both ways and, as noted above, there was no challenge to FCA’s evidence or analysis of the sums received by the defendants at the First Trial. However, in the interests of justice, and consistent with the rounding down that FCA was prepared to allow in respect of sums received by Avacade, I propose to round down the amounts applicable to the individual defendants as follows: £2.5m (CL), £2.5m (LL) and £1.7m (Mr Fox).
67. I propose to make IROs in the aforesaid amounts against each of the five defendants. I do so on the basis that each amount represents no more than a reasonable proportion of the likely amount that a court will order as against each of them under s.382(2) at/after the Second Trial having regard to the extent of the loss or adverse effect suffered by investors and reflecting the respective amounts actually received by each

of them according to the 30 June Judgment. This result accommodates all the concerns expressed in Lummis 10. Such orders are subject to the proviso that, pending any Second Trial, FCA may not recover any sum greater than £10,715,000.

68. If I have any hesitation in making IROs at this level, it is that they may involve a significant under-valuation which is unduly generous to the defendants at the present stage. It strikes me as the safest and fairest course to take by way of interim remedy, thereby depriving the defendants of their specific economic gains made at the expense of investors irrespective of whether the same can be characterised as ‘profits’ in their hands. It remains open to FCA to seek summary judgment and/or additional IROs by reference to incontrovertible ‘loss’ figures in lieu of a Second Trial, should the evidence and circumstances justify such application(s) in the future.

(ii) IRO referable to ‘profit’

69. The Represented Defendants do not contend that this court cannot be satisfied that the threshold or gateway requirement in s.382(1)(a) will be met in relation to each of them. I am satisfied, so far as required to be for present purposes, that some profit has accrued to each of them as a result of one of more of the proven contraventions in respect of which the three individual defendants were knowingly concerned at all material times, as appears overwhelmingly likely from the findings of fact as to amounts paid to and received by each of the defendants (see paragraph 12(ii), (iv) & (viii) above). On this basis and given the substantial sums involved, I am likewise satisfied as to CPR 25.7(1)(c) as already noted.
70. In light of my conclusion in paragraphs 64 to 68 above, it is not necessary to examine further whether the sums sought by way of IRO on the Gross Profit basis represent a reasonable proportion of the likely amount that a court will order as against each of the defendants under s.382(2) at/after the Second Trial having regard to “*the profits appearing to the court to have accrued*” to each of them. The Represented Defendants contend that such amounts do not represent profits in their hands, due to business overheads (AA) or personal taxation liabilities (CL & LL) which they say this court is unable to determine or take a view on at the present stage. As noted in paragraph 13 above, the trial judge expressed his own caveat in this regard, although no reference was made to it on behalf of the Represented Defendants during the hearing before me.
71. If it had been necessary to determine this point, I would have been satisfied that the amounts in question (set out in paragraph 65 above) represent a reasonable proportion of the likely amount that a court will order as against each of the defendants under s.382(2) at/after the Second Trial having regard to “*the profits appearing to the court to have accrued*” to each of them. That is not to say that it is the function of the court at the Second Trial to re-visit or make any further findings as regards such matters, simply that this court is tasked only with making an IRO pursuant to CPR 25.7.
72. The Represented Defendants referred to the fact that HMRC is currently challenging both the EBT and EFRBS and that this may result in CL or LL being found liable to

pay income tax on a proportion of their respective receipts during applicable periods. It is for this reason, and in light of the approach adopted in *Anderson* (above), that FCA advanced the Net Profit basis as its final alternative case (see paragraph 49(iv) above).

73. I am not persuaded that it would be appropriate to make allowance for potential income tax liabilities in the case of CL or LL in such circumstances. There is no evidence of any challenge to the EBT beyond a passing reference in Lummis 10; and no decision as yet on the challenge by HMRC to the EFRBS. No figure has been suggested, still less admitted, by CL or LL as representing their (maximum or probable) personal net gain from these improper business activities. As matters stand, it appears that the sums received by each of them was equivalent in substance to profit in their hands, i.e. disposable income. In any event, the court need only be satisfied under s.382(2) as to the amount of “*profits appearing to have accrued*” to a defendant, not actual profits.
74. I would, therefore, have been satisfied that it was appropriate to make IROs as against the three individual defendants on the basis of the figures used in FCA’s Gross Profits case by reference to the findings of fact in the 30 June Judgment. As it happens this is not necessary because I am satisfied that it is appropriate to make IROs against each of them, as well as Avacade and AA, in accordance with the Gain-Loss Proxy basis as explained in paragraphs 64 to 68 above.

FINAL INJUNCTION

75. No injunction is sought against Avacade which is now in liquidation. Mr Fox does not resist a final injunction against him in the terms of the draft order provided by FCA prior to issuance of the 30 June Judgment. The Represented Defendants do resist injunctive relief: they say there is no factual basis for such relief, i.e. no real risk of repetition of any prohibited behaviour.
76. The position of AA is different from that of CL and LL, both legally and factually, as noted above. An injunction lies against AA under s.380 FSMA on the basis that it has contravened one or more relevant requirements and there is a reasonable likelihood that such contravention will be repeated. Given the purpose of its existence and focus of its business, I am more than satisfied that such risk exists and that it is appropriate to grant a final injunction against AA.
77. At the hearing I made inquiries as to the age and employment status of CL and LL. I was informed that CL was born on 20 September 1959 and, having turned 60 years of age last year, he has now entered retirement with no intention of working further. LL was born on 5 August 1984. Despite having many years of working life ahead of him, I was told that he has no intention of working in financial services or investments again. These assurances were provided informally to me during the remote hearing by their solicitor, Mr Khub, at my request. I take note of them for present purposes, in so far as they go.
78. Given the extent of the involvement of both CL and LL in the activities of Avacade and AA over a significant period of time (i.e. 2010 to 2016), the nature and gravity of the proven contraventions, the gross investment sums involved as well as the significant amounts received personally by each of them through their selected

corporate and fiscal structures, I have no hesitation in concluding that there is (at least) a real risk of repetition of prohibited behaviour on the part of each of them if not restrained by an order of the court. Despite the oral assurances given to me at the hearing about their current intentions as regards future employment or enterprise, I am satisfied that it is just and convenient to grant final injunctive relief in the terms sought against both CL and LL, subject to the question of appropriate duration (see below).

79. In reaching this conclusion I have taken into account the observations and findings made by the trial judge about LL as a witness of fact. LL was the only one of the three individual defendants to give evidence at trial. In paragraph 16(i) of the 30 June Judgment, the trial judge commented on the distorted view that LL had as to the propriety of the relevant business activities and added: “*I do not think it was dishonest or motivated by callousness*”. I have no reason to believe that the same could not have been said about CL or Mr Fox, so far as may be relevant to the risk evaluation for injunctive relief in this context.
80. The fact that neither CL or LL has become knowingly concerned in (or directly undertaken) any other prohibited behaviour to date does not give this court the degree of comfort urged upon it by their counsel. It would have been a particularly bold move for either of them to have started a new line of financial services business during the currency of FCA’s enforcement process and these legal proceedings. The submission, however eloquent and adamant, that they have learned their lesson from being subjected to the ‘laboratory microscope’ of such enforcement process and serious public censure, does not preclude or materially reduce the risk of repetition of prohibited behaviour in the future, once these enforcement proceedings are closed and behind them.
81. I asked counsel for FCA whether the acknowledged bankruptcy risk created by a significant IRO made against either CL or LL (if so made) would materially impact the risk assessment for the grant of an injunction against either or both of them. I am satisfied that it would not, given the potential for operating as a shadow or *de facto* director of and/or other prime operator or stakeholder behind a new corporate entity in future. The use of tax-related structures such as the EBT and EFRBS demonstrates a certain degree of sophistication, involving trust arrangements and the purchase of gold, as well as an appetite for optimising personal economic advantage through (i.e. behind the veil of) limited liability entities. If there is sufficient personal economic incentive involved, the risk remains that CL or LL may seek to undertake new business activities in future that may result in further enforcement action by FCA.
82. The injunction against CL and LL is sought and made under s.37 SCA. It uses the language of ‘knowingly concerned’ which tracks the relevant findings made in the 30 June Judgment and the specific wording of s.382 FSMA. I am satisfied that such language is sufficiently clear and certain for the purposes of this final injunction. I am also satisfied that it is appropriate to include in this injunction a restraint upon any direct contravention on the part of CL or LL in future, i.e. acting in their own personal capacity. It makes sense to include this narrower (direct) language in conjunction with the wider (indirect) language: the precise *modus operandi* of prohibited behaviour need not be repeated in future. It is prudent to include wording that shuts off an obvious route for circumvention, irrespective of any intervening bankruptcy process.

83. The grant of injunctive relief in this form furthers the important policy of protecting UK investors, including elderly and vulnerable citizens who have paid their due share of income tax, made sacrifices and taken prudential decisions for their future retirement over the course of an honest working life. Whether or not these three defendants have learned their lesson already through the FCA enforcement process and this public litigation, I regard the added discipline of potential contempt sanctions as just and proportionate in the circumstances of the present case given the extensive adverse findings contained in the 30 June Judgment.
84. FCA seeks injunctive relief on a permanent basis. I was not addressed and did not inquire as to any fall-back position based on a limited duration with liberty to apply for extension. I will hear further submission on this point before issuing the final injunction order.

STAY OF EXECUTION

85. FCA has offered to undertake not to pursue any insolvency or bankruptcy proceedings against AA or CL or LL on the basis of the IROs whilst the Proposed Appeal remains pending or extant (“**FCA’s Interim Undertaking**”). In so far as any insolvency or bankruptcy proceedings later ensue this may mean that FCA does not pursue these proceedings further to a Second Trial or seek any final or further restitution orders against such defendants.
86. I decline to grant a stay of execution in respect of any of the IROs made against the Represented Defendants. The case as to stifling depends upon the intervening prospect of insolvency or bankruptcy proceedings, as explained in Lummis 10. The pursuit of the Proposed Appeal is protected or preserved through FCA’s Interim Undertaking and further prosecution of these proceedings at a Second Trial seems unlikely to happen in the event of such insolvency/bankruptcy, according to the FCA. There is, therefore, no material injustice to any of the Represented Defendants by the refusal of a stay of execution of the relevant IROs. They are, of course, free to seek such a stay from the Court of Appeal as part of the Proposed Appeal.
87. Although not invited to do so, I have also considered the possibility of making the IROs against the Represented Defendants conditional upon terms that protect and preserve their ability to pursue the Pending Appeal. For the reasons set out above in respect of refusing a stay of execution, I am not persuaded that conditions should be imposed save in so far as the court has accepted FCA’s Interim Undertaking in this context.

DISPOSITION

88. I make IROs against the five defendants in the following amounts - subject to the proviso that, pending any Second Trial, FCA may not recover any sum greater than £10,715,000:
- (i) Avacade: £10,000,000
 - (ii) AA: £715,000
 - (iii) CL: £2,500,000

- (iv) LL: £2,500,000
- (v) Mr Fox: £1,700,000

89. The above amounts are comfortably less than a reasonable proportion of the likely amount that a court would order as against each defendant under s.382(2) at/after the Second Trial having regard to the extent of the loss or adverse effect suffered by investors and reflecting the respective amounts actually received by each of them according to the 30 June Judgment. The assumptions behind the Gain-Loss Proxy basis for estimation are robust. If anything, these IROs are generous to the defendants, hence my observation about the possibility of further such orders in lieu of a Second Trial depending upon the evidential position as regards quantification of investor losses in future.
90. I refuse to stay execution of such IROs on the basis of FCA's Interim Undertaking which will need recording in the relevant order. I will receive further submission as to timing for compliance with (each of) the IROs; but good reason will need to be shown in order to extend that beyond the 21 day period provided for in FCA's revised draft order.
91. The order should include liberty to apply so that FCA may seek additional IROs without the need for any further formal application notice(s).
92. As regards the discrete dispute as to the recitals to such order, including the points raised in the letter dated 5 August 2020 sent to me on behalf of the Represented Defendants (see paragraph 9 above) it is appropriate, in my view, that the Gain-Loss Proxy basis of the IROs be recorded on the face of the order. This has potential practical utility in the insolvency context, as noted in paragraph 49(iii) above.
93. I will grant final injunctions against AA, CL, LL and Mr Fox in the terms of the revised draft order provided by FCA during the hearing, subject to being addressed as to the duration of such injunctive relief in the case of CL and LL (and, therefore, also Mr Fox). The injunction against AA will be permanent.
94. I will give directions in writing to counsel as to resolution of any disagreement on the wording of the orders consequent upon issuance of this reserved judgment and the separate matters dealt with orally at the conclusion of the hearing on Friday 31 July 2020.
95. Finally, in so far as the Represented Defendants are successful in obtaining permission to appeal in the Proposed Appeal, I can see sense in such permission being extended to cover the orders made by me in the present context. This, however, will be a matter for the Court of Appeal as appropriate.