Neutral Citation Number: [2021] EWHC 2866 (Ch)

Case No: BL-2017-000097

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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

Date: 27th October 2021

Before :

MR JUSTICE MILES

- -

Between :

EUROPEAN REAL ESTATE DEBT FUND (CAYMAN) LIMITED (IN LIQUIDATION)	**Claimant**
- and –	
(1) ANOUP TREON **(2) ARUNDEL GROUP LIMITED** **(3) DR DORAISWAMY SRINIVAS**	**Defendants**

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Christopher Parker QC and Edward Meuli (instructed by **Gateley Plc**) for the **Claimant**
Bridget Lucas QC and Daniel Kessler (instructed by **DMH Stallard LLP**) for the **First Defendant**
Saul Lemer (instructed by **Taylor Wessing LLP**) for the **Second** and **Third Defendants**

Hearing dates: 11, 14, 15, 16, 17, 18, 21, 22 and 23 June and 5, 6, 7 and 8 July 2021

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APPROVED JUDGMENT

Mr Justice Miles :

(a) Introduction

1. This case concerns an investment in the European Care Group ("ECG") business by a property debt fund called the European Real Estate Debt Fund ("the Fund"). The claimant, as the Fund's assignee, claims that the defendants fraudulently mispresented the financial position and prospects of the business and induced the Fund to subscribe for £11m of loan notes in June 2011. It also claims that the Fund made a follow-on investment of £4.25m in the group in 2012 to seek to mitigate its losses.

2. The first defendant, Mr Anoup Treon, founded ECG in 2000. The business grew rapidly, largely through acquisitions, and by 2009 it was the fifth largest care home business in the UK. ECG was advised for many years by the second defendant firm of financial advisers, then known as RP&C International Limited ("RP&C"), particularly Dr Doraiswamy Srinivas, the third defendant. Mr Treon and Dr Srinivas were long standing colleagues and friends.

3. By 2009/2010 ECG had substantial secured bank debt and had issued unsecured mezzanine notes. It was experiencing a liquidity crunch and needed to raise new capital. It had attempted unsuccessfully to attract equity. It therefore decided in 2010 to issue a new series of loan notes, hoping to raise some $50m odd (by a mixture of conversion of existing mezzanine notes and fresh capital). It appointed RP&C as placement agents for the note issue. Dr Srinivas (the main contact at RP&C) had the task of seeking and liaising with potential new investors. By the end of 2010 some of the existing mezzanine note holders had converted into notes of the new series and a limited amount of fresh money had been raised through the issue.

4. The Fund had spoken to Mr Treon and Dr Srinivas about a potential lending transaction in October 2010 but that came to nothing. Mr Treon suggested in January 2011 that it might be interested in an investment in the notes. The Fund's investment adviser was Duet Private Equity Limited ("Duet"). Duet's team exploring possible investments in ECG was led by Mr Cyrus Korat. Mr Korat had a series of meetings and other communications with Mr Treon and Dr Srinivas about the investment from January 2011 onwards and was provided with financial information about ECG's business and prospects. The Fund made its principal investment of £11m on 24 June 2011.

5. The claimant says that the information it was given was false and misleading. It says that Duet discovered this by early March 2012 and confronted Mr Treon at a meeting. Mr Treon was removed as a director in March 2012. Later in 2012, ECG's new management sought to restructure its debts. It invited the Fund to make a further investment and the Fund invested another £4.25m in July 2012.

6. ECG continued to struggle financially and ultimately went into administration in 2014. The Fund lost the entire value of its investment.

7. The claimant alleges that the defendants misled Duet about the recent financial performance and future prospects of ECG. Its principal allegations are that the defendants presented it with tailor-made trading numbers for 2010 which deliberately excluded a material amount of trading costs (mainly wages) without flagging this; second that the trading numbers for 2010 were already out of date when they were

repeated in February 2011; and third that the defendants presented projections for 2011-2013 which had already been superseded when given by more pessimistic ones. The claimant says that Duet and the Fund relied on the 2010 trading numbers and projections as accurate and current. The claimant contends that the defendants conspired to mislead the Fund. It also claims that Mr Treon is responsible in law for various representations made by the issuer of the notes in a loan note agreement of 24 June 2011 ("the LNA"). The claimant seeks damages for the Fund's full investment, including that made in 2012, which they say was by way of mitigation.

8. The defendants contest all the elements of the claims. They deny that the information was misleading. Mr Treon's case is that he told Mr Korat that the trading figures for 2010 had been "normalised". The second and third defendants say that Mr Treon told Dr Srinivas that Mr Korat knew the figures were normalised. They also deny that they made any representation to Duet about the accuracy of the 2010 figures. Mr Treon denies that the projections for 2011-13 had been superseded; and the second and third defendants deny that they were aware that outdated projections were provided to Duet. Both sets of defendants say that they gave Duet accurate and reliable information. They deny that they conspired to mislead Duet. They say that Duet carried out its own due diligence and deny that Duet or the Fund relied on any representations about the accuracy of the 2010 trading figures or the projections. Mr Treon denies any liability under the LNA.

9. The defendants accept, if they are liable, that the claimant is entitled to damages of £11m (with adjustments for interest received before the administration). But they deny any liability for the follow-on investment of £4.25m, saying that this was an independently motivated commercial decision of the Fund and was not made in reasonable mitigation of its loss.

10. The defendants also say that the action is statute-barred, having been commenced more than 6 years after the investment. The claimant relies on section 32 of the Limitation Act 1980 to seek to postpone the start of the limitation period.

11. This judgment is arranged as follows: (a) Introduction; (b) The parties and other players; (c) The admitted or uncontentious facts; (d) Approach to the evidence and the witnesses; (e) Principles of the law of deceit and conspiracy; (f) Analysis of the various claims, being: (i) the normalisation claims, (ii) the outdated 2010 figures claims, (iii) the revised projections claims, (iv) the bank covenant compliance claims, (v) the loan note agreement claims, and (vi) the conspiracy claims; (g) Damages; (h) Limitation; and (i) Conclusions.

12. I have concluded that the claim is statute-barred. I would otherwise have found for the claimant on most of the claims. Given the punchline a reader might have expected a shorter judgment. However I have made full findings on each element of the claims and, in any case, determining the limitation defence depends on a detailed scrutiny of the history.

13. I have been greatly assisted by the written and oral submissions of counsel for the parties. As well as being of a high calibre, they were detailed and extensive. In this judgment, I shall set out my conclusions on the essential issues and my reasons for reaching them and will not attempt to address every facet of the parties' submissions. But in preparing this judgment I have carefully reread them.

14. The trial took place physically in court with one witness, who was in the US, giving evidence by video link.

(b) Parties and other players

ERED and Duet

15. The claimant, European Real Estate Debt Fund (Cayman) Ltd (in liquidation), is part of the structure of the Fund, a debt fund established in 2008 seeking to pursue opportunities created by the scarcity of capital and liquidity in the commercial real estate banking system following the financial markets crash. The Fund's rationale was to generate income for investors from interest on debt investments, which were targeted at 15 per cent or more per annum.

16. The Fund structure included European Real Estate Debt S.a.r.l. ("ERED"), a wholly owned Luxembourg registered subsidiary of the claimant. ERED is the company that invested in the loan note issue. It assigned its claims to the claimant under a deed of assignment dated 13 October 2017.

17. Duet was one of the two co-sponsors of ERED. It was also appointed as the Asset Manager and Investment Advisor to ERED. It considered opportunities, carried out due diligence, and made investment recommendations to the Fund's investment committee ("the IC") which then decided whether to invest.

18. DRC Capital LLP ("DRC") replaced Duet in those roles in 2012.

19. The other co-sponsor of ERED was Forum Partners Investment Management LLC ("Forum").

20. The people at Duet who mainly worked on the investment in the loan notes were Mr Korat, a senior investment manager; Philip Moore, a senior investment manager; Rob Clayton, a senior investment manager; and Priti Shah, a junior investment adviser. Dale Lattanzio was managing director of Duet's Real Estate Development team and a member of ERED's IC. Mr Korat, Ms Shah and Mr Lattanzio all joined DRC in March 2012.

21. Forum's representative on the IC was Andrew Walker.

The European Care Group

22. The term "ECG" was used by the parties at the trial and is adopted here to describe the European Care group of companies.

23. ECG was established in 2000. As already explained, between 2001 and 2009 it grew rapidly as a result primarily of acquisitions to become the fifth largest private long term care provider in the UK.

24. ECG had two operating divisions: European Care Homes, its elderly care division comprising 90 care homes; and European Lifestyles, its specialist division providing long term specialist care to children and adults.

25. ECG had an ownership interest in roughly 65% of its homes, and leased the remainder, predominantly from a listed company, Public Service Properties Investments Ltd ("PSPI"), which RP&C also advised.

26. ECG was organised with a dual opco/propco structure. The propcos owned or leased the various care homes and other properties. The opcos operated the businesses and leased the properties from the propcos.

27. By 2010 ECG had £190m of senior debt and overdrafts provided by four senior lenders (Lloyds, Bank of Ireland, Allied Irish Bank and Abbey National, collectively "the Banks") as well as mezzanine debt provided through a RP&C managed fund.

28. ECG's turnover was mainly derived from local authorities, but also from full or top up payments made by private customers on monthly rolling contracts.

29. The ultimate parent company of the group was a BVI company called Esquire Consolidated Investment Holdings Limited ("Esquire"). The company was the issuer of the loan notes. It owned a Guernsey company, Esquire Consolidated Limited, which owned another company, European Consolidated Group Limited ("ECGL").

30. ECGL owned (a) Esquire Realty Holdings Limited (another BVI company), which in turn owned the various property-owning companies (or "propcos") in the group, and (b) European Care & Lifestyles Group Ltd, which owned European Care & Lifestyles (UK) Limited ("ECL"), the UK-based parent of the various opcos.

31. Consolidated group accounts were prepared at the ECGL level. The auditors were KLSA. The main partners involved with the audit of the ECGL accounts were Ketan Shah and Fayaaz Shariff.

32. Esquire was ultimately owned by the Bali Trust, a family discretionary trust, settled by Mr Treon's grandfather, of which Mr Treon was one of the discretionary beneficiaries.

33. Mr Treon was the founder of ECG. He was a director and the Group Chairman and CEO of ECL.

34. Pritesh Amlani was a director of ECL. He was styled as Managing Director and Finance Director. ECL had a large finance team whose members included Dhaka Basyal, an Assistant Management Accountant. Mr Amlani was replaced as finance director by Johal Baljit (as interim finance director) in 2011.

35. David Perry was the Vice Chairman of ECL.

36. Ted Smith was appointed as the CEO of ECL on 1 August 2011.

37. ECL had an advisory board. Its chairman was Sir John Hanson, who was also a non-executive director.

38. The directors of ECGL and Esquire were two corporate directors, ADL One Limited and ADL Two Limited, both Guernsey companies administered by Ardel Trust Company (Guernsey) Limited ("Ardel"). Ardel provided corporate governance and administration services. Paul Langlois and Russell Martyn were directors of Ardel and acted for the corporate directors of ECGL and Esquire.

RP&C

39. RP&C was and is an investment advisory firm based in London. It changed its name to Arundel Group Limited in October 2016. It acted as investment adviser to ECG, PSPI and USI (see below).

40. Its parent company was a US entity, RP&C International Inc. RP&C International Investments II LLC was a US based investment fund co-managed by RP&C and FOFM LLC ("FOFM") which provided mezzanine funding to ECG.

41. Dr Srinivas was a director and the COO of RP&C and RP&C International Inc. He was also a director of USI.

42. Ralph Beney was the Financial Director of RP&C. He was also a director of a number of PSPI subsidiaries which were landlords of ECG opcos.

43. David Quint was a director and the CEO of RP&C and a director of RP&C International Inc.

44. Richard Borg was a director and General Counsel of RP&C. He was a director of a number of PSPI subsidiaries which were landlords of ECG opcos.

PSPI

45. PSPI was an AIM listed specialist real estate investment company whose portfolio included 39 care homes leased to ECG. PSPI was ECG's largest private landlord.

USI Group/Project Saxon

46. USI Group Holdings AG ("USI") was the holding company of a Swiss-based investment group holding property and equity investments with an emphasis on the healthcare sector. Its investments included a 20% equity stake in PSPI.

47. In early 2011 a merger was proposed between USI and ECG. A newly incorporated BVI entity was incorporated in July 2011 to acquire the assets of USI and ECGL and its shares were to be admitted to trade on AIM and in Zurich. The proposed merger was given the codename "Project Saxon". In the event, the merger did not occur.

Nationwide

48. Nationwide Mutual Insurance Co ("Nationwide") was a large US based insurance company. It was a shareholder in RP&C and a mezzanine investor in ECG.

FOFM

49. FOFM was an Ohio based financial management and administrative firm advising on investments. It invested in the Esquire loan notes in 2011 and participated in the restructuring of ECG debt in July 2012. It also advised other investors about investing in the loan notes.

50. Todd Lensman was an investment adviser at FOFM and a director of RP&C International Inc.

Professionals and advisers

51. Various other advisers and professional firms were involved in the events.

52. FTI Consultancy Group ("FTI") were instructed by Lloyds Bank to conduct a business review of ECG in September 2010. They provided draft reports to Lloyds. The main contacts there were Andy Hall and Alistair Hay.

53. Deloitte were appointed by ECG in the preparation of a Vendor Due Diligence Report in March 2010 ("the VDD Report") to assist in a potential equity fundraising by Credit Suisse. They were engaged again by ECG in December 2010 to assist in advising about the turnaround of ECG's business and ECG's negotiations with its senior lenders. In the second period the main contacts in the reorganisation team were Henry Nicholson and Hannah Gray.

54. As part of the turnaround plan ECG also appointed Ian Gray of Baronsmead Consulting as a director.

55. Colliers International UK Plc ("Colliers"), a provider of real estate services, were appointed by USI to provide a valuation of ECG in connection with Project Saxon. The main person involved was Jeremy Tasker, who had great experience in the care home sector.

56. Fairfax I.S. Plc ("Fairfax") was appointed as the Nominated Adviser, Placing Agent and Broker for Project Saxon.

57. UHY Hacker Young acted as Reporting Accountants on Project Saxon. They reviewed and reported on the financial affairs of ECG and USI.

58. Speechley Bircham LLP were solicitors to Esquire for Project Saxon.

59. Knight Frank were appointed by the Banks in January 2011 to carry out a valuation of ECG.

60. Nabarro LLP and Ogier acted as Esquire's legal advisers for the loan note issue.

61. Gateley Plc and Edwards Angell Palmer and Dodge LLP were ERED's solicitors for the loan note investment.

(c) The admitted or uncontentious facts

62. Before commenting on the witnesses I shall set out a narrative of the admitted or uncontentious facts as these provide the context for the resolution of the disputed issues. At the PTR the parties undertook to use their best efforts to agree a statement of the admitted and uncontested facts. I was provided with an agreed document during the trial, which was very helpful. There were differences between the parties about some of the facts in the statement, which I have resolved below. I have also made some additions and changes to the parties' phrasing.

ECG's financial position in 2010 and the loan note fundraising

63. As already stated, by 2010 ECG had £190m of senior debt and overdrafts provided by the Banks and mezzanine debt provided through a RP&C managed fund.

64. During 2009 and 2010 ECG's cashflow was adversely affected as a result of a number of factors including the construction of new homes by ECG and the refurbishment of certain properties owned by ECG and PSPI. (The programme of new builds and refurbishments has been referred to by the defendants in their evidence as "the reorganisation".) During this period ECG had to bear the operating losses, market pressures caused by cuts in public spending by local authorities, and the continuing impact of the global credit crisis.

65. In 2009 ECG had attempted to raise funds through Credit Suisse, although the initiative failed and was aborted in 2010. In 2010 RP&C was mandated under an agreement to raise US$50m by way of a convertible loan note issue in order to redeem existing mezzanine debt and raise $25m of new funds. The notes had a coupon of 9% payable monthly and an 11% redemption premium taking the overall return (expressed as an IRR) to 20% pa. The notes matured on 31 December 2015 and were convertible in the event of an IPO at a 10% discount to the IPO price.

66. On 5 March 2010 Deloitte issued the VDD Report, as part of the fundraising efforts by Credit Suisse.

67. In July 2010 ECG agreed with HMRC to defer £698,000 of PAYE payable from April and May 2010 over the following six months, and later deferred payment of PAYE for August and September 2010.

68. In July 2010 ECG asked Lloyds for a bridge facility as a result of the cashflow pressures. Lloyds agreed to a temporary shadow facility permitting an excess of £1.8m until September 2010, subject to the provision of monthly management information, RP&C's oversight of all information provided to Lloyds, provision of details of the refurbishment plan, an operational assessment and action plan, and weekly reports from RP&C on the plans to raise capital. RP&C commenced the oversight process, which never got further than preliminary questions to which no formal answers were given and the process ended later in 2010. The defendants say this was in September 2010 when the Banks engaged FTI (see below). The claimant says it was in November 2010. Nothing turns on this difference.

69. By 10 August 2010 ECG had exceeded the temporary increase agreed with Lloyds.

70. On 16 August 2010 Mr Pritesh Amlani, ECG's Managing Director and Financial Director, forwarded to Mr Treon and Dr Srinivas ECG's management accounts for May 2010 and forecast management accounts for FY2010 which had been sent to Lloyds. ECG's forecast profit after central overheads (COH) before depreciation and interest (i.e. EBITDA after COH) was £14.2m for 2010 and £712,000 of exceptional items for 2010 (which were reported after EBITDA and COH but before mezzanine interest).

71. On 18 August 2010 Lloyds wrote to Mr Treon and informed him that ECG would be transferred to the Business Support Unit.

72. On 26 August 2010 Lloyds asked RP&C for an update on the loan note fundraising. Dr Srinivas told Lloyds that he expected to have the first closing the following week and a second was possible in around the end of September. Dr Srinivas recorded in an email to Mr Treon and others that Lloyds derived great comfort from the update on fundraising.

73. On 17 September 2010 ECGL signed its 2009 Accounts.

74. On 23 September 2010 RP&C reported internally that ECG's overdraft was at £7.9m even though $4m had recently been invested in the loan notes and noted that Lloyds was "turning up the heat". On 24 September 2010 Lloyds wrote to Mr Treon noting that ECG had successfully built a sizeable group but that ECG's "previous debt funded strategy is now causing problems, with changes in the credit markets, Local Authority pricing and margin pressures all impacting". Lloyds had relied on an expectation that the fund raising would bring ECG back within its overdraft limit by 30 September 2010 and had thought that RP&C would bridge any slippage in receipt of the loan note proceeds. Lloyds said it was willing to support ECG since the Nationwide funding had been delayed. The letter also recorded an agreement that FTI Consulting should undertake a two stage review.

75. On 24 September 2010 Lloyds appointed FTI to conduct a review of ECG including (as phase 1) an assessment of ECG's short term cashflow forecasts, and (as phase 2) an independent business review.

76. In September 2010 Esquire issued US$4m of loan notes to investors.

77. On 27 October 2010 Mr Treon emailed FTI noting that ECG required the anticipated £1.5m injection from Nationwide for working capital in November, and that ECG planned to reduce the £1.6m Lloyds facility from a later tranche of fundraising.

78. The Nationwide US$20m investment closed on 2 November 2010 and resulted in US$17.5m of existing mezzanine debt and accrued interest being exchanged and US$2.5m of new capital being raised. On the same date, RP&C exchanged existing mezzanine debt and accrued interest for US$1.3m of loan notes.

79. In November 2010 ECG appointed Deloitte's restructuring team to advise ECG and Ian Gray as an independent director to assist with a turnaround of ECG.

Duet considered a proposed investment in ECG's Kler portfolio

80. As already explained, Duet was investment adviser to the Fund. Part of its role was to consider potential investments.

81. The Fund was governed by a limited partnership deed, which contained a Schedule 1 that set out the investment policy and restrictions on investments. This recorded that the Fund would typically make investments in and provide debt finance secured on commercial real estate in Europe, which it would hold for the medium to long term. Part 2 of Schedule 1 provided that each time the Fund made an investment, each debt investment would be made in accordance with the Debt Strategy. Part 3 contained the Debt Strategy, which (among other things) required (a) an initial loan to value ratio equal to or less than 80% of an externally appraised real estate value, and (b) that

investments would have an Interest Coverage Ratio ("ICR") of no less than 1:1. Part 3 included other criteria including that at all times the Fund would consider the risk reward profile of an Investment, as provided by the investment adviser and where relevant would prioritise risk mitigation over the projected returns.

82. On 10 September 2010 a finance broker informed Duet that ECG was seeking short term secondary funding secured over eight of ECG's care homes. Duet was told by the broker that the lending would be repaid via RP&C's convertible loan note fundraising. Duet was sent a draft copy of ECGL's 2009 accounts. As already noted, on 17 September 2010 ECGL's audited 2009 accounts were signed.

83. Following a meeting they had on 21 October 2010 Mr Treon wrote to Mr Korat outlining the terms of a mezzanine investment of £7m to be secured against ECG's Kler Portfolio (over which AIB had a first charge). The funds sought were for working capital and the repayment of existing mezzanine debt. Mr Treon said he would be pleased to discuss a larger £40m funding package for ECG.

84. On 22 October 2010 Duet sent Mr Treon an indicative term sheet, which said that ERED would be the proposed lender, and that the lending would be subject to an ICR covenant of 1.8x (among other conditions). This was forwarded to Dr Srinivas on 29 October 2010.

85. Duet conducted due diligence on the Kler portfolio. On 5 November 2010 Mr Treon told ECG's internal finance team to expedite the provision of information to Duet and asked that he and Dr Srinivas be copied on emails. Mr Treon said that Duet wanted to close the deal immediately.

86. Duet provided a revised term sheet to Mr Treon and Dr Srinivas on 17 November 2010, which Dr Srinivas asked to discuss with Mr Treon. By a letter dated 24 November 2010 Mr Treon provided Duet (cc. to Dr Srinivas and Mr Borg of RP&C) a marked-up copy of the revised term sheet to be discussed. One of the points which Mr Treon had commented that they would need to discuss was the ICR covenant. The term sheet said that ERED was the proposed lender.

ECG's turnaround plan

87. On 3 November 2010 Lloyds wrote to Mr Treon agreeing an extension of the £1.8m temporary overdraft facility to 30 November 2010 (or such later date as may be advised by Lloyds), subject to (a) ECG revisiting its group strategy and its financial model to reflect current operations, (b) the appointment of FTI to conduct a business review, (c) restrictions on the use of overdraft facilities, (d) weekly written updates on the fundraising, and (e) provision of rolling weekly cashflows. ECG was thanked for its constructive approach.

88. On 8 November 2010 Mr Treon expressed in an email concern to RP&C about their not raising further funding before 30 November 2010 and said that raising £2.5m was critical.

89. On 12 November 2010 Santander wrote to Mr Treon and Mr Amlani about ECG's failure to provide financial information despite previous requests, which caused Santander concern about ECG's financial position. Santander also sought confirmation

of the fundraising exercise and noted that it intended to conduct a security review. Mr Treon said to Dr Srinivas, Mr Amlani and Mr Quint of RP&C that "They will get all info today".

90. On 12 November 2010 Mr Basyal, an accountant within ECG, sent Mr Saraogi (another ECG employee), cc. to Mr Amlani and Mr Treon and Mr Raj (another employee) an excel revised integrated model containing financial projections for the years 2010 to 2013 alongside a previous set of projections. Under this model the EBITDA after COH for 2010 was £10.9m. On 15 November 2010 Mr Amlani arranged a meeting with Mr Treon and Dr Srinivas to review the "revised Model financials for FTI" on the following day. On 16 November 2010 Mr Treon, Mr Amlani and Dr Srinivas had that meeting.

91. On 17 November 2010, Mr Basyal circulated to Mr Amlani, cc. to Mr Treon, Mr Saraogi and Mr Raj, another iteration of the model following a discussion.

92. On 18 November 2010 Santander emailed Mr Treon and Mr Amlani regarding ECG's 2011 cash flow forecast, which disclosed a peak funding requirement of £8.5m above ECG's existing facilities, which was to be bridged by a temporary Lloyds facility that was soon to expire, and funds raised by RP&C of US$6.5m. Santander noted that there was still a £4.5m shortfall of the £8.5m working capital requirement. Santander said, "the Group remains dependent on the fundraising exercise being undertaken by RP&C, to raise the additional £4.5m required".

93. On 19 November 2010 Mr Basyal circulated to Mr Amlani, cc. to Mr Treon, Mr Saraogi and Mr Raj, another iteration of the model. For 2010, this model stated "Profit after COH before Depn and Int" of £10.3m, resulting in a net loss before exceptional items. The model contained exceptional items of £1.064m for 2010, which were reported below profit after COH before depreciation and interest, but before mezzanine interest.

94. In response, on 19 November 2010 an email was sent from Mr Treon's email account to Mr Basyal, cc. to Mr Amlani, Mr Saraogi, and Mr Raj providing another iteration of the excel revised integrated model document. The email stated: "we have added a summary worksheet for wages exceptional". The attached model contained a "Wages Exceptional Summary" sheet, which calculated exceptional wages of £2.9m by reference to 15 (of 16 identified) care homes.

95. On 19 November 2010 Bank of Ireland ("BoI") contacted Mr Treon to fix a meeting. BoI said that while they appreciated the fundraising efforts, given the continuing challenges facing ECG, BoI colleagues from Ireland would attend.

96. On 21 November 2010 another iteration of the model was circulated by Mr Basyal to Mr Amlani, Mr Saraogi, Mr Raj, and Mr Treon. Mr Treon asked the ECG finance team to review the document before he did. Another iteration of the model was circulated by Mr Basyal to Mr Amlani, cc to Mr Treon, Mr Saraogi and Mr Raj later that day.

97. On 23 November 2010 BoI wrote to Mr Treon in respect of ECG's request to BoI for a temporary increase in its overdraft pending the capital raise. BoI were not in a position to grant the request at that stage. The letter referred to a potential syndication of the Banks' lending and the sharing of information between the Banks.

98. On 24 November 2010, in response to an email from FTI saying that they still did not have a working excel model (FTI had by then been provided with a pdf copy of the model), ECG provided to FTI an excel document titled "Revised Integrated Model 2009 – 2013".

99. This model has been referred to in the proceedings as "the Original Financial Projections". It was an excel model with a number of tabs. It comprised a profit and loss account, forecast balance sheets, and cash flows. The "summary P&L account" showed the following:

ESQUIRE CONSOLIDATED GROUP LIMITED

Contents

Projected Profit & Loss Accounts	2009 (Audited) £000	2010 £000	2011 £000	2012 £000	2013 £000
Turnover/Income	122,073	123,473	144,934	175,267	192,013
Wages	72,308	72,074	83,058	97,528	104,487
Controllable Costs	6,836	6,954	7,270	8,551	9,230
Fixed Costs	10,881	10,906	12,010	13,795	14,886
EBITDAR	32,048	33,538	42,597	55,393	63,410
Rent	11,330	12,230	16,108	17,925	21,050
Group EBITDA	20,718	21,308	26,489	37,468	42,360
Central Overheads	6,454	7,992	7,842	8,077	8,319
Profit after COH before Depn and INT	14,264	13,316	18,647	29,391	34,040
Depreciation	1,214	1,455	1,599	1,647	1,696
Interest & finance charge (excluding mezz)	10,135	11,412	11,505	11,865	11,865
Profit Before Exceptional Items	2,915	448	5,544	15,880	20,479
Exceptional Items	3,109	4,988	-	-	-
Profit Before Mezz Interst & Tax	- 194	- 4,540	5,544	15,880	20,479
Less: Mezz Interest	645	1,313	1,584	1,584	1,584
Profit Before Tax	- 839	- 5,853	3,960	14,296	18,896

100. The model included:

i) A "Wages Exceptional Summary" tab. This tab was "hidden" in the model. Such hidden or compressed tabs may be "unhidden" within excel. The tab included turnover and wages data for 15 homes. Wages above 57% of the turnover figure for each of the homes were described as "exceptional" and totalled £2.9m.

ii) An "Exceptional Schedule" (which was not hidden) which recorded a figure of £4.256m of "exceptional wages" and other exceptional items (coming to the total of £4.988m as shown in the summary P&L account for 2010 set out above).

101. On 25 November 2010 Mr Amlani emailed Dr Srinivas an electronic version of the Original Financial Projections, and on 30 November 2010 Mr Beney asked the RP&C finance team to review the Original Financial Projections to see if there were any obvious errors or points of query.

The drive for fundraising and the review of ECG's turnaround plan

102. On 30 November 2010 Mr Laven, a Swedish broker based in London, updated Dr Srinivas and Mr Treon on his attempts to solicit investment in the convertible loan notes. Mr Laven asked if he could continue marketing them during December, reporting that he had not been able to place any investments by November. He commented that

with the Swedish market booming it was difficult to promote English investments and said, "Even though the convertible notes terms are go[o]d they hesitate when they see the figures of European Care (I use your figures, Srini)." Dr Srinivas asked him to continue marketing until the end of December.

103. On 1 December 2010 US$5.2m of loan notes were issued and on 6 December 2010, a further US$2m. Of these amounts, the majority of the funds redeemed existing mezzanine debt.

104. On 17 December 2010 Mr Treon told Deloitte that AIB had rejected the proposed secondary investment by Duet in the Kler portfolio.

105. On 20 December 2010 Mr Treon asked Dr Srinivas whether Mr Treon should send to FOFM the financials that Dr Srinivas had sent to Mr Treon and Mr Amlani on 17 December 2010 (those financials had originally been sent to Nationwide and Dr Srinivas had asked Mr Treon and Mr Amlani to review and modify if required and arrange to send to Mr Lensman of FOFM). Dr Srinivas said to Mr Treon on 22 December that "the financials I sent you are the ones given to nationwide and reviewed by pritesh and you you may email the info to Todd and we can deal with queries as they arise". On 22 December 2010 Mr Treon sent David Quint of RP&C financial projections to be sent on to Mr Lensman of FOFM and Voras Capital, a potential investor via FOFM. Mr Lensman confirmed what documents were sent to Voras Capital on 3 January 2011.

106. On 23 December 2010 FTI produced its draft phase 2 report ("the FTI December Report"). FTI had been instructed by the Banks to review the Original Financial Projections and to carry out a sensitivity analysis on them. The draft was never finalised. The re-presentation of the Original Financial Projections by FTI at p.8 of the draft has been referred to in these proceedings as "the Business Plan". The heading on that page said, "in 2010 the impact of development work on the portfolio, difficult trading conditions, operational issues at a number of homes, higher central costs and higher interest costs caused the net loss to increase from £0.8m to £5.9m". Under the Business Plan in respect of FY2010 FTI restated ECG's 2010 figures. This included the inclusion in the wages line of £2.9m of wages "the Group classifies as "exceptional" in its Business Plan, since they exceed the target of 57% of revenues". A note stated that the exceptional costs included "agency staff costs of £1.3m that management believed did not represent underlying performance. We believe these should be included in operating costs".

107. Mr Treon sent a copy of the FTI December Report to Dr Srinivas on 5 January 2011.

108. On 28 December 2010 Ian Gray sent an email to Mr Nicholson of Deloitte, Mr Treon, Dr Srinivas, Mr Amlani and others commenting on a draft PowerPoint presentation for a meeting with the Banks on 5 January 2011. He noted that ECG had produced a plan that "may now have to be updated in the light of the FTI report, and the position in which we find ourselves. Should we suggest that we wish to revisit our plan and come back to the banking group in a month?" He also said, "We do not really cover how we can see that we will be funding the business over the next few months?"

109. On 29 December 2010 Mr Hall of FTI wrote to Mr Treon, Mr Amlani, and Deloitte, noting (inter alia) that the Banks had expressed concerns about the availability of

information, including understanding the historic cashflows and balance sheet movements in ECG. He also commented that the underlying performance of each service was "potentially masked by including some operating costs in exceptional items, no allocation of central costs, potentially the capitalisation of costs and potentially the level at which rents are set. To better understand this we need exceptional costs broken down by service where possible (e.g. agency staff costs), a breakdown of central costs by function and service where possible, details of any capitalised costs and details of the historic cost, capex investment and any revaluation by home/service". Mr Hall attached a detailed information request including for a breakdown of the 2009 and 2010 exceptional items.

110. On 5 January 2011 ECG presented its turnaround plan to the Banks at a meeting. The operational turnaround plan was presented by Mr Treon and Mr Perry, the Vice Chairman of ECL. The final version of the presentation prepared for the meeting referred to ECG's management's turnaround plan, which contained five key actions: (1) complete the current investment programme and profitably fill beds in the Care Division, (2) manage pricing and margin so wages reduce to c.57% of the Care Division revenue, (3) aggressively target turnaround or closure of underperforming mature homes Care Homes, (4) continue to drive growth in the Lifestyles division and fix the underperforming facilities, and (5) review and reduce central overheads.

Further discussions with Duet

111. On 10 January 2011 Mr Korat asked Mr Treon whether AIB had approved Duet's investment in the Kler portfolio. Mr Treon replied on 12 January 2011 that AIB had not. Mr Treon asked whether Mr Korat would instead consider investing £5m in the loan note issue and outlined the brief terms of the loan notes.

112. On 11 January 2011 Mr Treon sent Dr Srinivas and RP&C a PowerPoint presentation on ECG called "Executive Summary January 2011" ("the ECG Presentation"). This provided an overview of ECG and included "Section 11: Financial Performance". This included a profit and loss account for 2009 to 2013 down to profit before tax (taken from the Original Financial Projections) as follows:

ESQUIRE CONSOLIDATED GROUP LIMITED	2009 (Audited)	2010	2011	2012	2013
Projected Profit & Loss Accounts	£000	£000	£000	£000	£000
Turnover/Income	122,073	123,473	144,934	175,267	192,013
Wages	72,308	72,074	83,058	97,528	104,487
Controllable Costs	6,836	6,954	7,270	8,551	9,230
Fixed Costs	10,881	10,906	12,010	13,795	14,886
EBITDAR	**32,048**	**33,538**	**42,597**	**55,393**	**63,410**
Rent	11,330	12,230	16,108	17,925	21,050
Group EBITDA	**20,718**	**21,308**	**26,489**	**37,468**	**42,360**
Central Overheads	6,454	7,992	7,842	8,077	8,319
Profit after COH before Depn and INT	**14,264**	**13,316**	**18,647**	**29,391**	**34,040**
Depreciation	1,214	1,455	1,599	1,647	1,696
Interest & finance charge (excluding mezz)	10,135	11,412	11,505	11,865	11,865
Profit Before Exceptional Items	**2,915**	**448**	**5,544**	**15,880**	**20,479**
Exceptional Items	3,109	4,988	-	-	-
Profit Before Mezz Interst & Tax	**- 194**	**- 4,540**	**5,544**	**15,880**	**20,479**
Less: Mezz Interest	645	1,313	1,584	1,584	1,584
Profit Before Tax	**- 839**	**- 5,853**	**3,960**	**14,296**	**18,896**

(In some of these tables the minus sign is poorly aligned in the relevant column in the original. In this version for instance the "profit before mezz interest and tax" figure for 2010 is minus £4.54m and the "profit before tax" is minus £5.853m.)

113. These figures disclosed c.£5m of exceptional items in 2010. The ECG Presentation did not explain the nature of the exceptional items or refer to normalisation.

114. The ECG Presentation also contained a balance sheet for 2009 to 2013, which included a breakdown of shareholder funds. This breakdown disclosed the impact of the loss for 2010 on the balance sheet of minus £5.853m (in a "profit and loss" line):

ESQUIRE CONSOLIDATED GROUP LIMITED Projected Balance Sheet	2009 (Audited) £000	2010 £000	2011 £000	2012 £000	2013 £000
FIXED ASSETS					
Fixed Asset (Less Depreciation)	298,091	303,266	308,028	311,841	313,145
CURRENT ASSETS					
Stock/Inventory	369	369	369	369	369
Trade Debtors	6,927	2,717	6,931	11,036	14,470
Other receivables/debtors	8,072	7,365	7,365	7,365	7,365
Cash at bank & hand	-	-	- -	5,184	7,205
Prepayments	1,226	1,310	1,310	1,310	1,310
Total Current Assets	16,594	11,761	15,976	14,896	30,718
Creditors: Amount falling due<one year					
Trade Creditors	4,488	2,358	2,594	2,938	3,059
Bank Overdraft	466	9,165	12,475	-	-
Other current liabilities/accruals	15,881	12,432	12,432	12,432	12,432
Total Current Liabilities	20,835	23,955	27,501	15,369	15,491
Net Current Assets	- 4,241 -	12,193 -	11,525 -	473	15,228
Total Assets less Current Liabilities	293,850	291,073	296,502	311,368	328,373
Creditors Due after One year/Long term					
Senior Loan	158,680	157,846	159,315	159,884	157,993
Mezzanine loan	13,481	17,595	17,595	17,595	17,595
Other creditors	5,808	5,604	5,604	5,604	5,604
Creditors Due after One year/Long term liab	177,969	181,045	182,514	183,083	181,192
Net Assets	115,881	110,028	113,988	128,285	147,181
Share Capital & Reserves					
Ordinary Share Capital	-	-			
Preference share	4,351	4,351	4,351	4,351	4,351
Revaluation Reserves	114,189	114,189	114,189	114,189	114,189
Retained Earning	- 2,659 -	2,659 -	8,512 -	4,552	9,744
Profit & Loss	-	5,853	3,960	14,296	18,896
Total shareholder funds	115,881	110,028	113,988	128,285	147,181

115. On the same day, 11 January 2011, Mr Treon sent Dr Srinivas a revised version of the Original Financial Projections, which now included £6m of extraordinary items for 2010. This was not sent to the Banks or FTI.

116. In a letter of 11 January 2011 Lloyds told ECG that the Banks took comfort from the constructive cash management procedures implemented and agreed to extend a temporary facility of £2.2m to ECG until 7 February 2011.

117. On 12 January 2011 Mr Treon sent Sir John Hanson, non-executive Chair of ECL's Advisory Board, an email update on ECG. It was copied to Mr Amlani and Dr Srinivas among others. Mr Treon referred to the Original Financial Projections, described as "a new detailed financial model," which FTI had reviewed. Mr Treon said, "as you would expect they have been very conservative and have materially downgraded their

projections”. Mr Treon said that in his view they needed to raise an additional £10m of capital to deliver their plan to 2013. He referred to FTI’s sensitised case as being “very harsh” and mentioned FTI’s own professional indemnity insurance as being on the line with the Banks. Mr Treon noted that RP&C had raised US$7.5m of new cash (of US$32.5m raised in total) and were trying to raise the balance of the cash, which was “urgently required”. Mr Treon said that the Banks were still considering the consolidation of all their debt which amounted to £160m. He noted that ECG was losing £800,000 per month largely due to the renovations of the PSPI properties, the infill of the new homes, and certain care homes where performance has been adversely affected. Mr Treon said that “key to our problems is raising more capital” and set out steps that ECG was taking to reduce costs and turnaround the business. Mr Treon said, “David Pritesh and I remain confident of delivering the turnaround plan”. He noted that cash remained extremely tight and that they had had to defer £1.6m payable to the Inland Revenue in December 2010 and might have to defer the January 2011 payment too.

118. On 13 January 2011 Mr Treon emailed Roland Pickstock (whose family were involved in a joint venture business with ECG that owned certain properties leased to ECG), copied to Dr Srinivas, to ask whether his family were interested in a £4m investment in the loan notes. Mr Treon summarised the terms and stated: “As agreed I shall send you the detailed latest projections home by home. As I mentioned we may make an extra ordinary provision in the 2010 accounts to reflect losses on certain of the new builds in 2011 during fill period - these are not reflected in the financials I am sending to you”. Mr Treon then sent Mr Pickstock the excel model comprising the Original Financial Projections. Mr Pickstock did not make an investment in the loan notes.

119. On 13 January 2011 Mr Treon sent Dr Srinivas and RP&C an email updating them on Mr Treon’s discussions with prospective investors, including Mr Pickstock, Duet, and others. Mr Treon said he would ask if KLSA had any interested clients. Mr Treon commented that “prospects look excellent” and “It is CRITICAL we raise these funds and get the banks out – there is very positive news all around”.

120. On 13 January 2011 Mr Treon sent the ECG Presentation to a Mr Gianni Comis, an investment broker at BNP Geneva. Mr Treon asked Mr Comis not to circulate the document until they had spoken. He also sent the same document to Ketan Shah of KLSA, ECG’s auditors, saying “PP presentation on group with latest financials”.

121. Also on 13 January 2011 Mr Lensman of FOFM arranged a call the following day between RP&C, Mr Treon and Voras Capital to discuss the EBITDAR build up and additional financial information. Voras Capital, a potential investor through FOFM, had on 3 January 2011 been given the same projections as had earlier been sent to Nationwide.

Meeting on 14 January 2011

122. On 14 January 2011 there was a meeting between Mr Korat, Mr Treon, Dr Srinivas and Mr Borg at RP&C’s offices to discuss a potential investment in the loan notes.

123. Also on 14 January 2011 Mehmet Ahmed, a representative of First International Group (“FIG”), a potential investor in ECG, emailed Mr Treon (cc to Dr Srinivas and others) following a conversation he had had with Dr Srinivas in which Dr Srinivas had suggested a meeting to go through ECG’s financial model with Mr Treon or Mr Amlani.

Mehmet Ahmed asked for the model itself. On Monday 17 January 2011, Mr Treon sent the ECG Presentation and the full model containing the Original Financial Projections to Mehmet Ahmed.

124. On the same day, 17 January 2011, Mr Borg sent Mr Korat the covenants within the loan notes.

125. Also on 17 January 2011 Sir John Hanson emailed Dr Srinivas to ask whether Dr Srinivas could help him understand the fundraising process RP&C was undertaking as well as ECG's recovery plan that had been shared with the Banks and reviewed by FTI. Dr Srinivas agreed to brief Sir John Hanson on both. I find that that briefing probably took place about then.

Communications with Jerry Ahmed

126. On 18 January 2011 Mr Lensman of FOFM forwarded to Mr Treon and Dr Srinivas a request from Mr Jerry Ahmed (a private investor) for "any interim or preliminary full year financial information available to reflect 2010 results, even if it is internal or unaudited". Among other matters, Mr Ahmed wanted current revenue growth and profitability information and to see if "a[c]quisitions have become accretive to earnings". Mr Ahmed's email stated that he had briefly reviewed ECGL's 2009 accounts and the VDD Report and was concerned that ECG's operational performance in 2009 was evidenced by a net loss, tight cash flow, reduced margins and occupancy with additional leverage taken on to fund the loss.

Duet's request for "the full year 2010 trading figures" and the January Figures

127. On 18 January 2011 Mr Korat emailed Mr Treon, copied to Dr Srinivas at 09:56, saying: "Do you have the full year 2010 trading numbers available pls? I am working through the numbers right now, ahead of a prelim IC [*sc. Investment Committee*] discussion tomorrow."

128. Dr Srinivas replied to Mr Treon at 10:20: "Let us discuss before you send him the information." In response, at 15:21 Mr Treon asked for a call with Dr Srinivas, saying that Mr Korat needed the figures. At 15:38 Mr Treon forwarded Mr Korat's request to Mr Amlani and Dr Srinivas asking that something be sent to Mr Korat now as he was on the telephone.

129. Also on 18 January 2011, following a meeting that morning with Mr Treon, Mr Nicholson of Deloitte emailed Mr Treon a draft PowerPoint presentation intended for a meeting with the Banks on 27 January 2011. Mr Treon forwarded it to Dr Srinivas. The draft presentation stated that one of its four key messages was: "Following a review of recent trading and the FTI sensitivities the Group has prepared a reforecast which downgrades its projections". The document then contained placeholders for the key changes to the financial model and their financial impact. On 18 January 2011 Mr Treon arranged for a meeting on 20 January 2011 with Mr Nicholson and Dr Srinivas to discuss options and to complete the document. I find that such a meeting took place about then.

130. On the morning of 19 January 2011 Mr Treon met Dr Srinivas. I find it likely that they discussed the financial model.

131. On 19 January 2011 Mr Amlani emailed Mr Korat an excel document which has been referred to in the proceedings as "the January Figures". His covering email read,

> "As requested by Dr Srinivas and Anoup I enclose the P&L with Actual management figures to October 2010, Forecasted to December 2010 and projected for December 2011 to 2013. Please confirm receipt".

132. The January Figures showed this:

ESQUIRE CONSOLIDATED GROUP LIMITED

Projected Profit & Loss Accounts	YTD Oct 2010 £000 (Actual)	2010 £000 (Forecasted)	2011 £000 (Projected)	2012 £000 (Projected)	2013 £000 (Projected)
Turnover/Income	103,267	124,109	144,934	175,267	192,013
Wages	60,229	72,561	83,058	97,528	104,487
Controllable Costs	5,937	7,065	7,270	8,551	9,230
Fixed Costs	8,969	10,846	12,010	13,795	14,886
EBITDAR	28,132	33,636	42,597	55,393	63,410
Rent	10,063	12,270	16,232	18,047	21,177
Group EBITDA	18,068	21,367	26,365	37,345	42,233
Central Overheads	6,997	8,265	7,842	8,077	8,319
Profit after COH before Depn and INT	11,071	13,102	18,523	29,269	33,914
Depreciation	1,151	1,391	1,483	1,528	1,574
Interest & finance charge (excluding mezz int)	9,528	11,439	11,505	11,865	11,865
Profit Before Mezz Interst	393	272	5,535	15,876	20,476

133. The parties have referred to the first column as the "2010 Actual Figures to October"; the second as "the Forecasted Figures", and the final three collectively as "the Projected Figures". Mr Korat forwarded the figures to Philip Moore of Duet.

134. On 20 January 2011 Mr Korat asked Mr Amlani, copied to Dr Srinivas and Mr Treon, for a summary balance sheet as well. Dr Srinivas emailed Mr Amlani and Mr Treon back to say that Mr Korat and Dr Srinivas had spoken and that Duet was preparing for an internal investment committee meeting on ECG. Dr Srinivas said, "Let us talk before you email him the projected balance sheet for 2010 and 2011-2013. Ideally we should get him this info today."

Other third-party requests for ECG's financial information at that time

135. On 19 January 2011 Mr Beney of RP&C asked Dr Srinivas to send him "the updated presentation to lenders" and the Lloyds letter. He also asked if Mr Treon had confirmed that RP&C could send "the presentation" to various parties, including Bank of London and Middle East ("BLME"), which was considering a refinancing of PSPI. Dr Srinivas replied saying that he was meeting with Mr Treon in 15 minutes and would revert. Dr Srinivas then forwarded Mr Beney the Lloyds letter of 11 January 2011 and said that he would revert after his meeting with Mr Treon regarding information that could be given to outside parties.

136. On 20 January 2011 Mavuli Caboose (a Greek family office fund, which had invested \$4m in the loan notes in September 2010) invested a further US\$2m in the loan notes.

137. On 20 January 2011 Mr Treon met Dr Srinivas. The same day Mr Treon's assistant provided a typed-up copy on ECG headed paper of Dr Srinivas's comments that Dr Srinivas had written on a hardcopy printout of Jerry Ahmed's email of 18 January. Dr Srinivas commented that ECG's 2010 operating result at the top line revenue and EBITDAR level were expected to show marginal improvement over 2009 as evidenced by the attached unaudited management accounts as of 31 October 2010. Dr Srinivas commented on the forecasted growth in revenue and EBITDAR, providing figures for 2011 and 2013 that were consistent with the Original Financial Projections, save that Dr Srinivas included a figure for "net profit before exceptional items" for 2011 of £8.7m in square brackets. Dr Srinivas then forwarded to Mr Treon's assistant the email chain to Mr Korat attaching the January Figures.

138. Dr Srinivas then replied to Mr Lensman's email forwarding Jerry Ahmed's request. He asked Mr Treon to send a reply as discussed. Shortly afterwards Mr Treon sent Mr Lensman a response to Jerry Ahmed's query, which attached Dr Srinivas's typed-up comments (repeating the same typos), with a profit before exceptionals figure for 2011 (not in square brackets) of £8.7m, and the 2010 Actual Figures to October down to the line "profit after COH before depreciation and interest". Those figures did not refer to exceptional items. The information was then communicated by Mr Lensman to Jerry Ahmed, who made an investment of US$50,000 in ECG through FOFM in January 2011.

USI offer

139. By a letter on 20 January 2011 Dr Srinivas, acting on behalf of USI, made an offer to acquire all of the shareholding of Esquire in consideration of shares in USI (to be agreed). This offer was conditional (inter alia) on the simultaneous admission of the merged ECG/USI company to the SIX Exchange in Zurich and AIM in London. As already explained, the merger with USI was codenamed "Project Saxon".

Presentation of information to BLME

140. On 24 January 2011 Dr Srinivas emailed Mr Treon saying that RP&C intended to send the ECG Presentation - with certain changes - to BLME that day. Dr Srinivas asked Mr Treon to confirm he was happy. Dr Srinivas attached an original copy of the ECG Presentation. Dr Srinivas also attached a three page pdf document, which replicated slides 51-3 of the ECG Presentation with these changes:

i) for slide 51 the new document removed figures for net earnings before Mezz Int and stopped at EBITDA (post COH) for 2013;

ii) for slide 52 the new document removed the 2009 column, and the profit and loss account for 2010-13 stopped at the "Profit after COH before Depn and INT" line, i.e., EBITDA after COH. It therefore removed the reference to exceptional items and the negative figure for "profit before tax". A comparison of the two is shown below:

ECG Presentation

ESQUIRE CONSOLIDATED GROUP LIMITED	2009 (Audited) £000	2010 £000	2011 £000	2012 £000	2013 £000
Projected Profit & Loss Accounts					
Turnover/Income	122,073	123,473	144,934	175,267	192,013
Wages	72,306	72,074	83,058	97,528	104,487
Controllable Costs	6,838	6,954	7,270	8,551	9,230
Fixed Costs	10,881	10,906	12,010	13,795	14,886
EBITDAR	32,048	33,538	42,597	55,393	63,410
Rent	11,330	12,230	16,108	17,925	21,050
Group EBITDA	20,718	21,308	26,489	37,468	42,360
Central Overheads	6,454	7,992	7,842	8,077	8,319
Profit after COH before Depn and INT	14,264	13,316	18,647	29,391	34,040
Depreciation	1,214	1,455	1,599	1,647	1,696
Interest & finance charge (excluding mezz)	10,135	11,412	11,505	11,865	11,865
Profit Before Exceptional Items	2,915	448	5,544	15,880	20,479
Exceptional Items	3,109	4,988	-	-	-
Profit Before Mezz Interst & Tax	- 194	- 4,540	5,544	15,880	20,479
Less: Mezz Interest	645	1,313	1,584	1,584	1,584
Profit Before Tax	- 839	- 5,853	3,960	14,296	18,896

Revised version

ESQUIRE CONSOLIDATED GROUP LIMITED	2010 £000	2011 £000	2012 £000	2013 £000
Projected Profit & Loss Accounts				
Turnover/Income	123,473	144,934	175,267	192,013
Wages	72,074	83,058	97,528	104,487
Controllable Costs	6,954	7,270	8,551	9,230
Fixed Costs	10,906	12,010	13,795	14,886
EBITDAR	33,538	42,597	55,393	63,410
Rent	12,230	16,108	17,925	21,050
Group EBITDA	21,308	26,489	37,468	42,360
Central Overheads	7,992	7,842	8,077	8,319
Profit after COH before Depn and INT	13,316	18,647	29,391	34,040

iii) for slide 53, the new document removed all information for 2009, and the balance sheet stopped at the net assets line. The further breakdown of shareholder funds, which had included a profit and loss figure of minus £5.95m for 2010, was removed:

ECG Presentation

ESQUIRE CONSOLIDATED GROUP LIMITED
Projected Balance Sheet

	2009 (Audited) £000	2010 £000	2011 £000	2012 £000	2013 £000
FIXED ASSETS					
Fixed Asset (Less Depreciation)	298,091	303,266	308,028	311,841	313,145
CURRENT ASSETS					
Stock/Inventory	369	369	369	369	369
Trade Debtors	6,927	2,717	6,931	11,036	14,470
Other receivables/debtors	8,072	7,365	7,365	7,365	7,365
Cash at bank & hand	-	-	-	- 5,184	7,205
Prepayments	1,226	1,310	1,310	1,310	1,310
Total Current Assets	16,594	11,761	15,976	14,896	30,718
Creditors: Amount falling due<one year					
Trade Creditors	4,488	2,358	2,594	2,938	3,059
Bank Overdraft	466	9,165	12,475	-	-
Other current liabilities/accruals	15,881	12,432	12,432	12,432	12,432
Total Current Liabilities	20,835	23,955	27,501	15,369	15,491
Net Current Assets	- 4,241	- 12,193	- 11,525	- 473	15,228
Total Assets less Current Liabilities	293,850	291,073	296,502	311,368	328,373
Creditors Due after One year/Long term					
Senior Loan	158,680	157,846	159,315	159,884	157,993
Mezzanine loan	13,481	17,595	17,595	17,595	17,595
Other creditors	5,808	5,604	5,604	5,604	5,604
Creditors Due after One year/Long term liab	177,969	181,045	182,514	183,083	181,192
Net Assets	115,881	110,028	113,988	128,285	147,181
Share Capital & Reserves					
Ordinary Share Capital	-	-			
Preference share	4,351	4,351	4,351	4,351	4,351
Revaluation Reserves	114,189	114,189	114,189	114,189	114,189
Retained Earning	- 2,659	- 2,659	- 8,512	- 4,552	9,744
Profit & Loss		- 5,853	3,960	14,296	18,896
Total shareholder funds	115,881	110,028	113,988	128,285	147,181

Revised Version

ESQUIRE CONSOLIDATED GROUP LIMITED
Projected Balance Sheet

	2010 £000	2011 £000	2012 £000	2013 £000
FIXED ASSETS				
Fixed Asset (Less Depreciation)	303,266	308,028	311,841	313,145
CURRENT ASSETS				
Stock/Inventory	369	369	369	369
Trade Debtors	2,717	6,931	11,036	14,470
Other receivables/debtors	7,365	7,365	7,365	7,365
Cash at bank & hand	-	-	- 5,184	7,205
Prepayments	1,310	1,310	1,310	1,310
Total Current Assets	11,761	15,976	14,896	30,718
Creditors: Amount falling due<one year				
Trade Creditors	2,358	2,594	2,938	3,059
Bank Overdraft	9,165	12,475	-	-
Other current liabilities/accruals	12,432	12,432	12,432	12,432
Total Current Liabilities	23,955	27,501	15,369	15,491
Net Current Assets	- 12,193	- 11,525	- 473	15,228
Total Assets less Current Liabilities	291,073	296,502	311,368	328,373
Creditors Due after One year/Long term				
Senior Loan	157,846	159,315	159,884	157,993
Mezzanine loan'	17,595	17,595	17,595	17,595
Other creditors	5,604	5,604	5,604	5,604
Creditors Due after One year/Long term liab	181,045	182,514	183,083	181,192
Net Assets	110,028	113,988	128,285	147,181

141. On 27 January 2011 RP&C emailed BLME, at Dr Srinivas's request, a PowerPoint presentation on ECG dated January 2011, which replicated the ECG Presentation but

with the various changes referred to in the previous paragraph above ("the Revised ECG Presentation").

Initial approval by Duet for investment in ECG

142. On 24 January 2011 Mr Korat sent Mr Lattanzio a brief email summary of the proposed investment in the loan notes offered by ECG. Mr Korat noted that Nationwide had invested and set out the key financial terms. Mr Korat reported "2010 Financials Group EBITDA £21.4m". This figure was taken from the January Figures and was the figure for EBITDA before deduction of COH of £8.3 million. Using this figure Mr Korat calculated an EBITDA multiple of 8.1x (given total debt of £175m) but noted that this would be pushed to 9x if a further £18m of mezzanine was raised. Mr Korat commented that based on the VDD Report, ECG was forecasting fairly significant organic growth based on a number of newly expanded and refurbished facilities maturing in their occupancy profile. Mr Korat set out the protective covenants, including a debt plus rent covenant of 1.3x. Mr Korat recommended an investment of between £5m to £7m and stated, "we get to meet and invest alongside Nationwide, who are apparently looking for mezz lending opportunities in Europe". Mr Korat discussed ECG with Mr Lattanzio and Rob Clayton at a preliminary IC meeting on 25 January 2011.

143. On 25 January 2011 Mr Korat reported to Mr Treon and Dr Srinivas that, following a preliminary IC meeting, Duet was keen to proceed with an investment of £5 to £7.5m. Mr Korat confirmed that he needed to put something more detailed together for final consideration and would contact Mr Amlani on specific information he needed.

144. In response, Dr Srinivas emailed Mr Treon, saying this was great news and asking Mr Treon to call him. Dr Srinivas then reported to Mr Treon, Mr Amlani, and RP&C about his conversation with Mr Korat, in which Mr Korat had said he would circulate a list of information needed. Dr Srinivas had told Mr Korat he was willing to assist Mr Korat and Mr Amlani in the process, which Mr Korat had welcomed. Mr Korat had said that Duet took comfort from the involvement of RP&C and Nationwide.

145. On 26 January 2011 Mr Treon forwarded to Deloitte Mr Korat's email regarding the preliminary IC decision. Mr Treon commented "we will manage and deliver this funding".

The revision to the Original Financial Projections

146. On 26 January 2011 Mr Amlani emailed Mr Treon an updated version of the excel "Revised Integrated Model" (i.e. the Original Financial Projections). This version had been revised for 2010 to include actual information up to November 2010.

147. On 27 January 2011 Mr Treon emailed Dr Srinivas "the latest model" (called "Revised Integrated Model 2009-2013 Final Revised V6 26012011 Final No Contingencies AT"). The figures in this model were presented to the Banks and FTI with the additional contingencies included. Mr Treon commented in the email that all mezzanine interest and bank repayments were included, but there was "no contingencies or head room – need c. £3m". The attached model (which did not contain the contingencies) is known in these proceedings as "the January Financial Projections". It was sent to Deloitte too.

148. The summary profit and loss account for the January Financial Projections showed:

Projected Profit & Loss Accounts	2009 (Audited) £000	2010 £000	2011 £000	2012 £000	2013 £000
Turnover/Income	**122,073**	123,606	140,491	176,273	192,364
Wages	72,308	72,998	80,514	95,982	102,950
Controllable Costs	6,836	7,026	7,090	8,364	9,035
Fixed Costs	10,881	10,808	11,486	13,425	14,524
EBITDAR	**32,048**	**32,773**	**41,400**	**58,502**	**65,854**
Rent	11,330	12,270	16,440	19,073	22,150
Group EBITDA	**20,718**	**20,503**	**24,960**	**39,428**	**43,705**
Central Overheads	6,454	8,262	7,813	8,047	8,288
Contigencies		-	-	-	-
Profit after COH before Depn and INT	**14,264**	**12,241**	**17,148**	**31,381**	**35,416**
Depreciation	1,214	1,391	1,472	1,528	1,574
Interest & finance charge (excluding mezz)	10,135	11,367	11,229	11,407	10,812
Profit Before Exceptional Items	**2,915**	**- 516**	**4,446**	**18,447**	**23,031**
Exceptional Items	3,109	6,901	-	-	-
Profit Before Mezz Interst & Tax	**- 194**	**- 7,418**	**4,446**	**18,447**	**23,031**
Less: Mezz Interest	645	1,314	1,825	1,825	1,825
Profit Before Tax	**- 839**	**- 8,732**	**2,621**	**16,621**	**21,206**

149. On 27 January 2011 there was a meeting between ECG, its advisers, and the Banks. A presentation was prepared for this meeting. According to the presentation:

i) The objectives of the meeting were:

a) to update the Banks on actions taken following the 5 January meeting;

b) to "share our revised forecast prepared in light of recent trading and the FTI review";

c) to update the banks on their progress in resolving short to medium term financing challenges; and

d) to submit ECG's request for Bank support through to early March 2011.

ii) ECG had remained within its facilities and a new Financial Director had been recruited.

iii) Progress had been made since 5 January towards the key actions identified.

iv) Mr Treon and Mr Amlani were to present the "revised financial projections" section. The Group had prepared a "reforecast".

v) The key changes made to the revised forecasts compared to the model reviewed by FTI (i.e. the Original Financial Projections) included revising occupancy projections downwards for 2011 based on mid-January 2011 actuals, delaying projected fee and cost increases to April 2011 and reducing the fee increase to 1% for the remainder of 2011. The result was stated to be a £4.5m decrease to the projected profit after COH for 2011 (taking account of £3m of contingencies that had been deducted before EBITDA after COH).

vi) ECG's revised financial projections were set out on slide 19 (known in these proceedings as "the Revised Financial Projections"). These were essentially the same as the January Financial Projections, save that a contingency of £3m for 2011 and £2.4m for 2012 and 2013 had been included, which reduced EBITDA and profit for those years accordingly. They showed:

£m	FY10	FY11	FY12	FY13
Revenue	**123.6**	**140.5**	**176.3**	**192.4**
Wages	(73.0)	(80.5)	(96.0)	(102.9)
Other	(30.1)	(35.0)	(40.9)	(45.7)
Group EBITDA	**20.5**	**25.0**	**39.4**	**43.7**
Central Overheads	(8.3)	(7.8)	(8.0)	(8.3)
Contingency	-	(3.0)	(2.4)	(2.4)
Profit after COHs	**12.2**	**14.1**	**29.0**	**33.0**
Depreciation	(1.4)	(1.5)	(1.5)	(1.6)
Interest and Finance Charges	(12.7)	(13.1)	(13.2)	(12.6)
Exceptional Items	(6.9)	-	-	-
Profit before Tax	**(8.7)**	**(0.4)**	**14.2**	**18.8**

vii) Under these projections ECG was "still forecasting to be profitable in FY2011", albeit forecasting a loss before tax of £0.4m. ECG did not forecast any exceptional items for 2011 to 2013.

viii) ECG had a £2.5m funding requirement to the end of February 2011, assuming the existing bridge facilities remained in place.

ix) ECG had considered a number of medium term financing options being: (a) a strategic investor, although Credit Suisse had not been successful in delivering one; (b) the convertible loan note issue, which had raised $9.5m of new funds and $25.9m conversion of existing mezzanine debt; the target had been increased to $55m since the initial target of $50m would fall marginally short of the full cash requirement; (c) Project Saxon, an intended merger with a third party, which would strengthen ECG and result in a dual listing in Switzerland and on the AIM, which would be accompanied by a fundraising; (d) a disposal of ECG's business; (e) a disposal of part of ECG's business; (f) refinancing; and (g) all bank funding. ECG was pursuing Project Saxon and the loan note issue with all bank funding as a fallback.

x) The conclusions of the presentation included that: (a) significant progress had been made in the last two months, (b) ECG had taken steps towards a turnaround plan, (c) ECG had revisited its financial projections in light of recent trading and the report by FTI, (d) the Group's revised projections were more in line with FTI's sensitised case, though composed differently, (e) ECG had a peak funding requirement of £10.4m, (f) ECG needed to pursue a number of strategies for medium term resolution: ECG was pursuing the convertible loan note and Project Saxon: developing and delivering these options would take time and funding, and (g) ECG was deferring payment of creditors, including PSPI and HMRC.

xi) ECG requested further short-term assistance from the Banks, including continuation of a £2.2m overdraft, deferral of capital repayments, and £2.7m of further overdraft facilities.

150. On 30 January 2011 Mr Treon re-sent the January Financial Projections to Dr Srinivas and to Mr Beney. These were shared with KLSA on 2 February 2011.

Duet's requests for the model in February 2011

151. On 1 February 2011 Mr Korat emailed Dr Srinivas, Mr Amlani, and Mr Treon, referring to an earlier catch-up with Dr Srinivas and asking for a softcopy of the Private Placement Memorandum ("the PPM"). This was an information memo that had been produced in 2010 for marketing the notes. He also asked for "the excel model that Deloitte were using" and the updated balance sheet at year end 2010. Dr Srinivas replied at 17:30 stating that he would send a copy of the PPM, and in the same email asked Mr Amlani (who was copied in) to email Mr Korat the financial model and updated balance sheet.

152. At 18:25 Dr Srinivas emailed Mr Treon and Mr Amlani separately: "Let us discuss before you email Cyrus the information.", which Mr Amlani noted. At 20.37, Mr Amlani replied to Mr Treon and Dr Srinivas: "We have the November 10 figures updated on the model we shared with FTI not on the Deloitte Model. Can we please discuss what we wish to provide them with detailed or summary and per Deloitte or FTI or revised FTI we recently prepared Anoup."

153. Dr Srinivas replied at 20:44, asking to talk with Mr Treon and Mr Amlani the next day before they sent any information to Mr Korat. At 21:46 Mr Amlani told Dr Srinivas and Mr Treon that he would call Dr Srinivas the following day.

154. At 00:59 on 2 February 2011 Mr Treon asked Mr Amlani to speak to Dr Srinivas urgently about the figures and to send Dr Srinivas the figures sent to Mr Korat.

155. Later on 2 February 2011 Dr Srinivas's assistant sent Mr Korat the PPM, a form of loan note, a draft note purchase agreement, management accounts to 31 March 2010 ("the Interim Accounts"), the audited 2009 accounts for ECGL, and a sample EBITDAR covenant testing for 2009.

156. On 2 February 2011 Mehmet Ahmet, who had been sent the Original Financial Projections by Mr Treon, emailed Mr Treon (cc. to Dr Srinivas) asking to go through the exceptional charge of £5m, or for a document providing an explanation. He noted that "you touched upon it at our meeting in your office but I need something more substantial". Mr Treon emailed to say that Mr Amlani would send him a breakdown of the exceptionals and Colliers' details.

157. On 2 February 2011 Mr Amlani spoke to Dr Srinivas and Mr Treon about the information to be sent to Mr Korat.

158. On 3 February 2011 Mr Amlani emailed Dr Srinivas and Mr Treon a copy of the January Figures, noting that this was the only file he had sent to Duet. Mr Amlani said that they needed to decide what to send Duet for the model. Mr Treon then asked Mr Amlani to email to him the whole set of projections from which the January Figures

had been extracted. Mr Amlani responded, attaching an excel model, known in these proceedings as "the 3 February 2011 Model". (This is a potentially confusing label as it was actually the Original Financial Projections (from November 2010) revised to include actual figures to October 2010, but I will adopt it.) Mr Amlani commented:

> "I enclose the model used for the October 10 PL sent to Duet
>
> This was the final model provided to FTI with actual to Aug 10 and we then updated actuals to oct 10
>
> Let's discuss once you have reviewed so we can email to duet"

159. Dr Srinivas replied to Mr Amlani and Mr Treon and said that he would review the model that day and revert.

160. The 3 February 2011 Model showed:

	ESQUIRE CONSOLIDATED GROUP LIMITED					
2						Contents
3						
4		2009 (Audited)	2010	2011	2012	2013
5		£000	£000	£000	£000	£000
6	Projected Profit & Loss Accounts					
7						
8	Turnover/Income	122,073	124,109	144,934	175,267	192,013
9	Wages	72,308	72,561	83,058	97,528	104,487
10	Controllable Costs	6,836	7,065	7,270	8,551	9,230
11	Fixed Costs	10,881	10,846	12,010	13,795	14,886
12	EBITDAR	32,048	33,636	42,597	55,393	63,410
13	Rent	11,330	12,270	16,232	18,047	21,177
14	Group EBITDA	20,718	21,367	26,365	37,345	42,233
15	Central Overheads	6,454	8,265	7,842	8,077	8,319
16	Profit after COH before Depn and INT	14,264	13,102	18,523	29,269	33,914
17	Depreciation	1,214	1,391	1,483	1,528	1,574
18	Interest & finance charge (excluding mezz)	10,135	11,439	11,505	11,865	11,865
19	Profit Before Exceptional Items	2,915	272	5,535	15,876	20,476
20	Exceptional Items	3,109	4,988	-	-	-
21	Profit Before Mezz Interst & Tax	- 194	- 4,717	5,535	15,876	20,476
22	Less: Mezz Interest	645	1,294	1,584	1,584	1,584
23	Profit Before Tax	- 839	- 6,011	3,952	14,292	18,892

161. The values for each period in the "Profit before Mezz Interst" line in the January Figures equated to the values for the "Profit Before Exceptional Items" line in the 3 February 2011 Model. The January Figures did not contain the items below that line. The 3 February 2011 Model showed "Profit before Mezz Interest and Tax" of minus £4.7m whereas in the January Figures the "Profit before Mezz Interst" was shown as £272,000.

162. On 4 February 2011 (at 19:08) Mr Treon emailed Mr Amlani and Dr Srinivas with an excel model that was the same as the 3 February 2011 Model except that it did not contain information for 2009 and the balance sheet had been amended as set out below ("the 4 February 2011 documents"). On the same day at 19:18, Mr Treon emailed Mr Amlani and Dr Srinivas a word and pdf copy of a document containing financial projections for ECG. Mr Treon said, "Enclosed word and PDF document for Duet – we will speak at 9am tomorrow". The documents contained a profit and loss schedule for 2010 to 2013 down to "profit before exceptional items," and a summary projected balance sheet for 2010 to 2013. The balance sheet had been changed from the balance sheet in the 3 February 2011 Model such that there was no longer a comparison between

2010 and 2009, and the separate line entry for "Profit and Loss" (which had been minus £6,011k for 2010) was merged into the "Retained Earning" line, as shown below:

3 February 2011 Model

		2009	2010
61	Ordinary Share Capital	-	-
62	Preference share	4,351	4,351
63	Revaluation Reserves	114,189	114,189
64	Retained Earning	- 2,659	- 2,659
65	Profit & Loss		- 6,011
66	**Total shareholder funds**	115,881	109,871

4 February 2011 documents

	2010
Ordinary Share Capital	-
Preference share	4,351
Revaluation Reserves	114,189
	-
Retained Earning	8,670
Total shareholder funds	109,871

163. The 4 February documents also contained an "EBITDAR bridge" statement, which stated EBITDA (after central costs) for 2010 to be £13.119m (and an EBITDA bridge chart which referred to a 2010 EBITDA of 13.3m).

164. There was a discussion between Dr Srinivas, Mr Treon and Mr Amlani over the weekend of 5/6 February 2011. On Sunday 6 February 2011 Mr Amlani sent a revised Word document to Dr Srinivas and Mr Treon, "with the PL amended for 2010 figures". The attached document replicated the documents sent on 4 February, save that the P&L accounts no longer included FY2010. Mr Amlani said in his email: "I need to create PDF for the same once you confirm ok". Dr Srinivas replied that day, saying the document was fine and asking Mr Amlani to send it to Mr Korat and Mr Moore at Duet, copied to Dr Srinivas and Mr Treon.

165. On 7 February 2011 Mr Amlani emailed Mr Korat a pdf document entitled "ECG Financials final to Duet" ("the 7 February 2011 pdf"). Mr Amlani said, "As requested by Srini and Anoup please find attached the financials for Esquire Consolidated Group Ltd for your kind review. Srini will call you to discuss the same". The attached document was in the form discussed the previous day by Mr Treon, Mr Amlani and Dr Srinivas. The pdf contained P&L accounts for 2011 to 2013 that were the same as the Projected Figures in the January Figures. The entries went as far as "Profit Before Exceptional Items". The projected balance sheet for 2010 contained the figure of minus £8.67m for "retained earnings" but no "profit and loss" line and no comparison with 2009. The figures for 2010 in the EBITDA bridge statement and chart were £13.1m, materially the same as the Forecasted Figures (in the January Figures).

166. On 7 February 2011 Mr Beney emailed Mr Treon noting that Mr Tasker was waiting for a memory stick with "the updated model for EC" to complete his valuation.

167. On 11 February 2011 Mehmet Ahmed asked Mr Treon and Mr Amlani (cc. Dr Srinivas) again for a breakdown of exceptional items and the Colliers valuation. Mr Amlani sent a breakdown of the £4.988m in an excel document. This included a list of homes under the heading "exceptional wages" (adding up to £4.25m odd) and included 4 homes not included in the "exceptional wages summary" in the Original Financial Projections.

168. On 13 February 2011 Mr Treon sent Sir John Hanson an update for ECG's Supervisory Board. The covering email was copied to Dr Srinivas and others at RP&C. The update described the period since September 2010 as very challenging, referred to the fact that a delay in fundraising had meant ECG had requested additional facilities from Lloyds, and said that the Banks had provided £4m of assistance. Mr Treon mentioned that ECG had raised $11m of new cash and had increased the loan issue target to $55m. Mr Treon said there were good prospects that the balance of the cash would be raised, and that in the meantime ECG was in the hands of the Banks. Mr Treon stated that "our projections indicate we need circa £10m for the next three years." Mr Treon stated that the group was trading at a negative EBITDA due to the PSPI renovations and the launch of 400 new beds. He said, "[o]ur detailed projections which have been the subject of review by several external parties, indicate that we will go cash positive in July/August 2011. The group should then move into profits." He mentioned other changes including that there was a new finance director, Baljit Johal. Mr Treon concluded: "I have summarised below the group's projected performance in the next three years. This assumes no further acquisitions, filling up the new beds and some organic business in the specialist division." The figures that Mr Treon included in the update were the Revised Financial Projections (i.e., the January Financial Projections with contingencies). A note after the figures explained the exceptional item for 2010 (of £6.9m) as relating "to new builds, the PSPI properties under renovation and include some £2m professional costs".

169. On 14 February 2011 Mehmet Ahmed emailed Mr Amlani and Mr Treon, cc to Dr Srinivas, saying that on the Exceptional Costs Schedule there was no narrative and no clear explanation documented as to their origin and why they were exceptional. He referred to having had conversations with Mr Treon and Dr Srinivas on this, and having anecdotal evidence, but stated that there would need to be more written explanation and relevant documentation if they went to the next stage. He also requested the Colliers Report again. Mr Amlani later spoke to Mehmet Ahmed and confirmed in an email that Mr Ahmed had sufficient data for his meeting. Following an internal meeting the same day at First International Group, Mehmet Ahmed emailed Dr Srinivas asking to share feedback with him, rather than ECG. In the event First International Group did not invest in the notes.

Duet's further requests for ECG's model

170. On 14 February 2011, Dr Srinivas sent an email to Mr Korat asking for a quick chat. Mr Korat replied that he was working on an IC memo, targeting an IC meeting the following week. Mr Korat asked whether Dr Srinivas had an excel version of the model. Dr Srinivas forwarded the chain to Mr Treon asking Mr Treon to call him so that they could discuss what they needed to send to Mr Korat.

171. On 15 February 2011 Mr Korat emailed Dr Srinivas and Mr Treon, asking if Dr Srinivas had had any luck getting the operating model, commenting that he needed it for their IC. Dr Srinivas replied saying that he had spoken to Mr Treon and Mr Korat would receive it that day. Mr Korat replied to Dr Srinivas and Mr Treon, thanked Dr Srinivas, and asked for the underlying covenants for the different senior debt facilities, including LTV (loan to value) and ICR covenants.

172. Later on 15 February 2011 Dr Srinivas emailed Mr Amlani an excel version of the 4 February 2011 model (i.e. a full operating model). Dr Srinivas and Mr Amlani discussed the document to be sent to Duet.

173. Mr Amlani emailed Dr Srinivas (copied to Mr Treon) at 16:25 an excel document titled "backup excel workings for the PDF doc final to Duet.xls". This document was the source of the 7 February 2011 pdf, and it replicated its contents. It was not a full operating model. Mr Amlani commented: "Further to our discussion I enclose the excel workings for the PDF document we last submitted to Duet. Please confirm this is what you would like me to email to Cyrus." Dr Srinivas emailed Mr Amlani at 18:30 (cc to Mr Treon) saying he and Mr Amlani had spoken again and that Dr Srinivas was happy for ECG to release the document to Duet if Mr Treon was happy with it.

174. Mr Amlani also sent Dr Srinivas an excel spreadsheet setting out ECG's banking covenants with a column stating that the banking covenants had been met (the covenant column). Mr Amlani explained that ECG had waivers and the information was historic. Dr Srinivas responded to Mr Amlani saying, "We just spoke. Please delete the covenant column as discussed. You may release it to Duet if Anoup is ok with it".

175. Later on 15 February 2011 Mr Amlani emailed Mr Korat, Mr Treon and Dr Srinivas attaching the excel document titled "backup excel workings for the PDF doc final to Duet.xls" and an excel spreadsheet setting out the banking covenants with the covenant column removed.

176. A conference call between Mr Amlani and Duet was fixed for 16 February 2011 to run through Duet's queries. Mr Amlani emailed Dr Srinivas and Mr Treon and asked them if they should dial in as well. Dr Srinivas emailed Mr Amlani and Mr Treon about a separate conversation Dr Srinivas had had with Mr Moore of Duet in which Duet requested a "detailed breakdown of the turnover forecast as we anticipated". Dr Srinivas asked Mr Amlani to call Mr Treon so that "we can agree the information to be emailed to him".

177. On 16 February 2011 Mr Moore emailed Mr Amlani, cc. to Dr Srinivas and Mr Korat, a request for home by home information for ECG including historical turnover and occupancy data. In response, Mr Amlani provided Duet with information regarding ECG's properties, and an excel document that contained a detailed analysis of projected turnover, group occupancy data and third party rent for 2010 to 2013. This excel document included the EBITDA bridge from the 7 February 2011 pdf, together with information for 2009.

178. A meeting was scheduled to take place at ECG's offices on 17 February 2011, to be attended by Mr Amlani, and Mr Korat and Mr Moore for Duet. I shall return to this below.

179. On 17 February 2011 Mr Treon, cc to Dr Srinivas and Mr Amlani, sent Mr Pecorini, an intended co-placement agent for the loan notes from Brooks Houghton & Company, an excel model of the January Financial Projections. Mr Treon's covering email stated: "management have done a final review and I attach herewith the final model for the three years to 2013" and "we feel the attached is achievable: please note we do not include any new opportunities". He suggested a conference call with RP&C. The attached model included a projected P&L account including exceptional items of £6.9m for 2010.

180. On 17 February 2011 Mr Johal, ECG's new Finance Director, sent Mr Treon a draft January 2011 flash report, in which ECG's actual results were contrasted with budgeted figures which, for EBITDAR, were those in the January Financial Projections.

The 18 February 2011 Letter and provision of the excel model to Duet

181. On 17 February 2011 (23:52) Mr Treon emailed Dr Srinivas with a draft letter to be sent by RP&C to Duet together with an attached excel operating model. This was a bespoke model produced for Duet.

182. A few minutes later, at 23:55, Mr Treon emailed a copy of the same bespoke model to Mr Tasker of Colliers and to Dr Srinivas saying:

> "Jeremy we are in final stages of discussions with Duet who are interested in £10m subscription in the convertible loan stock. The attached is what they are working on [the ones you have are the latest - there is not much difference]. Duet want to chat to you about ECG and likely values. I have set these out - if you prefer I can send these officially to you with a valuation summary with a request for you to comment directly to Duet - can we please discuss?" (*square brackets in original*).

183. Dr Srinivas made some amendments to the draft letter that had been prepared by Mr Treon. Dr Srinivas then signed and sent a letter dated 18 February 2011 on RP&C headed paper to Duet ("the 18 February 2011 Letter"). The letter began "Following your discussion with Anoup & Pritesh we enclose herewith earnings projections prepared by European Care". The letter described the attached projections as being "in line with what we have shared with Nationwide and other Mezzanine investors updated for most recent information". Dr Srinivas commented that the projections required nil contribution from new opportunities, were based on ECG's current portfolio maturing (where capex had been incurred already), and achievable growth in ECG's lifestyles division which required no capex. Dr Srinivas stated: "In other words, the projections assume that EC will only expand organically during the next three years and, as such, we believe the projections to be reasonably conservative and readily achievable". The letter commented that Duet would note that senior and mezzanine interest charges were adequately covered and that in 2011, when earnings began to mature, the cover was 1.30 times and there is headroom to allow for contingencies. The letter described RP&C as bullish about ECG, in particular because of the advancement of the public company transaction, (i.e. Project Saxon), but invited Mr Korat to do his own analysis.

184. Dr Srinivas indicated in the letter that the earnings projections had been prepared by ECG. The attached projections ("the 18 February 2011 Model"), which were a detailed working excel model, contained a profit and loss schedule that was identical to that in the 7 February 2011 pdf (which was itself identical to the Projected Figures in the January Figures) save that the 18 February 2011 Model included a figure for mezzanine interest that was not included in the Projected Figures. The basis of preparation tab noted that "[t]he accounting policies applied to the forecast are consistent with that applied to historical data." The PL Analysis & Valuation tab, row 69 of the 18 February 2011 Model, contained a calculation of senior plus mezzanine interest (stated to be £2,777,778) against Profit Before Depreciation & Mezzanine Interest for 2011 of 1.3x.

185. On 18 February 2011 Duet asked Mr Amlani for further information in advance of a meeting with the IC, including the amount of capex investment in the past two years,

as much detail as possible on the drivers for the increase in EBITDA, 2010 real estate asset values, and the total debt. Mr Amlani forwarded the request to Dr Srinivas and asked for a discussion. Mr Amlani replied giving a capex spend of c.£3m per year for the past two years and said that Dr Srinivas would address the remaining questions from their meeting the previous day, including the detailed model as requested.

186. On 22 February 2011 Mr Amlani asked RP&C to consider an extension of the deferral of rent from PSPI for certain properties pending the fundraising. Mr Beney said he would treat the email as a formal request and would raise it with PSPI's board.

Duet's due diligence

187. On 18 February 2011 Mr Moore had emailed Ms Shah, who was an analyst at Duet, cc. to Mr Korat, about a draft IC memo for the proposed ECG investment. Mr Moore stated, "We received a model this afternoon which is saved in the model subfolder which shows that company in the steady state scenario which is one that I would like to present to Forum". He commented that the underwriting needed to be based on Debt/EBITDA metrics and Duet had to use the correct EBITDA number: "in my view [the correct EBITDA number] is the bottom one after all central overheads (c. £13 million at year end 2010, projected to hit £18 million in 2011)."

188. On 22 February 2011 Mr Korat emailed Mr Amlani and Mr Moore (cc. Mr Treon) asking for the EBITDA bridge they had discussed the previous week, which Mr Korat wanted to tie back to the 18 February 2011 Model. Mr Korat wanted as much detail as possible to explain the sources of EBITDA increase over the next few years. Mr Amlani forwarded the email to Dr Srinivas on 23 February 2011.

189. On 23 February 2011 Mr Amlani replied to Mr Korat that the EBITDA bridge was within one of the sheets in the model, forwarding his response to Dr Srinivas and Mr Treon. Mr Treon replied to Dr Srinivas asking Dr Srinivas to follow up with Mr Korat. Mr Treon told Dr Srinivas he did not want a dialogue between Mr Amlani and Mr Korat and said that if Dr Srinivas could let Mr Treon know "what they require we shall deliver it".

190. Mr Korat replied to Mr Amlani (cc to Mr Treon) to ask which tab Mr Amlani had been referring to. Mr Korat saw increased EBITDA going from £18.5m to £33.9m but wanted to identify the specific sources of the uplift, including new beds, new homes and fees. This request was forwarded by Mr Treon to Dr Srinivas at 10:29. Dr Srinivas replied to Mr Treon at 10:48 (cc. Mr Amlani): "Let us discuss before you respond. I think Cyrus may be looking for a detailed breakdown of the revenue and ebitda forecast. We may have to send him the home by home forecast but let us brainstorm. I will also speak to him before we talk." Mr Amlani later told Dr Srinivas and Mr Treon by email that the model RP&C had sent to Duet (i.e. 18 February 2011 Model) was on a home-by-home basis.

191. On 23 February 2011 Mr Korat also asked Mr Amlani for a breakdown of the use of the US$50m to be raised by the loan notes. Mr Amlani forwarded the email to Mr Treon with a copy to Dr Srinivas seeking a discussion. Mr Amlani then sent Mr Treon the excel file "backup excel workings for the PDF doc final to Duet.xls", which had been shared with Duet on 15 February 2011.

192. In a further email of 23 February 2011 Mr Korat asked Mr Amlani to confirm his understanding of the projected increases in turnover based on an increase in occupied beds. Mr Korat asked for confirmation as to whether capex would be required to generate the increase or if this was down to the natural occupancy increase as homes matured.

193. On 23 February 2011 Mr Korat sent Ms Shah an excel document entitled "HoldCo CF 150211", in which Duet calculated certain EBITDA ratios based on the 2010 Actual Figures to October and the Forecasted Figures. Duet calculated an ICR of 1.35x for 2011 based on the EBITDA (after COH) figure for 2011 from the January Figures (£18.523m).

194. On 23 February 2011 Duet discussed ECG. Following an IC meeting, on 23 February 2011 Mr Korat reported to Dr Srinivas that for Duet it was "all about proving that the beds that are coming on line had already been paid for in terms of capex". Mr Korat said that Duet would run scenarios based on the speed of the build up to prove to themselves that EBITDA would grow as forecast since Duet recognised that the Day 1 leverage amount was high. Mr Korat noted that Mr Treon was working on updated asset values.

195. On 23 February 2011 Mr Korat emailed Mr Amlani asking for a call the following day to discuss the available beds and occupancy to see what further investment was required to bring beds "on line" as per the forecast. Mr Korat wanted to understand the capex spend on this and use of loan note proceeds. Mr Korat also asked about updated asset values before they had a discussion with Colliers and how the new homes would be valued.

196. Following a call between them, on 24 February 2011 Mr Amlani emailed Mr Korat (cc to Mr Treon) a further financial model ("the 24 February 2011 Model"). The profit and loss accounts were identical to those in the 18 February 2011 Model. The model was revised to include occupancy by the divisions used for valuation. Mr Amlani also forwarded the email to Dr Srinivas and Mr Treon.

197. On 24 February 2011 Mr Johal, ECG's Finance Director, emailed BoI, copied to Mr Treon a January 2011 flash trading report, which was "indicative of the company's performance against budget". The budget figures for turnover and EBITDAR agreed to the January 2011 figures in the Revised Financial Projections. Mr Treon forwarded the email and attachment to Dr Srinivas.

198. Also on 24 February 2011 Mr Korat emailed Mr Lattanzio and Mr Clayton a summary of the potential ECG deal. He referred to "2010 Financials" with Group EBITDA of £21.4m and total debt of £175m. He said that the group was forecasting fairly significant organic growth based on a number of newly expanded and refurbished facilities maturing in their occupancy profile. This was based on the VDD Report. He concluded "I think we should consider an investment size of between £5-7.5mm … apart from a 20% return for a deal with pretty decent assets, we get to meet and invest alongside Nationwide, who are apparently looking for mezz lending opportunities in Europe".

199. On 25 February 2011 Mr Korat asked Mr Amlani, cc. to Mr Treon and Dr Srinivas, whether Duet could discuss the valuation basis with Colliers that afternoon. Mr Treon

made an email introduction for Duet and Colliers, noting that Duet would like further information and asking Colliers to assist Mr Korat as appropriate. Mr Korat spoke to Mr Tasker at around this time.

200. RP&C also provided Duet on 25 February 2011 with a breakdown of the current mezzanine investors in ECG, Nationwide ($20m), a Greek family office ($6m), and a US family office (including RP&C and family shareholders) ($9.5m).

The FTI February Report

201. On 25 February 2011 FTI produced a further draft report ("the FTI February Report"), which was never issued in final form or seen by Dr Srinivas or RP&C before ERED's investment. The FTI February Report stated that ECG had prepared a Revised Business Plan following the FTI December Report, which had been presented to the Banks on 27 January 2011 i.e. the Revised Financial Projections. FTI had received a copy for review on 8 February 2011. The report explained on page 3 that the Original Financial Projections had primarily been revised by updating occupancy assumptions in the light of actual January occupancy; reviewing assumptions around loss making homes in the light of management's operational turnaround plan and the infill of new builds; correcting errors and omissions; a review of the provision for capex in the forecasts; and including items previously omitted from the cashflow. There was also the inclusion of contingencies. A table showed that for 2011 EBITDA was reduced in the Revised Business Plan by £4.2m of which £3m was the result of the contingency. FTI set out the Revised Business Plan on page 6.

Further Duet due diligence

202. On 28 February 2011, Ms Shah emailed Mr Korat a "scenarios" document. This contained a "downside" scenario which included a 6 month delay in occupancy increase from the business plan.

203. On 4 March 2011 Dr Srinivas sent Mr Korat a pdf document prepared by Mr Treon the previous day containing responses to queries raised by Duet, which Dr Srinivas and Mr Treon were happy to discuss. The attached pdf document:

i) contained an explanation and justification of ECG's projected increments to wages and fees for 2011 to 2013, which reflected those applied in the Original Financial Projections, the 18 February 2011 Model, and the 24 February 2011 Model;

ii) explained that ECG had forecast a nil wage increase to October 2011, having agreed a 12-month wage freeze in October 2010. Wage rises in October 2011 would be dependent on fee increases;

iii) explained that a recent court ruling had prevented a local authority from forcing fee reductions on care home operators and noted that ECG had sent letters saying that private fees would increase in April 2011 by 4.3%;

iv) stated: "So in 2011, we have projected a 1.5% fee increase from April-Dec 2011, and a 1% wage increase. We expect to achieve the 1.5% increase and our wage increase shall be less than 1%. In terms of sensitising 2012 & 2013 if the fee

increase of 3% is not achieved then we would expect to balance this off with a lower wage increase";

v) set out a sensitivity analysis for 2012 to 2013 based upon a 1.5% increase to both wages and turnover that was applied to the figures from the 24 February 2011 Model. The document explained that if an increase in fees was not achieved, ECG would expect this to be balanced off by a lower wage increase. The sensitised version showed at £1.6m and £1.8m adverse variance at EBITDAR for 2012 and 2013 respectively; and

vi) attached third party and ECG reports on likely demand for care homes.

204. On 7 March 2011 Knight Frank, which was undertaking a valuation of ECG's assets for Lloyds, emailed Mr Johal, asking for further information. Knight Frank attached the financial information that they had been provided with, which contained a profit and loss account down to EBITDA before COH for the period 2009 to 2013, which agreed with the January Financial Projections and Revised Financial Projections.

205. On 8 March 2011, following a call on the previous day, Mr Treon sent Mr Korat and Dr Srinivas a further financial model, which ECG had prepared ("the Operating Model dated 8 March 2011"), which contained profit and loss account figures for 2011 to 2013 identical to the earlier models sent to Duet on 18 February and 24 February 2011.

206. Mr Treon stated in a covering email that the model contained an analysis of build up as Mr Korat had requested and he understood from Mr Korat that this was the last piece of information that Mr Korat needed. Mr Treon said he wanted to move towards a closing.

207. Later on 8 March 2011 Mr Treon sent Mr Korat and Dr Srinivas a summary of the timelines for the PSPI properties under renovation, and a document outlining ECG's specialist pipeline. Mr Treon commented that ECG had generated annualised turnover of £1.7m and EBITDA of £0.5m, with more confirmed under negotiation leading to a total of £6.4m of turnover and £1.9m of EBITDA. Mr Korat sought confirmation that this £1.7m was an increment that had been achieved for 2011.

208. On 8 March 2011 Bruce Albrecht, a partner at P&C Global Wealth Managers SA, who had been contacted by Dr Srinivas in respect of the loan note issue on 3 March 2011, emailed Dr Srinivas asking for a copy of the marketing presentation that Mr Albrecht had seen in RP&C's office. Dr Srinivas sent him the Revised ECG Presentation. Neither the covering email, nor the Revised ECG Presentation made any reference to exceptional items, or to the basis on which the figures had been prepared. Mr Albrecht informed Dr Srinivas on 9 March 2011 that no investment would proceed as his clients did not want to invest in the care home sector as they had already lost money on investments in this area.

209. On 11 March 2011, in response to a query from Mr Korat, an email sent on Dr Srinivas's behalf set out an explanation of the proposed merger with USI and its rationale. In response Mr Korat asked when the Colliers valuation would be finalised. Dr Srinivas replied that the valuation would be finished in April 2011.

210. On 15 March 2011 Mr Treon informed a number of members of management and non-executives, including Sir John Hanson, that the timetable for completion of the merger was 30 June 2011. Mr Treon said that Mr Amlani would focus on the merger, while Mr Treon would reappraise Mr Amlani's role with regard to operations. The report said "As you aware we have been under a lot of pressure on information flow with the exercise with the banks. I am pleased to inform you that the banks continue to support us and we continue to work with them."

211. On 21 March 2011 Mr Korat raised two final queries, including in relation to hedging of ECG's exposure to US$ resulting from the loan note issue to Nationwide and ECG's JV partners. Dr Srinivas confirmed that the exposure would be hedged and asked Mr Treon to provide details of the partners to ECG's joint ventures.

Duet's first IC memo

212. On 22 March 2011 Mr Korat emailed Mr Walker and Mr Schaper of Forum a memo on ECG. Mr Korat attached a draft memorandum for a discussion on a potential purchase of £9m fixed rate secured convertible loan notes ("the First IC Memo").

213. The IC met on 25 March 2011 to discuss the potential investment in ECG.

ECG pursues Project Saxon and further investors in the loan notes

214. On 22 March 2011 Mr Amlani sent Fairfax, which was advising ECG on Project Saxon, a high-level profit and loss account for 2011 to 2013, which comprised the Revised Financial Projections. Mr Amlani said that ECG was switching from UK GAAP to IFRS and the attachment did not reflect any changes resulting from the change to IFRS and were therefore draft. Fairfax replied seeking the full model.

215. On 23 March 2011 Mr Amlani emailed Dr Srinivas and Mr Treon a copy of the model prepared by ECG to be sent to Fairfax, which Mr Amlani asked Dr Srinivas to review before a discussion so they could agree what to send to Fairfax. The attached model comprised the Revised Financial Projections. On 24 March 2011, Mr Treon stated that the model looked OK and asked Dr Srinivas to sign off so it could be sent to Fairfax. On 24 March 2011, Mr Amlani sent a revised version of the model to Mr Treon and Dr Srinivas which Mr Amlani had amended for the points discussed with Mr Treon and Dr Srinivas. Mr Amlani wanted to discuss this with Dr Srinivas. On 24 March 2011 Dr Srinivas stated that the model "seems fine" and asked for it to be sent to Fairfax and circulated it within RP&C. Mr Amlani sent a model to Fairfax on the same day, which comprised the Revised Financial Projections.

216. On 24 March 2011 RP&C wrote to Mr Russell and Mr Langlois, the individuals at the corporate directors of ECGL and Esquire, acting as directors of Esquire Gruppe Limited ("EGL", another of the Guernsey holding companies of the ECG) to record in writing an oral agreement with RP&C to amend the performance fee due under the existing ECG management agreement so as to agree that RP&C would receive a performance fee of £6m in the event of Project Saxon occurring at a valuation of not less than £92.5m. In the event of a valuation under £92.5m the performance fee would be reduced proportionately. The performance fee and the annual fee of £400,000 would be payable immediately upon the merger. EGL was to use best endeavours to procure the new

management of the successor entity entered into a new management agreement with RP&C.

217. On 25 March 2011 Mr Treon sent Dr Srinivas a copy of a document and suggested it may be better if Dr Srinivas sent it to SG Hambros Bank. The attached pdf document contained a note on ECG dated March 2011, which set out an overview of ECG and the loan note issue. It referred to ECG launching some 400 beds in new build care homes in 2009-10 and to the refurbishment of twelve of PSPI's properties. It said that the refurbishment and new build bed fill had created a requirement for cash (both had resulted in cash consumption). It contained a profit and loss account which replicated the Revised Financial Projections (including the contingencies), save that the figures ended at a figure for "profit after contingencies before exceptional, note interest and tax", and did not state a figure for exceptional items. The document contained an overview of the proposed merger with USI. It said that the parties' advisers were working on completing the merger in June/July 2011 which would result in a listing on AIM and in Zurich. The document did not refer to the basis on which the figures had been prepared. Mr Treon later sent this document to SG Hambros Bank on 31 March 2011, copied to Dr Srinivas, and introduced RP&C, who Mr Treon said were leading the fundraising.

218. ECG met with the Banks on 25 March 2011, at which an update on Project Saxon was provided. The presentation for the meeting contained a summary of ECG's trading in February 2011. This showed ECG's performance ahead of the "revised forecast" (i.e., the Revised Financial Projections), which was referred to as the "budget", once the contingency was taken into account. The care homes dashboard showed some positive signals. Cash flow performance had also improved relative to forecast, and there had been a significant reduction in wages and agency fees. The presentation showed an additional funding requirement of £7.3m to the end of June 2011. The presentation concluded that ECG had made progress in a number of areas of the turnaround.

219. On 25 March 2011 Colliers confirmed that they had completed the ECG valuation based on information received from ECG and circulated a softcopy of its valuation summary.

Further Duet due diligence and meeting with Colliers

220. On 29 March 2011 Mr Korat emailed Dr Srinivas to arrange a meeting with Dr Srinivas, Mr Treon and ERED's IC on 31 March 2011. Mr Korat later emailed Dr Srinivas and Mr Treon saying that the IC's main concerns and the key topics for the meeting were how ECG would manage through the short-term budget squeeze given the high leverage at that time, the number of people local authorities would be placing in care homes at that time, and the ability of local authorities to push fees lower. Mr Korat suggested Mr Treon and Dr Srinivas consider why ECG was confident it could fill its new beds and how ECG was different from other operators which were struggling at the time. The IC had wanted to see a pretty harsh downside given the budget squeeze coming. Mr Korat mentioned that he had showed the IC an analysis of wages increasing faster than turnover but wanted ECG's thoughts about what the downside was and to consider what the plan was if occupancy growth was slower than forecast.

221. On 30 March 2011 Mr Amlani emailed Mr Treon and Deloitte noting that he was working on the key sensitivity adjustments to the financial model and suggested a meeting to run through the model. Deloitte said ECG should consider that the model

would be used as the basis for bank covenants and amortisations so that while the focus was on working capital for the next 18 months, ECG had to have an eye on the longer term picture.

222. On 31 March 2011 Mr Treon and Dr Srinivas met members of ERED's IC from Forum. Mr Lattanzio was unable to attend the meeting.

223. On 1 April 2011 Mr Treon emailed Dr Srinivas and David Quint an excel document which contained financial information for ECG, including profit and loss forecasts and net asset values. The document was a template for a valuation exercise for the purposes of the proposed merger. The profit and loss account contained the Revised Financial Projections.

224. Also on 1 April 2011 Mr Amlani emailed Mr Treon high-level comments on revisions being made to the financial model, which reduced ECG's expected profit, and increased its funding requirements.

225. On 5 April 2011 Mr Treon emailed Mr Korat and Mr Tasker (and Dr Srinivas), noting that Mr Korat wanted to discuss ECG further with Mr Tasker and asking Mr Tasker to assist Mr Korat as appropriate.

226. On 6 April 2011 Mr Tasker emailed Mr Korat Colliers' review of the top five care operators in the UK, which included ECG. The review said ECG had the second lowest risk of the five operators discussed. It said of ECG: "Based on the current review the group will offer 5,219 beds in 119 units throughout the UK with significant representation in the South East following completion of the current investment in improvements and pipeline (fully mature in 2013). This is a diverse group with focus on high acuity care across a wide range of service offerings with investments and pipeline targeted at dementia and specialist care. Active investment in improving the real estate to ensure that it can exploit profitable care sectors. Strong dementia care and childrens' services. Group risk assessment is based on mature trading. Financial information is not available to the market but we are aware that is (sic) has one of the strongest balance sheets in the sector".

227. Mr Korat emailed Mr Tasker on 7 April 2011 (cc. Dr Srinivas) thanking him for the document he had sent and saying that he would have some more focused questions for Mr Tasker, specifically his opinion on concerns around the difficult government funding environment over the next few years and how this would impact ECG versus its peers, who would win and lose from this environment as well as the characteristics of ECG's business that would enable it to cope with this environment. Dr Srinivas asked Mr Tasker to discuss this with Dr Srinivas before Mr Tasker replied to Mr Korat.

228. On 7 April 2011 Dr Srinivas sent Mr Korat (cc. Mr Treon) ECG's analysis of its beds, specifically in relation to how susceptible they were to government cuts in funding. This was the same as a document originally sent to Dr Srinivas by Mr Treon's assistant on 7 April 2011, with the addition of a tab called "ECG".

229. On 7 April 2011 Mr Treon sent this analysis to Mr Tasker (cc. to Dr Srinivas), referring to the fact that Dr Srinivas and he had sent it to Duet. Mr Treon explained that the analysis showed how ECG had some insulation from cuts, with only 444 residential beds at risk in relation to cuts in local authority budgets, the remainder being high end

nursing or dementia. Mr Treon said ECG was proactive in making changes to registration to suit the market, and that ECG had a dynamic and growing new business pipeline in the specialist sector. Mr Treon asked Mr Tasker whether he required anything else and to speak to Dr Srinivas before responding to Mr Korat. Mr Treon then forwarded Mr Tasker the spreadsheet containing ECG's specialist pipeline.

230. Mr Korat emailed Mr Tasker to arrange a meeting on 11 April 2011 to address Mr Korat's points raised in his email, in particular the relative quality of ECG's freeholds versus its competitors and to understand the valuation methodology.

231. On 7 April 2011 RP&C emailed Mr Treon and ECG's auditors details of RP&C's outstanding fees, which totalled £2.7m as at 2010 (as it had at the end of 2009).

232. On 8 April 2011 RP&C informed Mr Amlani and Mr Treon that the board of PSPI wanted to meet with ECG to discuss with Mr Treon what measures were being taken to address occupancy levels and EBITDAR in general and for the PSPI portfolio. RP&C said that PSPI had only seen the headline projected figures for 2011: £140m for turnover and £40m for EBITDAR.

233. On 11 April 2011 Mr Tasker met with Mr Korat and Forum. On 1 August 2011 Mr Korat emailed Ms Shah his notes of this meeting. The email records Mr Tasker's experience, his knowledge of ECG, his assessment of ECG as an operator, his assessment of ECG as compared with its competitors, his anticipated valuation of ECG of in excess of £300m (although he "was still working through his valuation data at the time"), and his assessment of the investment market. The email records that Mr Tasker considered ECG to be a very good operator, of high quality with a proven track record of being adaptable, with a business strategy that he believed was ideally suited to the environment now faced.

234. On 11 April 2011 Mr Treon emailed Mr Perry of ECG, RP&C and Mr Amlani with a Presentation for Nationwide on ECG, which Mr Treon asked Mr Perry and Mr Amlani to review and provide him with comments. The attachment set out a profit and loss account for 2011 to 2013 down to Profit Before Exceptional Items. The figures were the same as the Revised Financial Projections. Mr Treon said that he would call RP&C shortly. Later the same day Mr Treon circulated a revised final version of the presentation to RP&C. The revised version of the presentation contained the Revised Financial Projections, but only down to Group EBITDA before COH.

235. On 13 April 2011 Mr Treon forwarded Dr Srinivas and Mr Quint an email chain organising a meeting with the Banks on 27 April 2011. Mr Treon commented "we need to close Duet by then – Srini please ask Cyrus to speak to Richard [Borg] on legal agreement".

236. On 13 April 2011 Mr Korat emailed the IC an analysis Duet had prepared of a break-even scenario which Mr Korat stated was the best way to capture the overall risk of the business. Mr Korat said that Duet had tried to segregate the portfolio and stress the portion that was "at risk".

237. Following a discussion between Mr Korat and Forum, Mr Korat spoke to Dr Srinivas on 14 April 2011. Dr Srinivas then emailed Mr Korat, saying that he had discussed the variables for the stress testing with Mr Treon, and believed that applying a 20% haircut

to the high end dependency and nursing care beds, which accounted for 83% of total beds, would be conservative. Mr Korat sought clarification of Dr Srinivas's proposed stress test later that day. Dr Srinivas replied on 15 April 2011 commenting that for stress test purposes if one applied a 20% reduction (in fees and occupancy) to approximately 638 high end nursing and dementia beds at £600 pw, the adverse effect on turnover and EBITDA would be £4.3m and £1.3m, respectively at a 30% margin. Dr Srinivas described this as unlikely to happen given the current demand and supply dynamics for these beds.

238. On 14 April 2011 Mr Shah of KLSA, wrote to Mr Amlani and Mr Treon in respect of their audit of ECGL for the period ending 31 December 2010 and provided an updated list of matters to be resolved, including (inter alia) whether the going concern assumption was appropriate.

239. On 17 April 2011 Mr Treon showed Mr Korat some of ECG's properties. On 19 April 2011 Mr Lattanzio of Duet and Mr Korat met with Mr Treon.

Duet's IC meeting on 20 April 2011 and approval of the investment

240. On 20 April 2011 ERED's IC met to consider an investment in ECG. Duet produced a further IC memo ("the Second IC Memo") ahead of the meeting. I shall return to its contents in more detail below.

241. The minutes of the meeting record that the Second IC Memo and the breakeven scenarios analysis were tabled. The IC resolved that the proposed investment complied with ERED's investment policy and restrictions, and the proposed investment was approved.

242. On 21 April 2011 Mr Korat informed Mr Treon and Dr Srinivas that IC approval had been obtained to proceed with the transaction.

Further revisions to ECG's financial projections

243. On 21 April 2011 Mr Treon emailed Dr Srinivas about the Banks' desire to see a combined model for the merged entity under Project Saxon, stating that the Banks should not be given a combined model as it would adversely affect negotiations. Dr Srinivas agreed. Mr Treon noted to Dr Srinivas that "we have done the revised projections – we have made them conservative for the banks – these will be sent out this morning…for Fairfax we will (i) remove contingency and (ii) remove mezz interest from July 2011".

244. On 21 April 2011 Mr Johal sent Mr Treon, Mr Amlani, and Deloitte an excel document containing a reconciliation of ECG's actual figures and "V6 Budget" (being the Revised Financial Projections). The document was forwarded by Mr Treon to RP&C on 22 April 2011 and Mr Treon stated that ECG was "on target" and that the team had done well.

245. On 22 April 2011 Mr Treon sent an email to Mr Stephens of Fairfax, copied to Dr Srinivas and Mr Amlani, attaching a revised financial model to be presented to the Banks on 27 April 2011. Mr Treon noted that they had "stressed this downwards and have left the contingency in." Mr Treon said that the model showed a requirement of £6.5m of further funding to the end of 2013. Mr Treon said that ECG would make

changes to the model for Project Saxon, including removing the contingencies, but they would not change the trading forecast although ECG expect "to do much better in late 2011 and 2012". These showed:

	2009 (Audited) £000	2010 £000	2011 £000	2012 £000	2013 £000
Projected Profit & Loss Accounts					
Turnover/Income	122,073	124,007	134,148	171,420	196,531
Wages	72,308	73,596	80,190	97,196	107,277
Controllable Costs	6,836	7,421	7,145	8,562	9,309
Fixed Costs	10,881	10,979	11,788	13,649	14,849
EBITDAR	32,048	32,012	35,025	52,013	65,096
Rent	11,330	12,274	16,285	18,405	21,212
Group EBITDA	20,718	19,737	18,740	33,608	43,884
Central Overheads	6,454	8,491	7,952	8,094	8,337
Contigencies		-	2,500	2,400	3,000
Profit after COH before Depn and INT	14,264	11,247	8,288	23,114	32,547
Depreciation	1,214	2,730	1,489	1,528	1,574
Interest & finance charge (excluding mezz)	10,135	11,116	11,486	11,884	11,502
Profit Before Exceptional Items	2,915	- 2,599	- 4,688	9,703	19,472
Exceptional Items	3,109	8,326	195	-	-
Profit Before Mezz Interst & Tax	- 194	- 10,925	- 4,883	9,703	19,472
Less: Mezz Interest	645	1,116	1,825	1,825	1,825
Profit Before Tax	- 839	- 12,041	- 6,708	7,878	17,646

246. On 27 April 2011 there was a meeting between ECG and the Banks. A PowerPoint presentation was prepared for the meeting. The presentation referred to "the April Model", which is referred to in these proceedings as "the Re-Revised Financial Projections". It said that one of the objectives of the day was to provide an "update on management's latest view on the forecast performance in the business". Slide 8 said "our latest forecast 'the April Model' reflects the fact that some improvements are coming through more slowly than originally envisaged but that we continue to be confident about delivery of the turnaround". Slide 7 explained the basis on which ECG had reviewed their forecasts delivered on 27 January (i.e. the Revised Financial Projections) to take account of performance. It said that the forecasts had been signed off by the operational team. A table on slide 52 compared the Re-Revised Financial Projections to the Revised Financial Projections:

	January forecast			April forecast		
£m	2011	2012	2013	2011	2012	2013
Turnover	140.5	176.3	192.4	134.1	171.4	196.5
Care Homes	95.3	120.0	129.3	91.0	111.4	127.9
Lifestyles	45.2	56.3	63.0	43.2	60.0	68.6
Wages	80.5	96.0	102.9	80.2	97.2	107.3
Controllable Costs	7.1	8.4	9.0	7.1	8.6	9.3
Fixed Costs	11.5	13.4	14.5	11.8	13.6	14.8
EBITDAR	41.4	58.5	65.9	35.0	52.0	65.1
Rent	16.4	19.1	22.1	16.3	18.4	21.2
Group EBITDA	25.0	39.4	43.7	18.7	33.6	43.9
Central Overheads	7.8	8.0	8.3	8.0	8.1	8.3
Contigencies	3.0	2.4	2.4	2.5	2.4	3.0
Profit before depreciation & interest	14.1	29.0	33.0	8.3	23.1	32.5

247. On 2 May 2011 Mr Amlani emailed KLSA and Mr Treon commenting that he would review the model for UHY Hacker Young under UK GAAP as soon as the December 2010 numbers were finalised. Mr Amlani stated: "I appreciate you need the valuation finalised which I am hoping we will finalise close of business tomorrow with Jeremy".

248. On 3 May 2011 Dr Srinivas forwarded to Mr Beney an email chain and an ECG model sent by Mr Amlani to Fairfax on 24 April 2011 ("the Fairfax Model"). The Fairfax Model had been prepared on the basis of the instructions of Mr Treon on 22 April 2011. It reflected the Re-Revised Financial Projections, although the contingency had been removed and only half the mezzanine interest charge was applied in 2011.

Events in May and Duet's legal due diligence

249. On 4 May 2011 Dr Srinivas confirmed to Lloyds that Duet had obtained IC approval for an investment in ECG. Dr Srinivas referred to a target closing date of 24 May 2011. Dr Srinivas asked, given the lengthy and involved conversations that had been had with Duet, Lloyds not to contact Duet without Dr Srinivas's involvement.

250. By a letter dated 4 May 2011 Speechly Bircham (solicitors for ECG) wrote to Lloyds, care of Hogan Lovells, noting the proposed funding arrangements under Project Saxon. The letter referred to Lloyds' request for ECGL's audited 2010 accounts, noting that ECG wanted to sign off the accounts within seven days because Fairfax had confirmed it would be significantly positive for the marketing of Project Saxon, and would facilitate the investment by Duet and the down streaming of Duet's investment as the ECG directors needed a stable platform, and would assist in respect of RP&C's attempts to persuade Nationwide to convert their notes to equity upon the IPO. The letter requested that the Banks convert ECG's current overdraft facilities into a 12 month committed overdraft facility or term loan; waive any covenant financial breaches which may be in existence as at the date of the accounts and for 2011 and defer all amortisation payments for 12 months following the sign off of the accounts.

251. On 6 May 2011 Mr Korat said to Mr Borg that Duet wanted to ensure Duet had voting rights in excess of 33% irrespective of fluctuations in currency and further issues of loan notes and wanted to reduce the amount that Mr Treon could personally take from ECG from $7m to $2m. Mr Borg replied on 9 May 2011 proposing that these issues be dealt with by provisions within the loan note purchase agreement, for example limiting dividends to $2m.

252. On 10 May 2011 Mr Korat emailed Mr Borg a summary of legal due diligence findings, which included (inter alia) the need for additional representations and warranties in relation to the accuracy of any other key information that had been provided including the Operating Model dated 8 March 2011, the schedule of fee increase, the accuracy of information concerning Nationwide's investment and the terms of any side letters.

253. On 10 May 2011 Mr Korat asked Dr Srinivas if the Colliers report was available.

254. On 11 May 2011 Mr Stevens of Fairfax sent Dr Srinivas a draft note on Project Saxon for Nationwide for Dr Srinivas's thoughts. The attached note was an overview of Project Saxon and noted on the second page that "in 2011 the company is expected to achieve Revenue and EBITDA of £140 million and £25 million respectively" (which was consistent with the Revised Financial Projections for EBITDA before COH). The

note also contained forecasts for ECG that were consistent (for 2011-2013) with the Fairfax Model, which showed a net profit of £2.1m for ECG for the second half of 2011, net profit of £12.1m, £22.5m and £26m for 2012, 2013 and 2014 respectively. The draft note explained the conversion of the loan notes and the rationale of the pricing.

255. On 13 May 2011 Colliers provided a final pdf version of its valuation of ECG as at 31 March 2011 for USI ("the Colliers Report"). The valuation was based on the assumption of mature post-repositioning trading indicated within the budgets for 2011 to 2013, and not on ECG's current trading position. Colliers valued ECG's portfolio at £310.5m as at 31 March 2011 and indicated that the post-repositioning trading was significantly higher than current trading and that values would be lower if such improved performance were not achieved. Colliers confirmed that Colliers had reviewed ECG's proposals and concurred with ECG's projections of potential profit levels. The Colliers Report contained appendices containing trading information for the underlying properties as well as Colliers' forecasts for 2011, 2012 and 2013 and its estimate of the property's mature trading capacity. The Colliers Report and its appendices were provided to Duet by Dr Srinivas on 18 May 2011 in pdf.

256. On 10 June 2011 Colliers increased its valuation to £320m as at 31 May 2011 and noted that ECG had made considerable progress since December 2010 and expected a £2m positive effect on earnings.

257. On 13 May 2011 KLSA asked Deloitte whether the Banks had confirmed that they had agreed to waive the breaches of covenants prior to 31 December 2010; that, having been advised by ECG of likely breaches of financial covenants, the Banks had decided not to demand repayment for a period of at least one year; and that the Banks would provide additional funding on an ongoing basis to the conclusion of Project Saxon.

258. Mr Nicholson of Deloitte replied on 14 May 2011 "We remain in discussions with the lenders. So at this stage I cannot confirm the position. We expect to receive a response from them early next week and no doubt will have negotiations through the week. In terms of broad strategy though I see: ... In the event that the Duet money is received the lenders will convert the existing excess to a term loan or overdraft … If Duet money is not received then the lenders will continue to provide short term funding up to the point of Saxon implementation. On Saxon they will receive a level of paydown and implement the full restructuring." Mr Nicholson commented to Mr Treon, Mr Johal, and Ms Gray of Deloitte that he thought that ECG had not been in breach as at 31 December 2010 or at least had not acknowledged this and had not asked for waivers, and that ECG had been in default of capital repayments but had ongoing waivers for that.

259. On 17 May 2011 KLSA circulated draft consolidated accounts for FY2010 under UK GAAP to Mr Treon and Dr Srinivas ("the Draft 2010 GAAP Accounts"). The Draft 2010 GAAP Accounts reported that the "Contribution (EBITDAR)" reduced from £30m in 2009 to £24.5m in 2010, and there were exceptional costs (stated after EBITDA) amounting to £7.5m in 2010 compared to £1m in 2009. The overall loss for 2010 was £20.5m. The draft noted that a key performance indicator was the EBITDAR margin which had reduced to 19.9% (from 24.6% on account of the launch of a number of new builds that were in the fill stage (as per the 2009 Accounts). The profit and loss account for 2010 identified £5.114m of "exceptional direct costs", comprising £4.6m

of wages (within a total of £79.4m of wages) and £0.5m of fixed costs. ECG's EBITDA after COH was stated to be £1.546m.

260. The Draft 2010 GAAP Accounts contained a prior year adjustment in note 17, which stated:

> "The prior year adjustment is as a result of the following:
>
> > - timing difference of the rent waived by PSPI, the landlords of certain homes undergoing developments. The group deferred the rent earlier instead of from the date the developments commenced. The impact on loss for the year is £2.16m, increasing the loss from £1.8m to £4m and the impact on the net assets is reducing it from £115.9m to £113.7m.
> >
> > - reclassification of wages, controllable and central overheads from exceptional items. There is no impact on loss for the year and net assets as a result of this reclassification"

261. On 20 May 2011 Speechly Bircham confirmed to KLSA that the intention was "that with effect from the receipt of the Duet investment the bank facilities will be restructured to provide a 365-day committed overdraft facility, suspension of existing financial covenants with new covenants to be agreed, and suspension of current capital repayments".

262. On 20 May 2011 Deloitte emailed Mr Treon with the subject "Audit sign off for Duet funding", asking Mr Treon to confirm with KLSA whether they were happy with the proposed lending arrangements conditional upon the receipt of the funds from Duet.

263. On 20 May 2011 Mr Beney of RP&C asked KLSA various questions concerning the Draft 2010 GAAP Accounts. This included whether for wages, the exceptional item component comprised solely agency staff costs, or whether there were other items included in the £4.6m figure. KLSA replied that day in respect of exceptional wages: "Any excess wages over and above the group's budgeted ratio was taken to exceptional – Fayaaz will explain further upon his return next week from leave".

264. On 23 May 2011 KLSA emailed Mr Treon and Dr Srinivas a revised draft of the 2010 accounts stated under UK GAAP. Later on 23 May 2011 Mr Shah of KLSA emailed Hacker Young (cc to Mr Treon) a first draft of the IFRS conversion worksheet. The attachment contained an income statement for ECGL stated under IFRS, which for 2010 was consistent with the Draft 2010 GAAP Accounts down to EBITDAR, and thereafter included (among other adjustments) a "credit for future minimum rental increases" of £17.4m, resulting in an EBITDA after COH of £15m.

265. On 23 May 2011 RP&C discussed internally the issue of PSPI receiving its outstanding rent and the possibility of RP&C collecting some of the fees owed to RP&C by ECG out of the Duet funds.

266. On 23 May 2011 Mr Borg emailed his comments following a review of the comments of Edward Amer of EAPD Law, a US firm which was acting for Duet, on the draft note purchase agreement and loan note certificate, copying Mr Treon, Mr Langlois, ECG's legal advisers and Mr Korat. He asked Mr Treon and Mr Langlois whether the

representations in clauses 2.1, 2.3 and 2.15 of the draft loan note purchase agreement concerning disclosure were correct.

267. On 23 May 2011 the Banks' solicitor circulated (among other things) a term sheet for a committed overdraft facility in relation to the anticipated Duet funding. This provided for new covenants to be applied from September 2011 and contained a condition precedent that the proceeds from Duet's loan note investment were received.

Formal approval by ERED of the ECG investment

268. On 24 May 2011 Mr Lattanzio approved the minutes of the IC meeting on 20 April 2011. Also on 24 May 2011 Duet formally recommended the proposed investment in ECG to ERED Cayman. Duet commented that the proposed investment "fits the parameters of the Fund", attaching the minutes of the meeting, the Second IC Memo, and the breakeven analysis dated 13 April 2011. ERED Cayman met to approve the transaction on the same day. On 25 May 2011 ERED Cayman recommended the proposed investment to ERED.

269. On 1 June 2011 ERED's IC resolved to increase its proposed investment in ECG to £11m. On 2 June 2011 Duet formally recommended the increase to proposed investment to ERED Cayman, which then on 3 June 2011 in turn recommended the increase to the proposed investment to ERED. The increase was designed to ensure that ERED would retain a blocking majority for super-majority voting purposes under the loan notes. ERED approved the transaction at a meeting on 1 June 2011.

Further events in June 2011 - finalisation of the investment

270. On 6 June 2011 RP&C provided Nationwide with information about the Duet Group, including a prospectus for Duet Real Estate Finance Limited (the public investment feeder fund to ERED). RP&C explained that Duet had wanted a blocking vote and had therefore been provided with voting rights over RP&C's US$1,332,000 of loan notes, which voting rights would be lost when RP&C converted their notes under Project Saxon. RP&C noted that under the investment mandate, Duet's funds could only hold a debt investment, and would exchange its notes for identical notes to be issued upon the listing.

271. On 6 June 2011 KLSA provided a response to Mr Beney's query (copied to Mr Treon) concerning the exceptional wage costs included within the Draft 2010 GAAP Accounts, clarifying that now these totalled only £3.5m (and not £4.6m as previously calculated). KLSA provided in an excel document a breakdown of the makeup of the direct exceptional wage costs, which included 50% of agency costs for 17 regions in the sum of £785,727, and £2.673m of wages calculated by reference to the 15 homes identified in the "Wages Exceptional Summary" tab in the Original Financial Projections.

272. On 9 June 2011 Esquire received US$1.5m from FOFM's subscription in the loan notes. Of the proceeds $200,000 was applied to pay part of RP&C's outstanding fees from ECG and $400,000 was applied to pay outstanding rent to PSPI.

273. On 9 June 2011 Mr Korat forwarded the Colliers Report to Ms Shah.

274. On 13 June 2011 Mr Beney sent BLME 2010 reporting numbers for ECG's Wellcare portfolio. The attached excel documents comprised profit and loss accounts that contained a line for exceptional items.

275. On 15 June 2011 Mr Beney sent BLME financial information for ECG, which he had discussed with Dr Srinivas, which was stated to be from the Draft 2010 GAAP Accounts. The information provided was:

i) Turnover £123.0 million (2009 - £122.1 million)

ii) Wages £74.8 million (2009 - £72.2 million)

iii) Controllable costs £7.6 million (2009 - £6.9 million)

iv) Fixed costs £11.1 million (2009 - £10.9 million)

v) Contribution (EBITDAR) before exceptional items £29.5 million (2009 - £32.1 million)

276. These figures did not take account of the direct exceptional costs from the 2010 Draft GAAP Accounts. Mr Beney also confirmed that ECG's fixed assets were £294m and that he would arrange a further follow up meeting with Mr Treon so that BLME could get an update on the developments at ECG.

277. On 20 June 2011 RP&C responded to questions from Lloyds as to the timing of receipt of Duet's investment, which was expected to close on 24 June 2011.

278. On 22 June 2011 Mr Borg asked Mr Korat to email the documents to be warranted under the Loan Note Agreement, including the Operating Model dated 8 March 2011, the PPM, the schedule of fee increases, the analysis of beds, the project delivery schedule, the summary of capex and the VDD Report. Mr Borg said he would have "the issuer" agree that these are the agreed documents.

279. Later on 22 June 2011 Mr Borg emailed Mr Treon and Dr Srinivas, forwarding the documents that had been sent by Ms Shah to be warranted under the Loan Note Agreement, saying "Pls confirm these are the agreed docs thanks" and "Pls also confirm this is correct thanks" in respect of the VDD Report. Mr Borg repeated his request for confirmation from Mr Treon and Dr Srinivas on 23 June 2011: "Gentlemen Pls confirm the documents I sent you yesterday are the correct attachments to Duet's note purchase agreement". Mr Treon confirmed that they were the correct versions later that day.

ERED transaction closes and 2010 Accounts signed off

280. On 24 June 2011 by a loan note purchase agreement ERED subscribed for £11m of loan notes issued by Esquire and paid the sum of £11m to Esquire.

281. On 24 June 2011 KLSA circulated a final version of the draft 2010 accounts to Mr Treon.

282. On 26 June 2011 Mr Treon sent these to RP&C and asked RP&C to confirm that they were okay so that they could be executed on Monday 27 June 2011. This included a profit and loss account stated under IFRS in a different form to the Draft 2010 GAAP

Accounts. The draft included the same prior year adjustment for 2009 as in the Draft 2010 GAAP Accounts.

283. The 2010 GAAP Accounts for ECGL were signed on 4 July 2011.

Post transaction correspondence relating to Project Saxon

284. In July 2011 UHY Hacker Young prepared a draft report for Project Saxon.

285. On 1 August 2011 ECG appointed a new CEO, Mr Smith.

286. In August 2011 Mr Korat sought an update on ECG and to establish a forum for regular information exchange. A meeting took place on 12 September 2011 between Dr Srinivas, Mr Borg, Mr Treon, and Duet. Notes of the meeting refer to a discussion over the proposed USI merger, the proposed syndication of the senior debt, proposed changes to the loan notes upon the merger when all other mezzanine investors would convert, and a business update for 2011 covering the resignation of the Finance Director and the appointment of a new management team, other cost savings, and slower occupancy growth. Under the heading "Business update", Duet's notes of the meeting record "occupancy levels in the care homes business are rising slower than expected. However, Anoup believes that the new management team are focussed on this but there will be a six month lag to the original business plan".

287. On 5 October 2011 Mr Korat asked Mr Treon whether the business update discussed at their meeting was available as Duet was keen to get the update on the numbers as they were working on changes to the debt as a result of the merger. A further meeting took place on 11 October 2011, following which Mr Treon emailed Mr Korat, noting that trading information to 30 June 2011 was included in a Pathfinder prospectus for Project Saxon that would be circulated to Duet that week. Mr Treon commented that performance had been adversely affected by the work relating to the pending capital markets transaction. Mr Treon said that fundamentally there was no change in the business plan, which was to complete current refurbishments and extensions, fill the new builds, and focus on the organic growth opportunities in the Lifestyles division.

288. On 18 October 2011 Mr Borg sent Duet the draft Pathfinder prospectus, which stated on p.58 ECGL's audited financial results under IFRS for 2008-2010 and the first 6 months of 2011. This showed an operating profit of £7.9m and a loss of £9.8m before tax for 2010 and a loss before tax of £9.9m for the first 6 months of 2011.

289. On 4 November 2011 Mr Korat sent an email to Mr Borg and Dr Srinivas copied to Mr Treon which said, "We've spent some time reviewing the senior term sheet, pathfinder and response on the senior security questions, and we need to resolve a few important commercial issues" Mr Korat then set out certain issues concerning the terms on which the loan notes would be replicated after Project Saxon and the security to be provided to Duet. Mr Borg addressed these on 7 November 2011.

Duet's requests for 2011 financial information

290. On 12 December 2011 Mr Korat asked Dr Srinivas for the reporting of covenant adherence on a quarterly basis to be provided, noting that the figures to the end of September 2011 should be available. Dr Srinivas replied, noting that Mr Treon hoped

to deliver this shortly. Mr Korat then set out the covenant information he was expecting to see. Mr Korat chased this information on 16 December 2011 and was told that it would be provided shortly. Mr Treon subsequently suggested that he send Mr Korat the figures in the second week of January 2012. Mr Korat sent emails in January 2012 seeking this information and setting a date for a meeting.

291. A meeting was held on 17 January 2012 with Duet and Dr Srinivas and Mr Treon. Ms Shah's typed up notes of the meeting record that Fairfax no longer expected that the proposed IPO would raise £30m of equity; the Banks were now expecting £10m to be raised; Mr Treon provided information in relation to cash shortages in December 2011, further additional funding requests to the Banks and an injection of cash from Nationwide; Mr Treon had noted an expectation that the loan notes covenants would be breached in the interim period until the loan notes converted or there was an equity injection; ECG's occupancy was not as per the original business plan proposed to Duet; and late payments by local authorities meant ECG had not met its wage costs in December 2011.

292. On 2 February 2012 Mr Korat, having reviewed the materials, asked for further information, including an updated spreadsheet in the same format as before, containing actual trading information for 2011, ECG's calculation of covenants, and actual occupancy information for 2011.

293. Duet prepared an "ECG Business Plan Update" on or before 6 February 2012, which included a variance analysis comparing a "Bank plan" against Duet's base case at the time the proposed investment had been underwritten. The analysis noted that the new Bank plan projected turnover in 2013 (£146.5m) that was comparable to what Duet had expected turnover would be in 2011 (£144.2m).

294. Following a chaser from Mr Korat, on 15 February 2012 Mr Treon asked Dr Srinivas to send the financial information that had been sent to Duet previously so that Mr Treon could add in the actuals.

295. On 15 February 2012 Mr Treon sent Dr Srinivas a document that KLSA had prepared, which contained a profit and loss account showing that ECG's EBITDA (after COH) for 2010 had been £1.5m, with an overall loss for the year of £20.2m. Mr Treon asked Dr Srinivas whether it should be sent to Mr Korat.

296. On 21 February 2012 Mr Treon emailed Mr Korat (cc. Dr Srinivas). Mr Treon noted that the proposed merger with USI that was to raise £30m had been delayed; that the Banks had agreed to a new banking platform provided £10m was injected, which RP&C were looking at; and that ECG intended to convert the existing mezzanine debt (apart from Duet) and inject £10m and obtain a new banking platform. Mr Treon promised to send two models: a base case, and a flex case, as well as the 2011 financials.

297. On 21 February 2012 Mr Treon sent Mr Korat a model. The model stated a figure for EBITDA (after COH) for 2010 of £1.57m, with an overall loss for the year of £20.5m. For 2011, the model showed a turnover of £124m and an EBITDA of £1.17m and an overall loss for the year of £21.1m.

298. On 29 February 2012 Mr Korat emailed Mr Treon and Dr Srinivas, attaching a copy of the January Figures. Mr Korat noted that he had questions around the numbers. He

commented: "Broadly we would like to understand how this business plan relates to the previous financials that you have given us. I have attached the financials you gave us at the time we subscribed, and they don't seem to tie up with the 2010 financials in the business plan? Given we subscribed in 2011, I don't understand how these numbers could be different?"

299. Mr Korat also asked whether the audited accounts for ECGL for 2010 had been produced.

300. On 1 March 2012 Mr Treon told Mr Korat that he would send the audited accounts for 2010 and a bridge between 2011 actual and budget. Mr Korat asked to meet the new CFO and CEO and to receive weekly updates from ECG.

301. On 1 March 2012 Mr Treon forwarded Dr Srinivas the January Figures and asked to have a call with Dr Srinivas when he was in front of a screen. Later that day Mr Treon sent Dr Srinivas the audited 2010 accounts and asked to speak with Dr Srinivas before they were sent to Mr Korat. Mr Treon also sent Dr Srinivas a variance analysis (taken from a presentation to Nationwide) explaining variances of actual results for 2011 against a budget, with a comment: "The budget was set on the assumption that the fund raising distractions would be completed early in the year and that that (sic) Government austerity measures would soften, neither of which happened. It also lacked some of the detailed input and buy in from operations managers in the business that one would normally expect." The budget figures were the same as the Re-Revised Financial Projections for 2011 prior to the deduction of depreciation and interest.

302. On 1 March 2012 Mr Treon asked KLSA to compare the 2010 actual performance with the Forecasted Figures together with variances.

303. On 1 March 2012 Duet arranged a meeting with Mr Manson, the new CFO of ECG, and Mr Smith at ECG's offices on 5 March 2012 at 14:00. On 2 March 2012 Duet arranged a meeting with Mr Treon and Dr Srinivas at Duet's offices on 5 March 2012 at 17.30.

304. On 2 March 2012 Ms Shah sent herself an email attaching variance analysis between the actual trading information for 2010 and 2011 received on 21 February 2012 and the trading information that had been provided to Duet before the loan note investment as well as Duet's base case. For 2010 this showed a variance of £11.5m at EBITDA after COH.

305. On 5 March 2012 at 13:43 KLSA sent Mr Korat a document reconciling the variances between the actual results for 2010 and the Forecasted Figures. The variance analysis included reference to £4.6m of "exceptional agency costs". The notes in the document explained that in the Forecasted Figures (i) "in wages, agency costs were removed to arrive at normalised wage costs", and (ii) "under the refurbishment of homes programme and new builds, to arrive at normalised wages, controllable and fixed costs that were over and above the industry norm were removed to arrive at normalised costs used in the forecasts. These homes were either being decamped for refurbishments or for new homes they were in the fill up stage." This was said to amount to a variance of some £2.25m. KLSA also explained that an adjustment for a rent waiver was taken earlier in the Forecasted Figures, explained that depreciation had been higher and

mezzanine interest had been included. KLSA then set out a breakdown of £7.463m of exceptional items (which did not include any amount of wages or agency costs).

306. There was a meeting between Mr Korat, Mr Lattanzio and Ms Shah with Mr Treon on 5 March 2012. I shall make findings about this later. The documents show the following.

   i) On 5 March 2012 at 15:58 Mr Korat emailed Mr Tasker to arrange a call and at 16:02 Mr Treon emailed Mr Korat and Mr Tasker to ask him to call Mr Korat.

   ii) At 16:53 Mr Korat sought to cancel the meeting with Mr Treon and Dr Srinivas scheduled for that day, saying "we need to cancel the 5.30pm meeting today. We are not in a position yet to respond to you".

   iii) Later on 5 March ECG's CEO Ted Smith emailed Mr Korat, copying Mr Lattanzio, Mr Manson, and Lloyds, saying: "I do apologise for having to rush today and look forward to meeting you tomorrow…I'm sure you sensed a degree of tension in the room today – which is why it is important we meet without Anoup being present".

   iv) Later still on 5 March 2012 Mr Korat emailed Mr Walker of Forum (cc. Mr Lattanzio and Ms Shah) to give him a warning ahead of a likely restructuring proposal. Mr Korat wrote: "Trading performance for the company for 2011 was significantly weaker than we originally underwrote, putting it in covenant breach on our debt and causing the senior banks to seek a further equity injection into the company. Having gone through the financial data we have just received we have also discovered that financial information rep'ed to us from the company at the time of the underwriting (including historic data) appears to be materially different to the final audited accounting information we have just received." Mr Korat referred to Mr Treon being at the centre of the issues, and to RP&C having acted as the arranger. Mr Korat said that a new CEO and CFO was in place, and the Banks were asking for a further injection in order to permit them to restructure the senior debt, lower the overall interest costs, and to allow the new management to take forward their business plan. The request was likely to be made of the loan note holders, and Mr Korat had spoken to Nationwide.

307. On 6 March 2012 Duet met ECG's CEO Ted Smith, ECG's CFO David Manson, and Lloyds. On 6 March 2012 Mr Manson provided Duet with ECGL's audited 2010 accounts.

308. On 15 March 2012 Mr Treon left ECG pursuant to a compromise agreement.

Further investment by ERED

309. Following a meeting with Lloyds, on 21 March 2012 Mr Smith wrote to Mr Korat and other mezzanine lenders, commenting (inter alia): "In parallel to this the on-going conversation about an injection of £20m must be resolved. The Banks have collectively made it clear that if the CULS do not wish to participate on a 50/50 basis they are ready to execute their contingency plans…".

310. On 20 April 2012 Mr Korat wrote to Nationwide on the proposed restructuring of ECG's debt "I don't understand your logic. The only way you stay in this transaction is if there is an agreed deal, so comparing your old waterfall doesn't make sense, as that is an alternative that doesn't exist. If (as you say) you are indifferent, the better alternative for you is surely to stay in with some hope, rather than guarantee a zero and be the cause of this company going into administration which is the effect of your current stance. At least in our proposal you have the hope of gaining back money if the performance is better, or the multiple is better etc..."

311. On 29 May 2012 ERED's IC met to consider an IC Memo dated May 2012 ("the Follow-On IC Memo"). The Memo sought approval for a further investment of £4.25m in ECG as part of the restructure of the existing loan note investment. I shall return to this document in more detail below.

312. On 29 May 2012 the IC resolved that the proposed further investment of £4.25m complied with the Fund's Investment Policy and Restrictions. Mr Lattanzio voted in favour. Mr Walker of Forum voted in favour on 13 June 2012.

313. On 15 June 2012 Duet confirmed that the second investment fitted "the parameters of the Fund" and formally recommended the further investment to ERED Cayman.

314. On 4 July 2012 ERED subscribed for £4.25m of loan notes issued by Esquire and paid that sum to Esquire on that date. Under the Junior CULs (*sc.* convertible unsecured loan stock) Facility Agreement dated 4 July 2012 interest due to ERED between the February 2012 interest payment and 4 July 2012 in the sum of £376,750 was deferred and subsequently rolled together with the initial £11,000,000 principal invested into the "ERED Facility Commitment" of £11,376,750 under the agreement.

315. ERED received some interest payments from ECG from 28 July 2011 to 3 January 2013 as follows: £101,750 on 28 July 2011; £82,500 on 30 August 2011; £82,500 on 5 October 2011; £82,500 on 1 November 2011; £82,500 on 9 December 2011; £82,500 on 31 December 2011; £82,500 on 30 January 2012; £82,500 on 2 March 2012 and £37,529 on 3 January 2013.

316. On 16 April 2014, European Care & Lifestyles (UK) Ltd (ECL) was placed into administration.

317. By an assignment of 13 October 2017 ERED unconditionally and irrevocably assigned all claims of whatsoever nature arising out of ERED's investment in the loan notes issued by Esquire on 24 June 2011 and 4 July 2012 to ERED Cayman.

318. Notice of the assignment was given to Mr Treon, RP&C and Dr Srinivas on 16 October 2017.

319. The Claim Form was issued on 16 October 2017.

(d) Approach to the evidence and the witnesses

320. The disputed events happened ten or more years ago. It is a commonplace that hindsight and interest can have a real influence on the testimony of witnesses, particularly where so much time has elapsed since the relevant events. Memory is malleable and

susceptible to the operations of imagination, wishful thinking and personal interest. It bends and distorts under the strains and biases inherent in the forensic process. These points are well explained in *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403, 431 and *Gestmin SGMs Shah SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) at [15]-[22]. Robert Goff LJ famously said in *The Ocean Frost* [1985] 1 Lloyds Rep 1 at p. 57:

> "Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."

321. So the court's approach to the evidence should be recursive, with each such strand of evidence and the inherent probabilities operating as a cross-check for the others. I have followed this approach when making findings of fact. I will assess the evidence of the witnesses on the key disputed points in some detail later and at this stage restrict myself to general comments.

322. Mr Korat, had by 2011 had over 15 years' experience in real estate and capital markets. He led the investment for Duet. Mr Korat recognised that his recollection was largely based on the documents. When asked about the details he often asked to be taken back to his witness statements and I reached the view that he had little independent recollection of the details. There were indeed some events about which his account was demonstrably wrong and I concluded that his memory had been coloured or shaped by a general sense of grievance. He also had an obvious interest in seeking to throw the blame for the failed investment onto others. This led him at times to misremember or misconstrue events and documents in a way which now suits the claimant's case. I concluded that I should treat his evidence about some of the details of the history with caution where it was not supported by the documents or admitted facts. But I also thought that overall he had reasonably good memory of the important landmarks of the chronology. He was also able to describe the usual approach of Duet to investments and the processes it normally followed, which I found of some assistance.

323. Mr Lattanzio had also, by 2011, had over 15 years' experience in real estate and debt capital investing. In giving evidence he too was heavily dependent on the documents. There were some clear errors in his recollection. He gave evidence in his witness statement for example that Dr Srinivas was at the meeting in March 2012 at which Mr Lattanzio says he accused Mr Treon of having lied to Duet. He said that he had a clear recollection of the meeting. The documents show that Dr Srinivas was not in fact there. On this point, and some others, Mr Lattanzio's recollection has been coloured or modified by his sense of grievance. He too has an interest in blaming the defendants for the failed investment. I concluded that I should treat his evidence about specific events with some caution. However he too was able to give helpful evidence on Duet's usual approach to investments and its due diligence processes, which I found of some help.

324. Ms Shah was a reliable and straightforward witness who acknowledged the limitation of her memory. She was involved in the analysis of the information provided by ECG,

particularly the operating models provided in February and March 2011. I concluded that she did her best to assist the court, but that again her independent memory of the detail was fairly limited.

325. Mr Jerry Ahmed was a straightforward and reliable witness. He gave his evidence by video link. Again he properly accepted the limits of his memory.

326. Mr Treon gave evidence over several days. He was the founder of ECG and remained fervent about ECG's business, even nine years after leaving it. He had been immersed in the business and, at the relevant times, intimately understood all there was to know about its finances. In many of his answers he called it "his" business and he appears to have seen it as his creation. Mr Treon did not have a perfect recollection of some of the details about the numbers. For instance he could not recall just how the finance team had calculated the exceptional items figures in the Original Financial Projections. As I shall explain below the documentary record in that regard was not complete.

327. Mr Treon was a very poor witness. He gave oral evidence about a number of conversations he claims to have had with non-witnesses (such as Mr Moore of Duet or Sir John Hanson) which I concluded he had invented or imagined. He also abandoned a critical factual allegation of his pleaded case, namely, that the Projected Figures (for 2011-13) had been normalised. I reached the view that Mr Treon was often willing to say whatever was necessary to defend his case, without much regard for its truth or accuracy. He was also inclined to make long speeches rather than answering the question asked. My conclusion that Mr Treon gave inaccurate or false evidence on some points does not of itself mean that I should reject everything he said; but I concluded that I should approach his testimony, unless corroborated or supported by other evidence, with real caution.

328. Mr Treon also called Jeremy Tasker of Colliers. As already explained, he met Duet's representatives as part of the due diligence exercise. He was a straightforward witness. He frankly accepted that he had very little recollection of his meeting with Duet.

329. Dr Srinivas was another unimpressive witness. He gave contradictory evidence about some of the key events. His counsel, no doubt recognising this, submitted that he was suggestible and that he changed his evidence depending on who had asked the questions. I do not think that is an adequate explanation of the inconsistences in his evidence. The reason he struggled to maintain a consistent position was that much of his evidence was at odds with the documents or was the product of imagination or wishful thinking. Counsel for Dr Srinivas also submitted that some of the cross-examination was hostile and that Dr Srinivas had not coped well with it. I disagree. Dr Srinivas struggled with some of the questions because of their substance, rather than the way they were put. I concluded that Dr Srinivas invented or imagined conversations which had not taken place, in some cases having heard Mr Treon give similar evidence a day or so before him. My conclusion that his evidence was false or inaccurate on some points does not of itself mean that I should reject everything Dr Srinivas said; but I approach his evidence, unless supported by other evidence, with great care.

330. The second and third defendants also called Richard Borg, RP&C general counsel, who was involved in the legal side of the loan note issue and finalisation of the LNA on behalf of Esquire. He was a straightforward and reliable witness.

331. The parties made (what have become very familiar, even routine) comments about the absence of certain witnesses. I have followed the well-known principles concerning adverse inferences and shall not repeat them here. I was unimpressed by the arguments that adverse inferences should be drawn and will comment on them only where I consider it necessary to do so below.

Expert evidence

332. The parties adduced expert evidence about accountancy principles and practice. The claimant called Andrew Conti and the defendants called Chris Osborne.

333. Both experts were very well qualified to assist the court. There was a large measure of agreement between them, reflected in their helpful joint statement. Both gave oral evidence. Each was moderate and measured and did their best to assist the court.

The documentary record

334. Counsel for the defendants emphasised that the documentary record is incomplete. The ECG companies are not parties and they entered administration in 2014. The claimant managed to obtain some documents from the administrators but they have not had access to the electronic records or the ability to perform searches. Mr Treon left ECG in March 2012 and has not had access to most of the documents until disclosure was given in these proceedings (in 2020). The second and third defendants were able to disclose their own documents, but those do not include ECG's internal communications. There are therefore likely to be missing documents sent or received by Mr Treon which were not addressed either to Duet or RP&C.

335. The defendants submitted that there would probably have been communications (now missing) showing, for instance, the calculation of the exceptional wage costs, and the way they were allocated to certain care homes. They say that a large number of ECG employees were involved in making those calculations and that they must have had good reason for doing so at the time. The problem is that the documents which show what happened are missing.

336. The defendants also submitted that there must have been further communications with the various third party investors referred to in the earlier chronological survey and that the documentary record before the court is again incomplete. They say that the court should therefore proceed on this territory cautiously and should not fall into the trap of supposing that the absence of evidence is evidence of absence.

337. The second and third defendants also submitted that the way documents have been disclosed could give a false impression of the extent and significance of the second and third defendants' involvement in the events. They say that a fuller documentary record would have shown that ECG's own employees were responsible for the production of financial models and other information.

338. I shall make due allowance for the gaps in the corpus of documents when making findings of fact. This is not however a case where one of the parties is responsible for the missing documents. The claimant has taken steps to obtain ECG's documents from the administrators and cannot be blamed if the record is incomplete. The court is often

required to make findings doing the best it can with the available evidence, and that is what I shall do.

339. Counsel for the defendants also noted that there appear to have been a number of meetings and conversations the contents of which are not recorded in any document. They also pointed out that Mr Korat explained in evidence that the Duet team sat together and that they would usually discuss their thoughts and analysis of investments orally rather than by email. These are again aspects of the evidentiary materials which I shall bear in mind when making findings of fact.

(e) Principles of the law of deceit and conspiracy

340. There was no material dispute between the parties about the law of deceit. All counsel referred to Jacobs J's helpful survey of the law in *Vald Nielsen Holding A/S v Baldorino* [2019] EWHC 1926 (Comm) (*"Vald Nielsen*") at [130] to [159], from which I shall borrow.

Elements of deceit

341. The tort of deceit requires the claimant to show that: (i) the defendants made false representations to the claimant; (ii) the defendants knew the representations to be false, or had no belief in their truth, or were reckless as to whether they were true or false; (iii) the defendants intended the claimant to rely on the representations; (iv) the claimant did rely on the representations; and (v) as a result the claimant has suffered loss and damage. *Vald Nielsen* at [131].

Representation

342. A representation is a statement of fact made by the representor to the representee on which the representee is intended and entitled to rely as a positive assertion that the fact is true. Determining whether any and if so what representation was made by a statement requires construing the statement in the context in which it was made, and interpreting the statement objectively according to the impact it might be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee. It is essential in any case of fraud for the dishonest representation to be clearly identified. *Vald Nielsen* at [132].

343. In order to be actionable a representation must be as to a matter of fact. A statement of opinion is therefore not in itself actionable. However: (a) a statement of opinion is invariably regarded as incorporating an assertion that the maker does actually hold that opinion; hence the expression of an opinion not honestly entertained and intended to be acted upon amounts to fraud; and (b) if a defendant says he expects an event to take place when he does not, he makes an untrue statement of fact: *Vald Nielson* at [133]

344. An express statement may impliedly represent something. For example, a statement which is literally true may nevertheless involve a misrepresentation because of matters which the representor omits to mention: *Vald Nielsen* at [135].

345. In relation to implied representations the court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context. That involves considering whether a reasonable representee in

the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged: *Vald Nielsen* at [136]. A "helpful test" for implied representations is "whether a reasonable representee would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it". But this is not to "water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied": *Vald Nielson* at [136].

346. It is necessary for the statement relied on to have the character of a statement on which the representee was intended, and entitled, to rely: *Vald Nielson* at [138].

347. It is also necessary that the representor should understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary "to show that the representor intended his statement to be understood by the representee in the sense in which it was false": per Morritt LJ in *Goose v Wilson Sandford & Co* [2001] Lloyd's Rep PN 189 at [41].

348. The courts have noted that "a cocktail of truth, falsity and evasion is a more powerful instrument of deception than undiluted falsehood. It is also difficult to detect": *Vald Nielson* at [139].

349. Different statements at different times must frequently be read or construed together in order to understand their combined effect as a representation: *Vald Nielsen* at [142].

350. Where a person has made a misrepresentation it is open to him to correct it before it is acted on but it is not enough to show that the other party could have discovered the truth. The correction must be made fairly and openly: *Vald Nielsen* at [143].

351. In *Cassa di Risparimo della Republica di San Marino SpA v Barclays Bank Ltd* [2011] 1 CLC 701, Hamblen J addressed the principles applicable to implied representations in a deceit case at [220]-[221] (omitting references and quotation marks):

> "In relation to implied representations the court has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context. That involves considering whether a reasonable representee in the position and with the known characteristics of the actual representee would reasonably have understood that an implied representation was being made and being made substantially in the terms or to the effect alleged.
>
> "In a deceit case it is also necessary that the representor should understand that he is making the implied representation and that it had the misleading sense alleged. A person cannot make a fraudulent statement unless he is aware that he is making that statement. To establish liability in deceit it is necessary to show that the representor intended his statement to be understood by the representee in the sense in which it was false."

Passing on information

352. Where a person passes on information which has been supplied to him he may simply pass it on as information or he may adopt it as his own statement. In *FoodCo UK LLF (t/a Muffin Break) v Henry Boot Development Ltd* [2010] EWHC 358 (Ch) ("*Muffin Break*") Lewison J said at [218],

> "If, in the course of negotiations, a person passes on information which has been supplied to him, he may simply pass it on as information, or he may adopt it as his own statement of fact. If he passes it on merely as information, he may be guilty of a misrepresentation if he does not fairly set out the information (e.g. where he passes on parts of a surveyor's report but omits qualifications to the surveyor's opinion). But otherwise he does not adopt it as his own. He may also make implicit representations by passing on the information. Thus where the audited accounts of a company were passed to potential buyers of the company, there was an implied representation by the person who passed on the accounts that the accounts had been prepared honestly; and that he was not aware of anything that prevented them from giving a true and fair view of the company's financial position: *MAN Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) (§79). Again, it all depends on context: there is no absolute rule of law."

Continuing representations

353. The tort of deceit is complete only when the representation is acted on. There may be a gap between the making of a representation and the representee acting on it. The question arises whether a representation continues to have effect at the moment when it is acted on. This is a matter of interpretation of the representation, which might be limited to a statement of the facts as they stand at the time the statement is made. However a representation which is made during the course of negotiations with a view to inducing the representee to enter into the contract will generally be characterised as continuing to the point where the contract is entered (Cartwright on Misrepresentation, Mistake and Non-Disclosure (5th ed.) at [3-09]).

354. The general principle is that a representation will be regarded as continuing until fully acted upon: *Concept Oil Services Ltd v EN-GIN Group LLP* [2013] EWHC 1897 (Comm) at [35] (per Flaux J).

355. In *Muffin Break* Lewison J said at [212],

> "…in my judgment, there is no duty to keep the counterparty constantly updated, still less to keep him informed about the ins and outs of negotiations with third parties. The duty is to communicate a change of circumstance which the representor knows has falsified a previous representation where the falsity exists at the date when the contract is concluded. What matters is the state of affairs at the date when the contract is concluded, and the representation is acted upon…"

356. In a case of deceit the question is whether the representor is fraudulent at the time of the contract. For this to be established the representee will have to show not only that the representee knew of the relevant change (he has discovered the change in the facts, or he has discovered that he already made a false statement) but also that his knowledge is sufficient to make him fraudulent: he must realise the significance of the change for

the statement he has already made: Cartwright [5-17]. Lewison J approved this passage in *Muffin Break* at [214].

Falsity

357. The representation must be false. A representation may be true without being entirely correct, provided that it is substantially correct and the difference between what is represented and what is actually correct would not have been likely to induce a reasonable person in the position of the claimant to enter into the contracts: *Vald Nielsen* at [144].

The mental element

358. The mental element required for deceit was stated by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337:

> "First, in order to sustain an action of deceit, there must be proof of fraud and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth."

359. As to recklessness even if the representor may have had no knowledge of its falsehood, he will still be responsible if he had no belief in its truth and made it "not caring whether it was true or false". *Vald Nielson* at [146].

360. The essence of the tort is fraud: and the core issue in a claim is whether the representee can show that the representor did not honestly believe the representation. He was fraudulent if he knew it was false; or suspected it might not be true; or was reckless as to its truth. But if he had a positive, honest belief in the truth of the statement, however unreasonable that belief might have been, he is not fraudulent and so cannot be held liable in deceit: Cartwright [5-14].

361. It is not necessary that the maker of the statement was "dishonest" as that word is used in the criminal law. The defendant's motive in making the representation is irrelevant. If fraud be established it is immaterial that there was no intention to cheat or injure the person to whom the false statement was made. What is required is dishonest knowledge, in the sense of an absence of belief in truth: *Vald Nielson* at [147]. This is the sense in which the term "dishonest" is used in this branch of the law.

362. Dishonesty must not be watered down into something akin to negligence, however gross. But the unreasonableness of the belief may be evidence from which fraud may be inferred: *Vald Nielson* at [148].

363. The test for the defendant's state of mind is subjective. An attempt to argue that there could be liability in deceit even in the absence of subjective knowledge or recklessness on the basis that the defendant's conduct was such that any reasonable and honest person

would regard it as dishonest was rejected in *Glossop Cartons & Print Ltd v Contact (Print & Packaging) Ltd* [2019] EWHC 2314 (Ch).

Intention

364. Actionable fraud involves an intention on the part of the representor to induce the representee to act on the statement made: *Vald Nielson* at [150]

365. To satisfy this requirement it is enough to show that the representor intended to deceive the representee, with intent: that is to say, that it shall be acted upon by him. It is only necessary that there should be an intention that the representation should be acted upon, not that the representor should intend the specific action taken by the representee. *Vald Nielson* at [151].

Indirect representations

366. A statement made to someone known to be acting as an agent for the claimant is sufficient to give rise to a claim by the claimant. But in any event, a representation made to a third party with intent that it be passed on to the claimant to be acted on by them will equally suffice. All that is required for these purposes is that the representation be intended, in one way or another, to reach the claimant in order to induce them to act on it. Nor is it even necessary that the defendant know precisely for who the statement is intended, provided he intends it to be relied on by someone in the claimant's position: *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)* [1998] 1 Lloyd's Rep. 684 at 696; Clerk & Lindsell at 17.32.

Inducement

367. A representee must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it, and that, having that understanding, he relied on it: *Vald Nielson* at [152].

368. The representee must actually be aware of the representation. It must be actively present in his mind: *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm) at [102].

369. In a case of deceit there is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent misrepresentation intended to cause him to enter the contract and that the inference will be "very difficult to rebut": *Vald Nielson* at [153]. However, it remains the case that the "tribunal of fact has to make up its mind on the question whether the representee was induced by the representation on the basis of all the evidence available to it": *BV Nederlandse Industrie v Rembrandt Enterprises Inc* [2019] EWCA Civ 596/at [25] and [43].

370. The onus of proof is on the claimant to prove inducement. However, beyond the benefit of the evidential presumption, the claimant only needs to show that the misrepresentation was "actively present in his mind" when he made the decision to enter into the transaction: *Vald Nielson* at [154]. The question is whether the state of the claimant's mind is disturbed by the representation and such disturbance was part of the cause of what he did (*ibid*.).

371. It is sufficient for the misrepresentation to be an inducing cause of the claimant entering into the transaction on the terms that he did. It is not necessary for it to be the sole cause: *Vald Nielson* at [155]. The test is whether the representation was a matter of some significance in the decision to enter the contract: *Vald Nielsen* at [157].

372. It is no answer to a claim in fraud that the representee could have discovered the falsity of the statement by exercising reasonable care and skill (e.g., by inspecting books or records available to him): *Vald Nielson* at [158]. Nor can the representor escape liability (or argue that the representee was not induced by the false statement) simply because the representee's agent was in receipt of the truthful information to correct a previous misrepresentation (*ibid*.).

373. Further, if the making of the representation in fact influenced the claimant, it is not open to the defendant to argue that the claimant might have acted in the same way had the claimant been told the truth. However, the claimant can adduce evidence as to what they would have done if they had been told the truth in order to establish inducement: *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm), at [105]-[106] , where Flaux J said that Hobhouse LJ in *Downs v Chappell* [1997] 1 W.L.R. 426 was seeking "to protect the victim of the fraud from the argument by the fraudster that the fraud had not induced the victim, because he would have done the same thing even without the fraud. Hobhouse LJ was in effect saying the fraudster cannot be heard to say, even if I had told you the truth, you would still have acted as you did. What he was not saying was that, if the claimant demonstrates, by cogent evidence, that it would not have acted as it did if it had known the true position, that evidence cannot be relied upon by the claimant as demonstrating inducement by the fraudulent misrepresentations".

Causation and loss

374. The representee must prove that it has suffered loss. If it would have acted in the same way even in the absence of the fraud the claim will fail: *Vald Nielson* at [159].

Standard of proof

375. The standard of proof in a case of fraud is the balance of probabilities. Whilst the court considers what is alleged when deciding on inherent probability, this is an aspect of common sense, not the standard of proof: *Vald Nielsen* at [149]. To similar effect see also *Bank St Petersburg PJSC v Akrhangelsky* [2020] EWCA Civ 408 at [44]-[47] and [117]-[123].

Conspiracy/Common Design

376. Where a person has not made a fraudulent misrepresentation directly or through an agent he can, nevertheless, be liable as a joint tortfeasor with a person who has committed deceit if he assisted the principal tortfeasor or if he procured or induced the commission of the deceit: see Cartwright at [5-22].

377. The test for liability as a joint tortfeasor is set out in *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229, per Lord Toulson JSC (at [21]):

> "To establish accessory liability in tort it is not enough to show that D did acts which facilitated P's commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further."

378. In *Vestergaard Fandsen A/S/ v Bestnes Europe Ltd* [2013] 4 All ER 781, Lord Neuberger stated as follows (at [34]):

> "As Lord Sumption pointed out in argument, in order for a defendant to be party to a common design, she must share with the other party, or parties, to the design, each of the features of the design which make it wrongful. If, and only if, all those features are shared, the fact that some parties to the common design did only some of the relevant acts, while others did only some other relevant acts, will not stop them all from being jointly liable…"

379. The test for unlawful means conspiracy is set out in *Kuwait Oil Tanker Co SAK v Al Bader* [2002] 2 All ER (Comm) 271 (Court of Appeal):

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

380. Of the various words used to describe a conspiracy "combination" has been preferred to "agreement". It is a rare case where there is evidence of an agreement and therefore it will be necessary to scrutinise the acts relied on in order to see what inferences can be drawn as to the existence or otherwise of the alleged combination: see *Kuwait Oil Tanker*.

381. Deceit may constitute the necessary unlawful action: *London Allied Holding Limited v Lee and ors* [2007] EWHC 2061 (Ch), per Etherton J at [252]. But in order to establish a conspiracy to commit deceit it is necessary to establish that deceit was committed and that the deceit was part of a "concerted action taken pursuant to the agreement": *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, per Lord Diplock at 188; Clerk & Lindsell on Torts, 23rd ed, [23-100].

(f) Analysis and detailed findings on the claims

382. The claimant alleges that there were four groups of representations, which it says were fraudulent. In the Particulars of Claim the claimant relied on a large number of representations. However by closing speeches at trial these had been distilled down to the following representations:

    i) an implied representation that the presentation of the Forecasted Figures (i.e. the 2010 numbers) contained in the January Figures (and repeated in the EBITDA bridge on 7, 15 and 16 February 2011) was not materially inaccurate or misleading (called for convenience "the normalisation claims");

ii) an implied representation that the 2010 figures (repeated on 7, 15 and 16 February 2011) were current ("the outdated 2010 figures claims");

iii) an express or implied representation that the Projected Figures (for 2011-2013) contained in the documents and models provided to Duet "were ECG's current and only expectations of its likely financial performance for the years 2011-2013". This is said to have been represented impliedly on 7 and 15 February 2011 in respect of the 7 February pdf and on 18 and 24 February and 18 March 2011 in respect of the models that were provided; and expressly in the 18 February 2011 letter from RP&C ("the revised projections claims");

iv) an express representation by Mr Treon on or about 14 January 2011 that ECG was in compliance with its banking covenants ("the bank covenant claims"); and

v) a series of representations in the LNA ("the LNA claims").

383. Counsel for the defendants observed that the claimant has previously alleged a large number of other implied representations. By closing speeches these were not pursued and I shall not address this further.

384. The claimant alleges that the representations were continuing ones which were therefore capable of becoming false by changing circumstances if uncorrected by the defendants.

385. The claimant alleges that Mr Treon is liable for each of these categories of representation. As to groups (i) to (iv) these were express or implied representations made to Duet. As to the representations made in the LNA, the claimant contends that Mr Treon caused Esquire to make representations to ERED which he knew were false.

386. By closing speeches at the trial the claimant accepted that it makes no claim against Dr Srinivas for misrepresentation under the bank covenant claims, or for the representations in the LNA.

387. However the claimant maintains a claim of conspiracy against Mr Treon and Dr Srinivas. It claims that they combined and agreed to provide false information to Duet. It claims that all of the representations were made pursuant to that combination.

388. The claimant claims against RP&C as vicariously liable for the wrongdoing of Dr Srinivas. It does not allege that others at RP&C were wrongdoers.

389. RP&C denies that Dr Srinivas is liable of any wrongdoing but accepts that it would be vicariously liable if Dr Srinivas was.

390. In this section of the judgment I shall analyse the various elements of the claims. I have already set out the uncontested facts. In this section I shall make further findings of fact.

(f)(i) The normalisation claims

Overview

391. The claimant's complaint concerns the figures for 2010 provided in the January Figures (i.e. the Forecasted Figures) and repeated in the 7 February pdf and the backup excel

document provided on 15 and 16 February 2011. The claimant says that Mr Treon and Dr Srinivas represented that the January Figures were accurate and not misleading; but failed to explain that a significant element of the staffing costs (£4.25m) for 2010 had been removed from wages and therefore excluded from the calculation of the profits. The claimant says that this undisclosed treatment of material staffing costs rendered the information misleading and inaccurate.

392. Mr Treon says (in outline) that he explained to Mr Korat the basis on which the January Figures had been prepared so that there was nothing misleading about them. He says in any event that he believed that Duet understood the normalisation of the numbers. He also says that, when read with the surrounding documents, there was nothing misleading about the presentation of the January Figures. He also denies that Duet or the claimant relied on the 2010 numbers.

393. Dr Srinivas denies that he made any representation about the January Figures. He says that Mr Treon told him that Mr Korat knew about the normalisation of the figures. He also relies on the other defences raised by Mr Treon.

394. It is convenient to consider the normalisation claims against the two groups of defendants separately, starting with the claims against Mr Treon.

Did Mr Treon make a representation?

395. As already explained, the January Figures were provided under cover of the email from Mr Amlani to Mr Korat on 19 January 2011.

396. The claimant alleges that in providing and repeating the Forecasted Figures Mr Treon impliedly represented that the presentation of the Forecasted Figures were not materially inaccurate or misleading. Mr Treon admits that he made that representation.

Was the representation false?

397. The Forecasted Figures showed EBITDA of £13.1m for 2010 (after the deduction of "wages" of £72.5m) and a figure of £272,000 for profit before mezzanine interest. The claimant alleges that the presentation of the figures was inaccurate or misleading. It complains about the removal of c.£4.25m of staffing costs, which were recurring operating costs, from the wages. It submits that any reasonable reader of the document would think (without being told anything more) that the figure of £72.5m for "wages" included all the wages for 2010. There was nothing in the numbers to suggest that ECG had incurred some wages which were not included in that figure. Equally, the claimant says, a reader would think (without more) that the "Profit before Mezz Interst" represented the difference between the turnover and all of the costs other than mezzanine interest.

398. The claimant says that this impression was inaccurate and misleading as ECG had in fact incurred staffing (wages or agency) costs in 2010 of some £4.2m over and above the stated £72.5m. They were shown in the "exceptionals" tab in the financial model from which the January Figures were derived but not in the January Figures.

399. Mr Treon accepted that taken on its own, and without an explanation being given to Duet, the presentation of the "normalised" information would have been misleading.

He said however that all parties knew that there were exceptional costs relating to wages for homes due to the reorganisation and that because it was a material item he had to point it out to them.

400. Mr Treon's case was that the Forecasted numbers for 2010 in the January Figures were "normalised" (by treating some of the wages as "exceptional") so that 2010 would be a proper benchmark for the Projected Figures for 2011-13. Mr Treon's pleaded case and evidence was that he explained this to Mr Korat.

401. Mr Treon indeed said that wherever "normalised" figures were presented to potential investors he made sure that they were made fully aware of the accounting treatment of part of the wage costs.

402. To put Mr Treon's evidence into context it is necessary to say something more about the treatment of these costs in ECG's management accounts.

403. Mr Treon explained in his evidence that for newly built and refurbished homes there was a delay between the homes being ready and the beds being filled up. ECG had to staff the homes before they were full and this meant in effect that they would be overstaffed. The proportion of staffing costs to turnover for such homes would therefore be higher than normal. If the full staff costs for 2009 and 2010 had been included they would therefore have represented a higher percentage of turnover than under normal trading conditions. Mr Treon said that this would have led anyone making a comparison with later periods to ask why the ratio of staffing costs in those periods had fallen compared with 2009/10.

404. Mr Treon explained that he and management therefore decided to treat a proportion of the staffing costs as exceptional and bring that part in below EBITDA in the management accounts. His pleaded case and evidence was that they treated as exceptional (a) 50% of total agency costs incurred by ECG and (b) where a home was a new build or had undergone refurbishment, any amount of wages over 57% of the turnover of that home.

405. Mr Treon's case was that such a normalisation process had been followed in the 2009 audited accounts and the Interim Accounts for Q1 2010 (both of which were provided to Duet).

406. In the 2009 Accounts there was an exceptional items line (appearing below EBITDA) of c.£3m. A note said, "Exceptional Items [relates to expenses incurred on new builds and homes planned for extensions and refurbishment]" (square brackets in original).

407. In the Interim Accounts there was an exceptional items line (appearing below EBITDA) of £906,000. There was no relevant narrative explanation.

408. It was not clear on the evidence before the court precisely how much of the £3m figure in the 2009 accounts or the £906,000 figure in the Interim Accounts was attributable to staffing costs (as opposed to such matters as professional fees). This is part of the case where there are gaps in the documentary record. I find that both figures included (at least) a material amount of staffing costs.

409. In the internal ECG models from which the January Figures were derived, there was a similar process of treating some of the staffing costs as "exceptional". As explained in the chronological section of this judgment, by 24 November 2010 ECG had deducted about £4.2m from the staffing costs for 2010: this was shown in the "exceptionals" tab in the Original Financial Projections. Mr Treon explained that this was regarded as a "normalisation process". This treatment was explained to FTI (as shown by FTI's comments on the point p.8 of the FTI December 2010 report: see further below).

410. It was common ground between the experts that, on the information available to them, treating part of the wages (which are operating costs) as "exceptional" was contrary to UK GAAP. The only accounting convention of which they were aware defining "exceptional items" was FRS3 under UK GAAP. Moreover, even if they could have been treated as "exceptional" within the accounting guidance (which neither expert supported) the figures should have been included in the relevant line item of operating costs (viz., wages), but been accompanied by an explanatory note. They should not have appeared below EBITDA.

411. It was however also common ground between the experts that UK GAAP does not apply to management accounts, which may be prepared in the form management considers most helpful for its own purposes.

412. Moreover I have found that the exceptional items in the 2009 accounts, which were audited by KLSA, included at least a material amount of staffing costs. In those accounts KLSA approved a treatment which treated such costs as exceptional and appearing below EBITDA. Mr Treon said that he believed that this treatment was in accordance with UK GAAP and I find that he had that belief.

413. The claimant argued that the draft FTI report of December 2010 showed that FTI did not agree with the treatment of any part of the wages as exceptional items and that Mr Treon should have accepted their views. FTI recategorized £2.9m as "wages" (on p. 8 of the report). They also referred in a separate note to £1.3m of "agency costs" and said that these too should be included in operating costs, but in the restated figures FTI continued to include this element in "exceptional costs". The claimant argues that Mr Treon should have realised from the FTI report that the treatment of the £4.2m of staffing costs was wrong.

414. Mr Treon said in evidence that he believed that there were permissible differences of view between accountants and that he continued to believe that this treatment of some of the staffing costs in the management accounts was justified. As already observed, he thought that KLSA had endorsed the approach. I find as a fact that Mr Treon continued to believe that management could properly treat part of the wages and agency costs in this way in the management accounts.

415. The treatment of some costs as exceptional had also been addressed in the VDD Report. Deloitte explained that in the YTD July 2009 accounts agency costs of £917,000 had been treated as exceptional, being c.57% of the total agency costs incurred of £1.6m. (Deloitte in fact referred to them as "exceptional" or "extraordinary" interchangeably. As the experts explained, these are different accounting concepts under GAAP, but nothing turns on the difference for present purposes.) Deloitte explained that c. £487,000 related to the Pirton Grange home, which had been undergoing refurbishment during the year. Apart from this they had not seen detailed support for the exceptional

costs. The VDD Report said nothing about wage, as opposed to agency, costs. Moreover the treatment (a deduction of 57% of total agency costs) is different from the approach taken in the Original Financial Projections in November 2010.

416. The claimant contended that the VDD Report undermined management's treatment of staffing costs as exceptional and that Mr Treon knew that. I find that the VDD Report was equivocal on the point. It suggested that a proper justification was required but did not suggest that the practice of treating some staffing costs as exceptional was wrong in principle. I do not think it likely that Mr Treon read the report as casting doubt on the treatment taken by ECG in its management accounts.

417. The claimant also submitted that the exceptional items in the 2010 management accounts were not arrived at by a genuine process, but were contrived, in order to flatter the figures. They pointed to changes in the overall number for exceptional wages and anomalies in the way some of the homes were treated. I have referred to some of these in the chronological survey. Mr Treon said that there had been a genuine process of calculation and that a number of accounting staff had been involved. He said that he could not now remember exactly how the calculation had been done and that this was an area of the case where he was hampered by gaps in the documentary record. He also pointed out that a large number of employees (including accountants) was involved, and that it is unlikely they were all implicated in massaging the numbers. The claimant has not satisfied me that the figure for exceptional wages was a complete contrivance. I accept Mr Treon's evidence that there was a rationale for the figure, used by management.

418. I therefore find that Mr Treon believed in 2010 and 2011 that the treatment of some of the costs as exceptional was an acceptable approach in ECG's management accounts; and that the amount treated as exceptional in the Original Financial Projections was calculated by management.

419. But the treatment of staffing costs in the management accounts is one thing. The presentation of "normalised" financial information to third parties is another. In my judgment, furnishing such "normalised" figures to third parties without a proper explanation of how they had been prepared would have been misleading. I accept the claimant's submission that any recipient of the Forecasted Figures would (without more information) suppose that all of the staffing costs incurred in 2010 (which were operating costs of the business of a recurring nature) had been included within the "wages" figure of £72.5m and that the final profit figure (expressed as "profit before mezz interest") was reached after the deduction of all staffing costs.

420. Counsel for Mr Treon submitted that this amounted to an allegation that the numbers accorded with generally accepted accounting principles. I do not agree. I consider that any reasonable reader of the numbers would have assumed (unless it was otherwise flagged up) that the figure for "wages" included all staffing costs; and that the bottom line figure represented the profits of the business after the deduction of all the costs of the business.

421. As already explained, Mr Treon in fact accepted that presenting the normalised information in the Forecasted Figures for 2010 without flagging that some of the staffing costs had been taken out (as "exceptional items") would have been misleading. He accepted that £4.2m was a material amount. His answer to the claim was that he

explained the treatment to Mr Korat and that Mr Korat understood that the numbers would be normalised.

422. In more detail, Mr Treon said that at some point before the email of 19 January 2011 he spoke to Mr Korat and explained that, owing to new builds and refurbishments, the 2010 numbers would be normalised by excluding some of the staffing costs. He said that Mr Korat actually asked for the 2010 numbers to be normalised in this way, so as to enable a proper comparison to be made with 2011 – 2013.

423. Mr Korat says that he did not discuss normalisation or exceptional items with Mr Treon and that he never realised that the numbers excluded part of the staffing costs. I turn to consider this crucial dispute of fact.

424. The starting point in relation to this issue is the meeting of 21 October 2010 concerning the Kler Portfolio.

425. I find that Mr Korat was aware from his meeting with Mr Treon on 21 October 2010 that the new build and refurbishment programme was one of the causes of the cashflow pressures on ECG in 2010, because such homes would have low occupancy levels some time after reopening. He also explained that this was one of the reasons why ECG was seeking to raise new funding from non-bank investors such as Duet. Mr Treon explained to Mr Korat that occupancy was down; that ECG needed to complete the reorganisation programme at which point occupancy would rise; that this was having an impact on profitability and that ECG needed additional working capital.

426. But I also find that Mr Treon did not inform Mr Korat that ECG had adopted a policy of treating a proportion of the staffing costs as exceptional. There was no reason for him to do so at that stage. There were no documents suggesting that he had done so.

427. There is a factual dispute about whether Mr Treon told Mr Korat in October 2010 that the banks were intending to restructure their debt. Mr Treon said he did; Mr Korat said he did not. That is not an issue I need to resolve.

428. The defendants submitted that Mr Korat was very keen to invest in ECG and was disappointed that the deal did not proceed in Autumn 2010. The suggestion appeared to be that he was prepared to cut corners. They refer to Mr Korat's email of 10 January 2011 asking whether AIB had approved the Secured Loan Option. They say this was Mr Korat chasing up the proposal. They noted that when Mr Treon responded on 12 January 2011 saying that they needed to look at other alternatives, it rapidly led to a meeting on 14 January 2011. They also noted that Duet had made only one investment by January 2011. I find that Mr Korat was reasonably keen to follow up the possibility of an investment in ECG. The purpose of the Fund was to invest and he was looking for possible deals. I do not however think that he was overly enthusiastic about ECG.

429. Mr Treon said in his witness statement that at the meeting of 14 January 2011, the first meeting about the possible loan note investment, Mr Korat said that he was keen to invest in the loan notes. Mr Treon said that about this time (i.e. at the meeting on 14 January 2011 or shortly afterwards) he explained again about the issues concerning the new homes and refurbishments and that staffing ratios would be higher until mature occupancy was achieved; and that agency costs were required for new builds while staff recruitment took place. He said that he explained that this had created a funding

requirement but that once optimum occupancy levels were achieved there would be a substantial increase in trading and that the near term prospects for the group were good.

430. Mr Treon said in his witness statement that, after the meeting of 14 January 2011, Mr Korat asked for an overview of ECG's financial performance. Mr Treon said that Mr Korat asked for an instant one page summary of 2010 trading results with projected figures for the ensuing years. He said in his statement that he explained to Mr Korat the basis on which ECG prepared management accounts and told him that the management accounts were prepared on the basis of normalised trading; that this included an explanation of the treatment of wages and agency costs as exceptional to the extent that they exceeded what was to be expected from normal trading and to report the exceptional items below EBITDA; that this was consistent with the accounting policies adopted in the 2009 accounts; that this was on the basis that the costs were not incurred in the ordinary course of business; that this was done to enable underlying historic, current and future trading to be benchmarked on a consistent basis, so that there could be a proper comparison of normalised historic costs with projected normalised costs.

431. Mr Treon said in his witness statement that Mr Korat was fully aware of this methodology and indeed said that he had noticed the classification of "such costs" (viz. staffing costs) in the 2009 accounts. Mr Treon gave similar evidence under cross-examination.

432. Mr Treon said in his witness statement that Mr Korat specifically wanted normalised figures; that he was seeking an immediate overview of the forecasts for future trading and that this should be on a normalised trading basis with projected figures so that a comparison with the projected figures would be meaningful; that he was aware of the problems concerning new builds and refurbishments and that his focus was on future trading; and that he wanted to understand how the homes would perform once the new and refurbished homes were fully operational and be comfortable that there would be considerable improvement once the homes reached mature occupancy.

433. Mr Treon said in his witness statement that he told Dr Srinivas before 18 January 2011 that he was preparing the information for Mr Korat on this basis. Dr Srinivas said in his statement that Mr Treon told him of his discussions with Mr Korat and that Mr Korat had asked for the information to be provided on a normalised basis.

434. Mr Korat denied that Mr Treon told him anything about the normalisation of the January Figures. He said it was not discussed at the meeting of 14 January 2011 or afterwards; Mr Treon did not tell him that there were any staffing costs not included in the "wages" line for 2010; there was no discussion of benchmarking; they did not discuss the notes in the 2009 accounts; they did not discuss normalising the Projected Figures; and that Mr Korat did not ask for "normalised" figures.

435. There is then a stark dispute as to whether Mr Treon explained before the January Figures were sent that they would be normalised. Before addressing that issue I make the following findings about the meeting of 14 January 2011 and the events before the provision of the January Figures. As to the 14 January meeting, I find the following:

i) Mr Treon touched at the meeting of 14 January 2011 on some of the same issues as had been discussed in October 2010: that new builds and refurbishments led to lower occupancy and that mature occupancy takes time to build up. Mr Treon

said that the near term prospects for ECG were good. He also explained that the business was very occupancy driven. Mr Treon explained that performance of the business depended on recovering occupancy levels.

ii) These were fairly general discussions without much surrounding detail. I also find that there was no discussion at the meeting of 14 January 2011 of the basis of preparation of the management accounts and nothing was said about normalisation.

iii) Mr Treon said at the meeting that ECG had the support of its Banks.

iv) At the meeting Mr Korat was provided with the PPM and the 2009 Audited Accounts, the Interim Accounts and the Deloitte Report.

436. I find that there was probably a discussion between Mr Treon and Mr Korat at some point after the meeting on 14 January 2011 and the provision of the January Figures on 19 January 2011. Mr Treon says that Mr Korat asked for financial information – he says in the form of a one page document. Mr Korat was equivocal in his evidence on this point. He accepted at one point that it was likely that there was a brief discussion but then said he could not recall it. I find, on balance, that a brief discussion took place. The most telling point is that Mr Korat's email of 18 January 2011 sought only the 2010 numbers, whereas the January Figures also included projected trading figures for 2011-2013. It is likely that Mr Korat asked for these too. I do not however accept Mr Treon's evidence that Mr Korat specifically asked for a one-page document. It is possible that he asked for the numbers for 2010 and projections for 2011 – 2013 without specifying their length or format.

437. I turn then to the crucial factual issue. I have concluded that Mr Treon did not inform Mr Korat about the normalisation of the staffing costs in the Forecasted Figures, whether at the 14 January 2011 meeting or otherwise. It is convenient to give my reasons under a number of (overlapping) heads; my overall conclusion rests on cumulative effect of these points.

438. First, when the claim was first formally intimated in a letter before claim (including draft particulars of claim) dated 18 June 2014, Mr Treon did not refer in his response to the alleged conversation with Mr Korat. Mr Treon's solicitors responded in a detailed letter of 22 August 2014 which stated, "[t]he January Figures provided were drawn up to show limited information, in accordance with what it was understood that Mr Korat had requested and negotiated with RP&C." The letter did not refer to any conversation between Mr Treon and Mr Korat about the basis on which the numbers had been drawn up. The case now advanced by Mr Treon is that it was he who had the conversation with Mr Korat.

439. Second, Mr Treon has changed his evidence about the conversation with Mr Korat. Mr Treon said in his witness statement that Mr Korat told him and Mr Amlani that he specifically wanted normalised numbers. In oral evidence he said that the conversation was between him and Mr Korat only.

440. Third, Mr Treon failed to provide a convincing reason why, when asked for 2010 trading figures, he did not simply provide the full picture, including an explanation that £4.25m had been removed from staffing costs. The model from which the numbers

were taken (an updated version of the Original Financial Projections) showed this and it would not have taken any time or trouble to give the full picture. If he had already told Mr Korat about the normalisation of the numbers there would have been no reason not to provide the model. It would indeed have been simpler to do that than go through the effort of producing the bespoke January Figures.

441. Mr Treon's only answer to this was that Mr Korat specially asked for more limited information to be given. I consider it very improbable that Mr Korat, an experienced investment professional, would have said he wanted the numbers to be presented to exclude (as exceptional) some of the staffing costs. It is still less probable that he would have accounted for this without also asking for details about the excluded costs. If he had been told about those costs he would have wanted to know their amount and how they had been calculated. Mr Treon's case involves the highly improbable idea that a potential investor deliberately asked for less financial information than the company was in a position to give. On Mr Treon's case, Mr Korat agreed that material amounts were being excluded from the 2010 wages without even inquiring about the scale of the exclusions.

442. Where figures are normalised it is important to know the basis of the normalisation. A professional investor would have wanted to know as much as possible about the numbers and make his own assessment, rather than deliberately putting himself in the dark by agreeing that some costs should be left out. I do not think that Mr Korat would have been willing to leave the normalised staffing costs as a known-unknown, without asking for any more information. Mr Treon's case is indeed that Mr Korat actually asked for numbers to include known-unknowns. That is intrinsically unlikely.

443. Mr Treon said in evidence that Mr Korat made it clear that he was not interested in 2010 and was only interested in 2011-13. Mr Korat denied that he said that and I find that he did not. In his email of 18 January 2011 he specifically asked for the full year trading figures for 2010 and was therefore clearly interested in them.

444. Mr Treon also suggested that Mr Korat was very keen to invest and therefore wanted to be able to present the rosiest picture to the IC. The innuendo was that he wanted the information to be cast in an optimistic way even if that meant leaving things out. Though it was not put in this way the suggestion appeared to be that Mr Korat was prepared to mislead the Duet team and the IC in order to push through the investment. However it was not put to Mr Korat in cross-examination that he was prepared to mislead his own team and I find that he did not. Mr Korat also explained (and I accept) that Duet looked at a great many investments and only recommended a small proportion to the IC. Moreover, if the deal went wrong he would be answerable for it. He also invested his own money in the Esquire loan notes. He had no reason to present an unduly sunny picture to the IC.

445. <u>Fourth</u>, there is no reference to the normalisation of the trading figures for 2010 in Duet's internal documents. Mr Korat was an experienced investment professional and it is probable, had he been told about the normalisation of the numbers, that he would have recorded this (as well as asking for more complete information). There was no mention of normalisation in the internal email from Mr Korat to Mr Moore attaching the January Figures. Mr Korat did not mention it either when first communicating with Mr Lattanzio. Mr Moore told Ms Shah on 18 February 2011 that the correct EBITDA to use was £13.1m. There was no mention of normalisation in either of the IC memos

produced by Duet. Mr Korat's evidence (which I accept on this point) was that the IC would have needed to know of the normalisation of the results.

446. The defendants submitted that when Mr Moore's email of 18 February 2011 to Ms Shah said that the ECG operating model showed the company in a "steady state scenario" he was referring to normalised figures. They submitted that the reference to steady state scenario was an acknowledgement that in so far as it built on figures for 2010, for comparison those costs reflected what could be expected from normal trading and excluded exceptional items. I do not accept that. The model did not include profit and loss figures for 2010 and, as Mr Treon accepted, the projections for 2011-13 were not normalised. Moreover the model does not refer to exceptional items. It is therefore most unlikely that Mr Moore was saying anything about normalisation or exceptional items.

447. The defendants submitted that Mr Korat's evidence about this email was unsatisfactory. He sought in his witness statement to explain the reference to "steady state" as concerned with a sensitivity analysis, assuming no growth in the business. In oral evidence he suggested that it might be a reference to the sponsor's own plan; or that Duet might take the scenario from the last year (i.e. 2010) and assume no changes; or that it assumed ECG would meet its targets for 2011 but not grow thereafter. I agree with the defendants that none of these speculative explanations was convincing and I agree that these were strained interpretations of the email, but the criticism does not appear to me to have much consequence. Whatever the phrase "steady state" may have meant, it did not refer to the normalisation of the results for 2010 (or 2011-2013).

448. Fifth, there is nothing in the emails that passed between Mr Treon, Mr Amlani and Dr Srinivas in the run up to Mr Amlani producing and sending the January Figures to indicate that Mr Korat had asked for "normalised" figures. I have already set out the sequence of communications leading up to the preparation of the January Figures. On 18 January 2011 Mr Korat asked whether "the full year 2010 trading numbers [were] available". Dr Srinivas told Mr Treon not to send the information to Mr Korat until they had had a discussion. Mr Treon replied but said nothing about any discussion with Mr Korat about normalising the numbers. Mr Treon then sent another email to Dr Srinivas asking him to get something to Mr Korat. He again did not say anything about any agreement that Mr Korat had asked for normalised numbers. Mr Amlani then sent the numbers without any reference to normalisation or any suggestion that Mr Korat had asked for them to be normalised.

449. Sixth, there is no echo of any agreement with Mr Korat about the normalisation of the numbers in any of the subsequent communications between Mr Treon, Dr Srinivas and Mr Amlani when they were discussing what further information to provide to Duet.

450. Seventh, having observed them giving evidence over a number of days at the trial, I generally preferred the evidence of Mr Korat to that of Mr Treon and on this aspect of the case. I have set out my views of the witnesses earlier in this judgment. As explained there I concluded that the evidence of Mr Treon has to be approached with considerable caution. I also had some reservations about Mr Korat's recollection. But I accept his evidence that had he known of the normalisation of the numbers he would have recorded this. I accept his evidence that he did not agree that the January Figures should be prepared on a normalised basis and that he did not know that part of the 2010 staffing costs had been treated as exceptional. He explained in evidence (which I accept) that

Duet would have looked at the numbers differently had they known that some of the staffing costs of the business had been taken out.

451. I also consider that some of Mr Treon's evidence about later events included invented or imagined conversations. I deal with this further below. This gave me further reason to doubt his evidence about the communications he says he had with Mr Korat at the time when the January Figures were provided.

452. Eighth, I specifically reject Mr Treon's evidence that Mr Korat said that he had already noted the normalised treatment of staffing costs from his reading of the 2009 accounts. It would have been a surprising point for Mr Korat to have volunteered. It was not suggested to Mr Korat in cross-examination that, absent an explanation from Mr Treon, Mr Korat would have thought that ECG was omitting staffing costs from its wages figures. I find that Mr Korat did not say that he had noted the normalised treatment of staffing costs from his reading of the 2009 accounts. This finding is also another reason for treating Mr Treon's account of the conversation generally with care.

453. Ninth, Mr Treon's account of the treatment of the Projected Figures for 2011-2013 is telling. If the purpose of normalising the numbers had been benchmarking it would have been necessary to make adjustments for excessive staffing costs for all periods until the refurbishment programme had concluded. Mr Treon said in his witness statement that it was anticipated as at August 2010 that the PSPI refurbishments were scheduled to continue until the second quarter of 2011. This is also supported by the contemporaneous documents. For there to be consistent benchmarking an appropriate allowance would therefore have been required in respect of these homes in respect of 2011.

454. Mr Treon appears to have appreciated that this posed a problem for his case. In his Re-Amended Defence Mr Treon pleaded that "the Forecasted Figures and the Projected Figures were drawn up on the normalised basis specifically requested by Mr Korat" (underlining added). The same point was also repeated in his witness statement. (Dr Srinivas and RP&C also made this point in their Defence). However Mr Treon immediately accepted in cross-examination that there had been no normalisation of the Projected Figures for 2011-13.

455. He even suggested in cross-examination that it would not have been possible to normalise the future numbers, but I do not accept that (quite apart from it being at odds with the position taken in his Defence). The projected numbers were all based on assumptions and there is no reason why, if the numbers for 2010 were being normalised, adjustments could not be made for 2011. But in any event it was common ground that the 2011 – 2013 figures were not normalised.

456. Two conclusions may be drawn from this aspect of the case. The first is that Mr Treon's case and evidence has shifted significantly, which inevitably undermines the credibility of his evidence about his discussions with Mr Korat. The second is that his pleaded case at least had the merit of apparent consistency whereas his revised case makes little sense. If there was indeed a wish to allow the benchmarking of 2011-2013 with 2010 then for consistency it would have been necessary to normalise the 2011 numbers in the same way as the 2010 ones. But it is now accepted that this was not done. This is further reason for doubting Mr Treon's evidence that there was any discussion of benchmarking in connection with the January Figures.

457. Tenth, Mr Treon's own account of the normalisation of the numbers was confused and confusing. Though Mr Treon said he explained to Mr Korat and other third parties that the commercial justification for "normalisation" was to remove the distortions due to new-builds and refurbished care homes, the calculation of the "exceptional" wages in the Original Financial Projections was not restricted to new builds and refurbished homes. In particular, at least two mature homes were included in the "wages exceptional summary" tab in ECG's model. When asked about this Mr Treon said that he would not have regarded the relevant homes (Bryn Cwyber and Bishops Court) as mature, despite the description of them as mature in other documents. Mr Treon was ultimately unable to explain this and relied on the passage of time and fading of memory. He suggested that the purposes of the homes might have been redesignated and that this would have led to similar issues of higher staffing costs in proportion to turnover. He also said that this was an area of the case where caution was required because there might have been other relevant documents which have not been produced on disclosure. He said that careful consideration had been given to the numbers.

458. In cross-examination Mr Treon gave a series of answers which were consistent with ECG's management adopting a rather broader rationale for the calculation of the exceptional items than one based only on new-builds and refurbishments. He said that the adjustments related to the wages for homes which were not trading under normal circumstances or were trading under abnormal conditions; or where the wages were abnormal; or where the relevant home was undergoing reorganisation, reregistration or a strategic review. This is consistent with the rationale for the adjustment being based on some broader view of "abnormal" trading.

459. I find that management probably believed it had a defensible rationale for the calculation but that the calculation was not restricted to new builds and refurbishments, but somehow related to some problem homes with poor trading results.

460. But the point nonetheless bears on the inherent probabilities surrounding Mr Treon's account of his conversation with Mr Korat. For the reasons just given, the calculation of the exceptional wages in the Original Financial Projections does not appear to have been simply restricted to new-builds and refurbishments and was concerned with a broader notion of "abnormal" trading conditions (to include problem homes undergoing "reregistration or a strategic review" as Mr Treon put it in evidence). Against that background, if Mr Treon had embarked on a conversation with Mr Korat about the normalisation of the numbers, he would have needed to explain to Mr Korat more than a simple point about the occupancy issues with new-builds and refurbished homes. A candid account (which is what Mr Treon said he gave) would have required a broader discussion about "abnormal trading" etc. Had that taken place in my judgment Mr Korat would certainly have asked for further information about the basis of such abnormal trading and how the numbers had been adjusted. But Mr Treon accepted in cross-examination that he did not tell Mr Korat that ECG had problems with its mature homes, and continued to maintain that his explanation to Mr Korat was only about new-builds and refurbishments. This is further reason for thinking that the conversation did not take place.

461. Eleventh, Mr Treon had an obvious motive for excluding some of the staffing costs from the operating costs. If they had been included it would have been evident on the face of the January Figures that the profits did not even cover senior interest for 2010.

Mr Treon also accepted in cross-examination that including the full numbers in the 2010 costs would make the projections for 2011 appear unrealistic.

462. This conclusion is supported by considering the projected percentage of wages to turnover for 2011, 2012 and 2013, which were c. 57%, 55% and 54% respectively. In the "normalised" January figures the percentage for 2010 was c. 58%. If the full staffing costs had been stated in the "wages" line, including the £4.25m treated as "exceptional" in the Original Financial Projections, the percentage for 2010 would have been c. 62%; some 5% points higher than the figure for 2011.

463. Mr Treon indeed volunteered in cross-examination that if he had sent Mr Korat un-normalised figures Mr Korat would have asked why the wage ratio in later years was lower than the wage ratio for 2010. He also said that if he had put wages of £76m into the Forecasted Figures the first question he would have been asked was how ECG could increase its turnover from 2010 - 2011 by £20m while increasing wages by only £4m. While the numbers he used in this part of his evidence were not correct, Mr Treon's message was clear enough: had the full amount been included in the "wages" line for 2010 he would have expected Duet to ask how turnover could be increased without a corresponding proportionate increase in wages.

464. In other words Mr Treon thought that a presentation of the numbers which included all staffing costs in the "wages" line would have raised red flags about the plausibility of the projected figures for 2011 onwards. Mr Treon therefore had clear reason for normalising the numbers.

465. Mr Treon said in his evidence that this was the very reason why he explained to Mr Korat that he was going to strip out the exceptional wages for 2010. But I think it more likely than not that he decided to provide the normalised numbers without explaining to Mr Korat what he had done. He knew that Duet was having a preliminary look at the opportunity and hoped to pique Duet's interest by "normalising" the numbers.

466. Moreover, given that (as Mr Treon accepted) the ratio of wages to turnover was likely to be a material consideration for Duet, in my judgment it is improbable (as I have already said) that Mr Korat would not have asked for details of the amount and rationale of the normalised wage adjustment had it been raised and discussed.

467. Twelfth, the chronological narrative set out earlier shows that, after the production of the January Figures, Mr Treon was involved in making changes to documents designed to remove, so far as possible, references to the trading figures for 2010 and comparative balance sheet figures for 2009, so as to reduce the prospects of Duet asking about the treatment of some of the staffing costs as exceptional. I find that Mr Treon would not have been concerned about providing the trading figures for 2010 if he had already explained the normalisation of staffing costs to Mr Korat.

468. Specifically, on 20 January 2011 Mr Korat asked for a summary balance sheet for 2010. It would have been simple to provide the Original Financial Projections. If Mr Treon had already told Mr Korat about normalisation there would have been no reason not to send it by return.

469. The balance sheet was not however provided until the 7 February 2011 pdf. That document involved changes from that contained in the internal financial model of ECG

(as replicated in the "executive summary" document provided by Mr Treon to Dr Srinivas on 11 January 2011). First, the comparative figures for 2009 were removed and, second, the line item "profit and loss" (which would have showed a loss for 2010 of some £6m) was removed altogether.

470. As I have said Mr Treon was unable to explain satisfactorily why ECG did not simply hand over the full version of the balance sheet (already available in the executive summary document) when Mr Korat first asked on 20 January 2011. Nor was he able to explain the changes made to the balance sheet in the 7 February 2011 pdf set out in the previous paragraph. He said in evidence that it was because he understood Mr Korat wanted an "opening balance sheet" and that is what he provided. But that is not what Mr Korat asked for on 20 January 2011 and, in any case, it would have been far simpler simply to give him the existing information from existing formats (including the executive summary of 11 January 2011) rather than changing the format and removing the 2009 comparator. I find that the reason for making these changes was to try to reduce the risks of flagging up the exceptional items.

471. Another example of the changes made to the information provided to Duet was the deletion from the operating models of any P&L figures for 2010. Had the models been provided with the 2010 numbers included, Duet would have seen the references to the exceptional items for 2010 and would have seen that these were between £5m and £6m (including £4.25m of staffing costs) depending on the relevant model. I find that Mr Treon was concerned that if these were revealed to Duet it would have discouraged them from pursuing the investment. As already stated, Mr Treon was anxious to secure the ERED investment, which was critical to carry ECG through its cashflow pressures.

472. Moreover, at about the same time as he was dealing with Duet, Mr Treon was also communicating with another potential investor, Mehmet Ahmed of FIG. ECG had provided Mehmet Ahmed with more information than he had provided to Duet, including information about the existence of the treatment of some of the staffing costs as exceptional items. Mehmet Ahmed had asked for further information about the exceptional items. In the end he decided not to invest. I find that by the time he was considering what information to provide to Duet in February 2011 Mr Treon had realised that the disclosure of information about the exceptional items made it more difficult to sell the investment and this was one of the reasons for seeking to avoid any presentation to Duet which would highlight the existence of exceptional items.

473. Mr Treon suggested that the reason for removing the profit and loss figures for 2010 was simple: that Mr Korat had repeatedly made it clear that he was not interested in 2010. I have already rejected that evidence. Mr Korat had asked for 2010 figures on 18 January 2011. But there is another reason why Mr Treon's case on this point was unconvincing. If Mr Treon had already explained the normalisation of the 2010 figures there would have been no reason to edit the numbers to remove the 2010 profit and loss figures, or the 2009 comparable balance sheet. If Duet had genuinely not cared about 2010 there would have been no harm in providing the numbers.

474. For these reasons I find that Mr Treon (and Dr Srinivas) edited the figures provided to Duet in February 2011 to reduce the risks of Duet spotting the deduction of substantial exceptional items from the profit and loss figures for 2010. There would have been no need to do this if Mr Treon had already told Mr Korat about the normalisation of the January Figures.

475. Thirteenth, "normalised" information was provided to other potential investors at about the same time without the normalisation being flagged up. This undermines Mr Treon's contention that, when sending normalised numbers, he always informed investors of the treatment of part of the staffing costs as exceptional. In relation to these third party investors I have made allowances for the fact that the disclosure is incomplete. Even with that allowance, I consider that conclusions may properly be reached about the way financial normalised information was sent out to some investors without any flagging.

476. The first example is Jerry Ahmed. He was interested in investing. I have already set out the relevant chronology. Mr Ahmed asked for "interim or preliminary full year financial information available to reflect 2010 results". He asked various questions and addressed them to Mr Lensman of FOFM. Mr Lensman forwarded them and did not attempt to answer them himself. Dr Srinivas drafted a response for Mr Lensman to communicate which attached a set of figures which had been normalised, but did not refer to any exceptional treatment of staffing or any other costs of the business. Jerry Ahmed gave evidence (which was not challenged) that he was not told that the figures were normalised and that he had not asked for them to be normalised. All that was suggested to him in cross-examination was that he spoke to FOFM. Mr Treon and Dr Srinivas both gave evidence of conversations with Mr Lensman in which (they say) he was told about the normalisation of the numbers. They said that it was for him to explain this to Mr Ahmed. I reject this evidence:

i) Mr Ahmed was clear (and I accept) that he was never told of the normalisation of the numbers. If Mr Lensman (a professional man) had been told about the normalisation of the numbers given to Mr Ahmed he would have explained it to Mr Ahmed. Counsel for Mr Treon said there was no evidence about what FOFM told Mr Ahmed. But Mr Ahmed was adamant that he was not aware of the normalisation of the numbers and he was not challenged about that.

ii) The documents show that Mr Lensman simply passed Mr Ahmed's queries on without comment. He was relying on Mr Treon and Dr Srinivas for answers, which he then passed on. There is nothing in the documents to suggest that a separate explanation of exceptional items was given to Mr Lensman.

iii) No good reason was suggested why, when attaching the figures for 2010, Mr Treon and Dr Srinivas did not explain that they were normalised. I find the suggestion that they thought that Mr Lensman would give the explanation to be inherently implausible.

iv) While there was some evidence at the trial that FOFM were aware of some items being treated as exceptional (including by being sent some information in June 2011), there was no evidence of ECG or RP&C providing Mr Lensman with any model which disclosed the c.£5m of exceptionals for 2010.

477. I find on the balance of probabilities that Mr Treon and Dr Srinivas knew that the numbers were normalised and failed to explain this to Jerry Ahmed or Mr Lensman.

478. I specifically reject the evidence of Dr Srinivas that Mr Lensman told him in terms that Jerry Ahmed was given all the data that he (Mr Lensman) was aware of, and that Jerry Ahmed was aware of the exceptional items in the 2010 numbers. Jerry Ahmed was not challenged on his evidence that he was not aware of the exceptional items; and there is

no reason to think that Mr Lensman would have lied to Dr Srinivas about telling Jerry Ahmed if that was not true. I concluded that Dr Srinivas was making up or imagining a convenient conversation rather than recounting a genuine recollection.

479. A second example is BLME. BLME was interested in potentially refinancing the portfolio or properties owned by PSPI. I have already set out the chronology. In summary, slide 52 of the original version the ECG Presentation of January 2011 showed normalised "profit after COH before depreciation and interest" of £13.3m, "profit before exceptional items" of £0.5m, "exceptional items" of £5m, "profit before mezz interest" of minus £4.5m and "profit before tax" of minus £5.85m. The slide was edited by Dr Srinivas and approved by Mr Treon to remove the lines after normalised "profit after COH before depreciation and interest" of £13.3m. It removed all indications that there had been a normalisation of the profit figure. The balance sheet for 2010 in slide 53 was also edited to remove the reference to the loss of £5.85m under share capital. The edited presentation was then given to BLME on 27 January 2011.

480. Dr Srinivas explained in cross-examination that Mr Treon had made a deliberate decision to provide normalised information to BLME without flagging the normalisation. He said that if BLME was seriously interested they would conduct due diligence and at that stage Mr Treon would make the information available. So, he said, the original "normalised" information was an introduction. Dr Srinivas said that this was "the approach in those days".

481. This was an important passage in the oral evidence. It explains why the slides provided to BLME were amended as just explained. I find that there was a deliberate decision (in which both Mr Treon and Dr Srinivas were involved) to provide information to BLME in an (undisclosed) normalised form to engage or pique its interest. They anticipated that if BLME asked for more information about the make-up of the numbers they would be told about normalisation. Dr Srinivas did not suggest that he had sought to prevent Mr Treon following this course with BLME. On the contrary he went along with it. It was Dr Srinivas who undertook the editing of slides 52 and 53 of the ECG Presentation to remove any reference to exceptionals.

482. Dr Srinivas suggested that Mr Beney of RP&C explained the position to BLME concerning the exceptional items. There was no documentary evidence to suggest that he had given such an explanation. Moreover the documentary evidence suggests that Mr Beney did not understand the treatment of exceptional items. He appeared to think that they were limited to agency costs and did not include wages (see his email of 20 May 2011). Moreover, for the reasons I have already given, merely to have said that there were "exceptionals" would not have been enough. I find that, as Mr Treon and Dr Srinivas knew, Mr Beney was not in a position to provide an adequate explanation to BLME.

483. Dr Srinivas and Mr Treon were unable to explain why the changes were made to the slides unless the purpose was (i) to remove information which would highlight the presence of exceptional items and (ii) present the numbers in a better light but (iii) without explaining the normalisation of the numbers. I find that that was why the slides were changed. I also draw the inference that Mr Treon and Dr Srinivas anticipated that BLME would have to be told more if they asked questions about the numbers in due diligence but hoped that would not happen.

484. The defendants relied on the subsequent provision of some information to BLME about specific companies within the Wellcare portfolio. That information does not however show that BLME were provided with an explanation of normalisation or the nature of the exceptional items. Moreover that information was only provided in June 2011, much later than the communications in January 2011.

485. The defendants also noted that BLME was provided with the Interim Accounts in March 2011, and that these referred to the c.£1m of exceptional items of Q1 2010. But that was some time after the initial communications set out above.

486. Dr Srinivas said in his evidence that this approach (of providing normalised information without explanation but with the expectation that they would have to explain the normalisation if asked) did not happen with Duet, as they were told about normalisation at the time the January Figures were provided. However I see no reason to think that Mr Treon and Dr Srinivas approached Duet differently from their (contemporaneous) discussions with BLME. As Dr Srinivas said that was "the approach in those days". They also followed the same approach with Jerry Ahmed and Mr Albrecht (see below). I conclude that it is probable that they followed the same approach with Duet.

487. Normalised information was also provided by Dr Srinivas to Mr Bruce Albrecht (of P&C Wealth Managers SA in Zurich) on 8 March 2011 without any explanation of the basis of normalisation or reference to any exceptional items. The attached material (which is the same as that sent to BLME) ended with the line "Profit after COH before Depn and Int" which showed profits of £13.3m for 2010. The balance sheet omitted any comparison with 2009 and stopped at the net assets line (therefore omitting a "profit and loss" or even a "retained earnings" line). Dr Srinivas said in oral evidence that he subsequently met Mr Albrecht in RP&C's offices and that he walked him through the numbers they had sent. He also said that he told Mr Albrecht that there were exceptional items to be removed in 2010. He said that he would have told him that these included wage and agency costs but that they did not get into the detail. He said that he did not consider himself competent to walk through the information. I am unable to accept this evidence for several reasons:

i) If such an imprecise explanation had been given one would have expected to see some follow-up correspondence with Dr Srinivas. This would have been found in the second and third defendants' documents, so this is not one of the potential black holes in the documentary record.

ii) The purpose of presenting the numbers as "normalised" but without referring to exceptional items or other adjustments was probably undertaken to reduce the chances of a reader detecting (at least at the outset) that there had been any normalisation: see the approach taken to the information provided to BLME explained earlier. The same information was given to Mr Albrecht. The defendants were unable to explain why the numbers were presented in that way, for normalisation then to be explained orally. I find the suggestion that things took that course inherently improbable.

iii) As I have explained, I considered that Dr Srinivas (like Mr Treon) had a habit of imagining or contriving (while in the witness box) evidence of conversations which would explain away or account for difficulties in his case.

iv) Dr Srinivas's evidence about this meeting was inconsistent. He started by saying that he had walked Mr Albrecht through the "model" (i.e. the presentation sent on 8 March) and then said he would not have been competent to walk him through it and referred him to ECG. Again Dr Srinivas's evidence about the meeting started by saying that he explained the nature of the exceptional items before morphing into saying that he "would" have told him about the nature of the exceptional items rather than that he did. When pressed further about what he had explained about the exceptional items he said that *if* Mr Albrecht had expressed interest in the discussions he *would* have put him in touch with Mr Treon. I conclude that Dr Srinivas's account about this conversation was invented.

488. I therefore find that the approach taken to Mr Albrecht was the same as the way Mr Treon had decided to approach BLME: i.e. sending them normalised information without explaining the treatment of the wages or agency costs to engage their interest in a possible deal while recognising that it might well become necessary to explain the normalised treatment if the investor asked about the composition of the numbers during due diligence.

489. I find that Mr Treon's approach (in which Dr Srinivas assisted) was that ECG would provide normalised numbers for 2010 to show things in the best possible light and only to provide an explanation of normalisation if asked relevant questions about the composition of the numbers during the investor's due diligence.

490. The first defendant referred to the case of Mr Mehmet Ahmed who, they say, was provided with information about exceptional items. They submit that this shows that they were open with third parties. However, in the case of Mehmet Ahmed, he was provided at an earlier stage with a model which included some information about exceptional items. Mehmet Ahmed then said that he did not properly understand the exceptional items and asked for more information about them. He then appears to have lost interest in investing. The fact that Mehmet Ahmed was given information about exceptional items when he asked does not show that all the other investors were. I have found that they were not.

491. The second and third defendants also referred to a number of communications with several other third parties in which ECG disclosed information about exceptional items (as itemised in Annex 2 to their closing submissions). The particular reasons for those communications were not explored in evidence. I have considered the examples in Annex 2 and concluded that the same reasoning applies as in the case of Mehmet Ahmed. There may have been good reasons for these communications, but there are examples of other investors (including Jerry Ahmed and BLME) where the investor was not told about the exceptional items.

492. The defendants suggested that an adverse inference should be drawn from the failure of the claimant to call the various third parties, or at least that the court should be very cautious before treating the communications with them as significant. I accept that the court must exercise some caution but the history set out earlier is based on the contents of the documents and the defendants' own evidence in the course of cross-examination. I do not think that any particular adverse inferences can be drawn from the absence of the third parties themselves.

493. Fourteenth, as already mentioned there was a meeting on 5 March 2012 attended by Mr Lattanzio, Mr Korat and Ms Shah of Duet and Mr Treon. By that stage Duet believed that the numbers it had been presented with in 2011 contained misrepresentations. Mr Lattanzio and Mr Korat said in evidence that at the meeting Mr Lattanzio accused Mr Treon of fraud and that he did not react. Their evidence must be treated with some care because Mr Lattanzio and Mr Korat said in their initial witness statements that they recalled that Dr Srinivas was also at the meeting. He denied that and they then corrected their statements to say that they could no longer recall him being there. Ms Shah also said that she would not have called what happened a confrontation, which suggests that Mr Lattanzio has recalled the meeting as rather more dramatic than it probably was. However, having considered the evidence of the witnesses, I find on balance that Mr Lattanzio accused Mr Treon of misrepresentation and that Mr Treon did not respond by saying that he and Duet had discussed the normalisation of the numbers. If Mr Treon and Mr Korat had discussed the normalisation of the numbers a year or so earlier, he would in all likelihood have protested that Mr Korat had asked for normalised numbers and he been given just what he had requested. He did not do that.

494. Fifteenth, I have taken into account Mr Treon's submission that, had he not disclosed the true position, there would have been a huge risk, even an inevitability, of eventual discovery. This could have been during Duet's due diligence or after the investment (e.g. in management accounts or audited accounts for FY2010). Mr Treon submitted that it would have made no sense for him to conceal the existence of the exceptional staffing costs from Duet when the truth was bound to emerge.

495. There was of course a material risk of the full position coming to light in the course of due diligence. However I find that Mr Treon thought that, if that happened, he would then seek to explain more fully the treatment of the exceptional staffing costs. According to the evidence of Dr Srinivas this was the approach taken in relation to BLME – i.e. to furnish them with unexplained normalised information at the outset but to be ready to give the fuller, non-normalised, picture as due diligence progressed. In any case the worst that would happen if the question arose before the investment had taken place would be that Duet would not invest. I conclude Mr Treon took the view that he would be able to finesse his answers if investors probed the numbers more deeply in due diligence.

496. As to the risk of disclosure of the full position after Duet had invested, at the time the representations were made Mr Treon was very confident that Project Saxon would be consummated. Duet would have been an investor in a different, expanded, group. More generally I find that Mr Treon was optimistic about the prospects of the business if ECG could survive its short-term cashflow pressures. He had limitless self-belief and that spilled over into his buoyant expectations for the future of the group. He believed that ECG would be able to pay the interest on the loan notes and that Duet would have no reason to revisit the historical information he had provided for 2010. But even if it did, there was still the possibility that he would be able to explain away the January Figures as a misunderstanding. So if there was a risk of discovery it was manageable and unlikely to be of any consequence. It was a gamble Mr Treon was prepared to take to get the business through what he saw as a bump in the road.

497. I also consider that in his evidence Mr Treon understated the importance to ECG of persuading Duet to invest. He sought to suggest that he was more or less indifferent, saying that ECG did not need the Duet money and did not need to look for funding.

This was not so, as the documents made clear. ECG was undergoing serious cashflow pressures. It was not paying its debts as they fell due and had deferred large payments to the Inland Revenue. Mr Treon described this in his witness statement as a cash crisis. The Banks were pushing ECG to find a solution to its funding shortfall. Lloyds was prepared to grant a short term overdraft extension but this was not a lasting solution. It is clear from the documents that Mr Treon saw the raising of new money under the loan note programme as urgent at just the time he was in discussions with Duet. Hence on 12 January 2011 Mr Treon said in an email to Sir John Hanson that so far RP&C had raised only $7.5m of new money under the programme and that "RP&C are putting in all efforts to raise the balance of the cash – this is urgently required". On 13 January 2011 he wrote to Dr Srinivas that "It is CRITICAL we raise these funds." On 26 January Mr Treon forwarded an email of 25 January 2011 from Mr Korat to Mr Nicholson of Deloitte referring to the discussions with Duet. He said that they wanted a February close. I find that Mr Treon regarded the Duet/ERED investment as very important and reject his evidence that he was indifferent to it. Mr Treon therefore had a strong motive for presenting ECG's finances to Duet in the rosiest light possible.

498. Sixteenth, I have carefully considered the submission of counsel for Mr Treon that, in assessing whether the January Figures were misleading, one must also consider them in the context of the other documents given to Duet previously or at around the same time. The other documents included (i) the VDD report, (ii) the 2009 accounts (iii) the Interim Accounts (iv) the 7 February pdf. Mr Korat accepted in evidence that he read and considered each of those documents. Counsel submitted that the information in those documents showed the existence of exceptional items and the extent of the trading losses for 2010 after exceptional items. I shall revert to them in the context of limitation. However I find as a fact that Mr Korat did not realise that ECG had a policy of deducting exceptional items in respect of its "wages" and certainly did not conclude that in 2010 it had deducted £4.25m of such costs.

499. The claimant also makes the overarching point that the January Figures were misleading because they did not explain that a significant amount of the staffing costs for 2010 had been excluded from the "wages" line. The vice is not merely that there were undisclosed exceptional items, but that these included costs which fall under the rubric of a line item (i.e. "wages") where numbers were expressly given. The claimant points out that staffing costs were one of the key drivers of profitability of the business. I accept these submissions. The January Figures misleadingly gave the impression that all wages were deducted before EBITDA, whereas a significant amount (some £4.25m) were not. It was self-evident that staffing costs were a key component of the profitability of the business and by excluding a material slice of them the January Figures gave a misleading impression.

500. As already noted, Counsel for Mr Treon also observed that the excel model of 18 February 2011 included a column that disclosed exceptional items in December 2010. However that column was hidden or compressed. It is possible for a user of excel to reveal hidden or compressed columns. I accept the evidence of Ms Shah that she did not do that. I do not consider that the inclusion of the exceptional items in the hidden or compressed column revealed the exceptional items to Duet.

501. In the light of these various features of the evidence, I find that Mr Treon did not explain the normalisation of the 2010 Forecasted Figures to Mr Korat before or at around the time they were provided. I therefore conclude that the Forecasted Figures for 2010 in

the January Figures were misleading and that Mr Treon's implied representation that they were accurate and not misleading was untrue when they were provided; and that the misleading nature of the January Figures was not cured by the provision of the 7 February pdf.

502. I turn next to Mr Treon's case that he explained the normalised nature of the Forecasted Figures subsequently.

503. Mr Treon said in his witness statement that at a meeting with Mr Korat and Mr Moore on about 17 February 2011 he attended a meeting at Mr Korat's offices with Mr Amlani. He said in his statement that he could not remember precisely what was discussed at the meeting.

504. Mr Korat denied that he had ever met Mr Amlani. I find that he did meet with Mr Amlani on that date. This is most likely given the electronic invitations, the terms of the letter of 18 February 2011 and the email of 22 February 2011. I conclude that Mr Korat has forgotten this meeting with Mr Amlani. The claimant relied on a letter from Mr Amlani's solicitors saying that he had not met Duet. However I give that no weight as Mr Amlani was not called as a witness and the letter also denied that he had had communications with Duet, which is patently incorrect: he communicated with them by email and phone.

505. Counsel for the defendants submitted that the court should draw the inference that Mr Korat was distancing himself from the meeting because he knew that what Mr Treon said about it was correct. I do not draw that inference. Mr Korat's recollection of the details was generally poor and I conclude that he was mistaken about the meeting and about meeting Mr Amlani. But it does not follow that I must accept Mr Treon's version of events. That falls to be tested by the other evidence and the inherent probabilities. I have also already noted that in his witness statement he said that he could not recall much about the meeting.

506. In cross-examination Mr Treon gave an account of his meetings with Duet on or around 17 February 2011 which differed from that given in his witness statement. He said in oral evidence that he was 100 per cent certain that there was a meeting with Mr Moore of Duet at ECG's offices on or around 17 February 2011 at which he and Mr Amlani went through the detail of an ECG operating model and that they specifically discussed the exceptional items. Mr Treon said that Mr Moore needed help understanding the model and that they walked him through it. He said that they unhid all the columns and that they showed Mr Moore how home-by-home occupancy matured over three years. Mr Treon said that they showed him the balance sheet, including that reserves were minus £8.6m as opposed to £2.6m because of exceptional items of £5.4m (for 2010). He said that Mr Moore said that they were not interested in historical figures. Mr Treon also said that he had navigated Mr Korat through the model and had unhidden all the tabs and shown him how it was all put together including the balance sheet.

507. I am unable to accept this evidence for several reasons. The first is that the purpose of the meeting on 17 February 2011 was a discussion of the materials that had been disclosed by then (including on 16 February). At that stage ECG had not provided a working operating model. Mr Amlani, Dr Srinivas and Mr Treon were still trying to decide what to provide to Duet.

508. The second reason is that the first version of the working model was provided to Duet the next day, 18 February 2011. There is no documentary evidence of any later meeting at which they walked Mr Moore (or Mr Korat) through the model. Nor do I think that an experienced professional in Duet's position would have needed to be taken through the model in person. If there had been specific queries Mr Moore would probably have raised them by phone.

509. The third reason is that Mr Treon did not refer to any other meeting with Mr Moore or Mr Korat in his Defence or his witness statement. Had Mr Treon genuinely recalled such a crucial meeting with Mr Moore or Mr Korat he would self-evidently have addressed it in his Defence or (at least) his witness statement. All that Mr Treon said in his witness statement about this period is that he could not recall what had been said at the meeting of 17 February 2011. It is incredible that he should suddenly have recalled, in great detail, a meeting at which he walked Mr Moore through a model and explained normalisation to him. Indeed his evidence in the witness statement did not descend to the level of actual numbers. Mr Treon suggested that an adverse inference should be drawn from the failure of the claimant to call Mr Moore. I do not agree. There was nothing in the pleadings or witness statements to suggest that he was a significant witness.

510. The fourth reason is that it was not suggested to Mr Korat in cross-examination that such a meeting had occurred. More specifically it was not suggested to Mr Korat that Mr Treon or Mr Amlani ever walked him or Mr Moore through an operating model or showed them the balance sheet or the exceptional items in any model.

511. I am satisfied that Mr Treon's evidence about the meeting with Mr Moore and/or Mr Korat was a recent invention or embellishment and that the reason Mr Treon said that he had explained things in such detail to Mr Moore was that Mr Moore had not been called as a witness (which may have been because the meeting had never previously been pleaded or flagged up).

512. Nor am I able to accept Mr Treon's evidence that at a meeting on 17 February 2011 he and Mr Amlani explained that the normalised figures excluded exceptional wages and agency costs. I accept the evidence of Mr Korat that this was never explained to him. The reasons why I have rejected Mr Treon's case that he explained this to Mr Korat on or about 18 or 19 January 2011 apply with the same force here and apply (with the necessary modifications for the passage of the month or so). I find for these reasons that nobody explained the normalisation of the Forecasted Figures to Duet.

513. Dr Srinivas said in oral evidence that Mr Treon had told him in February 2011 that he had walked Mr Moore through a working model and had expressly discussed the £6m loss for 2010 with Duet. I conclude that this evidence did not represent any genuine recollection on the part of Dr Srinivas. It was not mentioned in Dr Srinivas's witness statement. The first time Dr Srinivas raised it was after sitting through Mr Treon's oral evidence and I have concluded that he simply repeated what he had just heard in court.

514. Mr Treon also said in his witness statement that when Colliers produced its valuation it was based on actual figures and did not segregate abnormal costs as exceptional; and that Mr Korat told him that he and his team understood this and that Mr Tasker had also told them about this when they were conferring with him.

515. I do not accept this evidence. Mr Tasker said in cross-examination that he had no memory of the April 2011 meeting he had with Mr Korat. He was only able to provide evidence about his usual practice. Mr Tasker said in cross-examination that he would not have discussed the contents of his report with Duet and that he would not have disclosed documents to a party that was not an addressee of the report, and that he would not have taken him through the schedules to the report. He said that he would have been in a position to answer any questions about his approach to valuation but could not remember what had actually been discussed. Mr Tasker said he might have taken Mr Korat through an explanation of the valuation methodology but not the actual valuation. There is no reason to think that a general discussion of Collier's valuation methodology would have raised the treatment of exceptional items. It is indeed inherently unlikely that there would have been a discussion of this kind about what are essentially accounting concepts. Duet knew of Mr Tasker's expertise and was interested in Mr Tasker's valuation and of his overall views of ECG and its business.

516. Mr Korat's evidence was that he did not discuss the treatment of abnormal or exceptional items with Mr Tasker. He said that the valuation was not discussed in any detail. Mr Tasker did not give any evidence to the contrary (indeed he accepted he could not remember the meeting and that he would not have taken Mr Korat through the schedules). I accept Mr Korat's evidence.

517. I find moreover that Mr Treon's evidence on this point was another invention. My rejection of Mr Treon's positive evidence about this alleged conversation with Mr Korat gives further reason to doubt other aspects of his account of his conversations with Mr Korat about normalisation.

518. Mr Treon's case was that the Colliers report (which was subsequently provided to Duet) contained schedules for each of the care homes which included historical figures for wages and agency costs and included them all (without treating them as exceptional or otherwise disregarding them) in calculating the historical earnings.

519. Counsel for Mr Treon submitted that the schedules provided all the relevant historical information to show Mr Korat and Duet the granular detail for each home, without any deduction for exceptional items: a simple analysis of the information (totting up the numbers with a calculator) would have revealed the actual historical costs. Counsel also submitted, in reliance on the joint statement of the experts, that (i) while it is not possible to reconcile the Colliers Report to other documents, limited sampling indicates that it is likely that at least some of the wages costs treated as exceptional by ECG were included by Colliers; and (ii) the information in the Colliers Report would (after some analysis) show negative EBITDA after COH for 2010 of £7.25m.

520. Mr Korat gave evidence that Duet did not go through the schedules to the report (some 120 odd) to calculate the total wages and it was not suggested in cross-examination that Duet did so. Mr Korat also gave evidence that the relevance of the report for Duet was the overall valuation, not the detailed information about ECG's performance. This was not challenged and I accept it.

521. I therefore conclude that the presentation of the Forecasted Figures for 2010 in the January Figures was misleading and that Mr Treon's representation about them was therefore false.

Intention

522. Mr Treon denied that he intended that the January Figures would be relied on. He said, first, that Duet made it clear that they were interested in what ECG would do in the future and were therefore interested in the projections and second that the numbers were being provided only for the purposes of a preliminary IC meeting and that they would be superseded by further due diligence. He observed that Duet did not in fact revert with requests for further financial information about the trading figures for profit and loss for 2010.

523. I am unable to accept this. Mr Treon knew and intended that Duet would conduct itself on the basis that the January Figures were accurate and not misleading. Though Mr Treon believed that Duet was more interested in the future projections I reject the suggestion that Duet ever said or suggested that they had no interest in the figures for 2010. Mr Korat asked specifically for both profit and loss and balance sheet figures for 2010 and Mr Treon must have realised that they had at least some interest in those numbers for the purposes of assessing the investment. Duet also asked for an EBITDA bridge to understand the build-up of EBITDA. The EBITDA bridge provided on 7 February 2011 gave a bridge from 2010 to 2013, using the normalised figure of £13.1m for 2010. Mr Treon intended that Duet would use it in reaching a decision about the investment. Indeed the email from Mr Amlani under which the bridge was sent (copied to Mr Treon and Dr Srinivas) said "we now look forward to your approval of the funds".

524. As already noted, another potential investor, Jerry Ahmed, asked for trading information about 2010. By asking for the 2010 numbers Duet was not doing anything out of the ordinary.

525. Moreover, it is inherently probable that figures for 2010 were likely to be of interest to an investor as providing a basepoint comparison for the projected figures for 2011-13. This conclusion is supported by the provision of the EBITDA bridge, which shows the build up from 2010 to 2013. Mr Treon also volunteered in the course of his evidence (as already explained) that he would have had a challenge explaining the projected figures if he had not normalised the figures for 2010. He expected that an investor would have been interested in comparing the ratio of wages to turnover for 2010 and 2011 in assessing the plausibility or reality of the projections.

526. I therefore conclude that Mr Treon represented that the presentation of the Forecasted Figures for 2010 was accurate and not misleading knowing and intending that Duet would rely on them as accurate and reliable figures as part of the process of deciding whether to invest.

Knowledge/recklessness.

527. The next issue is whether Mr Treon had the requisite state of mind. Much of the relevant ground has already been covered. Mr Treon accepted that the presentation contained in the Forecasted Figures would have been misleading in the absence of an explanation to Duet that part of the staffing costs had been deducted and treated as exceptional items. He accepted that the deduction was material and needed to be explained to all investors.

528. I have already found that Mr Treon did not explain the "normalised" treatment of the staffing costs to Duet.

529. Counsel for Mr Treon submitted (in the alternative to Mr Treon's principal case) that even if Mr Korat did not understand the treatment of part of the staffing costs as exceptional it is probable that Mr Treon genuinely believed that he had explained the treatment to Mr Korat and that he therefore lacked the necessary state of mind. In other words, that Mr Treon thought he had explained the normalisation of the 2010 numbers.

530. I am unable to accept this submission. On the evidence there was no realistic room for a misunderstanding along those lines. Mr Treon's case and evidence about the conversation was that he and Mr Korat discussed the rationale for the normalisation of the figures, namely, the current problems arising from the new-builds and refurbishments; that Mr Korat had actually asked for the numbers to be normalised so that Duet could benchmark the projections against historical trading; that Mr Korat actually said that he had noticed the exceptional treatment of wages in the 2009 accounts; and that Mr Korat asked for the projected numbers for 2011-13 to be normalised. In short Mr Treon's case and evidence was that the conversation was detailed and specific; that he gave a full and clear explanation of the way the figures would be presented and that Mr Korat not only agreed but actually asked for normalised figures.

531. I have found as a fact that Mr Korat did not appreciate the treatment of a chunk of the staffing costs and did not ask for the figures to be normalised. It is far-fetched to suggest that the parties could have had a conversation where, on the one hand, Mr Treon came away thinking Mr Korat understood (in some detail) the normalisation of the numbers, while, on the other, Mr Korat had no inkling that the numbers he was given had been normalised. The differences between their evidence were far from being ones of nuance and they cannot be explained by the vagaries of recollection. Moreover, if Mr Treon had embarked on explaining the normalisation of the numbers I am satisfied that Mr Korat would have asked questions and tried to get to the bottom of the treatment. This would have been reflected somewhere in the documentary record. But, as I have said, there is no trace of the idea of normalisation in any of the email communications between the parties or the internal communications between RP&C and Mr Treon, or the internal documents of Duet.

532. Furthermore, if Mr Treon had thought that Mr Korat had asked for the figures to be normalised there would have been no reason to edit the information provided to Duet after 19 January 2011. As already seen, Mr Treon discussed with Dr Srinivas and Mr Amlani what should be provided and edited the documents.

533. Counsel for Mr Treon relied again in this context on the risks of discovery and that Mr Treon would not knowingly have made false statements about the January Figures knowing that Duet would almost certainly find out at some stage that they had been normalised. Counsel said that the allegations of fraud made no sense. I have already addressed this submission. For the reasons given there, I find that Mr Treon was prepared to run the risk of later detection. He may well have anticipated that the normalised treatment of the numbers would emerge through due diligence. But he hoped that, if it did, he would be able to persuade Duet that the investment was justified by the future trading projections. In any case the worst that could happen was that Duet would not invest. As to the risk of Duet discovering it at some time after investing, Mr Treon anticipated that the merger would have been achieved and believed that, even if the merger failed, ECG would have navigated its cashflow crisis so that Esquire would be able to service its obligations under the loan notes. So there was some risk, but Mr

Treon thought it was worth taking as a way of getting ECG through its current cash squeeze.

534. Counsel for Mr Treon also submitted that the case that he knowingly misled Duet was undermined by his willingness to provide unrestricted access to Colliers, who knew the full picture, including the wage and agency costs for 2010. Mr Treon therefore knew that Duet could find out the full picture. Had he been seeking to mislead Duet he would not have allowed them to speak freely to Colliers. I am unpersuaded by this argument. For the reasons already given Mr Treon knew that there was a risk of discovery but thought it was one he could manage. Moreover Colliers were valuers and it was likely that Duet would be interested in asking them about their valuation rather than quizzing them about the underlying trading numbers.

535. For these reasons I find that Mr Treon knew that the presentation of the January Figures to Duet was inaccurate or misleading.

536. The claimant alleged that there was a further reason why Mr Treon knew (or was reckless as to whether) his representations about the Forecasted Figures were false. It said that the representation was a continuing one and that Mr Treon became aware from the draft audited accounts for 2010 at the latest that the normalisation treatment used in producing the Forecasted Figures was wrong and inadmissible as a matter of accounting. In the light of my earlier conclusions the claimant does not need to establish this further ground. However for completeness I have concluded that the draft accounts did not themselves cause Mr Treon to conclude that his earlier approach to normalisation was wrong. I accept Mr Treon's evidence that the discussion about the draft accounts arose from the involvement of Hacker Young in the recasting of the accounts for the purposes of Project Saxon. Mr Treon understood that there was a continuing debate between Hacker Young and KLSA about the proper accounting treatment. Mr Treon continued to believe that the treatment that had been followed in the 2009 accounts was acceptable. The information provided to Mr Treon about the draft 2010 accounts was inconclusive and suggested that there remained a debate as to whether it was appropriate to treat some of the staffing costs as exceptional. I therefore find that the events surrounding the 2010 draft accounts are not a separate ground for saying that the representation was false.

Inducement and loss

537. As already explained, in a case of deceit there is an evidential presumption of fact (not law) that a representee will have been induced by a fraudulent misrepresentation intended to cause him to enter the contract and that the inference will be "very difficult to rebut"; however, it remains the case that the court must make up its mind on the question whether the representee was induced by the representation on the basis of all the evidence available to it; the claimant needs to show that the misrepresentation was "actively present in his mind" when he made the decision to enter into the transaction; the question is whether the state of the claimant's mind is disturbed by the representation and such disturbance was part of the cause of what he did; it is sufficient for the misrepresentation to be *an* inducing cause of the claimant entering into the transaction on the terms that he did; the test is whether the representation was a matter of some significance in the decision to enter the contract; it is no answer to a claim in fraud that the representee could have discovered the falsity of the statement by exercising reasonable care and skill; and if the making of the representation in fact

influenced the claimant, it is not open to the defendant to argue that the claimant might have acted in the same way had the claimant been told the truth.

538. ERED invested in June 2011. The claimant accepted that Duet's principal focus in due diligence was on the figures for 2011-2013. It submitted however first, that without the 2010 figures being presented in the way they were Duet would not even have proceeded with due diligence and, secondly, that the figures for 2010 were significant as Duet (and therefore ERED) used them as a comparison to assess how much improvement there would need to be in 2011 to achieve the projected figures and therefore to assess the investment. The claimant says that second point is also supported by the request for the EBITDA bridge.

539. The defendants made the general submission that Mr Korat was keen to invest in the notes before the merger (which would enhance ERED's position as the other mezzanine holders would convert to equity). They suggested (obliquely) during cross-examination that he knew that the January Figures had been normalised and that the reason he did not disclose this to the IC was that he wanted to push the investment through. I reject those submissions. I have already found that Mr Korat was not aware of the normalisation of the numbers. Mr Korat had no incentive to push the investment through without alerting the IC to the basis on which the numbers had been prepared.

540. The defendants submitted that Duet and ERED were investing in June 2011, that what mattered was ECG's ability to pay the mezzanine debt in the future, and that they were not interested in the historical trading numbers. Duet also knew that ECG was facing cashflow pressures in 2010 but that it was in turnaround and that what mattered was its trading prospects in the years after the investment.

541. In support of this submission the defendants observe that Duet carried out its own extensive due diligence. It did not ask for any update on the 2010 trading figures or for any breakdown of them. By contrast it asked for a great deal of material about the future prospects. Examples include the following:

i) On 22 February 2011 it asked for the EBITDA Bridge; on 23 February 2011 Mr Korat noted the uplift in EBITDA from 2011 to 2012 and told Mr Amlani that he wanted more specifics about it.

ii) Also on 23 February 2011 he asked questions about the forecast turnover for 2011, occupancy rates and bed rates and the increase in beds between 2011 and 2013.

iii) In his later email of 23 February 2011 he said that for Duet it was all about providing the increase in occupancy build up to prove that EBITDA would grow as forecast.

iv) On 24 February 2011 Mr Amlani sent in response an added worksheet to show "PL Analysis and Valuation Occupancy" by division.

v) On 4 March 2011 Dr Srinivas forwarded a response from Mr Treon to queries raised by Mr Korat. These related to fee increases, wage increases and included versions of the projections with assumptions about these increases and various reports concerning demand for beds.

vi) On 8 March 2011 a further version of the model was sent to Duet with an additional worksheet to reflect ECG's analysis of the turnover build up.

vii) The same day Mr Treon sent Mr Korat and Dr Srinivas the pipeline for ECG in 2011.

viii) On 14 March 2011 Mr Korat sought reassurance as to when the Colliers valuation would be provided and how likely it was that the merger could happen.

ix) Duet were given access to Mr Tasker and were provided with the Colliers valuation report.

x) Duet created their own projections for 2011 to 2013, using much of the data contained in ECG's working models but applying different growth assumptions. They used these for assessing the coverage ratios and likely returns on the investment in the various scenarios.

xi) The claimant's witnesses accepted that in reaching their decisions they focused on the projected outcomes.

542. I find that Duet's analysis indeed focused mainly on their projections for 2011 to 2013.

543. The defendants went further and said that Duet had no significant interest in the 2010 numbers. Duet never asked for more up to date numbers, even though they knew that the Forecasted Figures included forecasts. They observed that Duet did not ask for any further financial information about 2010.

544. However these submissions appeared to me to be directed at the suggestion that the 2010 numbers were Duet's main or principal area of focus. I have already found that Duet concentrated primarily on the future trading rather than on 2010, but it is not the ultimate question. Moreover Duet did ask for some further trading information (about occupancy etc.) which tied in with the 2010 numbers. I also find that Duet believed that the numbers it had been given were accurate and not misleading and thought that they were adequate for its purposes.

545. The legally relevant question is whether the representation about the 2010 numbers played a significant part in the decision to invest, not whether it was the central inducement. I am satisfied that the Forecasted Figures were actively present in Duet's and (therefore ERED's mind) and were significant in two ways.

546. First, I accept Mr Korat's evidence that if Duet had understood that the profits for 2010 were not sufficient even to service the senior interest it would not have pursued the due diligence process. Duet would have seen that the group was struggling to meet even its senior interest from profits. Second, I accept the evidence of Mr Korat, Mr Lattanzio and Ms Shah that Duet used the 2010 Forecasted Figures as a means of comparison, to test the plausibility of the projected profits for 2011. The 2010 numbers formed the starting point for the comparison.

547. In this context the Second IC Memo set out the 2010 Forecasted Figures. It contained tables of the Duet base case and downside case which started with 2010 numbers, including the figures for turnover and "wages" and the £13.1m EBITDA figure taken

from the Forecasted Figures in the January Figures. The following columns then set out Duet's projected numbers for 2011-13. This was effectively showing a bridge analysis. This is consistent with the claimant's witnesses' evidence (which I accept) that Duet and ERED used the 2010 numbers as a starting point when assessing the likelihood of their projected cases being achieved. Mr Korat said (and I accept) that they looked at the trend and asked whether it made sense that ECG were going to grow from £13.1m of EBITDA in 2010 to £18.5m in 2011. I find that had Duet and (ERED) understood that the numbers for 2010 had been normalised, this would have led to a different approach of the build-up of EBITDA for the later years, particularly 2011.

548. The Second IC Memo also contained a calculation of a debt/EBITDA ratio (of 13.79x) for 2010. (Had the EBITDA not been normalised in respect of £4.25m of staffing costs that ratio would have been materially higher (about 20x)).

549. It also included Duet's break-even scenario which included an ICR ratio of 1.15x for 2010 based on the Forecasted Figures. (The ratio would have been significantly less than 1.0 had EBITDA not been normalised). Mr Korat's and Mr Lattanzio's evidence was that if he had known that ECG was not able to cover its interest from profits in 2010 he would not have recommended an investment because it would not have complied with ERED's debt strategy. I accept this evidence and so find.

550. By using the numbers in this way Duet did not make any adjustments for the fact they had been "normalised" for staffing costs. I have already found that Duet was unaware of the removal of staffing costs from the wages line and that it (and therefore ERED) believed also that the Forecasted Figures had not been inaccurately or misleadingly presented.

551. The defendants also submitted that Duet and ERED were not interested in exceptional items in previous years' accounts. Where the IC memo referred to historical results for 2006-2009 the figures stopped before the exceptionals line. The defendants argued that because Duet and ERED were uninterested in exceptional items, the exclusion of exceptional items from the Forecasted Figures for 2010 could not have affected their minds. The defendants relied specifically on passages in the cross examination of Mr Korat, Mr Lattanzio and Mr Shah to the effect that Duet would ordinarily exclude exceptional items from their assessment of the core trading performance of a company. They also relied on passages in the evidence of Mr Korat and Mr Lattanzio to the effect that their real complaint was about the magnitude of the exceptional items, not their existence. The defendants submitted that the exclusion of the exceptional items from Forecasted Figures therefore made no real difference to Duet's assessment.

552. I am unable to accept these submissions. The claimant's complaint is not merely that Forecasted Figures did not refer to certain items it had decided to treat as "exceptional". It is that the Forecasted Figures purported to present staffing costs (in the "wages" line item) while removing a material amount (£4.25m) of those staffing costs. In its management accounts ECG chose to call these "exceptional items". Whether that accorded with generally accepted accounting practice does not matter as they were management accounts. But Duet and ERED did not realise that a material amount of the wages had been removed. I am satisfied that Duet and ERED would not have been indifferent to knowing the total wages for 2010 was £4.25m higher than presented and that, if they were included, net profits (before mezzanine interest) would be negative, but that ECG regarded £4.25m of the costs as "exceptional".

553. I am also satisfied that Mr Korat, Mr Lattanzio and Ms Shah all thought of "exceptional items" as unusual, one-off events which were not expected to be repeated. I accept their evidence that they would not have regarded the treatment of the part of the wages in respect of some (under-occupied) care homes as meeting this description. They would have regarded these wages as properly falling under the operating costs of the business.

554. For these reasons the defendants have failed to discharge the evidential onus of showing that ERED was not induced to invest by the representations about the accuracy of the Forecasted Figures.

555. It is common ground that, if the other elements of the tort are established, ERED has suffered at least some loss. There is a dispute about the extent of the loss, to which I shall return.

The normalisation claims against Dr Srinivas/RP&C

556. Before I consider the separate elements of the claim against Dr Srinivas and RP&C it is convenient at this stage to address more generally the role of Dr Srinivas and his understanding of the financial information. Dr Srinivas's position was that his role was to liaise and pass on information generated by ECG to Duet and other investors; that he wanted to keep abreast of what information was being provided to investors and gave advice about the form in which it was expressed, but was not involved in the content of the information. He also said that while he reviewed the information at a general or high level he did not understand the details of it.

557. I find that Dr Srinivas had a far better understanding of ECG's financial information than he is now prepared to accept. He was intimately involved in the process of deciding what information should be given to individual investors and he was deeply interested in understanding its content as well as its form. My reasons follow.

558. First, Dr Srinivas had acted as a financial adviser to Mr Treon and ECG over many years. RP&C was also in charge of seeking to promote the loan note issue. Nationwide was an investor in RP&C and Nationwide was another investor in ECG. RP&C also advised USI, the potential merger partner. Dr Srinivas knew about the group's relationships with its banks, landlords, potential merger partners, and potential fund raising efforts. He could not possibly have carried out these various roles without a detailed understanding of ECG's financial performance and prospects. This is specifically the case in relation to his role as placement agent for the loan notes. RP&C could not properly have fulfilled its mandate unless Dr Srinivas had familiarised himself fully with the latest financial information concerning ECG. I was unconvinced by his attempt to understate his level of understanding.

559. Second, the documents show that he was regularly and frequently given financial information about ECG and attended meetings with Mr Treon and Mr Amlani to discuss it. Non-exhaustive examples include these:

   i) Dr Srinivas was sent the ECG business model in November 2010 and had a meeting with Mr Treon and Mr Amlani to discuss this on 16 November. He knew this was to be provided to FTI.

ii) On 25 November 2010 Mr Amlani emailed him an electronic version of the Original Financial Projections.

iii) Mr Treon sent a copy of the FTI December Report to Dr Srinivas on 5 January 2010. This was a potentially important document for ECG. Dr Srinivas clearly knew of the involvement of FTI and I consider it likely that Dr Srinivas would have read this report. This is supported by the fact that Ian Gray included Dr Srinivas in an email of 28 December 2010 referring to the FTI report.

iv) On 11 January 2011 Mr Treon sent Dr Srinivas and RP&C the ECG Presentation, which included an overview of the business and figures taken from the Original Financial Projections. On the same day Mr Treon sent Dr Srinivas a revised version of the Original Financial Projections.

v) On 12 January 2011 Mr Treon copied Dr Srinivas into his email to Sir John Hanson giving an update on ECG. This referred to the Original Financial Projections and the work undertaken by FTI. It set out a series of financial challenges. The fact that Dr Srinivas was copied into the emails tends to show that Mr Treon considered he should be kept up to speed with all developments in the business. That accords with the probabilities: Dr Srinivas could not have performed his job properly without an intimate and up-to-date understanding of the business and its finances.

vi) Indeed on 17 January 2011 Sir John Hanson emailed and asked Dr Srinivas to help him understand the fundraising process as well as ECG's recovery plan that had been shared with the banks and reviewed by FTI. Dr Srinivas agreed to do so and I find that the discussion took place. Sir John must have seen Dr Srinivas as sufficiently well-informed to ask for guidance. Dr Srinivas would not have agreed to the discussion unless he had considered himself properly informed about the recovery plan.

vii) Between 18-20 January 2011 Dr Srinivas and Mr Treon discussed the contents of a draft PowerPoint presentation intended for a meeting with the Banks on 27 January 2011. This referred to ECG downgrading its projections and had placeholders to be filled in. I find that Dr Srinivas was involved in finalising these projections.

viii) On 27 January 2011 Mr Treon emailed Dr Srinivas the January Financial Projections, describing it as "the latest model". It was called "Revised Integrated Model 2009-2013 Final Revised V6 26012011 Final No Contingencies". I find that Dr Srinivas reviewed this model in order to be in a position to carry out his role properly. I also find that he knew what it was: i.e., the latest model, downgraded from the Original Financial Projections, because he had met Mr Treon to discuss them.

ix) On 30 January 2011 Mr Treon re-sent the January Financial Projections to Dr Srinivas.

x) On 13 February 2011 Mr Treon sent Sir John Hanson an update for the Supervisory Board. The covering email was copied to Dr Srinivas and others at RP&C. It referred to the challenging trading conditions and to the fundraising

efforts. It also included numbers from the Revised Financial Projections, described as the "group's financial performance in the next three years". I find that this was provided to Dr Srinivas to enable him to carry out his various functions and as part of the process of keeping him fully in the loop. I also find that he read the email and understood that the group had adopted new financial projections in January 2011.

xi) On 24 February 2011 Mr Johal, the financial director of ECG, sent Mr Treon a flash report which compared the budget to the January performance. The budget was based in part on the Revised Financial Projections. Mr Treon forwarded this to Dr Srinivas. I find that he did this in order to keep Dr Srinivas up to speed with developments in the business. I also find that Dr Srinivas looked at the attachment in order to keep himself properly informed.

xii) On 23 March 2011 Mr Amlani sent Dr Srinivas and Mr Treon a copy of a model intended to be presented by ECG to Fairfax in connection with Project Saxon. The attached model was the Revised Financial Projections. Mr Amlani asked Dr Srinivas to review it before a discussion so that they could agree what to send to Fairfax. Dr Srinivas responded that the model looked "fine" and asked that it be sent to Fairfax. This shows first that Mr Amlani was continuing to seek guidance and agreement from Dr Srinivas as to the contents of the information to be provided to third parties; and second that Mr Amlani expected Dr Srinivas to review the information before they discussed it. I find that Dr Srinivas did indeed review the model sufficiently to have an intelligent discussion with Mr Amlani. I reject his evidence that he only reviewed such models at a high level if by that he meant that his review was cursory.

xiii) On 25 March 2011 Mr Treon and Dr Srinivas were involved in discussions about information to be provided to SG Hambros Bank. It included a P&L account which repeated parts of the Revised Financial Projections. Again I find that Dr Srinivas read the attached information.

560. Third, Dr Srinivas liaised very closely with Mr Treon and Mr Amlani about the information to be provided to Duet. Examples include:

i) Dr Srinivas took part in the initial meeting with Mr Korat on 14 January 2011, which was at RP&C's offices.

ii) When Mr Korat asked on 18 January 2011 for the full year 2010 trading figures Dr Srinivas immediately emailed Mr Treon saying, "let us discuss before you send him the information". I find that Dr Srinivas was involved in deciding on the content of what was to be sent. It would have been easy, had Dr Srinivas merely wanted to know the form of the information, to suggest that they send the ECG Presentation, which had already been prepared. Instead the bespoke January Figures were prepared and sent.

iii) On 1 February 2011 Mr Korat asked Dr Srinivas, Mr Amlani and Mr Treon for further information, including the excel model used by Deloitte and an updated balance sheet at the 2010 year end. Dr Srinivas emailed Mr Treon and Mr Amlani, saying that they should discuss before providing the information to Mr Korat. He asked to speak to Mr Amlani and Mr Treon the following day. A

conversation took place on 2 February 2011 to discuss what to send to Duet. Dr Srinivas said in his evidence that he was simply wanting to know what was being sent to Duet. I do not accept that. He was involved in advance in the process of deciding what information should be provided to Duet. What was in fact provided was the 7 February 2011 pdf. I find that Dr Srinivas considered the contents of that document with some care. I also find that he knew from Mr Amlani's email of 3 February 2011 that it was based on the Original Financial Projections, updated for actual figures up to October 2010. He knew that the 7 February 2011 pdf did not contain profit and loss figures for 2009 and that the balance sheet did not contain a profit and loss line.

iv) Dr Srinivas's involvement in the production of the 7 February 2011 pdf is also shown by the way Mr Amlani described it in the covering email. He said it was "as requested by Srini and Anoup" and that Dr Srinivas would call Mr Korat to discuss it. This is further evidence that Dr Srinivas was involved, in advance, in the contents of information. He was not merely concerned (as he now contends) to be kept abreast of the form of the information being provided by Mr Amlani and Mr Treon.

v) On 14 February 2011 Mr Korat asked for an excel version of ECG's model. Dr Srinivas and Mr Amlani then had further discussions about what to give to Duet. In an email on 14 February 2011 Mr Amlani sent Dr Srinivas an excel model and asked Dr Srinivas to confirm that this is what he wanted Mr Amlani to send to Mr Korat. Dr Srinivas and Mr Amlani had a further discussion and Dr Srinivas said that he was happy for the document to go to Duet if Mr Treon was happy with it. This again shows that Dr Srinivas was engaged in deciding, with Mr Amlani and Mr Treon, what information should be provided to Duet. I find that Dr Srinivas reviewed the attachment to the email of 14 February 2011 before discussing it with Mr Amlani.

vi) On 16 February 2011 Mr Amlani emailed Dr Srinivas and Mr Treon, asking Dr Srinivas to call Mr Treon so that they could agree the information to be emailed to Mr Moore. Again Dr Srinivas was being asked in advance to agree the information to be sent to Duet; he was not simply being kept abreast afterward of what had been sent.

vii) Dr Srinivas sent the 18 February 2011 letter which contained the working excel model. The covering letter made various statements about the enclosed information, including that it was updated for most recent information. I find that Dr Srinivas must have reviewed the enclosed model before sending the letter. I do not accept his evidence that he reviewed it only at a high level, if by that he intends to convey that he looked at it cursorily. I also find that he knew what the model contained (and its ultimate source, the Original Financial Projections) from his discussions with Mr Amlani over the previous few days.

viii) On 23 February 2011 Duet asked Mr Amlani for more information. Dr Srinivas sent an email to Mr Treon (cc. Mr Amlani) saying, "Let us discuss before you respond." Again Dr Srinivas was involved in deciding what to provide.

561. <u>Fourth</u>, Dr Srinivas liaised with Mr Treon and Mr Amlani about the information to be sent out to other investors and other third parties. Examples include these:

i) Between 20-22 December 2010 Mr Treon, Mr Amlani and Dr Srinivas discussed what information should be sent to FOFM for Voras Capital. Dr Srinivas referred to the underlying financials. He said that RP&C would be able to deal with queries as they arise.

ii) Dr Srinivas had a conversation with Mehmet Ahmed about ECG on about 14 January 2011.

iii) Dr Srinivas addressed Jerry Ahmed's request for information in January 2011. He drafted the response of 20 January 2011 and provided Jerry Ahmed with financial information. I find that he considered the contents of that information before drafting the covering email.

iv) Between 24-27 January 2011 Dr Srinivas was involved in the process of amending the slides from ECG Presentation in order to produce the document to be given to BLME. These changes removed the references in the original slides to exceptional items. I find that Dr Srinivas was aware of the changes made to the relevant slides. This was a change in the content of what was provided. As already explained, the changes were made after discussions between Mr Treon and Dr Srinivas.

v) Dr Srinivas had a discussion with Mehmet Ahmed about exceptional items on about 14 February 2011. Mehmet Ahmed had been provided at an earlier stage with the Original Financial Projections and I find that, in order to have this discussion, Dr Srinivas must have familiarised himself with the exceptional items in that model.

vi) On 17 February 2011 Mr Treon cc'd an email to Mr Pecorini as a prospective co-placement agent for the loan notes. He attached the latest model, which included a P&L account for 2010 including exceptional items of £6.9m. I find that Dr Srinivas read this to keep himself informed.

vii) On 8 March 2011 Bruce Albrecht emailed Dr Srinivas seeking a copy of a marketing presentation which Mr Albrecht had seen in RP&C's offices. Dr Srinivas sent him a copy of the Revised ECG Presentation (i.e. the version with the amended slides which had been sent to BLME in January). I find that Dr Srinivas knew the contents of that presentation, having been involved in creating it in January.

562. These documents again show Dr Srinivas's active involvement in agreeing what information should be sent out. He was not simply asking to be kept informed by Mr Amlani of what he had provided to third parties. It is again noteworthy that ECG did not simply send out existing information; what was provided to investors was specifically tailored for them.

Representations in respect of the January Figures

563. I now turn to the elements of the normalisation claims against the second and third defendants.

564. The first question is whether Dr Srinivas made any representations in respect of the January Figures.

565. The claimant says that the communications between 19 January 2011 and 7 February 2011 (when some of the numbers were repeated) were made on behalf of Dr Srinivas and that he did nothing to distance himself from them.

566. Dr Srinivas and RP&C deny this and contend that (save for the 18 February 2011 letter) they did no more than pass on ECG's information to Duet in a ministerial capacity, so that Duet did not understand that they were making any representations in respect of the information.

567. The 19 January 2011 email from Mr Amlani to Mr Korat (cc. Dr Srinivas and Mr Treon) email that the January Figures were enclosed "as requested by Dr Srinivas and Anoup".

568. Dr Srinivas said that he did not see a draft of the January Figures before they were sent. There is no email attaching a draft of them. I accept on balance that he did not see a draft before they were sent. However I also find that he knew in advance and discussed with Mr Amlani and Mr Treon what was going to be sent. The emails between him, Mr Amlani and Mr Treon show that he had an anxious interest in what ECG was going to send. Mr Amlani said in the covering email that the figures were as requested by Dr Srinivas and Mr Treon. I also find that it probable that he read the January Figures at about the time he received them from Mr Amlani. His own evidence was that he wanted to know what had been provided to Duet so that he would be in a position to discuss the information. I return further to this point below.

569. Mr Korat asked the next morning, 20 January 2011, for a balance sheet for 2010 and 2011-13. Dr Srinivas then got in touch with Mr Korat who told him they were preparing for their IC meeting. Dr Srinivas asked to talk with Mr Treon before it was provided.

570. Dr Srinivas had another call with Mr Korat on 25 January 2011. Mr Korat said that he was preparing a list of information required by Duet. Dr Srinivas said that he was happy to assist him and Mr Amlani in the process and Mr Korat welcomed that. He also mentioned that Duet took comfort from RP&C and Nationwide's involvement. Dr Srinivas and Mr Korat agreed that they would speak periodically to update each other on the status of their investment proposal and the deal.

571. They had a further catch up conversation on 1 February 2011 after which Mr Korat asked for more information and an excel model. Dr Srinivas provided some further information the following day. Mr Korat says that during one of these calls Dr Srinivas said that he would serve as an ongoing point of contact to help progress the deal.

572. On 7 February 2011 Mr Amlani sent the 7 February 2011 pdf. In his email he said, "As requested by Srini [sc. Dr Srinivas] and Anoup please find attached the financials for [ECGL] for your kind review. Srini will call you to discuss the same. Please confirm receipt and we now look forward to your approval of the funds."

573. Counsel for the second and third defendants submitted that the emails and calls did not amount to a representation by them to Duet. He said that Mr Amlani was not acting as agent of Dr Srinivas. He also suggested that the reason Mr Amlani referred to the figures being provided as requested by Dr Srinivas and Mr Treon was that the email was

coming from him in response to an email from Mr Korat to which Mr Amlani had not been addressed. He also pointed out that the emails made it clear that the information was ECG's own and had not been prepared by RP&C. I am unable to accept those submissions. The emails of 19 January 2011 and 7 February 2011 both said that the numbers were being sent "at the request of" Dr Srinivas and Mr Treon. This naturally meant that Mr Amlani was sending the figures on behalf of Dr Srinivas; or at least with his approval. Dr Srinivas's name indeed came before that of Mr Treon in the two emails. The 7 February email also said that Dr Srinivas would call Mr Korat to discuss the figures, which further suggested that Mr Amlani was sending them on Dr Srinivas's behalf and with his approval. That was in fact the case. Dr Srinivas had told Mr Amlani by email that he approved the document enclosed with the email. Dr Srinivas also knew and told Mr Treon (see his email of 7 February 2011) that Duet took comfort from the involvement of RP&C and Nationwide. Duet could also reasonably suppose in the light of these emails and RP&C's role as placing agent for the notes that Dr Srinivas had reviewed and approved the numbers. Dr Srinivas did nothing to distance himself from the presentation of the figures. On the contrary, he was held out (as he knew) as being ready and able to discuss the figures with Mr Korat. Duet's witnesses gave evidence (which I accept) that they took comfort from the involvement of RP&C as advisers to ECG.

574. Counsel also submitted that Mr Korat accepted in evidence that he knew that the January Figures and 7 February 2011 pdf were ECG's financial information, prepared by ECG, and that, therefore Dr Srinivas cannot have been making a representation about them. But the conclusion does not follow from the premise. It is possible for a person to make a representation about the accuracy or reliability or information provided by another.

575. I also note that in the letter of 18 February 2011 RP&C contained a number of express representations about the financial information, including giving RP&C's bullish views about the business. There was no suggestion in that letter that by doing so it was doing something remarkable or even unusual, or that it had changed its role from that it had when financial information was being provided to Duet "at Dr Srinivas's request" in January and early February 2011.

576. In all the circumstances I find that the implied representation about the presentation of the numbers made in the 19 January 2011 and 7 February 2011 emails was made on behalf of or adopted by Dr Srinivas (as well as by Mr Treon).

Falsity

577. I have already determined that the representation made by Mr Treon was false. The same conclusion applies here.

Intention

578. I have already determined that Mr Treon intended that Duet would rely on the representation. There is no material difference Mr Treon and Dr Srinivas in this regard. Dr Srinivas knew that Duet wanted the 2010 figures in order to assess the investment opportunity and that was why Mr Amlani sent them. He also knew about the provision of the EBITDA bridge on 7 February 2011 and was copied into Mr Amlani's email of the same date which said that they now looked forward to Duet's approval of the funds.

Dr Srinivas also accepted in cross-examination that he thought the 2010 figures would be of significance to a potential investor (although, having agreed, he then made a different point about his understanding of exceptional items). Dr Srinivas was also involved in the provision of trading information about 2010 to Jerry Ahmed, which bolsters the conclusion that he appreciated that investors in the notes in 2011 were interested in information concerning trading figures for 2010.

579. I therefore find (for essentially the same reasons as in the case of Mr Treon) that Dr Srinivas intended that Duet would rely on the presentation of the January Figures (and therefore on the implied representation that they were not inaccurate or misleading).

Knowledge/recklessness

580. Dr Srinivas denies that he knew that (or was reckless as to whether) the presentation of the January Figures was inaccurate or misleading.

581. Dr Srinivas accepted that he knew that the numbers had been normalised and that ECG was treating part of the staffing costs as exceptional items deducted after EBITDA. I find that he knew that these normalised costs would have been deducted after the line "Profits before mezz interest" in the January Figures. Dr Srinivas also accepted that it was essential to explain to potential investors that the numbers had been normalised. Indeed his own case was that he always insisted to Mr Treon that this should happen. He knew that, absent an explanation of how they were prepared, the provision of the normalised numbers to potential investors was liable to mislead.

582. Dr Srinivas's main defence on this element of the case was that Mr Treon told him (at about the time the numbers were provided) that he had explained to Mr Korat that the January Figures had been normalised (and that, indeed, Mr Korat had asked for normalised figures). Mr Treon also gave evidence that he told Dr Srinivas that he had explained normalisation to Mr Korat and that Mr Korat had asked for normalised numbers.

583. Before making my findings about that, I should address Dr Srinivas's evidence that he did not read the January Figures and therefore did not notice that the line "profit before mezzanine interest" did not state that they were "profits before exceptional items". I reject this evidence. First, the chronology shows that Dr Srinivas, Mr Treon and Mr Amlani discussed what was to be provided to Duet before it was sent. Second, Dr Srinivas said that he needed to understand the information that was being sent to Duet and it is probable that he reviewed it. Third, Dr Srinivas knew that the numbers had been normalised in the sense that some of the staffing costs had been treated as exceptional. It would have been obvious to him, from reading the one-page document, that it did not mention exceptional items or provide any other clue that it had been normalised. Fourth, other material was being sent at about the same time which, on Dr Srinivas's own case, had been edited to remove references to the exceptional items. I conclude that Dr Srinivas was aware that the January Figures did not refer to exceptional items or otherwise indicate that the numbers had been normalised.

584. I turn then to Dr Srinivas's contention that Mr Treon told him that Mr Korat had asked for normalised figures. I am unable to accept Dr Srinivas's and Mr Treon's evidence. I find that Mr Treon did not tell him that Mr Korat wanted normalised figures and that

Dr Srinivas knew that Duet was not given any explanation of the normalisation of the numbers. This is for a number of interrelated reasons (which have cumulative weight).

585. First, I have found that Mr Treon did not inform Mr Korat about the normalisation of the numbers. Mr Treon and Dr Srinivas carefully considered what should be provided to Duet (and other potential investors). It is inherently improbable that Mr Treon would have misled Dr Srinivas about what he had told Mr Korat. Mr Treon and Dr Srinivas had had a long and close business relationship. They were also good friends.

586. Second, Mr Treon knew that Dr Srinivas and Mr Korat were speaking about the information and he would have wanted Dr Srinivas to know what he had told Mr Korat to minimise the risk of cross-wires.

587. Third, as Dr Srinivas explained, in the case of the information provided to BLME (which was at about the same time as the numbers were given to Duet) Mr Treon and Dr Srinivas agreed that the normalised numbers should be provided without an initial explanation of the normalised treatment. Dr Srinivas sent the slides to BLME knowing that BLME did not know their basis of preparation. For the reasons I have already given there is no plausible reason why Mr Treon would have taken a different tack about the numbers sent to Duet.

588. Fourth, Dr Srinivas knew that the information provided to Jerry Ahmed, too, excluded any explanation that it had been "normalised". Dr Srinivas was indeed responsible for drafting the covering email which he knew was going to be provided to Mr Lensman with the normalised numbers. I find that he reviewed the numbers and understood the way in which they had been normalised. Though his covering draft email referred to "net profits before exceptional items" growing between 2011 and 2013 Dr Srinivas said nothing more about the nature of any exceptional items and, in particular, nothing about part of the staffing costs being treated as exceptional items in 2010. There was no suggestion in the email to which this was an answer that Mr Ahmed had asked for normalised numbers. The numbers actually provided were "normalised" in the sense that an amount was deducted from "wages" but without any disclosure that this was done.

589. I have also rejected Dr Srinivas's case that Mr Lensman told Dr Srinivas that he had explained the exceptional items to Mr Ahmed. I find that did not happen and that Dr Srinivas knew that unexplained normalised figures had been given to Mr Ahmed. This again shows that Dr Srinivas knew that normalised information was being provided to potential investors without anyone telling them about the basis on which the numbers had been prepared. This is consistent with the approach I have already found Mr Treon took with the numbers sent to BLME and Duet.

590. Fifth, there is not a trace in any of the communications passing between Dr Srinivas and Mr Treon to suggest that the numbers had been normalised.

591. Sixth, there is Mr Srinivas's understanding of the treatment of the "exceptional" costs in the 2010 numbers.

592. If Dr Srinivas had believed that Mr Korat was fully aware of the normalisation of the January Figures he would have reacted differently to Mr Korat's requests for further information in January and February 2011. So, for instance, when Mr Korat asked for

an excel version of the model, Dr Srinivas would simply have told Mr Amlani and Mr Treon to send the existing version of the model, such as the 3 February 2011 Model or the January Financial Projections which Dr Srinivas had been provided with. These contained a full version of the "normalised" figures. Dr Srinivas and Mr Treon instead came up with the 7 February 2011 pdf – which was a one-off document tailor-made for Duet. I find that the reason Dr Srinivas did not suggest that was that he knew that Mr Treon did not want to alert Duet to the normalisation of the numbers. Dr Srinivas had no cogent explanation why he did not tell ECG simply to send the full model to Duet or why he approved Mr Amlani sending the 7 February 2011 pdf to Duet.

593. Seventh, I have concluded that a number of elements of Dr Srinivas's evidence concerning the information given to Duet and other investors were recently imagined or invented:

i) As already explained Dr Srinivas claimed that Mr Treon told him that he had walked Mr Moore through the model and had discussed the losses of £6m with him. Dr Srinivas did not mention that in his witness statement and the first time it has ever been suggested was soon after he had heard Mr Treon giving evidence. I have found that there was no such conversation.

ii) Dr Srinivas claimed that Mr Lensman told him that he had specifically told Jerry Ahmed about the exceptional items in the 2010 numbers and given him the data. I have rejected this account.

iii) Dr Srinivas said in evidence in that in February 2011 he told ECG to send a full operating model to Mr Korat. He repeated this several times in his evidence. However when questioned by counsel for Mr Treon he said that he had never asked ECG to send the model. I reject his evidence that this was said.

iv) Dr Srinivas gave evidence that he believed that the projected figures for 2011-2013 (as well as those for 2010) had been normalised; he testified that Mr Treon had told him that the projections were his best estimate on a normalised basis. He also pleaded in his Defence that the projected figures were normalised. He said that Mr Korat had asked for this. I have already found that the figures for 2011-13 were not normalised and that Mr Treon knew this. Dr Srinivas tried in cross-examination to take another track to justify his position by saying that the refurbishment and new build programme was complete by the end of 2010. But that was demonstrably wrong as well as being at odds with the idea the 2011 – 2013 numbers were normalised. The documents show that there were some care homes where refurbishment was yet to start: in January 2011 the plan was to complete the refurbishment within 18 months. I find that Mr Treon did not tell Dr Srinivas that the projected figures for 2011-13 had been normalised and that Dr Srinivas simply imagined or invented this conversation to bolster his case.

594. As already explained, the fact that a witness has given imagined or concocted evidence on one point does not mean that all of his evidence should be disregarded. But the points listed above are very closely related to Dr Srinivas's understanding of the information provided to Duet and others. This tendency of his to invent or imagine convenient conversations on the hoof to bolster his case has led me to approach very cautiously what he said about the crucial conversation he claims to have had with Mr Treon.

595. Eighth, it is inherently probable that Mr Treon and Dr Srinivas agreed or understood that they would follow the same kind of approach to Duet as they were taking to BLME, Mr Albrecht and Jerry Ahmed: i.e. to get them on the hook by presenting things in the best possible light while being prepared to deal with later queries about the numbers. The information was given to Duet at about the same time as Dr Srinivas was sending information to BLME and Mr Albrecht and there is no reason to think that Duet would be treated differently from them.

596. Ninth, I have given careful consideration to Dr Srinivas's motives and the risks he would have been running. Dr Srinivas and RP&C said that it was very improbable that Dr Srinivas would knowingly have been involved in misleading Duet. They submitted that Dr Srinivas obtained no personal benefit from the success of ECG as his pay was not conditional on its success or that of the loan note issue. Dr Srinivas would have been putting his own reputation and career at jeopardy as well as risking the reputation of his firm, and the obvious financial consequences of a claim. They observe that RP&C was an FCA regulated business and that Dr Srinivas was a regulated individual. Dr Srinivas has had a long career as a financial adviser and has never been accused of wrongdoing. They point out that RP&C invested $1.3m into ECG's mezzanine debt which RP&C then exchanged for loan notes, which indicates RP&C's confidence in ECG.

597. The claimant raised various counterpoints. First, RP&C was not a large firm and ECG owed it large outstanding fees (of c. £2.7m). RP&C was itself in a difficult financial position at the time. Second, RP&C stood to make a large performance fee if the merger with USI went ahead and this was more likely to occur if ECG could navigate a course through its cashflow or liquidity crisis. Dr Srinivas therefore had an indirect financial stake in the success of ECG. Third, the fundraising had not been very successful in raising new money by the end of 2010. ERED was seen as a potential substantial investor and there were a number of emails showing that Mr Treon was effectively depending on it. Mr Treon called the ERED investment "critical". I reject the second and third defendants' submission that the defendants saw the investment by ERED as merely making life easier. The position of the group was precarious and attracting the ERED money was a key priority. Fourth, Dr Srinivas was a close friend and long-standing associate and adviser of Mr Treon. He was dedicated to doing everything he could to assist Mr Treon in finding a way through the group's cash flow crisis. The relationship between Dr Srinivas and Mr Treon was not the usual arm's length one of client and independent adviser. A flavour of this is given by the email traffic summarised earlier. Moreover Mr Treon was a charismatic, somewhat overbearing, and powerful character and I find that Dr Srinivas was eager to please him. Fifth, the evidence showed that both Dr Srinivas and Mr Treon firmly believed that ECG was a fundamentally sound business and that if it could find funding to navigate it through the next few months, there was every prospect of the loan notes being serviced. There is nothing in the evidence to suggest that Dr Srinivas ever anticipated that the notes would not be paid in full. Dr Srinivas confidently believed that Project Saxon would proceed and ECG would therefore become part of a larger combined group with a stronger covenant. Dr Srinivas's confidence in ECG is indeed supported by the fact that RP&C made an investment of $1.3m in the notes. Sixth, I find that Dr Srinivas also probably thought that there was a good chance that the basis on which the numbers had been normalised would be explained to Duet at some stage in due diligence and expected (as did Mr Treon) that it would be possible to finesse the explanation in such

a way as to persuade Duet to invest nonetheless. In the event that did not happen and Duet never learnt of the normalisation of the numbers.

598. Dr Srinivas's motivation has to be seen in the light of all these circumstances. There were some risks (for him, RP&C and indeed ECG and Mr Treon) if the information given to Duet did not disclose the normalisation of the numbers. But the risk probably did not seem that great and Dr Srinivas believed that once ECG had achieved the Duet investment things would turn out well. Dr Srinivas thought the business was fundamentally sound and that the merger would proceed. He thought that loan notes would be serviced. Dr Srinivas had strong personal reasons to support Mr Treon and RP&C had financial incentives, which were aligned with those of ECG, in obtaining the funding.

599. One also needs to remember that motive is irrelevant in law to a claim in deceit. It is not necessary to show that the representor was actually dishonest in the sense of having an intention to cheat or injure the representee. The representor may even make a deceitful statement with a view to bringing about a commercial transaction which he believes is in the interests of the representee. It is quite possible that Dr Srinivas genuinely believed that the investment was a good one all round: it would provide funding to ECG and healthy returns to investors, including Duet.

600. In short, while general considerations about motivation are of some assistance in reaching conclusions about the probable facts here they point both ways. I have taken them into account in reaching the factual findings set out earlier.

601. I conclude that Mr Treon did not tell Dr Srinivas that Mr Korat had asked for the January Figures to be normalised to take out exceptional staffing costs. Dr Srinivas accepted that a recipient of normalised figures would have had to be told that they were normalised; and that otherwise they would be misleading. Since Mr Treon did not tell him that Duet knew about the normalisation of the figures, I conclude that Dr Srinivas knew that the presentation of the January Figures to Duet on 19 January 2011 (and repeated on 7 February) was inaccurate or misleading.

Inducement and loss

602. I have already addressed inducement. I shall address damages below.

(f)(ii) The outdated 2010 Figures claim

Overview

603. The claimant's complaint under this head is that Mr Treon and Dr Srinivas continued to send (or cause to be sent) financial information to Duet about 2010 which was out of date and had been superseded by more accurate information. As already explained, Duet was provided with information on 7 February 2011 (and the backup information on 15 and 16 February 2011) which repeated the figure of £13.1m for EBITDA for 2010. The 7 February 2011 pdf contained the EBITDA bridge which showed the build-up of EBITDA between 2010 and 2013.

604. By 7 February 2011 ECG had produced the January Financial Projections and the Revised Financial Projections. The January Financial Projections showed EBITDA

after COH for 2010 of £12.24m (it was £13.1m in the January Figures), a difference of c.£860,000.

605. It will be noted that this complaint is independent of the claimant's case concerning "normalisation" as the EBITDA numbers in both the January Figures and the two further sets of Projections dating from the end of January 2011 were "normalised". The complaint is that, even assuming Duet had known about the normalisation of the numbers, by February 2011 there was more up to date, information about the 2010 trading profits and that it was misleading to continue to provide out-of-date numbers.

606. Mr Treon suggested at one point in the trial that the difference between 2010 EBITDA figures the January Figures and the January Financial Projections was the result of the treatment of exceptional items. That was wrong: both numbers were expressed before exceptional items. The principal components of the difference of c.£860,000 were lower turnover (of c.£503,000) and higher wages (of c.£437,000).

607. I shall consider the claims under this head against Mr Treon and Dr Srinivas/RP&C together as much of the factual ground has already been covered.

Representations by Mr Treon/Dr Srinivas

608. The claimant contends that there was an implied representation that the presentation of the information provided on 7 February 2011 (repeated on 15 and 16 February 2011) was not inaccurate or misleading.

609. As already mentioned, Mr Treon accepted that there was an implied representation that the January Figures were not inaccurate or misleading. Dr Srinivas and RP&C accepted that, if Dr Srinivas made any representation about the January Figures at all, he made the same implied representation (but they denied that he made any such representation).

610. For the reasons already given, I find that Mr Treon and Dr Srinivas both approved the format and contents of the 7 February 2011 pdf. In his covering email Mr Amlani said that the information was sent at the request of Dr Srinivas and Mr Treon and suggested that Duet would discuss the information with Dr Srinivas. Dr Srinivas was copied into that email. He did not distance himself from its contents or suggest that Duet should not rely on it. I find that the representation that the information enclosed with the email was accurate and not misleading was made or adopted by both Mr Treon and Dr Srinivas.

Falsity

611. The 2010 numbers in the January Financial Projections were of course backward looking. They were based on management accounts up to November 2010 plus one month's forecast. That involved a further month's information than was available when the January Figures were compiled. They were therefore more up to date.

612. The 2010 EBITDA figure provided in the 7 February 2011 pdf (repeated on 15 and 16 February) was £13.1m. It formed part of the EBITDA bridge. The correct, up-to-date figure was £12.24m. The difference is significant and material. I find that the information was inaccurate and the representation was therefore false.

Intention

613. I find that Mr Treon and Dr Srinivas intended that Duet would rely on the EBITDA bridge (which included the 2010 EBITDA figure of £13.1m). As Mr Amlani explained in his email, Dr Srinivas and Mr Treon had requested that he should provide Duet with the 7 February 2011 pdf. He also said that Dr Srinivas would discuss the information with Duet. They knew that Duet wanted the information to assess the investment. The email of 7 February 2011 also said that they were now (i.e. as a result of the information) looking forward to Duet's approval of the investment. Mr Treon and Dr Srinivas also knew that Mr Korat wanted specifically to tie the EBITDA bridge into the models that were provided to Duet after 18 February 2011 (see e.g. Mr Amlani's email of 22 February 2011 at 15:21 to Mr Moore, which was forwarded to Mr Treon and Dr Srinivas). It was also self-evident that Duet would wish to assess the trends of EBITDA and 2010 formed the starting point.

Knowledge/recklessness

614. Mr Treon knew of the January Financial Projections and the Revised Financial Projections. He was involved in their production and knew how they had been compiled. He had indeed presented the Revised Financial Projections (i.e. the January Financial Projections plus contingencies) to the Banks on 27 January 2011. He sent them to Sir John Hanson on 13 February 2011.

615. Mr Treon said in the course of evidence that he would not have considered the difference as "that material". I am not able to accept this evidence. I consider that he knew that Duet would wish to know the latest iteration of the 2010 numbers and that the difference of £860,000 was not immaterial. Indeed Mr Treon did not go that far, he said it was not "that material" (thereby accepting that there was a variance). Moreover, he would have known that the difference would have shown a bottom line loss (i.e. the line called "profits before mezzanine interest" in the January Figures). Mr Treon did not suggest that the failure to send out the outdated figures was inadvertent.

616. I conclude Mr Treon knew that the figure for 2010 EBITDA provided to Duet on 7, 15 and 16 February was outdated and inaccurate and that his representation that he was providing accurate information was false.

617. Dr Srinivas accepted that the provision of the figure of £13.1m in February 2011 was a mistake and that Duet should have been provided with the figure of £12.24m. Dr Srinivas said that he did not look at the figures in any detail. In the course of cross-examination Dr Srinivas said a number of times that ECG produced many different models and projections in 2010 to 2011 and that he did not review them carefully. He said that he was not involved in preparing the ECG models. He said that his role was restricted to considering the form in which the information was being presented to investors and that any questions about the numbers had to be addressed with ECG. At times his evidence gave the impression that he had historically had very little understanding of ECG's financial information.

618. I came to the conclusion that Dr Srinivas was seriously understating the grasp he actually had of the figures at the relevant times. I have already addressed this issue in detail. The documents show that he applied his mind to the contents (and not just the

form) of the financial information given to investors and that he also paid attention to the most important iterations of the models produced by ECG.

619. I find that he did review the various ECG models and understood the differences between them. In particular I find that he understood that the January Financial Projections (and Revised Financial Projections) were different from the Original Financial Projections and that they represented an important iteration by ECG of its business model. They were provided to Dr Srinivas on 27 and 30 January 2011 and again on 13 February in the Update to the Supervisory Board. I find that Dr Srinivas was aware of those numbers.

620. I find that Dr Srinivas knew from reviewing the January Financial Projections (or the 13 February update document) that the EBITDA for 2010 was now being reported internally as £12.24m. He knew from his involvement in the January Figures and from his discussions with Mr Treon and Mr Amlani that the January Figures were based on the earlier, outdated, information compiled in November 2010. He therefore knew that the figure for 2010 EBITDA presented to Duet in the documents of 7 February, and 15 and 1 February 2011 was inaccurate and misleading.

621. I also find that even if Dr Srinivas did not know this he was reckless as to the correctness of the figure for 2010 EBITDA. He knew that there had been changes to ECG's management accounts since November 2010 when the Original Financial Projections were produced. He knew this from his own involvement in the process that led to the projections that became the January Financial Projections; and from being sent the final version of those projections; from his usual (admitted) practice of reviewing each model and set of projections for turnover and EBITDA; and from reading the 13 February 2011 update document. Since he therefore knew that there had been significant changes to the figures for EBITDA he could have had no honest belief that the EBITDA figure for 2010 presented in the 7, 15 and 16 February 2011 documents was up to date and therefore accurate without checking. If he had checked he would have known the true position; if he did not check he was reckless as to the accuracy of the 2010 EBITDA figure.

Inducement

622. The evidential presumption of reliance applies so that the defendants have an evidential burden of showing that the ERED did not rely on the representation (including through the involvement of Duet). In my judgment they have not done so. I have already dealt with the issue of inducement in connection with the 2010 numbers contained in the January Figures. Since the complaint under this head relates to the repetition of part of the January Figures (i.e. the EBITDA figure of £13.1m) the same reasoning applies. Mr Korat gave evidence (which I accept) that Duet (and therefore ERED's IC) relied as part of their due diligence on the EBITDA Bridge, which showed the growth of EBITDA from the figure for 2010. The question is not what Duet or ERED would have done had it known the truth but whether the information that was provided to it (and the implied representations about its accuracy and reliability) were present to its mind and played a significant part in its decision making. I find that they did.

623. There was a negligible difference (of £17,000) between the 2010 EBITDA in the Forecasted Figures in the January Figures and that in the EBITDA Bridge. The defendants suggested that because the IC Memos did not refer to the figure used in the

EBITDA Bridge, ERED cannot have relied on that figure. I reject that submission. In substance the same figure was repeated in the EBITDA Bridge. Duet relied on the EBITDA Bridge as part of its due diligence (see above).

624. I shall address causation and damages further below.

(f)(iii) The Revised Projections claims

Overview

625. This part of the case concerns the Projected Figures (for 2011-13) contained in the January Figures. It is common ground that these were repeated in the 7 February 2011 pdf and the operating models that were provided to Duet on 18 and 24 February 2011 and 8 March 2011, save that in the operating models there was a line for mezzanine interest that was not in the Projected Figures.

626. The claimant's case under this head is that during February and March 2011 Duet was given financial projections in various forms for ECG for the years 2011 to 2013 by both Mr Treon and Dr Srinivas (or at their instigation) which were consistent with or which repeated the January Figures, when in fact ECG had created and adopted more pessimistic projections (the January Financial Projections and the Revised Financial Projections) based on more up to date occupancy data and changes to other assumptions.

627. The claimant says that by the end of January 2011 the January Financial Projections or Revised Financial Projections (which together I shall call "the New Projections" where it is unnecessary to distinguish them) represented ECG's then current expectations of its performance and that both Mr Treon and Dr Srinivas knew this.

628. The claimant claims that Duet and ERED treated the ECG operating models it was given on 18 February 2011 and afterwards as ECG's current projections and that it then used these in its due diligence process.

629. Mr Treon's position was in broad terms that the New Projections were over-conservative projections that had been produced to satisfy the Banks and that they did not represent ECG's management's expectations of the future performance. His position was that the Original Financial Projections continued to represent those management expectations. He also denied that Duet or ERED relied on the Projected Figures and therefore that they relied on any representations about those figures.

630. Dr Srinivas and RP&C accepted that there was a representation about the 18 February Model in its letter of that date. Dr Srinivas's position was in broad terms that he was not aware of the details of the changes between the various models. He said that Mr Treon had told him that he believed that the group would achieve the Original Financial Projections. He did not realise that the projections presented to Duet (based ultimately on the Original Financial Projections with some variances) were out of date or had been superseded. Dr Srinivas and RP&C also denied that Duet or ERED relied on any representations made in the letter of 18 February 2011 or otherwise.

631. It is convenient to address the claims under this head against Mr Treon and Dr Srinivas/RP&C together.

Was there a representation?

632. The claimant pleads that, by furnishing (i) the 7 February 2011 pdf (and the excel backup on 15 and 16 February 2011 and (ii) the operating models on 18 and 24 February and 18 March 2011, the defendants impliedly represented that the Projected Figures remained ECG's current and only expectations of its likely financial performance for the years 2011 to 2013. It pleads separately that the 18 February 2011 letter also represented that the Projected Figures had been updated for the most recent information.

633. Mr Treon accepted that he impliedly represented (a) that he had an honest belief that the projections were prepared on a reasonable basis and (b) that the projections reflected ECG's view of what would happen.

634. I find that Mr Treon impliedly represented that they honestly believed that the projections referred to in [632] above set out ECG's then current best expectations about its trading results for 2011 to 2013. I do not consider that there was a representation that the documents contained ECG's <u>only</u> current expectations. It was always possible that ECG might have other current projections (for instance a sensitised downside case) which it had not disclosed. However, absent some disclosure that the projections provided to Duet were such a downside case, Duet was entitled to suppose that the documents contained ECG's best expectations (or "base" or "central" case as these things are sometimes called in the investing world).

635. I also find that RP&C's letter of 18 February 2011 represented expressly that the 18 February Model constituted ECG's management's current best expectations of its trading results for 2011 to 2013 and that it had been updated for the most recent information.

636. The claimant also contends that the representations were continuing in the sense that if ECG's projections became outdated, Mr Treon and Dr Srinivas needed thereafter to inform Duet that the projections they had provided had become outdated. I do not accept that there were continuing representations of that kind. The defendants to my mind impliedly or expressly represented that the relevant projections were ECG's management's <u>current</u> best expectations on the date(s) when they provided the projections to Duet. The defendants did not thereby represent that management's expectations would not change; or imply that they would tell Duet when their expectations changed. As to this, it is inherent to any trading business that management's expectations about future trading will change continuously as events unfold. I do not think it would be reasonable for a party in the position of Duet to suppose that Mr Treon and Dr Srinivas would revert if and when ECG's management expectations changed. Moreover, there was a significant delay between the provision to Duet of the Projected Figures and ERED's actual investment. It was open to Duet to seek assurance that the projections they had been given remained ECG's current ones.

Falsity

637. I start with some undisputed facts. By 27 January 2011 ECG's management had prepared the New Projections. There were material differences between these and the Projected Figures in the January Figures.

638. For instance in respect of the figures for 2011, comparing the Projected Figures to the January Financial Projections respectively: turnover had reduced from £144.9m and £140m; EBITDA from £18.5m to £17.1m; and "profit before mezz interest and tax" had reduced from £5.53m to £4.4m.

639. On the other hand the numbers for 2012 (including EBITDA) were rather more optimistic in the New Projections than in the Projected Figures.

640. The reasons for the changes between the Projected Figures and the New Projections were explained in the presentation to the Banks of 27 January 2011 as follows: occupancy had been revised downwards based on mid-January 2011 actuals; different assumptions were made about the timing and amount of fee increases and wage increases were deferred to October 2011; rental figures had been revised; changes had been made to other amounts; and a contingency held in respect of debtors had been unwound. In addition in the Revised Financial Projections a specific contingency line was added to the P&L account.

641. Mr Treon contended that the New Projections were not adopted by ECG's management as its current projections. He contended that they had been prepared on the advice of Deloitte on a conservative basis to seek to negotiate more advantageous terms with the Banks, as to amortisation and covenants.

642. I find that by 18 February 2011 the New Projections had been adopted by ECG as its current best expectation of its trading results for the years 2011-13, for the following reasons.

643. First, Mr Treon said in evidence that ECG's base projections were the ones they had provided to Colliers. This was also consistent with his pleaded case that ECG's expectations were reflected in the projections which were provided to Colliers. There was a dispute about what was provided to Colliers. Mr Treon said that Colliers were sent a version of the Projected Figures; the claimant said that they were sent the January Financial Projections. I find that Colliers were sent the January Financial Projections. My reasons are these:

    i) On 7 February 2011 Mr Beney told Mr Treon that Mr Tasker was waiting for the updated model for ECG.

    ii) In his email of 17 February 2011 Mr Treon told Mr Tasker that he was enclosing what they were sending to Duet (i.e. the 18 February Model). He said that "the ones you have are the latest - there is not much difference". So Mr Treon told Mr Tasker that the projections Colliers already had were "the latest" and were different from those sent to Duet.

    iii) The defendants' expert compared a sample of the data from the Colliers' Report and matched it precisely to the January Financial Projections. On the other hand the data does not match the 3 February 2011 Model (on which the January Figures were based). This gives strong support for the view that Colliers was working on the basis of the January Financial Projections.

iv) The variance of turnover for 2011 was only about £0.6m between the Colliers Report and the New Projections; the variance against the Projected Figures is over £5m.

v) The only suggested candidates for what was provided to Colliers other than the New Projections were the 3 February 2011 Model or the Original Financial Projections. But each is improbable for the reasons given by the defendants' expert. Moreover the 3 February 2011 Model was tailor made for Duet and there is no evidence to show that it was also provided to Colliers. And Mr Treon would not have referred to either of these candidates in the email of the 17 February as "the latest".

vi) Mr Treon eventually accepted in cross-examination that Colliers were sent the January Financial Projections (though he said that the differences between those and the January Figures were not material, a point to which I shall return below).

644. Second, apart from Mr Treon's evidence on the point, the fact that the January Financial Projections were provided to Colliers, who were charged with carrying out a valuation of the business, is itself strong support for the view that these were ECG's management's latest core expectations for 2011-13.

645. Third, the presentation to the Banks on 27 January 2011 said that "following a review of recent trading and the FTI sensitivities the Group has prepared a re-forecast". I see no reason not to take those words at face value.

646. Fourth, on 13 February 2011 Mr Treon sent the Supervisory Board an update document containing the Revised Financial Projections to Sir John Hanson, (copied to Dr Srinivas). The update described them as "the group's projected performance in the next three years". The covering email did not suggest anything different. The update was to be circulated by Sir John Hanson to other members of the board. Mr Treon said in evidence that Sir John Hanson had asked to be sent a haircut version of the projections. There is no trace of that in the documents. Had that conversation taken place one would have expected to see it referred to in the update document or the covering email. Mr Treon could not explain why Sir John Hanson or the Supervisory Board would have wanted anything other than the latest actual expectations of management, which is what Mr Treon said they were getting. Nor would anyone have wanted a downside version unless the reasons for the haircut and variances from an underlying base case were also spelt out. I find that the supposed conversation did not take place and that Mr Treon's evidence was imagined or fabricated.

647. Fifth, on 17 February 2011 Mr Treon sent Mr Pecorini, a prospective co-placement agent for the notes, cc. Dr Srinivas, the January Financial Projections. He said management had done a final review and that they felt the attached projections were achievable. There is nothing to support Mr Treon's suggestion in evidence that Mr Pecorini had sought a set of "flexed figures". It is inherently implausible that Mr Treon would have sent anything other than ECG's latest projections to someone being lined up as a placing agent. Again if the figures had been flexed one would have expected to see an explanation of it. I find that this conversation too was imagined or invented.

648. Sixth, on 17 February 2011 and 24 February 2011 Mr Treon was sent a flash report by the accounting team containing budget figures taken from the January Financial Projections. This shows that ECG management were using those figures as the budget.

649. Seventh, on 22 and 24 March 2011 Mr Amlani sent the Revised Financial Projections to Fairfax (cc. Mr Treon and Dr Srinivas) for the purposes of Project Saxon. Mr Amlani had discussed this with Dr Srinivas. He said that he was enclosing a high level P&L summary for ECG for 2011-2013. He said that he was discussing the model with Hacker Young. There was nothing in the email to suggest that the projections were not ECG's latest.

650. Eighth, on 31 March 2011 Mr Treon sent information to a potential investor in the loan notes, which included "the 2011, 2012 & 2013 projected performance" taken from the Revised Financial Projections (without exceptional items). There was nothing to suggest that they were anything other than ECG's current expectations.

651. Ninth, on or before 7 March 2011 ECG sent part of the January Financial Projections to Knight Frank, who were carrying out a valuation exercise for the Banks.

652. Tenth, ECG made a presentation to the Banks on 25 March 2011, which was shared with Dr Srinivas the same day. It presented an analysis of the variances between the "revised forecast" (i.e. the Revised Financial Projections) and actual trading results for February 2011. Some of the graphs in the presentation referred to the "budget per revised model".

653. Eleventh, on 1 April 2011 Mr Treon sent an excel document to Dr Srinivas by email containing the Revised Financial Projections for the purposes of Project Saxon.

654. Twelfth, on 11 April 2011 Mr Treon provided Dr Srinivas with a draft presentation to Nationwide which contained part of the Revised Financial Projections.

655. Thirteenth, on 21 and 22 April 2011 Mr Treon sent to Dr Srinivas and others at RP&C an excel document which included an analysis of the variances of ECG's actual trading for Q1 2011 against a budget that matched the Revised Financial Projections.

656. Fourteenth, the presentation of 27 April 2011 to the Banks said that the Revised Financial Projections "reflected our best view of the anticipated performance for the year".

657. Fifteenth, there is nothing in any of the contemporaneous documents to suggest that the Projected Figures (as provided to Duet) were used internally by ECG for budgeting purposes or otherwise after January 2011.

658. I also find that Mr Treon's evidence about the various financial models was unreliable:

i) Colliers did not review the occupancy data in the models sent to Duet. Rather they reviewed the occupancy data from the January Financial Projections.

ii) As already explained, I find that his evidence about a conversation with Sir John Hanson about the update document for the Supervisory Board was untrue.

iii) Mr Treon said in cross-examination that the Projected Figures were given to Fairfax. That did not happen. Fairfax were given the January Financial Projections.

659. Mr Treon said repeatedly in his evidence that the January Financial Projections were prepared on a conservative basis to assist in negotiations with the Banks. I reject this suggestion. Mr Treon did not plausibly explain why it would have assisted in those negotiations to understate the group's expected performance. Mr Treon's counsel suggested that if the banks had seen higher projected profits they might have pressed for a tougher amortisation schedule, but that was speculation and was not supported by the contemporaneous documents. Moreover, while the January Financial Projections were worse than the Projected Figures for 2011 they were better for 2012-2013. As to other covenants, these were set by reference to various ratios and Mr Treon's counsel was unable to explain why a different (and, on Mr Treon's case, less favourable) set of forecasts would have led the banks to impose less stringent covenants.

660. I concluded that Mr Treon's evidence in this regard was contrived. The contemporaneous documents show that he did indeed regard FTI's comments on the Original Financial Projections to be unduly conservative. Some of the documents also support his view that the Re-Revised Financial Projections were over-conservative (see for instance the email of 22 April 2011 from Fairfax). But the contemporaneous documents do not suggest that Mr Treon or his advisers thought that the New Projections produced in January 2011 were over-conservative or had anything to do with negotiations with the Banks. On the contrary, as already explained, they represented management's genuine views about the anticipated performance of ECG.

661. I therefore find that by 18 February 2011 the New Projections had been adopted by ECG as its current best expectation of its trading results for the years 2011-13. I also find that the New Projections were materially different from the Projected Figures given to Duet on 18 February 2011, 24 February 2011 and 24 March 2011. It follows that the representations made by the defendants that the Projected Figures were ECG's then current best expectations about its trading results for 2011 to 2013 were false.

662. I have already rejected the claimant's case that the representations they made about the projections were continuing in the sense that Mr Treon or Dr Srinivas were required to inform Duet of subsequent changes to ECG's expectations. But in case this aspect of the case goes further, I find, for completeness, that ECG adopted the Re-Revised Financial Projections as its latest expectations, for the following reasons.

663. First, they were sent to Fairfax for the purposes of Project Saxon.

664. Second, the presentation to lenders dated 27 April 2011 stated that the objectives of the meeting were to provide an update on management's latest view of the forecast performance of the business; that the April model reflected their updated view based on experience in the first quarter; and that the April model was conservative and deliverable.

665. Third, the April Financial Projections were later referred to as the budget figures in an analysis of the variance between actual and budget for the purposes of a presentation to Nationwide in 2012.

Intention

666. I find that the defendants intended that Duet and ERED would rely on the Projected Figures in deciding on the investment in the loan notes and would when receiving them treat them as ECG's latest projections, for the following reasons.

667. First, Mr Amlani sent the 7 February 2011 pdf under cover of an email "as financials for ECG", being "for [Duet's] review". The email said they were sent at the request of Dr Srinivas and Mr Treon and that "we now look forward to your approval of the funds."

668. Second, in the 18 February 2011 letter Dr Srinivas described the 18 February 2011 Model as "earnings projections prepared by European Care ("EC") which should assist you in assessing the EC opportunity". The letter also said they were up to date.

669. Third, Mr Amlani sent the 24 February 2011 Model to Mr Korat in response to specific inquiries arising from Duet's due diligence.

670. Fourth, Mr Treon sent the Operating Model of 8 March 2011 to Mr Korat, cc. Dr Srinivas, by an email of that date. He referred to the model being the last piece of information that was outstanding. He said, "It will be useful if we can now take it to the next stage with view to a closing."

671. The defendants argued that they thought that Duet were undertaking their own due diligence, using their own assumptions. However as just explained, the defendants gave the Projected Figures to Duet knowing that Duet would use them in assessing the investment. The defendants did not know exactly how Duet would use the projections. But they appreciated that Duet wanted a working model and that the models they provided on 18 February 2011 and thereafter contained an enormous amount of information, including hard coded occupancy data for the various care homes. The defendants might have thought that Duet would carry out sensitivity analyses by changing some of the assumptions in the model. But they could not have thought that Duet would be able to rebuild the projections, including occupancy data and the other hard coded numbers.

Knowledge/recklessness

672. I start with Mr Treon. It is clear from the chronology that he had a firm grasp of what was given to Duet. The question is whether he knew at that time that the projections provided to Duet in February and March 2011 (i.e. the Projected Figures) were not ECG's current best expectations of its trading performance for 2011-13.

673. I have already set out the events and communications which have led me to conclude that by 18 February 2011 at the latest ECG had adopted the New Projections as its current business plan. Mr Treon was involved in or aware of each of the events or communications. He knew, first, that the New Projections had been adopted by ECG and, second, that they had been revised from the original Business Plan from November 2010. I shall not repeat all those events and communications but note these again:

i) Mr Treon presented the Revised Financial Projections to the Banks on 27 January 2011. The presentation explained that changes had been made to update things from the original Business Plan from November 2010.

ii) On 13 February 2011 Mr Treon sent the update to Sir John Hanson and the Supervisory Board, including the Revised Financial Projections. He said "[o]ur detailed projections which have been the subject of review by several external parties".

iii) By 25 February 2011 he had read the FTI February Report which summarised the changes that had been made to the original Business Plan. This included revisiting occupancy assumptions in light of the actual January occupancy figures; reviewing assumptions around loss making homes in light of management's operational turnaround plan and the infill of new builds; correcting some errors and omissions such as PSPI rents and deferred consideration; a review of capex in the forecasts; and including items previously omitted from the cash flow.

iv) In his email of 17 February 2011 to Mr Tasker Mr Treon said that the attached document (which contained the Projected Figures) was what Duet was working on and that "the ones you have are the latest – there is not much difference". I have already explained my reasons for finding that Mr Tasker had been sent the New Projections. This email shows that Mr Treon understood that there were differences between the two and that Mr Tasker had been sent the "latest" projections.

674. I have also concluded that Mr Treon gave untruthful evidence about the New Projections. I also conclude that he gave that evidence because he realised that he had provided Duet with stale, out-of-date, projections and he therefore said that the New Projections did not represent ECG's expectations.

675. For these reasons I conclude that Mr Treon knew that the projections given to Duet were out of date and that they did not represent ECG's current best expectation of trading for 2011-2013.

676. I turn to Dr Srinivas's state of mind. He knew the nature of the information that was provided to Duet in February and March 2011 (i.e. the Projected Figures). He was responsible for the 18 February 2011 letter. Though Mr Treon provided a draft, Dr Srinivas made his own amendments to it. I find that he reviewed the attached model before writing the letter.

677. Dr Srinivas said in his written evidence that he reviewed the various financial projections generated by ECG at a high level. He said that every time ECG issued a new model the projected figures represented ECG's reasonable expectations at that time of its likely financial performance.

678. In cross-examination Dr Srinivas's evidence was confused. He accepted that he reviewed the summary figures to give him an idea of how things were progressing, and also accepted at one point that this would require a comparison with earlier models. At other points he suggested that while he reviewed the various models at a very high level he did not compare the numbers and therefore did not appreciate the differences

between them. He also suggested at times that the figures were ECG's and that all he was doing was checking that the information was presented to investors in an appropriate form.

679. I reject those parts of Dr Srinivas's evidence where he suggested that he was unaware of the changes in ECG's projections. I have already addressed this issue. But in summary, I repeat the following headline reasons. RP&C were the placing agents for the notes and Dr Srinivas was the principal person carrying out that function. He had to be able to liaise intelligently with potential investors. He needed to understand ECG's business plan and hence to keep abreast of the various projections. But Dr Srinivas needed to know the main financial metrics, including ECG's projected turnover and profitability (i.e. the summary p&l account). Any investor would be interested in the projected performance of the group and a placing agent would therefore have to be on top of the latest version. The chronology bears this out. Dr Srinivas was kept abreast of the contents of the information being sent to investors and was involved in many discussions about its content. Mr Amlani indeed often looked to him for approval before the information was sent out.

680. Dr Srinivas was also involved in advising USI in relation to Project Saxon and in that role too he needed to understand ECG's actual and projected financial position. He must have reviewed the contents of the various projections.

681. I conclude for these reasons that Dr Srinivas was attempting when giving oral evidence to understate his involvement in the production of the information and his understanding of ECG's various financial projections.

682. More specifically, I find that Dr Srinivas knew in January 2011 that ECG had revised its business model and that the New Projections represented its current best expectations by 18 February 2011. I have already set out the events and communications which have led to my conclusion that ECG adopted the New Projections as its business model. Dr Srinivas was aware of many of these events:

i) Dr Srinivas knew by mid-January 2011 that ECG was reviewing its financial projections. On 18 January 2011 Mr Treon sent a draft presentation for the Banks to Dr Srinivas which included a slide which said, "Following a review of recent trading and the FTI sensitivities the Group has prepared a reforecast which downgrades its projections". At about the same time Dr Srinivas and Mr Treon met to discuss the draft presentation. I find that Dr Srinivas knew from those discussions that ECG was revising its projections downwards.

ii) It is likely, given that he and Mr Treon met to discuss the draft presentation, that Dr Srinivas was aware of the final version of the presentation to the Banks of 27 January 2011. That contained the Revised Financial Projections and explained why ECG had revised its business plan.

iii) Mr Treon sent the update to the Supervisory Board to Dr Srinivas on 13 February 2011. This contained the Revised Financial Projections and described them as the group's projected performance in the next three years. It is probable that Dr Srinivas read this to keep properly abreast of ECG's financial affairs.

iv) On 17 February 2011 Mr Treon copied Dr Srinivas into his email to Mr Pecorini. This again attached the Revised Financial Projections. Mr Pecorini was a prospective co-placement agent for the loan notes. Dr Srinivas claimed in evidence that he did not review the financial information attached to the email. I find that it more probable than not that Dr Srinivas did read it. Mr Treon's email suggested a conference call with RP&C and it is likely that Dr Srinivas would have read the email and reviewed the attachment, at least for its headline numbers. It would not have taken him long because he had already received the Revised Financial Projections in various forms before then.

v) Mr Treon and Dr Srinivas discussed the Revised Financial Projections which were sent to Fairfax for Project Saxon on 22 and 24 March 2011.

vi) As already noted, Mr Treon gave a potential third party investor a document which contained the Revised Financial Projections on 31 March 2011. Dr Srinivas and Mr Treon discussed the contents of that document before it was sent.

vii) The presentation to the Banks of 25 March 2011 containing an analysis of the actual trading results against the Revised Financial Projections was shared with Dr Srinivas on the same date.

viii) On 1 April 2011 Mr Treon emailed Dr Srinivas an excel document containing the Revised Financial Projections for the purposes of Project Saxon. Dr Srinivas was also advising USI.

ix) On 11 April 2011 Mr Treon provided Dr Srinivas with a draft presentation to Nationwide which contained part of the Revised Financial Projections..

x) On 21 and 22 April Mr Treon and Dr Srinivas were provided with a document which contained an analysis of the variances between actual trading for Q1 2011 with a budget that matched the Revised Financial Projections.

683. In addition, Mr Treon copied Dr Srinivas into the email of 17 February 2011 to Mr Tasker which said that Colliers had been sent the latest version of the model and that it was different from the information provided to Duet. Counsel for Dr Srinivas said that the email was confusing and that Dr Srinivas's evidence showed that he had misunderstood it. I reject that. Dr Srinivas's evidence about the email was indeed confused but I concluded that that was because it showed that he was aware of the differences between the models at about the time he was composing the letter to Duet of 18 February 2011 and he could not explain it away.

684. Some of the events listed above occurred after the date of the representations made to Duet in February and March 2011. However they remain relevant to showing Dr Srinivas's understanding of ECG's projections at the time the representations were made to Duet. He understood by late January that ECG had revised its expectations and had adopted the New Projections. These (or parts of them) were then given to various parties (including the Supervisory Board, the Banks, a prospective co-placement agent, potential investors, the advisers for Project Saxon). Dr Srinivas did not react to any of these communications (before or after the communications with Duet) by querying or

raising any questions about the projections. The reason is that he understood from late January onwards that they represented ECG's business plan.

685. Dr Srinivas said in evidence that Mr Treon told him that he remained confident that the Projected Figures (i.e. those provided to Duet) would be achieved. As to this:

i) I am unable to accept that there was any such discussion. There is no trace of it in the documents. As already explained, by late January 2011 ECG's management had developed the New Projections, to take account of recent trading data and the correction of various errors. ECG then provided the Revised Financial Projections to various third parties including the Banks, a prospective co-placement agent, potential investors and advisers for Project Saxon. By late January 2011 the New Projections were being used as ECG's budget and the focus of discussion was on whether that budget could be achieved. There was no realistic occasion for a separate discussion about the prospects of achieving the earlier, now superseded, business plan which underpinned the Projected Figures.

ii) In any event, the representation was that the Projected Figures were ECG's current best expectations of its trading performance, and the current issue is whether Dr Srinivas believed that to be the case. Even if Mr Treon had told Dr Srinivas that he was personally confident of meeting the Projected Figures (and therefore outperforming the current business plan for 2011), Dr Srinivas knew by the end of January 2011 that ECG's management had adopted a downgraded set of projections as its business plan.

686. I conclude that Dr Srinivas did not have a positive belief when he signed the letter of 18 February 2011 that the attached model (which contained the Projected Figures) was ECG's latest model. I find that he knew that ECG had adopted a more recent model, which downgraded the numbers from those underpinning the Projected Figures. It is no answer for Dr Srinivas to say that he relied on Mr Treon for the truth of the statements in the letter (most of which Mr Treon had drafted). Dr Srinivas indeed added the comment that the attached model had been updated for the most recent information. Dr Srinivas knew the true position, namely that the Projected Figures were out of date.

Inducement

687. The evidential presumption of inducement applies.

688. The defendants submit that ERED was not induced by the representations about the Projected Figures.

689. The second and third defendants contend that the claimant did not refer to the 18 February 2011 letter in their original particulars of claim and only introduced it into their pleading in their reply, after it had been referred to in the defence. They say that this shows that ERED could not have relied on the letter of 18 February 2011. I do not accept this submission. The claim was not issued until October 2017. The omission of any reference to the letter may be explained by the claimant and its lawyers overlooking the letter when formulating the claim. I accept though that the omission in the original pleading is a reason for scrutinising the issue of inducement with additional caution.

690. I find (taking into account the evidential presumption) that in deciding to invest ERED was induced by the defendants' representations that the Projected Figures were ECG's current expectations of its financial performance, for the following reasons.

691. First, ERED's decision to invest was based on the Second IC Memo, which contained a Day 1 ICR calculation based on the EBITDA for 2011 derived from the Projected Figures. The ratio based on the January Financial Projections would have been lower. Indeed had Duet been provided with the Revised Financial Projections, Duet would have seen that the ICR covenant for senior and mezzanine interest was less than 1.0x.

692. The defendants submitted that the ICR calculation was not significant to ERED's investment decision. They observed that on some occasions ERED did not appear to be interested in the ICR figure or that it was prepared to invest even when its own ICR requirements were not met. I am not persuaded by that argument. The defendants identified one example where no ICR was applicable but that was explained by the fact that there was no interest payable at the outset of that investment. The defendants also pointed to an example where Duet modelled for a specific event which would have reduced the ICR below 1.0x, but in that case the loan would still have been recovered. In any event these appeared to me to represent the exception rather than the rule. Overall the evidence establishes that the ICR figures were at least a significant metric for Duet and ERED and in relation to this particular investment the Memo did set out the Day 1 ICR calculation, which was based on the Projected Figures for 2011. Duet (and therefore ERED) were therefore influenced by the defendants' representations that the Projected Figures were ECG's current view of its expected trading performance.

693. Second, the Second IC Memo also contained Duet's modelling analysis which derived from the operating model underlying the Projected Figures, albeit with certain varied assumptions. The Memo also set out Duet's downside and breakeven analyses which were based on the EBITDA figures in the Projected Figures, with various downside assumptions. I find that these various analyses were an important feature of Duet's (and therefore ERED's) approach to the decision to invest.

694. The defendants submitted that the analyses contained in the Second IC Memo were Duet's own work. They argued that Duet made its own assumptions about the growth of key input such as fees, rents and wages and came up with their own projections; and that this shows that Duet did not rely on the Projected Figures but undertook their own independent analysis, based on its own due diligence. I cannot accept this submission. Duet used the Operating Model of 8 March 2011 to produce its own projections. It changed some of the assumptions about the likely growth of costs and revenues. But its projections (with those changed assumptions) were ultimately based on the Operating Model. That Operating Model contained an enormous number of hard coded data points about the projected occupancy rates at each of the homes and the attendant costs. Duet used that model as the basis of its own projections, though it changed some of the general assumptions about the growth of fee rates and costs. I find that, had Duet been provided with a different set of projections in February and March 2011, it would have used those as the basis of its modelling and the resulting projections would have been materially different. Duet (and ERED) were therefore significantly influenced by the defendants' representations that the Projected Figures were ECG's current view of its expected trading performance.

695. The defendants submitted that Duet was in fact able to make adjustments to the occupancy rates and pointed out that at one stage Ms Shah appears to have been able to produce a model which shifted the occupancy for the various homes by six months. It was unclear from the evidence just how she did that. But I do not think it assists the defendants since it was clear from the oral testimony and the documents that Duet's projections as set out in the Second IC Memo were in fact based on the occupancy data contained in the 8 March 2011 Operating Model, with adjustments being made to the assumptions about the rates of growth of fees and costs.

696. I shall address the issues of loss and damage further below.

(f)(iv) The bank covenant compliance claims

697. The claimant alleges that Mr Treon told Mr Korat that ECG was in compliance with its covenants with the Banks when it was not. The claim is made only against Mr Treon.

698. Mr Treon denies that he told Mr Korat that ECG was in compliance with its covenants with the Banks. He says that he told Mr Korat that the Banks were supporting ECG and that they were in discussion about issues of the consolidation of the bank debt, collateralisation and the waiver of covenants.

699. I am not satisfied on the balance of probabilities that Mr Treon made the alleged representation.

700. First, the claimant's case about the occasion when the statement was made has changed. The pleaded case was that Mr Treon made the statement at the meeting of 14 January 2011. Mr Korat said the same in his first witness statement. In his second statement he said that he could not recall whether it was said then or at a later meeting or call. In oral evidence Mr Korat said that the email of 15 February 2011 about the banking covenants was a follow up to the call or meeting where Mr Treon had made the statement. But that was a month after the meeting at which it is (still) pleaded that the statement was made.

701. Dr Srinivas was at the meeting of 14 January 2011 and he was not challenged about his evidence that Mr Treon did not say that the banking covenants had been complied with.

702. Second, the alleged statement is not recorded in Duet's internal documents or echoed in any information provided by Mr Treon to Duet.

703. Third, Mr Korat did not have a good independent recollection of what was said at meetings or on calls. His evidence was largely derived from documents and in cross-examination he often asked to be reminded of the contents of his witness statement before answering a question and then tended to stick loyally to what he had said in the statement. In a number of respects I have rejected his evidence as inaccurate.

704. Fourth, in my judgment Mr Korat has probably misremembered what Mr Treon said about the Banks at the meeting of 14 January 2011. He recalls that Mr Treon said something about the Banks and the covenants but has wrongly mis-recalled it as a representation that the banking covenants were being met. I think it more likely that Mr Treon said that the Banks were continuing to support the business and that they were willing to provide a waiver.

705. Fifth, for Mr Treon to say that the covenants had not been breached would have been blatantly untrue. I have of course found that he made other untrue statements about the financial information provided to Duet. But for those other misstatements I have also found that he thought that he could have finessed an explanation had Duet asked for more information and appreciated the true position. There would have been no room for fudging a lie about the banking covenants.

706. This part of the claim therefore fails.

(f)(v) The Loan Note Agreement claims

707. The LNA agreement was made between ERED and Esquire. It contained various warranties and representations. The claimant alleges that these were false. The claimant does not allege in its pleadings that Esquire was guilty of fraudulent misrepresentation.

708. Mr Treon was not a director of Esquire. The claimant does not allege that Mr Treon was a de facto or shadow director of Esquire. The claimant alleges that Mr Treon caused or procured Esquire to make the relevant representations.

709. To recap, the corporate directors of Esquire were ADL One Ltd and ADL Two Ltd. The individual principally responsible for these corporate directors was Mr Langlois of Ardel Trust Company (Guernsey) Ltd.

710. It is common ground that Mr Langlois was not involved in the day-to-day trading and operations of the care homes by EGL and its subsidiaries. Mr Treon pleads however that Esquire was involved in transactions relating to the property side of ECG and the Loan Note issue and that it obtained its own professional advice in that regard.

711. Mr Borg of RP&C assisted in the production of the Loan Note Agreement. As already explained, on 23 May 2011 he sent an email to Mr Langlois and Mr Treon seeking confirmation that the representations in clause 2.3 and 2.15 of the LNA were correct. There is no record of any response from either Mr Treon or Mr Langlois. Mr Borg said in evidence that without Mr Treon's approval Mr Langlois would not have signed the LNA.

712. I find on the balance of probabilities that Mr Treon gave his approval for the representations in the LNA and that Esquire would not have entered the agreement without Mr Treon's approval.

713. The next issue is whether there is a legally sustainable basis for claiming against Mr Treon personally in relation to the representations.

714. The claimant relied first on the well-known case of *Standard Chartered Bank v Pakistan National Shipping Corp (No. 2)* [2002] UKHL 43 for the proposition that a person who makes a fraudulent representation cannot avoid liability by saying that he was acting for a company. That general proposition does not however assist the claimant here. In *Standard Chartered* the individual defendant, who was a director of a company, signed the relevant letter. But here Mr Treon was not a director of Esquire and did not sign or execute the LNA on Esquire's behalf. There is no allegation at all that he was an agent of Esquire. This is not therefore a case of an agent who has made a fraudulent statement seeking to escape liability by reason of the agency.

715. The claimant alleges alternatively that, even if he was not an agent, Mr Treon knowingly and deliberately caused the directors of Esquire to make false representations about ECG's business.

716. The claimant relies on paragraph [17-32] of Clerk and Lindsell on Torts for the proposition that a representation made to a third party with intent that it is passed on to the claimant to be acted on by him will suffice to render the maker of the statement liable. Here the relevant representations were about the business and affairs of ECG; Mr Treon knew that the directors were looking to him for approval and the representations were going to be relied on by ERED.

717. Counsel for Mr Treon accepted that in principle a defendant may be personally liable if he procures a third party to make a representation that the defendant knows to be false and intends the claimant to rely upon, even where the representor is unaware that the representation is false. Counsel for Mr Treon submitted that on the facts this test was not established. They point out that Esquire had its own professional advisers and that, for tax reasons, it was important that the company was separately managed in Guernsey.

718. As to the relevant facts, the claimant says that the individuals behind the corporate directors had very little (if any) knowledge of the business and could and would not have entered the agreement containing the representations on Esquire's behalf had he not given his approval. The claimant says that the actual directors had no involvement in or understanding of the day to day affairs of the group and that they could not have caused the representations to be given by Esquire without Mr Treon's approval. This is not therefore a case where the directors could have verified the representations to their own satisfaction from other information available to them: they were completely reliant on Mr Treon to approve the representations given by Esquire. This is demonstrated by the email from Mr Borg.

719. I accept the claimant's submission that the facts I have found are sufficient to render Mr Treon liable for the representations on the basis that he procured the directors to cause Esquire to enter the LNA containing the representations. This is an extreme case where the corporate directors were entirely dependent on Mr Treon in making the representations about the business and affairs of ECG. Mr Treon knew from the email of Mr Borg that the directors were entirely dependent on his say-so; that they had no independent knowledge of the business. The fact that the company had independent professional advisers does not affect this conclusion; they were not in a position to provide any independent advice about the truth of the representations and there is no evidence that they did so. All that happened was that Mr Borg sought the approval of Mr Treon to the content of the representations and he gave it. I conclude on the facts that he caused, procured or instructed the representations to be made. The directors carried out his instructions.

720. The claimant also relied on the following passage from Cartwright on Misrepresentation, Mistake and Non-Disclosure (5th ed.) at 5-22: "Where the defendant did not, directly, or through an agent, make the fraudulent misrepresentation, he may still be liable as a joint tortfeasor with the person who does commit the tort or deceit if he is liable as accessory by assisting the principal tortfeasor, or if the defendant procured and induced that person to commit the tort." However the paragraph goes on to explain that there must have been a pursuance of a common design to do the acts

which constituted the tort; and in the case of deceit this means that the elements of the tort must be shared by both the principal and the accessory.

721. But here the claimant has not alleged that Esquire was itself guilty of the tort of deceit. Its case is that the corporate directors (through Mr Langlois) relied on confirmation of Mr Treon, but it does not allege that Mr Langlois knew or was reckless as to the truth of the representations. I therefore consider that this way of advancing the case is flawed.

722. There is a further general point. Some of the representations are expressed as dependent on the state of mind of Esquire. The claimant does not seek to say that the de jure directors of Esquire were aware of the falsity of the representations. Rather it argues that Mr Treon's knowledge should be attributed to Esquire. As Mr Treon was not a director of Esquire the claimant contends that his knowledge should be attributed on the basis that he was the natural person who was in fact responsible for the representations being made. The claimant referred to a number of cases culminating in *Bilta (UK) v Nazir (No 2)* [2015] UKSC 23.

723. I am not persuaded on the basis of these authorities that Mr Treon's state of mind is to be attributed to Esquire. In each of the cases where knowledge has been attributed to a company the relevant person is either an officer (de jure or de facto) or employee or an agent or (at least) a shadow director of the relevant company. The claimant has not alleged that Mr Treon was any of these things. Rather the allegation is that the directors looked to Mr Treon for approval and that without his approval they would not have caused the company to enter into the LNA. I do not think that is sufficient for the purposes of attribution of his states of mind.

724. I find that Mr Treon read the LNA in order to provide the confirmation sought in the email of 23 May 2011 and that he knew of the contents of the representations made by Esquire. I also find that he intended that ERED would rely on the representations as they were part of the process of negotiating the LNA. I also find that ERED was induced by the representations (with the exception of the fifth representation – see below) in the sense that they had a significant influence on ERED's decision to enter the LNA. That leaves the issues of falsity and Mr Treon's state of mind.

725. The <u>first representation</u> is in clause 2.3 of the LNA. Esquire represented that:

> "The Financial Projections and each other document, certificate and written statement furnished by or on behalf of any Company in connection with the transactions contemplated hereby or by any other Transaction Document taken together as a whole, do not contain any untrue statement of material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances in which they were made, not misleading."

726. For the reasons already given extensively I consider that the following documents were misleading:

i) The Forecasted Figures in the January Figures were misleading (by omitting to state that that they had been normalised).

ii) The EBITDA bridge within the 7 February 2011 pdf was misleading by containing a 2011 EBITDA figure of £13.1m whereas ECG's forecast by then

was £12.2m. The 7 February 2011 pdf repeated the Projected Figures and misleadingly presented them as ECG's current expectations.

iii) The Operating Model of 8 March 2011 (which was expressly included within the definition of Financial Projections) contained the Projected Figures and misleadingly presented them as ECG's current expectations.

727. For the reasons already set out, Mr Treon knew that these documents were misleading and therefore knew that the representation was untrue.

728. The <u>second representation</u> is that by clause 2.3 of the LNA, Esquire represented it did not have actual knowledge of any facts which, so far as Esquire could reasonably foresee, could, individually or in the aggregate, have a Material Adverse Effect, namely a material adverse effect on (a) the business, assets or financial condition of the Companies taken as a whole, or (b) the ability of the Issuer to perform its obligations under any of the Transaction Documents.

729. The claimant alleges that there was a deterioration in the business in 2010 and 2011 and that Mr Treon knew this. It relies for instance on the list of audit issues attached to an email of 14 April 2011 showing that the appropriateness of a going concern assumption had been questioned in light of an operating loss of £13.3m, an increase in net current liabilities and a reduction in net assets, various trading difficulties, and a continuing cash flow crisis despite the raising of additional funds from investors. It is also said that Mr Treon knew from the Draft 2010 Accounts that ECG could not cover its interest costs from its operational cashflow and that its losses had to be restated.

730. I do not think that the meaning of this representation is at all clear. Though it refers to a Material Adverse Effect there is no comparator for measuring the adverse effect against and (correspondingly) no period in respect of which the effect has to be shown to have occurred. Generally such clauses are concerned with an adverse effect since a given date or by comparison with a given state of affairs, but that is not the case here.

731. In my judgment the better reading of the clause is that there would be a breach if there were existing facts known to Esquire at the time of the LNA which could in the foreseeable future have a Material Adverse Effect ("MAE") on the business etc. of ECG or the ability of Esquire to perform its obligations under the Transaction Documents. But it is not clear what state of affairs the MAE falls to be measured against. The claimant says it is to be measured against the disclosed position: so if there were facts known to Esquire which had not been disclosed and which could to Esquire's knowledge lead to a MAE, Esquire would be in breach. I agree that this is probably the better reading.

732. However Mr Treon was not cross-examined about his understanding of this representation and I do not think it is evident or even likely that he would have read it in the way now relied on by the claimant. I consider that he would probably have been uncertain what to make of it. I do not think that the claimant has established that Mr Treon understood that Esquire's representation was false. As already explained in order to be liable in deceit the representator must be shown to have understood the representation in the sense alleged by the claimant. I am not satisfied of this.

733. I have also concluded that the knowledge of Mr Treon is not to be attributed to Esquire.

734. For these reasons Mr Treon is not liable for this representation.

735. The third representation is that by clause 2.15 of the LNA Esquire represented that the contents of the Financial Projections were "accurate and complete in all material respects and, so far (sic) [Esquire] is actually aware, contain all the information necessary to enable the Purchaser to assess fully a prospective investment in the Notes."

736. It will be noted that the second part of this representation depends on Esquire's knowledge and I have already held that Mr Treon's state of mind is not to be attributed to Esquire. But the first part of the clause is not tied to Esquire's knowledge: it is a self-standing representation about accuracy and completeness of the Financial Projections.

737. I find that the representation was false to Mr Treon's knowledge because the Operating Model dated 8 March 2011 contained the Projected Figures, which were not ECG's current expectations of its financial performance for the period 2011 to 2013. Mr Treon knew that the Operating Model dated 8 March 2011 did not contain the Revised Financial Projections or the Re-Revised Financial Projections so that the information was not accurate or complete. Mr Treon is liable for this representation.

738. The fourth representation is that by clause 2.15 of the LNA Esquire represented that "The Financial Projections were prepared by [Esquire] in good faith using reasonable assumptions based on the current operations of the Companies."

739. This is again a hybrid. The representation about good faith is about Esquire's state of mind and for reasons already given I do not consider that Mr Treon's knowledge is to be attributed to Esquire. But the next part of the representation is not tied to Esquire's state of mind. It is an objective statement about the reasonableness and currency of the Financial Projections. For the same reasons as for the third representation I conclude that Mr Treon knew that the Operating Model dated 8 March 2011 was not prepared on reasonable assumptions based on the current operations of ECG. It was based on out-of-date data. Mr Treon knew this was not true. He is liable for this representation.

740. The fifth representation is that by clause 2.16 of the LNA Esquire represented that "The Financial Statements [which were the audited 2009 accounts for ECGL and the Interim Accounts] have been prepared in accordance with US generally accepted accounting principles, consistently applied ("GAAP"), during the periods involved and fairly present in all material resects the financial position of ECGL as of the dates thereof and the results of its operations and cash flows for the periods then ended." It is common ground that the reference should have been to UK GAAP.

741. I am not satisfied that Mr Treon knew that this representation was false. In the first place I find that Mr Treon thought that at the time they were prepared the 2009 accounts were prepared in accordance with UK GAAP. They were approved by the auditors.

742. UK GAAP contains no prescriptive rules for management accounts like the Interim Accounts so there is no realistic case that there was any breach of the representation in respect of those accounts.

743. The claimant relies on the draft 2010 accounts and the proposal that the 2009 accounts would have to be restated. However, for the reasons given earlier in the judgment, I accept the evidence of Mr Treon that, as he understood it, the proposal to restate the

2009 accounts came about in the context of Project Saxon and the need to comply with International Financial Reporting Standards. He also said (and I accept) that he did not agree with the proposed restatement of the 2009 numbers. I accept his evidence that he continued to believe that the 2009 Accounts had been prepared in accordance with UK GAAP. His evidence was that after he was provided with the draft 2010 accounts he mainly left the preparation of the accounts to the professional firms and internal accountants.

744. In any event I do not consider that ERED's decision to invest was significantly influenced by this representation. Its decision had no regard to the 2009 Accounts or the Interim Accounts. The Second IC Memo contained some historical figures (including for 2009) by way of background but these were not taken from the 2009 Accounts.

745. The sixth representation is that by clause 2.16 of the LNA Esquire represented that:

> "Since 31 December 2009 there has been no adverse change or adverse development in the business, properties, assets, operations, financial condition, prospects, liabilities or results of operations of the Companies which has had or, to the knowledge of the Issuer of its Subsidiaries, is reasonably likely to have, a Material Adverse Effect."

746. Unlike clause 2.3 this representation sets a starting date (31 December 2009) as a comparator). The claimant submits that the clause is to be read as subject to an implied proviso that it covered only undisclosed facts or circumstances. I agree with that reading (which is of course a limitation on the scope of the clause).

747. The claimant submits that the representation was untrue because there had been numerous circumstances which showed that the prospects of the business were materially worse than they had been as at the end of 2009 and that this had not been disclosed.

748. I do not think that the claimant has shown that the representation was untrue or that, if it was, Mr Treon knew it to be untrue. The question whether the business and prospects were materially worse in June 2011 than they were at the end of 2009 would have called for an assessment of the whole range of factors: its prospective profitability; the position with its lenders; its liquidity and so forth. In some respects the business and its prospects were arguably better than in 2009: some of the properties had been refurbished and there were potentially profitable new builds. Mr Treon thought that this would lead to increased profitability. Other things were worse: the group was for instance facing a severe cash squeeze. Some of the facts and circumstances had been disclosed to Duet, others had not. I reached the view from hearing Mr Treon's evidence that he remained confident about the prospects for the business and thought that things were at least as good in June 2011 as at the end of 2009. There was very little cross-examination as to the comparison between June 2011 and December 2009. The claimant relied in closing on the fact that on a proper view the profits for 2010 were significantly less than those for 2009. But that submission does not address the comparison between June 2011 and December 2009. I am not satisfied, having considered the evidence in the round, that the claimant had made out its case under the sixth representation.

(f)(vi) The conspiracy claims

749. In the light of my earlier findings that the defendants are all liable for fraudulent representation it is unnecessary to consider the alternative plea of conspiracy. However for completeness I shall address it briefly.

750. The claimant contends that Mr Treon and Dr Srinivas unlawfully conspired to provide misleading and outdated information to Duet/ERED with the intention of causing loss to ERED.

751. A conspiracy may take the form of a combination or understanding. It is often the case that a combination will be inferred from overt acts: *Kuwait Oil Tankers*.

752. I have found that Mr Treon and Dr Srinivas were closely involved in the provision of information to Duet. They knew what information was being provided and that it was false and misleading. Dr Srinivas accepted that there was a deliberate strategy of providing normalised figures to investors without disclosing the nature or extent of the normalisation in order to interest them. It was only if they asked more questions in the course of due diligence that the full position would be explained. Another way of putting this was that there was a deliberate plan to provoke the interest of investors by telling them part of the picture (while anticipating that the whole picture might emerge in due diligence). Though Dr Srinivas denied that they had done this with Duet, it seems to me that this is indeed what happened. I have rejected the evidence of Mr Treon that he explained the true position to Mr Korat at the outset and the evidence of Dr Srinivas that Mr Treon told him that Mr Korat had asked for normalised numbers. In reality they both knew that Duet was being given normalised numbers, without being told about the basis of preparation. I find that Mr Treon and Dr Srinivas had at least an understanding that Duet would be treated in the same way as some of the other investors and that this involved the provision of misleading information.

753. I also find on the balance of probabilities that Mr Treon and Dr Srinivas had a common understanding that, having provided the Projected Figures for 2011-13 it would damage their prospects of persuading Duet to recommend an investment if they subsequently provided downgraded projections. For this reason they continued to provide versions of the Projected Figures even when they knew they had been superseded by the New Projections. Dr Srinivas repeatedly said that he did not really consider the contents of the various projections or make any comparison between them. He sought to suggest that he had little understanding of the numbers. I have already rejected that evidence. I consider that Dr Srinivas, like Mr Treon, understood that ECG had adopted new, revised, projections in late January 2011. I find it likely that the two of them agreed or reached a common understanding that these should not be provided to Duet and took steps instead to provide Duet with further versions of the (now outdated) Projected Figures, including in the model attached to the 18 February 2011 letter and the Operating Model of 8 March 2011.

754. For these reasons I conclude on the basis of my detailed findings in relation to the misrepresentation claims that the claimant's conspiracy claim succeeds.

(g) Damages

755. The claimant alleges that it has suffered two rounds of losses: the value of its initial investment in 2011 (less appropriate deductions for interest received) and the value of second investment in 2012.

756. There is no dispute about £11m investment.

757. There is a dispute about the second investment. The claimant accepts that by the date of the second investment (of £4.25m) it was aware that there had been misrepresentations. It claims however that the second investment was made in reasonable mitigation of its losses.

758. The defendants dispute this. They say that the 2012 investment was a commercial decision reached independently of the original investment decision. They point out that Duet's Follow-On Memo of 29 May 2012 concluded that, under expected scenarios, it would recover its original investment and the further investment in full. They say that Duet was positive about the second investment, seen as a standalone deal. That assessment turned out to be wrong. But the claimant made the investment with its eyes open and, as with any investment, accepted the risk of loss.

759. I do not accept that the question whether there was reasonable mitigation can be answered by asking the general question whether the 2012 investment was a commercial decision or whether the claimant was optimistic about the outcome. Wherever a party suffers a loss in a commercial context and decides to put its hand in its pocket to mitigate or reduce its losses, the decision can be regarded as commercial. The defendants relied on *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch) at [385] where Arnold J said the claimant's actions were "not a reasonable attempt at mitigation, but a commercial gamble". I do not read Arnold J as setting out a new test for mitigation or as suggesting that a commercial decision involving a further risk of loss could not be reasonable mitigation. He was simply applying the established principles to the facts before him.

760. The legal question is whether ERED took reasonable steps to mitigate (i.e. counteract, cure or lessen) the losses consequent on the defendants' wrong. This involves showing that the steps taken were in mitigation (and were in that sense causally related to the wrong) and were reasonable. Where the test is satisfied the loss is recoverable even though the loss is in the event greater than it would have been had the mitigating steps not been taken.

761. Duet's recommendations concerning the 2012 investment were explained in the Follow-On Memo, which included the following points:

    i) The financial information provided by the group at the time of the investment was incorrect and indeed misstated the 2010 trading performance.

    ii) Since the investment was made the trading performance of the business had been weaker than anticipated. ECG was seeking to restructure its debts and acquire certain assets from PSPI. As part of the restructuring, the senior lenders had therefore asked the noteholders to provide a portion of top-up debt which would sit in the senior part of the capital structure.

iii) The group needed a further £18m of debt in order to work through its business plan, complete the acquisition of assets from PSPI and break certain swap hedges. £11m of this would be provided by the Banks and £7m by the noteholders. The other noteholders were not able to contribute. A new waterfall would be created under which the participating noteholders would be placed in a new class, senior to the non-participating noteholders as regards principal. The new money element would carry a coupon of LIBOR plus 200 basis points for five years.

iv) Under the heading "Returns" the memo set out the expected returns, including the original £11m investment, interest received to date, new money, interest to the end of the term and equity in the event of conversion.

v) In the "summary" section the memo recorded that as a result of the new financing ERED had the opportunity to subordinate new debt claims that ranked alongside them, thereby improving their position in the capital structure. Though the new money carried a low rate of interest its position in the structure was high enough to eliminate the risk of not recovering the principal in full. The base returns were sufficient to fulfil the Fund's overall objective.

vi) The summary also stated that further opportunities to enhance trading performance are available with discussions on the acquisition of the remaining assets owned by PSPI.

762. I find as a fact that Duet would not have recommended the 2012 investment as a standalone investment. I accept the evidence of Mr Korat and Mr Lattanzio that the follow on investment would not have been made unless ERED was seeking to protect itself from the predicament it found itself in as an existing investor. I accept their evidence that the follow on investment, considered alone, would not have met the ERED fund's investment criteria. The only reason for Duet even considering the follow-on investment was that it had made the original investment and, in the light of deteriorating business conditions, it wished to protect and enhance its existing position.

763. The defendants submitted that Duet carried out its own analysis of the risks of the follow-on investment and expected ERED to be able to recover its initial and further outlays in full. They say that this was reflected by the positive recommendations in the Follow-On Memo. But that is entirely consistent with the follow-on investment being made (at least primarily) as a means of protecting the initial investment. Duet thought at the time that it would be able to mitigate its losses in full. That turned out to be wrong but it does not mean that what it did was anything other than mitigation. I am satisfied that it would not have made the second investment unless it was already invested to the tune of £11m, and that its principal reason for making the second investment was to protect itself against losing that initial investment.

764. I also consider that it was reasonable for ERED to take the step of seeking to enhance its position by making the follow-on investment. It reasonably appeared to Duet in May 2012 that ERED would be able to recover its original and follow-on outlays in full.

765. The defendants did not suggest that ERED could realistically have withdrawn its existing investment in 2012 (by alleging misrepresentation or breach of the terms of the LNA). That is for good reason. By 2012 ECG was in a precarious position with its

Banks. That was why the debt had to be restructured and the follow on investment was being sought. If ERED had sought at that time to recover its initial investment it is likely that the restructuring would have failed and that the group would have entered insolvency. The information provided to Duet at that time suggested that there were good chances of ERED making a full recovery if it supported the restructuring.

766. I conclude that in making the follow on investment ERED was reasonably seeking to mitigate its loss and (subject to the possible limitation defence) is entitled to damages for the follow-on investment of £4.25m as well as the original investment of £11m.

(h) Limitation

767. The claimant issued the claim form on 16 October 2017, more than six years after ERED's investment. The defendants say that the claim is therefore statute barred. The claimant relies on section 32 (1) of the Limitation Act 1980 to seek to postpone the start of the limitation period.

768. Section 32 (1) provides:

> "(1) Subject to subsections (3) and (4A) below, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> > (a) the action is based upon the fraud of the defendant; or
> >
> > (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
> >
> > (c) the action is for relief from the consequences of a mistake;
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it. References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent."

769. This section has been considered in a number of cases which were reviewed in *OT Computers Limited v Infineon Technologies AF* [2021] EWCA Civ 501. The following points (drawn from the judgment of Males LJ) are relevant for the present dispute:

i) The state of knowledge which a claimant must have in order for it to have discovered the concealment has for the most part been regarded as the knowledge sufficient to enable it to plead a claim. More recent authority such as *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2020] UKSC 47, ("*FII*") suggests that time should begin to run from the (possibly earlier) point when the claimant knows, or could with reasonable diligence know, about the mistake with sufficient confidence to justify embarking on the preliminaries to the issue of proceedings, such as submitting a claim to the proposed defendant, taking advice and collecting evidence. (I shall apply the statement of claim test, as it is not clearly established on the authorities whether the potentially more liberal test applies to fraud

claims. In any event the parties did not suggest that the slight differences in the test would materially affect the outcome.)

ii) Whichever of these tests is applied, "there will be cases where discovery of the relevant facts involves a process over a period of time as pieces of information become available. In such cases it may be difficult to identify the precise point of time at which a claimant exercising reasonable diligence could have discovered enough, either to plead a claim or (as the case may be) to begin embarking on the preliminaries to the issue of proceedings": [27] of *OT Computers*.

iii) The following passage from *Paragon Finance Plc v DB Thakerar* [1999] 1 ALL ER 400 has been treated as authoritative: "The question is not whether the plaintiffs should have discovered the fraud sooner; but whether they could with reasonable diligence have done so. The burden of proof is on them. They must establish that they could not have discovered the fraud without exceptional measures which they could not reasonably have been expected to take. In this context the length of the applicable period of limitation is irrelevant. In the course of argument May LJ observed that reasonable diligence must be measured against some standard, but that the six-year limitation period did not provide the relevant standard. He suggested that the test was how a person carrying on a business of the relevant kind would act if he had adequate but not unlimited staff and resources and were motivated by a reasonable but not excessive sense of urgency. I respectfully agree."

iv) In *OT Computers* Males LJ said at [47],

> "… although the question what reasonable diligence requires may have to be asked at two distinct stages, (1) whether there is anything to put the claimant on notice of a need to investigate and (2) what a reasonably diligent investigation would then reveal, there is a single statutory issue, which is whether the claimant could with reasonable diligence have discovered (in this case) the concealment. Although some of the cases have spoken in terms of reasonable diligence only being required once the claimant is on notice that there is something to investigate (the "trigger"), it is more accurate to say that the requirement of reasonable diligence applies throughout. At the first stage the claimant must be reasonably attentive so that he becomes aware (or is treated as becoming aware) of the things which a reasonably attentive person in his position would learn. At the second stage, he is taken to know those things which a reasonably diligent investigation would then reveal. Both questions are questions of fact and will depend on the evidence. To that extent, an element of uncertainty is inherent in the section."

770. The claimant argued that a bright line is to be drawn between the periods before and after the accrual of the cause of action. Since the purpose and consequence of the section is to postpone the limitation period it can only apply once the cause of action is complete. The claimant says this is supported by the words "the period of limitation shall not run until the plaintiff has discovered the fraud…" which implies that it is only discoveries after the date when the limitation period would otherwise commence that matter. In a case of deceit this is the date when loss is suffered. The claimant's state of mind and events occurring before that time are irrelevant. The court must restrict its

examination under the section to facts arising on or after the date when the cause of action accrued.

771. I am unable to accept this submission. Section 32(1) is of course only relevant once there is a complete cause of action because that is when the limitation period would otherwise commence, and the purpose of the section is to postpone that period. But it does not follow that the court investigating the claimant's state of mind must ignore events, communications or things known to the claimant before then. There may be cases where the claimant is aware (or could with reasonable diligence have been aware) of facts before it suffered any loss which would have enabled it to write a letter before action. In my judgment the court considering must examine all of the facts and should not artificially restrict itself to events or circumstances arising only after the cause of action has accrued.

772. This conclusion is supported by *OT Computers* at [27] where Males LJ emphasised that there may be cases where there is a sequence of events which are said to lead to the claimant having sufficient knowledge. There is no warrant in the language of the section for looking at only events or knowledge arising after the accrual of the cause of action. The ultimate question under the section is whether the claimant has or could have "discovered" the fraud and that may turn on events before as well as after loss was suffered.

773. This view of the section is also supported by the passage at [52] of *OTC Computers* which concerns the possibility of the claimant discovering the fraud "from the outset".

774. I also note that in *Thakerar*, a case about mortgage fraud, Millett LJ recited at p.417 the relevant events going to the plaintiffs' state of knowledge about the fraud. Some of those took place before the transactions giving rise to the losses claimed, while others happened afterwards. That makes sense. The question is whether at some point the claimant has (actually or constructively) sufficient knowledge to articulate a claim (or write a letter before claim) and the answer depends on considering the full sequence of events.

775. I also consider that this conclusion does not contradict the well- known principle that a fraudster is not entitled to plead that his victim failed to take reasonable care to detect the fraud (see e.g. *Redgrave v Hurd* (1881) 20 Ch.D.1.) The question is not whether claim is defeated by the careless failure of the claimant to spot the fraud. It is the quite distinct issue whether the claimant who brings his claim outside the primary limitation period for a fraud claim (6 years) is entitled to invoke the special statutory postponement of the limitation period. Such postponement is available to a defrauded claimant who could not normally have discovered the facts, but it is not available to all victims of fraud, however careless they may be in attending to and asserting their rights. If a claimant could reasonably have discovered the fraud by virtue of events and circumstances occurring before it actually suffered a loss, there is no principled rationale for allowing it the indulgence of more than the normal six years' period to bring its claim.

776. I therefore turn to consider the facts arising both before and after the investment occurred.

777. It was also common ground that the burden is on the claimant to establish that ERED could not, without the exercise of exceptional measures, have discovered the fraud. The defendants emphasise (and the claimant accepted) that in applying the section the court should consider what was known or could (with reasonable diligence) have been discovered by Duet and by ERED. The evidence at trial proceeded on this basis (and the claimant did not call any separate non-Duet witnesses to seek to suggest that its knowledge was different from that of Duet to discharge the burden under the section). For convenience I shall refer to Duet and ERED together as “the reasonable investor”; I shall also use that term as shorthand to cover a person in their position who has been reasonably diligent, without always repeating the full statutory formulation.

778. The defendants rely on a number of documents from which they say a reasonable investor could (with the exercise of reasonable diligence) have discovered sufficient facts to enable them to plead a statement of claim. These include the VDD Report, the Interim Accounts, the 2009 Accounts, the 7 February 2011 pdf and the Colliers Report. They also say that a reasonable investor could and would have called for the audited accounts for 2010 shortly after the investments and would have received and read these in early July 2011. They also rely on meetings between ECG and Duet after the investment.

779. I start with some general considerations. The first is that Duet believed that Mr Treon and Dr Srinivas were honest and straightforward. ECG was a well-established business. It had reputable professional advisers, including RP&C and Colliers. RP&C were backed by JP Morgan. It also advised Nationwide, an existing investor, which was large and well-regarded. Mr Treon and Dr Srinivas appeared from their communications with Duet to be helpful and responsive.

780. The second general point is that the court should take account of the position and business of Duet and ERED. Duet was a well-resourced expert adviser on investments. As at December 2010 it was managing assets worth $2.4b. It had seven members of staff and about six investments in the relevant period. Mr Korat, Mr Moore, Ms Shah and Mr Lattanzio were all experienced in assessing and analysing financial and accounting information. Mr Korat and Mr Lattanzio had each had more than 15 years’ experience in real estate and capital market investing. A reasonable investor in Duet’s position could reasonably be expected to approach potential investments with a careful eye and an appropriate degree of professional care (which is not to say outright distrust or cynicism). It could, in other words, be expected to undertake professional due diligence. I find that Duet’s level of resources and professionalism provide a reasonable proxy for those of a reasonable investor in its position.

781. The third general point is that it is the claimant’s case that ECG’s trading figures for 2010 and the 2010 balance sheet, which were specifically requested by Mr Korat, were significant documents for Duet in appraising the investment. I have accepted the evidence of the claimant’s witnesses that these documents were significant. It follows that, when working out what a reasonable investor would have done, I should proceed on the basis that it would have regarded the information about the 2010 trading figures and balance sheet as significant to their decisions, and would therefore have scrutinised the material (and any other documents which threw light on it) with reasonable attention.

782. The fourth general point is that it is the nature of a substantial financial investment that the potential investor will be able to demand up to date financial information; and to raise numerous and detailed questions. Rather than relying on its own speculation or assumption such an investor will ask questions and expect to be given answers. This is what due diligence is for.

783. The fifth is that in approaching the exercise under s.32(1) the court must be careful to avoid the dangers of hindsight and to examine events as they would have appeared at the time and in their proper context and sequence.

784. With these points in mind, I turn to the sequence of events.

785. I start with the Forecasted Figures for 2010. It was clear to Duet (and would have been clear to a reasonable investor) that the Forecasted Figures were incomplete figures drawn from data to October 2010. A reasonable investor would also have noted that the Forecasted Figures were no more than a short summary. They were not full management accounts. The balance sheet provided on 7 February 2011 was also an incomplete summary. It was also based on data to October 2010.

786. A reasonable investor would also have appreciated that as 2011 progressed it was likely that further work (including audit work) would have been undertaken to produce fuller and more accurate profit and loss and balance sheet figures for 2010.

787. As well as the January Figures Duet was provided with various other documents.

788. These included the 2009 Accounts. In January and February 2011 these were the most recently available audited accounts and a reasonable investor would have read them carefully. The P&L account referred to exceptional items of more than £3m. The notes to the accounts said that these related to expenses incurred on new builds and homes planned for extensions and refurbishment. This did not explain that they included part of the wage costs of running the care homes. However a reasonably diligent reader would have noticed at least the reference to exceptional items. Mr Korat's evidence was indeed that he did read the note about exceptional items. This shows that he read the accounts with some care.

789. I also consider that a reasonably diligent person in the position of Duet would have read the balance sheet in order to consider and assess the reported assets and liabilities, and would have noticed the overall balance of net assets (c. £116m).

790. Duet was also given the VDD Report and its appendices. Mr Korat accepted that he read these and I consider that a reasonable investor would have done the same. The document referred to the treatment of some agency costs as either "exceptional" or "extraordinary". A reasonable investor would not necessarily have concluded that there was a continuing policy of treating part of the staffing costs of the business as exceptional items. But the reasonable investor would have seen that some costs had been treated as exceptional or extraordinary in 2009.

791. Duet also received the Interim Accounts. These were management accounts for the first quarter of 2010. Mr Korat accepted that he read them and noticed that there were nearly £1m of exceptional items. Again I consider that any reasonable investor would have studied these accounts. Mr Korat also accepted that he had compared them with the

Forecasted Figures. However a reasonable investor would also have appreciated that there were no exceptional items in the Forecasted Figures but that the latter had a different description of the bottom line ("profit before mezz"). Given that the Interim Accounts were for a quarter of the period covered by the Forecasted Figures (2010) I consider that a reasonable investment professional in Duet's position would at least have wanted to know what had become of the exceptional items in the Interim Accounts and understand how those numbers tied in with the Forecasted Figures for the full year. Mr Korat said that he supposed that the Interim Accounts had been superseded by the Forecasted Figures. However, he did not know that. It would have been very simple to ask a question, rather than making an assumption.

792. A reasonably diligent reader of the Interim Accounts would also have seen that the loss for Q1 2010 was £1.1m. By contrast, on their face the Forecasted Figures showed a small profit for FY 2010 of some £272,000. The reasonable investor would also have known (from the information provided by ECG) that ECG's profitability was struggling during 2010 as a result of lower occupancy rates. Indeed Mr Korat accepted that he was aware (from the 2009 Accounts) that ECGL had a cashflow problem and was only able to pay its debts on the basis of borrowing. In my judgment a reasonable investor would have compared the Interim Accounts and the January Figures. The reasonable investor would then have wanted to understand how a loss of £1.1m for Q1 2010 turned into a profit for the full year and would have asked questions about this. I do not think that a reasonable reader would simply have assumed, without exploring the point further, that the Interim Accounts had been superseded.

793. The next relevant document raised is the 7 February 2011 pdf, which contained two things of potential relevance. First, projections for 2011-2013 contained a line referring to "exceptional items". Second, the summary balance sheet for 2010 included net assets of c. £110m and a figure for retained earnings of minus £8.67m. The defendants say that a comparison of that with the 2009 Accounts would have shown a fall in the net assets of c. £6m.

794. As to the first point, the reference to the exceptional items did not lead Mr Korat to understand that the 2010 numbers had been normalised. He observed that the exceptional items for 2011-2013 were projected to be zero and there was therefore nothing to cause the reader of this document to suppose that there had been exceptional items in the 2010 figures contained in the January Figures. Moreover, the reference to exceptional items was uninformative about the accounting treatment: a reasonable reader would not have understood from that document alone that in the January Figures for 2010 ECG had been treating part of its operating wages as exceptional.

795. On the other hand, the document has to be read together with the other documents which showed exceptional items being deducted in the accounts for 2009 and Q1 2010. Moreover, the figures for 2011-13, expressed to be "before exceptional items" (£5.5m, £18.7m and £20.4m respectively), were the same as the figures labelled "profit before mezz interest" in the January Figures from which a reasonable investor could have realised that the profit in the January Figures were before exceptional items. I consider that a reasonable investor would at least have wished to understand the basis on which exceptional items had been referred to in the earlier documents and would have explored this further with ECG.

796. The second potentially relevant matter is the figure of minus £8.67m retained earnings in the summary 2010 balance sheet. Mr Korat read this. He said that he did not appreciate from this document that ECG was expecting to suffer a loss on its profit and loss account for 2010 of £6m. He said that he did not compare the summary 2010 balance sheet with the 2009 audited balance sheet (which he had read). He said that the entry of minus £8.6m in the 7 February document did not cause him to revisit the January Figures.

797. I conclude that summary balance sheet for 2010 would have caused a reasonably diligent investor to ask further questions, for the following reasons. First, Duet was interested in the balance sheet numbers, and this is why Mr Korat asked for them. Indeed any reasonably diligent investor would have been interested in the balance sheet as this would contained information about the group's reported assets and liabilities. Second, I think that a reasonably diligent investor would have wanted to consider any material developments in the balance sheet position as between 2009 and 2010 and would therefore have made a comparison between the two. I do not think that doing so could be regarded as an "extraordinary measure" (in Millett LJ's phrase). I think that a reasonably diligent investor would also have noticed that the net assets in the balance sheet had fallen from c. £116m for 2009 to c. £110m in the summary 2010 balance sheet pdf: i.e. was some £6m lower. A reasonably diligent reader would have noted that this was reflected in the fall of the same amount in the figure for "retained earnings".

798. The claimant emphasised that the 7 February 2011 pdf did not actually include a comparison with 2009. But for the reasons I have just given, I conclude that a reasonably attentive investor would have wished to understand, at least in general terms, the development of the balance sheet of the group over the year. I have already found as a fact that Mr Korat read the 2009 Accounts carefully (and think that a reasonable investor would have done so). I find that a reasonably attentive investor would have noted the decline in net assets of c.£6m from 2009 to 2010. This was a material decline and a reasonably diligent investor would have noticed it.

799. Mr Korat said in evidence that the decline of £6m in the figure for retained earnings shown by comparing the two balance sheets could have been explained by other things, such as the payment of dividends. That was unconvincing, for a number of reasons. A reasonably attentive investor would have understood that dividends can only be paid from distributable reserves (including retained earnings). It would have seen that the Group did not have such reserves in 2009 or 2010. Moreover, the whole purpose of the approach to investors was that ECG was struggling with high levels of leverage and liquidity issues. Mr Korat knew about those problems. He accepted that he knew that ECG had a cashflow deficit and was only able to pay its debts by borrowing. It would have been quite startling for the business to be paying significant dividends at the same time as the drive to raise fresh funding – that would indeed have been a red flag. The far more likely reason for the reduction in the figure for retained earnings and net assets was that ECG had incurred trading losses during 2010.

800. In any case, rather than speculating or making assumptions about the reasons for the fall in retained earnings, a reasonable investor could and would simply have asked for an explanation. As I have said, it is the essence of due diligence to explore things by raising queries. I consider that a reasonable investor, considering the information available to Duet would have wished to understand the reasons for the fall in net assets

and retained earnings between 2009 and 2010; and how these related to the profit and loss numbers contained in the Forecasted Figures.

801. The defendants also relied on the fact that Duet had the Colliers Report. They submitted that Duet could have carried out a series of calculations and determined that there must have been wages incurred by ECG which were not included in the Forecasted Figures. I do not accept that a reasonable investor in the position of Duet (or a reasonable investor in the position of ERED) would have carried out such a calculation. Duet was interested in the valuation reached by Colliers in their Report but did not consider that they needed to go through the historical numbers in the schedules to the report to seek to verify what they had been told by ECG. I consider that was reasonable. I think that a reasonably attentive investor (or adviser) which wanted to find out more about the numbers would have asked ECG for more information (see further below).

802. It may assist at this stage in the analysis to draw some threads together. I find that a reasonably diligent (attentive) investor armed with the information in fact given to Duet would have appreciated the following: (a) ECG had probably treated some part of its staffing costs as exceptional items in the 2009 accounts; (b) ECG's management accounts for Q1 2010 had included exceptional items of £906,000 which were not reflected in the Forecasted Figures (despite covering some of the same period as the latter); (c) comparing the Interim Accounts to the Forecasted Figures it appeared that a loss running at £1.1m for Q1 2010 had become a small profit for the full year (despite ECG's poor trading performance at that time); (d) the 7 February 2011 pdf also had a profit and loss format which suggested at least the possibility of exceptional items; (e) the same document contained a summary balance sheet for 2010 which, if compared to the 2009 balance sheet, showed a reduction in net assets and retained earnings of some £6m, the most probable reason for which was that the group had incurred trading losses of that amount; (f) a reasonable investor would have made such a comparison; and (g) a reasonable investor would have wanted to understand the fall between 2009 and 2010 in the net asset retained earnings in the balance sheet and how this related to the profit and loss numbers contained in the Forecasted Figures. I find that these various things would have put a reasonably attentive adviser on inquiry.

803. I also consider that a reasonably diligent adviser could and would (without taking exceptional measures) have asked for further, updated, P&L and balance sheet figures for 2010 before ERED invested in June 2011. Duet knew that the January Figures were based on numbers up to October 2010. The same is true of the balance sheet provided on 7 February 2011 which was called a "projected balance sheet". As already noted, it is part of the claimant's own case that the numbers for 2010 were used by Duet to benchmark the projections for 2011-13 and were therefore significant. I consider that a reasonable investor looking to invest in June 2011 would have asked for updated figures, which would have taken into account further information. A reasonable investor or adviser would also have appreciated that it was likely that by late June 2011 much of the task of auditing the 2010 accounts would already have been carried out.

804. I also consider that a reasonably diligent adviser would have asked for more detailed figures than the very brief breakdown contained in the Forecasted Figures and summary balance sheet. A reasonable investor would have sought fuller figures so that a proper comparison with the forecasts could be carried out.

805. For these reasons I consider that a reasonably diligent investor would have put been sufficiently on inquiry to be prompted to ask some basic questions and demanded further information. It would have asked about the treatment of exceptional items in the 2009 Accounts and Interim Accounts. It would have asked how a projected loss of £1m for Q1 2010 in the Interim Accounts had been turned into a small profit for the FY 2010, despite the troubling trading conditions. It would have wanted to understand the reasons for the reduction of c.£6m in the net assets and retained earnings between the balance sheets for 2009 and 2010 and how these related to the small profit apparently shown in the Forecasted Figures for 2010. It would have asked for updated and more complete figures for 2010 than those provided in the January Figures – by the time of the transaction in June 2011 the figures were based on numbers some nine months or so old.

806. The claimant submitted that there was nothing to trigger these inquiries or requests for further information. In other words there was nothing to put Duet on inquiry. I do not agree. I consider that these would have been basic questions prompted by the very information that was in fact provided to Duet and indeed by the simple passage of time; seeking this further information would not have been an exceptional measure which a reasonably diligent investor could not be expected to take. It would to my mind have been a routine part of due diligence. Moreover, as Males LJ explained in *OT Computers* the statutory test of reasonable diligence has to be applied at all stages, including when considering whether there was anything to cause the claimant to make inquiries; the first stage postulates a reasonably attentive person.

807. The next question is what would have happened had Duet raised these further inquiries and requests with ECG and RP&C. I consider that Mr Treon and Dr Srinivas would have explained that ECG was treating some of the staffing costs as exceptional items, for the following reasons. First, if Duet had asked for an explanation of the fall of £6m in retained earnings as between 2009 and 2010 the only explanation would have been that there was a loss for the year. There was no other plausible candidate. It would not have been possible for Mr Treon to avoid explaining the full position. That would necessarily have led on to an explanation of the exceptional items. Equally, if Duet had asked whether the treatment of exceptional items in the 2009 accounts had carried over to 2010, the true position would have emerged. I have found earlier that Mr Treon's modus operandi was not to flag up the normalisation of the numbers at the outset but to anticipate having to explain the full treatment of the figures once asked more detailed questions about the numbers during the investor's due diligence. Where investors did ask about the treatment of exceptional items in 2010 they were given further information (see the case of Mehmet Ahmed).

808. Secondly, I consider it more probable than not that if Duet had asked for more detailed and updated trading numbers for 2010 they would have been given fuller management accounts for 2010 which would probably have included the exceptional items. Information of this kind was provided to Mr Mehmet and to other third parties (see annex 2 to the submissions of the second and third defendants). In this context, the reasonable investor would also have appreciated that ECG was likely to have more detailed and accurate figures for 2010 as 2011 progressed and the audit work for 2010 was undertaken. I consider that a reasonable investor considering making an investment in June 2011 would have expected the audit process to be well advanced and would have sought updated versions of the P&L account and balance sheet. I consider it more

probable than not that if a reasonable investor had required more detailed and up to date information in early June 2011 Mr Treon and Mr Dr Srinivas would have provided much fuller information, which would have shown the January Figures (and the balance sheet of 7 February 2021) to be unreliable.

809. So far I have addressed events before the investment. The defendants also referred to events or circumstances in the period between the investment and 17 October 2011.

810. The first is that ERED was entitled under the LNA to the delivery of audited accounts for ECG, which had to be produced within 180 days of the year end. They submitted that an investor exercising reasonable diligence would have called for and considered audited accounts for 2010 as soon as they were published (on 4 July 2011). ERED was also entitled to consolidated management accounts within 60 days of the end of each quarter.

811. It was the provision of the accounts (together with an explanation of the variances given by KLSA) which led Mr Lattanzio to accuse Mr Treon of misrepresentation at the meeting of 5 March 2012. Hence the provision of the accounts quickly revealed the facts giving rise to the normalisation claims.

812. Mr Korat accepted that he understood that ERED was entitled under the terms of the LNA to call for accounts within 180 days of the relevant year end. He also accepted that Duet generally sought accounts as and when they became due. He also said that Duet sought accounts during the Fund's reporting round and that this accorded with their normal practice. Duet did not in fact ask for the 2010 audited accounts until December 2011.

813. I consider that a reasonably attentive and diligent investor having the right to call for audited accounts would, in the exercise of reasonable diligence, have requested (at the end of June or in early July 2011) the audited accounts for 2010, and well as quarterly accounts for Q1 2011. Investors and advisers need to monitor their portfolios of investments and, acting reasonably, can be expected to call for the information to which they are contractually entitled as it becomes available. The reason for stipulating a contractual entitlement to information is to ensure that the investor (and its advisers) are able to receive and review up to date timely information. By July 2011 the latest trading numbers available to Duet (the Forecasted Figures) were stale being based on data to the end of October 2010. To ask for information to which the investor is contractually entitled would not be an exceptional measure which an investor could not reasonably be expected to take. I do not think a reasonable diligent investor would simply wait until its own reporting round was approaching. It might need to take appropriate protective action before then and, in any event, needs to know how its portfolio of investments is performing. It is also relevant that simply obtaining accounts and reading the accounts would not have involved the expenditure of unusual resources by Duet or ERED: this was, as I have said, information to which it was contractually entitled.

814. The defendants also rely on a business update given at the meeting on 12 September 2011. Duet learnt that there was a six month time lag in reaching the occupancy levels set out in the original business plan. I do not think that merely being told that, without more, would have led to a reasonable investor to think that there had been anything wrong with the circumstances surrounding the investment, or to lead it to take further

steps that would have led to the discovery of the fraud. But it seems to me that it would have led a reasonably attentive person to request a copy of the audited 2010 accounts and Q1 management accounts for 2011. Indeed it seems to me that a reasonably attentive person in Duet's position would have wanted those accounts in advance of the meeting in order to be properly informed with the most recent information beforehand.

815. I find that if Duet (or the putative reasonable investor) had asked the further questions and information requests set out in [805] above or sought the 2010 audited accounts and Q1 2011 management accounts in July 2011 it would have discovered sufficient facts to enable ERED to plead a statement of claim. It would have discovered the "normalisation" of the Forecasted Figures from the answers given by ECG or the 2010 audited accounts. It would have been apparent to Duet/ERED that the figures had given a false impression of ECG's profitability for 2010. I find in all the circumstances that the reasonable investor could and would have known enough to enable it to plead a statement of claim before 17 October 2011.

816. The same reasoning and conclusion applies to the outdated 2010 figures claims. A reasonable investor which had taken the steps I have concluded could and would have been taken would have ascertained that the Forecasted Figures for 2010 were unreliable. Moreover, a reasonable investor thinking of investing in June 2011 would have asked for updated management accounts for 2010 (not least because the investor would have known that the audit would have been nearly complete). The reasonable investor would also, shortly after the investment was made, have sought management accounts for Q1 2011 and audited accounts for 2010. These would have revealed that the Forecasted Figures were unreliable and out of date.

817. As to the claims based on the misleading projections for 2011-13, the defendants observe that the claimant's pleaded case (at para 10.2 of the particulars of claim) is that:

> "the Forecasted Figures were used to assess the reliability of the forecasts for the years 2011 onwards contained within the Projected Figures, which were repeated in the [7 February 2011 pdf] and in the Operating Model dated 8 March 2011. Had an accurate and/or fair depiction of ECG's financial performance for 2010 been presented to Duet, Duet would have challenged and/or rejected the Projected Figures, i.e. the forecasts for 2011 onwards, and the growth assumptions on which those were based. Accordingly, Duet would not have recommended an investment in the Loan Notes, and ERED would not have invested in the Loan Note Issue."

818. The defendants submitted that it follows that (on the claimant's own case) if it had taken the various steps set out above it would have challenged and rejected the Projected Figures too. It could and would therefore have discovered the facts giving rise to this element of the fraud claims at about the same time. I accept this submission. I also consider that once the reasonable investor had been provided with the audited accounts it would quickly have concluded that all of the figures it had been provided with in January to March 2011 were flawed and unreliable.

819. Furthermore, for reasons already given I consider that, using reasonable diligence, a reasonable investor could (and would) have sought and read the management accounts for Q1 2011, as well as the audited accounts for 2010. It could and would have done this in late June or early July 2011. The reasonable investor would have then realised

that the projections it had been provided for 2011 were out of line with the numbers in the more recent management accounts for Q1 2011. Had it also received and read the 2010 audited accounts the putative reasonable adviser/investor would also have concluded that the projections for 2011-13 were implausibly optimistic.

820. Moreover, even if (contrary to my finding in the previous paragraph) the reasonable investor had not previously seen the need for the Q1 2011 management accounts, I am satisfied that a reasonably attentive person in the position of Duet would have been prompted by being told at the meeting of 12 September 2011 that ECG's assumptions about the growth in occupancy were delayed by six months. Occupancy was a key driver, and a reasonable investor who learnt of the delay would have wanted the most up to date management information available. The investor would then have asked for further information which would have revealed sufficient detail to enable it to plead a statement of claim by 17 October 2011.

821. I also consider (as an independent point) that a reasonable investor would in any event have demanded more up to date projections than those provided in January-March 2011. The transaction did not take place until 24 June 2011 and there was therefore a long delay between the provision of the projections in January (and the various iterations of the same projections) and the deal being consummated. I consider that a reasonably attentive and diligent investor would have asked in the run up to the transaction for the latest set of projections. Had that happened in my judgement it is probable that Mr Treon and RP&C would have provided (at least) the same projections as had been provided to Colliers. I do not think it likely that they would have provided projections as stale as those found in the January Figures (which were ultimately derived from the Original Financial Projections of November 2010).

822. The claimants did not advance any additional or separate reasons for seeking to argue that s.32(1) would apply differently to the LNA claims than to the misrepresentation claims. There is good reason for that. The facts giving rise to the LNA claims are essentially the same as those that give rise to other claims. The same circumstances, steps and events that would have enabled ERED to plead a case in respect of those claims would equally have allowed ERED to plead a case in respect of the LNA claims. The same reasoning applies to the conspiracy claims.

823. For all these reasons the claimant has failed to satisfy the requirements of s. 32(1).

(i) Conclusions

824. The claim is statute-barred and must therefore be dismissed. The claims would otherwise have succeeded.