Neutral Citation Number: [2021] EWHC 763 (Ch)

Case No: CR-2019-000812

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

Rolls Building
Fetter Lane
London, EC4A 1NL
Tuesday 30 March 2021

Before :
MR JUSTICE MEADE

- -

Between :

(1) LLOYD CHRISTOPHER BISCOE **(2) LOUISE DONNA BAXTER** **As Joint Liquidators of** **(3) EQUITABLE LAW CAPITAL LIMITED**	**Applicants**
- and -	
(1) GRAHAM WILLIAM MILNER **(2) LILLIAN MARIE MILNER** **(3) WILLIAM DAVID CLARKSON** **(4) PAUL CLARKSON** **(5) ANTHONY FLATON** **(6) BELMONTE LIMITED** **(7) RICHARD ARNISON** **(8) EIGER LITIGATION MANAGEMENT LIMITED** **(9) CAROLE CLARKSON**	**Respondents**

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Reuben Comiskey and Katie Longstaff (instructed by **HCR Sprecher Grier**) for the **Applicants**
Brad Pomfret (instructed by **Rahman Ravelli**) for the **Third, Fourth and Ninth Respondents**
The Fifth Respondent appeared in person
Alexander Heylin and Annie Townley (instructed by **Hemingways Solicitors**) for the **Sixth and Seventh Respondents**
The **First, Second and Eighth Respondents** did not appear and were not represented.
Hearing dates: 20-22, 25-29 January 2021, 2-3 February 2021

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APPROVED JUDGMENT

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

Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 30 March 2021.

Mr Justice Meade:

INTRODUCTION

Overview

1. The First and Second Applicants (together "the Liquidators"), who are partners in Begbies Traynor, are the joint liquidators of the Third Applicant (which the documents refer to as "the Company" or "ELC" – I will use the latter except when quoting other documents).

2. This judgment, which follows a ten-day trial, concerns an application for various orders for payment and compensation against certain of the Respondents (others having settled or been struck off).

3. ELC's only business was the running of an investment scheme called "the ELC Legal Redress Scheme" ("the Scheme"). The idea behind the Scheme was the funding of claims against financial institutions for mis-selling of bonds. I will shortly explain it in a little more detail.

4. The Scheme ran for only a short time, during which investors put in about £3.3m. They received payments of only just over £230,000. The Respondents, on the other hand, received just under £2.2m, either in their own hands or through their companies. ELC was put into insolvent liquidation, in which liquidation there is alleged to be a deficit of just over £2m.

Outline of the Scheme

5. The idea behind the Scheme was as follows:

    i) An investor would put in money by way of a loan to ELC, in units of £1,500.

    ii) ELC would use the money to fund a bond mis-selling claim, which claim would be identified and managed by a claims management company, in particular one called Missold2U Limited ("MS2U").

    iii) If the claim succeeded, the claimant would be paid their compensation, less a success fee to MS2U, and that success fee would be shared with ELC, with the investor receiving a (fixed) return.

    iv) If the claim failed, the loss of the £1,500 would be covered by insurance ("the Contract of Insurance"). The insurance was to be provided by a company called Gable Insurance AG ("Gable"), which went into liquidation on 17 November 2016).

    v) The insured was ELC, rather than the investor – I return to that below. The insurance was brokered by the Sixth Respondent ("Belmonte").

    vi) The Scheme required investors, and these were identified by the marketing efforts of the Fifth Respondent ("Mr Flaton"), acting through his companies Fox and Co Limited and Carter Rovali Limited ("Fox and Co", "Carter Rovali").

vii) The Scheme was promoted to investors by a brochure, of which there were multiple versions. The Points of Claim refer to a specific version as "the Brochure".

viii) The legal relationship between each individual investor and ELC was governed by a standard agreement called the Fixed Return Agreement ("FRA").

6. It is not in dispute that the Brochure contained many serious misrepresentations, but a key issue at this trial was whether the remaining Respondents knew about them or were involved in their making.

Dramatis Personae – key figures

7. I will now identify the key individuals and companies; I will introduce other more minor players as they arise.

8. I have already mentioned the Applicants. It is the First Applicant, Mr Biscoe, who has taken the lead in the liquidation of ELC and who gave evidence before me.

9. The First and Second Respondents are a married couple. The First Respondent ("Graham Milner") was the sole *de jure* director of ELC from 10 September 2014 onwards. He carried out mainly administrative functions.

10. The Second Respondent ("Lillie Milner"), by contrast, did not have a formal directorship but was on any view a key player in ELC and the Scheme. She was certainly *a* moving spirit, whether she was *the sole* moving spirit is one of the central factual issues between the Applicants and the Third Respondent ("David Clarkson"). It is accepted by the Third Respondent that Lillie Milner was a *de facto* and/or a shadow director of ELC.

11. Lillie Milner had two companies through which she received money from ELC. They can be referred to together as "Savvy Sister".

12. The Applicants settled with the Milners by a written agreement dated 11 September 2019 ("the Milner Settlement Agreement"). An issue for me is whether the Milner Settlement Agreement bars the claims against the other Respondents.

13. David Clarkson is accepted to have been involved in ELC and in the Scheme. His case is that he was an arm's length introducer to ELC of the Fifth, Sixth and Seventh Respondents and never saw the Brochure. The Applicants' case is that he was central to ELC's running and to the Scheme and was a *de facto* and shadow director.

14. The Fourth and Ninth Respondents are, respectively, David Clarkson's son and wife ("Paul Clarkson", "Carole Clarkson"). David and Carole Clarkson have been separated for many years but remain in contact and on at least reasonably good terms. Paul and Carole Clarkson settled with the Applicants during trial ("the Clarkson Settlement Agreement").

15. I have already introduced Mr Flaton, the Fifth Respondent, and his companies. It is also worth mentioning that:

i) Belmonte appointed Fox & Co as its Appointed Representative ("AR") in December 2014 (the appointment ended in October 2016) and this formed part of

the Applicants' case, as the basis of an allegation that Belmonte was responsible under s. 39 of the Financial Services and Markets Act 2000 ("FSMA") for the dishonesty alleged against Mr Flaton. The argument was dropped late in the trial.

ii) Another company formed by Mr Flaton was Sable INTL Limited ("Sable"). He did this with the idea that it could take over and expand the investors into the Scheme in a way which was FSMA-compliant. Sable was investigated by the Police, in the course of which Mr Flaton's computers were taken.

16. Likewise, I have already introduced the Sixth Respondent, Belmonte. It is FCA regulated.

17. The Seventh Respondent ("Mr Arnison") is an owner of the Sixth Respondent. He is an FCA approved person. His fellow owner at the time of the events concerned was Mr Andrew Wesson ("Mr Wesson"). No claim was made against Mr Wesson. Mr Arnison and Mr Wesson were both involved in putting in place the Contract of Insurance.

18. I will need to return in more detail to the way the case against Mr Arnison was put, and developed. It changed significantly over time, and even during the trial.

19. The Eighth Respondent ("Eiger") performed administrative functions for the Scheme. It was in common ownership and control with Belmonte. It was struck off on 8 January 2019. It remains relevant as part of the history.

20. I have already introduced MS2U (where the key player was one Joseph Battle, "Mr Battle"), and Gable and Mr Flaton's companies.

21. White & Co Limited ("White & Co") is a firm of accountants which was appointed to receive and hold investors' moneys pending payment to ELC.

22. Hectary International Limited ("Hectary") is a Seychelles company. David Clarkson says that he was engaged by Hectary, that Hectary was entitled to introduction fees/commissions from ELC, and that he was then paid appropriately by Hectary pursuant to agreements that he had with it in a way that I describe below. The Applicants dispute the genuineness of this; it is not in dispute that the money in fact went directly to David Clarkson.

23. Advice was given in relation to the Scheme at different times by two members of the Bar, Mr David Berkeley QC and Mr Mark Anderson QC ("Mr Berkeley QC" and "Mr Anderson QC" respectively). I make clear that no criticism is made of either of them or of the soundness of their advice, which was given on the basis of the facts relayed to them and in the context of important developments in the case law over the period in question.

Operation of the Scheme

24. I will summarise how the Scheme ran, noting the points of major dispute where the Applicants say that what was done was improper:

i) Investors were introduced by Carter Rovali (or Fox & Co).

ii) Each investor paid their investment to White & Co, to be held on trust pending payment to ELC.

iii) Mr Arnison/Belmonte wrote to White & Co when specific cases were assigned to an investor (this was done by a "bordereau" report).

iv) Then White & Co would release £1,500 per case to ELC (on the first occasion it was to Belmonte).

v) Out of each £1,500 advanced to ELC:

a) £250 was paid to Carter Rovali as commission (it is an important issue whether it was honest to take this from investors' moneys);

b) £200 was paid to Belmonte as an insurance premium (most of which was then paid by it to Gable);

c) £20 was paid to Eiger as an administration fee;

d) £30 was paid to White & Co as a fee for operating the client account and doing money laundering checks.

vi) Then ELC would pay money from the residue to MS2U.

25. The money per claim *available* for ELC to provide to MS2U at the final stage was £1,000 (but would have been £1,250 had Carter Rovali's commission not come out of the investor's funds). In fact, much less was paid to MS2U. It was £500 or even less; it has been understandably difficult for the Applicants to put the pieces together, but on average it appears only £328 per claim was paid over. In due course, if claims were successful then returns would be paid to investors by ELC, and a small amount was.

The regulatory context, and advice on it

26. Underlying the history of ELC is the advice it received, and complaints that were made against it by the FCA, in relation to two aspects of FSMA.

27. The first was whether the Scheme was a Collective Investment Scheme ("CIS") under s. 235 FSMA. If it was, then it was also an Unregulated CIS ("UCIS").

28. Mr Anderson QC advised on this twice, as noted in the brief chronology below. On the first occasion his advice was, subject to important caveats, to the effect that the Scheme was not a CIS. By the second occasion, in March 2016, the Court of Appeal had given its decision in *FCA v. Capital Alternatives* [2015] EWCA Civ 284 which changed the picture very considerably, as Mr Anderson QC advised.

29. It was Mr Anderson QC's second advice that led to Belmonte ceasing to offer any further cover, as I explain below, whereupon no further money could be taken into the Scheme.

30. The second aspect of FSMA relevant to ELC was accepting deposits, which is prohibited under s. 19 unless a person is authorised or exempt, and ELC was neither.

31. The relevant definitions of "deposits" is contained in art. 5 of the Financial Services and Markets Act (Regulated Activities) Order 2001 ("RAO").

32. Unauthorised deposit taking was the focus of the FCA's complaint against ELC. Mr Berkeley QC advised on it, and I give further details of that below. His advice was

pessimistic but suggested the possibility that ELC's business could be rearranged to avoid the problem.

33. I have not set out the provisions of FSMA or RAO here because Counsel for the Applicants made clear that it was not necessary to his case to determine whether ELC was in fact in breach of FSMA, or when, or on what exact basis. Rather, the Applicants' case includes the assertion that it was dishonest for the remaining Respondents to be involved with ELC continuing to do business when they knew of negative advice on these issues.

THE ISSUES

34. The parties provided a list of issues prior to trial. It was helpful at the time, but matters moved on very considerably, and I consider it best for me to set out my own understanding of which issues are agreed and which are contested. In various instances I also identify issues which fell away or were conceded, or which I consider not to matter.

Issues of general importance

35. A number of issues affect the case as a whole, and/or multiple Respondents:

    i) What marketing materials and other documentation for the Scheme were prepared and sent to investors?

    ii) It was not in dispute to any material degree that the Brochure contained the Representations pleaded in the Points of Claim and that those were false.

    iii) What did the Respondents know about the marketing material and other documentation? The Applicants dropped the allegation that Mr Arnison knew about the Brochure late in the trial.

    iv) Was ELC insolvent and from when? At the end of the evidence and before closing submissions were prepared I said that unless any party objected I would be proceeding on the basis that ELC was insolvent from the outset. No party objected and that is the basis on which I will proceed. The reason for this approach was that it was not in dispute that ELC in fact had no working capital but was paying out large amounts to the Respondents while incurring large obligations to investors.

    v) What advice was given about the compliance of the Scheme with FSMA?

    vi) What did the Respondents know about that advice?

    vii) As I have already mentioned, it was made clear by the Applicants following questions from me at the end of the evidence that it was not necessary to their case for me to decide whether the Scheme in fact did comply with FSMA.

    viii) Was the Scheme carried on fraudulently, and if so was it fraudulent from the start?

    ix) It was not in dispute that bond mis-selling claims and PPI claims were funded through the Scheme and that the latter was in breach of ELC's obligations. It is

not central to the Applicants' case what David Clarkson knew about this, but he was aware of PPI claims as an issue in about November 2015.

x) It was not in dispute to any material extent that the payments by ELC referred to in the Points of Claim as "the Misapplications" were made as alleged.

xi) Was the insurance provided by the Contract of Insurance effective? This is a particularly messy issue, but I note that it was not in dispute that the insurance was provided to ELC and not to individual investors, and that it did not cover PPI claims. I deal with this issue in the context of the allegation against Belmonte of transaction at an undervalue.

xii) What was the nature and quality of the Liquidators' investigations and what is the significance thereof?

xiii) Does the Milner Settlement Agreement preclude the maintenance by the Applicants of the remaining claims, or some of them?

Issues relating to David Clarkson

36. The issues in relation to David Clarkson were:

i) What was David Clarkson's role in the Scheme and with ELC?

ii) What did David Clarkson know about ELC's operation of the Scheme and its financial affairs?

iii) Was David Clarkson a *de facto* director (the allegation that he was a shadow director fell away – see below)?

iv) If so, what duties did he owe? I do not think this was in dispute to a material degree, if the premise that he was a *de facto* director were to be made out.

v) Was he in breach of those duties?

vi) Was David Clarkson dishonest?

vii) Is David Clarkson liable for fraudulent trading?

viii) Is David Clarkson liable for wrongful trading?

ix) Were the payments by ELC to David Clarkson transactions at an undervalue?

x) What remedies are appropriate if he was liable for any of the above?

Issues relating to Mr Arnison/Belmonte

37. The issues relating to Mr Arnison/Belmonte were:

i) If the Scheme was fraudulent, is Mr Arnison or Belmonte liable for providing dishonest assistance to it? As with Mr Flaton, a central allegation related to Carter Rovali's commission. I list the other dishonesties alleged when I come to this.

ii) Is Mr Arnison or Belmonte liable for fraudulent trading under s. 213(2) of the Insolvency Act 1986 ("IA86"). This did not seem to add anything to the dishonest assistance claim.

iii) As already mentioned, the claim that Belmonte was liable under s. 39 FSMA in relation to the appointment of Fox & Co as its AR was dropped late in the trial.

iv) Is Belmonte liable to repay moneys received by it from ELC on the basis that they were pursuant to transactions at an undervalue under s. 238 IA86? During closing submissions this claim was narrowed to money that Belmonte itself received, so no longer extended to the money that it took in for Gable's benefit.

v) What remedies are appropriate if Mr Arnison or Belmonte was liable for any of the above?

Issues relating to Mr Flaton

38. The issues relating to Mr Flaton were:

i) If the Scheme was fraudulent, is Mr Flaton liable for providing dishonest assistance to it? In particular, was he dishonest in relation to Carter Rovali's receiving its commission from investors' funds?

ii) Is Mr Flaton liable for fraudulent trading under s. 213(2) IA86? Again, this did not seem to add to the dishonest assistance claim.

iii) The allegation that Mr Flaton was liable to repay moneys received by Carter Rovali on the basis that they were transactions at an undervalue was dropped during closing submissions.

iv) What remedies are appropriate if he was liable for any of the above?

Other issues that fell away or do not need or merit decision

i) The Applicants alleged a conspiracy on the part of the Milners, the Clarksons and Mr Flaton to injure ELC. I could not see how this added anything or how the Applicants could win on it if they lost on the other claims. It was covered briefly in the Applicants' closing submissions and they never formally dropped it, but I said to Counsel for David Clarkson that I did not see what it added and that I did not require him to address it. The Applicants did not object. In these circumstances I do not intend to deal with it.

ii) Similarly, the Applicants alleged that in addition to being a *de facto* director David Clarkson was a shadow director. The real thrust of their case was that he was a *de facto* director, and they agreed that the shadow director allegation would require proof of specifically what he directed ELC to do, so could be harder to prove. Since it was common ground that there was no additional benefit to the Applicants in proving shadow directorship, and since I have found that he was a *de facto* director, I do not propose to decide the shadow director claim and that means I do not need to decide certain points of law.

iii) An allegation that one of the Misappropriations, a payment to Mediprotect Limited (a company alleged to be owned by Paul Clarkson), was a preference was

pleaded and mentioned in the Applicants' opening skeleton, but not its closing, and was not referred to again. I do not think it was of separate significance, or needs deciding.

Addressing the issues in this judgment

39. I have written this judgment to address all the above issues, but because of the multiple Respondents and their different roles, it has been necessary to touch on some of the issues in more than one place. It is also not practical to deal with the issues in the order above.

CONDUCT OF THE TRIAL

40. The trial was conducted entirely remotely. This generally worked well although there were some internet outages from time to time.

41. The Applicants, who had the greatest administrative burden and the heaviest load in terms of cross-examination, were represented by Mr Reuben Comiskey and Ms Katie Longstaff.

42. The Clarksons, who expressed particular concerns about COVID at the PTR, were at a serviced office, at which a representative of the Liquidators was also present to observe compliance with the rules in relation to David Clarkson's evidence.

43. Mr Brad Pomfret represented all the Clarksons. They were litigants in person at the time of the PTR (although they had solicitors earlier) and until very close to the trial, and Mr Pomfret therefore had limited time to prepare, which I record he coped with in an extremely calm and efficient way.

44. I refer below to certain health issues which David Clarkson had and their significance.

45. Mr Flaton was a litigant in person. He did a very good job in difficult circumstances and was assisted by his father (who also attended the interview of Mr Flaton by the Liquidators) in the role of McKenzie Friend. They were in the same place except that Mr Flaton Senior left the premises for the duration of Mr Flaton's oral evidence.

46. Mr Arnison and Belmonte were represented by Mr Alexander Heylin and Ms Annie Townley. When I refer to "Counsel for Mr Arnison" I mean Counsel for Mr Arnison and Belmonte, and similarly when I refer to "Mr Arnison" I mean Mr Arnison on behalf of Belmonte, there being in general no need to distinguish between them.

47. The Clarksons and Mr Arnison cooperated and shared the advocacy where possible, in particular in relation to the argument over the effect of the Milner Settlement Agreement.

48. The trial took ten days in Court. The estimate was already increased from 6 to 8 days at the PTR, and then was increased to ten during the trial. I have to say that the complexity of the case and the number of parties was such that it was inevitable that neither earlier estimate was enough. Even ten days was an extremely tight squeeze and was only achieved by allowing for two rounds of post-hearing written submissions. Had the claims against Paul and Carole Clarkson not settled the situation would have been even worse. David Clarkson's cross-examination overran severely, not because the time was

not well used but because the estimate given did not reflect the amount of material to be covered, and the time necessary for the Respondents to cross-examine each other (which I directed in each case should take place before the Applicants, the most/truly adverse party, cross-examined).

49. Part of the problem with the time estimate was that there were so many claims and defences against so many Respondents, all dealt with at a level of detail which was sometimes necessary but often not. The parties did not cut things down materially until closing submissions.

50. At the start of the trial, Counsel for Mr Arnison applied to strike out large parts (originally, all) of the witness statement of Mr Biscoe on the basis, mainly, that it was merely comment. He prepared a schedule listing the objections and the Applicants marked it up with their responses.

51. Overall and in the main, I thought that although there was a lot of material in the statement which was not direct evidence, it collated the information from the extensive documentation to show what the Applicants were relying on and for what, and provided more detail than the pleadings did or were required to, but earlier than the Applicants' skeleton argument. So I did not think it was deleterious or ill-intentioned.

52. On the other hand, Counsel for Mr Arnison was right to identify the issue and was entitled to certainty about what he was required to cross-examine upon. The preparation of the schedule was a sensible and proportionate approach and the Applicants should have engaged with it much sooner.

53. I directed that Counsel for Mr Arnison was not required to cross-examine to those parts of the statement identified in the schedule in certain ways. He sought further clarification which I gave on specific paragraphs. I was cited various authorities on this sort of situation, in some of which much more stringent orders, including striking out, were made. No doubt those decisions were appropriate on their facts and if Mr Biscoe's statement had been more tendentious or argumentative or prolix, or less useful I would have reacted differently.

Witnesses

54. The witnesses who gave oral evidence before me for the Applicants were:

    i) Mr Biscoe;

    ii) Dr Holloway, an investor who has also been active in a creditors' committee in the liquidation. He was a good and straightforward witness;

    iii) Mr Gary Drewery, an accountant specialising in insolvency, who prepared bank account analyses, and Deficiency Statements as at various dates. He was a very good and clear witness and his evidence was unchallenged except for the minor error concerning Belmonte, which he acknowledged without hesitation.

55. I comment on Mr Biscoe's investigations as Liquidator in more detail below.

56. The following Respondents gave evidence:

    i) David Clarkson;

ii) Mr Flaton;

iii) Mr Arnison.

57. I comment on each of them in detail below.

58. Statements were put in for Paul and Carole Clarkson but following their settlement with the Applicants they were not called to give oral evidence. No party submitted that I should draw any inference from this, and I do not do so.

THE LIQUIDATORS' INVESTIGATIONS

59. The Agreed Points of Law, to which I refer in more detail below, contained the following:

i) A "liquidator conducting an investigation into a contentious issue arising in a company's affairs should strive to gather and review all readily available evidence on that issue on an impartial basis. He should be alive to the possibility of conjecture and unsubstantiated opinion. He should re-evaluate evidence as the investigation progresses" - *Re Guardian Care Homes (West) Ltd (In Liquidation)* [2018] EWHC 2664 at [116]. **Agreed by all parties**

60. In addition, Counsel for Mr Arnison referred me in written submissions after the trial to the statements by Falk J in *Re Keeping Kids Company* [2021] EWHC 175 (Ch) at [899]-[902].

61. All the Respondents made submissions about what they said was the lack of thoroughness of the Liquidators' investigations. At one point at the start of the trial Counsel for Mr Arnison sought to elevate the complaints to the level of a substantive defence to the claims, in the nature of abuse of process. I ruled that that would require an amendment to the pleadings, which was not sought. But the complaints about the investigations remain in play for the purpose of undermining the reliability of the Applicants' evidence.

62. The Respondents' submissions focus on:

i) The initial appointment of Begbies Traynor;

ii) The relative scrutiny given to the Milners as compared with the other Respondents;

iii) The way in which the Milners were permitted to provide such documents as they did;

iv) The consideration provided by the Milners under the Milner Settlement Agreement (which was said to be much too low); and

v) The fact that Lillie Milner was not called to give evidence, despite clause 3.1.3 of the Milner Settlement Agreement allowing the Liquidators to require her to give a witness statement.

63. To some extent these all go together, and in my view they show that the Liquidators did not treat all the Respondents alike and did not gather all readily available material, but

the one that troubles me the most is iii) – the way that documents were provided. It is the one that has the most direct impact on my ability to make full, accurate and informed findings of fact.

Initial appointment

64. It was the Milners themselves who chose Begbies Traynor. One can understand why the Respondents feel uncomfortable about this, but in itself it does not have much significance. There was an early sense of insinuation by the Respondents that there was something improper about Begbies Traynor being chosen, or some significant previous relationship, but this was not really pursued.

65. However, one of the first things that then happened was that Graham Milner, the sole *de jure* director, filled in his Directors' Questionnaire on 15 November 2016, in which he identified David Clarkson (but not Lillie Milner) as a shadow or *de facto* director. This was on the stated basis that David Clarkson was responsible for relationships with the "IFA Broker" (which probably meant Mr Flaton even though he was not an IFA) and Belmonte. Lillie Milner was mentioned only as responsible for the relationship with MS2U.

66. In my view this clearly understated Lillie Milner's role in a way which even at an early stage should have rung alarm bells for the Liquidators. And it was put to Mr Biscoe, and I accept, that the Milners had an obvious incentive to increase the apparent culpability of David Clarkson and de-emphasise that of Lille Milner.

67. Further, questions 41 to 43 of the Questionnaire identified that ELC had kept accounting records and that statutory records and a minute book had been kept. These should surely have been the first port of call, but Mr Biscoe did not secure them.

Relative scrutiny

68. The Liquidators used more care and energy over getting in the documents of the other Respondents than they did of the Milners. They did not obtain Lillie Milner's computers or telephones or the documents identified in Graham Milner's Questionnaire and they did not use their compulsory powers under s. 236 IA86 (which they did with David Clarkson). The explanation was offered that that was because it would not have been possible to go behind a witness statement from the Milners that they had provided everything, but I do not accept that because at the very least the documents identified in the Questionnaire had plainly not been provided.

The way the Milners provided disclosure

69. Rather than getting complete electronic repositories of documents from Lillie Milner, or at least intact copies of the originals with metadata, the liquidators allowed Lillie Milner to forward original emails to herself, print them, and provide those.

70. In a similar vein, Lillie Milner provided text messages by taking screen shots and giving those to the liquidators, rather than giving access to the complete (relevant) contents of her phone.

71. Both of these raised the possibility that Lillie Milner could give over materials that were selective, or redacted, or tampered with. I have already said that I think she had the potential positive motivation to try to cast the blame elsewhere.

72. No adequate justification for this approach was given.

Consideration under the Milner Settlement Agreement

73. The Milner Settlement Agreement was made on a "means" basis, i.e. on the basis that what would be paid would be conditioned on what the Milners had.

74. In cross-examination of Mr Biscoe, Counsel for Mr Arnison made a powerful case that Mr Biscoe simply accepted valuations of the Milners' properties provided by them, and that those valuations were obviously too low. There was also questioning about the Milners' mortgage with an offshore company of unknown ultimate beneficial ownership, although I found that less clear.

75. This is not of direct relevance, in my view. It is entirely possible that the Milners just out-negotiated Mr Biscoe who settled too low. But it does somewhat emphasise the impression, which is more relevant in relation to the way the Milners gave disclosure, for example, that Mr Biscoe yielded too easily to Lillie Milner.

Not bringing evidence from Lillie Milner

76. In cross-examination Mr Biscoe simply said, as was often the case, that he acted on advice in not getting a witness statement from Lillie Milner. He provided no explanation of substance.

77. However, when the matter came up in oral argument, as it was bound to do, Counsel for the Applicants offered an explanation. It was phrased as a possible hypothetical reason for not obtaining evidence from Lillie Milner, but it was fairly obvious that it was intended to provide the actual explanation without too-obviously being evidence from Counsel. The explanation was that evidence had not been obtained from her because it was thought that because she was a "professional liar" she would not be believed.

78. This explanation was a fairly obvious one and had already occurred to me. The difficulty is, of course, that it undercuts still further the reliance that can be placed on the documents she provided, as to the way they were selected or as to whether they might have been meddled with.

APPROACH TO THE EVIDENCE

79. In the present case I have both witness and documentary evidence to consider, in a commercial context of arranging and selling financial products, which is such that normally one would expect there to be a full paper trail. If there had been such a paper trail then a reasonable approach would have been to use that as a structure for factual findings, and to test the witness evidence against it. I considered key authorities about the relative significance of documentary and witness evidence recently in *Martin v. Kogan* [2021] EWHC 24 (Ch); one aspect that I think is important in this case is the significance of testing matters against the known or undisputed facts.

80. However, a distinguishing feature of the present case is that not only is the documentary record incomplete, but a number of documents have plainly been tampered with (as the parties agree, although they dispute who was the culprit).

81. In my view, I must still assess all the evidence. I have to take account of the incompleteness of the documents and that there are documents which are not genuine. But I would not be justified in rejecting whole categories of documents without sufficiently granular consideration. Nor, obviously, can I uncritically start from the documents and subordinate the witness evidence to them without having in mind the shortcomings of the documents.

82. In doing this, I think it is important that I should bear in mind where the problems with the documents lie, and what effect they have. Some sources of documents are more reliable than others. Thus:

    i) Disclosure given by the Applicants is known to be incomplete insofar as much of it came through the hands of Lillie Milner who had a motive to be selective, and contains documents which I find below have been altered. There are concrete examples of documents which she had but did not give to the Liquidators, and whose existence is known of from other sources (e.g. the documents at B/51 and B/60 which were not given by her to the Applicants, but were in the disclosure of Mr Arnison/Belmonte).

    ii) Disclosure given by David Clarkson is also incomplete and unreliable for similar reasons, and, for example, because he claims he could not access his bank statements, emails or (I think) texts. It was not explicitly put to him by Counsel for the Applicants that he was specifically lying about his inability to get his emails or bank accounts, but I think the general challenge to his veracity was good enough, and I found his explanations unconvincing. On a similar note, and in support of this, I specifically reject his assertion that someone else must have been using his email address. I deal with this below.

    iii) Disclosure given by Mr Flaton is known to be incomplete because (I find) his computers were taken by the Police in connection with the Sable investigation, but those that remain were carefully indexed by him and their authenticity has not been questioned, in the sense that there has been no suggestion that they were altered or tampered with in his hands (although he received documents which I find were falsified before being sent to him). The Applicants positively relied on Mr Flaton's disclosure in numerous respects for this reason.

    iv) Disclosure given by Mr Arnison and Belmonte is complete and reliable and indeed includes documents potentially harmful to their position (such as in relation to the Abbreviated Advice of Mr Anderson QC).

83. I will bear in mind this variation in quality in assessing the evidence, and will seek to cross-check the documents from one source against the others, as the parties did in their submissions.

84. Tampered documents include in particular (as the parties agree, or I find):

    i) Letters of advice from Belmonte to ELC in August 2014 - I find that these were tampered with by David Clarkson, as I cover below.

    ii) The altered version of the advice of Mr Anderson QC sent to Mr Flaton. Again, I find that David Clarkson tampered with this.

iii) Documents similar to ones given by Belmonte to ELC but altered, as identified in Mr Arnison's first statement, paragraph 245. Someone at ELC (or David Clarkson) must have altered these, but I cannot say who.

iv) Documents used to impersonate Mr Arnison in connection with Sable, as identified in his first statement, paragraphs 240 to 244. These were gone into to some extent at trial. No party disputed that the documents were tampered with. I cannot say who was responsible specifically. Mr Arnison's list of potential culprits included Mr Flaton, but this at least I reject.

85. The picture on this changed right up until the very end of the trial, when the issue about the (draft) letters to the FCA of 26/27 November 2015 to which I refer below came to light.

86. I also bear in mind that the problems with disclosure from inside ELC or from David Clarkson have a differing impact on the remaining Respondents. There is of course a dispute about whether David Clarkson was "inside" ELC in the sense of being a *de facto* director, but he was on any view in close and regular contact with Lillie and Graham Milner, and for a period so was Paul Clarkson. So if there were incidents or documents which Lillie Milner omitted, David Clarkson would have a much better chance of realising it than would either Mr Flaton or Mr Arnison/Belmonte.

87. A particular issue that arises is with the text messages that passed between Lillie Milner and David Clarkson and which were provided by her to the Liquidators. As I have explained, this was done by her printing screen shots of messages which she chose. David Clarkson repeatedly questioned these when they were put to him, but his criticisms were vague and general, apart from a single point about the reference to Mr Arnison as "rich" in August 2014, which I reject below. If the texts were seriously incomplete or materially doctored then I think he would have been able to come up with much better examples. On the contrary, however, they fit well with the known chronology and with other documents and dates (for example, the preparation of the business plan in May 2014, the events of 12/13 August 2014, and the arrival of the FCA letter of complaint in March 2015). Their tone and content is also convincing and I find that they are genuine. A limitation is that they are not always in strictly chronological order of presentation and not every page bears a date, but it is very minor impact.

88. Another specific problem was that because Lillie Milner printed out the emails that she gave to the Applicants, it was difficult to be certain in some instances about which electronic document was attached to a specific email. The problem was compounded by the way in which attachments were shown in forwarded emails, and by Counsel for the Applicants accidentally putting questions on the wrong basis in this regard, which was understandable given the complications, but could have been avoided.

89. Overall, although I have to be careful about the reliability of disclosure from ELC via the Applicants on specific issues and incidents, most especially the FCA investigation and which version of the Brochure was being referred to at specific points, I do not have any real hesitation in relying on the documentary record (emails and texts in particular) to make overall findings about the general nature of how ELC worked, and of David Clarkson's involvement in it.

THE SCHEME DOCUMENTATION

The Brochure

90. The Applicants' case is that the Brochure contained misrepresentations, made to investors, which were false and made fraudulently.

91. The Applicants made clear that their cause of action is not in fraudulent misrepresentation in itself since, they accept, those would be claims that would belong to the individual investors. Rather, they rely on the misrepresentations as part of the fraudulent and dishonest conduct of certain of the Respondents.

92. The Applicants' case was pleaded by reference to a particular version of the Brochure which was the one that Mr Holloway received. It was entitled "Equitable Law Capital ELC Finance and Legal Redress".

93. There were other versions of the Brochure over time.

94. In particular, the Applicants' evidence also focused on what was referred to in Mr Biscoe's statement as "the Mis-selling Brochure", which bore the title "Legal Redress for Investment Mis-selling". It contained many similar statements to those in the Brochure.

95. The Liquidators sent questionnaires to investors, and one of the objectives of that was to identify what materials they received. I am not convinced that the process was entirely rigorous, and the questionnaires were not provided by the Liquidators so there is something of a lack of transparency. Nonetheless, there is enough for me to conclude that most and probably all investors received the Brochure and that a significant number also received the Mis-selling Brochure.

96. There was unfortunate and to some extent probably avoidable confusion during the oral evidence about which version/draft was sent to whom and when. However, as I say below, David Clarkson's involvement with ELC was such that I hold he saw all the material versions of and contents of the Brochure.

97. The misrepresentations relied on in the Points of Claim were:

> '22. The Brochure contained the following representations:
>
> (i) "Unlike many other investment schemes your capital is fully protected with ELC." (at pages 2, 3,4, 5,7, 8, 10, 11 and 12 of the Brochure)
>
> (ii) "To be involved with ELC [i.e. the Company] is a chance to participate in a scheme unlike any other. We offer a system that provides a healthy and secure return on your money whilst, at all times, protecting your initial capital through robust insurance cover and strong commercial agreements." (at page 3 of the Brochure)

(iii) ELC provides a system overseen by 3 leading UK FCA regulated Firms, a Chartered Accountant [i.e. White & Co], a UK Insurer [i.e. Gable] and a UK specialist insurance Broker [i.e. Belmonte] ... All of the Regulated Firms monitor the scheme for validity and security of funds." (at page 3 of the Brochure)

(iv) "Your money is used solely for the purpose of financing the generation and management of mis-selling claims." (at page 3 of the Brochure)

(v) "ELC has been set up as a standalone company to deal solely with bond and investment mis-selling claims" (at page 3 of the Brochure)

(vi) "We currently employ the services of many senior managers who have a background within the banking sector who bring great inside knowledge as to how to deal with these claims against banks and similar institutions." (at page 4 of the Brochure)

(vii) "...we have arranged CAPITAL GUARANTEE INSURANCE underwritten by Gable Insurance; ... we will not go forward with any offering without it. Your capital, when you put it with us, is safe and we are one, if not the only company, of this type that can say this." (at page 4 of the Brochure)

(viii) "Their [i.e. the Company's] team of experts can draw on years of experience as they were employed by the high street banks especially to handle investment complaints within the large banks and the Financial Ombudsman Service." (at page 5 of the Brochure)

(ix) "Loans are repaid upon completion of each case with a fixed fee charge from successful conclusions of cases." (at page 6 of the Brochure)

(x) "Cases must carry insurance underwriting." (at page 7 of the Brochure)

(xi) "There is a requirement that cases can be completed in under a year" (at page 7 of the Brochure)

(xii) "ELC adopts a proven process-driven strategy when running and winning cases for the mis-selling of investment products. ELC provides key management experience..." (at page 7 of the Brochure)

(xiii) "To date our average redress for clients is £16,000 and on average it takes approximately 8 months to complete a case." (at page 7 of the Brochure)

(xiv) "HOW CAPITAL PROTECTION IS ACHIEVED

We have designed this product to carry minimal risks and this is one of the few products on the market that actually guarantees to return capital. In simple terms, Clients capital is paid back from one of two ways; either from the successful conclusion of the claim (and the fees recovered) or, if that fails, from the insurance company." (at page 8 of the Brochure)

(xv) "At the time of launch of the ELC Legal Redress Scheme the expected loan amount used by ELC per case will be circa £1,500. Each case will pay the following costs which are fully covered the insurance underwriter

- Case acquisition
- Accountants Fee
- FGI [i.e. insurance] premium
- Administration Fee" (at page 10 of the Brochure)

(xvi) "The capital lent to ELC by the Lender is fully insured by Gable Insurance." (at page 12 of the Brochure)

(xvii) "Please note that the use of the word 'protected' throughout this brochure refers only to the fact that 100% of the amount loaned is covered by insurance for non-return." (at page 12 of the Brochure)"'

98. The allegations of falsity were pleaded in the Points of Claim as follows:

> **"Misrepresentations made to Investors**
>
> 46. The representations set out in paragraph 22(i), (ii), (vii), (x), (xiv), (xvi) and (xvii) were false in that they falsely represented that an Investor's advance to the Company would be fully covered and protected by an effective contract of insurance which would return the whole advance to the Investor in the event that the underlying Claim failed. This representation was false on the grounds set out in paragraph 29 above.

47. The representation set out in paragraph 22(iii) was false, in that there was no oversight of the Scheme provided by any of the 3 regulated entities mentioned.

48. The representations set out in paragraph 22(iv) and (v) were false, in that the claims financed were, in almost every case, not Bond Claims but PPI claims.

49. The representations set out in paragraph 22(iv) and (xv) were false, in that the money advanced to the Company by the Investors was not used for the limited purposes set out therein, but was instead paid away in the manner set out in paragraph 34 above.

50. The representations set out in paragraph 22(vi), (viii) and (xii) were false, in that the Company did not have any employees with any experience of banking or financial services, whether in Bond mis-selling or otherwise. The only employee of the Company was Mr Milner.

51. The representations in paragraph 22(xii) and (xiii) were false, in that the Company had no track record or previous history of trading, so that it had not achieved the past results represented.

52. The representations set out in paragraph 22(ix) and (xi) were false, in that no cases were completed, whether within a year or otherwise, and no loans were repaid."

99. As is obvious, the representations are of differing levels of detail and significance. The more fundamental ones were as to the assurance investors could have about the safety of their capital, as to their money all being put towards funding save for some specified costs, and as to the claims being for bond mis-selling. Others, such as the specific companies involved and their roles, and ELC's track record were points of detail intended to give general comfort (these were in general completely made up, for example in that ELC had no track record at all and the figure of average recovery of £16,000 was fiction).

100. David Clarkson was taken through the Brochure (and much of the Mis-Selling Brochure) in cross-examination. In substance he accepted all the allegations of falsity put to him (which did not include details of what proportion of the claims were PPI and when he knew about that); his defence was simply that he did not see the Brochure. I deal with that below, and reject it.

The FRA

101. As I have said above, the relationship between individual investors and ELC was governed by the terms of the FRA.

102. Provisions of the FRA were pleaded in the Points of Claim at length. This was necessary to the Applicants' case at that stage because one of the ways they sought to demonstrate insolvency of ELC was by showing that it was in breach of the FRA and liable to repay all the investors. Since it is accepted before me that ELC was insolvent because it had no capital and was making large payments out from the beginning while incurring liabilities to the investors, there is no need to make detailed findings about the FRA, or to set out its provisions at any length.

103. However, clause 2.2 remains important in relation to the point about the payment of Carter Rovali's commission. Clause 2.2 provides:

> "The proceeds of each advance shall be applied in or towards satisfaction of Borrower's overheads in bringing a redress claim."

The Contract of Insurance

104. The pleaded parts of the Contract of Insurance which are of relevance to this judgment are:

i) The definition of "Claim" in Section 1 as:

> "Any claim acquired by the CMC in relation to Investment Bond mis-selling using funds drawn down by the CMC under the facility provided by the Insured".

ii) Clause 2.1:

> "Subject to the terms and conditions of this Policy, the Insured will be indemnified by the Insurer in relation to, and the Insurer will pay to the Insured, the lesser of the Limit of Indemnity [which was £1,500 per Claim] and the amount of the loss realised by the Insured in connection with its Loan to the CMC in respect of a Claim."

105. The former is relevant to demonstrate that the Contract of Insurance did not cover PPI claims. This is not in dispute and is also the clear effect of recital c. The latter is relevant to the Carter Rovali commission issue.

106. The Applicants also relied upon the "Right of Audit" as defined in Section 1:

> "The Insured and the CMC will allow the Administrator [which was Belmonte] to audit files on a random basis to ensure compliance with the terms herein."

107. Mr Arnison and Mr Flaton referred in their oral evidence to recital b. which was as follows:

> "The Insured intends to provide fixed charge loans and other bespoke financial funding (hereinafter the "Loans") to the CMC in its sole discretion for the purpose as defined."

The bordereaux

108. Money from investors was tracked by Eiger/Belmonte by way of what Mr Arnison referred to as "the bordereau basis". This meant that tranches of money from investors were linked to individual claims to be brought by the claims management company (and were also assigned week-by-week). Mr Arnison also explained that this was better for the insurer in administrative terms, and it did not need to issue individual policies to individual investors. It was the way that Belmonte had previously dealt with ATE insurance policies.

109. There was extensive reference to the bordereau approach in the evidence and some of the skeletons. I was not clear if it was relied on by the parties as to its actual or legal effect. I asked them in closing and they all said not; that the bordereaux were just a convenient administrative approach.

110. Perhaps surprisingly, Mr Arnison was not clear in his own mind about what protection the bordereau approach gave an investor whose interest was "noted on the policy" in accordance with it. I accept that he thought in some rather inchoate way that it might be useful if the insured (ELC) or the underwriter (Gable) was in financial difficulties or unwilling to claim, but no party submitted that that was the case in law.

The MS2U Agreement

111. ELC's relationship with MS2U was to be governed by a written agreement of 25 September 2014 ("the MS2U Agreement"). This was not easy to understand and how it was operated in practice is obscure, other than that the Applicants have been able to identify payments made between ELC and MS2U, and to assess how much was paid to it per £1,500 investment (referred to above).

112. However, the details of the MS2U Agreement are not important to the issues that I have to determine, so I will say no more about them and do not need to quote them.

THE MISAPPLICATIONS

113. "Misapplications" is the expression used by the Applicants to describe all those payments made from ELC in connection with the Scheme which are alleged to have been wrongful.

114. They are as follows (taken from paragraph 34 of the Points of Claim):

(i) "£126,953 to Mr [Graham] Milner during the period 16 October 2014 to 17 October 2016;

(ii) £369,612.99 to Savvy Sister during the period 8 October 2014 to 8 March 2016;

(iii) £541,643.61 to Mr [David] Clarkson during the period 9 October 2014 to 30 September 2016;

(iv) £26,877.09 to Mr P Clarkson during the period 14 August 2015 to 22 April 2016;

(v) £120,000 to Mediprotect during the period 7 September 2016 to 9 September 2016;

(vi) £599,500 to Carter Rovali during the period 3 October 2014 to 22 March 2016;

(vii) £59,200 to Eiger during the period 6 October 2014 to 26 February 2015; and

(viii) £347,000 to Belmonte during the period 13 March 2015 to 24 March 2016."

115. I address the payments to Belmonte in connection with the claim against it for transactions at an undervalue. My considerations there would also apply to the payments to Carter Rovali and Eiger. They were payments which reflected the value that those companies' efforts would have had to ELC had the Scheme not been conceived of and run in the fraudulent way that it was.

116. There is little evidence about the payments to Paul Clarkson (£26,877.09), but the evidence shows that he was actually doing significant administrative work. The duration of his appointment leads me to conclude that this payment was for work actually done.

117. Some of the money paid to Graham Milner was also for administrative work that he actually did, but the way in which the Scheme and ELC were run makes it impossible to tell how much, and none of the parties attempted that exercise. In the very roughest of terms, I think he probably did about as much actual administrative work as Paul Clarkson. The rest of the money paid to him was a way of enriching the Milners as part of the fraudulent running of ELC.

118. All the other payments were means for taking money out of ELC for the benefit of those running it, which includes David Clarkson.

FINANCIAL POSITION OF ELC

119. ELC filed one set of accounts, for the year ended 31 March 2015. They were not filed until 12 February 2016 and were abbreviated accounts. They were approved by Graham Milner on behalf of the Board (although of course he was the only Director).

120. The accounts showed total net assets of £1,805 and creditors of £8,452. This was plainly a complete misrepresentation of the position of ELC, not least because it had already taken in £605,000 from investors by 31 March 2015.

121. The deficiency to creditors at various points in time were calculated by Mr Drewery and included in his witness statement. They rose from £1,081,579.51 at 22 July 2015 to £2,128,151.07 at March 2016. Mr Biscoe provided the up to date figure in November 2020 as £2,076,649.28. None of these figures was challenged.

REASONS FOR THE COLLAPSE OF THE SCHEME; "TOO GOOD TO BE TRUE"

122. The hoped-for success of the Scheme, and therefore of ELC, was dependent on a number of things. Key requirements were:

    i) First, investors were needed.

    ii) Second, appropriate insurance was needed to reassure the investors that their money was safe.

    iii) Third, a flow of mis-selling claims was needed, to be matched against the investors putting money in.

    iv) Fourth, the mis-selling claims had to be sufficiently remunerative to pay back the individual claimants, as well as to pay MS2U, ELC and provide a return to the investors.

    v) Fifth, ELC needed to have working capital to pay its expenses until it could make a profit from successful claims.

123. Various figures were put forward in the pleadings and contemporaneous documents to illustrate this. It is unnecessary to go into the details. One thing they showed was that a really quite high level of recovery for each claim was needed.

124. As to the first requirement there was no problem getting investors – Mr Flaton was successful on that front.

125. As to the second, insurance was of course put in place with Gable through Belmonte. I deal below with the alleged deficiencies of it, but to the extent there were any, they were not the reason why the Scheme and ELC failed.

126. As to the third and fourth requirements, the needed flow of claims was not there, and they were not profitable enough. It is not clear when this bit, but it undoubtedly did. It is, presumably, the reason why MS2U started using the money from ELC to fund the much less profitable PPI claims.

127. As to the fifth requirement, ELC never had any working capital to speak of. It used incoming investors' funds to try to keep itself going and to pay other earlier investors their returns (to the limited extent that it did). In this sense, it was really a Ponzi scheme.

128. It was the problems with the third, fourth and fifth requirements that, in my view, led to the Scheme's and ELC's failure. The fifth was very seriously compounded by the large amounts being paid out to the Milners and David Clarkson (or the companies with which they were associated). And any attempt to keep things going with further investments coming in, even if it could otherwise have been possible, was derailed by the regulatory problems with the FCA.

129. It was a feature of the Applicants' case that the Scheme was obviously "too good to be true" in promising yields of up to 8% with no risk to capital. There is a good deal of truth to this, but so far as it matters, it seems to me that if ELC had been properly capitalised and well managed, without the very large payments out, and if investors' moneys had only been taken where there were appropriate mis-selling claims to allocate them to, then the Scheme could have enjoyed some success. The reason is that the mis-selling claims were inherently highly likely to succeed (because of the result of the regulatory action over the mis-selling by the financial institutions concerned) and some would be expected to have very good recovery. So I think the charge levelled at Mr Arnison, Belmonte and Mr Flaton that they must have realised that the Scheme was a fraud simply because it was too good to be true, does not hold water. Clearly, and sadly, the investors did not take any such view, either.

CHRONOLOGY OF THE MAIN EVENTS

130. The parties provided a very detailed Agreed Chronology which I have used extensively in preparing this judgment. It is, however, too detailed to be of use as a narrative to help the reader of this judgment get an overall understanding, so I provide a higher level account of the main events. In some instances the dates are by reference to an approximate period, or I have given them slightly out of strict order in an attempt to group related events together for readability.

2014

131. ELC was incorporated on 21 March 2014 with a Mr Clifford Connors as its only director.

132. Early in 2014 there were meetings and discussions involving, variously, Lillie Milner, David Clarkson, Mr Arnison and Gable at which the potential for the Scheme was discussed. It is a matter of dispute as to who had and proposed the idea first. I do not think it matters but the likeliest explanation is that it arose from discussions between Lillie Milner and Mr Battle of MS2U.

133. In a similar time frame, an early version of the Brochure was created and emailed between David Clarkson and Mr Flaton.

134. Continuing into May and June 2014, there were discussions about the Scheme documentation and potential payment levels (for example in relation to Mr Flaton's companies' commissions).

135. In July 2014, Mr Flaton asked for assurance that the Scheme was not a UCIS. Belmonte also said that it was going to instruct Counsel. In the same month, further Brochure versions circulated between David Clarkson and Mr Flaton.

136. On 21 July 2014 Belmonte instructed Mr Anderson QC to advise on the legality of the Scheme. He gave telephone advice on two occasions, there were further instructions to him, and he advised in writing on 19 August 2014.

137. Also during August 2014 Mr Flaton was provided with versions of a letter of advice concerning the UCIS issue from Belmonte to ELC and an edited version of Mr Anderson QC's advice.

138. Meanwhile, on 30 July 2014 Belmonte provided ELC with draft documentation for the Scheme based on a previous somewhat similar scheme that Belmonte had participated in. This was described in an email of 4 August 2014 as being on a "non-liability" basis.

139. On 8 September 2014 the Contract of Insurance was made between ELC and Gable, and on the same day a Letter of Engagement was entered into between Belmonte and Gable.

140. On 10 September 2014 Mr Connors resigned as director of ELC and was replaced by Graham Milner.

141. ELC started to accept investments on or just before 11 September 2014. On this first occasion Mr Arnison made the commission payment from Belmonte to Carter Rovali.

142. In mid to late September 2014, various agreements are said to have been made between David Clarkson and Hectary. Their authenticity is disputed.

143. In mid-September Belmonte prepared two documents summarising Mr Anderson QC's advice.

144. White & Co was formally engaged on 18 September 2014, and the MS2U Agreement was made on 25 September 2014.

145. ELC started to receive payments from White & Co on 2 October 2014.

146. Payments to David Clarkson purportedly relating to Hectary started on 9 October 2014.

2015

147. On 25 February 2015 David Clarkson found out that the FCA was investigating ELC, and on 13 March 2015 the FCA gave formal notice of investigation, which David Clarkson sent to Mr Arnison on 17 March 2015.

148. On 21 April 2015 the FCA wrote to state that it considered that ELC was accepting deposits. Discussions between Mr Arnison and David Clarkson took place, leading to a reply from ELC to the FCA on 5 May 2015.

149. On 22 July 2015 Mr Berkeley QC advised that ELC probably was taking deposits and liable to enforcement action, but suggested how possible remedial action could be taken. He broadly agreed with Mr Anderson QC's earlier advice about the UCIS issue.

150. In September 2015 ELC instructed Mr Berkeley QC to correspond with the FCA on its behalf. David Clarkson passed on the gist of the advice to Mr Arnison on 10 September 2015.

151. On 23 September 2015 the FCA stated that it was "firmly of the view" that ELC was taking deposits, and raised the UCIS issue again.

152. On 20 October 15, following discussions, Mr Berkeley QC on behalf of ELC gave a written undertaking not to accept any new payments pending resolution of the FCA's complaint.

153. However, up to this time ELC did take payments, and did so thereafter as well (it is a key dispute whether ELC was advised that it could carry on taking "pipeline" investments, and/or whether ELC told Mr Arnison or Mr Flaton that that was the case).

154. From no later than November 2015, MS2U was using funds from ELC to pay for new facilities and for funding PPI rather than bond claims.

155. In late November 2015 Mr Berkeley QC provided a draft letter for circulation to investors to the FCA. There is a major dispute about the correct date and the authenticity of documents relating to this.

156. The FCA responded on 16 December 2015 rejecting the draft letter, and ELC ceased to instruct Mr Berkeley QC from February 2016.

2016

157. ELC instructed Mr Anderson QC again in March 2016 (the instructions being drafted by Mr Wesson of Belmonte) and on 14 March 2016 he advised that ELC was taking deposits and probably (based on a new Court of Appeal decision) also that the Scheme was a UCIS.

158. Belmonte provided no further cover under the Contract of Insurance after 17 March 2016 but carried on maintaining the existing cover.

159. On 12 October 2016 the FCA approved a circular letter to investors (as proposed by Mr Anderson QC), which was never sent, and Mr Anderson QC was no longer instructed after 18 October 2016.

160. On 26 October 2016 ELC instructed Begbies Traynor to convene a meeting of shareholders to place ELC into creditors' voluntary liquidation.

161. Following a chaser from the FCA on 28 October 2016 ELC wrote to investors on 31 October 2016 to tell them about the FCA's investigation.

162. On 11 November 2016 ELC entered creditors' voluntary liquidation and the First and Second Applicants were appointed Joint Liquidators.

163. At about the same time, the Police investigated Sable for fraud, and it entered administration on 21 November 2016.

2017 onwards

164. Investigations of ELC began in late 2016/early 2017 with a Director's Questionnaire by, and interview of, Graham Milner. The investigations continued, including interviews of Lillie Milner, Mr Arnison and Mr Flaton.

165. The present application was issued on 30 January 2019.

166. The Milner Settlement Agreement was made on 11 September 2019.

THE AGREED POINTS OF LAW

167. The parties provided me with a very helpful Agreed Points of Law. I have reproduced large parts of it below. The following should be noted:

    i) Where the Agreed Points of Law say that something is "Agreed by all parties" that means the represented parties and does not include Mr Flaton. Mr Flaton was kept informed of the process of negotiation and agreement but it was (in my view, rightly) thought that it would slow things down if he was actively involved throughout. In any event, his interests were essentially identically aligned with the other Respondents on those aspects of the law which touched on him.

    ii) The Agreed Points of Law include references to authority, but they are illustrative and not exhaustive. The parties cited other authorities, but there is nothing to be served by my referring to them here in relation to issues that were agreed.

    iii) Within the material contained in the Agreed Points of Law under various headings, I have omitted paragraphs below if I do not think they are relevant.

168. I have dealt with all the legal issues going to dishonesty, of which there are a number, next. I have dealt with the other legal issues where they arise. The main disputes of law are in relation to i) transactions at an undervalue and ii) the Milner Settlement Agreement issue.

LEGAL STANDARDS – DISHONESTY AND DISHONEST ASSISTANCE

Dishonesty

169. The parties were essentially agreed as to the basic test for dishonesty. The Agreed Points of Law contained the following:

    i) The Court will approach the question of dishonesty as follows:

        a) It will ascertain the relevant facts, including the respondent's state of knowledge or belief as to the facts (the subjective element); and

        b) Consider those facts objectively. The Court has to ask itself whether the respondent's conduct was honest or dishonest according to the standards of ordinary decent people: *Group Seven Ltd v Notable Services LLP* [2020] Ch. 129 at [58]. **Agreed by all parties.**

    ii) There is no need for the respondent to realise that his conduct was dishonest by the normally accepted standards of honest conduct, nor does he need to be conscious that he is transgressing those standards: *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37; [2006] 1 W.L.R. 1476 at [15] and [16]. **Agreed by all parties.**

    iii) "*Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty*" (*Royal Brunei Airlines Sdn. Bhn. v Philip Tan Kong Ming* [1995] 2 A.C. 378 at pp.389-390) **Agreed by all parties.**

    iv) A fraudulent representation, whether it is made knowingly or recklessly is a fraud and constitutes dishonesty (*Standford International Bank Ltd (in liquidation) v HSBC Bank Plc* [2020] EWHC 2232 (Ch) at [58] – [59]). **The Respondents say that the foregoing is so in the context of a deceit claim but cannot be transposed into a generalised principle that if one does not know or does not care about something that one is dishonest in relation to it (*Standford* at [59]-[61]).**

    v) A knowledge of a fact may be imputed to a person if he turns a blind eye to it. It occurs where (a) there exists a targeted suspicion that certain facts may exist and (b) there is a conscious decision to refrain from taking any step to confirm their existence. Blind-eye knowledge is equated with actual knowledge - *Group Seven Ltd v Notable Services LLP* at [59], [61]. **Agreed by all parties.**

170. I do not consider it necessary to resolve the point at iv) above since it does not arise. David Clarkson was knowingly dishonest and Mr Flaton and Mr Arnison were neither knowingly dishonest, nor reckless, and nor did they turn a blind eye. In any event, recklessness was not adequately pleaded against the

Respondents (only on a very narrow front in relation to the legal advice received against Mr Arnison; in the circumstances seeking to rely on it as evidence of dishonesty without pleading was not good enough), and blind eye knowledge was not pleaded other than in relation to Mr Flaton. I consider below whether Mr Flaton and/or Mr Arnison misunderstood the legal effect of the FRA or the Contract of Insurance in respect of the payment of Carter Rovali's fees, but it was not argued, and clearly is not the law, that merely misunderstanding such a matter is in itself dishonesty.

Fraudulent representations

171. The Agreed Points of Law contained the following:

    i) Where a person makes a representation knowing that it is false, or being reckless as to whether it is was true, he makes that representation fraudulently: *Derry v Peek* (1889) 14 App Cas 337 at 374. **Agreed by all parties**

Dishonest assistance

172. The Agreed Points of Law contained the following:

    i) The general requirements of liability for dishonest assistance are that: (1) there is a trust or fiduciary duty; (2) there is a breach of trust/duty by the trustee/fiduciary; (3) the defendant induces or assists that breach and (4) the defendant does so dishonestly - *Lewin on Trusts 20th Ed.* at 43-014. **Agreed by all parties**

173. A subsidiary point of disagreement developed at trial, which was what significance the dishonest assistance (if shown) need have. In the end, I think the parties agreed that it is not a requirement that the assistance itself cause loss, but that it has to be more than minimal and must enable the breach by the trustee to be committed. This is what *Lewin* says at 43-032. The parties dug into the detail of a number of authorities in arguing this out, but I will not go into them here because I thought it was an illegitimate exercise in comparing facts and not directed to identifying principles. This subsidiary point is also not very important in the scheme of my decision since it only really came into play in relation to Mr Arnison and the abbreviated versions of the advice of Mr Anderson QC, and I have found that he was not dishonest in any event.

Pleading dishonesty

174. The Agreed Points of Law contained the following:

    i) Allegations of dishonesty must be pleaded clearly and with particularity, setting out the specific facts and circumstances supporting the inference of dishonesty by the defendants; *Ivy Technology v Martin* (2019) EWHC 2510 [12]. **Agreed by all parties**

Dishonesty - burden and standard of proof

175. The Agreed Points of Law contained the following:

i) It is for the applicant to prove dishonesty to the civil standard of proof - *Bank St Petersburg PJSC and another v Arkhangelsky and another* [2020] EWCA Civ 408. **Agreed by all parties**

176. Counsel for Mr Arnison also relied on the well-known principle that the inherent probability or improbability of an event may be taken into account in this context, and that in the right situation the seriousness of an allegation may make it less probable. He accepted that the applicability and force of the principle depends on the facts and is not universal. I did not understand Counsel for the Applicants materially to disagree with this, and I have borne it in mind in the context where it arises, which is in relation to Mr Arnison's honesty.

DAVID CLARKSON

General observations

177. David Clarkson clearly has significant health issues, which he was also suffering from at the time of the events surrounding ELC. I was not provided with details and they were not explored in cross-examination, but nor would it have been necessary to intrude in that way.

178. It was not submitted for him that his health issues specifically affected his memory or cognition, and although he mentioned at times that his medication was taking its toll, and on one occasion that he had not taken it so as to make giving evidence easier, the overall impact was essentially that he tired more easily. I have taken account of this, and during his evidence breaks were taken, or evidence sessions concluded, to reflect his fatigue.

179. David Clarkson's susceptibility to tire was exacerbated by the overrun in his cross-examination. The overrun was not due to time being wasted, but to the original estimates (and later, the updated estimates) being much too short, and taking too little account of the questions that the other Respondents would want to ask of him. I have taken account of this too, in assessing his evidence.

180. Overall, although giving evidence was clearly something of an ordeal for David Clarkson, I am satisfied that he understood what was going on and what he was being asked perfectly well. His recollection was more than adequate, and, as I go into in more detail below, I think he synthetically asserted a lack of memory when it suited him, on issues where he was in difficulty. In addition, I think it is significant that at the time of the events surrounding ELC he was having the same or similar health issues, but it did not stop him from organising and carrying out complex commercial arrangements and dealing with numerous other people in tight time frames, as with the FCA investigation and associated taking of advice.

181. In assessing David Clarkson's evidence, I have two main questions to answer: (1) was he acting dishonestly in the light of what he knew and (2) was he acting as a *de facto* director of ELC? It is important that I bear in mind that these are not the same question and the answer to the one does not necessarily follow

from the answer to the other. They are however related, both in point of time and as to the events that concern them. So it is not possible to structure this judgment to address them entirely separately.

182. I also must bear in mind that because David Clarkson is the only witness associated with the running of ELC who gave oral evidence, there is a risk of the perception that he must have been a *de facto* director; the absence of both Graham and Lillie Milner might give a misleading impression that David Clarkson was more central than he really was. I have taken this into account, although my ultimate conclusion is that he was indeed central, along with Lillie Milner.

183. A final general observation before I embark on the detail is that I must have carefully in mind the incompleteness of the documentary record. I have dealt with this above and have concluded that while it is a real issue, it did not disadvantage David Clarkson significantly in presenting his case.

184. David Clarkson's case as put in closing written submissions on his behalf was "*In a nutshell, [he] was a consultant to ELC, who provided it with a number of important introductions, including to Mr Flaton and Mr Arnison, and their respective companies. He was not a registered, de facto or shadow director of ELC*".

185. As, however, is apparent, he had far more frequent and detailed communication with ELC than would be consistent with merely being a consultant, and his remuneration of (probably) over £500,000 was out of all proportion to the introductions to Mr Flaton and Mr Arnison. Although clearly he did make those introductions, neither Mr Flaton nor Mr Arnison had anything of a unique or even especially unusual character to offer (internet marketing and ATE insurance brokerage respectively). His level of remuneration was much more consistent with his simply sharing with Lillie Milner what they were able to abstract from ELC, and I find that is what happened.

Points relating to David Clarkson's credibility and reliability

186. In addition to the above, I bear the following in mind in relation to David Clarkson's credibility and reliability:

    i) When struggling to explain various emails he claimed that one or other of the Milners had had access to his email account. This was a fresh allegation which was not substantiated and was inconsistent with Mr Flaton's experience – he said there had never been any sign of any such thing.

    ii) He claimed that he could not remember important emails, but on other matters, such as his having paid a bill at a restaurant or being away on a particular date, he claimed to have very clear recollection. Memory is of course patchy for everyone to some extent, but David Clarkson's recollection or lack of it correlated to the needs of his case in a way which makes me conclude that he was saying what suited him about what he could remember.

iii) Various ELC emails use the maiden name of Carole Clarkson. David Clarkson denied that he was aware of this. But in his interview with the Liquidators he had said it was his idea to use her name and he had got the idea from what he understood Virgin to do. He was obviously being untruthful, most likely because he used her name as a sort of alias, and his attempt to blame his statements to the Liquidators on his medication was desperate.

iv) In his witness statement he sought to distance himself from the Brochure's use of the term "guaranteed", but he himself had suggested the phrase "Capital Guaranteed Insurance" in emails with Mr Flaton.

Inception of the Scheme

187. It is not entirely clear who came up with the idea of the Scheme, but on balance I think it is more likely than not that Lillie Milner conceived of it as a result of discussions with Mr Battle of MS2U, as David Clarkson asserted.

188. However, the fact that David Clarkson did not have the initial idea for the Scheme is of minimal if any relevance to whether he bears legal responsibility.

Introduction of Mr Flaton and Mr Arnison

189. As I have said already, it is not in dispute that David Clarkson made these two introductions. The introductions were made before the dates of the Hectary Agreements (see below) and this led to an argument about whether the introductions could provide consideration under the Agreements. Counsel for David Clarkson argued that they could, because it was mutually expected that David Clarkson would be remunerated for the introductions. I would have accepted that, in the abstract, had the remuneration been in some way proportionate to the introductions, but it plainly was not.

190. Thereafter, David Clarkson maintained ELC's relationships with Mr Flaton and Mr Arnison/Belmonte. He was in regular and close contact with each of them, both on points of detail and higher level strategic matters. I give examples below. This went far beyond being merely their introducer.

191. By contrast, David Clarkson had much less to do with MS2U and Mr Battle. That was far more the province of Lillie Milner, although Mr Clarkson met MS2U's personnel sometimes, and knew some aspects of Lillie Milner's relationship with it, such as her working there.

The letter of advice, amended advice of Mr Anderson QC

192. David Clarkson's credibility and honesty were attacked in relation to specific documents. The main ones concerned advice about UCIS in the time frame when both Mr Anderson QC and Belmonte were providing advice.

193. Mr Anderson QC provided verbal advice to Belmonte prior to giving formal written advice.

194. Belmonte then gave a letter of advice to ELC on 12 August 2014 summarising the position. David Clarkson admitted receiving this.

195. In the text messages, there are two from David Clarkson to Lillie Milner which related to "tony" and the "opinion".

196. The first, on 12 August 2014 says "*Spoke to tony he wont move until re get written opiniog [sic]. I also need to amend that before is goes to him*".

197. The second, on 13 August 2014, says "*I have amended letter from rich. Spoken to tony he has 8 people waiting for opinion. Letter will do.*"

198. An amended letter was sent to Mr Flaton by David Clarkson under cover of an email of 19 August 2014. Among other things, it said that Mr Flaton would in due course be able to "show" (the quotation marks are in the original) Mr Anderson QC's written opinion to his clients.

199. The amended letter was significantly altered to give the impression that the documentation intended to be used had been approved by Mr Anderson QC.

200. David Clarkson had no explanation for the alteration of the letter of advice. He denied altering it, but the inference that he did so is overwhelming, and I find that he did. I also find that the intention was to mislead Mr Flaton about the strength and scope of the advice. He did it because Mr Flaton was pressing for comfort about the advice and would not start taking money without it. The desire to start money coming in was an obvious incentive for David Clarkson to make the changes.

201. This is also an instructive incident in terms of the way in which I think that I need to approach the documents in this case:

    i) The fact that David Clarkson received the letter from Belmonte is proved by Belmonte's disclosure, which is reliable.

    ii) The existence and terms of the amended letter, and its having been sent to Mr Flaton is proved by Mr Flaton's disclosure, which is reliable as to its contents, albeit incomplete because of the police seizure.

    iii) The text messages are consistent in terms of dates and events with the known reliable materials to which I have just referred. They do not stand alone.

202. It was in relation to these specific text messages that David Clarkson made his most specific criticism. He said that he only ever referred to Mr Arnison as "Richard", and indeed Mr Arnison said that he did not like to be called "Rich". However, there was also evidence that Lillie Milner referred to him as "Rich", to needle him. I think it is perfectly possible that David Clarkson was echoing this, and anyway the texts from him are littered with mistyping. This is a tiny crumb at best and in assessing the text messages is far outweighed by the consistency with known, reliable events, including those to which I have just referred.

203. Mr Anderson QC's written advice was given on 19 August 2014. It was provided by Belmonte to ELC on 26 August 2014 in an email from Mr Arnison to David Clarkson and Lillie Milner.

204. Belmonte also sent a letter to ELC of the same date entitled "Bond Mis-Selling"

205. On 27 August 2014, David Clarkson emailed Mr Flaton. The email attached a document purporting to be Mr Anderson QC's advice.

206. Mr Anderson QC's advice was generally positive that there was no breach of s. 235 FSMA 2000, but was significantly caveated in relation to the documents he had seen being drafts, in relation to the advice being only for Belmonte, and in relation to his assuming that the facts "on the ground" matched what he had been told.

207. However, the version sent to Mr Flaton was rather crudely altered in relation to these caveats, with a significant change in tone.

208. It was put to David Clarkson that he had altered the advice; he denied this. In re-examination he said that he probably spoke to Lillie Milner in between getting the advice in and sending the altered version to Mr Flaton, the implication that Lillie Milner might have made the changes. That is totally improbable given the timing and the absence of any explanation as to how Lillie Milner might have substituted the one for the other without David Clarkson noticing. There is also no sign of the existence of any email to David Clarkson from anyone else providing him with the altered version (I bear in mind that this is an area where it is relevant that Lillie Milner might have provided incomplete documents).

209. It is obvious, and I find, that he altered the document with the intention of changing its tone and of concealing from Mr Flaton that it had been changed.

210. The above acts of alteration by David Clarkson were dishonest. They were covert, they involved falsifying documents and concealing the falsification. They were intended to have an effect on Mr Flaton's behaviour to the benefit of David Clarkson and the Milners, and ELC.

211. Counsel for David Clarkson objected that this episode was not adequately pleaded. There is force in this contention, but it concerned a topic, the advice of Mr Anderson QC, which was always central, and nothing was specifically identified on behalf of David Clarkson that could have been done with greater or better notice. It was possible, for example, to look into the text messages to identify the very specific "rich" point. So overall I do not think the way in which the issue was raised caused any real prejudice.

The Client Source Terms of Business Agreement

212. There is a written agreement dated 1 September 2014 between ELC and David Clarkson, which purports to entitle David Clarkson to £250 per £1,500 received, by way of introduction fees. It also purports to provide for half of that amount (£125) to go to Lillie Milner or her nominated party.

213. However, although it was in contemplation that David Clarkson was responsible for introducing Mr Flaton and Mr Arnison, it was not expected that he would be introducing investors – the whole point of having Mr Flaton was to find them.

214. In addition, it is impossible to see how the payment to Lillie Milner could be justified. She was not going to make any such introductions. The effect of the payments, if made, would be to funnel money from ELC to Lillie Milner in a way that was not transparent and not justified.

215. There is no sign in David Clarkson's bank accounts, obtained by the Applicants under a *Bankers Trust* Order of 8 March 2018, of any such payments to Lillie Milner ever taking place (with the possible exception of a relatively modest amount to Mediprotect, with which company she was involved), although David Clarkson said that they did in a witness statement of 27 October 2017 made pursuant to s.236 IA86 (which led to the *Bankers Trust* Order). In passing, I note that these were events which make clear that David Clarkson was conscious of intended payments to Savvy Sister and Mediprotect from ELC, and that those companies were Lillie Milner's.

216. David Clarkson's evidence on this agreement and the transactions under it was completely unreliable, and at the same time he could not provide any justification for why the payments would have been appropriate if they had been made.

217. The Applicants challenged the authenticity of this agreement. As I understood it, the grounds for the challenge were:

    i) The agreement was not found in ELC's books and records.

    ii) The agreement was not mentioned during the Liquidators' investigations, but only for the first time in the Clarksons' Points of Defence.

    iii) The agreement did not tally with the transactions known to have taken place.

    iv) The agreement is signed by Graham Milner, but he had not become a director by 1 September 2014.

218. More broadly, the Applicants challenge the authenticity in the context of the general dishonesty they allege, and the issue over Lillie Milner's involvement.

The Hectary Agreements

219. There are four Agreements between Hectary and ELC. The first was made on 15 September 2014 (with an addendum of 18 September 2015), and the second, third and fourth on 25 September 2014, which was the same date as the MS2U Agreement.

220. One of the Agreements of 25 September 2014, an "Agreement for the Referral of Claims", was in ELC's books and records.

221. The Applicants also challenged the authenticity of the Hectary Agreements, on very similar grounds as for the Client Source Terms of Business Agreement, (although as I say one of them was in ELC's files).

222. David Clarkson accepts that although the agreements were with Hectary, ELC made payments to him personally. The explanation offered was that this was because ELC did not want to make payments directly to Hectary, whose only bank account was offshore. I found this not to be credible.

223. David Clarkson also said in his witness statement that payments directly to him made sense because Hectary owed him £386,000 from past commissions (there was no documentary evidence of this) and those could be offset against what he received from ELC. He said that Mr Jute, a Director of Hectary, would provide a witness statement confirming all this, but that was never done.

224. A further issue is that the Hectary agreements envisaged it getting £250 per £1,500 invested in the Scheme by way of introduction, and David Clarkson did receive payments of that order (although his payments are not entirely matched by Hectary invoices), but of course Hectary did not make any such introductions, as clients came from Mr Flaton's efforts. It also would make no sense, and could not benefit ELC, for Hectary to receive £250 from each incoming £1,500 even if it did no work.

225. Mr Clarkson's account of the rationale for, and operation of, all these five agreements was incredible and I reject it. He was making it up to cover up what he had done. His completely contradictory account of why 50% was to be paid to Lillie Milner (but was not) was particularly implausible.

226. Although it does not matter much, and despite that fact that I conclude David Clarkson dishonestly altered other documents, I do not think that it is shown that these agreements (and I include the Client Source Terms of Business Agreement) were concocted after the event. It is more likely that they were put in place at the time to provide some sort of cover. The fact that they were not in ELC's records does not mean anything given their incompleteness and having been filtered through Lillie Milner, and if the agreements had been concocted recently I think a better job would probably have been done to make them consistent with David Clarkson's defence.

Level of David Clarkson's involvement in the Scheme

227. The contemporaneous texts and emails, and the evidence of Mr Flaton and Mr Arnison paint a convincing picture of David Clarkson being in close and continual contact with the affairs of ELC, particularly but not exclusively in relation to the relationships with Carter Rovali on the marketing side, with Belmonte on the insurance side, and in relation to the FCA investigation. David Clarkson was also involved in discussions of individual payments into the Scheme.

228. For example:

i) He was in touch with Lillie Milner when she had trouble opening a bank account for ELC.

ii) He worked on the business plan for ELC, including providing detailed figures.

iii) He discussed MS2U's remuneration with Lillie Milner. At this point (texts in May 2014) and others he referred to ELC as "we" in a way which I found telling, and for which he provided the unconvincing explanation that he was using the pronoun in a sort of figurative sense. I find that it reflected the reality that ELC was the creature of Lillie Milner and him.

iv) In another text on 6 June 2014 in rejecting Mr Battle's demands, he said "This our scheme".

v) He got into the level of detail of needing the email info@equitablelawcapital.co.uk to "take apps in" – another occasion where he referred to ELC as "we".

vi) He discussed Mr Flaton's remuneration with Lillie Milner.

vii) He reported to Lillie Milner in detail in August 2014 about provision of the letter of advice to Mr Flaton.

viii) Also in August 2014 he sent a text to Lillie Milner to say "*OK look like some money may have landed waiting for ben bilal* [of White & Co] *to confirm. Only 50k but a start and hues* [an obvious error for "gives"] *us 9k each*."

ix) In September 2014 (texts of 12 September) he texted that he would organise the paperwork for an investment with White & Co.

x) On 18 September 2014 Lillie Milner texted him that she had cheques for "*£110k in my bag*", which he replied "*gets us about 30k each*". David Clarkson initially tried to explain this as being related to a scheme between Lillie Milner and her accountant to bring in cash from Dubai, but then had to retract that.

xi) In September 2014 he personally arranged for Mr Arnison to pay Carter Rovali directly from the first payment from an investor.

xii) He had some direct contact with investors, and at other times supervised Paul Clarkson's contacts with them.

229. David Clarkson was also involved in discussions and decisions about the appointments of Graham Milner as director and of Paul Clarkson as employee, and in relation to the remuneration each of them was to receive. For example:

i) On 3 October 2014 Lillie Milner texted him to ask for his approval that "*Gray*" [Graham Milner] should receive "*£5k*" (in context, per month) on the basis "*His head on block if it goes tits up.*" David Clarkson replied "*I think 5k ok as a base and more when money gets rolling*".

ii) On 12 September 2015 he texted Lilly Milner "*I want to put paul* [Clarkson] *on payroll as I paying him and think we need agree leave more in pot.*"

iii) On 11 November 2015 he texted to say that Paul Clarkson "*will take over director from graham if that helps*".

230. David Clarkson was involved in discussions about the Brochure and other Scheme documentation:

i) In texts in June 2014 he discussed its finalisation and printing and sent an amended version to Lillie Milner.

ii) In July 2014 he was involved in amending the subscription form to match the Brochure in respect of a point of quite fine detail.

iii) In September 2014 he sent a suite of Scheme documentation to White & Co with detailed comments showing a knowledge of the specific workings, including of the then-current draft Brochure.

iv) In October 2014 he sent a suite of the documentation to Mr Flaton. The covering comments were brief but showed a good level of understanding of and involvement with the detail.

v) He approved the MS2U Agreement in December 2014 in emails with Lillie Milner.

231. I find on this basis, and consistently with his general oversight of the marketing and insurance aspects of the Scheme, that he was aware of the contents of all of the versions of the Brochure. This is not inconsistent with his statement, which may well be true, that the words were mainly written by Graham Milner. It is also not inconsistent with his having stated at some points that the expression "capital guaranteed", and similar other formulations, should not be used. He may have said that, but I find that to the extent he did, he did not follow through with it, and as I have mentioned above, he positively put forward similar expressions in emails with Mr Flaton.

232. I have dealt elsewhere in this judgment with the FCA investigation. David Clarkson was in extremely frequent contact by email and text with the Milners in relation to it. He was the person handling it, and he did do with personal control and input far beyond that which could reasonably result merely from having made the introductions to Mr Flaton and Mr Arnison.

233. It was in the context of the FCA investigation primarily that David Clarkson twice (in October and November 2015) made the suggestion that liquidation of ELC should be considered. Counsel for David Clarkson sought to gain some credit for David Clarkson in relation to these suggestions, and to say that although David Clarkson made the suggestion it was for the Milners, and particularly Graham Milner, actually to make the decision. I reject those submissions. David Clarkson was in the thick of the discussions, driving them as much as anyone else, if not more so. On the first occasion he said (email of 8

October 2015, my emphasis) "*We could stop and liquidate.*" It is true that in the second email string in November the tone of his advice is more arm's-length, but still is in the context of being involved in the fine detail of relations with MS2U, the financial position of ELC and the types of claims available. In any event, even if viewed favourably to David Clarkson's position on honesty/*de facto* director/wrongful trading it is a tiny shred compared to the many other weighty items against him.

234. In case it is not clear already, I emphasise that I find that David Clarkson knew the financial affairs of ELC very well, knew all the payments in and out that are relied on by the Applicants, knew that ELC had no working capital and, in short, that it was being run in the nature of a Ponzi scheme for the benefit of those in charge, in particular himself and Lillie Milner. He accepted that the Brochure contained many serious misrepresentations, and he knew of its contents at the time.

FRAUDULENT TRADING

The law

235. The Agreed Points of Law contained the following:

i) To establish that a person is guilty of fraudulent trading, the applicant must prove:

a) That any business of the company has been carried out to defraud creditors or with a fraudulent purpose - s.213(1) IA86; and

b) That the person was knowingly a party to the carrying on of the business in such manner – s.213(2) IA86. **Agreed by all parties**

ii) A person does not need to be a director (*de jure* or otherwise) to be guilty of fraudulent trading. **Agreed by all parties**

iii) S.213 IA86 has extra territorial effect. **Agreed by all parties**

iv) In order to prove fraudulent trading under s.213 of the Act, the Applicants must show actual dishonesty - *Re Patrick and Lyon Ltd* (1933) Ch 786. **Agreed by all parties**

v) Where a person is guilty of fraudulent trading, they are liable to contribute to the company's assets and such contribution should reflect the loss which has been caused to creditors by the carrying on of the business in the manner stated at s.213(1) IA86 . Contribution does not include a punitive element - *Bernasconi v Morphitis* [2003] Ch 552 at [53]. **Agreed by all parties**

vi) Where liability is established against more than one defendant, liability may be joint and several, however it may be appropriate to make an individual assessment of a respondent's contribution on the facts of the

case - *Re Overnight Ltd (No.2) (Goldfarb v Higgins)* [2010] EWHC 613 (Ch); [2010] B.C.C. 796 at [32]. **Agreed by all parties**

236. Points ii) and iii) were only relevant to make out liability against Belmonte (on the extra territorial point), Mr Arnison and Mr Flaton and do not come into play since I have found they were not dishonest.

237. Given my findings above, it is clear that the Scheme was dishonest and fraudulent from the outset, and David Clarkson was fully aware of the same. So he is liable under s.213.

DE FACTO DIRECTOR

The law

238. The Agreed Points of Law contained the following very brief statement:

    i) There is no definitive test for *de facto* directorship; the question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. The approach to adopt in determining whether a person is a *de facto* director is summarised in *The Official Receiver v Howard Duckett* [2020] EWHC 3016 (Ch) at [124 - 127], which in turn refers to the guidance in *Smithton Limited v Naggar* [2014] EWCA Civ 939, [2015] 1 WLR 189. **Agreed by all parties**

239. Since the trial, Falk J gave judgment in *Re Keeping Kids Company* [2021] EWHC 175 (Ch) which contains an extremely thorough analysis at paragraphs 153-167, from which I have worked, but which is too long to set out here. It is consistent with what the parties agreed, and picks up the cases they cited in their skeletons in supplementation of the Agreed Points of law, but is more full and more detailed.

Corporate Governance Structure

240. A key part of the assessment, an "important starting point" is to identify the corporate governance structure.

241. Counsel for David Clarkson pointed to the fact that the books and records, including a minute book, were not comprehensively recovered. I have dealt with this above. If there are any minutes of board meetings, for example, I do not have them.

242. However, I do not think this is a point which really helps David Clarkson. There are two main reasons:

    i) First, my clear overall impression is that ELC was run in a very slapdash and informal way, with no regard for appropriate governance. I doubt if board meetings were ever held.

ii) Second, David Clarkson was in such close contact with the internal workings of ELC that if there had been board meetings, or other formal matters, or minutes, he would have known of their existence at least in general terms and could have described them. I do not accept that there are potentially exculpatory materials in this regard that the Milners might have suppressed that would help him.

243. I feel confident in being able to find that the corporate governance structure of ELC from its earliest days was that:

i) David Clarkson and Lillie Milner ran ELC as co-equals (if anything, David Clarkson was slightly the dominant of the two although the Scheme was initially Lillie Milner's idea).

ii) David Clarkson and Lillie Milner co-operated as equals in setting ELC's strategy, and making all the significant operating decisions.

iii) David Clarkson's specific areas of responsibility were marketing and dealing with insurance cover. Although overall everything was subject to agreement with Lillie Milner, he had day-to-day autonomy in these critical areas.

iv) David Clarkson and Lillie Milner gave instructions to the next level down of management, which was Graham Milner and (later) Paul Clarkson.

v) Below Graham Milner and Paul Clarkson there may have been some administrative staff, but I heard almost no evidence about that.

vi) There was no level of governance above David Clarkson (or Lillie Milner).

Decision making

244. In terms of actual decision making, consistently with my findings above, David Clarkson took a central role in deciding strategy, operating decisions, and financial decisions from the biggest down to the level of a few thousand pounds.

245. He also participated fully in setting the remuneration of more junior persons (Graham Milner and Paul Clarkson) and agreed with Lillie Milner what she would receive, as the text messages support.

246. David Clarkson's case that he was a consultant and gave advice but was at arm's length is obviously not true.

Presentation to the outside world

247. David Clarkson had no formal title with ELC, but then neither did Lillie Milner, who is agreed to have been a *de facto* director.

248. However, had ELC been a more formal company, David Clarkson would have filled a role probably called Co-CEO.

249. The evidence of emails to outside persons do not present David Clarkson as having a formal title, and the email account he used generally was not an ELC email account, but apart from that, the directions he was giving and the information he was providing were of a kind and at a level of the highest decision making (but also down to more minor and more detailed matters) and gave the appearance of being on behalf of ELC. I refer to my findings above about putting in place the Scheme documents, and also to how matters worked with Mr Flaton and Mr Arnison.

250. Mr Flaton in particular gave oral evidence that Lillie Milner and David Clarkson appeared to be of equal status in meetings, and that David Clarkson was his point of contact with managerial status. Counsel for David Clarkson submitted that this evidence was only about the early stages, but I reject this attempt to limit its impact. Mr Flaton was speaking generally, albeit that an *example* he touched on was an early meeting.

David Clarkson's points

251. I turn to the points made in David Clarkson's defence on this issue.

252. First, it is said that ELC was formed by Lillie Milner's accountants and on her instructions. This is true but has no impact on how it was later run.

253. Second, it was pointed out that Mr Arnison described Lillie Milner as "the driving force" behind ELC in his interview with the Liquidators. But that is just a soundbite and may well be a comment on Lillie Milner's powerful personality. It also relates to her undoubtedly greater role on the claims (MS2U) side of ELC. So I take it into account but it is extremely minor.

254. Third, there are documents showing that Lillie Milner did a lot of detailed work, including in response to queries from Mr Arnison. No one disputes that she was also a key player, but it does not downgrade David Clarkson's role.

255. Fourth, there are documents referring to "Lillie's proposal" and similar. These do not take matters further given the fact that she probably did initiate the idea of the Scheme.

256. Fifth, a document prepared for the Liquidators called "Brief Overview of Equitable Law Capital" on their appointment does not mention David Clarkson at all, and says that the Scheme emanated from MS2U and Mr Battle. This document, described as "very significant" in written closing submissions for David Clarkson, came from the Milners and is an attempt to cast the blame on MS2U. It is in no sense an honest or complete or thorough assessment. Just as it does not mention David Clarkson, nor does it mention the very large sums paid to Lillie Milner.

257. Sixth, it was submitted that there are documents showing that Lillie Milner was responsible for the Brochure and David Clarkson merely for finalising and printing it in June 2014. Quite apart from the fact that his being responsible for getting something done by a printer is inconsistent with his case that he was a

high-level, arm's-length introducer and consultant, I have identified evidence above that he was involved in the detail of the Scheme documentation.

258. Seventh, it was submitted that David Clarkson played only a minor part in relation to the FCA. This is contrary to all the evidence.

259. In summary, the points made by David Clarkson are of virtually no weight individually or collectively and barely engage with the case against him.

260. In reaching my conclusions, I do not need to rely and do not rely on the statement by Graham Milner in his Questionnaire to the effect that David Clarkson was a *de facto* director (although for numerous other reasons I agree that he was). I accept the submission of Counsel for David Clarkson that Graham Milner had reason to enlarge David Clarkson's role so as relatively to diminish his wife's. But the other evidence is overwhelming.

WRONGFUL TRADING

The law

261. The Agreed Points of Law contained the following:

i) To establish that a person is guilty of wrongful trading, the applicant must show:

a) That the company has entered insolvent liquidation and at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration; and

b) That person was a director of the company at that time – s.214(2) IA86. **Agreed by all parties**

ii) The facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both **(a)** the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and **(b)** the general knowledge, skill and experience that that director has – s.214(4) IA86. **Agreed by all parties**

iii) The Court shall not make a declaration under s.214 IA86 with respect to any person if it is satisfied that after the condition specified in s.214(2)(b) IA86 was first satisfied in relation to him (the time when he knew or ought to have concluded that there was no reasonable prospect of avoiding insolvency liquidation or administration), that person took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken - s.214(3) IA86. **Agreed by all parties**

iv) Where a person is guilty of wrongful trading, they are liable to contribute to the company's assets and such contribution should be measured by whether there had been any increase in the net deficiency of the company as regards its general body of unsecured creditors during the relevant period – *Ralls Builders Ltd (In Liquidation)* [2016] Bus. L.R. 555 at [241]. **Agreed by all parties**

262. There was one point of dispute in relation to wrongful trading. The Respondents argued that, for a claim in wrongful trading to succeed, it must be shown that the loss complained of would not have been suffered had the respondent complied with his or her duties. For this proposition they rely on *Lexi Holdings v Luqman* [2008] 2 BCLC 715. In that case, a company in administration made claims against two non-executive directors for breach of duty. It was alleged that their total inactivity had caused the company to suffer loss as a result of misappropriations by the managing director and transactions infringing ss. 330 and 320 Companies Act 1985. The Court considered (at [28] et seq.) whether the breaches of duty had caused loss, so that the causation requirement was established.

263. The Applicants say that *Lexi Holdings* was not a claim under s. 214 IA 1986. Accordingly, they argue that it is not relevant and does not establish that there is a causation requirement of the kind alleged in relation to a wrongful trading claim.

264. I agree with the Applicants on this point. Their position is consistent with the language of s. 214(1) and with the decision in *Ralls Builders*, above, which requires a causative link between the *continuation of trading* and an increase in the deficiency to creditors.

265. In any event, on the facts as I find them below David Clarkson's behaviour was a key causative factor in causing the losses ELC suffered and the increase in loss to the creditors. His behaviour was not the *sole* cause because others, including in particular Lillie Milner, also played a major part. I mention this because it means that this point would go nowhere for David Clarkson unless it were to be submitted on his behalf that s. 214 only bites where the failures of the director in question were the sole cause of loss. No authority was provided in support of such a proposition and in my view it would be obviously wrong.

Analysis

266. I have noted that it is accepted that ELC was insolvent from the outset because it had no working capital to fund its activities but was making substantial payments out and incurring significant liabilities.

267. David Clarkson said that he thought ELC had working capital because Graham Milner had told him so. There is no documentary evidence of this and I reject David Clarkson's evidence that it happened as deliberately untrue. I am sure that given David Clarkson's extremely close involvement with payments in and out, he knew ELC's financial situation; he knew that it was never solvent and was bound to go into insolvent liquidation (that would happen once there was

no longer enough money coming in from new investors, as happens with Ponzi schemes).

268. It does not matter whether he had "access" to ELC's bank accounts and I accept that he probably was not a signatory on the bank accounts, but that in itself does not mean that he did not know the financial status of ELC.

269. During the time that ELC was trading but was, to David Clarkson's knowledge, insolvent, its deficiency in relation to the creditors grew, for all the reasons given above, and was inherent to the fraudulent nature of the Scheme.

270. Thus David Clarkson is liable under s. 214 IA86 from the inception of the Scheme.

271. David Clarkson relies on s. 214(3) on the basis of the two occasions on which he mentioned the possibility of liquidation. However, s. 214(3) only applies if the director takes "every step" to minimise potential loss, and clearly David Clarkson did not do so as ELC continued to do business in the same way until Belmonte stopped providing any further insurance cover.

MISFEASANCE AND BREACH OF DUTY

272. Since he was a *de facto* director, David Clarkson owed ELC statutory duties under the Companies Act 2006 ("CA06") ss. 171-177.

273. The Agreed Points of Law contained the following:

    i) *De facto* directors owe their company the following statutory duties: ss.171-177 CA06. **Agreed by all parties**

    ii) As a result of the company's insolvency or probable insolvency (*BTI 2014 LLC v Sequana SA* [2019] Bus LR 2178 at [220]), the duty imposed by s.172 CA06 becomes a duty to take into account the creditors' interests when determining how the company should act, and to treat those interests as paramount. **Agreed by all parties save that the Clarkson Respondents say that the obligation to treat creditors' interests as paramount is not established;**

    iii) If a director failed to take creditors' interests into account, or did so in a way which was wholly unreasonable, the Court is entitled to substitute its own judgment - *Re HLC Environmental Projects Ltd* [2014] BCC 337 at [92]. **Agreed by all parties**

    iv) The Court has discretion to relieve a director from liability under section 1157 CA06 if it appears to the court hearing the case that the officer or person concerned is or may be liable but that he acted honestly and reasonably, and that having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused, the court may relieve him, either wholly or in part, from his liability on such terms as it thinks fit. It is not necessary for a defendant to plead section 1157 CA06; *Re Kirbys Coaches Ltd* (1991) BCC 130.

Section 1157 CA06 may relieve a director for his breaches of duty under the CA06 only; it cannot relieve a director for his wrongful receipt of company funds – *Guinness v Saunders* [1990] 2 A.C. 663 at 695-697, or in relation to claims brought pursuant to ss. 213 or 214 IA86. **Agreed by all parties**

274. I do not consider it necessary to determine the point of disagreement as to ii), since in my view David Clarkson gave no importance at all to the interests of creditors and the question of whether or not they should have been paramount is academic. Also, David Richards LJ in *BTI* indicated the point is a difficult one, and it is better that it should be considered and decided when it matters, and with full argument.

275. Given my findings about how the Scheme operated and David Clarkson's role, it is clear that he acted in breach of his duties under those sections, in particular the duties to act for proper purposes, to act bona fide in the best interests of ELC as a whole, to take into account creditors' interests, and to exercise reasonable care, skill and diligence. Save for the last, those are fiduciary duties.

276. S. 1157 does not arise given my finding that David Clarkson was dishonest.

CONSTRUCTIVE TRUSTEE

277. On my findings thus far, in particular that he owed the fiduciary duties of a director and behaved dishonestly in the ways that I have described, David Clarkson became a constructive trustee of the moneys paid to him from ELC. I also refer to my analysis below of why on the facts the payments to him were transactions at an undervalue. His defence to this claim lay purely in the denial that he was a *de facto* director and was not dishonest; it raises no point of principle or law.

TRANSACTION AT AN UNDERVALUE

278. The relevant statutory provisions are ss. 238 and 241 IA86, with the latter identifying orders that may be made pursuant to the former (but expressly "without prejudice to the generality of [s.] 238(3) …"). The Agreed Points of Law contained the following (which I have edited slightly to remove reference to preferences, as they are no longer relevant):

    i) A transaction at an undervalue is actionable under section 238 if, at the relevant time (s.240 IA86) (a) the company makes a gift to the person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration or (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company, with value to be assessed from the point of view of the company. **Agreed by all parties**

ii) By s. 238(5) the court shall not make an order under the section in respect of a transaction at an undervalue if it is satisfied (a) that the company which entered into the transaction did so in good faith and for the purpose of carrying on its business, and (b) that at the time it did so there were reasonable grounds for believing that the transaction would benefit the company. **Agreed by all parties**

iii) The time at which a company enters into a transaction at an undervalue is a relevant time if the transaction is entered into at a time in the period of 2 years ending with the onset of insolvency (i.e. the date the company entered into CVL). **Agreed by all parties**

279. The Applicants sought:

i) The repayment from David Clarkson of the £541,643.61 that he received; and

ii) The repayment from Belmonte of the £347,000 that it received.

280. Until closing submissions the Applicants were also seeking the repayment from Mr Flaton of the £599,500 that Carter Rovali received. This was dropped during closing submissions when the Applicants accepted that it was not possible to recover from Mr Flaton personally money which had been paid to Carter Rovali. No explanation was given for why this step was not taken earlier.

281. In addition, in closing written submissions the Applicants accepted that they could only recover from Belmonte the amounts that Belmonte itself actually received and kept, and could not recover those parts of the £347,000 that were paid to Gable (which was most of it). The Applicants later clarified that they did not exclude recovery of sums paid to Eiger.

282. The Points of Claim asserted that the relevant payments were made for "no consideration, alternatively for consideration which was worth significantly less, in money or money's worth, than the payments", and referred back to earlier paragraphs of the pleadings, which said that:

i) David Clarkson had no entitlement to receive any payments;

ii) As to Belmonte, the Contract of Insurance provided no effective cover.

283. At the trial there was no dispute as to whether the requirements of s. 238 were met other than in relation to whether the payments were at an undervalue. In post-judgment written submissions it was submitted for Belmonte that the Contract of Insurance was made more than two years before the onset of insolvency (September 2014 v. November 2016). This point should have been pleaded, but in any event the substantive answer to it would have been (as Belmonte's submissions effectively recognised) that the transactions were continuing ones with the payment of each £1,500, so the great majority was within the 2-year period.

284. Whether there is an undervalue is normally assessed by reference to valuations, although there can be cases where it is obvious that whatever the precise value, the incoming value is significantly less than the outgoing value: *Ramlort Ltd. v. Reid* [2004] EWCA Civ 800 at [103]-[105]. The value is prima facie what a reasonably informed purchaser would pay in arm's length negotiations (*Philips v. Brewin Dolphin Bell Lawrie Ltd.* [2001] 1 WLR 143) and where there is a market in the assets of the type in question, the market value is the relevant figure: *Re Brabon, Treharne v. Brabon* [2001] BCLC 11.

285. The relative values have to be assessed from the point of view of the company: *Re M.C. Bacon Ltd* (No 2) 1990 BCLC 324 at 340. What is typically valued is the consideration from each side for which they bargain. The view is expressed in *Goode on Principles of Corporate Insolvency Law*, 5th Ed. at 13-23 and 13-26, by reference to cases including *Claridge's Trustee in Bankruptcy v. Claridge* [2011] EWHC 2047 (Ch) and *Agricultural Mortgage Corp Ltd v. Woodward* [1995] 1 BCLC 1 that unbargained-for benefit and detriment are not to be taken into account. I agree with this and return to its relevance below.

286. In general the valuation must look to the time of the transaction, but where the value is uncertain or speculative, subsequent events may be looked at to test the accuracy of the valuation: *Philips v. Brewin Dolphin*.

287. The cases against David Clarkson and against Belmonte are very different.

288. In my view, the case against David Clarkson is straightforward given my findings on the facts of what he did. What he received in connection with the Hectary agreements was essentially £250 per claim, presented as an introduction fee for each case for finding the investors. But he did not provide any such introductions; Carter Rovali found the investors. Furthermore, while he did make the introductions to ELC of Mr Flaton and Belmonte, those were of very low value, for reasons I have given. On any view they were worth vastly less than the payments he received and the fact that no specific figure has been provided is not important.

289. So the Applicants' claim against David Clarkson under this head succeeds. The benefit of the introductions he did make is, I find, so low in the context of the payments he received that the best way to most closely approximate ELC's position had the transactions not taken place, as s. 238(3) requires, is to order him to repay all of them.

290. The claim against Belmonte is quite different and raises different issues. They fall under two broad headings:

    i) The Applicants alleged that the insurance cover was *flawed*, because, for example, it was for only one year when claims might well take longer.

    ii) The Applicants alleged that the payments to Belmonte provided no value to ELC "because they were made pursuant to a Scheme which was not carried out in ELC's interests or for its benefit", because it, the Scheme, was a fraud from the outset.

291. Neither of these involved a valuation approach of the ordinary kind. Belmonte negotiated the premium at arm's length with ELC and there is no evidence that the price arrived at was other than one which was appropriate if the insurance did what it appeared to.

292. As to the flaws alleged to affect the insurance, my understanding was that they fell away. It was true that the initial period of the insurance was only one year and that the renewal process was scrappy and unclear, but Counsel for the Applicants accepted that there was an extension. Similarly, the fact that ELC was the insured and not the investors meant that the policy would not pay out to the investors in the event of the insolvency of ELC, but from ELC's point of view the insurance was what it was supposed to be.

293. In addition, the Applicants did not try to claim under the insurance: despite being asked by Mr Arnison to pursue a claim in the administration of Gable, the Applicants never did so. I was told in submissions that that was because they were unable to tally any claim managed by MS2U with an entry against the policy on the bordereaux, and the view was taken that the overriding fraud made a claim impractical, but there was no detailed evidence about this.

294. My clear understanding during and at the end of the oral closing submissions, and in the light of the written submissions which preceded them, was that the Applicants were abandoning the allegations that the insurance was flawed and proceeding only on the more fundamental basis of the Scheme being a fraud from the outset. I am sure that Belmonte and its Counsel thought the same. I mention this because in further written submissions after trial the Applicants sought to revive the points, including a fresh emphasis on the allegation that Belmonte had not audited properly (as to which, see further below). The audit point cannot in my view carry any weight because it is impossible to see how Belmonte's right to audit the company could be a benefit to ELC.

295. I would not allow the Applicants to reopen and indeed expand the flaw points in this way, and it was not the intention of my directing further written submissions after trial to permit the surviving issues to be widened. But even if I did allow it, I find that the flaw points are fundamentally bad ones, and/or cannot support the claim under s. 238 in the absence of evidence as to their effect on the value of the insurance, which has not been provided.

296. That leaves the Applicants' point that the whole Scheme (and therefore ELC's whole business) was a fraud from the outset and that ELC received no benefit from the insurance because it was doomed.

297. This is a radical and, so far as I am aware, novel point. It asserts that a transaction may be a transaction at an undervalue within the meaning of s. 238 even if it took place at a freely negotiated market price, if events affecting the company but extraneous to the transaction (and of which the other party could have no knowledge) mean that the company was doomed. It would seem to have the effect that every transaction by a doomed company would be a transaction at an undervalue.

298. I asked for authority to support the Applicants' approach. On behalf of the Applicants, attention was drawn in its written post-trial submissions to the *Philips v. Brewin Dolphin* and *Re M.C. Bacon* lines of cases about reference to subsequent events, speculative consideration, and the valuation having to be from the company's perspective. I have dealt with those above. In my view none of them supports the Applicants' more radical argument; they deal with conceptually quite different issues of how to ascribe value to a transaction in an uncertain situation, and the appropriate perspective.

299. In my view, the Court should look to the *bargained-for* benefits and detriments, within the scope of the transaction or series of transactions under consideration. I think that is established by the cases referred to in *Goode* to which I have referred above. There is no basis in s. 238 for looking to events extraneous to the transaction(s) in the way that the Applicants contend. The Applicants' argument is effectively that a transaction is at an undervalue within the meaning of s. 238 even if at a genuine and appropriate price because the company then later fails to deploy the (appropriate) value it receives effectively, or at all. This is incompatible with the purpose of s. 238 which is to unwind transactions where the company does not receive appropriate value.

300. So the claim against Belmonte under s. 238 fails for this reason. That conclusion makes it unnecessary for me to consider what order would have been appropriate if there had been a transaction at an undervalue. It also makes it unnecessary for me to consider Belmonte's assertion that it would have a defence under s. 238(5). I do not consider that that was really pleaded and furthermore it emerged that the argument was formulated on the basis that the good faith required was that of the other party to the transaction whereas it is in fact (as Counsel for Mr Arnison later accepted in post-judgment submissions) that of the company. In any event in case I am held on appeal to be wrong on my main conclusion, I think I have made full factual findings, including about the state of mind of the individuals concerned, to allow the Court of Appeal to determine these matters. This is not an indication one way or another about how I would rule on permission to appeal.

MR ARNISON

301. It was submitted for Mr Arnison that in assessing his honesty I should take account of the facts that:

    i) He is a professional person and FCA regulated.

    ii) He has had an unblemished career in the insurance industry.

    iii) The Financial Ombudsman made no findings against him on the complaint of Dr Holloway.

    iv) He was cleared of wrongdoing by the City of London Police.

    v) Belmonte received only about £92,000 and in fact made a loss on the Scheme.

vi) He co-operated fully with the Liquidators in his interview and with disclosure.

302. I accept that in principle some of these might be relevant to assessing the inherent likelihood that Mr Arnison would act dishonestly, but apart from the last, to which I return, I have found them of only modest significance, and I have felt able to assess Mr Arnison's conduct and honesty by direct consideration of what actually happened, without resort to these second order matters.

303. As to the individual points above, I do agree that Mr Arnison's professional position in the insurance industry means that he would have had a lot to lose by behaving dishonestly, so i) and ii) have some significance. As to iii) the Ombudsman rejected the complaint because Dr Holloway was not a client of Belmonte, so it has no significance, and as to iv) I get no assistance from a conclusion arrived at by reasoning and on materials that I do not know. As to v), the modest amount in fact received is a bit misleading as Mr Arnison hoped and expected that much more would flow in. This does not make it a point against him, but it diminishes any significance in his favour.

304. I do find point vi) significant. If Mr Arnison had had some consciousness of doing wrong, and had been actively dishonest as alleged, then he could have been a lot less open, and would have had the incentive and probably the opportunity to avoid giving disclosure of documents against him. A central allegation against him is that he dishonestly prepared, or was involved in, the abbreviated version(s) of the Advice of Mr Anderson QC. But this really only came to light because Mr Arnison gave disclosure of relevant documents.

305. Mr Arnison gave his evidence in a trenchant and at times rather argumentative way (which led to some unduly long answers), but he was generally direct and open in what he said. His demeanour did not give me any reason to doubt the truth of what he was saying.

Belmonte's position in relation to the Scheme

306. Mr Arnison made the point repeatedly and forcefully that Belmonte was only the insurance broker for the Scheme, and that his conduct therefore ought not to be assessed on the basis that he was central to it.

307. There is some force in this, but it must not be overdone. Belmonte's limited role is indeed supported by the fact that it is now accepted that it was not involved in putting together the Brochure, but on the other hand:

i) Mr Arnison had a direct relationship with Mr Flaton and Fox and Co/Carter Rovali which involved a good deal of communication and led to Fox and Co's appointment as Belmonte's AR.

ii) Mr Arnison met and communicated with Lillie Milner and David Clarkson on a significant number of occasions.

iii) Belmonte and ELC made common cause in relation to the FSMA/FCA issues and co-operated in taking advice.

iv) Belmonte stood to make a significant amount of money if the Scheme went well, but how much would depend directly on the investment inwards.

v) Belmonte through Eiger had a role in facilitating the flow of money in by the bordereaux when investment was matched to cases.

vi) Mr Arnison provided draft documents for use as templates.

Allegations of dishonesty against Mr Arnison

308. It bears repeating that Mr Arnison is not alleged to have known of the wider Ponzi-style fraud, or of the excessive payments to the Milners and the Clarksons, or indeed that ELC lacked any working capital – there was evidence, which was not challenged, that he was told that it did.

309. In closing, Counsel for the Applicants arranged his submissions as to Mr Arnison's alleged dishonesty under five headings:

i) That he knew Carter Rovali was paid its commission from shareholder funds. A significant aspect of this allegation from a strategic point of view was that the Applicants were able to seek to maintain it despite having dropped the allegation that Mr Arnison had seen the Brochure, basing the argument on the FRA alone.

ii) Preparation and distribution of abbreviated versions of the advice of Mr Anderson QC.

iii) Continued assistance with the Scheme after the undertaking to the FCA, the "pipeline" issue.

iv) Failure to conduct an audit as permitted by the Contract of Insurance.

v) Making statements to individual investors (in particular Dr Holloway and a Mr Scott) that their funds would be fully insured.

310. Counsel for the Applicants barely pushed iv) in his closing submissions; he said that it was fourth for a reason (although he maintained that point v) was not to be denigrated on the same lines). I found it hard to follow, and I accept the submissions made on behalf of Mr Arnison that the purpose of the audit was to protect Gable against the possibility that ELC would recycle coverage when a claim succeeded and use the same premium for another claim. Investors were not told or given the impression that Belmonte would look after them by way of the audit provisions of the Contract of Insurance. It is true that Mr Arnison allowed Lillie Milner to present a small number of claims chosen by her in mid-2015 (which were all bond mis-selling claims), rather than conducting a more searching check, but that is nowhere near dishonesty, and more broadly I accept his evidence that the frequency of audits (intended to be every two years) was in

line with his experience in the insurance industry and considered reasonable by him.

311. So I also reject iv). I will deal with the others in the above order.

Mr Arnison and Carter Rovali commission

312. Point i) covers very similar ground to the parallel allegation against Mr Flaton, but must be considered from the different perspective of Mr Arnison, who is no longer alleged to have seen the Brochure.

313. The basic point was that clause 2.2 of the FRA and clause 2.1 of the Contract of Insurance meant that it was wrong, because a breach of the FRA, to pay Mr Flaton's commissions from investor's funds, and that the insurance would not cover ELC for Mr Flaton's commission. In the light of this, it is said, Mr Arnison was dishonest. It is important to note that the Applicants have to show what Mr Arnison's state of mind was, not just whether there was a breach of the FRA.

314. As I understand it, Mr Arnison's responses were:

    i) It was not a breach of the FRA;

    ii) The insurance would cover ELC for Mr Flaton's commission;

    iii) If there was a breach, or a problem with the insurance cover then he did not realise it.

315. As to the FRA, I think "*Borrower's overheads in bringing a redress claim*" in clause 2.2 does not cover Carter Rovali's commission because those were not costs of *bringing a claim* but of *getting investment*. But I also think this is not very clear, and furthermore provided that the insurance obtained would cover ELC for commissions paid to Carter Rovali, and MS2U were given enough to run the claims, then I do not think the Applicants made out a case that a breach would be truly significant.

316. As to the terms of the Contract of Insurance, I prefer the view that clause 2.1 would allow ELC to recover commission to Carter Rovali in the event of an unsuccessful claim because of the reference to "*loss realised by the Insured in connection with its Loan to the CMC in respect of a Claim*" [emphasis added]. A point was also made by Mr Arnison (and Mr Flaton) about "bespoke financial funding" in recital b., but I did not understand that. As with clause 2.2. of the FRA, clause 2.1 is not clear.

317. Given Mr Arnison's greater understanding and experience he could have been in a position to think things through in more detail than Mr Flaton. I note the Applicants' point that in August 2014 Mr Arnison said that he was going to check through the documentation carefully (an email of 4 August 2014, in which I hold that the "I" in the last paragraph does refer to Mr Arnison), and that the supplemental instructions to Mr Anderson QC of 15 August 2014 referred to deductions being made from each £1,500 that did not include Carter

Rovali's commission, only to Eiger's administration fee and the insurance premium.

318. However, I accept Mr Arnison's evidence that he did not see anything wrong at the time; that he thought the limitations in clause 2.1 of the Contract of Insurance were there to cap Gable's liability at £1,500 and to prevent it being liable for sums loaned to persons other than the claims management company; and that he thought ELC could validly claim £1,500 for a failed claim even if the amount loaned was diminished by Carter Rovali's commission.

319. I also accept the general point that it would have been a very odd thing for Mr Arnison to go along with Carter Rovali's commission coming from investors' funds had he thought it was wrongful, since Gable was well aware of what was being done.

320. I also consider that if Mr Arnison had thought it was wrong for Carter Rovali to be paid in the way that it was, he would simply have required that its commission be paid from ELC. He had nothing to gain from the particular way in which it was done.

321. So for these reasons, I hold that Mr Arnison was not dishonest in this respect. Nor was he reckless. At a maximum, as with Mr Flaton, he was in possession of documents which on a more careful reading could have indicated that Carter Rovali's commission should not have been paid in the way that it was. It is not that he did not care what was in those documents, or turn a blind eye, but, at worst, that he misunderstood them. In general, he was concerned that things should be done properly.

Abbreviated Advice of Mr Anderson QC

322. I turn to point ii).

323. In mid-September, probably on 16 September, 2014 a document was prepared at Belmonte (I use the passive voice because its authorship is unclear) entitled "Mr Richard Jones QC advice of the 19th August 2014" and on the next line "Abbreviated Advice by Belmonte Ltd". The reference to Richard Jones QC is confusing, and I will return to it below. I will call this "the Abbreviated Advice".

324. At the same time, Mr Arnison started work on a document called "Bond Mis Selling" which referred to Mr Anderson QC and included an extract from his Opinion.

325. Mr Arnison emailed the Abbreviated Advice to David Clarkson and Lillie Milner on 17 September 2014. Also referred to in the email was a "Q&A". The email said "*Attached the edited QC advice for Tony. Can you please get him to with draw the copy he is sending to everyone.*"

326. The Abbreviated Advice was not, however, sent to Mr Flaton, and nor was the Q&A; Mr Flaton said so in oral evidence and neither was included in his disclosure.

327. The circumstances surrounding the Abbreviated Advice and Bond Mis Selling document are very unclear. The episode only came to light following a passing and inaccurate reference in Mr Arnison's first witness statement to Mr Richard Jones QC having advised, and which led to a correcting second witness statement from Mr Arnison. The witnesses all said that they could not recall to whom Mr Flaton had been showing the full opinion. Mr Wesson was certainly involved but Mr Arnison explained that Mr Wesson has had COVID and is having memory problems (and there is no witness statement from him).

328. I feel able to make the finding that it is more likely than not that Mr Wesson initially created the Abbreviated Advice; he had a relationship with Mr Jones QC and possibly had obtained some informal advice in relation to ELC from him. But plainly Mr Arnison was aware of its existence, and I also find that his creation of the Bond Mis Selling document probably had a similar objective, which was to provide a shorter summary of the advice received.

329. The Applicants submit that Mr Arnison acted dishonestly in this episode; the allegation is that he wanted to provide Mr Flaton with a document that would be given to investors in order to give them a misleading impression of the strength of legal advice supporting the Scheme.

330. This episode is close in time and, it might be said, somewhat similar in nature to the alteration of documents by David Clarkson which I have found took place and were dishonest. But there are important differences. In particular:

    i) The Abbreviated Advice is expressed to be abbreviated. It does not purport to be the complete document.

    ii) The event came to light from Mr Arnison's/Belmonte's own disclosure and his first witness statement. He did not try to conceal it, and corrected matters in his second statement (although he should not have made the error in the first place).

    iii) The Abbreviated Advice is a reasonable attempt to capture the gist of the legal issue, and although it almost completely removes the caveats that Counsel was looking at draft documentation, and was assuming the facts to be as he was told (I note the words "*Based on the assumptions …*" in paragraph 11 remains), it does not contain inserted misstatements that the Scheme documentation had been approved by Counsel or the like.

331. Mr Arnison was clearly particularly uncomfortable when he gave his evidence about this episode, but in large measure that may have been because of the messy way in which it came to light and his erroneous first statement. Overall, I do not conclude that he was dishonest. The Abbreviated Advice was a summary, but that was plain on its face. In addition to the two kinds of caveat that were removed as I have mentioned already, (draft documentation, assumed facts), the Applicants pointed to the fact that the full advice contained a statement that it was for Belmonte's benefit. I do not think that he intended by these changes to give an actively misleading impression. I doubt if a reader's understanding would have been materially changed by the inclusion of a

statement that Counsel had made clear that his advice rested on the facts being as he was told.

332. In reaching this conclusion, I do not overlook the surrounding circumstance that it was desired that Mr Flaton should stop providing the full advice. This naturally leads one to ask what was thought to be wrong with it; what problem was it causing? The evidence does not provide an answer to this, but clearly it was not that the full advice had positively said that there was a significant problem; it did not say that. There are relatively benign possibilities – perhaps the second paragraph had sparked multiple requests about final documentation. This is speculation, of course, but the point is that it cannot be assumed that just because the full advice had caused issues, Mr Arnison formed a dishonest intention to misrepresent its contents.

333. The Bond Mis Selling document (not sent out) rather fortifies the impression that Mr Arnison's intention was to provide the gist of the advice on the potential point of law about s. 235, on the basis of the way the Scheme was intended to run. It strips the matter down to that by quoting only the key part of the Advice, with just very brief introductory words making clear that it is an extract.

334. In any event, the Abbreviated Advice was, as I have said, not sent to Mr Flaton and had no effect on anything that happened later. The Bond Mis Selling document was not sent out by Belmonte.

The "pipeline" issue

335. This, point iii), has particular significance for Mr Flaton as well as Mr Arnison.

336. The Applicants' case in this respect is that those Respondents provided dishonest assistance by continuing their activities in relation to the Scheme after ELC had given its undertaking to the FCA on 20 October 2015.

337. The undertaking was given on ELC's behalf by David Berkeley QC and was as follows:

> 1.4 Owing to the FCA's concerns ELC agreed not to accept any further sums from investors/lenders until resolution of this matter without first giving notice to the FCA.

338. One of the things that Mr Flaton and Mr Arnison say in answer to this is that they understood at the time that it remained permissible for FCA to take on investments if the relevant investors were "in the pipeline" at the time. "Pipeline" has not been tightly defined but essentially meant, as I understood it, investors to whom the Scheme had already been marketed.

339. The development of this issue has been chaotic and unsatisfactory for a number of related reasons. While none of the parties is without blame, I think the most fundamental problems lie with the difficulties of getting to the bottom of the facts in the absence of Lillie Milner giving evidence, and with documentation which is unreliable. The Applicants bear the greatest responsibility for this.

340. The point that it was dishonest to go on taking business after the undertaking was at least pleaded, but only in the Amended Points of Reply at paragraph 20G(viiii). However, it was identified at best fleetingly in the Applicants' opening written submissions at trial, and until well into the trial the emphasis in relation to the allegations of dishonesty against Mr Arnison were focused much more heavily on the allegation that he had been centrally involved in the drafting of the Brochures. As the trial went on, that allegation, which was where much of the work of Mr Arnison's advisers had gone, was entirely dropped, as was the allegation about Belmonte's appointment of Fox & Co under s. 39 FSMA, and aspects of the allegation that the insurance provided was inadequate.

341. Probably because the allegation was only made in Reply, there was no pleading in response by Mr Arnison/Belmonte.

342. However, Mr Biscoe's witness statement dealt with it to some extent, for example in paragraphs 222 and 223, and at paragraph 193 he referred without comment to what is a key bone of contention, a letter from Mr Berkeley QC of 26 November 2015, to which I will refer below.

343. In addition, the pipeline issue came up with e.g. Lillie Milner in her interview with the Liquidators, and in David Clarkson's witness statement.

344. As I have already said, none of the parties is without blame on this point, and it is only fair to say that the pipeline issue was not in itself or in terms raised in the witness statement of Mr Arnison for trial, or that of Mr Flaton. But the point was very specifically identified in the opening written submissions on behalf of Mr Arnison, by reference to an email in November 2016 from Lillie Milner, in which she said that Mr Berkeley QC had advised in October 2015 that pipeline investment was acceptable.

345. What then happened at trial was that David Clarkson referred to pipeline business in his cross-examination. Mr Flaton and Mr Arnison then referred to it in their oral evidence.

346. I can clear away immediately two points made on behalf of the Applicants, namely that the pipeline issue was concocted by Lillie Milner (or others) as a justification for breaching the undertaking only later (after March 2016), and that Mr Flaton and Mr Arnison only brought up the point in their oral evidence by way of being "contaminated" by what they heard David Clarkson say. The former is clearly wrong because there are definitely documents from before March 2016 which mention pipeline (I identify some below) and the latter is clearly wrong because the point was raised in the skeleton on behalf of Mr Arnison, as I have mentioned.

347. I also reject at the outset an attempt which was made by the Applicants in written submissions after the trial to say that it did not matter if Mr Flaton or Mr Arnison believed that pipeline business was acceptable, because it was dishonest to assist the Scheme given the fact of FCA investigation alone. It was too late to switch to this much broader allegation.

348. I will come shortly to some of the complexities of trying to work out what happened in this regard. However, I remind myself first of the importance of identifying the facts which are undisputed, or clearly correct. On this issue, I think the most important facts are that (i) Mr Arnison was keen to ensure that Counsel's advice was taken, as had happened with Mr Anderson QC's first advice, (ii) when Mr Anderson QC's definitive advice (to whose obtaining Belmonte through Mr Wesson was a key mover) was given in March 2016, Belmonte stopped providing cover immediately, and (iii) communications with the FCA and the taking of advice from Mr Berkeley QC were primarily handled by ELC and Mr Arnison was very much at one remove.

349. In my view, these facts make it inherently improbable that Mr Arnison would have carried on post-undertaking if he had known that that was contrary to the advice of Counsel.

350. Similar points apply to Mr Flaton, who had also been concerned to know that there was appropriate advice.

351. The other basic point is that I am concerned both with what advice Mr Berkeley QC actually gave, and with what was passed on by ELC to Mr Flaton and Mr Arnison. They are related but they are not the same.

352. I turn to try to address the detail. I am dealing here with a situation where I know I have less than complete information, because this is plainly a point on which Lillie Milner's evidence could be key, and I know that there are real issues over the reliability of the documentation (because of the issue over the 26 November 2015 letter, to which I come below).

353. I pick the chronology up on 10 September 2015, when David Clarkson updated Mr Arnison to the effect that Mr Berkeley QC advised that ELC's documentation "*need[ed] a complete overhaul to ensure ELC is compliant*", that ELC were "*probably guilty in certain areas of accepting deposits*", but that "*this area is very vague and probably could be defended at the moment. However, better safe than sorry …*".

354. On 8 October 2015 Mr Berkeley QC emailed ELC to say that the FCA was seeking confirmation that ELC was not accepting further deposits, which was discussed (via email) by the Clarksons and the Milners. This is the point at which David Clarkson made a suggestion to liquidate. The terms of the discussion are not very clear and no consensus emerged.

355. On 9 October 2015, Graham Milner emailed Mr Berkeley QC to say that "*I confirm we will cease marketing ELC ltd to new clients from close of play today, until this issue is resolved with the FCA as requested*." The reference to "*marketing … to new clients*" is of obvious importance to the pipeline issue.

356. There was then a meeting at Mr Berkeley QC's Chambers on 20 October 2015, the same day that the undertaking was given. The undertaking itself is not on its face consistent with there being a "pipeline" exception.

357. Mr Arnison accepts that the undertaking letter was sent to him by email but said that he did not see it at the time. In the same paragraph of his witness statement (258) he referred to another letter of 26 November 2015 from David Berkeley QC to the FCA, which he also says he did not see at the time.

358. The 26 November 2015 letter contains the following statement: "*As you are aware, my client is not currently taking any new business but is continuing to accept pipeline business notified before the agreed date … .*"

359. On its face, this letter is of course very clear support for the pipeline exception having been discussed and adopted at the time. The letter is also mentioned (without specific comment on the pipeline issue) in the witness statement of Mr Biscoe as having been sent to the FCA, as I have said above.

360. As I will explain, great controversy now surrounds the authenticity of the letter of 26 November 2015, but it is clear that it was in existence at the time or very shortly after, because it was included as item 20 in the instructions for Mr Anderson QC prepared by Mr Wesson by 1 March 2016, and it has been confirmed by the Applicants that it got into their disclosure as a result of a request to Mr Anderson QC for documents.

361. The FCA responded on 16 December 2015. It is stated to be in response to a letter of 27 November, and right at the very end of the last day of trial Counsel for the Applicants produced for the first time another letter marked with that date (27 November), not previously in the bundles, but which was in David Clarkson's disclosure, and which does not include the sentence I have quoted above from the 26 November version. The Respondents objected vehemently to its attempted introduction.

362. Moving on, there are later documents, but still in the time frame before the end of March 2016, which refer to pipeline. In particular, there are internal emails of 4, 5 and 26 February 2016 involving the Milners and the Clarksons, and an email from Mr Flaton to ELC of 21 March 2016 which attaches a "Pipeline Client List" and begins with the statement "*Please find attached a list of outstanding clients we are aware made enquiries before the FCA sanctions. These represent the last of any pipeline business and I can confirm that we have not been marketing ELC to any new investors since September/October 2015*". It was forwarded to Graham Milner immediately on receipt and then by him to Lillie Milner in November 2016.

363. Returning to the letters of 26/27 November 2015, Counsel for the Applicants took the position in closing submissions that it was inconceivable that Mr Berkeley QC had given advice that there could legitimately be a pipeline exception to the undertaking, that no such advice had ever been given, and therefore it could not have been relayed to Mr Flaton or Mr Arnison. It was in response to that submission that Counsel for Mr Arnison quite understandably pointed to the 26 November version. I can understand why the Applicants then went to find the 27 November version, but the lateness of their doing so, in the last hour of a ten day trial, when the 26 November version was referred to in their own evidence, and when the pipeline issue had been raised in David Clarkson's evidence, was just not good enough.

364. Obviously it is possible that the 26 November version is a concoction and was never sent to the FCA. Aside from its date being inconsistent with the reply, if it had been, one would have expected that the FCA would have commented in their reply about the pipeline exception, and the statement in the 26 November version that the FCA was already aware of it seems completely unsupported. Counsel for the Applicants submitted that it was unlikely that David Clarkson had concocted it (given that it was from his disclosure) and that the likely culprits were Lillie or Graham Milner.

365. My overall conclusion is that the absence of Lillie Milner and the extremely late confusion about critical documents, both of which resulted from the Applicants' actions and inactions on an issue which only came to prominence as they dropped other parts of their case, are so seriously unfair on Mr Flaton and Mr Arnison that it would be wrong of me to draw any conclusion against them on the pipeline issue.

366. However, on reflection I conclude that anyway on the materials available to me, it is more likely than not that the Milners and/or David Clarkson gave Mr Flaton and Mr Arnison the impression that the situation with the FCA was not such as to prevent investments being taken in relation to pipeline business. The main reasons for my conclusion are the undisputed facts referred to at the beginning of this section, the various contemporary documents prior to the end of March 2016 referring to "pipeline", and the 26 November 2015 version letter. As to the 26 November 2015 version letter, it may be, but if so, the reason for its concoction was probably to promote the false impression that there was a pipeline exception. On any view it shows that at the relevant period there was a document which entered the possession of Belmonte referring to a pipeline exception.

367. I have well in mind in reaching this particular conclusion that Mr Arnison did not refer to it explicitly in his witness statement at all. There are, however, possible explanations for this, including that he was dealing with the issue at the higher level that ELC was mainly dealing with the FCA and he was relying on them, or that he did not specifically remember it. Mr Flaton did not refer to it either, but he had no professional help with his witness statement and anyway the documents refer to him specifically in connection with pipeline.

368. Furthermore, in reaching this conclusion I have borne in mind the Applicants' submission that it is inherently unlikely that Mr Berkeley QC advised that there could be a pipeline exception given the actual terms of the undertaking. I see the force in that, and my conclusion relies on what it is likely that the Milners and/or David Clarkson told Mr Flaton and Mr Arnison. Given all the other surrounding circumstances and what else those individuals were prepared to do, it is entirely plausible that they would tell Mr Flaton and Mr Arnison something for which there was no basis. A plausible motivation for them to do that would be to keep ELC going, and get in more money for themselves.

369. Before leaving this point, I record that I also found it troubling that it involved the Applicants making a positive argument on the last day of trial that Lillie Milner had probably meddled with the *contents* of a relevant document. Up until then they had merely accepted the possibility that the disclosure was

incomplete, although there was one document (an email of 4 November 2015 produced by forwarding in an email from Lillie Milner to herself of 18 January 2017) which showed signs of a possible manual redaction, but not an alteration to the text, and on which the Respondents relied for the possibility of tampering but which the Applicants had downplayed. I have borne all this in mind when reaching the conclusions in this judgment.

Mr Arnison's contacts with investors

370. I turn to point v).

371. I agree with Counsel for Mr Arnison that this is an area where the Applicants' pleadings were deficient to an extent and in a manner that is unfair on Mr Arnison and prejudicial to him. It is true that contact with investors was mentioned, but there was a lack of detail and specificity, and what was pleaded was deficient in informing Mr Arnison what it would be alleged at trial that he had said that was dishonest, and in what respect.

372. The Applicants' opening skeleton was no better, and although the witness statement of Dr Holloway had been provided, it was no substitute for an adequate pleading.

373. Mr Arnison's witness statement engaged with the Applicants' pleaded case at the level at which it was developed. He explained that he did not actively contact investors, but did receive inquiries from some of them, and developed a process for handling those inquiries. He provided the documentation, which emphasised that Belmonte was not providing advice, and other such matters. At this general level, it seemed to me that Mr Arnison behaved professionally, and the overall approach was not criticised in cross-examination.

374. Mr Arnison's defence to the allegations made was also prepared in the context of a much more general case that he and Belmonte had been in the thick of the whole Scheme and had known, prepared and approved the contents of the Brochure, and provided insurance that was wholly worthless. That all changed, of course.

375. It was a very different approach for the Liquidators then to focus on the fine detail of Mr Arnison's engagement with a very small number of investors, without a supporting pleading.

376. As I have explained above, the Liquidators sought information from investors via questionnaires. These were not intended to get detailed information about any contact the investors might have had with Mr Arnison and were not the basis for this aspect of the Applicants' allegations at trial. Instead, the Applicants relied on the statement of Dr Holloway and his oral evidence, and disclosure documents about Mr Scott. Reference was also made to a letter to a Mr Pritchard, and there was brief cross-examination on it. If the Applicants wanted to develop a case that Mr Arnison's communications with investors followed a dishonest pattern they could have sought evidence from more investors. I can understand why that might not have seemed like a

proportionate way to proceed, but it would be unfair on Mr Arnison to treat the individual incidents that were before me as representative or typical.

377. In any case, those incidents were not very powerful:

i) Mr Arnison's evidence in relation to Dr Holloway was that Dr Holloway made a call to Belmonte which was taken by Mr Arnison's daughter, that the call was bad-tempered and she was upset. So, Mr Arnison said, he rather hastily sent some material obtained from Paul Clarkson to Dr Holloway by cutting and pasting it into an email. It is true that the material sent, particularly in the context of Dr Holloway's specific question (whether his "*capital [was] underwritten by yourselves should Equitable Capital be unable, for any reason, to repay my capital*") arguably went too far and could have given Dr Holloway the impression that, for example, his capital was absolutely protected even if ELC became insolvent, or that it was capital guarantee insurance for Dr Holloway. But I accept Mr Arnison's account in general, and that he did not intend to give any such impression.

ii) What happened with Mr Scott is extremely unclear given that there was no evidence from him. I accept Mr Arnison's evidence that his file note (which is not very legible) reflects him recommending Mr Scott to play safe and "keep his money". It was also alleged that Mr Arnison tried to put time pressure on Mr Scott, but he did not accept this and I reject it as unproven.

iii) As to the letter to Mr Pritchard, this was very little developed. It is alleged by the Applicants that it gives the false impression that investors' capital would be protected even if ELC failed, but I do not accept this. Though not well written, the letter does not say that and I think its focus on individual claims failing gives a fair impression of the insurance cover. It also identifies ELC as the policy holder.

378. I reject the incidents as being acts of dishonesty or evidence of a pattern of dishonesty.

MR FLATON

379. The claim against Mr Flaton based on the payments to Carter Rovali having been transactions at an undervalue were dropped late in the trial, with the explanation that it was not considered possible to succeed against him personally when the payments were made to his companies. In any event although I do not have to rule on it, it seems highly likely to me that that claim would fail for reasons parallel to those I have given in relation to the similar claim against Belmonte.

380. All the other claims against Mr Flaton depend on allegations that he was dishonest and/or acted in knowledge of the dishonest nature of the Scheme generally. It is said that he was either actively and positively dishonest or had "blind eye" knowledge.

381. I have already said that Mr Flaton represented himself at trial. Allowance must be made for the stresses that that brought with it. It led to some of his answers being rather long and emotional, and at times he was argumentative, but this was not especially marked and he was in general clear and direct in what he said.

382. At the time of the key events, Mr Flaton was in his late twenties. He was not especially experienced in the business world.

383. Mr Flaton's version of events is that his responsibility was just to market the Scheme; he was not FCA regulated, and he was not an IFA. He said he was concerned that the Scheme should be properly set up and he was keen for the involvement of companies that were regulated, in particular Belmonte. He accepted that he did review the Scheme documentation, but at a high level and not with a deep understanding of the detail.

384. Mr Flaton also sought to make clear that of the approximately £600,000 that his companies received, he did not himself get much. He had staff and expenses and sub-contracted much of the work. This was not challenged and I accept it.

385. It was particularly pressed on Mr Flaton in cross-examination that he cold-called potential investors, and that the Scheme was targeted at the elderly and vulnerable. These points were not themselves directly relevant to legal requirements of the Applicants' claims and were directed at his credit and general honesty. Mr Flaton denied them.

386. The other key points on which Mr Flaton was particularly challenged were:

    i) That the commissions paid to Carter Rovali (£250 per claim) came out of the investors' money as it was put into the Scheme, and not from ELC's funds as an expense of ELC. He accepted that that was how things worked, but denied that it was dishonest. He also denied that he knew, or thought, that it was inconsistent with the Scheme paperwork, in particular the Brochure.

    ii) That he was on notice that the Scheme was or might be a UCIS, but carried on marketing it, including after the undertaking given by ELC to the FCA on 20 October 2015. This was the "pipeline" issue to which I have referred above in relation to Mr Arnison.

387. I accept Mr Flaton's version of events and find that while he was naïve, he was not dishonest.

388. The veracity of his evidence has to be tested with due regard for the fact, which I find to be true, that his computers were taken by the Police in connection with Sable and he does not have anything like complete documentation.

389. I also bear in mind that while rejecting the allegations against him in strong terms throughout, he was generally co-operative with the Applicants' inquiries.

390. It is also important to bear in mind what Mr Flaton is *not* accused of. It is not alleged that he knew of the very large payments out to the Milners or the Clarksons, it is not alleged that he knew ELC had no working capital and was in the nature of a Ponzi scheme, and it is not alleged that he knew that MS2U was using investors' money for non-bond claims or for its own inappropriate purposes.

391. First, I reject on the facts the allegations that there was cold calling or that the Scheme was targeted at the elderly. The basis for the assertion of cold calling was questionnaires provided by individual investors to the Applicants. A small number referred to cold calling but those people did not give evidence and so their hearsay evidence could not be tested. There is no contemporaneous documentation supporting the allegation. A plausible explanation for there being reports of cold calling is that potential investors filled in an online form requesting a call-back which followed some time later, and it is possible that for some of them they did not have in mind filling in the form when they received the call-back. As to targeting the elderly, there is evidence that the investors were on average into their 70s and in many cases much older but that may perfectly well be because that is the demographic of people with the sort of available money that the Scheme would be of interest to. There is no direct evidence of targeting in the documents. That is not to minimise the distress that the Scheme has caused to elderly investors, which has clearly been genuine, very severe and deeply sad. I accept Mr Flaton's evidence that he feels very badly about the distress that has occurred.

392. Second, I accept Mr Flaton's evidence that he positively wanted to ensure that the Scheme was compliant with the relevant legislation. There is documentary evidence that he would not start bringing in investors until he was satisfied that there was appropriate advice, and he wanted to know that a regulated company (Belmonte) was involved. But he was dependent on others for this; he did not have the qualifications or expertise to make detailed judgments, or to understand the specific legal effect of provisions of the FRA, for example. He only reviewed the Brochure and other Scheme documentation at a high level and in this light. This level of care was consistent with his essential function being marketing.

393. Third, while it is true that the £250 per claim came from investors' funds and that this was arguably inconsistent with other Scheme documentation, I do not think that Mr Flaton ever focused on that as a significant distinction, let alone a problem. His attitude was that those involved in the Scheme (himself, Belmonte, ELC itself) all knew how he was being paid, and had it not been for the wider fraud, of which he was unaware, it would not have been a problem. He also took the reasonable view that it was obvious that the Scheme would incur marketing expenses that would be paid by way of a commission. Further, his understanding, somewhat rudimentary as it may have been, was that the whole £1,500 was insured.

394. Fourth, I accept that when he was told about the FCA investigation, he did not just ignore it, but he was given the impression that such regulatory problems as there were might be misconceived on the part of the FCA, and/or could be overcome by rearranging the operation of the Scheme. This is why he set up

Sable. I accept his evidence that he has worked hard to deal with the subsequent collapse of Sable. As to the pipeline issue, I refer back to what I have said in connection with Mr Arnison; at best the Applicants have failed to prove their case and on balance it is probable that Mr Flaton genuinely thought it was permissible for ELC to go on processing this business.

395. There was a late attempt in the cross-examination of Mr Flaton to show that even if there was a pipeline exception, some of the investment taken post-undertaking was from new investors. The whole interchange was a muddle and I do not think it proved anything.

396. On the regulatory issues, Mr Flaton was particularly challenged in relation to an email of 16 July 2014 to him from David Clarkson. He asked if investors ("Mr Jones" and "Mrs Smith") might get different returns depending on whether their respective funded cases succeeded or not, and David Clarkson replied that ELC would use "their own" cases to ensure that investors funding losing cases received the same as investors funding winning cases.

397. I agree that read carefully by a lawyer in the cold light of day this would be a clear indication of a risk of pooling, but I accept that Mr Flaton did not see it that way and I doubt if he really even understood it. What he wanted to know was at a much more basic level of whether some investors would feel disappointed by their luck.

398. I also note that Mr Flaton's witness statement was at least incomplete in saying that he was told of the FCA's investigations in August 2015 by David Clarkson, since he knew something of it in March 2015. I do not consider that the error was malicious and it made no difference to the overall picture.

399. None of this was dishonest and Mr Flaton did not turn a blind eye. As to the latter, he did have the raw materials in terms of documentation from which, with a careful and more qualified eye problems could have been spotted, but he did not ignore the materials, or go ahead without caring what they contained.

THE MILNER SETTLEMENT AGREEMENT

Legal principles

Where a settlement is concluded with one or more joint tortfeasors

400. The general common law rule is that, where there is a joint cause of action against more than one person, a discharge as against one of them operates as a discharge of all. However, a mere covenant not to sue one joint tortfeasor does not have this effect: *Clerk & Lindsell on Torts 23rd Ed.* at paragraph 30-37. This was common ground between the parties. Parliament has intervened to abolish the rule in relation to judgments (see section 3 of the Civil Liability (Contribution) Act 1978) but the rule survives in relation to compromise agreements.

401. In *Gardiner v Moore and Others* [1969] 1 Q.B. 55 the plaintiff brought a claim in libel against an author, the publishers and the printers of a newspaper article. Subsequently the plaintiff settled the claims against the publishers and the printers in circumstances where, it was accepted, there could be no real doubt that the plaintiff meant and wished to maintain proceedings against the author (see p. 85). Nonetheless, it was argued on behalf of the author on a preliminary issue that the respondents were joint tortfeasors; that the settlement agreements on their true construction constituted a release of the two out of three tortfeasors; that there was no express reservation of rights against the third respondent; and that, in law, the release of one joint tortfeasor releases the others in the absence of any express reservation (at p. 76).

402. Thesiger J noted the reason for the common law rule as enunciated in *Duck v Mayeu* [1892] 2 Q.B. 511 and *Apley Estates Co. Ltd. v. De Bernales* [1947] Ch. 217, namely that where there were joint tortfeasors the cause of action was one and indivisible and accordingly a release of that cause of action against one necessarily released it against all.

403. It was held that the settlement agreements did not amount to a release within the meaning of the common law rule. At pp. 94 – 95 Thesiger J said:

> "I hold that there is no material distinction between an express term in an agreement and one which is implied by law because it was so obviously the basis for the agreement that it was idle to express it by specific words. Secondly, I am satisfied that all solicitors and counsel, and through them all the parties to this case, knew quite well at all material times that both the plaintiff and his counsel did not intend to release or discharge the first defendant but, on the contrary, intended and desired to continue the action against him. Thirdly, I am quite satisfied that the intention being known to all, it was the basis on which the claim against the second defendants, the proprietors of the newspaper, and the claim against the third defendants, the printers of the newspaper, were settled."

404. Properly construed and interpreted, the settlement agreements did not amount to a release within the meaning of the common law rule. The basis for this conclusion was that there was an implied term to the effect that the plaintiff reserved his rights against the author; or alternatively there was a collateral agreement to each of the settlement agreements to the same effect (at p. 96).

405. *Watts v Aldington* [1999] L&TR 578 also concerned a libel case. A brought a claim against W and T and obtained a judgment against them for £1,500,000. T was adjudged bankrupt on his own petition and W was declared bankrupt on the petition of A. W appealed against the bankruptcy order, stating that he had offered to pay the sum of £10,000 to W in settlement of his liabilities arising out of the libel action. W was also aware that T had offered a settlement sum of £20,000 to A, but that A had rejected that sum since T's trustee in bankruptcy anticipated recovery of "appreciably more" than that figure.

406. A and W entered into a settlement agreement pursuant to which W paid the sum of £10,000 to A. By cl.6 of the settlement this was expressed to be:

> "…in full and final settlement of the judgment and orders referred to above and any liability howsoever arising before today's date which could involve any payment by you directly or indirectly to Lord Aldington." (At p.583).

407. W also gave certain undertakings to A in respect of his future conduct, in default of which A was entitled to take proceedings for the full judgment debt.

408. Subsequently W brought proceedings against A seeking a declaration that the settlement constituted a release by A of all rights against W and T arising out of the libel judgment.

409. In one of three concurring judgments given on appeal, Steyn LJ said at p.595 that the common law rule was "*undoubtedly a trap for the unwary*". Primarily on the basis of cl. 6 of the settlement agreement, he concluded that the agreement amounted to a release rather than a covenant not to sue. Steyn LJ then considered, as a separate point, whether the agreement contained a reservation of A's rights against W. He held that such a reservation might be express or implied. However, if it were to be implied, it must comply with the stringent tests applicable to the implication of terms. At p.597, he questioned whether the test of "strict necessity" was satisfied or, alternatively, whether it was so obvious that it went without saying that A was reserving his rights against T.

410. In this regard, the relevant surrounding circumstances were that: (a) A was willing to settle with W because A believed W to be impecunious; (b) A rejected an offer of £20,000 from T because A believed he would recover substantially more from T; (c) A was energetically pursuing his remedies against T prior to the settlement; and (d) the settlement was between A and W alone. These circumstances were known to both A and W.

411. Steyn LJ said at p.597:

> "It is important to formulate the right question to be posed by the notional bystander. In my judgment the right question is the following: is Lord Aldington reserving the right under his agreement to sue Count Tolstoy? In my judgment the objective setting of the contract convincingly shows that the answer of both parties to that question would have been "Yes, of course".
>
> That they would both have been unaware of the legal consequences is immaterial. Nothing in the language of the agreement militates against the implication. In my judgment the implied term is established. It is the equivalent of an express reservation. It follows that Count Tolstoy was not released."

412. Neill LJ also concluded that a reservation of A's rights against T should be implied into the settlement agreement, although his reasoning was slightly different. In particular, in relation to the question whether a term could be implied into the settlement agreement he said that:

> "It is not necessary to debate whether the implication of a term is part of the construction *stricto sensu* of the contract; it is sufficient to recognise that a decision as to the meaning and effect of a contract will take account not only of the terms which are expressed but also of the terms which can be properly implied." (At p.593).

413. At p.588 he said that the true enquiry was:

> "what is the meaning and effect of the agreement having regard to the surrounding circumstances and taking into account not only the express words used in the document but also any terms which can be properly implied?"

414. In the view of Neill LJ, the relevant facts and circumstances included the fact that the judgment was for £1,500,000 plus costs, whereas the sum to be provided by W under the settlement agreement was only £10,000, which was only about 0.5 per cent of the total. W also knew that A was seeking to recover an additional sum against T, and there was no indication that either party turned their mind to the possibility of a contribution claim.

415. Neill LJ said at p.594:

> "For my part I find it impossible to conclude that looking at the matter objectively Lord Aldington and Mr Watts intended that Count Tolstoy was to be forthwith discharged from all further liability. Mr Turner suggested that the right inquiry was whether the parties intended that Count Tolstoy should continue to have the right to have recourse to Mr Watts. With respect this suggestion seems to me to give the wrong emphasis to any possible contribution proceedings. The settlement was concerned with the rights which Lord Aldington had against Mr Watts. Though it is legitimate to imply into such an agreement a term as to the reservation of rights against Count Tolstoy, there is no basis for making any implication as regards possible rights of contribution by Count Tolstoy."

416. The issue was revisited in *Gladman Commercial Properties v Fisher Hargreaves Proctor* [2013] EWCA Civ 1466; [2014] C.P. Rep. 13. This case concerned the appellant's aborted purchase of two properties in Nottingham from the Nottinghamshire and City of Nottingham Fire Authority and Nottingham City Council. The respondents were chartered surveyors who were retained by the vendors and who were alleged to have made misrepresentations in relation to the transaction.

417. After the exchange of contracts, the appellants declined to complete. The Fire Authority issued proceedings seeking specific performance of the contract. The appellant claimed that it was induced to bid for and contract to purchase the properties by reason of alleged fraudulent misrepresentations made by the respondents as the sales agents for the vendors. It sought rescission and damages and joined the Council as a Part 20 defendant. The trial of the action was adjourned part-heard to facilitate negotiations between the parties and a settlement was reached on terms that the Council paid the sum of £2.7 million to

the appellant, but that the vendors retained the deposits paid on the properties. Clauses 4 and 5 of the agreement provided for a full mutual release of all obligations contained in the contracts for the purchase of the properties.

418. The appellant issued a second claim against the respondents for the fraudulent misrepresentations relied on against the claim against the vendors (albeit formulated slightly differently). There was an alternative case in negligent misrepresentation. The claim was struck out *inter alia* on the ground that it was an abuse of process: it was an attempt to pursue a cause of action that had already been released.

419. On appeal, it was common ground that the vendors and the respondents were joint tortfeasors. It also appears to have been accepted that, on its face, the settlement agreement operated as a release rather than as a covenant not to sue (see [40]). Accordingly, the Court of Appeal considered whether a term could be implied into the settlement agreement.

420. After summarising the history of the common law rule, Briggs LJ (with whom Ryder LJ and Longmore LJ agreed) discussed the *Watts* case, observing that it might represent a development of the law in this area. Prior to that decision, the basic enquiry was whether a settlement agreement amounted to a release or a mere covenant not to sue. However:

> 'In the *Watts* case, this court recognised an additional exception, namely where the agreement for the release of one (or more) joint tortfeasors contained a reservation of the claimant's right to sue the others. That reservation may be express or, as in that case, implied. Both Steyn and Simon Brown L.JJ. were, in that case, critical of the logic behind the common law rule, especially following its statutory curtailment. Steyn L.J. called it a "trap for the unwary". Simon Brown L.J. called it a "juridical relic".' (At [24]).

421. Briggs LJ also added:

> "The concept of a reservation of a right to sue might be thought equally illogical, if there really is a single cause of action. Some have suggested that such a reservation converts an apparent release into what is in substance only a covenant not to sue the defendant or defendants with whom the settlement is made." (At [24]).

422. He noted that, in *Watts*, the Court of Appeal considered that the general law as to the implication of terms was to be applied:

> 'In a passage which might be thought to anticipate more recent developments, Steyn L.J. (with whom Simon Brown L.J. agreed) said that: "The touchstone of implication is strict necessity." He added that the two practical tests then in vogue, namely the officious bystander and business efficacy tests were "merely aids to determining that issue". By "necessity", Steyn L.J. meant that the proposed implication had to be shown to be "strictly necessary if the reasonable expectations of the parties are not to be defeated".'

423. In terms of the background matrix of fact which fell for consideration, he said:

> "While I agree that the modern approach is to apply ordinary principles of construction to settlement agreements with one or more of a number of joint tortfeasors, the 'intention of the parties' to be identified by the process of interpretation is their imputed common intention, rather than that of one or other of them. The phrase means no more than the meaning of the agreement which they have made, objectively ascertained, read against the relevant background: see the Belize case (supra) at [16] and [21]."

424. Briggs LJ held that there was no basis for implying a reservation of the right to proceed against the respondents. The absence of any indemnity, or express covenant not to sue the respondents in the settlement agreement was of no significance since the ordinary effect of a settlement against one or more joint tortfeasors was to release all. There was therefore no need for such a clause. This was not a case where an agreement had failed to make express provision for what should happen when some event occurred. The fact that the vendors and respondents were joint tortfeasors was an important part of the background context, in circumstances where the parties were legally represented and could be taken to have understood the legal consequences of the settlement. Moreover, Briggs LJ said at [41] that:

> "The Settlement Agreement was made at the end of lengthy and extremely expensive litigation. The trial, although only part heard, had gone on for some fifteen days, and hundreds of thousands of pounds of costs had been spent on each side. The reasonable addressee may be forgiven for thinking that the parties intended thereby to put an end to their dispute yet, if the reservation of a right to sue the Respondents is to be implied, the Council and the Fire Authority were giving up a specific performance claim worth £6 million less the value of the Properties, paying a further £2.7million and nonetheless by implied agreement exposing themselves to the likelihood of contribution claims from the Respondents, if sued thereafter by the Appellant. That the Council and Fire Authority should be regarded as having agreed by implication to do so while professionally represented seems to me to be an altogether improbable hypothesis. This is not to focus on their presumed intention ahead of that of the Appellant. It simply shows that no such common intention can sensibly be presumed."

425. These decisions must now be read in the light of *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] A.C. 742. In that case the Supreme Court restated the law on implied terms and emphasised that there had been no dilution of the test. Lord Neuberger PSC referred to the statement of principle of Lord Simon of Glaisdale, giving the majority judgment in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 (at 283):

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable;

> (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

426. Lord Neuberger noted that the first requirement added little to the test and that the second and third requirements may be alternatives, although it would be rare that only one was satisfied.

Settlements with one or more concurrent tortfeasors

427. The common law rule as set out above does not apply against concurrent tortfeasors. The House of Lords considered the applicable principles in *Jameson v Central Electricity Generating Board* [2000] 1 A.C. 455. As regards the facts, Jameson had been employed by Babcock Energy and during his employment he had been exposed to asbestos. He had worked at various premises, including at power stations owned by CEGB. He sued his employer for damages and the claim, valued at £130,000, was settled for £80,000 shortly before his death. This sum was inherited by his widow. After his death, his personal representatives brought an action against CEGB under Fatal Accidents Act 1974 for the loss of the widow's dependency. By reason of section 4 of the 1976 Act, in making this claim the widow was not required to give credit for the sum of £80,000 which she had received from her husband's estate. It was held that CEGB was entitled to maintain a contribution claim against Babcock. Accordingly, if the claim under the 1976 Act was to proceed then Babcock, which had agreed to a full and final settlement of the damages claim, might be liable to make a contribution without setting off the sum it had already paid out to Jameson. The question before the House of Lords was whether the liability of concurrent tortfeasors for the same harm was discharged by a settlement entered into with one of them.

428. Lord Hope, giving the leading judgment, reasoned that damage is an essential part of the cause of action in a claim for damages based on tort. At p.473 he held that the critical question was whether the claim had in fact been satisfied. Once there is a judgment against one of several concurrent tortfeasors, full satisfaction will be achieved when the judgment is satisfied. Where the amount of the claim is fixed by agreement and there is a shortfall between the amount accepted and the full value of the claim, the compromise might nevertheless fix the value of the claim in the same way as a judgment. However, there might be cases in which the terms of the settlement showed that the parties had not treated the settlement as full satisfaction for the claim for damages.

429. At p. 476 he discussed the limits of the enquiry which a judge could undertake where a settlement was entered into with one current tortfeasor and an action was subsequently commenced against another:

> "He may examine the statement of claim in the first action and the terms of the settlement in order to identify the subject matter of the claim and the extent to which the causes of action which were comprised in it have been included within the settlement. The

> purpose of doing so will be to see that all the plaintiffs claims were included in the settlement and that nothing was excluded from it which could properly form the basis for a further claim for damages against the other tortfeasors. The intention of the parties is to be found in the words of the settlement. The question is one as to the objective meaning of the words used by them in the context of what has been claimed.
>
> What the judge may not do is allow the plaintiff to open up the question whether the amount which he has agreed to accept from the first concurrent tortfeasor under the settlement represents full value for what has been claimed. That kind of inquiry, if it were to be permitted, could lead to endless litigation as one concurrent tortfeasor after another was sued on the basis that the sums received by the plaintiff in his settlements with those previously sued were open to review by a judge in order to see whether or not the plaintiff had yet received full satisfaction for his loss. Different judges might arrive at different assessments of the amount of the damages. The court would then have to decide which of them was to be preferred as the basis for the apportionment between the various tortfeasors. I do not think that this can be regarded as acceptable. The principle of finality requires that there must be an end to litigation."

430. Lord Hope concluded that:

> "The question therefore is, as Mr. McLaren for the C.E.G.B. put it, not whether the plaintiff has received the full value of his claim but whether the sum which he has received in settlement of it was intended to be in full satisfaction of the tort. In this case the words used cannot be construed as meaning that the sum which the deceased agreed to accept was in partial satisfaction only of his claim of damages. It was expressly accepted in full and final settlement and satisfaction of all his causes of action in the statement of claim. I would hold that the terms of his settlement with Babcock extinguished his claim of damages against the other tortfeasors." (At p.476).

431. Lord Lloyd, dissenting as to the conclusion, said at p.466 that:

> "On the face of it, it would seem strange and unjust that a plaintiff who settles a claim against A in respect of one cause of action should be unable to pursue a claim in respect of a separate cause of action against B. Of course if the plaintiff recovers the whole of his loss from A, then he will have nothing left to recover against B. The payment received from A will have "satisfied" his loss".

432. The decision in *Jameson* was considered and explained in *Heaton v AXA Equity & Law Life Assurance Society plc* [2002] 2 AC 329 per Lord Bingham as follows:

> "3. A brings an action against B claiming damages for negligence in tort. The claim goes to trial, and judgment is given for A for £x.

There is no appeal and the judgment sum is paid by B to A. £x will thereafter be taken, in the ordinary way, to represent the full value of A's claim against B. A cannot thereafter maintain an action for damages for negligence in tort against C as a concurrent tortfeasor liable in respect of the same damage for two reasons: first, such a claim will amount to a collateral attack on the judgment already given; and secondly, A will be unable to allege or prove any damage, and damage is a necessary ingredient for a cause of action based on tortious negligence. A cannot maintain an action against C in contract either, in respect of the same damage, for the first reason which bars his tortious claim. There is however no reason of principle, in either case, on the assumptions made in this example, why B should not recover a contribution from C under the Civil Liability (Contribution) Act 1978 as a party liable with him for the same damage suffered by A.

4. In a second example the facts are varied. A brings an action against B claiming damages for negligence in tort. The action does not proceed to judgment because B compromises A's claim by an agreement providing that he will pay A damages of £x, which he duly does. If £x is agreed or taken to represent the full value of A's claim against B, A cannot thereafter maintain an action against C in tort in respect of the same damage for the second reason given in the last paragraph, and although he is not precluded from pursuing a claim against C in contract in respect of the same damage he cannot claim or recover more than nominal damages. There is again, in the ordinary way, no reason of principle in either case, on the assumptions made in this example, why B should not recover a contribution from C under the 1978 Act as a party liable with him for the damage suffered by A.

5. There is, however, an obvious difference between the action which culminates in judgment and the action which culminates in compromise: that whereas, save in an exceptional case (such as *Crawford v Springfield Steel Co Ltd* (unreported) 18 July 1958, Lord Cameron), a judgment will conclusively decide the full measure of damage for which B is liable to A, a sum agreed to be paid under a compromise may or may not represent the full measure of B's liability to A. Where a sum is agreed which makes a discount for the risk of failure or for a possible finding of contributory negligence or for any other hazard of litigation, the compromise sum may nevertheless be regarded as the full measure of B's liability. But A may agree to settle with B for £x not because either party regards that sum as the full measure of A's loss but for many other reasons: it may be known that B is uninsured and £x represents the limit of his ability to pay; or A may wish to pocket a small sum in order to finance litigation against other parties; or it may be that A is old and ill and prefers to accept a small sum now rather than a larger sum years later; or it may be that there is a contractual or other limitation on B's liability to A. While it is just that A should be precluded from recovering substantial damages

against C in a case where he has accepted a sum representing the full measure of his estimated loss, it is unjust that A should be so precluded where he has not.

6. The majority decision of the *House in Jameson v Central Electricity Generating Board* [2000] 1 AC 455 appears to have been understood by some as laying down a rule of law that A, having accepted and received a sum from B in full and final settlement of his claims against B in tort, is thereafter precluded from pursuing against C any claim which formed part of his claim against B. I do not think that my noble and learned friend Lord Hope of Craighead, in giving the opinion of the majority of the House, is to be so understood.

7. Mr Jameson (A) had contracted lung cancer as a result of exposure to asbestos dust during his employment by B. He brought an action in negligence against B claiming damages. Very shortly before his death the claim was settled for £80,000, which was paid just after his death. It was appreciated that his claim on a full valuation was worth £130,000 but also that the outcome of the litigation was uncertain. About a year after his death, a claim on behalf of his widow was brought under the Fatal Accidents Act 1976 for damages for her loss of dependency. This second action was brought against C, in whose premises A had worked during some of the time when he had been exposed to asbestos dust during his employment by B. Section 4 of the 1976 Act, as substituted by section 3(1) of the Administration of Justice Act 1982 , had the effect that the widow did not have, in estimating the value of her dependency, to give credit for the damages of £80,000 which she had inherited from A on his death. Thus, if the claim was maintainable, C would be potentially liable to the widow for a substantial sum and could look to B for contribution under the 1978 Act, and B would be potentially liable to contribute without any requirement that credit should be given for the £80,000 it had already paid. The widow could only maintain her claim against C if A, had he lived, would have been able to do so and it was held that A could not have done so because, by accepting £80,000 from B in full and final settlement of his claim, he had extinguished it and so had no claim which he could have pursued against C.

8. This conclusion was reached by a number of steps which included the following.

> (1) Proof of damage is an essential step in establishing a claim in tortious negligence ([2000] 1 AC 455 , 472a-c).
>
> (2) Such a claim is a claim for unliquidated damages (pp 473d, 474a).

> (3) Such a claim is liquidated when either judgment is given for a specific sum or a specific sum is accepted in a compromise agreement (pp 473d, 474b, 474e).
>
> (4) A judgment on such a claim will ordinarily be taken to fix the full measure of a claimant's loss (pp 473e, 474b).
>
> (5) A sum accepted in settlement of such a claim may also fix the full measure of a claimant's loss (pp 473e, 474e-f): whether it does so or not depends on the proper construction of the compromise agreement in its context (pp 473b, 476e, 474h).
>
> (6) On the facts of A's case, the sum accepted from B in settlement was to be taken as representing the full measure of A's loss: it followed that A's claim in tortious negligence was extinguished and he had no claim which could be pursued against C (p 476e).

I do not think the first four of these steps are controversial. The fifth proposition may perhaps have been stated a little too absolutely in *Jameson*, but as expressed above I do not think it can be challenged. There was clearly room for more than one view, as the division of judicial opinion in Jameson showed, whether the sum accepted in settlement by A was to be taken as representing the full measure of his loss, but if it did the conclusion followed: A could not have proved damage, an essential ingredient, in his action against C, and that was fatal to the widow's Fatal Accidents Act claim against C.

9. In considering whether a sum accepted under a compromise agreement should be taken to fix the full measure of A's loss, so as to preclude action against C in tort in respect of the same damage, and so as to restrict any action against C in contract in respect of the same damage to a claim for nominal damages, the terms of the settlement agreement between A and B must be the primary focus of attention, and the agreement must be construed in its appropriate factual context. In construing it various significant points must in my opinion be borne clearly in mind:

> (1) The release of one concurrent tortfeasor does not have the effect in law of releasing another concurrent tortfeasor and the release of one contract-breaker does not have the effect in law of releasing a successive contract-breaker.
>
> (2) An agreement made between A and B will not affect A's rights against C unless either (a) A agrees to forgo or waive rights which he would otherwise enjoy against C, in which case his agreement is enforceable by B, or (b) the agreement falls within that limited class of contracts which either at common law or by

> virtue of the Contracts (Rights of Third Parties) Act 1999 is enforceable by C as a third party.
>
> (3) The use of clear and comprehensive language to preclude the pursuit of claims and cross-claims as between A and B has little bearing on the question whether the agreement represents the full measure of A's loss. The more inadequate the compensation agreed to be paid by B, the greater the need for B to protect himself against any possibility of further action by A to obtain a full measure of redress.
>
> (4) While an express reservation by A of his right to sue C will fortify the inference that A is not treating the sum recovered from B as representing the full measure of his loss, the absence of such a reservation is of lesser and perhaps of no significance, since there is no need for A to reserve a right to do that which A is in the ordinary way fully entitled to do without any such reservation.
>
> (5) If B, on compromising A's claim, wishes to protect himself against any claim against him by C claiming contribution, he may achieve that end either (a) by obtaining an enforceable undertaking by A not to pursue any claim against C relating to the subject matter of the compromise, or (b) by obtaining an indemnity from A against any liability to which B may become subject relating to the subject matter of the compromise.
>
> In my consideration of this matter I have gained much assistance from the clear and illuminating judgments of the New Zealand Court of Appeal in *Allison v KPMG Peat Marwick* [2000] 1 NZLR 560 and from the perceptive critique of Jameson in *Foskett, The Law and Practice of Compromise , 5th ed (2002),* pp 119-125, paras 6-42-6-57."

433. These principles were applied in *Vanden v Kras Vanden Recycling Ltd* [2017] EWCA Civ 354. A company brought a claim against a former employee and two companies, asserting that the employee had passed sensitive information to the companies and that all three had conspired to use that information to set up a rival. A consent order was made pursuant to which one defendant was to pay £176,000 to the claimant. Once the consent order was satisfied, Kras applied for summary judgment. It argued that there was no longer any claim against Kras as another tortfeasor liable on the pleaded case for the same damage.

434. The Court of Appeal observed that a satisfied judgment ordinarily bars claims against other tortfeasors (apparently whether joint or concurrent) who were liable for the same damage. It was held (at [50] – [51]) that a satisfied consent order had the same effect:

> "50. Since in substance and in effect the order for payment made by the Consent Order is the same as would be made following a judgment I consider that the judge was correct to conclude that it is to be treated as a judgment for the purpose of the rule that satisfaction of a judgment bars claims against tortfeasors liable for the same damage.
>
> 51. The judge was also correct to hold that in those circumstances the question of whether there was an intention to fix the full amount of the loss does not arise. The judgment fixes the loss regardless of what may have been intended – see *Bryanston Finance Ltd v de Vries* [1975] 1 QB 703 at pp717E-F, 733 (per Lord Denning MR) and p739E- 740B (per Lawton LJ)."

435. The claim for conspiracy against Kras was barred, because if Kras were liable for damages on that claim it would be in relation to the same conspiracy and the same damage. However, other claims for damages (for breach of contract and inducing or procuring breach of contract) were made individually against Kras and the losses occasioned by those separate acts did not necessarily fall within the alleged conspiracy. (At [58]).

Wider application of the *Jameson* principle?

436. In *David Yablon Minton v Kenburgh Investments (Northern) Ltd (In Liquidation)* [2001] BPIR 64 the Court of Appeal accepted that the principles set out in *Jameson* might be applicable beyond the situation where claims were brought against concurrent tortfeasors.

437. In that case, a company in liquidation brought proceedings against a firm of solicitors which acted for the company in relation to a property redevelopment transaction. The company's former directors were joined as Part 20 defendants to the claim.

438. A preliminary issue arose as to the effect on the claim of a settlement entered into between the company and the directors. The settlement compromised the company's claims against the directors for alleged wrongdoing in relation to the same transaction and the whole of the agreed sum had been paid. The solicitors argued that the position of the solicitors and the directors was "closely analogous" to that of concurrent tortfeasors, that both claims arose out of the same transaction and that therefore the claim against the solicitors should be barred.

439. Robert Walker LJ held at p.74 that, on the pleaded cases, the directors and solicitors were not in a position closely analogous to concurrent tortfeasors. The pleaded causes of action were different and it was not obvious that the claim against the solicitors might not exceed the claim against the directors. Accordingly, the claim was not barred by the settlement. However, he added:

> ". . . I would not exclude the possibility of the [*Jameson*] principle being extended to closely analogous situations (although where the two actual or potential defendants are not liable in respect of precisely the same damage, abuse of process may be a safer

> foundation for the court to restrict further proceedings. . .)" (At p.74).

440. This *dictum* was approved in *Ogle v Chief Constable of Thames Valley* [2001] EWCA Civ 598. In that case, the appellant had been disqualified from driving for a period which was incorrectly recorded on the Police National Computer Record. By reason of the error he was incorrectly arrested on suspicion of driving whilst disqualified and was detained for some two and a half hours before being released. He settled a claim for wrongful arrest with the Surrey Police and sought to bring a second claim against the Thames Valley Police pursuant to section 22(1) of the Data Protection Act 1984.

441. It was held per Simon Brown LJ at [10] that:

> '…even if strictly the two Forces here are not to be regarded as concurrent tortfeasors, in my judgment they are plainly in a very closely analogous position, and I would regard the case as falling completely within the dictum of Robert Walker LJ in [*Kenburgh* – quoted above].'

442. Mance LJ said of the passage cited from *Kenburgh* that "it identifies the merging of the area of the law considered in Jameson into a wider principle of abuse of process." (At [32]).

443. The applicability of the *Jameson* principle beyond claims against concurrent tortfeasors was also considered in *Clark v Meerson* [2018] EWHC 142 (Ch). There, a liquidator brought claims against a company's former director and secretary. The claim against the director was for breach of fiduciary and statutory duties in causing or permitting the company to make certain payments, including alleged dividend payments to the secretary. Further or alternatively, the liquidator sought to recover the alleged dividends from the secretary as void payments under s. 127 IA86.

444. The court held that the claims against the director had been settled pursuant to a Part 36 offer prior to commencement. However, this settlement did not bar the claim against the secretary. Deputy Registrar Mullen said at [48] – [49]:

> "[48] It seems to me that the real question is whether the settlement with Mr Meerson falls within the Jameson v CEGB principle so as to bar the claim against Mrs Meerson. I do not think that it does. It is not a case which is 'closely analogous' to the position of the concurrent tortfeasors in Jameson. The claim against Mr Meerson, as put in the correspondence leading to the settlement, was different from the claim as it is now put against Mrs Meerson. The claim against Mr Meerson was put on the basis that he caused or allowed the payments to be made in breach of his duties to the company. It was essentially a claim that he account to or compensate the company for the loss said to have been caused. That against Mrs Meerson is for recovery of the allegedly void payments themselves. In such cases the restitutionary remedies may be proprietary. Those are separate causes of action potentially leading to different forms of relief. Nor did the liquidator's offer of settlement to Mr Meerson

> purport to be in full satisfaction of his claims in relation to the Alleged Dividend Payments. It was expressed to be a settlement of the whole of the claim against Mr Meerson, not the separate claim against Mrs Meerson.
>
> [49] I do not see that the mere fact of a settlement of a claim against Mr Meerson as director for breach of duty in allowing allegedly void dispositions of company property to be made can have he effect of barring a claim to recover the property from its recipient."

445. *Clark v. Meerson* was considered by HHJ Paul Matthews sitting as a High Court Judge in [2018] EWHC 2168 (Ch). After a detailed review of the authorities, he said this:

> '75. I now return to the decision of Deputy Registrar Mullen in *Clark v Meerson* [2018] BPIR 661 . As I have said, a company in liquidation claimed against its director for breaches of fiduciary and other duties in permitting certain payments to be made by the company, including payments to the director's wife. The company also made a claim against the wife as the recipient of the payments. The deputy registrar held that the company's *133 claim against the director had been compromised in correspondence. But that left the claim against the director's wife. It was argued that the Jameson principle applied to the settlement with the director so as to bar the claim against his wife. The deputy registrar, after considering the *David Yablon Minton* case held that it did not.
>
> 76. He said, at paras 48–49 [I have set these out above]:
>
> 77. As to the point made in para 49 of the judgment, I am afraid that I respectfully disagree with this as a matter of principle. It must at least depend on the facts. For example, if the claim against the director were for a breach of duty in making a payment of £100,000 to a third party which was rendered void by section 127, and the director settled the claim by paying £100,000 to the company, I do not see how (absent some special circumstances in which further losses were caused) the company could then make a further claim against the third party. Any recovery from that third party would mean the company recovering more than it had lost. Then, if instead the director compromised the claim by paying £90,000 to the company, the liquidator being prepared to accept less than the nominal value because of (say) litigation risk, the question would arise as to whether the whole of the claim in respect of the void payment had gone or not. That would be a matter of intention, to be resolved by construction of the settlement agreement. If on its true construction the agreement is that the whole of the claim has gone, it seems to me that the same conclusion follows, in accordance with the principles set out by Lord Bingham in *Heaton's* case [2002] 2 AC 329 .
>
> 78. The other point is whether the situation in which a claim arises against a company director for breach of duty in making a

> disposition of the company's property which is then rendered void by section 127 and the situation in which a claim arises against the recipient for the return of that property can be regarded as "closely analogous" (as the deputy registrar puts it, borrowing from the language of Robert Walker LJ in the *David Yablon Minton* case [2001] BPIR 64). The deputy registrar says [2018] BPIR 661, para 48 that they cannot, as the two situations involve "separate causes of action potentially leading to different forms of relief".
>
> 79. For my part, I would not accept that this was a sufficient reason. In many cases the two claims are two sides of the same coin. The loss to the company is caused by the disposition of its property. The director causes the disposition to take place. The recipient receives the property. Here there is in principle no difference between the value of the payment made to the recipient and the loss caused to the company by the acts of the director. If a trustee were to dispose of trust property in breach of trust to a person not entitled, the situation in which the claim against the recipient for the return of the property (or its value) arose would in my judgment be "closely analogous" to the situation in which the claim against the trustee arose for having committed the breach of trust in disposing of the property in the first place. As Robert Walker LJ says, it is a question whether the situations of the claims are closely analogous, not the claims themselves.
>
> 80. At least where a payment is made without consideration I cannot see that the position in the case of a company and its director should be different. The mere fact that the claim against one may be proprietary (to obtain the return of that property) and against the other may be personal (because the director or trustee does not have the property to return) in my judgment does not prevent the situations of the two claims from being "closely analogous". They arise from the same acts (payment by the company) and repair the same loss. However, I accept that dispositions to the company's own creditors amounting to preferences are different (as the Court of Appeal held in the *David Yablon Minton* case), because then no loss is caused to the company by the disposition. The loss is to those creditors who are not preferred. In such a case, the situations of the claims against the director and against the recipient are not "closely analogous".'

446. HHJ Matthews' analysis was *obiter* because he held on other grounds that the settlement in question specifically preserved the claim he was considering. However, his consideration was careful and detailed and I agree with it, certainly to the extent that the "closely analogous" principle cannot be excluded purely on the basis that the causes of action are different or different in nature (proprietary v. personal). However, this cannot be pressed too far, because it is ultimately based on the judgment of Robert Walker LJ in *David Yablon Minton* who himself had only said that he would not exclude the possibility of the "closely analogous" principle (albeit that it has been applied in *Ogle*, in a situation the Court thought was a clear one) and that where the successive

wrongdoers are not liable for precisely the same damage, abuse of process may be the more relevant analysis.

447. In *Re Overnight* [2010] EWHC 613 (Ch); [2010] B.C.C. 796 which was a claim for fraudulent trading, the court considered the nature of liability under section 213(2) IA 1986.

448. At [29], Roth J considered the judgment of Park J in *Re Continental Assurance Co of London Plc (in liq.)* [2001] B.P.I.R. 733, a wrongful trading claim under section 214 of the 1986 Act. Where such an application was made against more than one respondent, Park J rejected the proposition that the starting point should be one of joint and several liability since the wording of the section:

> "concentrates individually on each director who is a respondent to an application by a liquidator…
>
> … [T]he initial duty of the court where it finds that liability exists on the part of two or more respondents is to determine in the case of each respondent how much he individually ought to contribute." (At [386] – [387]).

449. Applying this reasoning, Roth J said at [30]:

> "30. The wording of s.213 is different from s.214 in that the statutory jurisdiction under the former is addressing "persons" in the plural rather than a single "person". But the reference in s.213 to "contributions" is in my view a clear indication that the contribution need not be the same for each respondent. I think it would be surprising if the 1986 Act sought to prescribe a different approach in a fraudulent trading case within s.213 from that in a wrongful trading case within s.214. The fact that immediately adjacent provisions in the statute adopt almost identical wording is in my view a strong indication that, as a matter of interpretation, no such distinction is intended."

450. He noted (at [32]) that:

> "It is clearly possible for the court to determine that several respondents should all be jointly and severally liable for the full loss caused to the creditor(s)."

451. Thus Roth J's reasoning was that in the context of ss. 213 and 214 IA86 the contributions of different respondents may be different, or they may both be jointly and severally liable for the full loss. It depends on the facts.

<u>The terms of the Settlement Agreement</u>

452. The relevant parts of the Milner Settlement Agreement are as follows.

453. Recitals (C) and (D) stated that:

> "(C) Pursuant to an Application Notice dated 30 January 2019 the Liquidators brought claims against Mr Milner and Mrs Milner alleging misfeasance, dishonest assistance and/or knowing receipt, conspiracy, transaction at an undervalue, and wrongful and fraudulent trading.
>
> (D) Without admission of liability the parties have agreed terms in respect of a full and final settlement of the Claims (as defined below), and this Agreement sets out the terms upon which the parties agreed a full and final settlement of the Claims."

454. "The Claims" were defined as:

> "any claim that the Company and/or the Liquidators may have, inclusive of interest and costs, against Mr and Mrs Milner in respect of the Application Notice dated 30 January 2019 with allocated claim number CR-2019-000812 and any other claims the Liquidators or the Company may have against Mr and Mrs Milner howsoever arising whether the Liquidators are currently aware of them or not."

455. "The Respondents" were defined as the respondents to the application notice with claim number CR-2019-000812. "The Settlement Monies" were defined as the sum of £190,000. Clause 1.3 provided that the contents of the headings did not affect the interpretation or construction of the settlement agreement and, by clause 2, the agreement was fully and effectively binding from Completion, which was defined as the date of the agreement.

456. Clause 3 of the Settlement Agreement, which was headed "Settlement and Default", stated as follows:

> "3.1 The Parties have agreed to settle the Claims on the following terms:
>
> > 3.1.1 Mr Milner and Mrs Milner shall pay or cause to be paid the Settlement Monies in cleared funds by way of a lump sum payment of One Hundred and Ninety Thousand Pounds (£190,000) to the Client Account on or before 18 September 2019;
> >
> > 3.1.2 Mr and Mrs Milner shall provide to the Liquidators' Solicitors, upon Completion, copies of all such information and documents they hold relating to the assets of David Clarkson, including but not limited to all bank account statements they may have in their possession or control; and
> >
> > 3.1.3 Mrs Milner has agreed to give evidence in support of the Company and/or the Liquidators' claims as detailed in the Application Notice dated 30 January 2019 with allocated claim number CR-2019-000812, and has agreed to provide, within 14 days of being

> requested to do so by the Liquidators or the Liquidators' Solicitors, a witness statement setting out details of the Respondents' involvement in the Company.
>
> 3.2. If the Settlement Monies are not paid by 2 October 2019, the Liquidators shall be entitled to enter judgment against Mr Milner and Mrs Milner, on a joint and several basis, for the sum of £3,193,109.81 together with interest thereon as from the date of default at the rate of 3% per annum."

457. Clause 4.1 provided that:

> "Upon receipt of the Settlement Monies in the Client Account, and upon receipt of the documents under clause 3.1.2, and upon receipt of the witness statement under clause 3.1.3 the Liquidators and the Company each agree to accept payment of the Settlement Monies, the documents under clause 3.1.2 and the witness statement under clause 3.1.3 in full and final settlement of the Claims."

458. Clause 5.1 was headed "Agreement not to sue" and provided that:

> "Subject to receipt of payment in full of the Settlement Monies, the documents under clause 3.1.2, and the witness statement under clause 3.1.3, each party agrees not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any other party any action, pursuit or other proceeding concerning the Claims in this jurisdiction, or any other. For the avoidance of doubt this shall not affect the parties to this Agreement's rights to enforce the terms of this Agreement."

459. Clause 6.1 provided that "This Agreement is intended to resolve finally the rights and liabilities of the parties in connection with the Application…" Clause 6.2 provided that:

> "Each party acknowledges that it has not relied upon or been induced to enter into this Agreement by a representation except to the extent that the representation is expressly stated in this Agreement. No party should be liable to any other party (in equity, contract or tort under the Misrepresentation Act 1967 or in any other way) for representation that is not expressly stated in this Agreement. This clause does not affect a party's liability in respect of a fraudulent misrepresentation or its own wilful default in this regard."

460. By clause 7.2 each party warranted and represented to the other with respect to itself that it had the full right, power and authority to execute, deliver and perform this Agreement.

The parties' submissions

461. The Applicants' position is that the Settlement Agreement does not affect the claims against the remaining Respondents, either in respect of liability or quantum. Counsel for the Applicants argued that

    i) The common law rule, that the release of one joint tortfeasor discharged all others, applied only in relation to joint tortfeasors;

    ii) The Applicant's case was that the Milners were joint tortfeasors with Mr Clarkson and Paul Clarkson in conspiracy, but not with the other Respondents in relation to any other claim;

    iii) Although the rule might extend to other "closely analogous" claims, the other claims in this case were not capable of falling within the extended rule. In relation to misfeasance and dishonest assistance, the claims concern specific assistance offered by the relevant individuals. The claims for transactions at an undervalue concern different and distinct transactions. In relation to wrongful trading and fraudulent trading, each person's involvement and liability must be considered separately (*Re Overnight*).

    iv) Even if the common law rule was engaged, the starting point for the Court was to determine the proper meaning of the Settlement Agreement in its appropriate factual context to ascertain whether it operated as a discharge against any of the remaining respondents (*Heaton v Axa*). He argued that, whether as a matter of construction or implication, it was clear that it did not.

462. Counsel for the Applicants relied on the fact that the claims were defined as the claims against the Milners only. Further, pursuant to clauses 3.1.2 and 3.1.3 of the agreement, Lillie Milner had agreed to assist the liquidator by providing evidence in support of his claims and information in relation to David Clarkson's assets. He argued that it could not have been the intention of the parties to settle all the claims brought against the remaining Respondents if, under the terms of the agreement, Lillie Milner was obliged to assist the liquidators in prosecuting those claims.

463. As to whether the claim against Mr Clarkson for conspiracy David Clarkson would be entitled to seek a contribution against Lillie Milner, Counsel for the Applicants argued that, if the Milners wished to protect themselves against such a claim, they would have been obliged to negotiate an indemnity.

464. Counsel for the Applicants also pointed to the fact that the settlement sum was less than £200,000 in the context of claims worth over £2 million; the Liquidators reached the settlement sum on a means basis and the Applicants never suggested by their conduct that they intended to release the claims against the other Respondents. The mere fact of the settlement with Paul Clarkson and Carole Clarkson was also indicative of the parties' belief that the remaining claims were extant.

465. As to the meaning of the Milner Settlement Agreement, Counsel for the Applicants argued that:

    i) Settlement agreements are to be construed in exactly the same way as other agreements. The first step was to ascertain the intention of the parties. If the intention is clear, as it was here, that the other claims should continue, the next step is to ask whether that could be derived from the terms of the agreement.

    ii) That was the exercise of contractual interpretation. It involved reading the words "*They have agreed to settle the claims on the following terms*…" as entailing an agreement not to sue as opposed to a release.

    iii) If it was not possible to read those words in that way, then the exercise of implication would come into play.

    iv) The test for an implied term is business efficacy, i.e. that a term is necessary to bring the contract into line with the intention of the parties as objectively determined from the wording of the agreement as it stands (*Marks & Spencer* at [22]). If it was not possible to interpret the Milner Settlement Agreement so as to conclude that it amounted to an agreement not to sue, it was necessary to imply such a term because otherwise clause 3.1.3 would be deprived of any point whatsoever.

466. Counsel for the Applicants relied on *Watts v Aldington*, submitting that in that case the Court of Appeal had to determine a similar question, namely whether a settlement with one joint tortfeasor operated as a release. The Court of Appeal had held that it was a relevant factor that the agreed sum to be paid under the settlement was much lower than the total liability. In entering into the settlement, both parties knew that the claimant hoped to recover a higher sum from the other tortfeasor. That, Counsel for the Applicants said, had its parallel in this case: there would be no reason to seek information about Mr Clarkson's assets (under cl. 3.1.2) if the liquidator did not intend to pursue a claim against him.

467. Counsel for the Applicants noted that in *Watts* there was no indication that either of the parties to the settlement gave any thought to the possibility of contribution proceedings. The suggestion that the court should enquire as to whether the parties intended a possible contribution claim to survive gave the wrong emphasis to possible contribution proceedings.

468. Counsel for the Applicants further submitted that Settlement Agreement did not fix the Applicants' loss.

469. Counsel for David Clarkson argued that the true effect of the Milner Settlement Agreement was to compromise the Applicants' claims against the Milners in full and final settlement of those claims; and to release the Milners from any liability in respect of those claims, including the liability to make a contribution to any other Respondent.

470. He pointed to the fact that the agreement contained no reservation of the Applicants' right to proceed against the remaining Respondents. The agreement was titled "Settlement Agreement and Release" and it contained various clauses which stated that it was entered into in full and final settlement of the claims, as defined in Recital (C) and clause 1.1.1. Clause 5 contained an agreement not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any other party any action, pursuit or other proceeding concerning the Claims in this jurisdiction. That clause, Counsel for David Clarkson submitted, should be read as prohibiting not merely claims made by the Applicants, but also claims which might lead to other claims being commenced against the Milners, including contribution claims.

471. Turning to the law, Counsel for David Clarkson accepted that a court could conclude, as a matter of construction, that a settlement agreement is a covenant not to sue rather than a release of the claim as against the other defendants. However, he argued that where there is no express reservation of the right to sue the remaining tortfeasors, such a term would not readily be implied. The effect would be to undermine the full and final settlement intended.

472. Counsel for David Clarkson submitted that:

    i) The modern approach is to be found in *Gladman Commercial Properties v Fisher Hargreaves Proctor* rather than *Watts v Aldington or Gardiner v Moore*;

    ii) In *Gladman* it was held that the normal legal effect of a discharge as against one joint tortfeasor was to discharge all. In this case the parties could be taken to have understood these consequences, particularly since they were legally represented (as in *Gladman*).

    iii) There was therefore no need for the Settlement Agreement to contain an indemnity or an express covenant not to sue the other joint tortfeasors for it to take effect as a release, rather than as a covenant not to sue.

    iv) Following the decision in *Marks & Spencer*, it would be a difficult task to persuade the court that a reservation of the right to sue should be implied. That would go against the essence of such an agreement. In the present case, it would be wrong to imply a reservation of the right to sue because that would be contrary to the express words of the agreement.

473. On the Respondents' case, the joint claims in this action were the claims for equitable compensation for misfeasance, breach of duty and damages for conspiracy (it may be noted that these claims are not made against Mr Arnison or Belmonte and submissions on their behalf focused on the "closely analogous" principle).

474. Counsel for David Clarkson distinguished the remaining claims, namely the transaction at an undervalue claim, the constructive trusteeship claim, the wrongful trading and the fraudulent trading claims. He submitted that:

    i) They were claims in respect of which liability is joint and several;

ii) Alternatively, they were claims in respect of the same damage claimed against the Milners; or

iii) They were closely analogous to claims made against the Milners.

iv) The claims in constructive trusteeship and for transactions at an undervalue were closely analogous to the claims for misfeasance. For example, if there was a claim in misfeasance against the Milners and David Clarkson in respect of payments to Hectary, then the claims against David Clarkson personally, as the recipient of those monies, would be the other side of the same coin.

v) In respect of the wrongful and fraudulent trading claims, those were claims in respect of the same losses claimed against the Milners, since they were claims for the losses suffered by ELC.

475. In respect of all these claims Mr Pomfret relied on *Heaton v AXA* as setting out the applicable principles. Where there is accord and satisfaction with one tortfeasor and others are liable in respect of the same loss, he submitted that:

i) The question is whether the settlement has fixed the full value of the claimant's loss.

ii) If it has, the remaining claims are barred.

iii) This is a question which must be determined by interpreting the settlement agreement.

iv) Where such an agreement contains a release, it would be undermined if a contribution could be claimed against the settling parties.

476. Counsel for David Clarkson argued that in the present case the Settlement Agreement is a full and final settlement of the Applicants' claims and a release on its face. That being so, it is for the Applicant to show that the other claims are not barred.

477. In relation to Counsel for the Applicants' point in relation to clauses 3.1.2 and 3.1.3, Counsel for David Clarkson said that it was clear from the agreement as a whole that it was a release. Those clauses must be construed and interpreted in that context; Lillie Milner could not have been obliged to give assistance in relation to claims for which she might incur a contribution liability, because that would be inconsistent with the rest of the agreement. Those clauses could only contemplate claims for which Lillie Milner could not be liable, which might include (for example) potential directors' disqualification proceedings or claims not involving her which could be introduced by amendment.

478. Counsel for Mr Arnison adopted Mr Pomfret's submissions. He added that the claim for dishonest assistance was the other side of the coin for the breach of duty claim, and hence in the "closely analogous" category. He also noted that, whilst Mr Clarkson was named specifically in the Settlement Agreement, Mr Arnison and Belmonte were not.

479. In reply, Counsel for the Applicants responded to the argument in relation to clause 3.1.3 of the agreement, that all of the claims as set out in the Points of Claim would be impacted by a release and that, as at the date of the Milner Settlement Agreement, the Points of Claim had already been served, so it followed that clause 3.1.3 clearly referred to the claims as formulated in the points of claim.

Assessment – the key legal point

480. I think the central point of law is as follows:

    i) As noted above, the position of the Respondents was that insofar as one is dealing with joint tortfeasors the test was that for *implication of a term*: given a release in a settlement against some joint tortfeasors, would a term be implied permitting the claimant to carry on its claims against other joint tortfeasors who were not party to the settlement? They bolstered this by reference to the common law rule.

    ii) Relying in particular on *Gladman*, to which I have referred above, and the clarification in *Marks & Spencer v. BNP Paribas* [2015] UKSC 72 as to the test for implication of a term, they submitted that it was "difficult to see how a reservation of a right of action against others jointly liable can ever be implied into a release."

    iii) They submitted that in relation to concurrent tortfeasors the issue was one of *interpretation* of the settlement agreement, to determine whether the settlement fixed the full measure of loss.

481. As I understood the submissions of Counsel for the Applicants, it was their position that the matter was one purely of interpretation, whether one was dealing with joint or joint and several tortfeasors.

482. In relation to the situation of joint tortfeasors, I accept the position of the Respondents that the test is that of implication of a term. In my view *Gladman* in particular makes this clear.

483. However, that does give rise to a difficulty, which does not appear to be covered by the case law to which I was referred, because the present situation concerns a settlement of a number of different claims against multiple defendants, where some would give rise to joint liability and others to joint and several liability (although the parties did not agree which claims were in which category).

484. However, the Milner Settlement Agreement does not distinguish between the claims in this way, so while in one sense a principled solution might be to apply the implied term standard with the joint liability claims and address the concurrent liability claims by way of interpretation, a conclusion that they should be treated differently in terms of whether they can proceed against the remaining Respondents would seem unlikely to have been intended.

Application to the facts

485. In my view, even if I were to apply the strict test for implication of a term in relation to all the causes of action, I would reach the conclusion that a term should be implied so that the Applicants were able to continue to pursue all the claims against all the remaining Respondents:

    i) While recognising the force of the common law rule and the generally strong expectation that claims against joint tortfeasors would be released, a powerful and indeed in my view overwhelming factor in the other direction is clauses 3.1.2 and 3.1.3.

    ii) Those clauses clearly and explicitly contemplate the continuation of the claims against the other Respondents.

    iii) Clause 3.1.3 is about the provision of assistance by Lillie Milner for the continued pursuit of the claims in the proceedings as they stood at the time of the settlement agreement.

    iv) Counsel for David Clarkson's submission that that clause might relate to other matters such as claims that could be formulated against the other Respondents by way of an amendment to the pleadings, or a director's disqualification, is fanciful and quite plainly not what was meant, or in the contemplation of the parties.

    v) Whether one applies the officious bystander test or the business necessity test, a term permitting the continuation of the claims against the other Respondents ought to be implied on this basis alone.

486. However, the surrounding context also provides further support for this conclusion:

    i) The settlement with the Milners was being made on a means basis (notwithstanding that the Milners may have been able to mislead the Applicants as to what their means in fact were, the *basis* was part of the common intention and understanding).

    ii) The settlement amount was a small proportion of the total claims.

487. As to the means basis, I think that:

    i) It has the effect of undermining, in the present case, the reason why the common law rule usually has major significance, as addressed above, i.e. that if claims are allowed to carry on against other joint tortfeasors then a contribution may be sought by them against the ones who have settled, inconsistently with a full and final settlement.

    ii) But if the settling joint tortfeasor has already paid out all that they can, then they have less and perhaps nothing to fear, financially at least, from a contribution claim.

iii) Counsel for David Clarkson sought to argue that the point cuts both ways and that a joint tortfeasor who settles on a means basis might be concerned to protect what little they might have left. I think that is much less likely. The point is in the Applicants' favour, in my view.

488. On this basis, it may not strictly be necessary to decide whether, for the purposes of those claims which would result in joint and several liability, the settlement agreement fixed the full measure of ELC's loss, but in my view it is obvious that it did not, and for very similar reasons to those I have just given: it was for much less than the total claims and made on the pragmatic basis that it was all that could be had from the Milners. I have to say that I did not understand on what basis it was argued by the remaining Respondents that the settlement did fix the full measure of the loss.

489. This also makes it unnecessary to determine which other claims in the proceedings might be closely analogous to those joint and several tort claims. I have said above that I agree with HHJ Matthews in *Officeserve* that it is not just a matter of looking at the cause of action, and with his analysis that a proprietary remedy against a recipient of a wrongful payment out of a company may properly be regarded as closely analogous to a personal claim for arranging the making that payment, on the basis that it is the other side of the coin. But there are so many possibilities with the different Respondents, and the different claims against them that I do not think it is appropriate or wise to try to reach subtle legal conclusions when it does not matter, in an area of the law which is clearly relatively undeveloped, as was indicated by Robert Walker LJ in *David Yablon Minton*.

490. I have to say that I am not sorry to reach the conclusion that the claims against the remaining Respondents are not barred by the Milner Settlement Agreement. It is a just result and I think (although this is not the rationale for my decision) that it was obvious to all concerned that there was an oversight by the Applicants in not including an express provision preserving the right to continue against the other Respondents. It is also a more harmonious result in the sense that it would, for reasons I have identified above, have been jarring if some claims could have continued (those giving rise to joint and several liability) while others were barred (those giving rise to joint liability). That is plainly not what was intended.

CONCLUSIONS

491. My conclusions are as follows:

i) The claims against David Clarkson succeed:

a) He is liable for fraudulent trading;

b) He was a *de facto* director;

c) He is liable for breach of the duties arising from his *de facto* directorship;

d) He is liable for wrongful trading;

e) The payments to him were transactions at an undervalue;

f) He is a constructive trustee of the moneys paid to him by ELC.

ii) The claims against Mr Flaton all fail.

iii) The claims against Mr Arnison and Belmonte all fail.

iv) The Milner Settlement Agreement does not preclude any of the claims against David Clarkson and would not have precluded any of the claims against Mr Flaton, Mr Arnison or Belmonte, had those claims otherwise been successful.

RELIEF, FURTHER HEARING

492. There will need to be a further hearing to determine what relief I should give. There was not time at the trial to argue out what relief would be appropriate in all the many scenarios of the claims succeeding or failing, or for submissions about what allowance if any should be made for the sums paid under the Milner Settlement Agreement or the settlement with Paul and Carole Clarkson.

493. At the same hearing I will deal with costs and any applications for permission to appeal.

494. In the mean time I direct that the time for seeking permission to appeal and for filing any Notice of Appeal shall not start to run. The parties will please submit an agreed Order formalising that.