Neutral Citation Number: [2024] EWHC 2122 (Ch)

Claim No: PT-2021-001033

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 14 August 2024

Before :

DAVID STONE
(sitting as a Deputy High Court Judge)

- -

Between :

(1) TIMOTHY FULSTOW

(2) ROBERT WOODS

Claimants

- and –

JEREMY FRANCIS

Defendant

- -
- -

Mr James Petts (instructed by **Murray Hay Solicitors**) for the **Claimant**
Ms Georgia Purnell (instructed by **DAC Beachcroft**) for the **Defendant**

Hearing dates: 10, 11, 12, 14 and 19 June 2024

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APPROVED JUDGMENT

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

This judgment is to be handed down by the deputy judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 14 August 2024.

David Stone (sitting as Deputy High Court Judge):

1. The Claimants, Mr Timothy Fulstow and Mr Robert Woods, claim declarations as to their beneficial interest in shares in Capital Land (EDA) Swindon Limited (**Capital Land**) held by the Defendant, Mr Jeremy Francis. Capital Land owns development land near Swindon known as New Eastern Villages (**NEV**). The NEV project is described as "the largest and most important urban regeneration development within the UK" – it is intended to include up to 12,000 homes.

2. It is not contested that Mr Fulstow organised a payment of £35,000 on 30 November 2015. It is also not contested that Mr Woods paid £25,000 on 30 November 2015. What is hotly contested is what those payments were for (and, in the case of Mr Fulstow, by whom the payment was made). This case is therefore largely about the events leading up to and following those two payments.

3. Mr James Petts instructed by Murray Hay Solicitors appeared for the Claimants. Ms Georgia Purnell instructed by DAC Beachcroft appeared for the Defendant.

The Parties' Positions in Outline

4. The Claimants' position at trial was that following a number of meetings and telephone calls in the days prior to 30 November 2015, Mr Francis made declarations of trust in the Claimants' favour in consideration of the sums they invested in Capital Land. The Claimants say that these declarations of trust were made in two emails from Mr Francis on 29 November 2015, in terms that differed only as to the amounts to be paid, and the percentage shareholding to be granted (Mr Fulstow's email included the higher payment and the higher percentage shareholding). The emails read:

> "Further to our telephone conversation and various discussions concerning the above I can confirm that I have agreed to provide you with a 25%/7% shareholding (or other such arrangements as may be agreed between us in lieu of this) in [Capital Land].
>
> I can confirm that upon receipt of £35,000/£25,000 into the account of Capital Land Property Group Limited I will hold 25%/7% of the shares in [Capital Land] on Trust for you or your nominee and prepare the relevant share transfer form to be held to your order, a copy of which will be emailed to you upon receipt of the funds."

5. The email to Mr Woods was copied to Mr Fulstow, but the email to Mr Fulstow was not copied to Mr Woods.

6. The Claimants seek declarations of their respective beneficial interests in the shares of Capital Land and an order that Mr Francis execute a stock transfer form transferring to them the shares in which they claim beneficial ownership. In addition to the 25% and 7% of the shares in Capital Land, the Claimants also

claim 25% and 7% respectively of B preferred ordinary shares issued in Capital Land to Mr Francis on 10 June 2016 based on Mr Francis' duties as a trustee of the shares and the rule against self-dealing.

7. Mr Francis denies the claim on the following bases:

   i) There was no intention to create legal relations between the parties until such time as the position in relation to a series of connected property investments had been resolved. This did not happen, and so no binding agreement was ever reached. The email of 29 November 2015 was intended to mean that Mr Francis would not dispose of or encumber his shares without notice to the Claimants;

   ii) Even if there was an intention to create legal relations, any agreement would be void for uncertainty because none of the primary terms had been agreed. Alternatively, any interest which the Claimants may have obtained was conditional on Mr Fulstow's bringing further investment to Capital Land, which he never did;

   iii) Mr Fulstow has no standing to bring the claim, since he was acting on behalf of a Marshall Islands company, Carina Limited (**Carina**), which has been dissolved, its assets having been transferred to PH Gold Limited (**PH Gold**), a company based in Cyprus;

   iv) In the alternative, Mr Francis relies on the doctrine of laches as debarring an order for specific performance;

   v) In any event, the shares cannot now be transferred to the Claimants because Capital Land's articles of association have since been amended to require the consent of subsequent investors before any shares can be transferred; and

   vi) Mr Francis also says that the £35,000 provided at the behest of Mr Fulstow included £10,000 as a loan in connection with a valuation to be undertaken on a different project, referred to in the evidence as the Blunsdon project.

8. The claim was initially issued, without the benefit of any pre-action correspondence, against Mr Francis and Capital Land. The Claim was wrongly issued by the Claimants under Part 8, and then moved to Part 7. On 3 February 2022, the (then) Defendants issued an application:

   i) to strike out the claim against Capital Land on the basis that no cause of action was pleaded against Capital Land; and

   ii) to strike out the claim advanced by Mr Fulstow against Mr Francis on the basis that in November 2015, Mr Fulstow was acting for and on behalf of Carina and hence Mr Fulstow did not have standing to bring the proceedings.

9. The Claimants discontinued the claim against Capital Land on 13 April 2022. The Defendant's strike out application against Mr Fulstow failed.

10. I was told by the Claimants that the shares in issue are now worth approximately £8,000,000.

Applications

11. There were several applications made on the first day of the trial:

    i) The Claimants sought relief from sanctions for a late filed disclosure certificate – this was not resisted, and I granted relief from sanctions;

    ii) The Claimants sought relief from sanctions for the late filing of a fifth witness statement of each of Mr Fulstow and Mr Woods – this was resisted, and, having heard from the parties, I denied relief from sanctions and declined to admit the witness statements – I discuss these witness statements further below;

    iii) The Claimants sought relief from sanctions for the late filing of the trial bundle – again, this was not resisted, and I granted relief from sanctions;

    iv) The Defendant applied, without the benefit of an application notice, for a determination by the Court in relation to Mr Fulstow's agency on behalf of Carina – after addresses from both counsel, this application was not pressed; and

    v) The Defendant applied, again without the benefit of an application notice, for a declaration that privilege had been waived in certain documents relating to advice given by one of the Claimants' former barristers, Mr Erol Topal. Whilst it was not contested that privilege in some documents had been waived, waiver was resisted in relation to others. On this application, it took several days for the potentially relevant documents to be identified. When they were, I determined that privilege had been waived for the reasons I gave at the time, and the documents were provided by the Claimants to the Defendant on the third day of the trial.

12. Thus, as the first day of the trial was occupied with applications, evidence was unable to start until the second day. In the end, the trial ran over, and the court needed to reconvene the following week for a full day for closing speeches.

13. Further, during the trial, Mr Francis found in his home office a series of books referred to in the proceedings as "day books". These included notes of Mr Francis' meetings and thoughts in roughly date order – although not comprising a diary in the traditional sense of that word as the pages were not printed with dates. Mr Francis described them as like scrapbooks and as common practice in his industry. Having discovered these documents, Mr Francis disclosed copies which were redacted for relevance and privilege.

14. I was asked to deal with several procedural issues concerning the redactions. To provide time for counsel for the Claimants to review the entries, cross-examination of Mr Francis was delayed. In the end, Mr Francis was taken to various pages of the day books, and counsel for the Claimants made submissions in relation to them.

15. It is, of course, regrettable that the day books were not located earlier. However, I accept Mr Francis' explanation that he had thought they were lost. Thus, whilst they ought to have been noted as such in Mr Francis' disclosure as irretrievable documents, I do not consider that omission to be worthy of sanction, and, indeed, I was not asked by counsel for the Claimants to sanction Mr Francis.

16. Counsel for the Claimants noted that a page of one of the day books had been removed – he asked Mr Francis if he had removed it, and Mr Francis replied that he had not. Having watched and heard Mr Francis give his answer under cross-examination, I accept his answer.

17. Following their review of the day books, the Claimants sought to adduce a sixth witness statement of Mr Fulstow. I admitted it for the reasons I gave at the time.

The Evidence

18. In addition to Mr Fulstow's sixth witness statement, the Claimants relied on three witness statements:

    i) A fourth witness statement of Mr Fulstow dated 14 February 2024;

    ii) A fourth witness statement of Mr Woods dated 14 February 2024; and

    iii) A second witness statement of Ms Connie Rodrigues dated 13 February 2024. Ms Rodrigues is a business consultant who at the relevant time worked for Conduit Asset Management (New Zealand), a company which no longer exists. In that role, Ms Rodrigues managed Mr Fulstow's finances.

19. I discuss these three witness statements in more detail below.

20. The Defendant relied on a single witness statement of Mr Francis dated 16 February 2024.

The Claimants' Witness Statements

21. On the first day of the trial an issue arose as to the weight I should place on three witness statements relied on by the Claimants. Counsel for the Defendant submitted that I should, of the court's own motion, strike them out (the Defendant had not filed an application to that effect). In the alternative, she submitted that I should accord them no weight, given the obvious failure to follow PD57AC (which deals with the preparation of trial witness statements). I declined to strike out the witness statements on the basis that that would leave the Claimants without any evidence, or would require the testimony to be given orally, thus further prolonging the trial. Neither course would have furthered the

Overriding Objective. I did say that I would take the Defendant's submissions into account in assessing the weight of the evidence given.

22. PD57AC has applied to trial witness statements for use in the Business and Property Courts since 6 April 2021. Its provisions have been discussed at length elsewhere, but, importantly, it provides (relevantly):

> "A trial witness statement must set out only matters of fact of which the witness has personal knowledge that are relevant to the case, and must identify by list what documents, if any, the witness has referred to or been referred to for the purpose of providing the evidence set out in the trial witness statement."

23. Further guidance is given in the Statement of Best Practice, which includes (relevantly):

    i) Factual evidence should be "testimony as to matters of which [the witness has] personal knowledge, including their recollection of matters they witnessed personally";

    ii) "Any trial witness statement should be prepared in such a way as to avoid so far as possible any practice that might alter or influence the recollection of the witness";

    iii) "It will generally not be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraph 3.2";

    iv) "The document list to comply with paragraph 3.2 of Practice Direction 57AC should identify or describe the documents in such a way that they may be located easily at trial";

    v) "Trial witness statements should not … seek to argue the case … set out a narrative derived from the documents … or include commentary on other evidence in the case"; and

    vi) "The preparation of a trial witness statement should involve as few drafts as practicable".

24. Still further, various judgments of this court have provided more detailed guidance on PD57AC: *Blue Manchester Ltd v BUG-Alu Technic GmbH* [2021] EWHC 3095 (TCC); *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC); *Greencastle MM LLP v Alexander Payne and ors* [2022] EWHC 438 (IPEC); *Prime London Holdings 11 Ltd v Thurloe Lodge Ltd* [2022] EWHC 79 (Ch); *Curtiss v Zurich Insurance Plc, East West Insurance Company Limited* [2022] EWHC 1749 (TCC); *Cumbria Zoo Company Ltd v The Zoo Investment Company Ltd* [2022] EWHC 3379 (Ch); *Bastholm and others v Peveril Securities (Dalton Park Retail) Ltd and others* [2023] EWHC 438 (Ch); and *McKinney Plant & Safety Ltd v The Construction Industry Training Board* [2022] EWHC 2361 (Ch).

25. It was plain to me from an initial review of the papers prior to the trial that the three trial witness statements had not followed PD57AC. This was for two primary reasons.

26. First, on their face, the witness statements were clearly inadequate. To list some examples of the clear failures to comply with PD57AC:

    i) None of the witness statements includes the witness's confirmation of compliance;

    ii) Ms Rodrigues' witness statement does not include a solicitor's Certificate of Compliance;

    iii) None of the witness statements includes a list of documents to which the witness was referred;

    iv) Ms Rodrigues' witness statement is a recitation of events based on the documents, seeks to argue the case, and comments on other evidence in the proceedings (for example, she writes "I do not believe that the company [PH Gold] is relevant in this instance as the First Claimant acted in his personal capacity with regards to the 30th of November 2015 investment");

    v) Mr Fulstow's witness statement is a recitation of events based on the documents, seeks to argue the case, and comments on other evidence in the proceedings (for example, he writes "Defence is relying on the fact that it was an offshore company, [Carina], that invested the aforesaid £35,000 in [Capital Land], and that I was only acting as an agent: this is not the case"). Further, it includes legal submissions, and matters of which Mr Fulstow can have had no direct knowledge (for example, he purports to give evidence of an email sent from Mr Francis to Mr Woods, which was not copied to Mr Fulstow); and

    vi) Mr Woods' witness statement repeats the errors in Mr Fulstow's witness statement. It is very similar in its wording to Mr Fulstow's witness statement, and appears to have been copied from it. For example, both witness statements include the following odd statement:

        > "During the course of this litigation, I have been transparent, and I have disclosed all relevant information as part of initial disclosure and extended disclosure".

        Not only is that statement irrelevant, but its appearance in both witness statements strongly suggests the absence of independent creation as the result of an interview formed of open questions.

27. Some of these errors were pointed out to the Claimants in an email on 16 February 2024 from the Defendant's solicitors, who provided an opportunity for the Claimants to file fresh, compliant witness statements. The Claimants did not avail themselves of that opportunity.

28. Second, an unusual aspect of this case meant that I was able to see at least in part the process by which the witness statements had been written. For reasons that were not discussed at trial, the Claimants had waived privilege in significant quantities of correspondence between the Claimants and their legal advisors, and as between their legal advisors. I was therefore able to see from those documents the process adopted by the Claimants' solicitors. This included:

    i) The Claimants first instructed their solicitor, Mr Richard Rooney of Murray Hay Solicitors on 1 November 2021.

    ii) In evidence before the court was a draft statement apparently dated 16 November 2021 which was said to be the basis of Mr Fulstow's fourth witness statement. This was said to have been drafted by Mr Fulstow following the meeting with Mr Rooney, and was said to set out in his own language the relevant facts. Counsel for the Claimants submitted that the existence of this document, which was said to be in similar terms to Mr Fulstow's fourth witness statement, should give the court confidence that the fourth witness statement was accurate, and not corrupted by processes which PD57AC is aimed at preventing. I do not accept that submission, primarily because there was no evidence as to the background to the creation of the 16 November 2021 document. It was submitted that this was, in effect, Mr Fulstow's unvarnished narrative account of the relevant events. However, that is difficult to square with the fact that that document, on its face, refers to various emails and other documents, which are attached as "TF Exhibits". It is clearly not an independent recollection – but rather a recitation of the (then) written record with Mr Fulstow's added commentary, made after consultation with Mr Rooney. It is not signed, let alone signed under a statement of truth. Indeed, it is not even clear that Mr Fulstow wrote it. It is also materially different to Mr Fulstow's fourth witness statement. I do not consider that this document helps the Claimants.

    iii) In any event, Mr Fulstow's oral evidence about the preparation of his witness statement was internally inconsistent – under cross-examination he mentioned preparing his fourth witness statement in his apartment, but also that it was prepared in his solicitors' conference room, but that he was not asked any questions by his solicitor.

    iv) On 26 May 2022, Mr Rooney emailed Mr Fulstow and Mr Woods as follows:

> "Just as an aide memoire when doing your requested chronological statement (you too Robert [Woods]).
>
> Our Case
>
> [Mr Fulstow] and [Mr Woods] are the beneficial owner as of 29/11/2015 - and both are entitled to a declaration and a transfer of 25 ordinary shares to [Mr Fulstow] and 7 ordinary shares to [Mr Woods].

> 1st Question
>
> Whether FF [sic] and [Mr Woods] contracted with [Mr Francis] personally. [Mr Fulstow] only - whether you were acting as an agent for [Carina]?
>
> Question 2 Tim [Fulstow] only
>
> If Carina, had Tim [Fulstow] informed [Mr Francis] of this before the 19/11/2015.
>
> Question 3
>
> If [Mr Fulstow] was acting personally, how was the money from Carina accounted for?
>
> Possibilities include:
>
> - payment of monies owed to [Mr Fulstow] such as a dividend, directors loan account.
>
> - loan to [Mr Fulstow]. Would there need to be accounting under Marshall Island Laws to account for this loan?
>
> - payment on purchase/ assignment of the shares by Carina from [Mr Fulstow].
>
> Note
>
> If and only if, the shares were assigned /sold to Carina does [Mr Fulstow] need to show how they were transferred to P H Gold."

This email demonstrates the very behaviour that PD57AC is aimed at preventing. This was shortly before the Claimants' Re-Amended Particulars of Claim were filed, and some time before their fourth witness statements were signed. Mr Rooney's aide memoir is contrary to the PD57AC regime of not asking leading questions. It clearly would have the effect of "alter[ing] or influence[ing] the recollection of the witness". It was, in my judgment, a clear breach of PD57AC.

v) It is also plain to me that (for example) paragraph 6(a) of the Particulars of Claim dated 1 June 2022 (which concerned the meeting at Home House on 27 November 2015, to which I return below), is identical to the equivalent paragraph of Mr Fulstow's witness statement, which on its face was not signed until some two years later. It is clear to me that this paragraph of Mr Fulstow's fourth witness statement was copied from the pleadings, rather than being his independent recollection.

vi) Ms Rodrigues gave evidence that she discussed the contents of her witness statement one-to-one with Mr Fulstow, and then put it together.

29. For these reasons, I am unable to give the three witness statements any weight in these proceedings. In my judgment, Mr Fulstow's fourth witness statement was based heavily on advice received from his solicitors as to what he should and should not say. It is not his independent recollection of events. It is a carefully constructed analysis of the documents then available to the Claimants. I can place no reliance on it. Mr Woods' fourth witness statement was copied from Mr Fulstow's, and, again, does not represent his independent recollection of events. Ms Rodrigues' second witness statement is the result of what she was told by Mr Fulstow to say, and, again is not her independent recollection of events. Where the contents of these witness statements are not corroborated by other sources (such as contemporaneous documents), I can have no confidence that the statements are truthful.

30. As set out above, on the first day of the trial, permission was sought to adduce two further witness statements, one made by each of the Claimants. I refused permission for the reasons I gave at the time. The fifth witness statement of each Claimant was said to correct the procedural errors with the fourth witness statements of each Claimant. However, they did not. First, each fifth witness statement on its face did not provide the clarity needed. For example, Mr Fulstow's fifth witness statement said "This and my fourth witness statement were based on a combination of evidence obtained by means of an interview or interviews with my solicitors and, following the production of a draft statement by my legal representatives, further instructions provided to my solicitor by me". Mr Woods' fifth witness statement says the same thing. Neither statement is true, as it turned out, in relation either to each Claimant's fourth or fifth witness statement.

31. Second, email correspondence from the Claimants' solicitors stated that the Claimants' counsel (who appeared before me) had prepared the fifth witness statements "and the wording in these statements are [sic] his". This would render the fifth witness statements also not compliant with PD57AC if what purported to be the words of Mr Fulstow and Mr Woods were actually the words of their counsel. Following circulation of a draft of this judgment in the usual way, I received written submissions from the Claimants' counsel to the effect that the "e-mail [referred to immediately above] is mistaken insofar as it states that counsel for the claimant produced the substantive parts of the 5th witness statements of the claimants or that the wording in those parts were drawn by counsel." The Claimants' counsel then set out what he had produced (a template of a standard witness statement) and what he had not (the substantive words of the firth witness statements). It is unnecessary for me to reach a concluded view, including because counsel for the Claimants submitted that it would not make a difference to the outcome of the application to admit the fifth witness statements or the outcome of the trial. Again, Mr Rooney has not had an opportunity to explain himself so I will not reach any further conclusions.

32. The fifth witness statements did include a list of documents to which the witness had been referred, but in each case the list read:

> "1. 1st and 2nd Claimants' initial disclosure.
>
> 2. 1st and 2nd Claimants' extended disclosure.

3. All filed witness statement [sic] in these proceedings.

4. Pleadings in these proceedings.

5. The Defendants [sic] initial and extended disclosure documents."

33. The typographical errors appear in both fifth witness statements.

34. Counsel for the Claimants conceded that the list "ought to have been more detailed". That could best be described as an understatement: this list is clearly and blatantly non-compliant with PD57AC. The witnesses are in effect saying "we've looked at everything". That does not assist the court in weighing the witnesses' evidence. More specifically, the list does not comply with paragraph 3.5 of the Statement of Best Practice – "The document list … should identify or describe the documents in such a way that they may be located easily at trial".

Solicitor's Certificate of Compliance

35. As noted above, Ms Rodrigues' witness statement does not include a Certificate of Compliance signed by the Claimants' legal representative. There is a Certificate of Compliance at the conclusion of Mr Fulstow's and Mr Woods' fourth witness statements. That certificate, in identical terms in each case, is largely in the usual form, but mentions expressly that the purpose and proper content of trial witness statements "have been discussed with and explained to Timothy Fulstow, Robert Woods and Connie Rodrigues". Normally, only the relevant witness making the statement would be named. The Certificate is signed by Mr Rooney.

36. As will be apparent from what I have set out above, I consider Mr Rooney's declaration that the witness statements are PD57AC compliant to be false. He was not cross-examined before me, and so has not had an opportunity to explain himself. However, I cannot see on the basis of what is before me that Mr Rooney can have been satisfied that the purpose and proper content of trial witness statements and the proper practice in relation to their preparation had been explained to the three witnesses. I cannot see how he can have believed that the two (or three) witness statements complied with PD57AC – because they clearly and obviously do not, and any solicitor properly practising in this court ought to have known that.

Oral Evidence

37. Oral evidence was given by each of Mr Fulstow, Mr Woods, Ms Rodrigues and Mr Francis. Each was cross-examined.

Mr Fulstow

38. Counsel for the Defendant described Mr Fulstow's evidence as "evasive, contradictory and untruthful". She submitted that Mr Fulstow refused to answer direct questions, instead circling back to repeat points that he thought would advance his own case and the account of events set out in his witness statement.

She submitted that he did not give credible explanations for the contradictions between his case and the documentary evidence. Having seen and heard Mr Fulstow under cross-examination, I accept those submissions. As will become apparent, there are in this case considerable inconsistencies between the Claimants' stated case and the documentary record which remain unexplained. I, too, found Mr Fulstow's answers to questions to be evasive – he often avoided direct questions by giving hypothetical examples as responses. He was occasionally irritated, and frequently argumentative. When pressed, he often did not answer the question put but rather recited his version of his case. On one occasion when asked about a text he had sent to Mr Francis, my note of the evidence (there was no transcript) records Mr Fulstow as saying "you use words and you don't mean those words". Mr Fulstow's clear answers were those that aligned with his case theory – but when documents were put to him that did not align with his case theory, his answers were evasive. Counsel for the Claimants submitted that Mr Fulstow may have "got wrong" the answers to questions of mixed fact and law, but that he was not wrong about events. I also reject that submission. Having watched and listened carefully to Mr Fulstow in the witness box. I find myself unable to rely on Mr Fulstow's oral testimony where it is inconsistent with other evidence.

Mr Woods

39. I have set out above my conclusions on Mr Woods' fourth witness statement: it was not prepared independently from Mr Fulstow's. Counsel for the Defendant submitted that "Mr Fulstow has manipulated Mr Woods into going along with his narrative, contrary to [his] own true recollection of events and the documentary record". Having watched, and listened carefully to, Mr Woods under cross-examination, I agree with that submission. Under cross-examination, Mr Woods did not appear to have any independent recollection of events. He was unable to explain the inconsistencies between his testimony and the documents. In counsel for the Defendant's words, with which I agree, he "demonstrated a blinkered determination to be faithful to Mr Fulstow's … version of events". Therefore, again, I can only place reliance on Mr Woods' testimony where it is consistent with other evidence.

Ms Rodrigues

40. Counsel for the Defendant described Ms Rodrigues' evidence as "wholly incredible". Because she was ill, Ms Rodrigues did not attend in court, but was cross-examined by video link. Despite her illness, Ms Rodrigues was able to give evidence, and counsel for both sides confirmed following her evidence that they had no issues with the technical way in which it had been given. That said, I did not find Ms Rodrigues' evidence to be helpful. She argued the Claimants' case, regardless of the question asked of her. She denied being Mr Fulstow's mouthpiece, but she clearly gave the court the evidence Mr Fulstow had asked her to. This was apparent in her oral testimony and in the documents before me. For example, Mr Francis' solicitors wrote to Ms Rodrigues on 16 December 2022 with a series of questions. On 17 January 2022, Mr Fulstow emailed Ms Rodrigues the answers to those questions. On 19 January 2023, Ms Rodrigues provided answers to Mr Francis' solicitors in relevantly identical form to how Mr Fulstow had emailed the answers to her. Counsel for the Defendant

described Ms Rodrigues as Mr Fulstow's puppet – she said what he asked her to say, both in her written and oral testimony. I accept that submission.

41. It was also clear from Ms Rodrigues' testimony that she believed that Mr Fulstow had significant flexibility in his financial arrangements – for example, she had no difficulty with Mr Fulstow's retrospectively deeming a transaction to have been made by one entity rather than another, without any paperwork. In the absence of documentary evidence, I can therefore put little weight on her evidence.

Mr Francis

42. Counsel for the Claimants described Mr Francis' behaviour under cross-examination as "persistently evasive and his answers frequently incoherent". He submitted that the "clear inference from this is that the [D]efendant knew that his account would not withstand scrutiny and wished to hide this fact". I was invited to treat with the "greatest suspicion" any "self-serving uncorroborated assertion" made by Mr Francis, and to reject it where it contradicts the Claimants' evidence. In my judgment, having seen and watched him under cross-examination, Mr Francis was not a perfect witness, but I do not consider him to have been a dishonest one. He was regularly irritated with the questions being put to him, but that seemed to me to be a result of what he perceived as having to defend an unmeritorious claim against him. He also struggled from time to time to understand the questions being put to him – counsel for the Claimants' questions were often long and challenging to understand, so I have some sympathy for Mr Francis on this ground. Therefore, whilst I am not able uncritically to accept his evidence, in circumstances where it was contradicted by the Claimants' evidence, I do consider Mr Francis' evidence more likely to be true. Where Mr Francis' evidence is contradicted by contemporaneous documents, I prefer the version set out in the documents.

43. There are, however, some challenges with relying on the documentary record. Agreements and drafts of agreements can be construed for their meaning. I have had more difficulty with emails between the protagonists, largely because I cannot be confident that they were being honest with each other at the time. It was apparent through the questions they were asked in cross-examination, and through other contemporaneous correspondence, that each of Mr Francis, Mr Fulstow and (to a lesser extent) Mr Woods said things in emails and texts which they either did not understand, did not intend, or did not mean. I have therefore treated their email and SMS correspondence, between themselves and with third parties, with some care.

Background Facts

44. The following facts were common ground between the parties and/or not contested and/or appear in the documentary record. In addition to the individuals and entities named below, there were several others referred to in the evidence, but I have not mentioned them unless to do so is necessary for an understanding of the events in issue.

45. Mr Francis is an established property developer. In or around 2013 he was approached to assist in a development scheme located outside Swindon. Capital Land was incorporated on 6 November 2013 as a special purpose vehicle to acquire a parcel of land from James Hill and his family (the **Hill Land**). Mr Francis was also investing in a site referred to as Blunsdon.

46. Mr Francis and Mr Fulstow were introduced in or around summer 2014. Mr Fulstow is also a property developer. At the time, he had several ongoing projects, including those known as Hull and Dover. Mr Fulstow and Mr Francis exchanged various emails, including about the Hull site (for example Mr Fulstow's email to Mr Francis of 8 June 2015 concerning £18 million funding for the Hull site) and Mr Francis' Blunsdon site (for example, Mr Francis' email to Mr Fulstow of 18 June 2015). The 18 June 2015 email also attached the option agreement as between Mr Francis and the Hill family in relation to the Hill Land.

47. Mr Fulstow and Mr Francis had a telephone call in early November 2015 (the contents and date of which are contested). I return to the contents of this call below, but record for present purposes my finding below that it occurred on 2 November 2015.

48. On 9 November 2015, Mr Fulstow emailed Mr Francis in the following terms:

> "Following on from our recent conversations, I am pleased to confirm that we have presented the Blunsdon Land investment site alongside our own sites in the South and North East and have gained significant interest from a well known source."

The references to the "South" and "North East" were to Dover and Hull.

49. On 12 November 2015, Mr Fulstow emailed potential external investors to present the Hull, Dover, Blunsdon and NEV projects: he wrote:

> "I have taken the liberty in attaching four particular sites, that I have been working on, which may be of interest to you."

50. On 25 November 2015, Mr Francis emailed Mr Fulstow with details of the deposit required for the Hill Land. Mr Francis' email précised the terms of the option agreement which he had previous sent to Mr Fulstow. Mr Francis wrote:

> "In order to secure deal, I need between 25k and 50k and we can agree upon JV deal. The company set up to do the deal is [Capital Land]. This is an SPV and I am the only shareholder, it is autonomous to anything else, so you and I doing a deal and transferring the shares will be no issue."

51. The same day, Mr Fulstow emailed Mr Francis and Mr James Bromhead (a potential investor) to set up a meeting "to investigate the possibility of a JV Partnership relating to the Eastern Village project". He commented "[w]e can discuss the Dover project at a later date if necessary". Also that day, Mr Francis emailed a fellow director of Capital Land referring to Mr Fulstow as his "new

investment partner", commenting that "the money is coming from Switzerland". Mr Fulstow accepted in cross-examination that he had told Mr Francis that the money would be coming from a bank account in Switzerland.

52. Mr Fulstow and Mr Francis met at the Home House private members' club in London on 27 November 2015. Some of the evidence suggested that Mr Bromhead also attended, but his account of events was not before the court. What was discussed at that meeting is highly contested. It is not contested that, during that meeting, Mr Fulstow offered to introduce Mr Francis to Mr Woods, with whom a telephone call then took place. The contents of that telephone call are also contested. Mr Woods is not a property developer – he and Mr Fulstow had met through golf and had been friends for approximately 10 years.

53. On 29 November 2015, Mr Francis sent Mr Woods a short email, copied to Mr Fulstow, attaching information about the NEV project.

54. Later on 29 November 2015, Mr Francis sent each of Mr Fulstow and Mr Woods a separate email, details of which are set out above at paragraph 4. Mr Francis' email to Mr Fulstow included words not in the email to Mr Woods:

> "Once the Option agreement has been secured we should meet in London to discuss the way forward for both NEV project, Blunsdon site and your sites at Hull and Dover."

55. On 30 November 2015, Mr Woods paid £25,000 to Capital Land. £35,000 was paid to Capital Land by Libra Payment Bureau Limited at the request of Mr Fulstow. Mr Francis says these were funds from Carina, whereas Mr Fulstow says the funds were his from his investments in Egypt. The payment form was in evidence – the transfer was from the Bank of Scotland, not from Switzerland. It is disputed whether another meeting took place on that day, but on neither side's case does anything turn on that meeting.

56. Capital Land entered into the second option agreement with the Hill Family that same day (30 November 2015) on terms including the following:

    i) Capital Land would pay either £75,000 or £100,000 on signing the option (in fact, £100,000 was paid);

    ii) A further deposit of either £900,000 or £925,000 (depending on what had already been paid) would fall due in January 2016;

    iii) Capital Land would pay £50,000 on 15 November 2016, with the same annual payment being made over the life of the option, if required; and

    iv) The option deadline to purchase the Hill Land for a fixed price of £30,285,000 (less the deposit payments made) would fall due in November 2019. The deposit payments were non-refundable if completion did not take place.

57. The £100,000 deposit was paid by Capital Land to the Hill Family.

58. On 2 December 2015 Mr Francis requested Mr Fulstow to "send me an overview of Hull so I can get my head around that". On 7 December 2015, Mr Francis forwarded to the Claimants an email to a potential investor stating "I have not forgotten you are stakeholders in NEV I just think for this exercise it may confuse matters and raise more questions at this stage, we can deal with this if and when they bite." On 9 December 2015, Mr Francis forwarded to Mr Fulstow the details of a potential investor who "might do Hull and Dover and prob[ably] NEV".

59. By 14 December 2015, Mr Francis was aware that Mr Fulstow's project in Hull was in administration, as he recorded that in his day book on that date.

60. On 16 December 2015, Mr Francis emailed the Claimants a template shareholders' agreement, stating "I am seeing solicitor this morning to sort out the enclosed." None of the details of the template document had been completed.

61. On 29 December 2015 Mr Francis emailed the Claimants a template Declaration of Trust (which was not completed – the quantities were blank) stating:

> "My solicitor says this should suffice and provide you with the protection you need pending entering into a comprehensive shareholders agreement which needs some thought and input.
>
> He also added that based on the email traffic and conversations between us all that contractually we have an agreement already in existence and the enclosed is belt and braces."

62. Also on 29 December 2015, Mr Francis emailed a third party, copying Mr Fulstow, about the Hull project. Mr Francis wrote:

> "I would however like to confirm that my company is keen to progress with the above and I look forward to being able to further our discussions early in January."

63. On 7 January 2016, Mr Fulstow emailed Mr Francis stating:

> "I am a little surprised to hear that he [a third party potential investor] is not interested in NEV when I specifically got him on board to focus and help progress this site, alongside Blunsdon, Hull and Dover.
>
> …
>
> I need some form of assurance, not being in possession of any documentation, regarding our agreement, that this is not the case and all efforts are being taken to secure the finance for the further option payment on NEV due the end of the month."

64. Also that day, Mr Francis emailed Mr Fulstow, with Mr Woods in copy, in relation to the sites at Hull, Dover, Blunsdon and the NEV project:

> "My goal is to sort out NEV and Blunsdon and if in the process we can take care of Hull, which I think we can then fine. As regards Dover whilst from my point of view it would be good to get it under our/your belt, there seems little point in putting us under more financial pressure to acquire this site if we do not need to.
>
> With NEV Blunsdon and Hull we could get by on less than 10m initially, depending on how we structure the acquisition of Hull. Personally I don't think there is a funder out there that will give us a utopic £20m to secure all four sites, if we can get it great, but I think Milich's approach is right, where we seek someone to do a small part and then introduce other elements as they become more confident.
>
> …
>
> Re the shareholder trust document I am waiting for it to come back from solicitors which I am advised is next week.
>
> You have my assurance that both the agreements with you and Robert [Woods] are in effect binding although we need to paper those off, I appreciate that needs doing."

65. Mr Jonathan Milich was a partner at Brookfield Financial.

66. In January 2016, Mr Francis was introduced to Mr Evgeny Novikov and Mr Roman Mikhaylenko as prospective investors in the NEV project. Mr Novikov provided a loan to Capital Land for the £900,000 payment due under the second option agreement at the end of January 2016. Mr Fulstow says that he was indirectly responsible for the introduction, but that is disputed.

67. On 26 January 2016, Mr Francis, Mr Novikov, Mr Mikhaylenko and Mr Fulstow met at the offices of Gordon Dadds, solicitors for Mr Novikov and Mr Mikhaylenko. Mr Woods was not present. A further investor, Mr Gowans, was present. What was discussed at that meeting is contested.

68. Following the meeting, Mr Novikov's solicitor circulated documentation in relation to a loan and Memorandum of Understanding (**MoU**). The solicitor noted:

> "The share charge has been drafted on the assumption that the shares held by James Francis [Jeremy Francis' son] will be transferred to the beneficial owners – Jeremy Francis and [Carina] – prior to completion. We understand that steps have been taken for this to happen. Please can you confirm that this is the case? It also assumes that [Carina] is not itself acting as a trustee. Please can you confirm if this too is the case?

> Please would you provide further information about the ownership of the shares held by [Carina] to enable our client to better understand the ownership structure of the borrower."

69. 27 January 2016 is the earliest date that Carina is mentioned in the documents before the court.

70. Mr Fulstow then forwarded to Ms Rodrigues the draft loan agreement and MoU with Mr Novikov and Mr Mikhaylenko stating "[t]rust documents are being drawn up today. Could you please forward the Carina Co[mpany] Number and registered address by return please."

71. At about this time, Mr Fulstow mentioned in correspondence that he was considering entering into an Individual Voluntary Arrangement (**IVA**). An IVA, governed by Part VIII of the Insolvency Act 1986, is a legally binding arrangement with an individual's creditors to pay all or part of her or his debts. This is consistent with Mr Francis' oral testimony that at about this time he was becoming aware of Mr Fulstow's financial difficulties.

72. The next instalment of the deposit was paid to the Hill family on 30 January 2016.

73. Also that day, the loan agreement and MoU with Nr Novikov were executed. It was not until 10 June 2016 that Mr Novikov's investment in Capital Land was finalised – as a result 100 ordinary shares and 100,000 A preferred ordinary shares in Capital Land were allotted to Mr Novikov and 100,000 B preferred ordinary shares were allotted to Mr Francis' son, James, to be held on trust for Mr Francis. Between 2016 and 2020 a further 257,957 A preferred ordinary shares were allotted to IV Fund SAC Limited (**IV Fund**) following investment.

74. Thereafter, Mr Fulstow and Mr Francis continued to discuss the NEV Project. Mr Fulstow corresponded with his IVA supervisor. Mr Fulstow and Mr Francis continued to discuss the Dover project.

75. On 19 May 2016, Mr Francis provided to Mr Woods a draft template profit share agreement which provided that Mr Francis would pay Mr Woods 7.5% of the net profit payable to Mr Francis as a shareholder of Capital Land, following the sale of Capital Land's share capital or assets. Discussions went on for some months. Mr Francis agreed that Mr Woods would receive at least £25,000 after any sale of the Capital Land shares or assets, and Mr Woods agreed that no security was needed for the £25,000 investment. Mr Woods then proposed a different arrangement, namely either 15% beneficial interest in the shares held by James Francis, or an option over 15% of the beneficial interest in the shares held by James Francis. Neither was accepted by Mr Francis.

76. In early June 2016, Mr Fulstow texted Mr Francis twice seeking assurances of Carina's investment in the NEV project – "I am being asked to provide my assets in Court next week". On 14 June 2016, Mr Fulstow emailed Mr Francis "for and on behalf of [Carina]" as to "the investment and share purchase made by [Carina]". Mr Francis offered to Carina a draft profit share agreement in

identical terms to that offered to Mr Woods. Mr Fulstow responded saying he considered Carina to be entitled to 25% of the shares in Capital Land.

77. On 30 June 2016, Mr Francis' solicitor, Mr Williams, sent to Mr Fulstow a profit share agreement – it is addressed to Carina, and provides for a 7.5% profit share – commenting:

> "The investors (Evgeny Novikov et al) did not want multiple shareholdings within the structure and in order to ensure the structure is Insolvency remote this structure has been utilised to protect the project and the joint venture funding."

78. Mr Fulstow responded:

> "It was agreed with Jeremy [Francis] for [Carina] to receive 25% shareholding for the £25,000 investment in to the Co[mpany], not a profit share of 7.5% as noted in the draft attachment.
>
> Please can you have the draft amended to show the correct figure and I can arrange for a Director of Carina to sign."

79. On 29 July 2016, Mr Fulstow emailed Mr Francis' solicitor, copying Mr Francis, saying that the position agreed between Mr Fulstow and Mr Francis prior to any investment by Mr Woods was:

> "£25,000.00 for a 25% shareholding of the Company. Jeremy [Francis] went on to say that if Mr Woods came on to invest, he could only offer 7% for his £25,000.00 investment and that I / Carina, would have to look to gifting some of our shares to Mr Woods. This is separate matter yet to be resolved."

80. Further investment in Capital Land occurred thereafter, with IV Fund providing a £4 million loan, and Mr Francis investing £2.5 million of capital and providing a personal guarantee of £9.8 million.

81. On 1 August 2016 Mr Fulstow and Mr Francis met to discuss the position regarding Capital Land.

82. On 3 August 2016, Mr Fulstow texted Mr Francis asking "[c]an you arrange for us to meet Robert [Woods] in the next week or so? I really want to complete the paperwork on the Carina investment and the other loan."

83. On 4 August 2016, Mr Fulstow emailed his IVA supervisor listing some of his assets. He wrote: "I have the option that has now been taken in the purchase of the site in Swindon known as Hill Farm. Planning is to take at least 16 months." This was a reference to the NEV project.

84. On 1 September 2016, Mr Fulstow entered into an IVA. I deal further with Mr Fulstow's IVA below. The IVA was closed on 3 February 2022, with Mr Fulstow's creditors receiving just over 1p in the pound (that is, nearly 99% of Mr Fulstow's debts of around £8 million were written off).

85. On 8 September 2016, emails disclose a dispute between Mr Woods and Mr Fulstow on the basis that Mr Woods was getting a lesser share than Mr Fulstow. Mr Woods commented:

> "So I suggest the way forward is we get your £10k loan back from Jeremy [Francis] and get the paperwork for our shares, then as you said try to get out next year maybe."

86. Mr Fulstow responded:

> "I have no idea what your final agreement was with [Mr Francis] as I was not there, remember. I will offer you a 25/100 : 35/100 split on the option if I do not get my £10k back from [Mr Francis] in 4 weeks. If I do, then parity."

87. I was informed during the trial that Mr Fulstow and Mr Woods have since (at least by 27 March 2018) agreed to split evenly between them any financial outcome from these proceedings.

88. Through 2016 and 2017, Mr Fulstow continued to try to meet up with Mr Francis. For example, on 8 February 2017, Mr Fulstow texted Mr Francis:

> "We really need to bottom out the shareholding to Carina for the Eastern Stall project plus the £10,000 short term loan that is 1 year over due."

89. On 6 June 2017, Mr Francis by text offered Mr Woods his money back with interest. He stated "there are no shares just a share in net sales profit".

90. Carina purportedly assigned its assets to PH Gold on 8 February 2018.

91. Carina was annulled on 11 July 2019.

92. Planning permission was obtained for the NEV project in August 2021. On 16 September 2021, Mr Fulstow emailed Mr Francis, copying Mr Woods, congratulating Mr Francis on obtaining planning permission and asking to meet to discuss "our investment into the project".

93. There was no protocol-compliant pre-action correspondence. The Claim Form was issued on 29 November 2021.

Mr Fulstow's IVA

94. The documentary evidence first shows a mention of an IVA in late January 2016. The documents suggest that as at 14 March 2016, Mr Fulstow owed approximately £8 million that he was unable to service. The IVA in effect provided for his creditors to accept a percentage of the debts instead of forcing Mr Fulstow into bankruptcy. Mr Fulstow's initial IVA (approved by his creditors) estimated that they would recover between 37p and 58p in the pound. As the supervisor's final report notes, it was not possible to realise some assets, leading to a position whereby Mr Fulstow's creditors ended up receiving just over 1p in the pound.

95. Relevantly for these proceedings, none of the formal IVA documents in evidence mentions any interest by Mr Fulstow in the shares in Capital Land, either on his own behalf or via his beneficial interest in Carina or PH Gold. Some of the documents mention Mr Fulstow's taking on a consultancy role for the NEV project – but this never eventuated. It also appears to have been in Mr Fulstow's instructions to his solicitors: before the court was an email dated 11 January 2022 from Mr Rooney which stated "[Mr Fulstow] has been the subject of an IVA. He has not disclosed the potential asset in his Schedule of Assets."

96. Mr Fulstow's evidence when cross-examined at trial was that he told his supervisor about his interest in the shares of Capital Land, but that his supervisor said that they did not need to be included in the IVA. The documentary evidence is very detailed indeed on Mr Fulstow's other assets – but fails to mention any interest in the shares of Capital Land. There is an email dated 4 August 2016 which reads:

> "I have the option that has now been taken in the purchase of the site in Swindon, known as Hill Farm. Planning is to take at least 16 months."

97. His supervisor responded: "Thanks Tim..... It [sic] far from being includable in the proposal. I will call you this afternoon."

98. That reference, which was together with references to Mr Fulstow's updating the family home and other attempts to increase the value of his assets, appears to be the only reference to the NEV project in Mr Fulstow's correspondence with his IVA supervisor. This is surprising, particularly given that the Claim Form in these proceedings was filed on 29 November 2021, whilst Mr Fulstow was still under supervision.

99. I was also told (as mentioned above) that Mr Woods and Mr Fulstow have reached an agreement to split evenly the proceeds of any judgment I make in their favour, despite their claim being that Mr Woods owns 7% of the relevant shares and Mr Fulstow owns 25%. That agreement was made at least by 27 March 2018, when Mr Fulstow was still under IVA supervision. On its terms, it would involve Mr Fulstow giving Mr Woods 9% of Capital Land. I was told that would now be valued at some millions of pounds. I do not need to decide the issue, but it seems to me that that was not an agreement Mr Fulstow was entitled to make without the permission of his IVA supervisor.

100. I was told that, latterly, Mr Fulstow had re-engaged with his supervisor, who is now aware of the claim and aware of these proceedings. I am not asked to make an order in relation to the supervisor, and, at the end of the day, it may not matter. But counsel for the Defendant urged me to take into consideration in assessing Mr Fulstow's honesty his dealings with his supervisor, and submitted that they indicate either that: (1) Mr Fulstow did not consider that any agreement had been made to transfer shares; (2) any shares were actually owned by Carina; or (3) Mr Fulstow has deliberately defrauded his creditors.

Was a binding contract concluded between the Claimants and Mr Francis whereby Mr Francis agreed to transfer 25% and 7% of the shares in Capital Land in return for investments of £35,000 and £25,000 respectively?

The law

101. Counsel for the Defendant referred me to the remarks of Leggatt J (as he then was) in *Blue v Ashley* [2017] EWHC 1928 (Comm):

> "Generally speaking, it is possible under English law to make a contract without any formality, simply by word of mouth. Of course, the absence of a written record may make the existence and terms of a contract harder to prove. Furthermore, because the value of a written record is understood by anyone with business experience, its absence may – depending on the circumstances – tend to suggest that no contract was in fact concluded. But those are matters of proof: they are not legal requirements. The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable: see e.g. Burrows, "*A Restatement of the English Law of Contract)"* (2016) section 2." (at paragraph 49)

> "For the purpose of the law of contract, an offer is an expression, by words or conduct, of a willingness to be bound by specific terms as soon as there is acceptance by the person to whom the offer is made: see e.g. Burrows "*A Restatement of the English Law of Contract)"* (2016) section 7.3; and *Chitty on Contracts* (32nd Edn, 2015), vol 1, para 2-003. There can be circumstances in which a person uses the language of offer without expressing a genuine willingness to be bound. For example, if someone says to a party "I will give you a million pounds if you can speak for a minute on [a random subject] without hesitation, deviation or repetition", this is unlikely to be interpreted as an offer despite the literal words used. That is because it is unlikely that anyone would reasonably have thought that the words were meant seriously. In such circumstances the words uttered would not be capable of creating any obligation, even a purely moral obligation, let alone one that is legally enforceable." (at paragraph 52)

> "Even when a person makes a real offer which is accepted, it does not necessarily follow that a legally enforceable contract is created. It is a further requirement of such a contract that the offer, and the agreement resulting from its acceptance, must be intended to create legal rights and obligations which are enforceable in the courts, and not merely moral obligations. Not every agreement that people make with each other, even if there is consideration for it and the terms are certain, is reasonably be intended to be enforceable in the courts. […] Factors which tend to show than an agreement was not intended to be legally binding include the fact that it was made in a social context, the fact that it was expressed in vague language and the fact that the promissory statement was made in anger or jest." (at paragraph 56)

> "Vagueness in what is said or omission of important terms may be a ground for concluding that no agreement has been reached at all or for concluding that, although an agreement has been reached, it is not intended to be legally binding. But certainty and completeness of terms is also an independent requirement of a contract. Thus, even where it is apparent that the parties have made an agreement which is intended to be legally binding, the court may conclude that the agreement is too uncertain or incomplete to be enforceable". (at paragraph 61)

The Claimants' pleaded case

102. The Claimants' pleaded case is that:

i) Mr Fulstow orally accepted Mr Francis' offer made at the Home House meeting on 27 November 2015 creating an oral contract that Mr Francis would transfer 25% of the shares of Capital Land in exchange for an investment of £35,000 by 30 November 2015;

ii) Mr Woods orally accepted Mr Francis' offer made over the telephone from Home House on 27 November 2015 creating an oral contract that Mr Francis would transfer 7% of the share in Capital Land in exchange for an investment of £25,000 by 30 November 2015; and

iii) the two emails from Mr Francis on 29 November 2015 were confirmation of the earlier oral contracts, or, in the alternative, were offers which the Claimants then accepted by making the payments on 30 November 2015.

£10,000 loan

103. It is convenient to deal first with an issue relating to the £35,000 paid to Capital Land on 30 December 2015. It does not now seem to be seriously contested that, of the £35,000 paid to Capital Land on 30 November 2015, £10,000 was a short-term loan. Indeed, this is now averred in the Claimants' skeleton argument, contrary to their pleadings. The Claim Form and prayer for relief in the Amended Particulars of Claim do not mention the £10,000 loan, probably because at that point, the Claimants' position was that it was not a loan but that the whole £35,000 was an investment in Capital Land.

104. In the absence of any mention of the loan in the Claimants' pleadings, it would not be appropriate for me to order the return of the money, or to set the terms of any interest payable on it (and there was no evidence before me as to what that rate might be). However, I record what appears now to be an agreed position, that of the £35,000 paid to Capital Land on 30 November 2015, £10,000 was a short-term loan. This is consistent with Mr Francis' version of events, with the documents passing between Mr Woods and Mr Fulstow, and with the texts sent by Mr Fulstow to Mr Francis, some of which I have set out above.

The Claimants' position at trial

105. The Claimants' position at trial on the legal effect of the Home House meeting/call was different from their primary pleaded case. It was no longer put that agreement had been reached at the Home House meeting on 27 November 2015. Rather, it was put to me that the first question I needed to answer was what was agreed on 30 November 2015. The Claimants' position was that Mr Francis urgently needed additional funds at the end of November 2015 to secure the option over the Hill Land. He therefore had to promise more than he would have liked to get Mr Fulstow and Mr Woods to provide funds at very short notice. Mr Francis then realised that Mr Novikov did not want the Claimants involved as investors, and so attempted to reach a compromise by offering instead a profit share agreement. When that was refused, it is said that Mr Francis fabricated the narrative now put forward in the Defence to evade liability. It is said that Mr Francis was under "significant financial pressure" in November 2015 and that he "needed" the investment on extremely short notice to secure the option to purchase the Hill Land.

The early November call

106. As mentioned above, there was a call between Mr Fulstow and Mr Francis in early November 2015. In his evidence, Mr Francis said that the call was made in between visits to two hospitals where he was seeing his wife (in one hospital) and his son (in the other hospital). Given his wife's treatment regime, he was able to pinpoint the date to 2 or 16 November 2015. He vividly recalled having the call, and its contents:

    i) He discussed with Mr Fulstow the option over the Hill Land, and the requirements for payments in late November and late January;

    ii) Mr Fulstow raised the prospect of Mr Francis investing in Mr Fulstow's projects, and vice versa. Mr Fulstow said he was willing to offer Mr Francis a 20% interest in the Hull and Dover projects in return for an interest in the NEV project;

    iii) Mr Francis expressed an interest in exploring those project, but needed to deal first with the November and January payments on the NEV project – Mr Francis said that a £25,000 contribution towards the 30 November 2015 payment would "ease the pressure and free up capital";

    iv) Mr Fulstow said that he would be able to provide or source the funding required to meet the upcoming payments on the NEV project;

    v) Mr Fulstow told Mr Francis that he could make 25% of Capital Land available to Mr Fulstow provided Mr Fulstow provided Mr Francis with a 20% stake in the Hull and Dover projects and sourced the additional funding for the January payment on the NEV project; and

    vi) Mr Francis and Mr Fulstow discussed how Mr Fulstow might be able to be involved in the Blunsdon project.

107. Mr Francis says that the call concluded with he and Mr Fulstow agreeing to explore a deal whereby he would give Mr Fulstow a 25% interest in the NEV

project and Mr Fulstow would (a) pay £25,000 towards the 30 January 2015 deposit on the NEV project; (b) provide or source the funding required for the 30 January 2016 payment on the NEV project and (c) give Mr Francis a 20% stake in the Hull and Dover projects.

108. I accept Mr Francis' recollection of the contents of that call. He recalled vividly the circumstances of the call. I also find that the call probably took place on 2 November 2015 – the earlier of the two dates that Mr Francis calculated from this wife's treatment regime. The earlier date fits with the written record: for example, on 9 November 2015, Mr Fulstow emailed Mr Francis in the following terms:

> "Following on from our recent conversations, I am pleased to confirm that we have presented the Blunsdon Land investment site alongside our own sites in the South and North East and have gained significant interest from a well known source."

109. On 12 November 2015, Mr Fulstow emailed potential external investors to present the Hull, Dover, Blunsdon and NEV projects: he wrote:

> "I have taken the liberty in attaching four particular sites, that I have been working on, which may be of interest to you."

110. These contemporaneous documents, both emails sent by Mr Fulstow, are inconsistent with Mr Fulstow's version of events that collaboration was not discussed with Mr Francis.

111. Importantly, the 2 November 2015 call forms an important background for the further discussions between Mr Fulstow and Mr Francis. Neither side suggested that any legally binding agreement was reached on that call – but it does in my judgment set the scene for what was to come.

Mr Francis' "needs" in November 2015

112. It was put to me by counsel for the Claimants that Mr Francis was in financial distress in November 2015 and "needed" the investments from Mr Fulstow and Mr Woods so as not to miss the opportunity provided by the option for the Hill Land. Counsel relied on statements made to this effect under cross-examination. It was further put to me by counsel that £25,000 was a significant sum of money.

113. Dealing with the second issue first, I do not doubt that most people would consider £25,000 to be a significant sum of money – it would be truly life-changing for most of the population. However, I do not accept that £25,000 was or is a significant sum of money to Mr Fulstow, Mr Woods or Mr Francis. The other figures in this case, some of which I have set out above, demonstrate that £25,000 is one of the lower figures involved – particularly compared with the purchase price of the Hill Land (£32 million), the personal guarantee made by Mr Francis (£9.8 million) or even the debts provided for in Mr Fulstow's IVA (£8 million, including £400,000 which Mr Fulstow described as borrowed from a "friend"). Considering these other figures, £25,000 would have seemed insignificant to those involved. Mr Francis described it in his oral testimony as

akin to a goodwill payment to show willing to be further involved in the project, and I accept that characterisation.

114. Dealing now with the first issue of whether Mr Francis "needed" the £25,000 investment, there was also evidence before me that Capital Land was already holding £100,000 in cash clearly earmarked on the face of the documents for the deposit needed on 30 November 2015. Again, this does not support the Claimants' stated position that Mr Francis "needed" the investment. For reasons that were not explained to me, Mr Francis emailed the Claimants showing that the £100,000 was sitting in the bank, so they were aware at that time that Mr Francis could cover the £100,000 should he wish to. What was going to stretch Mr Francis was the further payment which would quickly become due: the £900,000 due at the end of January 2016. I accept Mr Francis' evidence that he was trying to involve Mr Woods and Mr Fulstow to get their assistance with that larger payment – either from their own funds, or through the introduction of other investors.

115. Finally, the terms of the option agreement themselves provided that the deposit could be either £75,000 or £100,000, at Capital Land's option. So on that basis, one of the £25,000 investments was not needed at all. Instead of paying the full deposit of £100,000, Capital Land could simply have declined to deal with either of Mr Woods or Mr Fulstow, and instead paid £75,000.

116. The current value of Capital Land was unknown at the time – but Mr Francis clearly considered it to have potential (as time has shown). Mr Francis gave credible oral testimony that he did not want to give away more of the equity in Capital Land than he needed to – this also has the benefit of according with business sense.

117. I therefore do not accept the Claimants' position that Mr Francis was prepared to promise more than he would have liked because of his financial position, nor that two investments of £25,000 would have made any noticeable difference to his financial position. Capital Land had £100,000 available to it to pay the deposit. I accept Mr Francis's evidence that he was looking for goodwill payments from Mr Woods and Mr Fulstow to bring them on board for a wider deal, including to help cover the £900,000 due on 30 January 2016, either through their own funds or through introducing further investors.

A wider deal?

118. Mr Francis' position is that his discussions with Mr Fulstow were always part of a wider deal. I have set out above Mr Francis' recollection of his call with Mr Fulstow on what I have found to be 2 November 2015. The documentary evidence is that that discussion carried on over email, with Mr Fulstow representing to third parties that he was involved in the Hull, Dover, Blunsdon and NEV projects. I do not accept Mr Fulstow's position under cross-examination that he was presenting the projects collectively to encourage investment in one or more of them, and that there was no collaboration between him and Mr Francis. I prefer Mr Francis' recollection of events to that of Mr Fulstow. Under cross-examination, Mr Fulstow had no credible other

explanation for why the Hull and Dover projects were mentioned numerous times in the contemporaneous documents before the court.

What, if anything, was agreed at Home House on 27 November 2015?

119. The Claimants' primary position, as set out in their pleadings and in Mr Fulstow's fourth witness statement in relevantly identical terms was that an agreement was reached with Mr Francis at the Home House meeting on 26 November 2015.

120. Mr Fulstow's written evidence was:

> "It was at this meeting that I decided to help the Defendant in a personal capacity and invest £35,000 towards the above-mentioned option agreement. At this meeting at Home House the Defendant made an offer to me where he said, or words to the effect, that:
>
> a. He owned 100% of the issued shares in the Company.
>
> b. If I invested £35,000 on or before the 30th of November 2015, I would receive 25% of the issued shares in the company from the Defendant.
>
> c. The £35,000 was to be paid into the company's bank account on or before the 30th of November 2015.
>
> I orally accepted the above offer. Further, the Defendant and I shook hands and he agreed to back this oral contract with an email."

121. The Claimants' Re-Amended Particulars of Claim is in relevantly identical terms.

122. This version of events had been abandoned by the time of the Claimants' counsel's skeleton argument shortly before trial.

123. Mr Francis contests this account. He said that at the Home House meeting, he and Mr Fulstow discussed a 25% interest in the profits of the NEV project upon Mr Fulstow's (1) providing £25,000 towards the deposit due on 30 November 2015; (2) providing or introducing the funding requirement for the £900,000 deposit due on 30 January 2016; and (3) securing Mr Francis a 20% interest in the Hull and Dover projects. He also recalls Mr Fulstow's discussing that an off-shore company would be making the investment.

124. Mr Woods' situation is different. His written evidence was that he received a telephone call from Mr Fulstow on 27 November 2015 requesting his help in raising the initial deposit to secure the option. Mr Woods wrote in his witness statement:

> "I was told that I would receive a 7% shareholding for investing £25,000 by the 30th of November 2015. I agreed in principle and agreed to meet the Defendant.
>
> I met to [sic] the Defendant and the 1st Claimant on the 30th of November 2015 at Home House, Portman Sq, London and accepted the Defendant's offer orally."

125. The Claimants pleaded that contractual relations were entered into at the Home House meeting, and it was included in Mr Fulstow's evidence, but, as I have said, that position was abandoned by the time of the Claimants' skeleton argument, and it was not relied on in counsel for the Claimants' closing speech. Rather, he said that the first main question I needed to decide was what was agreed on 30 November 2015.

126. On Mr Woods' own evidence, he did not accept any offer from Mr Francis until 30 November 2015. I therefore have no hesitation in finding that Mr Woods and Mr Francis did not enter into legally binding relations during their call on 27 November 2015.

127. In my judgment, the position is the same with Mr Fulstow. Mr Fulstow and Mr Francis did not enter into binding legal relations on 27 November 2015 at Home House. I do not believe Mr Fulstow's written account of what occurred at Home House. I do believe Mr Francis' account. Following the various discussions and email exchanges in early November 2015, it is clear to me that Mr Fulstow and Mr Francis had been discussing a wide series of possible investments, including Mr Francis' Blunsdon and NEV projects and Mr Fulstow's Hull and Dover projects. This is also evidenced by the contemporaneous documents, with Mr Fulstow having emailed third party investors to present all four projects in which he was said to be involved – namely Hull, Dover, Blunsdon and NEV. I believe Mr Francis when he says he was looking for the £25,000 payments as an indication of willingness to be involved – he was not desperate for the funding to pay the 30 November 2015 deposit, but rather was seeking to tie in Mr Fulstow (and Mr Woods) to obtain their assistance with the larger sums of money which would soon become due on the NEV project. He discussed with Mr Fulstow (and probably with Mr Woods) the need to raise that money – either from them, or with their assistance. There was no intention at that stage to enter into legally binding relations, nor had any terms been agreed. These were exploratory conversations, with more required to create legally binding relations.

128. The Claimants' primary pleaded case therefore fails.

Were the emails of 29 November 2015 offers capable of acceptance?

129. Counsel for the Claimants submitted that "the contemporaneous documents, especially the e-mails sent on the 29th of November 2015, are the most reliable evidence of what the parties in fact agreed, and those documents, the most important of which were written by [Mr Francis] himself within a day of the time at which the agreement is said to have taken place, are consistent with the Claimants' case and inconsistent with the Defendant's case". He therefore, in

effect, asked me to ignore other evidence (including his own clients' evidence) and instead focus on the two emails. He submitted that:

i) the emails are clear on their terms – "I confirm that I have agreed to provide you… I will hold … on trust …";

ii) Mr Francis was aware of the meaning of holding something on trust, because he had already entered into such a relationship with his son;

iii) Mr Francis was aware of the words SUBJECT TO CONTRACT because he used them on an email on 7 December 2015, and would have known to apply them to the emails of 29 November 2015 if he had intended that they (the emails) not constitute an offer capable of acceptance;

iv) Mr Francis' evidence under cross-examination was that the emails of 29 November 2015 were intended accurately to represent the discussions between the parties;

v) Mr Francis wrote to the Claimants on 7 January 2016 in terms that he believed a binding agreement was already in place (but, I add, without saying what the terms of that agreement were);

vi) the email correspondence from Mr Francis which followed positively encouraged the Claimants to believe they were to be given shares, up until Mr Francis' change of heart in January 2016 – that change of heart, it was submitted, was brought about through the intervention of Mr Novikov – Mr Francis noted in his day book for 25 January 2015 "Shares > ownership – JF only !!!"; and

vii) the Claimants would have no incentive to make the investments without some sort of guarantee.

130. Mr Francis' position is that the emails "amount to nothing more than a short summary of the initial commitment fee and that Mr Francis agreed not to encumber the shares until the global agreement was agreed, hence the use of the term 'on trust'".

131. Neither side's case theory is entirely consistent with the documentary record. In any event, it is not for the Defendant to prove his case, but rather for the Claimants to prove theirs. Doing the best I can, it seems to me extremely unlikely indeed that the emails of 29 November 2015 were intended by any party to create legally binding relationships between Mr Francis and Mr Fulstow on the one hand, and between Mr Francis and Mr Woods on the other. They were not, in my view, clear and certain offers capable of acceptance. Rather, they were, in my judgment, a part only of what was in play between the parties. Mr Francis' evidence to the court was clear that the payments on 30 November 2015 were supposed to demonstrate Mr Fulstow's and Mr Woods' willingness to provide or help raise the upcoming £900,000 to be paid by 30 January 2015, and that there were therefore terms that needed to be agreed before legally binding relations could be established. The emails set out part of any deal – but not all of it or enough of it to form contractual relations. It seems to me

inconceivable that Mr Francis would give away a significant portion of the equity in Capital Land for £50,000 when he had £100,000 in the bank, and could readily have reduced the deposit to £75,000 in any event. I also do not consider that Mr Fulstow and Mr Woods as experienced businessmen understood that they would be acquiring the shareholding they allege for the comparatively small investment they were making. There was, in my judgment, no objective common intention of the parties.

132. Mr Woods and Mr Fulstow both gave evidence that they would not have parted with £25,000 each on 30 November 2015 without some certainty as to the nature of their investment. I reject that evidence. Mr Woods and Mr Fulstow are both experienced businessmen used to dealing in much larger sums of money. Mr Fulstow saw an opportunity to get involved in a project he saw as successful (at a time when his projects in Hull and Dover were struggling) and he was prepared to pay £25,000 as part of the price of entry to that opportunity. He was also aware that more was required of him – that he needed to fund the larger deposits that were coming or help find someone who could. I also accept Mr Francis' evidence that the NEV project was part of a wider discussion of other projects – including Hull, Dover and Blunsdon. In short, there was still much to work out before establishing contractual relations.

133. The position with Mr Woods is different. He had not had multiple conversations with Mr Francis. He was not involved in other projects. Rather, I find he was brought in by Mr Fulstow, and led by him. He paid the £25,000 because Mr Fulstow told him to – without knowing what he was getting for that investment. He was not, in my judgment, expecting 7% of Capital Land. Counsel for the Claimants submitted that it was of no legal consequence that the email to Mr Woods was copied to Mr Fulstow, but the email to Mr Fulstow was not copied to Mr Woods. In my judgment, that fact supports my finding that Mr Woods was being led by Mr Fulstow – and that Mr Francis understood, at least at some level, that Mr Woods was unaware of the discussions that were ongoing with Mr Fulstow.

134. I therefore reject the Claimants' position that the emails of 29 November 2015 were offers capable of acceptance, and that acceptance was made on 30 November 2015 on the terms set out in the emails. In my judgment, the emails of 29 November 2015 were a short summary of the initial commitment fee – Mr Francis had not agreed to encumber the shares until a global agreement had been agreed. It is that basis on which he used the term "on trust".

135. Whilst not relevant to my assessment of what happened towards the end of November 2015, the conclusion I have reached is consistent with how the Claimants then behaved. Mr Woods emailed Mr Francis' solicitor on 20 October 2016: "Can I ask you please do I own an equity in the development plot? I don't do I? I own 7% of an option to purchase at £30mil?".

136. The position is similar with respect to Mr Fulstow – whilst there are emails back and forth which mention shares, Mr Fulstow did not declare the ownership of any shares in Capital Land to his IVA supervisor. Rather, Mr Fulstow made several references to being a consultant on the NEV project. It is also consistent with the position of Mr Novikov who was adamant by 27 November 2016 that

neither Mr Fulstow nor Carina should be involved in the NEV project by way of a share allotment: indeed, it appears that Mr Novikov would not have proceeded with his investment in late January 2016 if Carina/Mr Fulstow were already shareholders in Capital Land. The fact that Mr Novikov did proceed to invest strongly suggests that Mr Fulstow/Carina did not have a legal or equitable stake in Capital Land at that time.

137. The Claimants' claim therefore fails.

138. I therefore do not need to resolve what was discussed at the 26 January 2016 meeting, as the Claimants do not rely on it as having any effect on their case. On the Claimants' case, their contract with Mr Francis came into effect at the latest on 30 November 2015 and I have found that not to be correct.

139. I also do not need to consider the Defendant's submission that Mr Woods' 7% share came out of Mr Fulstow's 25% share.

140. I also do not need to consider the submissions of counsel for the Defendant that, if there was a contract, it was void for uncertainty. I also do not need to consider the Defendant's submissions that there were conditions precedent that needed to be fulfilled. Those were said to be (a) transfer of a 20% interest in the Hull and Dover projects; and (b) help with sourcing the further funding needed for the NEV project. If they were conditions precedent, then, in my judgment, they were not fulfilled. The Claimants accept that 20% of the Hull and Dover projects were never transferred. In relation to the introduction of further investors, the Claimants point to the introduction of Mr Milich who was then said to have introduced Mr Novikov, who did invest. However, Mr Francis' evidence was that Mr Milich had been known to him already for some time, and I did not find Mr Fulstow's account to be credible. I therefore do not consider that the Claimants sourced additional investment for the NEV project. I do not accept the Claimants' evidence that they indirectly introduced Mr Novikov.

141. There was evidence and submissions in relation to an American investor called Brooke Johnson. I mention Mr Johnson for completeness, but do not consider his involvement relevant to the issues I have to decide.

If there was a contract, was Mr Fulstow acting on behalf of Carina and, if so, does he have any standing to sue?

142. Counsel for the Defendant referred me to the remarks of Nugee J (as he then was) in *Munday and Anor v Hilburn and Anor* [2014] EWHC 4496 (Ch) at 45:

> "… In order to succeed at trial, a claimant must, of course, not only show that there is a good claim vested in someone but that it is vested in him. If, therefore, it can be shown that the claim, whether good or bad, is incontrovertibly not vested in him and for that reason the action is doomed to failure, whatever its merits, the Court must be in a position to stop the claim proceeding to trial. I do not see any procedural difficulty in this. The defendant in an appropriate case can apply to strike

> the claim out […] or can apply for what is often called reverse summary judgment…"

143. I have held above that no contract was concluded between the Claimants and Mr Francis to transfer shares in Capital Land. If I am wrong in that, I have set out briefly below my findings in relation to Carina.

144. The Defendant's position is that any contract entered into for the transfer of shares was not with Mr Fulstow, but with Carina. Mr Francis recalled that Mr Fulstow said at the 27 January 2016 meeting at Home House that the funds remitted to Capital Land on 30 November 2015 were an investment by Carina. This was also the Claimants' position until the strike out application referred to at paragraph 8 above.

145. Mr Fulstow's evidence was that the £35,000 paid on 30 November 2015 came from monies from his investment in a hotel in Egypt and that he then decided on 26 January 2016 to nominate Carina to hold both his and Mr Woods' shares, and that Mr Woods agreed to this.

146. Contrary to that, Mr Francis submitted that he had been told prior to the payment of £35,000 on 30 November 2015 that the money was coming from an off-shore company controlled by Mr Fulstow, and from a Swiss bank account, and, whilst he (Mr Francis) did not know which company that was at the time, he later found out at the end of January 2016 that it was Carina. Mr Fulstow accepted in cross examination that he had told Mr Francis that the money was coming from a Swiss bank account. He also accepted that Carina's bank account was in Switzerland.

147. Further, the Defendant submitted that the documentary evidence is clear – and that Mr Fulstow only denied acting for Carina when it became apparent on legal advice that that would stymie his claim:

    i) Mr Fulstow's email of 14 June 2016 to Mr Francis and his solicitor "For and on behalf of [Carina]";

    ii) Mr Fulstow's email of 30 June 2016 to Mr Francis and his solicitor: "I[t] was agreed with Jeremy [Francis] for [Carina] to receive 25% shareholding for the £25,000.00 investment in to the Co[mpany], not a profit share of 7.5% as noted in the draft attachment";

    iii) Mr Fulstow's email of 27 July 2016: "I have tried again to contact Jeremy [Francis] in this outstanding matter of the share purchased by [Carina] … the matter will be handed over to solicitors to see what can be done to protect [Carina]'s position";

    iv) Mr Fulstow's email of 29 July 2016 to Mr Francis and his solicitor: "As for the investment I undertook on behalf of [Carina] …";

    v) Mr Fulstow's email of 6 June 2017: "The Company, [Carina], who made the investment have enquired as to what legal route should be taken…";

vi) Mr Fulstow's email of 26 November 2018: "The Company that I represent ([Carina]) has yet to be given any form of confirmation of its investment into the project, nor evidence of the shares agreed … Yours sincerely, Tim Fulstow For and on behalf of [Carina]";

vii) Mr Rooney's email to Mr Topal of 11 January 2022: "Your instructing solicitors are of the view that the pleaded agreement as set out in the Claimant's Part 8 Claim Form establishes a trust whereby for the consideration of £35,000 paid by [Mr Fulstow's] Company [Carina] [Mr Francis] would hold 25% shareholding in [Capital Land] for [Mr Fulstow] or his nominee";

viii) Mr Topal's email to Mr Rooney of 20 January 2022: "[Mr Fulstow] will be in effect admitting that he personally has no claim – instead [PH Gold] as owner of assets previously owned by [Carina] has the cause of action";

ix) The Claimants' solicitors' email of 27 January 2022 to the Defendant's solicitors: "You will see clearly … that the shareholding of [Mr Francis] amounting to 100 shares is held as to 68 ordinary shares for [Mr Francis] and 32 ordinary shares for [Mr Fulstow's] company [Carina] who assigned their assets to [PH Gold]";

x) Mr Topal's advice of 1 February 2022:

> "On 30 November 2015 a payment was made for the shares offered to [Mr Fulstow]. However, as far as can be ascertained at present, the payment was made by a Martial Islands [sic] based company Carina. … In conference [Mr Fulstow] said that Carina had been voluntarily wound-up and all its assets transferred to a Cyprus based company [PH Gold]…";

xi) Mr Rooney's email of 22 March 2022 sent to the Claimants summarising a meeting with Mr Fulstow's IVA supervisor:

> "Both Mark and Nicholas agreed that the IVA should be reopened in light of the fresh circumstances surrounding [Mr Fulstow's]/PH Gold's claim of 25 shares in Capital Land … The evidence filed to date is that the right call for the shares (option) was vested in Carina, which before its liquidation was assigned to PH Gold a Cypriot Company. [Mr Fulstow] is arranging for his Management Asset Company to confirm that the assignments from Carina to [PH] Gold were all lawfully exercised under the respective jurisdictions and that as proprietor of [PH] Gold [Mr Fulstow] has been vested with the rights to litigate to secure the issue of the agreed shares";

xii) Mr Bishop's email of 4 April 2022 to Mr Rooney:

> "What really concerns me is the apparent and potential conflict of [Mr Fulstow's] evidence and instructions. At your meeting 22 March it seems that [Mr Fulstow] is saying that Carina made the investment and that interest was assigned to PH Gold. That conflicts with his instructions by email that Carina paid the monies on behalf of [Mr Fulstow], that was recorded as a company loan, and the loan was then assigned to PH Gold";

xiii) Mr Fulstow's email later that day to his solicitors: "I can confirm that the payment was made by Carina on instruction to Connie Rodrigues";

xiv) Mr Rooney's email of 5 April 2022 to the Claimants:

> "[Mr Fulstow] has sent emails which suggest that Carina made the investment, but [Mr Bishop, the Claimants' then barrister] stated that these emails are for cross-examination at trial, but are per se contradictory to what [Mr Fulstow] is saying now";

xv) Mr Fulstow's email to Ms Rodrigues of 22 May 2022:

> "Following on from our telephone conversation yesterday, I would be grateful if you could confirm the process in which a Marshall Island Co ([Carina]) is able to legitimately transfer funds and assets without written 'chose in action'. Without a contract or written directive. I have ccd in Richard Rooney Esq. our solicitor dealing with my case against Jeremy Francis, whom I invested £35,000.00 for a 25% shareholding of his Company [Capital Land]. That money, as you know, was provided to me from Carina's coffers. We need to show that no paperwork was necessary for this loan/dividend payment. We also need to prove that no paperwork was necessary for the transfer of assets from Carina to [PH Gold]. Please could you address this e mail directly to Richard Rooney Esq. of Murray Hay Solicitors. I'd be most grateful"; and

xvi) Mr Fulstow's instructions to his legal team on 23 August 2022:

> "It was mooted that I assign the shares to Carina during the meeting with [Mr Francis] and Mr Novikov at Mr Novikov's solicitors office. My further correspondence with Mr Williams ([Mr Francis'] solicitor) when disagreeing percentage ownership of shares, he decides that I have already assigned the shares over to Carina. I was only going along with this whilst I tried to focus on the most serious point being the number of shares that were agreed on the 30th November 2016."

148. According to the written record, Mr Fulstow's position changed at around the time of the strike out application (which was heard on 27 April 2022). Counsel's skeleton argument for the strike out hearing states:

> "[Mr Francis] asserts that Carina was the contracting party and made payment of £25,000 to [Capital Land]. That is incorrect. The evidence is clear [that] [Capital Land] received £25k from Libra Payment Bureau Limited, not from Carina."

149. There was no evidence before me that Libra Payment Bureau Limited is connected in any way to Mr Fulstow – indeed, it seems to be a payment company that held money on behalf of various entities.

150. As set out above, I have not accepted Mr Fulstow's or Ms Rodrigues' evidence where it is contested or inconsistent with the contemporaneous documents. I do not accept Ms Rodrigues' account that the payment could not have been on behalf of Carina because Mr Fulstow did not have authority to do so because he was not an officer or director of Carina. Ms Rodrigues' evidence was clear that she acted at Mr Fulstow's behest, including for entities where he was the ultimate beneficial owner.

151. I do not accept Mr Fulstow's account that this money came from his Egyptian investments – because he provided no documentary evidence that this was the case, and it is reasonable to assume that documents would have been available had that been the case. The documents show that the £35,000 payment was made by Ms Rodrigues at Mr Fulstow's request – but do not say on whose behalf they were paid. Mr Francis understood that the money would be coming from a Swiss bank account and from an offshore company. There are contemporaneous documents to support Mr Francis' understanding – and, indeed, Mr Fulstow confirmed under cross-examination that he said the money would be coming from a Swiss account. Mr Francis also said that at the time he was unaware that Carina was the offshore company, but that he became aware in late January 2016. That is consistent with the written record at the time, such as it is. It is also consistent with the very many documents from January 2016 onwards which assert that it was Carina that made the investment. Those were also the Claimants' instructions to Mr Rooney, to Mr Topal and to Mr Bishop, at least up until the strike out application. In my judgment, it was Carina which provided the £35,000.

152. I do not accept Mr Fulstow's account at trial that he invoked Carina's name in his email exchanges to bring gravitas to his attempts to obtain the shareholding in Capital Land – including because he maintained this position with his own legal team, when gravitas was not required.

153. There is no evidence (nor was it asserted) that Carina had ever transferred its interest to Mr Fulstow. Rather, Carina's interest appears to have been transferred to PH Gold. Whilst Mr Fulstow is a shareholder in that entity, that does not give him standing to sue on its behalf. Therefore, even if I had found that Mr Francis had entered legally binding relations to transfer shares (which I have not), that would have been with Carina, not with Mr Fulstow personally.

154. It also follows that the £10,000 loan to which I have referred above was from Carina, not from Mr Fulstow personally. That is consistent with Mr Fulstow's not having mentioned the loan to his IVA supervisor.

If there was a contract, is the doctrine of laches applicable to bar the Claimants' claim for specific performance?

155. Given my findings above, I do not need to prolong an already overlong judgment dealing with this issue in any detail. However, should this matter go further, I record my findings of fact, in case they become necessary:

    i) the Defendant is in a considerably worse position than he would otherwise have been in had the Claimants not delayed in bringing proceedings;

    ii) I have found above that the Claimants did not fulfil several of the matters which were in discussion between them: in the case of both Claimants, providing (or sourcing) further investment; and in the case of Mr Fulstow, providing a stake in the Dover and Hull projects;

    iii) Mr Francis has made considerable further investment in Capital Land, including (a) investing £2.5 million; (b) providing a £9.8 million personal guarantee; and (c) spending considerable time on the project;

    iv) Mr Fulstow was under an IVA and could not have invested further; and

    v) There was no evidence of Mr Woods' ability or willingness to invest at those sorts of levels.

156. In any event, the Claimants say they are not seeking specific performance, so the issue does not arise.

If there was a contract such that the ordinary shares in Capital Land were held on trust for the Claimants, do the Claimants have any claim for B preference ordinary shares?

157. Given my findings above, I only need to deal with this issue very briefly.

158. The Claimants accept that any agreement they say was reached to transfer shares included an implied provision that their shareholding would be diluted by further investments in Capital Land – thus the Claimants make no claim to the shares allotted to Mr Novikov or to IV Fund. However, the Claimants claim the additional shares that Mr Francis allotted to himself – the B preferred shares. They submit that Mr Francis provided no additional capital investment commensurate with this additional shareholding relative to the Claimants. The Claimants claim a proportionate share in these shares to the amounts which they say they invested in the original ordinary shares (25% and 7% respectively) based on Mr Francis' fiduciary duty as trustee of the share in Capital Land for the Claimants. The pleaded fiduciary duty is the duty not to permit the fiduciary's interests to conflict with his duties.

159. The difficulty with this submission is a factual one – Mr Francis did make further investment in Capital Land – both a financial investment, and a personal guarantee. This aspect of the Claimants' claim would also fail.

If the Claimants succeed in relation to beneficial ownership, should the Court order transfer or another order?

160. The Defendant's position before me was that if the Claimants succeed totally, they are entitled to declarations, but they are not entitled to any further remedy because Capital Land's articles of association provide that Mr Francis cannot transfer his shares without the permission of the other shareholders.

161. In my judgment, had the Claimants been successful, they would have been entitled to the declarations they seek, and an order that Mr Francis use his best endeavours to effect a share transfer. However, as the Claimants have failed, the issue does not arise.

Conclusions

162. The Claimants' claim fails.